Docket: 2013-3028(IT)G

BETWEEN:

RIO TINTO ALCAN INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Rio Tinto Alcan Inc. (2012-4808(IT)G)
on October 19, 20, 21 and 22, 2015,
at Montreal, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Yves St-Cyr Larry Nevsky
Counsel for the Respondent:	Susan Shaughnessy Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* (Canada) for the 2003 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

The parties will have until September 8, 2016 to agree to costs, failing which they are directed to file their written submissions on costs no later than September 9, 2016. Such submissions are not to exceed ten pages.

Signed at Ottawa, Canada, this 15th day of July 2016.

"Robert J. Hogan"

Hogan J.

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Counsel for the Respondent:	Susan Shaughnessy Nathalie Labbé

JUDGMENT

With respect to the assessment issued by the Minister of National Revenue with respect to the Appellant's 2007 taxation year, the Court's judgment is a *pro tanto* judgment because other issues remain to be determined after future hearings. To the extent that, following the Court's disposal of all of the remaining issues, the Court determines that the assessment issued for the Appellant's 2007 taxation year must be returned for reconsideration and reassessment, the Appellant shall be allowed the deductions set out in paragraph 210 of the attached Reasons for Judgment in the calculation of the non-capital loss arising in respect of the Appellant's 2005 taxation year that was carried forward and deducted by the Appellant in the calculation of its taxable income for its 2007 taxation year, the whole in accordance with the attached Reasons for Judgment.

The parties will have until September 8, 2016 to agree to costs, failing which they are directed to file their written submissions on costs no later than September 9, 2016. Such submissions are not to exceed ten pages.

Signed at Ottawa, Canada, this 15th day of July 2016.

"Robert J. Hogan"

Hogan J.

Citation: 2016 TCC 172
Date: 20160715
Dockets: 2013-3028(IT)G
2012-4808(IT)G

BETWEEN:

RIO TINTO ALCAN INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED AMENDED REASONS FOR JUDGMENT

The Amended Reasons for Judgment are issued in substitution for the Reasons for Judgment dated July 20th, 2016

Hogan J.

I. Overview

[1] The Appellant, Rio Tinto Alcan Inc. ("Alcan"), incurred significant fees for legal, investment banking and other services (the "Disputed Expenses"), broadly speaking, in the context of the acquisition of the shares of Pechiney SA ("Pechiney") and the spin-off of Alcan's rolled products business to its shareholders (the "Spin-off"). The Spin-off was implemented by transferring the shares of Arcustarget Inc. ("Archer"), the parent corporation of the rolled products business, to Alcan's shareholders through Novelis Inc. ("Novelis"). In filing its tax returns for the taxation years in respect of which the Disputed Expenses were incurred, the Appellant deducted a significant amount of those expenses under subsection 9(1) and various paragraphs of subsection 20(1) of the *Income Tax Act* (Canada)[1] (the "Act"). With respect to the Pechiney transaction, the Minister of National Revenue (the "Minister") disallowed the amounts deducted by the Appellant on the grounds that the expenses were inextricably linked to a capital transaction and the deductions under subsection 20(1) did not apply. With respect to the Novelis transaction, the Minister disallowed the amounts deducted by the

[1] R.S.C. 1985, c. 1 (5th Supp.).

Appellant on the grounds that the expenses were incurred for the purpose of effecting the disposition of the Archer shares and the deductions under subsection 20(1) did not apply. In the Minister's opinion, these expenses should be added to the adjusted cost base of the Pechiney shares or deducted from the proceeds of disposition of the Novelis shares,[2] as the case may be.

[2] The reassessments prompted the Appellant to reconsider its initial filing position. The Appellant now claims that the full amount of the Disputed Expenses is deductible under a combination of subsection 9(1) and paragraphs 20(1)(*e*), (*bb*) and (*cc*) of the Act. Alternatively, the Appellant contends that any Disputed Expenses that are not deductible under the aforementioned provisions are eligible capital expenditures.

[3] The Appellant's appeal from the assessment issued by the Minister in respect of its 2007 taxation year raises a number of issues, only one of which is addressed in these Reasons for Judgment. Prior to the hearing, the parties agreed, with the Court's consent, that only the question of the deductibility of the expenses incurred by the Appellant in respect of the Novelis transaction for its 2005 taxation year would be dealt with at this stage. Therefore, in these Reasons for Judgment, the Court addresses only the amount of the non-capital loss that can be carried forward by the Appellant from its 2005 taxation year and deducted in the calculation of its taxable income for the 2007 taxation year. The remaining issues will be determined at a later date in accordance with the agreement of the parties.

II. Parties' Positions

A. Appellant's Position

[4] In its Reply to the Respondent's Written Arguments, the Appellant provided a breakdown of the Disputed Expenses together with the corresponding provisions of the Act under which each Disputed Expense is claimed. That breakdown is reproduced below:

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[2] In paragraph 4 of the Repondent's Written Arguments, the Respondent says the Novelis expenses should be deducted from the proceeds of disposition of the Novelis shares. In the Court's view, assuming that the Respondent's position is correct, the Novelis expenses would be deductible in the calculation of the proceeds of disposition of the Archer shares transferred to Novelis as consideration for shares of Novelis that were subsequently redeemed.

a) DISPUTED EXPENSES (PECHINEY) – Total $77,374,669

INVESTMENT BANKERS

Morgan Stanley Total: $26,051,194

Alcan's position is that:

$18,887,115 should be allowed under 9(1); and
$7,164,079 should be allowed under 20(1)(bb).
Or
$26,051,194 should be allowed under 20(1)(bb).
Or
Any portion of the total amount not deductible under 9(1) and/or 20(1)(bb) should be deductible under 20(1)(b).
Or
Any portion of the total amount not deductible under 9(1) and/or 20(1)(bb) and/or 20(1)(b) should be deductible up to a maximum amount of $2,605,119 under 20(1)(e).

Total: $8,150,233

Lazard Frères

Alcan's position is that:

$5,297,652 should be allowed under 9(1); and
$2,852,581 should be allowed under 20(1)(bb).
Or
$8,150,233 should be allowed under 20(1)(bb).
Or
Any portion of the total amount not deductible under 9(1) and/or 20(1)(bb) should be deductible under 20(1)(b).
Or
Any portion of the total amount not deductible under 9(1) and/or 20(1)(bb) and/or 20(1)(b) should be deductible up to a maximum amount of $407,512 under 20(1)(e).

ADVERTISING FEES

Publicis and Valmonde Total: $19,089,946

Subsection 9(1) or paragraph 20(1)(b): $19,089,946

REPRESENTATION TO GOVERNMENT AGENCIES

Anti-Competition Regulators

Freshfields Bruckhaus	Total:	$4,954,777
	Paragraph 20(1)(cc) or 20(1)(b):	$4,954,777
Sullivan Cromwell	Total:	$2,566,609
	Paragraph 20(1)(cc) or 20(1)(b):	$2,566,609
McMillan	Total:	$552,186
	Paragraph 20(1)(cc) or 20(1)(b):	$552,186
Various other law firms	Total:	$432,810
	Paragraph 20(1)(cc) or 20(1)(b):	$432,810
National Economic Res. Ass.	Total:	$241,539
	Paragraph 20(1)(cc) or 20(1)(b):	$241,539
Monitor Company Group	Total:	$755,227
	Paragraph 20(1)(cc) or 20(1)(b):	$755,227
Frontier Economics	Total:	$177,349
	Paragraph 20(1)(cc) or 20(1)(b):	$177,349
SCEHR Patrick Rey	Total:	$10,008
	Paragraph 20(1)(cc) or 20(1)(b):	$10,008
Federal Trade Commission	Total:	$392,112
	Paragraph 20(1)(cc) or 20(1)(b):	$392,112

REPRESENTATION TO GOVERNMENT AGENCIES

Securities Regulators

Sullivan Cromwell	Total:	$6,801,202
	Paragraph 20(1)(cc) or 20(1)(b):	$6,801,202
Darrois Villey	Total:	$3,088,260

	Paragraph 20(1)(cc) or 20(1)(b):	$3,088,260

PRINTING AND ISSUING FINANCIAL REPORTS

PwC	Total:	$1,104,875
	Subsection 9(1), subparagraph 20(1)(g)(iii), paragraph 20(1)(e) or paragraph 20(1)(b):	$1,104,875
Bowne	Total:	$868,736
	Subsection 9(1), subparagraph 20(1)(g)(iii), paragraph 20(1)(e) or paragraph 20(1)(b):	$868,736
SEC	Total:	$321,572
	Subsection 9(1), subparagraph 20(1)(g)(iii), paragraph 20(1)(e) or paragraph 20(1)(b):	$321,572
Various other regulators	Total:	$34,858
	Subsection 9(1), subparagraph 20(1)(g)(iii), paragraph 20(1)(e) or paragraph 20(1)(b):	$34,858

OTHER MISCELLANEOUS EXPENSES

Sullivan Cromwell	Total:	$967,152
	Subsection 9(1) or paragraph 20(1)(b):	$967,152
Davis Polk and ADP	Total:	$187,739
	Subsection 9(1) or paragraph 20(1)(b):	$187,739
Ogilvy Renault	Total:	$20,054
	Subsection 9(1) or paragraph 20(1)(b):	$20,054
Various small suppliers – communication	Total:	$152,180
	Subsection 9(1) or paragraph 20(1)(b):	$152,180
Ernst & Young	Total:	$449,963
	Subsection 9(1) or paragraph 20(1)(b):	$449,963
Ritz-Carlton Montreal	Total:	$2,660
	Subsection 9(1) or paragraph 20(1)(b):	$2,660
Various small suppliers – others	Total:	$1,048
	Subsection 9(1) or paragraph 20(1)(b):	$1,048

b) DISPUTED EXPENSES (NOVELIS) – Total $19,759,339

INVESTMENT BANKERS

Morgan Stanley	Total:	$296,863
	Subsection 9(1), paragraph 20(1)(bb) or 20(1)(b):	$296,863
Lazard Frères	Total:	$16,031,657
	Subsection 9(1), paragraph 20(1)(bb) or 20(1)(b):	$16,031,657

PRINTING AND ISSUING FINANCIAL REPORTS

PwC	Total:	$1,803,192
	Subsection 9(1), subparagraph 20(1)(g)(iii) or paragraph 20(1)(b):	$1,803,192

Bowne	Total:	$1,025,849
	Subsection 9(1), subparagraph 20(1)(g)(iii) or paragraph 20(1)(b):	$1,025,849
Ernst & Young	Total:	$601,778
	Subsection 9(1), subparagraph 20(1)(g)(iii) or paragraph 20(1)(b):	$601,778

B. Respondent's Position

[5] The Respondent's position with respect to the Pechiney transaction is that all of the fees paid to various service providers are in the nature of capital expenditures and should be added to the adjusted cost base of the Pechiney shares. Specifically, the Respondent argues that the impugned expenses were made in connection with the acquisition of the Pechiney shares, which produced an enduring benefit to the Appellant. The Respondent further contends that none of the deductions provided for in paragraphs 20(1)(*bb*), 20(1)(*cc*) or 20(1)(*g*) of the Act are applicable in the circumstances.

[6] The Respondent's position with respect to the Novelis transaction is that all of the fees paid to various service providers are in the nature of outlays or expenses made or incurred for the purpose of effecting the disposition of the rolled products business and should be deducted from the proceeds of disposition of the Archer shares[3] pursuant to paragraph 40(1)(*a*) of the Act.

III. Factual Background and General Credibility Observations

A. Factual Background

(1) Alcan

[7] During the relevant period, Alcan was the parent company of Alcan Group, an international group of companies involved in the aluminum industry. Alcan's shares were traded on various stock exchanges, including the Toronto, New York and London stock exchanges.

[8] Directly and through subsidiaries, joint ventures and related companies around the world, the activities of the Alcan Group included bauxite mining;

[3] *Supra* note 2.

alumina refining; power generation; aluminum smelting, manufacturing and recycling; and work in research and technology. The Alcan Group was a leading producer of primary metal and a global producer and marketer of rolled aluminum products. Alcan was a leading converter of flexible packaging in Europe and one of the world's leading suppliers of packaging materials for the consumer goods, pharmaceutical, and cosmetics industries.

[9] One of Alcan's business priorities was the maximization of shareholder value, which it accomplished by seeking out additional opportunities for increased revenues, earnings and economic value. Alcan had a long history of major acquisitions and transactions it had entered into for this purpose. Alcan sold its products to its subsidiaries and also received management fees and dividends from its subsidiaries.

(2) The Pechiney Acquisition

[10] Alcan initially set its sights on Pechiney as a potential partner in the early 1990s. In 1999, Alcan intended to merge with Pechiney and Alusuisse Lonza Group Ltd. ("Algroup"). Pechiney and Algroup were two of the largest industrial enterprises in France and Switzerland, with core businesses in the aluminum sector. Alcan successfully merged with Algroup in 2000, but Pechiney was not a part of that merger. According to the testimony of Mr. David McAusland, who was Alcan's Senior Vice-President of Mergers and Acquisitions and Chief Legal Officer during the relevant period, the transaction with Pechiney failed due to social and regulatory complications. In particular, the European Commission Merger Task Force, a competition regulator, raised concerns regarding the competitive overlap of two significant assets in Europe: a German rolling mill owned by Alcan and a French rolling mill owned by Pechiney.

[11] At the end of 2002, the law was amended in France to allow for hostile bids that were subject to regulatory approvals. Prior to this amendment, it was prohibited in France to make a hostile takeover bid that had regulatory conditions attached to it. In light of the regulatory change, Alcan again considered the possibility of a transaction with Pechiney.

[12] In order to analyze the merits and feasibility of a potential transaction with Pechiney, Alcan engaged two investment banking firms, Morgan Stanley & Co. Incorporated ("Morgan Stanley") and Lazard Frères & Co. LLC ("Lazard Frères"). Morgan Stanley and Lazard Frères were tasked with analyzing the business and financial conditions of Alcan and Pechiney and preparing financial models of the

potential transaction. Morgan Stanley was the lead investment firm assisting Alcan and made a number of presentations of its financial model to the Alcan board of directors (working together with Alcan in some instances) from December 2002 through July 2003. Lazard Frères played a role supplementary to the work done by Morgan Stanley and became involved later in the process than Morgan Stanley. 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.

[13] On July 2, 2003, the Alcan board of directors approved a purchase offer proposal for the share capital of Pechiney.

[14] On July 7, 2003, Alcan filed its initial offer for Pechiney's securities at €41 per share (60% in cash and 40% in new Alcan shares), subject to three conditions: (i) the American and European competition authorities granting authorizations; (ii) the *Ministère de l'Économie, des Finances et de l'Industrie française* authorizing the proposed transaction; and (iii) more than 50% of the share capital and voting rights of Pechiney, calculated on a diluted basis, being obtained by the expiry of Alcan's offer. This initial offer was rejected by Pechiney's board of directors on July 8, 2003.

[15] In July and August 2003, Alcan and Pechiney engaged in discussions regarding the initial offer, particularly in relation to the price offered by Alcan. During this period, Morgan Stanley and Lazard Frères revisited their respective financial models, giving specific consideration to the price.

[16] On August 31, 2003 and at Pechiney's request, Alcan submitted an amended offer, which valued the shares at a maximum price of between €47 and €48 per share. Pechiney's board of directors rejected the amended offer on the same day. Shortly thereafter, Pechiney and Alcan again resumed communications.

[17] On September 12, 2003, Pechiney's board of directors recommended the acceptance of a Revised Offer at €47.5 plus a premium of €1 should 95% or more of the Pechiney shares be acquired. The Revised Offer was subject to certain conditions, including authorization from the *Conseil des marchés financiers* (France) and approval by the American and European competition authorities. After receipt of the requisite approvals from governmental and regulatory authorities, the revised offer was presented to the French and American shareholders on October 7 and October 27, 2003, respectively. The revised offer had an expiry date of November 24, 2003.

[18] By November 24, 2003, Alcan had obtained the acceptance of the revised offer to the extent of 92.21% of the share capital and 93.55% of the voting rights of Pechiney. Alcan acquired the Pechiney shares that were tendered during this offering period on December 15, 2003.

[19] Alcan reopened the revised offer from December 9 through December 23, 2003 in order to secure more than 95% of the shares and voting rights of Pechiney. By December 23, 2003, Alcan obtained the acceptance of the revised offer to the extent of 97.95% of the share capital and 97.92% of the voting rights of Pechiney. On February 6, 2004, Alcan acquired all of the Pechiney securities that had been tendered during the reopening period.

[20] In the context of the Pechiney transaction, Alcan retained professional advisors, incurred costs for preparing, printing and issuing various documents, and incurred other miscellaneous expenses. The details of these expenditures are described below.

(a) Investment Bankers

[21] From 2002 to 2004, Morgan Stanley and Lazard Frères independently worked on financial models, by means of which they analyzed various strategies and alternatives for developing Alcan's business. The firms prepared financial and valuation opinions as well as industry, market and price analyses with respect to various opportunities offered to Alcan and possible financial arrangements regarding Pechiney. During that period, many presentations were made to the Alcan board of directors.

[22] Alcan signed an engagement letter with Morgan Stanley on June 1, 2003 to formalize the terms upon which Morgan Stanley had been engaged by Alcan. The engagement letter confirms that Morgan Stanley was hired as a financial advisor. The fees payable by Alcan are stated in the engagement letter as being a US$3,750,000 "Announcement Fee" and a success-based "Transaction Fee" set at a maximum of US$21,600,000. The Announcement Fee would be credited towards the Transaction Fee if the transaction was concluded. If the acquisition had not been completed, Alcan would have been charged an "Advisory Fee" of US$100,000 per month for Morgan Stanley's services. Ultimately, Morgan Stanley was paid an amount of CAN$26,051,194 for its services.[4]

[4] Exhibit A-21.

[23] Alcan signed a similar engagement letter with Lazard Frères on July 4, 2003 to formalize the terms upon which Lazard Frères had been engaged by Alcan. The engagement letter confirms that Lazard Frères was hired as a financial advisor. The fees payable by Alcan are stated in the engagement letter as being €1,000,000 upon the announcement of the transaction, €4,000,000 payable upon completion of the transaction, and €2,500,000 payable within two years of the announcement of the transaction. The second and third payments were contingent on Alcan acquiring more than 80% of the shares of Pechiney. Lazard Frères was paid an amount of CAN$8,150,233 for its services.[5]

(b) Advertising Services

[24] Alcan engaged Publicis Consultants ("Publicis"), a French firm providing corporate communications and public relations services, to promote Alcan's reputation in Europe and the proposed acquisition of Pechiney. The hostile takeover of Pechiney posed political challenges since, as Mr. McAusland explained in his testimony, there had been very few hostile takeovers in France prior to Alcan's bid and Pechiney was considered a "*fleuron*" or "technological darling" of France. One of Alcan's motivations for engaging Publicis was to enlist the services of Mr. Maurice Levy, the Chief Executive Officer of Publicis. According to Mr. McAusland, Mr. Levy was a highly influential and well-connected businessperson in France. Bolstered by the assistance of Publicis and Mr. Levy, Alcan was able to strengthen its reputation with the French public and officials.

[25] Specifically, Publicis organized social events and press conferences, published the Alcan offer to acquire Pechiney, ran publicity campaigns and purchased advertising space in French newspapers, including those owned by Valmonde & Cie ("Valmonde"). Publicis was paid $18,983,316 for its services and Valmonde was paid $106,630 for the advertising space.

(c) Representations to Government Agencies

[26] Alcan engaged several law firms and service providers to assist with antitrust and securities law representations to government agencies in various jurisdictions worldwide. These representations were required to assist government bodies in understanding Alcan's business and to obtain clearance to issue Alcan's shares as part of the Pechiney transaction.

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[5] Exhibit A-32.

Anti-Competition Regulations

[27] McMillan Binch Mendelsohn LLP ("McMillan") was engaged to make representations to Canadian anti-competition regulators and to supervise other law firms making similar representations to government regulators in various jurisdictions.

[28] Freshfields Bruckhaus Deringer LLP ("Freshfields") provided services in relation to Alcan's representations to the European Commission Merger Task Force.

[29] Sullivan & Cromwell LLP ("Sullivan Cromwell") provided legal assistance in making representations to various government entities, and in particular, the United States Department of Justice and Federal Trade Commission.

[30] Monitor Company Group, Frontier Economics, SCEHR (Patrick Rey) and National Economic Research Associates Inc. provided the background information and economic data relating to Alcan's business to support the representations made to the various anti-competition regulators.

[31] In total, Alcan incurred expenses of $10,082,617 in relation to representations made to anti-competition regulators.

Securities Regulations

[32] In order to gain clearance for undertaking the Pechiney transaction, Alcan was obligated, as a public issuer, to make representations and filings in compliance with securities regulations.

[33] Darrois Villey Maillot Brochier Avocats ("Darrois Villey") assisted with making representations to European securities regulators and the French defence department.

[34] Sullivan Cromwell assisted with making representations to the United States Securities and Exchange Commission.

[35] Darrois Villey and Sullivan Cromwell also assisted with the preparation of documents that were required to be filed with regulatory authorities, such as a Form S-4, a "*note d'information*", and a prospectus. The Form S-4 is a registration statement with respect to the exchange offer to Pechiney's shareholders, which was

filed with the United States Securities and Exchange Commission. The "*note d'information*" is a similar document for the French securities regulator, the *Autorité des marchés financiers*.

[36] In total, Alcan incurred $9,889,462 in relation to representations made to securities regulators.

(d) Preparing, Printing and Issuing Documents

[37] Alcan incurred costs in the course of preparing, printing and issuing the Form S-4, the "*note d'information*" and the prospectus. Alcan also incurred share registration fees, transfer fees and listing fees in relation to these documents.

[38] PricewaterhouseCoopers LLP ("PwC") assisted with the preparation and issuance of the Form S-4 and "*note d'information*", the filings with the United Kingdom Listing Authority and the amendments to an annual report and a quarterly report.

[39] Bowne Financial Print and Bowne International ("Bowne") provided printing services, including typesetting, proofing, printing and distributing, with regard to the Form S-4, the "*note d'information*", and the prospectus.

(e) Other Miscellaneous Expenses

[40] Alcan incurred other miscellaneous expenses, including communication and translation costs, legal services by Sullivan Cromwell in respect of ongoing advice to the board of directors, legal services by Ogilvy Renault LLP ("Ogilvy Renault"), a cancellation fee by the Ritz-Carlton Montreal and advisory services by Ernst & Young on various corporate tax matters. The Appellant also claimed amounts paid to Davis Polk & Wardwell LLP ("Davis Polk") and ADP Investor Communication Services ("ADP") under this category.

(3) <u>The Novelis Spin-Off</u>

[41] I now turn to the facts underlying the Novelis Spin-off. While pursuing the Pechiney transaction, Alcan was aware that it would have to divest itself of certain assets in order to satisfy the European competition regulator. Alcan provided undertakings to European and American competition regulators in respect of two requirements: the European competition regulators required Alcan to separate the ownership of a French rolling mill (Neuf Brisach) and of a German rolling mill

(Norf), while the American competition regulators required Alcan to separate the ownership of an Oswego, New York, rolling mill and of a Ravenswood, West Virginia, rolling mill.

[42] Morgan Stanley worked on a financial model to consider two options that would allow Alcan to fulfil its regulatory undertakings: a spin-off of the divested assets or a sale of the shares held by Alcan in the entities in which the divested assets would be located. Morgan Stanley presented its financial model to the Alcan board of directors.

[43] On February 15, 2004, a strategy of splitting out the major portion of Alcan's rolled products businesses and transferring such businesses to Archer was submitted to the board of directors. This strategy was determined to be the most suitable way of meeting the competition regulators' restrictions while maintaining profitability for Alcan's shareholders and enhancing shareholder value. From February 2004 through May 2004, the board reviewed the divestiture plan and the two options for carrying out the divestiture.

[44] On May 17, 2004, the board of directors approved the announcement of the divestiture. The public announcement of the divestiture was made on May 18, 2004. In its public announcement, Alcan stated that the German rolling facility (Norf) and an American rolling facility (Oswego) would be included in Archer, while Alcan would retain the French rolling facility (Neuf Brisach) and another American rolling facility (Ravenswood).

[45] After the public announcement, several investors advised that they wished to acquire Alcan's rolled products businesses. Alcan's management held discussions with these potential investors. The best offers were submitted to the board of directors on November 23, 2004.

[46] The board also considered an alternate spin-off transaction, specifically contemplating a spin-off to Alcan's shareholders by way of a so-called "butterfly" transaction such that Alcan's shareholders would hold the shares of Archer through a new company, Novelis.

[47] At the November 23, 2004 meeting, Morgan Stanley and Lazard Frères each provided to the board a fairness opinion which indicated that the Spin-off offered the best value and was fair for Alcan's shareholders. The board formally approved the Spin-off at this meeting.

[48] On December 22, 2004, Alcan announced that its shareholders had voted in favour of the plan of arrangement for the spin-off of the rolled products businesses grouped under Archer.

[49] The plan of arrangement came into effect on January 6, 2005. The steps were undertaken in accordance with an advance ruling obtained by Alcan from the Canada Revenue Agency (the "CRA"),[6] and were, *inter alia*, as follows:

(a) Alcan restructured its capital by amending its articles of incorporation to create and authorize the issuance of a new class of common shares and special shares;

(b) The existing holders of Alcan's common shares exchanged their common shares for shares of the new class of common shares and the new class of special shares of Alcan;

(c) The Alcan shareholders transferred their special shares of Alcan to Novelis in exchange for shares of Novelis, and Alcan transferred the Archer shares to Novelis as consideration for special shares of Novelis; and

(d) Alcan and Novelis each redeemed the special shares each held in the other in exchange for non-interest-bearing demand notes, which were immediately set off against each other.

[50] The Alcan shareholders of record received one common share of Novelis for every five special shares of Alcan they held. Following the Spin-off, the common shares of Novelis were listed and traded on the Toronto and New York stock exchanges. As a result of the Spin-off, Alcan shareholders ended up as shareholders of two public entities, Alcan and Novelis. Pursuant to the Spin-off, Novelis acquired, through its acquisition of the shares of Archer, substantially all of the rolled aluminum product business held by Alcan prior to its acquisition of Pechiney in 2003 as well as certain alumina and primary-metal-related businesses in Brazil and four rolling facilities in Europe that Alcan acquired indirectly through the Pechiney transaction.

[6] Exhibit A-350.

(a) Investment Bankers

[51] Morgan Stanley was the principal financial advisor in respect of the divestiture. 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. The fees paid to Morgan Stanley were conditional on the transaction being finalized.

[52] Lazard Frères was the secondary advisor that provided financial services with respect to the divestiture. Lazard Frères provided independent advice and fairness opinions with respect to the same issues as those analyzed by Morgan Stanley. According to the testimony of Mr. McAusland and Mr. Healy, Lazard Frères was mainly involved in the analysis of an alternative sale transaction.

(b) Preparing, Printing and Issuing Documents

[53] Ernst & Young had two main responsibilities in assisting Alcan through its restructuring in 2004. First, Ernst & Young prepared documents for Alcan's shareholders in order to comply with Canadian and American securities legislation. This task involved reviewing, analyzing and preparing *pro forma* financial statements for Alcan's rolled products businesses for the five previous years. Second, in support of Alcan's in-house tax department, Ernst & Young reviewed the tax implications of the various divestiture options, analyzed the various options for grouping the assets under Archer, and assisted in the preparation of the request for an advance ruling submitted to the CRA.

[54] In support of Alcan's in-house accounting department, PwC audited various financial statements.

[55] Bowne printed the notice of the meeting of Alcan's shareholders, the management proxy circular in connection with the plan of arrangement, the non-offering prospectus, and Form 10, which all contained mandatory information that was sent to Alcan's shareholders.

B. General Credibility Observations

[56] The Respondent led no testimonial evidence. In addition, the Respondent's counsel posed few questions on cross-examination. I surmise that counsel for the Respondent had a clear litigation strategy that was based on the well-defined objectives of her client. The CRA has a long-standing policy that expenses incurred in the context of a takeover bid or the distribution of capital property to a corporation's shareholders are capital expenditures. I speculate that this is why the Respondent chose, for the most part, not to challenge the Appellant's proposed allocation of the Disputed Expenses between current and capital expenditures. I further suspect that the Respondent feared that, had she challenged the demarcation between current and capital expenses, it may have created a pathway for the Court to accept a bifurcation of the expenses based on the distinction between the decision-making and implementation phases of both transactions.[7]

[57] The drawback of this strategy is that it creates an easier route for the Appellant to establish a *prima facie* case regarding the factual matrix (the "Evidentiary Burden") to which it contends that the law must be applied. As will be seen later on in these Reasons for Judgment, this has worked out in the Appellant's favour with respect to some of the issues in the present appeal. However, on a few points, the Appellant's evidence has fallen well short of the mark.

[58] I will now comment on my overall impression of the testimonial evidence presented by the Appellant's witnesses.

[59] I found Mr. McAusland to be quite knowledgeable about the events that transpired on his watch while he was employed as a senior executive of the Appellant. He was a reliable and credible witness, particularly as to the Appellant's vision, strategy and structure with respect to the Pechiney and Novelis transactions. He provided a clear overview of the general objectives of each transaction. By his own admission, he was not steeped in tax matters. In this regard his testimony cannot serve as a reliable substitute for the testimony of the tax advisors who actually worked on the transactions. This explains why I find below that the Appellant has failed to satisfy its Evidentiary Burden with respect to the fees paid for tax advisory services. Finally, Mr. McAusland offered no insight into the work performed by the Appellant's auditors with respect to the financial information

[7] To be precise, it should be noted that the Respondent often did challenge the Appellant's allocation with respect to the deduction of the capital portion of the Disputed Expenses under specific provisions in subsection 20(1) of the Act.

presented in the Form S-4, the "*note d'information*" and the prospectus that were required to be filed. There was no oral evidence on the breakdown of the printing costs incurred, as regards the public documents, with respect to the printed pages containing financial and other information concerning, for example, the terms and conditions of the transaction. No one from PwC or Ernst & Young was called upon to testify on the work performed in connection with the financial information.

[60] Mr. Miller was the lead partner at Sullivan Cromwell, the transnational law firm that played a leading role with respect to the Pechiney transaction. It appears that his firm played a slightly lesser role, although an important one nonetheless, with respect to the Novelis transaction. I also found him to be a credible, reliable and knowledgeable witness.

[61] Mr. Brian Healy testified on behalf of Morgan Stanley. Mr. Healy is an investment banker with Morgan Stanley and was involved with the Pechiney and Novelis transactions. I found him equally to be a reliable and credible witness.

[62] I cannot say the same for Mr. Erik Maris, who worked on both transactions on behalf of Lazard Frères. On common agreement of the parties, he testified by video conference from Paris. While counsel for the Appellant read his questions from his written notes, I observed that Mr. Maris was typing on his smart phone, which was hidden from view under the table. He constantly glanced down at it. At times, he paced around the room. Unlike his counterpart from Morgan Stanley, his answers often struck me as rehearsed. As he was double-tasking throughout his testimony, he appeared to have had little opportunity to carefully consider the questions posed to him and to elaborate on his answers. Tellingly, his answers to counsel's questions were very short. For these reasons, I attach less weight to his testimony. This is not altogether fatal for the Appellant, as at times the documentary evidence is sufficient to establish a fact critical to the Appellant's case.

[63] Mr. Eric Giuily was called upon to testify on the purpose of the communication strategy developed by Publicis. Mr. Giuily was the president and managing director of Publicis during the relevant period. Mr. Giuily and Publicis were tasked with the mission of promoting the Appellant's vision for Pechiney. The Respondent pointed out notable inconsistencies between his testimony and prior statements of his and documentary evidence. For the reasons noted in paragraph 118 of these Reasons for Judgment I share the Respondent's view that little weight should be attached to his testimony.

[64] Finally, the Appellant called Mr. Jocelin Paradis as a witness. Presently, he is the vice-president of taxation for the Appellant. He previously worked for Rio Tinto and became involved with Alcan after its acquisition by Rio Tinto in 2007. Therefore, he has no contemporaneous knowledge of the transactions at issue in this appeal. He was not called for the purpose of providing such knowledge. In his position, he had to work on different audits and on the settlement of files, including those pertaining to the Pechiney and Novelis transactions. He was asked to provide guidance on the way Alcan's activities are structured. In particular, he was asked to provide information on the management fees and dividends received by Alcan from its subsidiaries. The Respondent did not object to his testimony regarding these facts, which can be discerned through a simple examination of the Appellant's financial records and working papers produced in the ordinary course of business. In that regard, I found him to be a reliable and credible witness.

IV. Issues

[65] In her written representations, the Respondent frames the issues as follows:

> 27. In the appeal bearing number 2013-3028(IT)G [pertaining to the Pechiney transaction], the issues to be decided are:
>
> a) Whether the appellant is entitled to deduct expenses totalling $77,374,669 in computing its income with respect to fees paid to various services providers by Alcan during its 2003 taxation year . . . [8]
>
> b) More specifically, whether the Appellant is entitled to deduct the following amounts under the provisions of the Act mentioned in the following table:

Service provider	**Amount claimed as a deduction in Notice of Appeal**	**Provision of the Act under which deduction claimed in Notice of Appeal**
Morgan Stanley	18,887,115 or 26,051,194	9(1) [and] 20(1)(bb) [or 20(1)(b)]
Lazard Frères	5,297,651 or 8,150,233	9(1) 20(1)(bb) [or 20(1)(b)]
Publicis Consultants	18,983,316	9(1)

[8] The Respondent claims that the fees were incurred in connection with the acquisition of the Pechiney shares. In my opinion, it is more accurate to say that the fees were incurred in the broad context of the Pechiney transaction.

Service provider	**Amount claimed as a deduction in Notice of Appeal**	**Provision of the Act under which deduction claimed in Notice of Appeal**
		[or 20(1)(b)]
Valmonde & Cie	106,630	9(1) [or 20(1)(b)]
US Federal Trade Commission	392,112	20(1)(cc) [or 20(1)(b)]
Freshfields [Bruckhaus]	4,954,777	20(1)(cc) [or 20(1)(b)]
McMillan Binch	552,186	20(1)(cc) [or 20(1)(b)]
Sullivan Cromwell	967,152 9,367,811	9(1) 20(1)(cc) [or 20(1)(b)]
Miscellaneous anti-trust matters (other Law Firms)	432,810	20(1)(cc) [or 20(1)(b)]
Darrois Villey	3,088,260	20(1)(cc) [or 20(1)(b)]
National Economic Research [Ass.]	241,539	20(1)(cc) [or 20(1)(b)]
PricewaterhouseCoopers	1,104,875*	9(1) or 20(1)(g)(iii) [or 20(1)(b)] [9]
Bowne Printing	868,736	9(1) or 20(1)(g)(iii) or 20(1)(b) [10]
Securities and Exchange Commission	321,572*	9(1) or 20(1)(g)(iii) [or 20(1)(b)] [11]
Other securities commissions	34,858*	9(1) or 20(1)(g)(iii) [or 20(1)(b)] [12]
Davis Polk & Wardwell and ADP	188,119	9(1) or 20(1)(g)(iii) [or 20(1)(b)]
Communication Costs [(Various small suppliers)]	152,180	9(1) [or 20(1)(b)]
Ernst & Young	449,963	9(1)[or 20(1)(b)]
[Ogilvy Renault]	20,054	91(1) [or 20(1)(b)]
Monitor Company Gr.	755,227	9(1) 20(1)(cc)

[9] The Appellant also argued that these amounts were deductible under paragraph 20(1)(*e*). For the reasons noted below, I conclude that this provision was not properly raised by the Appellant.
[10] *Idem*.
[11] *Idem*.
[12] *Idem*.

Service provider	**Amount claimed as a deduction in Notice of Appeal**	**Provision of the Act under which deduction claimed in Notice of Appeal**
		[or 20(1)(b)]
Frontier Economics	177,349	9(1) 20(1)(*cc*) [or 20(1)(b)]
SCEHR Patrick Rey	10,008	9(1) 20(1)(cc) [or 20(1)(b)]
Miscellaneous deductions [(Various small suppliers – Others)]	3,708	9(1) [or 20(1)(b)]
Amounts no longer contested by the Appellant*		
RBC	140,892**	
Sullivan Cromwell	1,873,562**	

* A total of $131,397 was allowed as a deduction at the time of reassessment but is still being claimed by the Appellant: $93,760 PwC; $2,397 SEC; $34,858 Other Securities Commissions.

** See page 11, Note 2 of Appellant's Written Arguments.

c) Whether expenses totalling $77,243,274 ($79,389,124 - $2,014,454 - $131,397) incurred . . . during Alcan's 2003 taxation year should be added to the appellant's cumulative eligible capital;

d) Whether expenses totalling $77,243,274 should be added to the "adjusted cost base" of the Pechiney shares by the Minister. . . .

. . .

29. With respect to the appeal bearing number 2012-4808(IT)G [pertaining to the Novelis transaction], the issues to be decided are:

a) Whether the Appellant is entitled deduct the following amounts under the provisions of the Act mentioned in the table:

Service Provider	Amount Claimed by Alcan	Provisions of the Act pursuant to which Alcan claimed the deduction
Bowne	$1,025,849	[9(1) or] 20(1)(g)(iii) [or 20(1)(b)]
Ernst & Young	$601,778	9(1) [or 20(1)(g)(iii) or 20(1)(b)]
PwC	$1,803,192	9(1) [or 20(1)(g)(iii) or 20(1)(b)]
Lazard Frères	$16,031,657	[9(1) or] 20(1)(*bb*) [or 20(1)(b)]
Morgan Stanley	$296,863	9(1) and 20(1)(*bb*) [or 20(1)(b)]
Total	$19,759,339	

b) Whether expenses totalling $19,759,339 were correctly deducted from the proceeds of disposition of the Novelis shares in accordance with paragraph 40(1)(*a*) of the Act.

[66] I agree with how the Respondent has framed the issues, subject to my comments in footnotes 8 to 12.

V. Analysis

(A) Current Versus Capital Treatment

(1) General Principles

[67] The Appellant claims deductions under subsection 9(1) of the Act in respect of fees incurred for investment banking services, advertising services, printing and issuing documents, and other miscellaneous expenses. Subsection 9(1) provides that a taxpayer's income from a business or property is the taxpayer's "profit" from the business or property for the year. Generally speaking, "profit" is understood to mean the difference between revenue and the expenses incurred to earn the revenue unless otherwise limited under the Act. Paragraphs 18(1)(*a*) and (*b*) are two provisions that limit the deductions which may be claimed under subsection 9(1).

[68] Paragraph 18(1)(*a*) of the Act provides that an outlay or expense can be deducted under section 9 only to the extent that the outlay or expense was made or incurred for the purpose of earning income from a business or property.

[69] It appears to be common ground that the Disputed Expenses that were incurred in the context of the Pechiney transaction are not affected by the limitation set out in paragraph 18(1)(*a*). However, in her written arguments, the Respondent does not concede this point with respect to the Disputed Expenses that were incurred in the context of the Novelis transaction (the "Novelis Disputed Expenses"). This being said, I agree with the Appellant's submission that this argument was not properly raised by the Respondent in her pleadings.

[70] In paragraph 92 of her Reply to the Amended Notice of Appeal, with regard to the 2005 taxation year the Respondent relies specifically on paragraph 18(1)(*a*) of the Act in respect of other expenses totalling $1,459,233 that do not form part of the Novelis Disputed Expenses. In contrast, the Minister's assumptions of fact make no reference to the Minister having assumed that the Novelis Disputed Expenses were not incurred for the purpose of earning income from a business or property. Instead, the Respondent's Reply to the Amended Notice of Appeal indicates that the Minister disallowed the Appellant's deduction on current account for the Novelis Disputed Expenses because the Minister found that they were capital expenditures deductible under paragraph 40(1)(*a*) of the Act.[13] Thus, the Respondent is barred from arguing that the Novelis Disputed Expenses were not incurred for the purpose of earning income from a business or property under paragraph 18(1)(*a*). Finally, as noted by Abbott J. in *British Columbia Electric Company Limited*,[14] "[s]ince 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*) whether it be classified as an income expense or as a capital outlay."[15]

[71] Paragraph 18(1)(*b*) of the Act is of particular relevance to the outcome of the instant case. Paragraph 18(1)(*b*) prohibits the deduction of an outlay or expense that is a capital expenditure. The Respondent relies on this provision to argue that the Disputed Expenses are not deductible as current expenses because they were

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[13] Paragraph 90 of the Respondent's Reply to the Amended Notice of Appeal.

[14] *British Columbia Electric Railway Company Limited v. The Minister of National Revenue*, [1958] S.C.R. 133 at page 137. Paragraph 12(1)(*a*) is almost identical to paragraph 18(1)(*a*). In paras. 178 to 181 below, I comment on how the Pechiney transaction allowed the Appellant to increase its business income.

[15] *Ibid*.

incurred in connection with the Pechiney transaction, which was carried out on capital account.

[72] In contrast, the Appellant argues that the Disputed Expenses were incurred as part of its ordinary business operations and not on capital account. In particular, the Appellant contends that the investment banking fees that it seeks to deduct under subsection 9(1) of the Act are current expenses because they relate to costs for professional advice relied upon by the Appellant's board of directors in deciding whether or not the Pechiney and Novelis transactions should be approved. For the purposes of my Reasons for Judgment, I designate fees for services that assist the board in the decision-making process and in the fulfilment of its oversight function as "Oversight Expenses". I designate fees for services that facilitate the execution of a capital transaction as "Execution Costs".

[73] While paragraph 18(1)(*b*) of the Act provides that no deduction can be claimed for an outlay or expense made or incurred "on account of capital", the Act does not define what is meant by that expression. Instead, Parliament has left it to the courts to define the principles that are to be used to distinguish capital expenses from current expenses. In *Johns-Manville Canada Inc. v. The Queen*,[16] Judge Estey of the Supreme Court of Canada provided an overview of the case law that elucidated these principles. The highlights of his review of the case law merit consideration here (at pages 56, 57 and 58-59):

> . . . This Court encountered s. 12(1)(*b*) in *Minister of National Revenue v. Algoma Central Railway*, [1968] S.C.R. 447. Fauteux J., as he then was, at p. 449, stated:
>
> > Parliament did not define the expressions "outlay ... of capital" or "payment on account of capital". There being no statutory criterion, the application or non-application of these expressions to any particular expenditures must depend upon the facts of the particular case. We do not think that any single test applies in making that determination. . . .
>
> The Court thereupon expressed agreement with the decision of the Privy Council in *B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia*, [1966] A.C. 224. . . . After reviewing a number of different approaches to the problem of classifying in law and accounting the nature of the expenditure, Lord Pearce stated, at pp. 264-65:

[16] [1985] 2 S.C.R. 46.

> The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a common sense appreciation of all the guiding features which must provide the ultimate answer. Although the categories of capital and income expenditure are distinct and easily ascertainable in obvious cases that lie far from the boundary, the line of distinction is often hard to draw in border line cases; and conflicting considerations may produce a situation where the answer turns on questions of emphasis and degree. That answer:
>
> > "depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process":
>
> *per* Dixon J. in *Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation* (1946), 72 C.L.R. 634, 648.
>
> [Emphasis added.]

. . .

In the *Hallstroms* case . . . Dixon J., as he then was, in discussing the difference between capital and income expenditures, stated, at p. 647, that the difference lay:

> . . . between the acquisition of the means of production and the use of them; between establishing or extending a business organisation and carrying on the business; between the implements employed in work and the regular performance of the work …; between an enterprise itself and the sustained effort of those engaged in it.

Other tests have been adopted in other tax systems. Also in Australia, in the High Court decision in *Sun Newspapers Ltd. v. Federal Commissioner of Taxation* (1938), 61 C.L.R. 337, the court, speaking through Dixon J. enunciated three principles to be applied in determining the character of an expenditure by a taxpayer for the purposes of applying the taxation statute. He stated, at p. 363:

> There are, I think, three matters to be considered, (*a*) the character of the advantage sought, and in this its lasting qualities may play a part, (*b*) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (*c*) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or

> enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.

On the preceding page, His Lordship, in explaining the test from another aspect, said:

> ... the expenditure is to be considered of a revenue nature if its purpose brings it within the very wide class of things which in the aggregate form the constant demand which must be answered out of the returns of a trade or its circulating capital and that actual recurrence of the specific thing need not take place or be expected as likely.

[Emphasis added.]

[74] In the absence of legislative guidelines, the Courts have developed at least three tests for distinguishing capital expenditures from current expenditures. The first test characterizes an expenditure by reference to its recurring or single outlay characteristic (the "Recurring Expense Test"). Under this test, recurring expenses are considered to be current expenditures. In contrast, if the expense takes the form of a single outlay, it is likely a capital expenditure.

[75] In the House of Lords decision of *British Insulated and Helsby Cables v. Atherton*,[17] Viscount Cave clarified that the Recurring Expense Test is not decisive in every case, stating, "it is easy to imagine many cases in which a payment, though made 'once and for all,' would be properly chargeable against the receipts for the year."[18] Professors Hogg, Magee and Li comment on the shortcomings of the Recurring Expense Test, first identified in *British Insulated*, as follows:

> It has been suggested, although not as a conclusive test, that a "capital expenditure is a thing that is going to be spent once and for all, and an income expenditure is a thing that is going to recur every year". If a payment is one-time expenditure, it is generally a capital expenditure and if it is part of an ongoing periodic number of payments, it is generally a current expenditure. This can be seen, for example, in the facts of the two cases discussed above: the current expense in *B.P. Australia Ltd.* [*v. Commissioner of Taxation of the Commonwealth of Australia* (1966)] was a recurring expenditure whereas the capital expenditure in *Sun Newspapers* [*Ltd. v. Federal Commissioner of Taxation* (1938)] was not.

[17] [1926] A.C. 205; 10 T.C. 155.
[18] *Ibid*. at p. 213 A.C. (p. 192 T.C.)

> However, the recurring expenditure test simply does not ask the right question. The idea that a capital expenditure is made "once and for all" is not always true because many businesses purchase new capital assets every year. Annual expenditures to purchase new machines, trucks, etc., for example, are recurring, but they are capital expenditures because each provides an enduring benefit to the business. On the other hand, a current expenditure, which provides a benefit to the business which is exhausted in the current year, could be of an unusual or non-recurring kind. An example is a severance payment made when a senior employee is dismissed. Despite its weaknesses as a test, the distinction between recurring and non-recurring expenses is still useful as it provides a very crude, but perhaps workable, demarcation between those capital expenditures that can feasibly [be] capitalized and those that cannot be.[19]

[Emphasis added.]

[76] In *British Insulated*, Viscount Cave proposed an additional test that focuses on the effect of the outlay rather than its form, stating:

> . . . when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.[20]

Thus, if the expense gives rise to a lasting or enduring benefit, it should be treated as a capital expenditure (the "Enduring Benefit Test"). By contrast, if the impact of the expense does not extend beyond the taxation year in which it was incurred, a current expenditure deduction should be available.

[77] The final test focuses on the purpose or rationale underlying the expense. This test is widely attributed to Judge Dixon in *Sun Newspapers*.[21] Under this test, 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.[22]

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[19] Peter W. Hogg, Joanne E. Magee and Jinyan Li, *Principles of Canadian Income Tax Law*, 8th ed. (Toronto: Carswell, 2013) in section 9.2(a)(ii) ("Capital expenditure" defined) at pp. 274 and 275.
[20] *British Insulated*, *supra* note 18 at pp. 213 and 214 A.C. (pp. 192 and 193 T.C.).
[21] (1938), 61 C.L.R. 337.
[22] *Canada Starch Co. v. Minister of National Revenue*, [1969] 1 Ex. C.R. 96 at pp. 101 and 102, [1968] C.T.C. 466 at pp. 471 and 472.

[78] In *Ikea Ltd. v. Canada*, the Supreme Court of Canada indicates that the underlying purpose of an expenditure is to be considered within the context of the taxpayer's business.[23] Judge Iacobucci endorsed the Tax Court judge's treatment of a tenant inducement payment as an income receipt, since that judge's conclusion was "based upon a total analysis of the role of the [payment] in the business operated by Ikea and of the purposes for which it was negotiated and obtained."[24] The Federal Court of Appeal confirmed in *Morguard Corp. v. The Queen* that the test from *Ikea* included the consideration of "the commercial purpose of the payment and its relationship to the business operations of the recipient".[25]

[79] 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.

(2) Expenses Incurred in the Decision-Making or Oversight Process

[80] The Appellant provided extensive submissions on the deductibility of fees incurred during the decision-making or oversight process. As the Appellant correctly points out, the case law supports the line of demarcation that it has drawn between Oversight Expenses and Execution Costs. For example, in *Bowater Power Co. Ltd. v. M.N.R.*,[26] the Federal Court ruled that the costs of engineering studies to determine the feasibility of power development sites were current expenses. In ruling in favour of Bowater, the Federal Court observed as follows (at page 5481):

> 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. In 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. While the hydroelectric 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

[23] *Ikea Ltd. v. Canada*, [1998] 1 S.C.R. 196.
[24] *Ibid.*, at para. 28.
[25] *Morguard Corp. v. Canada*, 2012 FCA 306 at para. 16.
[26] 71 DTC 5469.

> 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. I can, indeed, see no difference in principle between all of these cases.
>
> [Emphasis added.]

[81] The Federal Court's reasoning in *Bowater* mirrors the Appellant's reasoning in the instant case.

[82] In *Wacky Wheatley's TV & Stereo Ltd. v. M.N.R.*,[27] this Court adopted reasoning similar to that expressed by the Federal Court in *Bowater*. In the *Wacky Wheatley's* case, the taxpayer incurred travel costs in exploring the feasibility of its plan to expand its audio business into Australia. The Crown argued that the travel expenses should be capitalized because they were potentially linked to the creation of a new business structure in Australia. Judge Brulé, ruling in favour of the taxpayer, noted (at page 579):

> . . . Robert Wheatley testified that Wacky Wheatley's was "expansion minded" and opportunities in various markets in the United States and Canada had previously been explored, and at times acted upon. During its ten years of operation, Wacky Wheatley's had grown to include eight retail stores and further expansion was anticipated.
>
> . . .
>
> In the present case, the evidence shows that expansion into new markets was an on-going concern of the appellants. It is my opinion that the expenditures in question resulted from the current operations of each of the appellants "as part of the every day concern of its officers in conducting the operations of the company in a business-like way."
>
> A major expenditure of many businesses today is monies expended to maintain or increase market share under increasingly competitive conditions. To this purpose, many corporations spend significant amounts each year in advertising, promotions and market surveys. The expenditures in issue in these appeals, in my view, related to such an endeavour. They were monies spent to determine the profit potential of the Australian market and were current expenses of the appellants. This characterization reflects the "business and commercial realities of the matter".
>
> [Emphasis added.]

[27] 87 DTC 576.

[83] The Appellant also notes that the CRA has publicly endorsed the principles enunciated in *Bowater* and *Wacky Wheatley's* in its interpretation bulletin IT-475 "Expenditures on Research and for Business Expansion", as follows:

> 3. A taxpayer may carry out a continuous research program the purpose of which is to ensure that the taxpayer's business maintains or improves its position in its industry. Expenses of such a research program are treated as current expenditures deductible from income in the years in which they are incurred, notwithstanding the fact that from time to time the acquisition of capital assets may be a result of the research program.
>
> . . .
>
> 5. 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. However, once the commitment is made to proceed with the particular project all expenditures which are directly linked to the creation or acquisition of a capital asset form part of the capital cost of that asset unless that asset is not, in fact, created or acquired. In this latter case, architectural, engineering and other expenses relating to the proposed creation or acquisition of a specific capital asset are eligible capital expenditures (as defined in paragraph 14(5)(b)) for which an allowance is permitted by virtue of paragraph 20(1)(b) of the Act, provided that the expenses are incurred in connection with a business carried on by the taxpayer. If there is no such business at the time the expenses were incurred, no deduction for the expenses may be made.
>
> [Emphasis added.]

[84] The Appellant, in its written submissions, observes that Oversight Expenses are treated as current expenses for tax purposes in the United Kingdom. This result is based on section 75 of the *Income and Corporation Taxes Act 1988* (the "ICTA"), which provides that "expenses of management" are deductible on a current basis without defining what is meant by "expenses of management". In *HM Inspector of Taxes v Camas Plc*,[28] the Court of Appeal ruled that fees for third party advice given in the decision-making process with regard to a potential acquisition were "expenses of management" because the advice ". . . was

[28] *HM Inspector of Taxes v Camas Plc*, [2004] EWCA Civ 541. The expenditures that were ruled eligible for deduction on income account were for financial, legal and accounting advice. *Camas* at para. 3.

preparatory to the making of a decision to purchase, not part of the implementation of a purchase already decided upon."[29] [Emphasis added.]

[85] While the Act does not contain a provision analogous to section 75 of the ICTA, the decisions in *Bowater* and *Wacky Wheatley's* reflect very similar reasoning that is based on the general principles laid out in the Canadian case law. The CRA's position on investigatory expenses set out in IT-475 is also similar to the Court of Appeal's reasoning in *Camas*.

[86] The Respondent correctly notes that the Appellant acquired the Pechiney shares for the long term with a view to obtaining an enduring benefit. It is common ground that the shares are capital property. As noted earlier, the Respondent argues that, because the Disputed Expenses were incurred in the context of the Pechiney transaction, they are capital in nature. The Respondent relies on the decisions in *Neonex International Ltd. v. R.*[30], *Rona Inc. v. Her Majesty the Queen*[31] and *Firestone v. Canada*[32] to support her argument in this regard.

[87] I observe that the cases cited by the Respondent do not specifically consider the tax treatment of expenses incurred for work performed to assist board members in the oversight and decision-making process. Furthermore, *Neonex* and *Firestone* were decided prior to the *Ikea* decision. *Ikea* emphasizes the importance of the purpose test and the need for courts to critically examine the underlying purpose of an expenditure in the context of the taxpayer's business. 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.

[88] Simply put, Oversight Expenses are current expenses because they relate to the management of a corporation's income-earning process. Proper management includes the judicious allocation or reallocation of capital for the purpose of maximizing the income earned by the corporation. Ineffective oversight over the

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[29] *Ibid*. at para. 33 of Lord Justice Carnwath's reasons for judgment.
[30] *Neonex International Ltd. v. R.*, [1978] C.T.C. 485 (FCA).
[31] *Rona Inc. v. Her Majesty the Queen*, 2003 TCC 121.
[32] *Firestone v. Canada*, [1987] 3 F.C. 200, 87 DTC 5237 (FCA).

capital allocation process is a formula for disaster that often leads to a decline in earnings and cash flow and, as a result, the destruction of shareholder value. In this context, Oversight Expenses serve an income-earning purpose. Oversight Expenses per se do not create enduring benefits for taxpayers. Rather, it is the actual implementation of an approved capital transaction that creates the enduring benefit. In this context, the Court must carefully scrutinize the evidence, with proper regard to the applicable evidentiary burden, in order to ensure that the expenses that are treated by a taxpayer as current expenses actually pertain to advice given to the board of directors to assist it in the decision-making process undertaken as part of the exercise of the board's oversight function. This is to be contrasted with expenses incurred as part of the implementation of a transaction leading to the acquisition of capital property. In that context, the Court must look at the primary purpose of the work performed. Was the work commissioned primarily to assist in the oversight or management process, or was it primarily linked to the implementation of a transaction carried out on capital account?

[89] I will now apply these principles in my analysis of the parties' positions and in my review of the evidence. With respect to the advisory fees paid to Morgan Stanley and Lazard Frères, I will examine whether the evidence supports the Appellant's assertion that these fees were linked to the decision-making and oversight process.

B. Are any of the Disputed Expenses deductible as current expenses under subsection 9(1) of the Act?

(1) Are the fees paid to Morgan Stanley and Lazard Frères deductible as current expenses under subsection 9(1) of the Act?

(a) Pechiney

[90] The Appellant seeks to deduct, under subsection 9(1) of the Act, $18,887,115 out of the total amount of $26,051,194 that it paid Morgan Stanley for services in connection with the Pechiney transaction. This works out to 72.5% of the total amount paid to Morgan Stanley. This percentage is based on the following breakdown of fees provided by Morgan Stanley in a letter dated June 18, 2004:

(a) 30% attributed to general advisory services prior to June 1, 2003;

(b) 25% attributed to investigative and due diligence efforts prior to July 7, 2003 (the date the offer was publicly announced). These activities included among other things, reviewing general financial information, market and industry analyses and capital structure analysis to evaluate the advisability of the transaction;

(c) 10% attributed to rendering prior to July 7, 2003 (the date the offer was publicly announced), a financial opinion to Alcan with respect to the fairness of the consideration; and

(d) 7.5% (or half of the total of 15%) attributed to the analysis related to the amended and revised offers.[33]

[91] The evidence shows that Morgan Stanley had a long-standing relationship with Alcan prior to the Pechiney transaction. They were also involved in Alcan's failed attempt to merge with Pechiney in 1999. They began working on Alcan's renewed proposal to acquire Pechiney at or around the end of 2002, approximately six months prior to the public announcement of the initial offer on July 7, 2003.[34] The uncontradicted testimony of Mr. McAusland and Mr. Healy confirms that Morgan Stanley worked on the financial model for the transaction and prepared financial and valuation opinions, all for the purpose of providing the Appellant's board of directors with the necessary material to conduct a critical review of the proposed transaction prior to approving it. For example, on December 13, 2002, Morgan Stanley prepared for the Appellant's board a presentation on the financial impact and financing considerations relevant to a possible transaction with Pechiney.[35] Similar presentations were made in the period from April 2003 to July 2, 2003, when the transaction was finally approved by Alcan's board of directors.[36]

[92] I observe that the Appellant spent approximately $2,605,119[37] on the fairness opinion that was delivered by Morgan Stanley to its board of directors.[38] This opinion represented the culmination of the financial analysis provided to the Appellant's directors. The purpose of the opinion was to document the financial

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[33] Exhibit A-20.
[34] Mr. Brian Healy testified at trial about the relationship between the investment banking side of Morgan Stanley, of which he is a part, and Alcan. He also testified that Morgan Stanley officially started to work on the Pechiney transaction at the end of 2002. Transcript of Tuesday October 20, 2015, starting at p. 103.
[35] Exhibit A-207.
[36] Exhibits A-209 to A-212, A-216, A-217, A-224 and A-226.
[37] Ten percent of 26,051,194.
[38] Exhibits A-20 and A-21.

considerations that were taken into account by the Appellant's directors in deciding to approve the transaction.

[93] A fairness opinion is not required by law. The Appellant's directors could have approved the transaction without one. The purpose of the opinion was thus to document the fact that the Appellant's directors has discharged their oversight duties by acting on a fully informed basis. The fairness opinion is evidence that can be used to demonstrate that the directors acted with due care in approving the transaction. In this context, the work that went into the fairness opinion was not, as argued by the Respondent, carried out in the course of the actual implementation of the Pechiney transaction.

[94] The Respondent claims that the evidence points to the fact that the Appellant pursued the acquisition of Pechiney as far back as the Appellant's first failed attempt to acquire Pechiney through a three-way friendly merger. The Appellant waited for an opportune time to try again. According to the Respondent, the Appellant simply changed its tactics by appealing to Pechiney's shareholders directly through a hostile takeover bid, which would circumvent any opposition from Pechiney's management.

[95] In my opinion, the Respondent's version of events is an oversimplification of what occurred. Markets change rapidly. Transactions may be accretive to value under certain market conditions and not under others. Financial modelling must take into account the changing landscape. Interest rates, blended costs of capital, commodity prices, growth prospects, and anticipated synergies are but a few of the factors that the board must carefully consider before committing to an acquisition. Another important consideration is the interests of the various stakeholders in a transaction. Different stakeholders may attempt to block a takeover bid if they see the acquisition as conflicting with their interests. In France, at the time of the Pechiney transaction, the law had been recently amended to allow for hostile bids that were subject to regulatory approvals. With that background in mind, I surmise that the shareholders could have easily influenced the public authorities if they had felt that the Appellant's offer negatively affected their interests. For example, an offeror may be asked to increase its offer price or to guarantee employment and certain levels of capital spending in order to overcome opposition. In light of all these factors, a contemporaneous financial model must be prepared to provide the board with the material information necessary to evaluate the terms and conditions upon which a transaction might prove beneficial to the corporation's shareholders.

[96] The evidence shows that the above was done in the instant case. This is not surprising. As part of the oversight process, directors must constantly ask themselves whether the matters that they are called upon to oversee will increase or subtract from the corporation's earnings. In view of the numerous acquisitions completed by the Appellant prior to its acquisition of Pechiney, a careful evaluation of corporate opportunities appears to have been an ongoing quest for the Appellant's directors and was intrinsically linked to the income-earning process.

[97] I suspect that the Minister would not have disallowed the Disputed Expenses had the Appellant simply hired additional employees to carry out the advisory work provided by Morgan Stanley and Lazard Frères. There would have been no demand by the Minister for the Appellant to track the salaries and benefits paid to such employees and to allocate them to work performed in connection with the financial analysis of the Pechiney transaction. In the case at hand, there is no suggestion that part of Mr. McAusland's salary and benefits and the director's fees paid by the Appellant are not deductible because they were amounts paid in connection with the Pechiney and Novelis transactions. While internal advice often costs less, it is not a reliable substitute for independent third party advice. Effective oversight requires independent advice to ensure that the advice on which the board relies to approve a capital expenditure is not skewed by personal interests. My view on this point is supported by the Federal Court of Appeal's decision in *Pantorama Industries Inc. v. Canada*[39] In that case, the taxpayer hired a contractor to find locations for its stores and negotiate leases and lease renewals on its behalf. In finding that the fees paid to the contractor were current expenses, Judge Noël (as he then was) determined that "the fact that the appellant made a decision to outsource this aspect of its business should have no bearing on the tax treatment of the expenditure".[40]

[98] I conclude that Oversight Expenses are deductible by the Appellant. The evidence shows that Oversight Expenses are of a frequent and recurring nature for this taxpayer. More importantly, the Oversight Expenses are deductible because they were incurred to facilitate the board of directors' oversight over the income-earning process, 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

[39] 2005 FCA 135, [2006] 1 F.C.R. 561.
[40] *Ibid*. at para. 25.

regard, the Appellant's Oversight Expenses form part of the Appellant's annual costs of business.

[99] I do not agree with the Appellant's submission that the expense incurred for work performed by Morgan Stanley in connection with the amended and revised offers qualifies as a current expense. The evidence shows that the Appellant was engaged in negotiations with the Pechiney board on the terms of an increased offer in or around August 2003. These negotiations culminated in an increase in the offer price for the Pechiney shares. The Appellant's board did not adopt a new resolution to approve the revised offer. I surmise that the Appellant's legal advisors concluded that the initial board resolution was drafted broadly enough to authorize amendments to the Appellant's offer. Viewed in this light, the initial offer served to create a framework for negotiations which led to a higher offer that was ultimately recommended for acceptance by Pechiney's board of directors. In my opinion, the work performed by Morgan Stanley in the context of active negotiations was more closely linked to the implementation of the transaction.

[100] Considering all of the foregoing, I conclude that the Appellant is entitled to deduct, as a current expense, 65%[41] of the fees paid to Morgan Stanley for the advisory services performed in connection with the Appellant's board of directors' review and approval of the Pechiney transaction.

[101] The Appellant also seeks to deduct under subsection 9(1) of the Act, $5,297,652 out of the total amount of $8,150,233 that it paid Lazard Frères for services in connection with the Pechiney transaction. This works out to 65% of the total amount paid to Lazard Frères. At the request of the Appellant, Lazard Frères provided a breakdown of the fees associated with the various services provided in connection with the Pechiney transaction.[42] Thirty-five per cent of the Lazard Frères fees were attributed to professional advice provided to the Appellant's board of directors as to whether, and on what terms, the board should approve an offer for all of the Pechiney shares. The evidence shows that this work included valuation work and the modelling of potential synergies that could be derived from the transaction.[43] At trial, Mr. Maris testified that Lazard Frères started to work for Alcan on the Pechiney transaction 18 months prior to the public announcement of

[41] The amount deductible under subsection 9(1) of the Act is therefore $16,933,276.
[42] Exhibit A-33.
[43] Point 1, Exhibit A-33.

the transaction, which occurred in July 2003.[44] For the reasons noted earlier, I am satisfied that the fees payable for this work are deductible on current account.

[102] For the reasons also noted earlier, I do not share the Appellant's view that the fees charged by Lazard Frères for work performed in connection with the negotiation and revision of the Appellant's offer are deductible as current expenses. Therefore, only 35% of the fees paid to Lazard Frères for advice provided in connection with the Pechiney transaction qualify for deduction under subsection 9(1) of the Act.[45]

(b) Novelis

[103] The Appellant argues that its board retained Morgan Stanley and Lazard Frères to provide advice as to which of the possible divestiture scenarios would be most favourable for its shareholders. Therefore, the Appellant argues, these expenses were incurred in connection with the board's decision-making and oversight functions rather than the implementation of the Spin-off.

[104] Mr. Maris testified that Lazard Frères began its advisory work on the Novelis transaction immediately following the closing of the Pechiney transaction. Lazard Frères was tasked with conducting the financial analysis and modelling for two alternative transactions. His evidence on this point was not challenged by the Respondent in her cross-examination or written argument.[46] On the one hand, Lazard Frères was asked to advise the Appellant's board on financial considerations relevant to an outright sale of Novelis. At the same time, Lazard Frères was to advise the board on the financial considerations relevant to a Spin-off of Novelis.

[105] To accomplish its mandates, Lazard Frères pursued a dual-track financial review and advisory process.[47] With respect to the outright sale option, Lazard Frères recommended that the Appellant seek expressions of interest from private equity sponsors and institutional and strategic buyers. Lazard Frères organized the expression of interest process in order to validate the financial advice that it ultimately provided to the Appellant's board of directors to enable it to choose

[44] Transcript, October 22, 2015 at pp. 7 and 8.
[45] This works out to $2,852,581.55 (35% of 8,150,233).
[46] In her written arguments, at para. 194 on p. 76, the Respondent actually describes the task of Lazard Frères with respect to the Novelis transaction as relating to "a possible alternative transaction, that is, the sale of the assets as opposed to a spin-off".
[47] Transcript, October 22, 2015, at p. 22.

between the two options. A second team worked on the financial modelling of the Spin-off.

[106] The evidence shows that the financial advisory process for the Novelis transaction extended over a long period of time because of the complexities arising from the simultaneous investigation of both alternatives. For this reason, the fairness opinion was delivered to the board of directors on November 23, 2004. The Board of Directors formally approved the Spin-off at this same meeting.[48] The Spin-off was finalized on January 6, 2005.[49]

[107] I agree with the Appellant's submission that the evidence demonstrates that substantially all of the work performed by Lazard Frères in connection with the Novelis transaction related to financial advice provided in the course of the oversight process. I observe that Lazard Frères spent approximately 345 days, out of a total of 389 days they spent on the Novelis transaction, working on that transaction prior to its final approval. This works out to 88.69% of the total number of days they spent providing advice in connection with the transaction. In the absence of contrary evidence, I conclude that 88.69% of the total amount of $16,031,657 claimed by the Appellant as a deduction for its 2005 taxation year is deductible on current account.[50]

[108] With respect to the Novelis transaction, Morgan Stanley also provided strategic advice in relation to the two alternate divestiture options. As indicated by Mr. Healy in his testimony at trial, Morgan Stanley's work was performed from October 1, 2003 to January 5, 2005.[51] A substantial portion of the fees paid to Morgan Stanley in connection with the Novelis transaction was claimed as a deduction by the Appellant in its 2004 taxation year, which was statute-barred at the time the audit commenced in respect of that transaction. Therefore, the Minister did not disallow the deduction for Morgan Stanley's fees that was claimed by the Appellant for 2004.

[109] The Appellant seeks to deduct the amount of $296,863[52] paid to Morgan Stanley, which relates to reimbursable expenses incurred in connection with the

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[48] Appellant's Written Arguments at para. 168.
[49] Appellant's Written Arguments at para. 171.
[50] This comes out to $14,218,476.59 (16,031,657 x 88.69%) which would be deductible under subsection 9(1) of the Act.
[51] Transcript of the hearing, October 20, 2015, at pp. 132 to 136.
[52] Morgan Stanley charged $8,253,794.52 in total for the Novelis transaction as per the invoice prepared by Morgan Stanley dated January 25, 2005, which is Exhibit A-47. This amount includes $296,863 for reimbursable expenses.

Novelis Spin-off. There is insufficient evidence for the Court to determine whether these expenses were incurred in relation to advice provided to the Appellant's directors in connection with their oversight function. The invoice for this amount does not explain the nature of these expenses and the services they relate to. The testimony of Mr. Healy and Mr. McAusland did not provide any additional guidance in this respect. Consequently, the Appellant has not satisfied its Evidentiary Burden with respect to this expense.

(2) Are the fees paid to Valmonde and Publicis deductible as current expenses under subsection 9(1) of the Act?

[110] The Appellant hired Publicis to handle its communication strategy for the purpose of supporting its hostile takeover bid of Pechiney. The Appellant formalized its relationship with Publicis on June 11, 2003,[53] a few weeks prior to the approval of the Pechiney transaction by the Appellant's board on July 2, 2003.

[111] The Appellant paid a total amount of $18,983,316 to Publicis. The Appellant submitted that 50% of the fees were incurred to promote Alcan's brand, while the other 50% were incurred to obtain the support of Pechiney's shareholders for its bid. Initially the Appellant deducted $9,491,658 as a current expense on the basis that the fees for the communication advisory services were advertising expenses incurred to increase the Appellant's profit from its business operations. The balance of the fees was added to the adjusted cost base of the Pechiney shares. The Appellant now says that the full amount is deductible as a current expense because advertising fees should benefit from the broad principle of deductibility. The Appellant also contends that one of the objects of the promotional and 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.

[112] 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

[53] Exhibit A-58.

becoming overly politicized. To have got bogged down in a political quagmire could have led to a costly failed transaction.

[113] The evidence shows that one of the reasons the Appellant retained Publicis was to obtain the services of Mr. Levy and Mr. Giuily. The evidence shows that Mr. Giuily was well connected in the political world in France. As shown by a letter from Publicis Consultants to Alcan confirming its mandate, Mr. Giuily had previously worked within the French Ministry of the Interior (*Ministère de l'Intérieur*). Therefore, he was extremely well-placed to lobby the political decision makers and to influence their views of the Pechiney transaction. It is common knowledge that the opponents of a hostile offer will raise various factors to justify opposition to the offer, including the spectre of job losses, capital spending reductions and the dismantling of head office infrastructure, the impact on local suppliers and the reduction of local and national tax revenue. If constituents are concerned, so will be their elected representatives. 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.

[114] All of the above is borne out by the evidence. As the Respondent points out, the mandate given to Publicis was correctly spelled out in the engagement letter, which reads as follows:

> [TRANSLATION] At our recent meetings, you were so good as to inform us of your desire to entrust us with a mission to provide assistance and advice with regard to defining and implementing your communication and public relations strategy in connection with the stock transaction you are presently considering (Project Blue).[54]
>
> Lors de nos récentes réunions, vous avez bien voulu nous faire part de votre souhait de nous confier une mission d'assistance et de conseil sur la définition et la mise en oeuvre de votre communication et de vos relations publiques, dans le cadre de l'opération boursière que vous étudiez actuellement (Projet Blue). [55]

[54] Letter from Publicis Consultants to Alcan dated June 11, 2003, Exhibit A-58. Transcript of the hearing, October 20, 2015, cross-examination of Mr. David McAusland, p. 75, l. 6 to p. 76, l. 10.

[55] *Ibid*. First paragraph of the letter.

[115] Project Blue refers to a takeover of Pechiney. Mr. McAusland acknowledged during his cross-examination that Publicis was hired to "instil confidence in the public regarding Alcan's stewardship of the Pechiney assets."[56]

[116] The Respondent drew attention to the following testimony given by Mr. McAusland during his examination for discovery:

> "So, to have advertising at which there was probably some -- but my point is advertising with Alcan only completely without reference to the Pechiney transaction, you know, wouldn't necessarily make sense. You have the promotion of Alcan as a corporate citizen, as a credible company, as a steward of the enterprise and as opposed to value being paid for the company. So there's promotion of the offer, the value of the offer, the desirability from the financial perspective as accepting the offer because it's a good deal. It's one thing. And then promoting Alcan as a steward and as an excellent corporate citizen and owner is another thing. But the second the stewardship is also related to the Pechiney offer, but not the financial side and not how good a deal it is for the shareholders, it's the stewardship side and that the public should have confidences [*sic*] in Alcan as a steward of these incredibly important assets going forward." (As read.)[57]
>
> [Emphasis added.]

[117] On the evidence, it is apparent that Publicis was hired to promote a positive vision for the transaction for the purpose of winning over the different stakeholders affected by a takeover of Pechiney.

[118] As noted in my credibility observations, there were some inconsistencies in Mr. Giuily's testimony. Mr. Giuily had prepared a breakdown of Publicis' fees to support an allocation favourable to current account treatment; however, as the Respondent also correctly points out in her written submissions, the invoices that Mr. Giuily relied on to prepare his allocation of the Publicis fees do not support his position.[58]

[119] On the evidence before me, I find that the expense relating to the communication strategy, and thus the Publicis expense, was incurred for the underlying purpose of implementing the Pechiney transaction. The Appellant did

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[56] Transcript of the hearing, October 20, 2015, cross-examination of Mr. David McAusland, p. 70, lines 23 to 28.

[57] Transcript of the hearing, October 20, 2015, cross-examination of Mr. David McAusland, p. 72, l. 27 to p. 74, l. 7 (read from the discovery transcripts).

[58] I adopt the Respondent's conclusions on the evidence, contained in paragraphs 129 to 139 of her written submissions.

not present any credible evidence that the communication strategy was undertaken in connection with its business. I note that the Appellant did not sell its products directly to the public. Its manufactured products are sold to distributors and other manufacturers. There is no evidence to demonstrate that consumers of products containing aluminum sourced from the Appellant were targeted by the communication strategy developed. Additionally, the Appellant did not present any evidence to demonstrate that these expenses would have been incurred in the absence of the Pechiney transaction. Therefore, I conclude that the total amount of the Publicis fees is a capital expenditure because this amount was incurred to facilitate the implementation of the Pechiney transaction.

[120] The Appellant also sought to deduct the amount of $106,630 paid to Valmonde for ancillary services rendered to assist in its communication strategy. For the reasons noted above, I conclude that those services were provided to the Appellant in the execution of its takeover bid and are therefore not deductible under subsection 9(1) of the Act.

(3) Are the other Miscellaneous Expenses incurred by the Appellant in the context of the Pechiney transaction deductible under subsection 9(1) of the Act?

[121] The Appellant claims a deduction for a total amount of $1,780,796 with respect to miscellaneous expenses that it contends were current expenses incurred in connection with its business.

[122] The Appellant claims as a current expense a total amount of $967,152 paid to Sullivan Cromwell on the basis that the expense was incurred in connection with advice provided to the board of directors with respect to their ongoing fiduciary duties.[59] In addition, the description of the services refers to "[o]ther legal advice and services", including advice regarding fiduciary duties. The invoice itself refers to work performed in connection with the Pechiney transaction. In light of the fact that a large portion pertained to rent and in view of the fact that Mr. Miller provided very little evidence with respect to these fees, I conclude that the

[59] The Appellant indicates that this amount was determined by "taking the amount set out in Exhibit A-81 and applying the percentage from Exhibit A-80" (Appellant's Written Arguments, para. 141). Paragraph 7 of Exhibit A-80, which is a letter in which a breakdown of their fees is provided by Sullivan Cromwell, states that 5% of Sullivan Cromwell's services pertained to "[o]ther legal advice and services", including advice to the board of directors regarding fiduciary duties and liabilities in respect of the transaction. This letter also indicates that the total amount of fees invoiced by Sullivan Cromwell for its services was US$9.45 million. Therefore, it appears that the Appellant has incorrectly claimed an amount of $967,152. Rather, the expense claimed should be the Canadian dollar equivalent of 5% of US$9,367,811.

Appellant has failed to satisfy its Evidentiary Burden with respect to the amounts being deductible on current account. For these reasons, I conclude that these amounts must also be capitalized.

[123] The Appellant claims a total amount of $20,054 paid to the law firm then known as Ogilvy Renault on the basis that Ogilvy Renault assisted the board of directors and officers in complying with legal requirements in connection with their duties. In making its claim, the Appellant relied on an invoice from Ogilvy Renault which briefly describes its services.[60] I am unable to discern from the invoice whether the fees pertained to advice given in the course of the oversight process or are linked to Execution Costs. The majority of the descriptions on the invoice indicate that the services pertain to preparing and drafting the "Project JEDI Transaction Manual". The Appellant also relied on testimony from Mr. McAusland and Mr. Miller. Mr. McAusland testified that the advice from Ogilvy Renault pertained to general corporate law issues such as the issuing of securities and the registration requirements in connection with the Pechiney transaction. Mr. Miller testified that Sullivan Cromwell supported Ogilvy Renault in advising the board, but I cannot discern from that statement the precise nature of the services Ogilvy Renault provided. Overall, the testimony regarding Ogilvy Renault's services was vague. For these reasons, I conclude that the amount paid to Ogilvy Renault was a capital expenditure.

[124] The Appellant claims a total amount of $449,963 paid to Ernst & Young on the basis that these fees were incurred for tax advice. No one from Ernst & Young was called by the Appellant to explain the detailed summary of the invoice. I draw a negative inference from this. I am unable to determine from the descriptions shown on the invoice whether the tax advice pertains to the pre-closing or post-closing structuring of the Pechiney transaction, or to other matters. I surmise that the services provided by Ernst & Young pertained to advice as to tax structuring that related to the implementation of the transaction and the post-closing reorganization transactions. On this basis, I conclude that the Appellant has failed to satisfy its Evidentiary Burden with regard to establishing that the amount of $449,963 is deductible on current account.

[125] The Appellant claims a total amount of $187,739 paid to Davis Polk and ADP. The Appellant presented invoices issued by Davis Polk and ADP as evidence in support of its claim. The invoice from Davis Polk indicates that the advisory services pertained to the Appellant's relationship with Morgan Stanley, Morgan

[60] Exhibit A-130.

Stanley's role in the transaction, and the Appellant's obligations under U.S. securities regulations.[61] The only description on the invoice for ADP indicates that the services pertained to "66 shareowner positions of the reorg for Pechiney".[62] The Appellant has failed to satisfy its Evidentiary Burden with respect to this amount. Therefore, I conclude that the legal advice pertained to the implementation of the Pechiney transaction and that the expense was incurred on capital account.

[126] The Appellant claims an amount of $152,180 described as communication costs on the basis that these costs related to conference calls, translation services and other communication services. My review of the invoices indicates that these expenses were incurred as part of the Appellant's communication strategy to implement the Pechiney transaction. For the reasons noted in paragraphs 110 to 120 of these reasons, I am of the view that these expenses are capital expenditures.

[127] The Appellant also claims an amount of $2,660 paid to the Ritz-Carlton Montreal for a cancellation fee. It appears that this expense related to the implementation of the transaction. Therefore, it is a capital expenditure.

[128] Finally, the Appellant claims an amount of $1,048 paid to various small suppliers. No evidence was presented on this amount. The Appellant's claim for a deduction for this amount as a current expense is therefore denied.

[129] For all these reasons, I conclude that the miscellaneous expenses totalling $1,780,796 are not deductible as current expenses. They are capital expenditures.

(4) Are the Disputed Expenses incurred in printing and issuing documents in the Pechiney transaction or the Novelis transaction deductible under either subsection 9(1) of subparagraph 20(1)(*g*)(iii) of the Act?

[130] The Appellant is claiming that the expenses totalling $2,517,780 that it incurred in relation to printing and issuing the documents directed to the Pechiney shareholders are deductible under subsection 9(1) or alternatively under paragraph (20)(1)(*g*)(iii) of the Act. With respect, I disagree.

[131] The Appellant's argument is based on this Court's finding in *Boulangerie St-Augustin Inc. v. The Queen*.[63] In that case, the taxpayer was a target corporation whose shareholders were asked to tender their shares in takeover bids.

[61] Exhibit A-122.
[62] Exhibit A-120.
[63] 95 DTC 164 (TCC); aff'd. 2002 DTC 6957 (FCA).

The taxpayer argued that — in accordance with section 134 of the Quebec *Securities Act*[64] and the Quebec *Companies Act*[65] — it was its legal obligation to furnish information circulars to its shareholders. Therefore, the fees incurred to prepare the circulars should be deductible as a current expense.

[132] Judge Archambault held that the obligation to keep shareholders informed was similar to the taxpayer's obligation under the *Companies Act* to provide the corporation's financial statements. He noted that "business people consider these expenses as necessary business expenses and that they are deductible as general administrative expenses".[66]

[133] However, *Boulangerie St-Augustin* is distinguishable from the present case. Although the taxpayer in that case was required by law to distribute the information circulars, it was a target corporation issuing circulars to its own shareholders. In the case at bar, the Appellant was required by law to file forms such as the S-4, which are akin to a prospectus. These documents were directed to the shareholders of Pechiney. These documents contain information that is considered material to the shareholders' decision to accept or reject the Appellant's offer.[67] The Appellant was required to provide this information to the Pechiney shareholders in the course of the implementation of its takeover bid with respect to Pechiney. The preparation and delivery of the documents were an essential step in the implementation of the Appellant's takeover of Pechiney. Therefore, the expenses pertaining to the preparation and filing of these documents were incurred on capital account.

[134] In *Boulangerie St-Augustin*, Judge Archambault gave guidance with respect to paragraph 20(1)(*g*)(iii) of the Act specifically. In order for costs to be deductible under this provision, the annual reports contemplated should be financial in nature. The Appellant maintains that the reports to be filed with the regulatory authorities and provided to Pechiney's shareholders were financial in nature, containing historical financial data and *pro forma* financial statements, among other information. As the shareholders of Pechiney were entitled to this information by law, these expenses should also be deductible under paragraph 20(1)(*g*)(iii) of the Act.

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[64] R.S.Q., c V-1.1.
[65] Subsection 98(2) of the *Companies Act*, R.S.Q., c. C-38.
[66] *Supra* note 64, at p. 171.
[67] I note that, under the Appellant's first offer, the Pechiney shareholders were offered shares of Alcan; thus they were potential investors in the Appellant.

[135] In my opinion, the Appellant's claim under paragraph 20(1)(*g*)(iii) of the Act must also be rejected. In short, the Appellant failed to satisfy its Evidentiary Burden. No one who provided services in connection with the presentation of the financial information was asked to testify. The Court is unable to discern whether these expenses were incurred specifically for the purpose of printing financial information and issuing it to the Appellant's shareholders or to the Pechiney shareholders. The documents contained much more than financial information.

[136] I arrive at the same conclusion with respect to the fees labelled by the Appellant as "Printing and Issuing Financial Reports and Other Professional Fees" in respect of the Spin-off of Novelis. These expenses are clearly capital in nature. The management circular and plan of arrangement were sent to the Appellant's shareholders to provide them with the material information required in order for them to approve or reject the Spin-off. The Appellant has also failed to satisfy its Evidentiary Burden with respect to the deductibility of the fees under paragraph 20(1)(*g*)(iii) of the Act. For example, the printing costs have not been allocated between pages containing financial information and pages containing other information, such as the terms and conditions of the plan of arrangement and the non-financial information pertaining to Novelis. Finally, no one was called from PwC or Ernst & Young to explain the work performed by those organizations and the breakdown of their fees.

C. Are any of the Disputed Expenses capital expenditures deductible in whole or in part under subsection 20(1) of the Act?

(1) Are the fees paid to Morgan Stanley and Lazard Frères deductible under paragraph 20(1)(*bb*) of the Act?

[137] The Appellant argues that the amounts paid to Morgan Stanley and Lazard Frères in connection with the Pechiney and Novelis transactions would also be deductible under paragraph 20(1)(*bb*) of the Act.

[138] The English and French versions of paragraph 20(1)(*bb*) of the Act read as follows:

(*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	(i) est versée par le contribuable au cours de l'année à une personne ou à une

business of which	société de personnes dont l'activité d'entreprise principale consiste :
(A) is advising others as to the advisability of purchasing or selling specific shares or securities, or	(A) soit à donner des avis sur l'opportunité d'acheter ou de vendre certaines actions ou valeurs mobilières,
(B) includes the provision of services in respect of the administration or management of shares or securities, and	(B) soit, entre autres choses, à assurer des services relatifs à l'administration ou à la gestion d'actions ou de 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, or	(A) soit pour obtenir un avis sur l'opportunité d'acheter ou de vendre certaines actions ou valeurs mobilières du contribuable,
(B) services in respect of the administration or management of shares or securities of the taxpayer.	(B) soit pour la prestation de services relativement à l'administration ou à la gestion d'actions ou de valeurs mobilières du contribuable.

[139] As the parties agreed in their written arguments,[68] the amounts paid to Morgan Stanley and Lazard Frères by the Appellant are deductible under this provision only if the following three conditions are satisfied:

(a) the amounts paid are not commissions;

(b) the fees were paid for advice as to 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.

[140] The Respondent argues that the first and second of these conditions set out in paragraph 20(1)(*bb*) have not been met with respect to either transaction. The

[68] Appellant's Written Arguments, para. 402 at p. 115 and Respondent's Written Arguments, para. 89 at pp. 38 and 39.

Respondent did not challenge the third condition.[69] In any event, considering the evidence as a whole, it is indisputable that the principal business of Morgan Stanley and Lazard Frères consists of providing advice on the advisability of purchasing or selling shares or securities.

(a) Pechiney

[141] The Respondent contends that the first and second conditions have not been satisfied because the Appellant paid "commissions" for advice related to the takeover of Pechiney rather than the advisability of purchasing or selling specific shares of the Appellant.[70]

(i) Were the amounts paid to Morgan Stanley and Lazard Frères commissions?

[142] I observe that the term "commission" is not defined in the Act; however, the courts have considered the meaning of this term in other tax contexts.

[143] The modern approach to statutory construction is described in the Supreme Court of Canada decision *Canada Trustco Mortgage Co. v. Canada*. [71] This approach involves a textual, contextual and purposive analysis and, more precisely, looks at the grammatical and ordinary sense of a provision with reference to its entire context, the purpose of the legislation and the intention of Parliament. Furthermore, an important objective in interpreting the Act is to achieve consistency, predictability and fairness.[72]

[144] In *Canada Trustco*, the Supreme Court also provided the following guidance on undertaking the modern approach of statutory interpretation:

> 10 . . . When the words of a provision are precise and unequivocal, the ordinary meaning of the words play [*sic*] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive

[69] Appellant's Written Arguments, para. 35 at p. 17 and para. 404 at p. 116; Respondent's Written Arguments, para. 90 at p. 39.
[70] Respondent's Written Arguments, para. 90 at p. 39.
[71] 2005 SCC 54, [2005] 2 S.C.R. 601.
[72] *Ibid*. at paras. 10, 11 and 12.

> process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[73]

[145] In their written submissions, both parties rely on different passages of this Court's decision in *ITA Travel Agency Ltd.*[74] as authority for the meaning of the term "commission". This decision involved the determination of whether amounts received from air carriers were commissions, and as a result,[75] consideration for a taxable supply to which GST would be applicable. My colleague Judge Lamarre (as she then was) focused on the ordinary meaning of the word "commission", citing the following definitions:

> 34 The *Concise Oxford Dictionary* (Oxford: Oxford University Press, 1990) defines a commission as "a percentage paid to the agent from the profits of goods etc. sold, or business obtained". According to that definition, something must be actually paid to someone in order for an amount to constitute a commission, and that amount must be expressed as a percentage.
>
> 35 In *Black's Law Dictionary* (St. Paul, Minn: West Publishing Co., 1990), the definition of commission reads as follows:
>
> > The recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor, broker, or bailee, when the same is calculated as a percentage on the amount of his transactions or on the profit to the principal. Weiner v. Swales, 217 Md. 123, 141 A.2d 749, 750. A fee paid to an agent or employee for transacting a piece of business or performing a service. Fryar v. Currin, App., 280 S.C. 241, 312 S.E. 2d 16, 18. Compensation to an administrator or other fiduciary for the faithful discharge of his duties.
>
> 36 From this definition, we see that commission entails the actual payment of an amount of money calculated as a percentage on the amount of a transaction or on the profit to the principal.
>
> . . .
>
> 38 In *Consolboard Inc. v. MacMillan Bloedel* (1982), 63 C.P.R. (2d) 1, [varied by 74 C.P.R. (2d) 199 (F.C.A.), but not with respect to the question addressed here], Cattanach J. of the Federal Court, Trial Division spoke about the meaning of the words "commission" and "discount". In that case, the defendant, the producing mill, shipped its products to a sales subsidiary which warehoused

[73] *Ibid*. at para. 10.
[74] [2001] G.S.T.C. 5, affirmed 2002 FCA 200 [2002]G.S.T.C. 58 (FCA).
[75] I observe that the term "consideration" is much broader than the concept of a "commission".

> the finished product and sold it to the trade. As compensation for its efforts, and as the basis for its income and ultimate profit, the sales subsidiary received a predetermined percentage of the sale price to the consumer. The sales subsidiary also arranged direct car sales and those cars were shipped directly to the customer by the mill from the mill by various means of transport. The sales subsidiary was paid an allowance of five per cent on the sale price to the purchaser to allow it a profit for its efforts in making the sale. During the evidence and in argument, this allowance had been called a "discount" or a "commission". Cattanach J. of the Federal Court, Trial Division defined the words "commission" and "discount" in these terms at page 22:
>
> > ... Those words cannot be words of art in a commercial sense, neither are they technical words in any art or science. Therefore they must be given their meaning as used in common parlance.
> >
> > In commerce a commission is a percentage of a price of a product paid to an agent or like person who transacts business on behalf of others, as compensation for his efforts.
> >
> > Likewise in commerce a discount on the sale of an article of trade is an abatement or deduction from the nominal value or price of that article.
> >
> > The nub of the controversy is whether the allowance paid to the sales subsidiary is a "commission" or a "discount".
> >
> > If it is the former it is an expense in the mill's operation and is properly deducted from income.
> >
> > If it is the latter then it is not part of the price to the consumer and should be deducted from the net mill return.
>
> [Emphasis added.]

[146] In light of the above, the term “commission” signifies an amount calculated by reference to a percentage of the price of a product sold or a percentage of the profit earned by a principal in connection with a transaction. Relying on this definition, the Appellant contends that the fees paid to Morgan Stanley and Lazard Frères in the context of the Pechiney transaction are not commissions because the amounts were not determined by reference to a percentage on sales or volume; rather, the amounts were fixed fees. The Appellant also points to evidence indicating that Morgan Stanley and Lazard Frères provided their services as independent contractors and not as agents for the Appellant.

[147] I agree with the Appellant's submission that the fees paid to Morgan Stanley and Lazard Frères in connection with the Pechiney transaction were not determined by reference to a percentage on sales or volume. In both cases, the fees were fixed. While portions of the advisory fees were contingent on the Appellant acquiring a certain number of Pechiney shares, the amount paid was nonetheless fixed prior to the completion of the transaction.

[148] In contrast, the Respondent relies on paragraph 41 of the same decision to argue that the word "commission" can be interpreted to include a lump sum or fixed fee:

> 41 Therefore, there seems to be two defining characteristics of a commission. First, a commission is an amount that is actually paid or credited to someone. It does not include artificial, notional or fictitious payments or credits. In my view, an accounting entry cannot be a commission. Second, a commission is usually expressed as a percentage, or if it is expressed as a lump sum amount, it must at least be proportionate to the work done or to the value of the item sold. . . .

[149] On review of *ITA Travel*, it appears that Judge Lamarre relied on her understanding of the *ratio decidendi* in *Campbell v. National Trust Co. Ltd.*[76] as authority for the proposition that the term "commission" can include a lump sum or fixed amount:

> 37 In *Campbell v. National Trust Co. Ltd.*, [1931] 1 W.W.R. 465, Lord Russell of the Privy Council defined a commission as follows at page 471:
>
> > The verbal agreement between Campbell and Wallberg stipulated for the payment of "a commission," but there was no indication of the amount thereof, or how such amount was to be ascertained. Nor does the evidence contain any suggestion that there existed any custom applicable to the present case, by reference to which the amount of commission could be ascertained. In these circumstances the contract can only mean that Campbell shall be paid a proper lump sum in remuneration for his services in introducing Clarke. It is no objection to this view that a commission frequently, or even commonly, takes the form of a percentage. 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.

[76] [1931] 1 W.W.R. 465, cited at para. 37 of Judge Lamarre's reasons in *ITA Travel*.

[Emphasis added.]

[150] It is apparent from the above passage that the Court construed the term "commission" by taking into account the entire context of the parties' agreement. In *Campbell*, the Privy Council noted that the parties intended that a "commission" would be paid, without defining how it was to be determined. Because of this, the Privy Council concluded that the parties had envisaged the payment of a lump sum amount. In contrast, the context in which the term "commission" is used in the Act does not favour a departure from the ordinary meaning of that term.

[151] The Appellant also referred me to the decision in *Minister of National Revenue v. Yonge-Eglinton Building Ltd*.[77] That decision concerned the scope of paragraph 11(1)(*cb*) of the Act, which read, at the time, as follows:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> . . .
>
> (*cb*) an expense incurred in the year,
>
> (i) in the course of issuing or selling shares of the capital stock of the taxpayer, or
>
> (ii) in the course of borrowing money used by the taxpayer for the purpose of earning income from a business or property (other than money used by the taxpayer for the purpose of acquiring property the income from which would be exempt),
>
> but not including any amount in respect of
>
> (iii) a commission or bonus paid or payable to a person to whom the shares were issued or sold or from whom the money was borrowed, or for or on account of services rendered by a person as a salesman, agent or dealer in securities in the course of issuing or selling the shares or borrowing the money, or
>
> (iv) an amount paid or payable as or on account of the principal amount of the indebtedness incurred in the course of borrowing the money, or as or on account of interest;

[77] [1974] 1 F.C. 637 (FCA).

[152] In *Yonge-Eglinton Building*, Thurlow J. determined the meaning of the term "commission" by referring to the *Shorter Oxford Dictionary*, which defines a commission as "a pro rata remuneration for work done as agent".[78] Judge Thurlow noted that a similar definition is found in the *Living Webster Encyclopedic Dictionary*. The Appellant relies on that decision and passages from the *ITA Travel* decision to contend that an amount must be paid to an agent in order for it to be a commission. While I do not need to determine this specific issue to dispose of this matter, I am satisfied that the evidence shows that Morgan Stanley and Lazard Frères did not act as agents for the Appellant.

[153] In conclusion, I find that the amounts paid to Morgan Stanley and Lazard Frères in relation to the Pechiney transaction were not commissions.

(ii) Advice as to the advisability of buying or selling a specific share or services in respect of the administration or management of shares

[154] With respect to the second condition referred to in paragraph 139 above, relying on the principles of bilingual statutory interpretation, the Respondent submits that the meaning of the expressions "specific share" and "*certaines actions*" in clause 20(1)(*bb*)(i)(A) excludes advice with respect to the takeover of an entire entity.

[155] In *R. v. Daoust*,[79] Judge Bastarache referred to cases that elucidate the principles that should be used in the context of bilingual statutory interpretation. After reviewing the case law, he endorsed a two-step procedure, as follows:

> 26 . . .
>
> I would also draw attention to the two-step analysis proposed by Professor Côté in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 324, for resolving discordances resulting from divergences between the two versions of a statute:
>
> > Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the

[78] *Ibid*. at p. 645.
[79] 2004 SCC 6, [2004] 1 S.C.R. 217.

> legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.

27 There is, therefore, a specific procedure to be followed when interpreting bilingual statutes. The first step is to determine whether there is discordance. If the two versions are irreconcilable, we must rely on other principles: see Côté, *supra*, at p. 327. A purposive and contextual approach is favoured: see, for example, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33.

28 We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning": *Bell ExpressVu*, *supra*, at para. 29. If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions: Côté, *supra*, at p. 327. The common meaning is the version that is plain and not ambiguous: Côté, *supra*, at p. 327; see *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at p. 863.

29 If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 669; *Pfizer Co. v. Deputy Minister of National Revenue For Customs and Excise*, [1977] 1 S.C.R. 456, at pp. 464-65. Professor Côté illustrates this point as follows, at p. 327:

> There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.

30 The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent: Côté, *supra*, at pp. 328-329. At this stage, the words of Lamer J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1071, are instructive:

> First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

31 Finally, we must also bear in mind that some principles of interpretation may only be applied in cases where there is an ambiguity in an enactment. As

> Iacobucci J. wrote in *Bell ExpressVu, supra*, at para. 28: "Other principles of interpretation -- such as the strict construction of penal statutes and the "*Charter* values" presumption — only receive application where there is ambiguity as to the meaning of a provision."

[156] These sources indicate that, when there is a discrepancy between the two versions of the same legislation, the principles of bilingual statutory interpretation guide us towards an interpretation that educes the common meaning of both provisions. However, this common meaning has to be consistent with Parliament's intent.

[157] I agree with the Appellant's interpretation of the English expression "specific". In the context of paragraph 20(1)(*bb*), "specific" implies that the advice must pertain to the purchase or sale of particular shares or securities. For example, a fixed fee charged for a recommendation to buy common shares of an identified corporation would be deductible under this provision.

[158] The English term "specific" translates into French as "spécifique". The French expression "certaines actions" translates into English as "some shares". The English word "specific" and the French word "certaines" do not have the same meaning. The English word "specific" is more restrictive.

[159] Relying on the French version, the Respondent contends that "all of the shares" of Pechiney are not "certaines actions" or "some shares". According to the Respondent, this is the meaning that should be preferred. With respect, I do not agree with the Respondent's interpretation. As noted above, the principles of bilingual statutory interpretation require that we search for a common meaning or, if there is no common meaning, the more restrictive of the two meanings. The Respondent's construction gives rise to an interpretation that favours only the French version of the provision. More importantly, the analysis presented by the Respondent in her written submissions does not reflect Parliament's intention. The context in which the terms are used suggests that Parliament used the expressions "specific shares" and "certaines actions" to exclude generic investment advice such as a recommendation that 10% of an investor's savings be invested in preferred shares. In summary, the wording and context of the provision suggest that Parliament intended that a deduction would be available where the investment advice is clear and concerns shares of a particular issuer.

[160] Finally, the French expression "certaines actions" does not imply that the advice must be given for less than all of the shares of a particular entity. All of the

shares of a particular entity are "some shares" in the sense that there remain other shares of different entities that a taxpayer could acquire. In my opinion, the French version of the provision would have to be worded as follows for the Respondent's interpretation to prevail:

> soit pour obtenir un avis sur l'opportunité d'acheter ou de vendre seulement certaines actions ou valeurs mobilières d'une société donnée.
>
> [Emphasis added.]

Corresponding changes would also have to be made to the English version of the provision. It is certainly not the Court's role to modify the wording of a provision.

(iii) Services rendered after the approval of the Pechiney transaction

[161] In the alternative, the Respondent argues that the fees paid by the Appellant for the services provided by Morgan Stanley and Lazard Frères after the board's approval of the Pechiney transaction on July 2, 2003, are not deductible under paragraph 20(1)(*bb*) of the Act. The Respondent contends that after that time the fees payable for advisory services were not incurred for "advice as to the advisability" of buying the Pechiney shares.

[162] I agree that the evidence put forward by the Appellant must be scrutinized to determine whether the expenses were actually incurred for advice as to the advisability of buying the Pechiney shares. As shown in Morgan Stanley's letter dated June 18, 2004,[80] 30% of Morgan Stanley's work is associated with general advisory services, 25% relates to the analysis of the transaction and 10% relates to the preparation and rendering of the fairness opinion. This work meets the criterion of providing advice as to the advisability of purchasing or selling a specific share. The other 35% of the work does not fit this criterion because it relates to work performed to facilitate the execution of the transaction.

[163] The same analysis applies to Lazard Frères in connection with the Pechiney transaction. As shown in Lazard Frères's letter dated June 22, 2004,[81] 35% of the fees charged related to professional advice "as to whether, and on what terms, to purchase the shares of Pechiney, including valuation work, and modelling of price and potential synergies to be derived from the acquisition".[82] However, the other

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[80] Letter from Morgan Stanley to Alcan dated June 18, 2004, Exhibit A-20, pp. 913 to 915.

[81] Letter from Lazard Frères to Alcan dated June 22, 2004, Exhibit A-33, p. 985.

[82] *Ibid.*

65% of the fees did not relate to advice as to the advisability of purchasing specific shares.

[164] In light of all of the foregoing, if I am wrong on the first issue and the investment advisory fees pertaining to the Pechiney transaction that I have allowed as deductions under subsection 9(1) of the Act are capital expenditures, the Appellant could deduct the same amounts, and no more, under paragraph 20(1)(*bb*) of the Act.

(b) Novelis

[165] With respect to the Novelis transaction and, specifically, the fees paid to Lazard Frères in connection therewith, the Respondent contends that the first and second conditions have not been satisfied because the Appellant paid a commission for advice related to the disposition of its flat rolled products division rather than the advisability of purchasing or selling specific shares of the Appellant.[83]

[166] I will begin my analysis with the Respondent's second contention, namely, that the fees paid to Lazard Frères were not paid for advice as to the advisability of purchasing or selling a specific share of the Appellant nor for the management or administration of specific shares of the Appellant. As noted, the Respondent's view is that the fees were paid for the disposition of Alcan's flat rolled products division by way of the Spin-off transaction.

[167] With respect, I do not agree with the Respondent's argument since the engagement letter signed by the Appellant and Lazard Frères covers more than the disposition of the flat rolled products division. The introduction of this letter states:

> 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).
>
> [Emphasis added.]

[83] Respondent's Written Arguments, paras. 203 and 205 at pp. 79 and 80.

[168] Even if the Appellant ultimately chose to undertake the Spin-off transaction, Lazard Frères's fees covered work performed with respect to the alternative sale transaction as well. To support this argument, the Appellant submitted letters[84] which had been sent to potential buyers by Lazard Frères. Thus, I do not agree with the Respondent's position that Lazard Frères was not providing advice as to the advisability of selling a specific share or security of the Appellant.

[169] Furthermore, the Respondent makes a critical mistake in seeking to define the Spin-off transaction solely by reference to its substance. The evidence, particularly the advance ruling delivered by the Income Tax Rulings Directorate of the CRA,[85] at paragraphs 41 to 44, is that the Appellant in fact sold the shares of Archer to Novelis in consideration of the receipt of preferred shares (the "Rollover Preferred Shares"). The Appellant filed a joint election with Novelis under subsection 85(1) in order for section 85 to apply to the transfer of the Archer shares to Novelis. The elected amount, which became the Appellant's proceeds of disposition, appears to have been equal to the Appellant's adjusted cost base of the Archer shares.[86]

[170] In reassessing the Appellant in respect of the Novelis transaction, the Minister treated the Lazard Frères fees as an amount deductible from the proceeds of disposition on the basis that they were not current expenses or "commissions" with the meaning of the Act. The Minister did not assess on the basis of the substance of the series of transactions implemented to give effect to the Spin-off. The Minister determined that the Appellant was entitled to a deduction of the Lazard Frères fees from the proceeds of disposition realized in connection with the sale of Archer to Novelis. Therefore, I am satisfied that the Appellant received advice with respect to the advisibility of selling the Archer shares to either private equity sponsors or strategic investors or, as ultimately decided, to Novelis for preferred shares of that corporation that were subsequently redeemed.

[171] I now turn to the issue of whether the amount paid to Lazard Frères is a commission. The engagement letter signed by the Appellant and Lazard Frères provides a different basis on which the fee is defined in respect of the Novelis transaction. The relevant clause reads as follows:

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[84] Letters sent to potential buyers by Lazard Frères, all but one dated August 27, 2004, Exhibit A-22.

[85] Advance income tax ruling relating to the Novelis Spin-off dated December 15, 2004, Exhibit A-350. At trial, no evidence was presented to suggest that the Spin-off was not carried out in compliance with its description in the advance ruling.

[86] *Ibid*. at para. 45.

5. Fees and expenses

In compensation for the Services, Alcan will pay to Lazard the following fees:

(a) A fee of USD 2,000,000 payable on the earlier of (i) closing of a Rollco Transaction or (ii) June 30, 2005 (the *Advisory fee*), creditable against any fee payable under (b) below; and

(b) A fee payable upon closing of a Rollco Transaction (the *Rollco Success Fee*) as set forth in the table below calculated by reference to the difference, if positive, between (i) the Aggregate Value of the Rollco Transaction (as defined below) and (ii) the Base Enterprise Value of Rollco (as defined below):

Aggregate Value of the Rollco Transaction (AVRT)	**Rollco Success Fee**
BEV < AVRT< BEV + USD 200M	1.50% (AVRT – BEV)
BEV + USD200M < AVRT < BEV + USD 300M	1.75% (AVRT – BEV)
BEV + USD300M < AVRT < BEV + USD 400M	2.00% (AVRT – BEV)
BEV + USD400M < AVRT < BEV + USD 500M	2.25% (AVRT – BEV)
BEV + USD500M < AVRT	USD 10M + 3% (AVRT – (BEV + USD 500M))

and

(c) A Fee of USD 500,000 payable on announcement of a Corus Transaction (i.e., approval by the Corus Supervisory Board of a Corus Transaction), creditable against any fee payable under (d) below; and

(d) A fee of USD 3,000,000 payable upon closing of a Corus Transaction (the *Corus Success Fee*).

In all cases, the sum of the Corus Success Fee and the Rollco Succes Fee shall not exceed USD 15,000,000.

[172] The Respondent contends that the "Rollco Success Fee" was an increasing percentage of the difference between the AVRT and the BEV. This argument is based on Mr. Maris' testimony. He testified that the Aggregate Value of the Rollco Transaction was the value of the transaction and that Lazard Frères would aim for a higher value because it would influence the fee that it would receive under the

engagement letter. Therefore, the Respondent argues that the Rollco Success Fee paid to Lazard Frères should be considered a commission.

[173] The fees paid to Lazard Frères were not determined by reference to the amount received by the Appellant in connection with the sale of Archer as described above, namely, the value of the Rollover Preferred Shares. In short, the fees payable to Lazard Frères had nothing to do with the consideration received by the Appellant. Furthermore, Lazard Frères did not act as agents of the Appellant in providing advice with respect to the Spin-off and the alternative sale transaction. Therefore, the amount paid to Lazard Frères in connection with the Novelis transaction was not a commission.

[174] In accordance with my analysis in the context of the Pechiney transaction, I find that the services provided by Lazard Frères prior to the board's approval of the Spin-off pertain to advice as to the advisability of selling specific shares of the Appellant. Therefore, if I am wrong on the first issue and the amount paid to Lazard Frères in connection with the Novelis transaction that I have allowed as a deduction under subsection 9(1) of the Act is a capital expenditure, the Appellant could deduct the same amount, and no more, under paragraph 20(1)(*bb*) of the Act.

[175] With respect to the Appellant's claim for the fee paid to Morgan Stanley in connection with the Novelis transaction, I maintain my view that there is insufficient evidence to determine whether this expense was incurred in relation to advice as to the advisability of selling a specific share of the Appellant. Therefore, the Appellant's claim for the amount of $296,863 paid to Morgan Stanley does not succeed under paragraph 20(1)(*bb*).

(2) Are the fees claimed by the Appellant for representations to government authorities deductible under paragraph 20(1)(*cc*) of the Act?

[176] The Appellant claims a total amount of $19,972,079 under paragraph 20(1)(*cc*) of the Act on the basis that this amount was incurred in making representations relating to the Appellant's business to government authorities.[87] Paragraph 20(1)(*cc*) of the Act reads as follows:

[87] Costs incurred – Pechiney, Exhibit A-362.

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

Expenses of representation

(*cc*) an amount paid by the taxpayer in the year as or on account of expenses incurred by the taxpayer in making any representation relating to a business carried on by the taxpayer,

(i) to the government of a country, province or state or to a municipal or public body performing a function of government in Canada, or

(ii) to an agency of a government or of a municipal or public body referred to in subparagraph 20(1)(*cc*)(i) that had authority to make rules, regulations or by-laws relating to the business carried on by the taxpayer,

including any representation for the purpose of obtaining a licence, permit, franchise or trade-mark relating to the business carried on by the taxpayer;

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 :

Frais de démarches

cc) une somme payée par le contribuable au cours de l'année au titre des frais qu'il a engagés pour effectuer les démarches concernant une entreprise exploitée par lui :

(i) auprès du gouvernement d'un pays, d'une province ou d'un État ou auprès d'un organisme municipal ou public remplissant des fonctions gouvernementales au Canada,

(ii) auprès d'une agence d'un gouvernement ou d'un organisme municipal ou public, visés au sous-alinéa (i), qui était autorisé à édicter des règles ou des règlements concernant l'entreprise exploitée par le contribuable,

y compris les démarches faites en vue d'obtenir une licence, un permis, une concession ou une marque de commerce pour cette entreprise;

[Emphasis added.]

[177] The Respondent contends that the fees claimed by the Appellant are not deductible under that provision because the representations did not concern matters relating to the Appellant's business. In the Respondent's view, the representations concerned matters relating to the businesses of the Appellant's subsidiaries and the

acquisition of Pechiney.[88] They did not concern matters that had an impact on the Appellant's business.

[178] With respect, I disagree with the Respondent's analysis. The fact that the representations were necessitated by the Pechiney acquisition does not preclude them from being related to the Appellant's business. In my view, the Pechiney transaction directly enhanced the Appellant's business since the Pechiney shares were used by the Appellant in the course of carrying on its business. The evidence shows that, after the Appellant acquired new entities such as Pechiney, it soon earned income from sales to those entities, from management fees, from other service fees and from dividends.[89] While dividends are generally considered to be income from property, that characterization is not inconsistent with a finding that the Appellant used the Pechiney shares in the course of carrying on a business. In fact, the Act explicitly recognizes that shares may be used in a business the purpose of which is to earn dividend income. The definition of a "specified investment business" found in subsection 125(7) of the Act is based on that concept. The relevant part of that definition reads as follows:

> 125(7) . . . specified investment business, carried on by a corporation . . . means a business . . . the principal purpose of which is to derive income (including interest, dividends, rents and royalties) from property . . .
>
> [Emphasis added.]

[179] Prior to the enactment of that definition, income from property earned through a modicum of activity was considered by the case law to be income from an active business for the purpose of the small business deduction. For example, in *Canadian Marconi v. Canada*,[90] the Supreme Court of Canada determined that the taxpayer was carrying on a business when it used the excess cash from its electronics business to buy investment assets. Outside the realm of a "specified investment business", the factors considered by the Supreme Court in *Marconi* remain relevant.

[180] While shares can be used in carrying on a business, it does not follow that those shares are any less capital property than are plant, equipment or rental

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[88] Respondent's Written Arguments, paras. 169 and 170 at pp. 67 and 68.

[89] Exhibits A-357 to A-359. At trial, there were also two tables (Exhibits A-364 and A-365) that were brought into evidence. Exhibit A-364 relates to management fees and dividends from/to foreign subsidiaries for the taxation years from 2003 to 2007, as per the T106 slips that were filed by Alcan. Exhibit A-365 likewise relates to management fees and dividends, but for taxation years 2008 to 2014.

[90] *Canadian Marconi v. Canada*, [1986] 2 S.C.R. 522, 86 DTC 6526.

property used in a business to earn income. In summary, fees incurred for services that are directly linked to a capital transaction are capital expenses. Similarly, the shares are capital property. This does not preclude the Pechiney shares having been used by the Appellant in the course of carrying on a business.

[181] I also disagree with the Respondent's contention that the representations to government authorities related to the businesses of the Appellant's subsidiaries, and not to the Appellant's business. The Appellant's business included income-earning activities conducted through a global structure of subsidiaries and related entities. The evidence shows that the Appellant 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. I infer from the evidence that the regulators could easily have affected the transactions carried out by the Appellant in the foreign jurisdictions. This type of risk is very hard to quantify because it affects future revenue and can give rise to significant legal costs. I surmise that the Appellant's directors would have been unwilling to authorize the Pechiney transaction without the regulatory requirements being met. The evidence also shows that they approved the Novelis transaction only after it was structured to give effect, *inter alia*, to the competition undertakings given by the Appellant in the context of the Pechiney transaction. The Appellant could not have afforded to do otherwise.

[182] I will now examine the evidence relating to the breakdown of the fees of the service providers to determine whether the services actually pertain to representations made to government authorities.

[183] The Appellant claims a total amount of CAD $9,367,811 with respect to services rendered by Sullivan Cromwell. Mr. Miller was the lead partner on the Appellant's account.[91] In his letter dated June 23, 2004,[92] Mr. Miller indicated that 75% of Sullivan Cromwell's services, for which the Appellant was invoiced a total of US $9,648,833 converted to CAD $12,490,415, pertained to government representation work conducted on behalf of the Appellant, as follows:

- representation with respect to U.S. securities regulation (20%);

- representation with respect to securities and takeover authorities in France (35%);

[91] Examination of Mr. Scott Miller, Transcript of the trial, Thursday October 22, 2015 at p. 70, lines 15 to 21.
[92] Letter from Sullivan Cromwell LLP to Alcan Inc., signed by Scott D. Miller and providing a general breakdown of services rendered to Alcan for the Pechiney transaction, Exhibit A-80.

- representation with respect to U.S. anti-trust matters (20%).[93]

[184] Mr. Miller's testimony was not contradicted by the Respondent. As noted in my credibility observations, I found him to be a reliable and credible witness. Therefore, on the basis of Mr. Miller's allocation[94], the amount of CAD $9,367,811 is deductible under paragraph 20(1)(*cc*) of the Act.

[185] The Appellant also deducted the amount of $4,954,777 under paragraph 20(1)(*cc*) of the Act for the services rendered by Freshfields. In paragraph 178 of her written arguments, the Respondent accepts that this amount was incurred for European competition law advice. The Respondent's only argument is that the expenses were incurred in respect of the Pechiney takeover. On the evidence,[95] I am equally satisfied that the work pertained to competition law representations made on behalf of the Appellant to European government authorities. Therefore, the full amount is deductible under paragraph 20(1)(*cc*) of the Act.

[186] The Appellant paid Darrois Villey, $3,088,260, which it deducted under paragraph 20(1)(*cc*). On the evidence provided in Mr. McAusland's testimony, I am satisfied that this amount pertained to representations made to government agencies in Europe and to the French Defence Department to gain the required regulatory approvals in connection with the transaction and the Appellant's business. Therefore, the full amount is deductible under paragraph 20(1)(*cc*) of the Act.

[187] The Appellant also deducted a total amount of $1,618,647[96] with respect to fees paid to McMillan, the Federal Trade Commission, National Economic Research and other law firms in various jurisdictions. On the basis of the testimonies of Mr. McAusland and Mr. Miller and the documentary evidence, I am satisfied that these amounts pertain to services relating to representations made to government authorities by the Appellant in connection with regulatory compliance and clearance. Therefore, the full amount is deductible under paragraph 20(1)(*cc*) of the Act.

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[93] *Ibid*.
[94] This covers the services highlighted in the three bullet points in paragraph 183 above.
[95] Invoices issued by Freshfields Bruckhaus Deringer, Exhibits A-76 and A-77.
[96] This amount represents a total of $552,186 for services rendered by McMillan Binch LLP, $392,112 paid to the Federal Trade Commission, $241,539 paid to National Economic Research Associates Inc. and $432,810 paid to other law firms.

[188] The Appellant paid $755,227 to the Monitor Company Group, $177,349 to Frontier Economics and $10,008 to SCEHR Patrick Rey, for a total of $942,584 which was claimed as a deduction by the Appellant under paragraph 20(1)(*cc*) of the Act. The Respondent argues that these amounts are not deductible since they relate to the takeover of Pechiney. Mr. McAusland testified that these fees "relate to supporting the filings made to regulatory authorities".[97] Mr. Miller testified to the same effect. Therefore, I am satisfied that these amounts pertain to services relating to representations made by the Appellant in connection with regulatory compliance. The full amount claimed is deductible under paragraph 20(1)(*cc*) of the Act.

[189] In summary, in view of all of the above, the Appellant is entitled to deduct amounts of $7,025,858 and $10,604,268 under paragraph 20(1)(*cc*) of the Act.

(3) Are any of the Disputed Expenses deductible under paragraph 20(1)(*e*) of the Act?

[190] In paragraphs 490 to 503 of its written arguments, the Appellant contends that, in the alternative, a portion of the Disputed Expenses incurred in relation to the Pechiney transaction is deductible under paragraph 20(1)(*e*) of the Act because the Appellant also issued shares of its capital stock to the Pechiney shareholders. The Appellant seeks to deduct the printing costs for the offering documents directed to the Pechiney shareholders, 10% of the fees paid to Morgan Stanley, 5% of the fees paid to Lazard Frères and 5% of the fees paid to Sullivan Cromwell.

[191] The Respondent takes the position that this argument was not raised in the Notice of Objection or in the Notice of Appeal and, as a result, the Appellant is barred under subsection 169(2.1) of the Act (the "Large Corporation Rule") from raising this argument.[98] In the Notice of Objection, the Appellant listed paragraph 20(1)(*e*) as one of the provisions relied upon, but made no further reference to that paragraph in its reasons supporting its position. The pleadings reveal that the only expenses specifically claimed by the Appellant under paragraph 20(1)(*e*) were fees in the total amount of $2,104,454, consisting of $1,873,562 paid to Sullivan Cromwell and $140,892 paid to RBC, which the Minister had allowed.[99] Similarly, in its Notice of Appeal, the Appellant listed

[97] Cross-Examination of Mr. David McAusland, Transcript of the trial, Tuesday, October 20, 2015, at p. 85, ll. 9 to 16.
[98] Respondent's Written Arguments, paras. 227 and 228 at p. 86.
[99] Appellant's Notice of Appeal in file 2013-3028(IT)G at p. 10.

paragraph 20(1)(*e*) as one of the provisions relied upon, but made no further reference to that paragraph in its reasons supporting its position.

[192] Subsection 169(2.1) of the Act provides:

> 169(2.1) Notwithstanding subsections 169(1) and 169(2), where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) served a notice of objection to an assessment under this Part for the year, the corporation may appeal to the Tax Court of Canada to have the assessment vacated or varied only with respect to
>
> (*a*) an issue in respect of which the corporation has complied with subsection 165(1.11) in the notice, or
>
> (*b*) an issue described in subsection 165(1.14) where the corporation did not, because of subsection 165(7), serve a notice of objection to the assessment that gave rise to the issue
>
> and, in the case of an issue described in paragraph 169(2.1)(*a*), the corporation may so appeal only with respect to the relief sought in respect of the issue as specified by the corporation in the notice.

It is common ground that the Appellant is a large corporation. Therefore, in its Notice of Objection, the Appellant was required to comply with subsection 165(1.11) of the Act with respect to each issue on which it wished to appeal to this Court. Subsection 165(1.11) of the Act provides:

> 165(1.11) Where a corporation that was a large corporation in a taxation year (within the meaning assigned by subsection 225.1(8)) objects to an assessment under this Part for the year, the notice of objection shall
>
> (*a*) reasonably describe each issue to be decided;
>
> (*b*) specify in respect of each issue, the relief sought, expressed as the amount of a change in a balance (within the meaning assigned by subsection 152(4.4)) or a balance of undeducted outlays, expenses or other amounts of the corporation; and
>
> (*c*) provide facts and reasons relied on by the corporation in respect of each issue.

[193] The Appellant contends that it has complied with subsection 169(2.1) of the Act because it put forward the issue of "[w]hether the Deducted Expenses are deductible in computing Alcan's income for the Period" in its Notice of Objection

and relied upon various paragraphs of subsection 20(1) of the Act in the reasons supporting its position.[100]

[194] As the Respondent correctly notes, the purpose of the Large Corporation Rule is to allow the Crown to know at the objection stage the nature of the tax litigation and the quantum at issue.[101] In *The Queen v. Potash Corp. of Saskatchewan Inc.*,[102] the Federal Court of Appeal provided guidance on the requirement under paragraph 165(1.11)(*a*) to reasonably describe each issue to be decided:

> 22 . . . While a large corporation is not required to describe the issue "exactly", as the Judge states, it is required to describe the issue "reasonably". What is reasonable will differ in each case and will depend on what degree of specificity is required to allow the [Minister] to know each issue to be decided.
>
> . . .
>
> 24 Contrary to the Judge's suggestion, it would not have been reasonable to simply say that the computation of "Resource Allowance" or "resource profits" was in issue, without specifying the particular elements of that computation that required a determination by the Minister or the Tax Court, as the case may be. That level of generality would render the Large Corporation Rules meaningless, defeating the purpose of their enactment.
>
> [Emphasis added.]

[195] In *Bakorp Management Ltd. v. The Queen*,[103] the Federal Court of Appeal reiterated the need for some level of specificity in framing each issue, stating: "[a] general statement or question related to an amount that is to be determined for the purposes of the Act that would not allow the Minister to determine what is actually in dispute will not be a sufficient description of the issue".[104]

[196] In *Devon Canada Corp. v. The Queen*, the Federal Court of Appeal had the opportunity to consider whether the taxpayer met the requirements under subsection 165(1.11) in the context of a claim for a deduction under subsection 9(1) or paragraphs 20(1)(*b*) or (*e*) of the Act. The Federal Court of Appeal's comments offer insight into what would constitute a reasonable

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[100] Appellant's Notice of Objection, Exhibit A-337 at p. 6613.
[101] *Devon Canada Corp. v. The Queen*, 2015 FCA 214 at para. 21.
[102] *The Queen v. Potash Corp. of Saskatchewan Inc.*, 2003 FCA 471.
[103] *Bakorp Management Ltd. v. The Queen*, 2014 FCA 104.
[104] *Ibid*. at para. 28.

description of the issues that would sufficiently indicate the nature of the tax litigation in that context:

> 21 . . . In this case the nature of the tax litigation related to a particular deduction that was claimed by the predecessors of Devon. The Act is a statutory scheme. In order to claim a deduction in computing income or taxable income there must be a provision of the Act which would allow for such deduction. Therefore, it would seem to me that the nature of the litigation in this context would relate to the particular deduction that the taxpayer is seeking to claim. . . .
>
> . . .
>
> 25 Devon could have included alternative arguments in its notice of objection that would be inconsistent with its original position . . . However, having failed to do so, in my view, the issue raised by Devon in its original notice of objection that the Surrender Payments were deductible under section 9 of the Act (and therefore not on account of capital) cannot be considered to include the alternative and inconsistent arguments related to paragraphs 20(1)(*b*) and 20(1)(*e*) of the Act. When Devon was seeking, on behalf of AXL and Numac, to claim a deduction under either paragraph 20(1)(*b*) or 20(1)(*e*) of the Act it was raising new issues. Each of these paragraphs applies to amounts that would be on account of capital and contain [*sic*] conditions that must be satisfied in order for these provisions to be applicable. Therefore, the nature of the claims is different because the new deductions claimed are based on a different premise (payments on account of capital versus a current expense) and on different statutory provisions each with its own set of conditions.
>
> [Emphasis added.]

Thus, it appears that, in the context of the deductibility of expenses, each statutory provision on which the taxpayer grounds an entitlement to the deduction sought may entail its own distinct issue so as to change the nature of the tax litigation. In this case, the Appellant seeks to claim a deduction under paragraph 20(1)(*e*) and raises a new issue by doing so.

[197] In this case, the Appellant's statement of the issue as "[w]hether the Deducted Expenses are deductible in computing Alcan's income for the Period" is simply too broad to constitute a description sufficient to inform the Minister of what is actually in dispute. As in *Bakorp*, "[t]his description of the issue does not indicate anything about the question that must be answered to resolve this

dispute."[105] There is no indication of the particular elements of the computation of the deduction.[106]

[198] The Appellant suggests that, since it has raised the alternative argument that certain paragraphs of subsection 20(1) could apply to allow the deductibility of the Disputed Expenses, the nature of the issue has not changed with the introduction of paragraph 20(1)(*e*) as an additional reason. At paragraph 218 of its Reply to the Respondent's Written Arguments, it states: "Alcan has always contended that the expenses are deductible; it is only providing paragraph 20(1)(e) of the Act as a reason for this issue." The Appellant continues at paragraph 219 of its Reply by stating: "Alcan has always asserted that the provisions of subsection 20(1) of the Act may be applicable and it is not changing the nature of its claims or adding a new issue." The implication is that, by arguing the applicability of subsection 20(1) of the Act, the Appellant could potentially raise in argument any one of the paragraphs thereunder. I respectfully disagree. The issue as framed by the Appellant casts too wide a net over the range of entitlements that could potentially be raised. If the Appellant's position is correct, the Minister would have to guess at which of the numerous paragraphs in subsection 20(1) could hypothetically apply to the Appellant's situation. I do not believe that this result accords with the purpose underlying the Large Corporation Rule. Citing paragraph 20(1)(*e*) in the Notice of Objection, without more, does not reasonably describe the issue of entitlement to deduct the Disputed Expenses under that paragraph.

[199] Even if the issue had been reasonably described by the Appellant, the Appellant did not satisfy the condition set out in paragraph 165(1.11)(*c*), which requires a large corporation to provide the facts and reasons relied upon in respect of each issue. *Bakorp* indicates that simply listing a provision as a provision that is being relied upon does not identify the legal argument being put forward under that provision.[107] As noted, the Appellant listed paragraph 20(1)(*e*) as one of the provisions relied upon, but did not provide any further reasons with regard thereto. On the other hand, the Appellant specifically referred to paragraphs 20(1)(*g*), (*bb*), and (*cc*) of the Act in its reasons supporting its position and elaborated upon which of the Disputed Expenses were being claimed under those provisions and why. Therefore, the Appellant has failed to comply with the requirements of subsection 165(1.11) of the Act.

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[105] *Ibid.* at para. 33.
[106] *Ibid.* at para. 32.
[107] *Ibid.* at paras. 39, 42.

[200] Leaving aside the Large Corporation Rule, procedural fairness alone dictates that the Appellant should not be allowed to raise this issue at this late stage.[108] The Appellant never advised the Respondent that it would raise this issue. Needless to say, on discovery, the Respondent did not probe the Appellant's case with regard to paragraph 20(1)(*e*). Furthermore, the Appellant did not raise this argument during the hearing. I emphasize that neither of the parties made an opening statement. Therefore, the Respondent found out about this argument for the first time when the Appellant raised it in its written arguments filed many weeks after the hearing. Evidence was closed by then. It would be manifestly unfair if I allowed the Appellant to raise this argument this late in the process.

[201] If I am wrong on the above points, I also find that the Appellant failed to satisfy its Evidentiary Burden with respect to the amounts that would be deductible under paragraph 20(1)(*e*) of the Act. The Appellant's offer in the context of the Pechiney transaction was cash and shares. The cash component exceeded the share component. The Appellant has offered no basis for its allocation of the printing costs between the documents and information required to be disclosed for the non-share consideration and the documents and information pertaining to the share consideration. Similarly, the Appellant has offered no evidence to justify an allocation of the fees of the service providers (Morgan Stanley, Lazard Frères and Sullivan Cromwell) to the services required with respect to the share consideration and those required with respect to the non-share consideration. There is no *prima facie* evidence to support the allocation now suggested for the first time by the Appellant in its written submissions. Therefore, no deduction is allowed pursuant to paragraph 20(1)(*e*) of the Act.

(4) Are any of the Disputed Expenses eligible capital expenditures deductible under paragraph 20(1)(*b*) of the Act?

[202] The Appellant's final argument is that, to the extent that the Disputed Expenses are considered capital expenditures that are not deductible under the specific provisions discussed earlier in these reasons, they are "eligible capital expenditures" ("ECE") giving rise to a deduction under paragraph 20(1)(*b*) of the Act.

[108] See paragraph 70 of these reasons, in which I have rejected the Crown's argument under paragraph 18(1)(*a*) for a similar reason based on a compelling argument made by the Appellant's counsel. The adage "what is good for the goose is good for the gander" is applicable here, recognizing that the expression has to be adapted for the Crown and the taxpayer.

[203] The Appellant relies on Judge Hershfield's analysis in *Potash Corporation of Saskatchewan Inc. v. The Queen*[109] to justify its claim for ECE treatment. The Appellant contends that this decision stands for the principle that, when fees are incurred to enhance the economic and financial viability of a business, they may relate to the business of the taxpayer and thus not be part of the capital cost of the asset.[110]

[204] First, with respect to the Pechiney transaction, the underlying facts are very different than those considered in *Potash*. In the instant case, as the Respondent suggested in her written arguments,[111] the Appellant actively spent the capital portion of the Disputed Expenses to implement the transaction whereby it acquired the Pechiney shares. Unlike the situation in *Potash*, the funds were not spent to enhance the international tax position of the Appellant. They were Execution Costs as defined earlier in these reasons.

[205] With respect to the Novelis transaction, the Appellant exaggerates when it claims that the Spin-off was accomplished to satisfy its competition undertakings. The Spin-off embraced a much larger enterprise than the plants in the USA and Europe that were seen by the competition authorities as giving rise to a substantial lessening of competition. I do not believe that the Appellant undertook the Spin-off simply to comply with its competition undertakings, as it suggested in its written arguments. The evidence, considered as a whole, shows that the Appellant wished to enhance shareholder value through the Spin-off, which resulted in its shareholders holding shares in two separate public corporations that had a value greater than the value of the Appellant's shares before the Spin-off. In my opinion, the principles elucidated in *Potash* should not be expanded beyond the facts and circumstances of that case.

[206] The definition of "eligible capital expenditure" specifically excludes expenses described in paragraphs (*a*) to (*f*) of the definition, found in subsection 14(5) of the Act. Subparagraph (*f*)(iii) of the definition specifically excludes "any amount that is the cost of, or any part of the cost of" a share. The Disputed Expenses that I have found to be capital expenditures that are not deductible under specific provisions of subsection 20(1) are part of the Appellant's cost of the Pechiney shares in the same way that the consideration paid to the Pechiney shareholders forms part of the Appellant's cost of the shares.

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[109] 2011 TCC 213, 2011 DTC 1163.
[110] Appellant's Written Arguments, para. 519 at p. 146.
[111] Respondent's Written Arguments, para. 223 at p. 85.

[207] Slightly different reasoning applies to the Novelis Disputed Expenses. In short, the Appellant is not in the business of disposing of subsidiaries in favour of its shareholders pursuant to a corporate reorganization implemented on capital account. Those expenses are not amounts incurred in respect of a business of the taxpayer. Therefore, paragraph 20(1)(*b*) of the Act is not applicable in the Appellant's case with respect to either transaction.

VI. Conclusion

[208] Considering all of the foregoing, with respect to the Pechiney transaction, the assessment issued by the Minister for the Appellant's 2003 taxation shall be returned to the Minister for reconsideration and reassessment to allow the deductions of the following amounts at the proper exchange rate, if applicable:

DISPUTED EXPENSES (PECHINEY)

Service Provider	**Amount Deductible**	**Corresponding Provision**
Investment Bankers		
Morgan Stanley	$16,933,276	9(1) or 20(1)(*bb*)
Lazard Frères	$2,852,582	9(1) or 20(1)(*bb*)
Advertising Fees		
Publicis and Valmonde	$0	n/a
Representations to Government Agencies		
Freshfields Bruckhaus	$4,954,777	20(1)(*cc*)
Sullivan Cromwell	$9,367,811	20(1)(*cc*)
McMillan	$552,186	20(1)(*cc*)
Various other law firms	$432,810	20(1)(*cc*)
National Economic Res. Ass.	$241,539	20(1)(*cc*)
Monitor Company Group	$755,227	20(1)(*cc*)
Frontier Economics	$177,349	20(1)(*cc*)
SCEHR Patrick Rey	$10,008	20(1)(*cc*)
Federal Trade Commission	$392,112	20(1)(*cc*)
Darrois Villey	$3,088,260	20(1)(*cc*)
Printing and Issuing Documents		
PwC	$0	n/a
Bowne	$0	n/a

SEC	$0	n/a
Various other regulators	$0	n/a
Other Miscellaneous Expenses		
Sullivan Cromwell	$0	n/a
Davis Polk and ADP	$0	n/a
Ogilvy Renault	$0	n/a
Various small suppliers - communication	$0	n/a
Ernst & Young	$0	n/a
Ritz-Carlton Montreal	$0	n/a
Various small suppliers - others	$0	n/a

[209] The balance of the Disputed Expenses that pertain to the Pechiney transaction is to be added to the ACB of the Pechiney shares.

[210] With respect to the assessment issued by the Minister of National Revenue in respect of the Appellant's 2007 taxation year, the Court's judgment is a *pro tanto* judgment because other issues remain to be determined after future hearings. To the extent that, following the hearing of the other matters, the Court determines that the assessment issued for the Appellant's 2007 taxation year must be returned for reconsideration and reassessment, the Appellant shall be allowed the deductions set out in the table below in the calculation of the non-capital loss arising in respect of its 2005 taxation year that was carried forward and deducted by the Appellant in the calculation of its taxable income for its 2007 taxation year, the whole in accordance with these reasons for judgment.

DISPUTED EXPENSES (NOVELIS)

Service Provider	**Amount Deductible**	**Corresponding Provision**
Investment Bankers		
Morgan Stanley	$0	n/a
Lazard Frères	$14,218,477	9(1) or 20(1)(*bb*)
Printing and Issuing Documents		
PwC	$0	n/a
Bowne	$0	n/a

Ernst & Young	$0	n/a

[211] The balance of the expenses, not shown above, are deductible from the proceeds of disposition of the Archer shares pursuant to paragraph 40(1)(*a*) of the Act.

Signed at Ottawa, Canada, this **9th day of December 2016**.

"Robert J. Hogan"

Hogan J.

CITATION:	2016 TCC 172
COURT FILE NOS:	2013-3028(IT)G, 2012-4808(IT)G
STYLE OF CAUSE:	RIO TINTO ALCAN INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	October 19, 20, 21 and 22, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	December 7, 2016

APPEARANCES:

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Counsel for the Respondent:	Susan Shaughnessy Nathalie Labbé

COUNSEL OF RECORD:

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