Federal Court of Appeal  Cour d'appel fédérale

Date: 20180625

Dockets: A-360-16
A-361-16
A-432-16

Citation: 2018 FCA 124

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

Docket: A-360-16

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

RIO TINTO ALCAN INC.

Respondent

Docket: A-361-16

AND BETWEEN:

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Heard at Montréal, Quebec, on September 28, 2017.

Judgment delivered at Ottawa, Ontario, on June 25, 2018.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] This appeal raises, once again, the tax treatment of expenses incurred by a taxpayer in the course of investigating if and how it should proceed with a capital transaction. The taxpayer, Rio Tinto Alcan Inc. (Alcan) made significant payments to its investment bankers for advice on whether to proceed with the acquisition of Pechiney S.A. (Pechiney) and how to structure the transaction if it were to proceed. In a related transaction, it paid its investment bankers for advice as to how to divest itself of certain assets by spinning them off to its shareholders via a new corporation, Novelis Inc. (Novelis). As part of these transactions, Alcan also incurred other fees, only some of which are in issue in this appeal.

[2] Alcan deducted these expenses in the taxation years in which they were incurred pursuant to section 9 of the *Income Tax Act*, R.S.C. 1985, (5th Supp.) c.1 (the Act). The Minister disallowed the deductions pursuant to paragraph 18(1)(*b*) of the Act on the basis that they were incurred on account of capital.

[3] The Tax Court of Canada, per Hogan T.C.J., in a decision reported as 2016 TCC 172 (Reasons), found that a substantial portion of the fees paid to the investment bankers was deductible on the basis that the fees were incurred by Alcan's board of directors in the discharge of its oversight responsibilities with respect to the management of Alcan's income earning process. The Tax Court referred to the allowable expenses as "Oversight Expenses". At the same time, the Tax Court dismissed Alcan's appeal with respect to the balance of the investment bankers' fees, as well as certain other fees. These other fees, which the Tax Court called the "Advertising Fees" and "Reporting Fees", whose deduction was disallowed on the basis that they were incurred for the purpose of executing the Pechiney and Novelis transactions so that they were therefore outlays in the nature of capital. The Tax Court called these expenses "Execution Costs".

[4] The Minister appeals to this Court with respect to the deductibility of the Oversight Expenses while Alcan cross-appeals with respect to certain Execution Costs.

[5] In order to provide an idea of the scale of the amounts involved, the deductions which were disallowed in the Pechiney transaction totalled $77,374, 669 while those disallowed in the

Novelis transaction came to a total of $19,759,339. Of those amounts, investment bankers' fees came to $34, 201, 427 in the Pechiney transaction and $16, 031, 657 in the Novelis transaction.

[6] For the reasons which follow, I would dismiss both the appeal and the cross-appeal.

II. FACTS

[7] Alcan is a publicly listed company whose shares are traded on the Toronto, New York and London stock exchanges. At the material times, Alcan was the parent company of the Alcan Group, a leading producer of primary metal and rolled aluminum products. In the early 1990s, Alcan considered merging with Pechiney and Alusuisse Lonza Group Ltd. (Algroup), two of the largest industrial concerns in France and Switzerland respectively, with core business in the aluminum sector. In 2000, Alcan successfully merged with Algroup but its plans with respect to Pechiney did not materialize.

[8] In 2002, Alcan again considered the possibility of a transaction with Pechiney. To assist it in assessing a possible transaction, Alcan retained the services of two investment banks, Morgan Stanley & Co. Incorporated (Morgan Stanley) and Lazard Frères & Co. LLC (Lazard Frères). The bankers were asked to analyze the business and financial conditions of Alcan and Pechiney and to prepare financial models of the potential transaction.

[9] The bankers worked independently on financial models which analyzed various strategies and alternatives with respect to a possible Pechiney transaction. They prepared financial and valuation opinions as well as industry, market and price analyses with respect to various

opportunities and considered a variety of possible financial arrangements regarding Pechiney. Morgan Stanley, as the lead investment firm, made a number of presentations to the Alcan board of directors from December 2002 through July 2003. Lazard Frères supplemented the work done by Morgan Stanley and became involved in the process later than the latter. In particular, Lazard Frères, being a French firm, had the necessary connections and experience to assist with issues arising in France and with the analysis of French capital markets: see Reasons at paras. 12 and 21.

[10] On July 2, 2003, the Alcan board of directors approved a purchase offer proposal for Pechiney's share capital. Alcan's made an initial offer on July 7, 2003, which was rejected. However, on September 12, 2003, Pechiney's board recommended acceptance of a revised offer, subject to the approval of French and American regulatory authorities. Once the regulatory hurdles were cleared, the revised offer was presented to Pechiney shareholders in October 2003 and, by December 23, 2003, holders of more than 95% of Pechiney's share capital and voting rights had accepted Alcan's offer.

[11] European and American competition regulators had raised concerns with respect to the concentration of aluminum rolling mills in Alcan's hands as a result of the Pechiney transaction. In response, Alcan gave undertakings that it would separate ownership of two European rolling mills (Neuf Brisach and Norf) and two American mills (Oswego and Ravenswood). This was one of the factors which led to the Novelis transaction.

[12] Ultimately, Alcan retained two of the mills (Neuf Brisach and Ravenswood) while the other two (Norf and Oswego) were among the rolled products assets which were spun off to Alcan shareholders. This was done by means of a share transaction in which shares of Arcustarget Inc. (Archer), the Alcan subsidiary which held Alcan's rolled products assets, were transferred to Alcan shareholders through shares in Novelis, a new corporation specifically created for this transaction. In the end, Novelis held substantially all of Alcan's pre-Pechiney rolled aluminum product business as well as certain assets in Brazil, Europe and Asia. At the conclusion of a series of share transactions, each Alcan shareholder of record received one common share of Novelis for every five shares of Alcan so that each then held shares in both Alcan and Novelis.

[13] The investment bankers also provided services with respect to the Novelis transaction. From late 2003 to May 17, 2004, Morgan Stanley provided Alcan with strategic advice concerning the financial consequences of various divestiture options. From May 18, 2004, to November 22, 2004, Morgan Stanley provided Alcan with strategic advice concerning the financial consequences of the various options for disposing of the Archer shares. Morgan Stanley issued a fairness opinion on the spin-off and on November 23, 2004, recommended the spin-off as the best divestiture option. From November 23, 2004, Morgan Stanley continued to provide advice and opinions to ensure compliance with securities legislation, and participated directly in finalizing the spin-off: Reasons at para. 51.

[14] Lazard Frères provided independent advice and fairness opinions with respect to the same issues as those analyzed by Morgan Stanley. Lazard Frères was mainly involved in the analysis

of an alternative sale transaction, in which the assets would be sold to a third party. Offers were received and analyzed but ultimately, this option was not pursued: Reasons at paras. 44–47, 52.

[15] Not surprisingly for a transaction of this size, Alcan also incurred other substantial expenses. Some of these, such as representation expenses pursuant to paragraph 20(1)(*cc*) were refused by the Minister but subsequently accepted by the Tax Court. I shall deal with these only to the extent that they are issues in this appeal.

III. THE DECISION UNDER APPEAL

[16] After setting out the facts, the Tax Court discussed the general principles applicable to the treatment of amounts as either income or capital. It began with a discussion of the relevant parts of sections 9 and 18 of the Act, reproduced below:

9 (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.	9 (1) Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.
18 (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of	18 (1) Dans le calcul du revenu du contribuable tiré d'une entreprise ou d'un bien, les éléments suivants ne sont pas déductibles :
(a) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;	a) les dépenses, sauf dans la mesure où elles ont été engagées ou effectuées par le contribuable en vue de tirer un revenu de l'entreprise ou du bien ;
(b) an outlay, loss or replacement of capital, a payment on account of	b) une dépense en capital, une perte en capital ou un remplacement de

capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;	capital, un paiement à titre de capital ou une provision pour amortissement, désuétude ou épuisement, sauf ce qui est expressément permis par la présente partie ;

[17] The Tax Court noted that section 9 defines income from property or business as the taxpayer's profit from that business or property in the year, where profit is the difference between revenue and expenses incurred to earn the revenue, subject to any limitations in the Act. Two such limitations are paragraphs 18(1)(*a*) and (*b*) of the Act. Paragraph 18(1)(*a*) provides that an expense can be deducted only to the extent that it was incurred to earn income from the business or property: Reasons at para. 68. The Tax Court found that paragraph 18(1)(*a*) was not an issue in Alcan's appeal: Reasons at para. 70.

[18] On the other hand, paragraph 18(1)(*b*) was in issue in the appeal as it was the basis for the Minister's disallowance of the "Disputed Expenses", which is how the Tax Court referred to the expenses claimed by Alcan and refused by the Minister.

[19] Paragraph 18(1)(*b*), which disallows deductions to the extent that they are "on account of capital," led the Tax Court to a review of the jurisprudence on the issue of what constitutes an outlay on account of capital.

[20] In the course of that review, the Tax Court reviewed the jurisprudence beginning with *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 S.C.R. 46, [1985] 2 C.T.C. 111 (*Johns-Manville* cited to S.C.R.) which, in turn, referred to *Minister of National Revenue v. Algoma Central Railway*, [1968] 1 S.C.R. 447 at p. 449, 68 D.L.R. (2d) 447 (*Algoma Central* cited to

S.C.R.), *B.P. Australia Ltd. v. Commissioner of Taxation of Commonwealth of Australia*, [1966] A.C. 224, [1965] 3 All E.R. 209, *Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation* (1946), 72 C.L.R. 634, *Sun Newspapers Ltd. v. Federal Commissioner of Taxation* (1938), 61 C.L.R. 337 (*Sun Newspapers*), *British Insulated and Helsby Cables v Atherton*, [1926] A.C. 205 (*British Insulated*) per Viscount Cave, *Ikea Ltd. v. Canada*, [1996] 3 C.T.C. 307, 96 D.T.C. 6526 (F.C.A.) (*Ikea* cited to D.T.C.) and *Morguard Corporation v. Canada*, 2012 FCA 306, [2013] 1 C.T.C. 238 (*Morguard*).

[21] The Court then summarized its review of the jurisprudence to that point as follows:

> In light of the above, expenses can be classified by reference to their form (recurring or single outlay), effect (enduring benefit) or purpose. Because expenses can be incurred for a myriad of reasons, the courts have cautioned that the aforementioned tests must be applied on a case-by-case basis. In other words, there is no set formula as to their application. The courts must apply a common-sense approach, taking into account the particular facts and circumstances surrounding the expense in issue and considering what the expense is calculated to effect from a practical and business standpoint.
>
> Reasons at para. 79

[22] The Court then turned to a consideration of expenses incurred in the decision-making or oversight process in the context of a possible capital transaction. In the course of that review, it referred to *Bowater Power Co. Ltd. v. Minister of National Revenue*, [1971] F.C. 421, 71 D.T.C. 5469 Bowater (cited to F.C.) as well as *Wacky Wheatley's TV and Stereo Ltd. v. Canada (Minister of National Revenue)*, [1987] 2 C.T.C. 2311, 87 D.T.C. 576. It also noted Canada Revenue Agency, Interpretation Bulletin IT-475, "Expenditures on Research and for Business Expansion" (31 March 1981) in which the Minister stated his view that:

> Expenditures made as part of a taxpayer's ordinary business operations in respect of research to determine whether a capital asset should be created or acquired, but

> which themselves are not directly linked to the creation or acquisition of a capital asset, are current operating expenses which are deductible in the year incurred.

[23] The Tax Court acknowledged Alcan's argument that Oversight Expenses are deductible as current expenses in the United Kingdom, based upon a section of the *Income and Corporation Taxes Act 1988* (U.K.), 1988, c. 1, which provides for the deductibility of "expenses of management" at sections 75 and 76, a phrase which is not defined in the legislation.

[24] The Tax Court noted the Minister's reliance upon *Neonex International Ltd. v. Canada*, [1978] C.T.C. 485, 78 D.T.C. 6339 (F.C.A.) (*Neonex* cited to C.T.C.), *Rona Inc. v. Canada*, 2003 TCC 121, 2003 D.T.C. 264 (*Rona*), and *Firestone v. Canada*, [1987] 3 F.C. 200, 87 D.T.C. 5237 (F.C.A.) (*Firestone* cited to F.C.).

[25] The Tax Court noted that *Neonex*, *Rona* and *Firestone* did not specifically deal with expenses incurred to assist board members in the oversight and decision-making process. Furthermore, *Neonex* and *Firestone* were decided before *Ikea*, which underlined the importance of the purpose test in the context of the taxpayer's business.

[26] The Court's conclusions with respect to the Oversight Expenses as they relate to the Pechiney transaction are summarized at paragraph 98 of its reasons:

> I conclude that Oversight Expenses are deductible by the Appellant. The evidence shows that Oversight Expenses are of a <u>frequent and recurring nature for this taxpayer</u>. More importantly, the Oversight Expenses are deductible because <u>they were incurred to facilitate the board of directors' oversight over the income-earning process</u>, which includes, as noted earlier, oversight over the allocation of capital. Ineffective oversight by directors has a destructive domino effect for a corporation; it is a pathway to poor decision-making, which in turn leads to poor earnings, which then results in poor share price performance. In this regard, the

> Appellant's Oversight Expenses form part of the Appellant's annual costs of business.
>
> (my emphasis)

[27] The Court then ruled that 65% of the fees paid to Morgan Stanley and 35% of the fees paid to Lazard Frères in relation to the Pechiney transaction were deductible pursuant to subsection 9(1) of the Act as Oversight Expenses: Reasons at paras. 100 and 102. As for the Novelis transaction, the Court found that 88.69% of the fees paid to Lazard Frères for financial advice in the course of the oversight process were deductible as Oversight Expenses: Reasons at para. 107. Morgan Stanley's fees in relation to that transaction were mostly deducted in the 2004 taxation year which was statute-barred at the time the audit in respect of that transaction commenced, and were therefore not challenged by the Minister.

[28] The Court then addressed the Advertising Fees, that is, the fees paid to Publicis Consultants (Publicis) and Valmonde & Cie (Valmonde), two public relations firms. Alcan claimed that these fees were deductible as a current expense because advertising fees should benefit from the broad principle of deductibility. Alcan also contended that one of the objects of the advertising services provided by Publicis was the development of a market for the shares of its capital stock that it issued as partial consideration for the Pechiney shares.

[29] The Tax Court rejected these submissions and found that the underlying purpose of the Publicis fees was to facilitate the implementation of the Pechiney transaction by heading off possible political and public relations issues which might derail the transaction, given Pechiney's special status ("joyau technologique") in France. Publicis was retained to anticipate opposition to

the transaction by promoting Alcan as a "good steward" of Pechiney's operations: Reasons at paras. 112–113, 117 and 119.

[30] The Tax Court also found that the amounts paid to Valmonde were for ancillary services in relation to its public relations strategy and were incurred in the execution of its takeover bid. In the end result, the Tax Court found that the Advertising Fees were incurred to facilitate the execution of the Pechiney transaction and were therefore not deductible as current expenses.

[31] The Tax Court then considered whether various reporting fees were deductible, either pursuant to subsection 9(1) or subparagraph 20(1)(*g*)(iii) of the Act. These fees were incurred for printing and issuing documents to Pechiney shareholders and to Alcan's shareholders with respect to the Novelis transaction.

[32] As regards the Pechiney transaction, the Tax Court rejected the argument that the Reporting Fees were deductible pursuant to subsection 9(1) because, in its view, the provision of the information in the documents was an essential step in Alcan's implementation of its takeover bid: Reasons at para. 133. As a result, it found that the fees for the preparation and filing of the documents were capital in nature. As regards the Novelis transaction, the Tax Court came to the same conclusion concerning the capital nature of the Reporting Fees.

[33] In deciding as it did, the Tax Court distinguished *Boulangerie St-Augustin Inc. v. The Queen*, [1995] 2 C.T.C. 2149, 95 D.T.C. 164 (T.C.C.), aff'd (1996), 206 N.R. 241, 97 D.T.C. 5012 (F.C.A.) (*Boulangerie St-Augustin*). In that case, the Tax Court decided that

business people considered expenses incurred for preparing management circulars in the event of a takeover bid were necessary business expenses, on the same basis as preparing annual reports. In the present case, the Tax Court distinguished *Boulangerie St-Augustin* on the basis that Boulangerie St-Augustin was dealing with its own shareholders whereas Alcan was required to prepare and circulate the prospectus-like documents for Pechiney shareholders' use in deciding whether or not to accept Alcan's offer. The preparation and circulation of this information was an essential step in the implementation of Alcan's takeover bid and therefore non-deductible as pursuant to subsection 9(1).

[34] Having found that the Reporting Fees were not deductible pursuant to subsection 9(1), the Court turned its attention to the question of whether those outlays were deductible pursuant to subparagraph 20(1)(*g*)(iii) which, in its material parts, provides as follows:

20 (1) Notwithstanding paragraphs 18(1)(*a*), 18(1)(*b*) and 18(1)(*h*), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	20 (1) Malgré les alinéas 18(1)*a*), *b*) et *h*), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :
…	…
(*g*) where the taxpayer is a corporation,	*g*) lorsque le contribuable est une société :
…	…
(iii) an expense incurred in the year in the course of printing and issuing	(iii) une dépense engagée durant l'année à l'occasion de la publication et de l'envoi d'un rapport

a financial report to shareholders of the taxpayer or to any other person entitled by law to receive the report;	financier aux actionnaires du contribuable ou à toute autre personne qui a le droit, selon la loi, de recevoir un semblable rapport ;

[35] In *Boulangerie St-Augustin*, the Tax Court held that for the purposes of subparagraph 20(1)(*g*)(iii), a "financial report" corresponds to an annual report, that is, a report addressing a corporation's financial situation, generally including financial statements and often officers' comments on the corporation's activities: see *Boulangerie St-Augustin* at para. 21. Alcan argued that the documents in its case were required to be filed with regulatory authorities and provided to Pechiney's shareholders. These documents were financial in nature, containing historical financial data and pro forma financial statements, as well as other information. Given that Pechiney shareholders were entitled to receive this information, Alcan argued that the conditions for the application of subparagraph 20(1)(*g*)(iii) were satisfied.

[36] The Tax Court found that the evidence was insufficient to allow it to come to accept Alcan's submissions. It noted that no one who provided services in connection with the financial information was called to testify. As a result, the Court was "unable to discern whether these expenses were incurred specifically for the purpose of printing financial information and issuing it to [Alcan's] shareholders or to the Pechiney shareholders": see Reasons at para. 135. In addition, the Tax Court noted that the documents contained much more than financial information: Reasons at para. 136.

[37] Insofar as the reporting requirements with respect to the Novelis transaction was concerned, the Court noted that Alcan had not met its evidentiary burden of demonstrating

deductibility pursuant to subparagraph 20(1)(*g*)(iii) as no evidence was called to allocate the costs between pages containing financial information and those containing other information. The Court also relied upon the fact that no one was called from the accounting firms involved, PwC and Ernst & Young, to explain the work they performed and the breakdown of their fees.

[38] As a result, the Tax Court ruled that the Reporting Fees were not deductible pursuant to subparagraph 20(1)(*g*)(iii) of the Act.

[39] The last issue dealt with by the Tax Court which is material to this appeal is the deductibility of the investment bankers' fees pursuant to paragraph 20(1)(*bb*) of the Act which is reproduced below:

20 (1) Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	20 (1) Malgré les alinéas 18(1)a), b) et h), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :
…	…
(*bb*) an amount, other than a commission, that	*bb*) une somme, autre qu'une commission, qui, à la fois :
(i) is paid by the taxpayer in the year to a person or partnership the principal business of which	(i) est versée par le contribuable au cours de l'année à une personne ou à une société de personnes dont l'activité d'entreprise principale consiste :
(A) is advising others as to the advisability of purchasing or	(A) soit à donner des avis sur l'opportunité d'acheter ou de vendre

selling specific shares or securities,	certaines actions ou valeurs mobilières,
(ii) is paid for	(ii) est versée:
(A) advice as to the advisability of purchasing or selling a specific share or security of the taxpayer,	(A) soit pour obtenir un avis sur l'opportunité d'acheter ou de vendre certaines actions ou valeurs mobilières du contribuable,

[40] Alcan made this argument in the alternative, in the event that its position with respect to subsection 9(1) was not accepted by the Tax Court. The latter also considered the argument in the alternative, in the event that its conclusions with respect to the deductibility of its investment bankers' fees pursuant to subsection 9(1) were not accepted by this Court.

[41] All agreed that a deduction was available pursuant to this provision only if:

(a) The amounts paid are not commissions;

(b) The fees were paid for advice as the advisability of purchasing or selling specific shares; and

(c) The fees were paid to a person whose principal business is advising others as to the advisability of purchasing or selling specific shares.

[42] Because the parties agreed that Morgan Stanley and Lazard Frères both met the third criterion, that is their principal business involved advising others as to the advisability of purchasing or selling specific shares, the discussion focussed on the other two criteria.

[43] The first issue was whether the amounts in question were commissions, a term which is not defined in the Act. On this issue both parties relied on the same Tax Court decision, *ITA Travel Agency Ltd. v. Canada*, [2001] G.S.T.C. 5, 2001 G.T.C. 258 (WL) (*ITA Travel* cited to

G.S.T.C.), though each relies upon a different portion of the case. Alcan argued, on the basis of paragraphs 34 to 38 of *ITA Travel*, that "commission" meant an amount calculated by reference to a percentage of the price of a product or a percentage of the profit earned by a principal in connection with a transaction. The Tax Court agreed with Alcan that the bankers' fees with respect to the Pechiney transaction were not determined on the basis of a percentage on sales or volume.

[44] The Minister, on the other hand, relied on paragraph 41 of *ITA Travel* which, on the basis of the Privy Council's decision in *Campbell v. National Trust Co. Ltd.*, [1931] 1 W.W.R. 465, [1931] 1 D.L.R. 705 (*Campbell* cited to D.L.R.), left open the possibility that a commission might be a lump sum rather than a percentage.

[45] The Tax Court rejected the Minister's argument. It found that the possibility of a lump sum "commission" in *Campbell* was a function of the peculiarities of the transaction, specifically that the parties had in mind that the "commission" in that case would be a lump sum. The Tax Court concluded that, given the context in which "commission" is used in the legislation, there was no reason to depart from the ordinary meaning of that word.

[46] The second condition for a payment to be deductible pursuant to paragraph 20(1)(*bb*) is that the payment must have been made for advice with respect to the sale of shares. The parties' disagreement turned on the fact that the English version of the legislation refers to "specific shares" while the French version speaks of "certaines actions". This led the Minister to argue that this provision did not apply to the purchase of all the shares of an issuer.

[47] The Tax Court quoted at length from the Supreme Court's decision in *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, concluding that the principles of bilingual statutory interpretation require that a discrepancy between the two versions of legislation should be resolved by an interpretation which incorporates the common meaning. The Court was of the view that "specific shares" and "certaines actions", which it translated as "some shares", do not have the same meaning because "specific shares" is more restrictive.

[48] The Tax Court rejected the Minister's argument that "certaines actions" ("some shares") does not include all of the shares of an issuer. In the Tax Court's view, this interpretation gives effect only to the French version of the provision. It preferred the interpretation in which a deduction would be available where the investment advice "concerns shares of a particular issuer": Reasons at para. 159. The Tax Court reasoned that, in this interpretation, all of the shares of a particular issuer are "some shares" in the sense that there remain shares of different issuers that a taxpayer could acquire.

[49] Given that it was satisfied that the conditions set out in subparagraph 20(1)(*bb*)(iii) were met, the Tax Court found that the investment bankers' fees incurred in obtaining advice as to whether to proceed with the Pechiney transaction were deductible pursuant to that provision but only to the same extent as it had determined in its section 9 analysis: Reasons at para. 164.

[50] The Tax Court then addressed the application of paragraph 20(1)(*bb*) to the Novelis transaction. The Minister had refused the deduction of Lazard Frères' fees on the basis that they were incurred in relation to the disposition of Alcan's rolled products division and not with

respect to a sale of shares. The Tax Court found, on the basis of the documentary evidence as to the work done by Lazard Frères, as well as the characterization of the transaction in an advance ruling that it was in fact a share transaction: Reasons, at paras. 168, 170.

[51] The next question, namely whether Lazard Frères' fees were a commission, arose because of the formula for the calculation of those fees. Lazard Frères was to be paid on a sliding scale based on the difference of the Base Enterprise Value of "Rollco" and the Aggregate Value of the Rollco Transaction. As the difference increased, the fees owing to Lazard Frères increased up to a fixed maximum. The Tax Court found that the fees payable to Lazard Frères had nothing to do with the consideration received by the appellant and that, in any event, Lazard Frères did not act as Alcan's agent in providing advice with respect to the transaction: Reasons at para. 173. As a result, the fees paid to Lazard Frères in connection with the Novelis transaction were not a commission.

[52] In addition, the Tax Court also found that the services provided by Lazard Frères prior to the approval of the spin-off transaction were advice with respect to the shares, specifically the Archer shares: Reasons at para. 170. To that extent, the conditions of paragraph 20(1)(*bb*) were satisfied with respect to Lazard Frères' fees for the Novelis transaction.

[53] As a result, in the event that the fees paid to Lazard Frères were a capital expenditure—and not a current expense as found by the Court—the amount of those fees, to same extent as had been determined in the subsection 9(1) analysis, were deductible pursuant to paragraph 20(1)(*bb*) of the Act: Reasons at para. 174

[54] As for Morgan Stanley's fees with respect to the Novelis transaction, the Tax Court found that the evidence was insufficient to allow it to determine if Morgan Stanley's advice was given with respect to the advisability of selling a specific Alcan share. As a result, it held that those amounts were not deductible pursuant to paragraph 20(1)(*bb*): Reasons at para. 175.

IV. ISSUES

[55] Given that there is both an appeal and a cross-appeal, there are two sets of issues.

[56] The Minister appeals from the Tax Court's finding that Oversight Expenses were current as opposed to capital expenses. Since these findings turn on the distinction drawn by the Tax Court between Oversight Expenses and Execution Costs, the essence of the Minister's appeal is that the Tax Court erred in law in failing to give effect to the jurisprudence relating to the distinction between capital and current expenditures.

[57] The Minister also appeals the Tax Court's alternative finding that if the investment bankers' fees were capital in nature, they were nonetheless deductible pursuant to paragraph 20(1)(*bb*) of the Act, which provides for the deductibility of fees paid for investment advice.

[58] Alcan appeals from the Tax Court's dismissal of its appeal with respect to the deductibility of Reporting Fees and Advertising Fees. Alcan's position is that these fees were deductible pursuant to subsection 9(1) of the Act. To that extent, Alcan is arguing that the Tax Court erred in its appreciation of the evidence in relation to those expenses. In the alternative,

Alcan argues that the Reporting Fees were deductible pursuant to subparagraph 20(1)(*g*)(iii) as fees incurred for printing and issuing a financial report to shareholders and others entitled at law to receive such a report.

V. ANALYSIS

A. *Standard of review*

[59] Since this is an appeal from a decision reached after a trial, the standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 31, [2002] 2 S.C.R. 235 (*Housen*), namely, correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, except where it is possible to identify an extricable error of law in which case the standard of review for that question is correctness.

B. *Current expenses vs expenses on account of capital.*

[60] The Minister's position before this Court, as it was before the Tax Court, is that this case falls to be decided according to the established jurisprudence dealing with the distinction between current and capital outlays.

[61] In my view, the Tax Court's analysis does not depart from the principles set out in the jurisprudence. The Tax Court made a series of factual findings which bring the case within a line of existing jurisprudence. While the expression "Oversight Expenses" may be novel, the reasoning which led the Tax Court to its conclusion is not.

[62] The Tax Court found that Alcan has a long history of entering into major acquisitions and other transactions for the purpose of increasing revenues, earnings and economic value. It noted that Alcan sold alumina and other partially manufactured products to distribution and manufacturing subsidiaries throughout the world. It also sold its products to independent distributors and manufacturers: Reasons at para. 181. It received management fees for management services provided to its subsidiaries and also received dividends from the latter: Reasons at para. 9.

[63] In light of Alcan's numerous acquisitions prior to the Pechiney transaction, a careful evaluation of corporate opportunities "appears to have been an ongoing quest for [Alcan's] directors and was intrinsically linked to the income-earning process": Reasons at para. 96. Outlays of this kind were of a frequent and recurring nature for Alcan and formed part of its annual costs of business: Reasons at para. 98.

[64] The Tax Court's factual conclusions support the proposition that a core feature of Alcan's business model included the acquisition of corporations for the purpose of generating revenue, increasing its income and adding to shareholder value.

[65] To that extent, the Pechiney and Novelis transactions touch upon factors incorporated into the tests for distinguishing between capital and current expenses. The Tax Court found that Oversight Expenses were a recurring item in Alcan's business. This touches upon the Recurring Expense test. The Tax Court also found that Oversight Expenses were incurred for the purpose of generating revenue as part of the income earning process. This is consistent with the Underlying

Purpose test articulated by Australia's High Court in *Sun Newspapers*, which the Tax Court summarized as follows

> … if an expense is incurred with respect to a matter related to the income earning process, this suggests that it was incurred on current account. In contrast, an expenditure is capital in nature if it is incurred as part of the actual implementation of a transaction that results in the acquisition of a capital asset or the creation, enhancement, or expansion of a taxpayer's business.
>
> (my emphasis, Reasons at para. 77)

[66] Similar language can be found in the Supreme Court's decision in *Ikea*, though the issue there was on the receipt side of the ledger rather than the expense side. In considering whether a tenant inducement payment (TIP) was a capital or an income receipt, the Supreme Court commented that Bowman J. (as he then was) reached the conclusion that it was on account of income "based upon a total analysis of the role of the TIP in the business operated by Ikea and of the purposes for which it was negotiated and obtained": *Ikea* at para. 28.

[67] The Minister relies upon the Enduring Asset test set out in *British Insulated* but the jurisprudence supports the proposition that expenses incurred in the course of exploring capital transactions are not invariably capital expenses.

[68] In *Bowater*, the issue was the deductibility of the engineering fees incurred by the taxpayer in deciding whether to construct capital works to increase its power generation capacities to meet anticipated increases in demand. Ultimately, the taxpayer decided not to proceed with construction but sought to deduct the engineering fees as current expenses. The Minister disallowed the fees as outlays on account of capital.

[69] The Federal Court, per Noël A.C.J., made two points of interest in allowing the deduction of the engineering fees. The first is that "[i]n distinguishing between a capital payment and a payment on current account, regard must always be had to the business and commercial realities of the matter": see *Bowater* at p. 443. The business realities of the matter surely include the nature of the taxpayer's business.

[70] The second point is material to the role of capital-related expenses in terms of the taxpayer's business:

> I do not indeed feel that merely because the expenditure was made for the purpose of determining whether to bring into existence a capital asset, it should always be considered as a capital expenditure and, therefore, not deductible. […] While the hydro-electric development, once it becomes a business or commercial reality is a capital asset of the business giving rise to it, whatever reasonable means were taken to find out whether it should be created or not may still result from the current operations of the business as part of the every day concern of its officers in conducting the operations of the company in a business-like way.
>
> *Bowater* at p. 443.

[71] The first proposition is relevant because it underlines the fact that the capital/income distinction is not an abstract exercise but rather must be undertaken in light of the taxpayer's business and commercial realities. ("[…] regard must be had to the business and commercial realities of the matter […]": *Bowater* at 443; *Canada Starch Company Co. v. Canada (Minister of National Revenue)* (1968), 68 D.T.C. 5320 at 5325, [1969] 1 Ex. C. R. 96), ("the application of the common sense approach to the business of the taxpayer":*Johns-Manville* at 72).

[72] The second proposition is important because it makes clear that the normal management of a company's business operations may include the evaluation of a future course of action

which may or may not result in the construction or acquisition of a capital asset. As the Court pointed out, the mere fact that an expenditure is incurred in the course of deciding whether or not to acquire or create a capital asset, does not mean it is necessarily made on account of capital.

[73] A more recent example of the same principle can be found in this Court's decision in *Pantorama Industries Inc. v. Canada*, 2005 FCA 135, [2005] 2 C.T.C. 336 (*Pantorama*). The issue was the deductibility of the fees which Pantorama, a retailer doing business in shopping malls, paid to a firm of real estate consultants to assist it with leasing activities. The consultant "found rental space […] provided advice, market information and rental rates [and] negotiate[d] the terms of leases and renewals with the landlords": *Pantorama* at para. 8. Following an audit, the Minister disallowed the deduction of the consultant's fees and took the position that they were payments on account of capital that had to be amortized over the term of the leases with respect to which they were paid.

[74] This Court disagreed:

> When the matter is considered from the perspective of the appellant's business, as it must be, it seems clear that the variable fees were not paid "in order to secure an actual asset to the [appellant] but to enable [it] to continue to carry on, as it had done in the past…" (see *Mitchell v. B.W. Noble Ltd.*, [1927] 1 K.B. 719 at page 737, as quoted in *Johns-Manville Canada Inc. v. The Queen*, 85 DTC 5373 (SCR) at page 5379).
>
> *Pantorama* at para. 18.

[75] The Minister places particular reliance upon *Neonex* and *Firestone* in which expenses incurred in exploring capital acquisitions were disallowed as current expenses. However, as this

Court noted in *Morguard*, at paras. 13 and 14, these cases are not authority for the proposition that the acquisition of income producing assets can never be a business in itself.

[76] In this case, the Tax Court considered the context in which Alcan, a corporation whose shares are widely held, and listed on the Toronto, New York and London stock exchanges, operates:

> In recent times, there has been an increasing demand by shareholders for directors to exercise greater oversight over the activities of public corporations. In the modern corporate world, shareholders of corporations expect that directors will review material transactions with the same level of scrutiny as that undertaken by well-advised investors. Shareholders expect that board members will challenge proposals brought to them by management and seek independent professional advice to guide them in their decision-making process. Shareholders will hold directors personally liable if they fail in their duty of care in this regard.
>
> Reasons at para. 87

[77] To that extent, the distinction which the Tax Court drew between Alcan's case and the *Neonex* and *Firestone* cases is a legitimate distinction. There is no indication in the reports of those cases that they were publicly traded, widely-held corporations. The issue is not whether "the legal duties of a board of directors to oversee management's actions changed significantly in the last 15 or 20 years of the 20th century," as argued by the Minister at paragraph 71 of her Memorandum of Fact and Law, but rather whether the context in which directors of publicly traded widely-held corporations operate is different from that of directors of closely held corporations. The Tax Court's comments on this "standard of care" issue clearly contemplate the position of directors of widely held corporations: see Reasons at para. 87.

[78] The context in which decisions are made and the quality of information required to make management decisions in a particular context are elements of "the business and commercial realities of the matter," which in this case were an additional factor leading the Tax Court to conclude that Oversight Expenses were part of Alcan's income-earning process and were therefore deductible on current account.

[79] To summarize, the Tax Court did not err in finding that Oversight Expenses, as it defined them, are deductible on current account. Its conclusion is grounded in its factual findings and is consistent with the jurisprudence on which it relied.

C. *Paragraph 20 (1)(bb).*

[80] Given my conclusion that Oversight Expenses are deductible as current expenses, the question of whether they would be deductible pursuant to paragraph 20(1)(*bb*) of the Act does not arise. Nonetheless, given that the Supreme Court may be asked to consider the matter, I offer my comments on that issue.

[81] As noted in my review of the Tax Court's reasons, the issues in relation to paragraph 20(1)(*bb*) have to do with whether or not the fees paid to Alcan's investment bankers were commissions and whether the advice given was with respect to "specific shares" or "certaines actions". Only the fees paid to with respect to the Novelis transaction are in issue in this part of the appeal.

[82] Although the Minister takes issue with the Tax Court's conclusion that amounts paid to the investment bankers were not commissions, she simply repeats the argument she made before the Tax Court based on that court's decision in *ITA Travel*. In that case, the Tax Court relied upon the Judicial Committee of the Privy Council's (Privy Council) decision in *Campbell*, an action by a person (the go-between) who introduced the owner of a pulp mill to a paper broker as a result of which a multimillion dollar transaction was concluded between the mill owner and a customer referred to it by the paper broker.

[83] The agreement between the go-between and pulp mill owner was an oral agreement reached in a single conversation. The go-between asked the mill owner if he was interested in meeting someone who could purchase all of his mill's output. The mill owner said that he was. Before the go-between would reveal the name of the broker, he asked for the mill owner's agreement that he would be paid "a commission" if a transaction was concluded. Nothing was said as to the amount of the commission or as to the way in which it was to be calculated. Once the contract between the owner and the broker's client, the Hearst Corporation, was concluded, the go-between asked for payment of his commission and, being rebuffed, sued successfully to recover it. The case made its way through the courts of Ontario and came before the Privy Council.

[84] The Privy Council dealt with the issue of the "commission" in one paragraph in which it cited no authority or reference works. Its conclusion was expressed in one sentence:

> The word "commission" may quite properly, both from a legal and commercial point of view, be employed as denoting a lump sum which represents no percentage on anything, as, for instance, an agreement to pay a commission of £500.

Campbell at 711.

[85] Looking at the matter some 80 years later, one could be forgiven for thinking that what the Privy Council described as a commission was simply a fee, as in "an agreement to pay [a fee] of £500."

[86] In the end, the Privy Council awarded the estate of the go-between, whose estate was represented by National Trust, a lump sum of $50,000 based on its view of the value of the contract to the mill owner.

[87] In the absence of some recourse to authority or to reference works, it is not far-fetched to surmise that the Privy Council arrived at its conclusion as to the meaning of "commission" on the basis of its own knowledge of the word's legal and commercial usage in the United Kingdom in 1931.

[88] As a result, the case is of little assistance in understanding what Parliament had in mind in 1974 when the reference to "commission" was added to the existing provision of the Act dealing with investment counsel fees. The Tax Court reasoned that the Privy Council's conclusion "does not favour a departure from the ordinary meaning of the term": Reasons at para. 150. I see no error in the Tax Court's conclusion on this point.

[89] The question of whether the English and French versions of the Act agree and whether they cover the sale of all the shares in a particular company strikes me as a question which does not need to be decided as both versions lead to the same conclusion in this factual situation. In

my view, neither “specific shares” nor “certaines actions” excludes the possibility that the provision applies to a sale of all of the shares of a particular issuer. Within the universe of all securities available to be purchased by an investor, all of the shares of a particular issuer are “certaines actions” or “some shares” to the extent that they are less than the whole of all shares which an investor might purchase. They are also “specific shares” in the sense that they can be identified with precision.

[90] To the extent that the Minister argues that paragraph 20(1)(*bb*) only applies to a purchase of some shares of an issuer, she should be able to identify some statutory purpose which would justify a distinction between advice related to the purchase of some shares of an issuer as opposed to advice with respect to the purchase of all the shares of that issuer. She has not done so. In the absence of such a rationale, I can see no reason for reading in the limitation suggested by the Minister.

[91] There may be circumstances in which the difference between the two versions of paragraph 20(1)(*bb*) may be significant but, in my view, this is not one of them.

[92] This leaves the application of paragraph 20(1)(*bb*) to the Novelis transaction. The Minister argues that paragraph 20(1)(*bb*) does not apply to the Novelis transaction because the fees paid to Lazard Frères were not paid for advice with respect to the advisability of buying or selling “certaines actions” or “specific shares” but rather they were paid for advice for assistance in disposing of Alcan’s flat rolled products businesses: Appellant’s Memorandum of Fact and Law at para. 102. The Minister argues that the Tax Court misinterpreted the evidence regarding

the services rendered by Lazard Frères and quotes, in support of its position, a paragraph of the Lazard Frères Engagement Letter. This same paragraph was quoted by the Tax Court in support of its conclusion:

> Pursuant to our recent discussions, we are pleased to enter into this agreement under which Lazard Frères (Lazard) will assist Alcan Inc. (Alcan) as its financial advisor in connection with (i) the possible acquisition by Alcan of Corus Aluminium, in whole or in parts (a Corus Transaction) and (ii) maximizing Alcan shareholders value through the planned divestment of its commodity Aluminum rolling activities (Rollco), which transaction may take the form of a demerger or spinoff of Rollco or, alternatively, a sale of assets or equity securities or other interests in Rollco or other similar transaction (a Rollco Transaction and, together with a Corus Transaction, the Transactions and, individually, a Transaction).
>
> Reasons at para. 167 (emphasis in the original).

[93] To the extent that the construction of contractual terms is a question of mixed fact and law subject to review on the standard of palpable and overriding error (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50–52, [2014] 2 S.C.R. 633; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 21 and 42, [2016] 2 S.C.R. 23), I am not satisfied that the Minister has discharged its burden. A question of contractual interpretation upon which reasonable persons can disagree falls short of palpable and overriding error. The enumeration of some, but not all, of the services to be provided by Lazard Frères pursuant to the Engagement Letter does not address the most significant aspect of the Tax Court's reasoning with respect to the Novelis transaction, found at paragraphs 169-170 of its Reasons. In those paragraphs, the Tax Court makes the point that both in the advance ruling obtained by Alcan and in the reassessment by the Minister, the Novelis transaction was treated as a share transaction, more specifically a sale of Archer shares to Novelis, in respect of which Alcan received advice from Lazard Frères. The Minister has not persuaded me that the Tax Court fell into palpable and overriding error.

[94] The Tax Court's conclusion to the effect that the investment bankers' fees were not commissions has not been shown to be an error. The fact that the amount of the investment bankers' fees varied according to certain performance benchmarks does not bring those fees within the definition of commissions.

[95] As a result, I see no error in the Tax Court's conclusion that, if the investment bankers' fees are found to be capital in nature, they were nonetheless deductible pursuant paragraph 20(1)(*bb*) of the Act.

D. *Paragraph 40(1)(a)*

[96] The Minister also argues that the Tax Court erred in not applying the specific terms of paragraph 40(1)(*a*) of the Act to the Novelis transaction on the basis that since it is the more specific provision, it should have been applied to the transaction rather than paragraph 20(1)(*bb*). In making this argument, the Minister relies upon the following passage from *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147 at paragraph 32, [1998] 2 C.T.C. 35:

> The great difficulty which seems to have plagued the courts in the assessment of profit for income tax purposes bespeaks the need for as much clarity as possible in formulating a legal test therefor. The starting proposition, of course, must be that the determination of profit under s. 9(1) is a question of law, not of fact. Its legal determinants are two in number: first, any express provision of the *Income Tax Act* which dictates some specific treatment to be given to particular types of expenditures or receipts, including the general limitation expressed in s. 18(1)(*a*), and second, established rules of law resulting from judicial interpretation over the years of these various provisions.

[97] The difficulty, as I see it, is that paragraph 40(1)(*a*) is no more specific than paragraph 20(1)(*bb*). Both dispositions are highly technical and therefore highly specific. Since

the Minister asserts that paragraph 40(1)(a) applies, it is for her to demonstrate that this is the case. It is not sufficient for her to simply assert her contention.

E. *Conclusion on the Appeal*

[98] This is sufficient to dispose of the appeal which I would dismiss with costs. I now turn to the cross-appeal.

F. *The Cross-Appeal: Advertising Fees and Reporting Fees*

[99] In its cross-appeal, Alcan argues for the deductibility of two classes of fees which it characterizes as Advertising Fees and Reporting Fees. Advertising Fees are fees paid to Publicis and Valmonde. Reporting Fees are fees paid to PriceWaterhouseCoopers LLP (PwC), Browne and the U.S. Securities and Exchange Commission in relation to the Pechiney transaction and to PwC and Browne in relation to the Novelis transaction.

[100] In each case, Alcan argues that the Tax Court applied the wrong legal test, which constitutes an extricable legal error, and as a result, is reviewable on the standard of correctness.

[101] In my view, Alcan mischaracterizes the argument which it wishes to make. In fact, Alcan disagrees with the Tax Court's assessment of the sufficiency and probative value of the evidence with respect to these disputed expenses. The Tax Court is entitled to deference with respect to its assessment of the evidence; the standard of review is palpable and overriding error.

[102] Dealing first with the Advertising Expenses, Alcan argues that they were incurred for the purpose of earning income from a business and "thus not limited by paragraph 18(1)(a) of the Act, they should be deductible on current account and not be limited by paragraph 18(1)(b) of the Act": Alcan's Memorandum of fact and law at para. 211.

[103] In *British Columbia Electric Railway Company Limited v. Minister of National Revenue* (1958), 58 D.T.C. 1022 at 1027-28, 12 D.L.R. (2d) 369, the Supreme Court held that:

> Since the main purpose of every business undertaking is presumably to make a profit, any expenditure made "for the purpose of gaining or producing income" comes within the terms of s. 12(1)(a) [now 18(1)(a)] whether it be classified as an income expense or as a capital outlay.

[104] As a result, the fact that an outlay is made for the purpose of gaining or producing income does not preclude a finding that it was made on capital account.

[105] It is not contested that the Pechiney shares are capital property in Alcan's hands: Reasons at para. 86. The Tax Court's ruling with respect to Advertising Fees rests on a factual finding that the Advertising Fees were not incurred as part of Alcan's decision-making process but that they were incurred in the course of putting into effect Alcan's decision once it had been made. As such, they were implementation costs. At that point, the jurisprudence on the distinction between outlays made on capital account and on income account applies in the ordinary way with respect to those steps taken "with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade" as per *British Insulated*.

[106] Alcan cites a number of cases to the effect that advertising expenses are deductible as a current expense. If one accepts that expenses incurred to earn income can nevertheless be capital expenses, the fact that in some cases a category of expense has been found to be a current expense does not preclude a finding that in other cases, that same category of expense can be found to be a capital expense. In each case, it is a question of the purpose for which the expense is incurred: see *Sun Newpapers* at 359-61

[107] The Tax Court's findings of fact with respect to the Advertising Expenses are reproduced below:

> With respect, I disagree with the Appellant that these expenses were incurred to increase business profits or to address a current business concern. On the evidence before me, I find that the underlying purpose of the Publicis expenses was to facilitate a smooth implementation of the Pechiney takeover. The evidence shows that this was the first hostile takeover bid to be launched for a company that was viewed as a French national jewel. The Appellant had reason to believe that its bid might meet strong resistance from affected stakeholders. It was of paramount importance for the Appellant to develop a communication strategy to address the stakeholders' legitimate concerns and to prevent the decision-making process from becoming overly politicized. To have got bogged down in a political quagmire could have led to a costly failed transaction.
>
> […] The Appellant had to promote a positive vision of its plan for Pechiney. Publicis was asked to develop and implement a strategy to overcome the anticipated natural opposition to the Appellant's bid. It did so by promoting the Appellant as a good steward of Pechiney's operations.
>
> Reasons at paras. 112-13.

[108] The Tax Court committed no palpable and overriding error when it concluded that the Publicis expense was incurred for the underlying purpose of implementing the Pechiney transaction and was therefore a capital expenditure.

[109] The same applies to the Valmonde expenditure for the same reasons.

[110] This leaves the question of the Reporting Expenses. Alcan argues first that these expenses come within the principle articulated in *Boulangerie St-Augustin* and are, on that basis, deductible as current expenses. Alcan says that the Tax Court erred in distinguishing *Boulangerie St-Augustin* and, in so doing, it erred in law.

[111] In the alternative, Alcan argues that the Reporting Expenses are deductible pursuant to subparagraph 20(1)(*g*)(iii) of the Act which provides as follows:

20 (1) Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	20 (1) Malgré les alinéas 18(1)a), b) et h), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :
(g) where the taxpayer is a corporation,	g) lorsque le contribuable est une société :
(iii) an expense incurred in the year in the course of printing and issuing a financial report to shareholders of the taxpayer or to any other person entitled by law to receive the report;	(iii) une dépense engagée durant l'année à l'occasion de la publication et de l'envoi d'un rapport financier aux actionnaires du contribuable ou à toute autre personne qui a le droit, selon la loi, de recevoir un semblable rapport ;

[112] Alcan argues that the Tax Court erred in concluding that the evidence did not permit it to decide the extent to which the reports in question were financial reports or whether they were financial reports at all within the meaning of subparagraph 20(1)(*g*)(iii).

[113] Dealing first with *Boulangerie St-Augustin*, the distinction which the Tax Court drew between a corporation which is the object of a takeover bid and a corporation which is the author of a takeover bid is a relevant distinction. An expense incurred to inform a corporation's shareholders of a bid for their shares cannot reasonably be construed as an expense incurred to acquire a capital asset. In fact, the question as to whether the expenses incurred in *Boulangerie St-Augustin* were capital in nature did not even arise. The Minister's position in that case was the expenses in question were not deductible as current expenses and that they were not eligible capital expenditures because they were not incurred for the purpose of earning income from a business, as set out in paragraph 18(1)(*a*): see *Boulangerie St-Augustin*, at paras. 11–13.

[114] The debate in this case is rather different. The Minister concedes that the amounts in question come within paragraph 18(1)(*a*); the issue is whether they are caught by paragraph 18(1)(*b*). That question cannot be answered by pointing back to paragraph 18(1)(*a*). The question which must be asked and answered to address paragraph 18(1)(*b*) is whether the expenses were incurred in the process of creating or acquiring an enduring asset. The Tax Court addressed that question and concluded that the amounts were incurred "in the course of the implementation of [Alcan's] takeover bid with respect to Pechiney": Reasons at para. 133. In other words, the amounts were incurred in the process of acquiring a capital asset. The Court came to the same conclusion with respect to the Novelis transaction: Reasons at para. 136. I can see no error, let alone palpable and overriding error, in the Tax Court's reasoning or its conclusion.

[115] The argument with respect to subparagraph 20(1)(*g*)(iii) is, in essence, a debate about whether the documents in issue were "financial reports". It should be recalled that in *Boulangerie St-Augustin*, the Tax Court concluded that the circulars in issue there were not financial reports because they were insufficiently similar to annual reports: *Boulangerie St-Augustin* at paras. 21–22. In paragraphs 22–23 of its reasons in *Boulangerie St-Augustin*, the Tax Court set out the reasons why the management's circulars were not financial reports:

- They contain no "financial picture" of Boulangerie's business;
- They do not contain financial statements or information from financial statements;
- The fact that the board of directors had to consult the financial statements in order to make its recommendation to the shareholders was not sufficient to brand this document as a financial report.
- The purpose of the circular from the board of directors was to provide information for their decision respecting a [takeover bid];
- The only heading among the roughly 15 appearing in the circular of April 2, 1990, that concerns the financial situation was that under which the board stated that there had been no major change in the corporation's situation since the date of the previous financial statements.

[116] In this case, the Tax Court found that the relevant documents contained much more than financial information, as was the case in *Boulangerie St-Augustin*: see the last bullet point above. The Tax Court found that, in the absence of evidence from the service providers in question, it could not determine whether the fees in issue were incurred *specifically* for the purpose of printing financial information —as opposed to the terms and conditions and other information contained in the documents—and issuing it to Alcan or Pechiney shareholders.

[117] Alcan points to specific pieces of evidence in an attempt to persuade us that the Tax Court erred in its determination. This Court does not have the Tax Court's familiarity with the whole of the evidence, and is not in a position to second-guess the latter's appreciation of

discrete pieces of evidence in light of the whole of the evidence. This is why the Supreme Court in *Housen* ruled that appellate courts should defer to trial courts conclusions of fact: *Housen* at para. 25. I see no error in the Tax Court's conclusion on this issue as it relates to the Pechiney transaction.

[118] The Tax Court employed the same reasoning and came to the same conclusion with respect to the Novelis transaction at paragraph 136 of its Reasons. Once again, and for the same reasons as stated above, I see no error in the Tax Court's conclusions.

G. *Conclusion on the cross-appeal*

[119] As a result, I would dismiss the cross-appeal with costs.

VI. CONCLUSION

[120] I would dismiss the appeal with costs and the cross-appeal with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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AND DOCKET:	A-361-16
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