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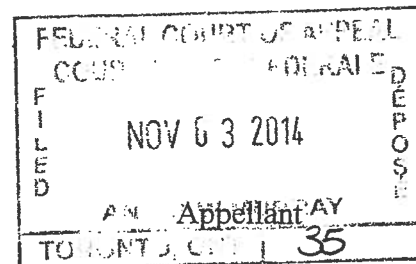
Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL



BETWEEN:

McKESSON CANADA CORPORATION

- and -

HER MAJESTY THE QUEEN

Respondent

MOTION RECORD

(Leave to File Amended Notice of Appeal & Supplementary Memorandum)

In accordance with Rule 364 of the *Federal Court Rules*

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Paul Schabas & Jeffrey Trossman

OSLER, HOSKIN & HARCOURT
Box 50, First Canadian Place
Toronto, Ontario
M5X 1B8

Al Meghji & Amanda Heale

Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

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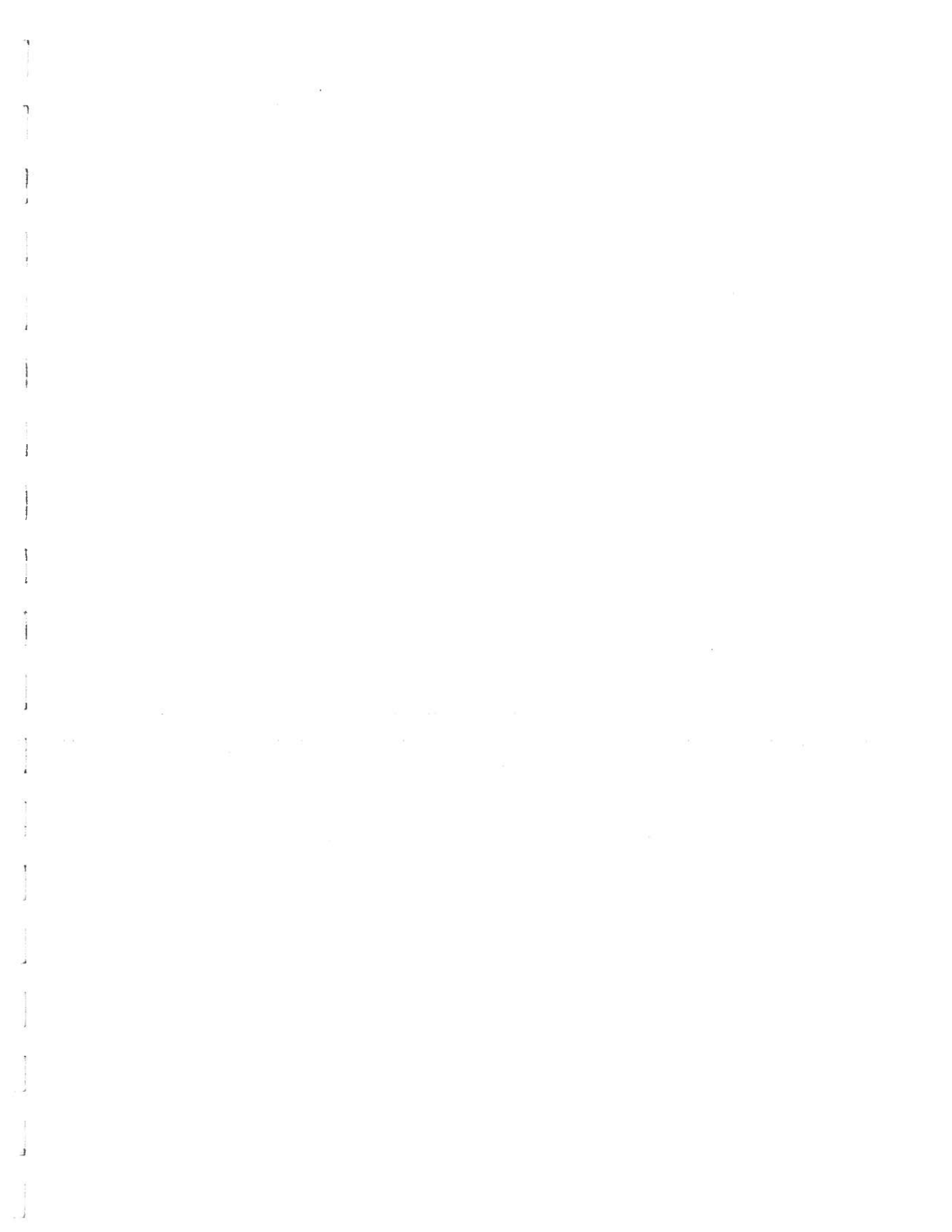
Box 50, First Canadian Place
Toronto, Ontario
M5X 1B8

Al Meghji & Amanda Heale

HENEIN HUTCHISON LLP
3rd Floor, 235 King Street East
Toronto, Ontario
M5A 1J9

Marie Henein, Scott C. Hutchison &
Matthew Gourlay

Counsel for the Appellant



Court of Appeal File No. A-48-14
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FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

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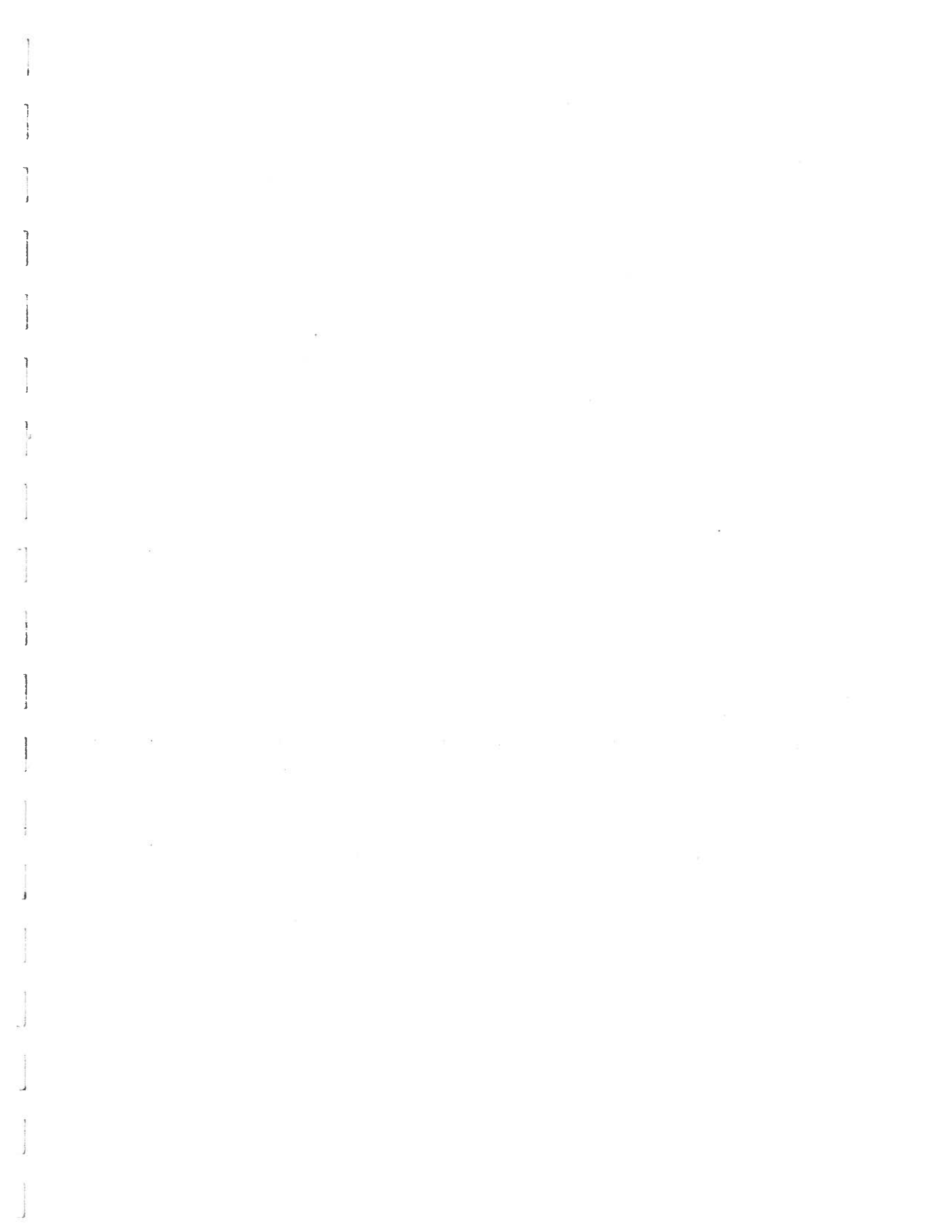
5. Reasons for Recusal of the Honourable Mr. Justice Boyle
6. Draft Supplementary Memorandum of Fact and Law



Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL
COUR D'APPEL FÉDÉRALE
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ANDREW MURRAY
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FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

NOTICE OF MOTION

(Leave to File Amended Notice of Appeal & Supplementary Memorandum)
in accordance with Rule 364 of the *Federal Court Rules*

TAKE NOTICE THAT the Appellant, McKesson Canada Corporation, will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. Leave to file an Amended Notice of Appeal, replacing the Notice of Appeal dated January 10, 2014, under Rule 75 of the *Federal Courts Rules*; and

2. Leave to file a Supplementary Memorandum of Fact and Law.

THE GROUNDS FOR THE MOTION ARE:

1. The Appellant, McKesson Canada Corporation, appealed a reassessment under the *Income Tax* Act to the Tax Court of Canada. The matter was heard before the Honourable Justice Patrick Boyle.

2. On December 13, 2013, Justice Boyle dismissed the appeal with costs. On the same day, he ordered that the parties make written submission on two outstanding issues: costs, and the re-consideration of a pre-trial confidential information order.

3. On January 10, 2014, the Appellant filed a Notice of Appeal to the Federal Court of Appeal.

4. In or about March and April, 2014, both parties made written submissions to Justice Boyle on the outstanding costs and confidentiality issues.

5. On June 11, 2014, the Appellant filed its Memorandum of Fact and Law in the Federal Court of Appeal.

6. On August 8, 2014, the Respondent filed its Memorandum of Fact and Law.

7. On September 4, 2014, Justice Boyle issued – of his own motion – a decision recusing himself from hearing the pending costs and confidentiality matters of which he remained seized. In his Reasons for Recusal, Justice Boyle explained that this decision was prompted by his review of the Appellant's Factum filed on June 11, 2014, which had been sent to him "by several prominent Canadian tax lawyers as well as by a colleague on the Court." Justice Boyle held that the Appellant's Factum alleged that he was "untruthful and deceitful", stated "clear untruths about me", and made "allegations of impartiality [sic]." Justice Boyle proceeded to respond in detail to arguments the Appellant had advanced in its Factum. In the result, Justice Boyle

decided that a reasonable person, aware of this alleged "attack [on] the personal or professional integrity of the trial judge", would not believe that he could remain impartial.

8. Justice Boyle's Reasons for Recusal raise a further ground of appeal in addition to those already set out in the Appellant's Notice of Appeal dated January 10, 2014. The Appellant proposes to file an Amended Notice of Appeal and Supplementary Memorandum of Fact and Law that set out the following additional ground of appeal:

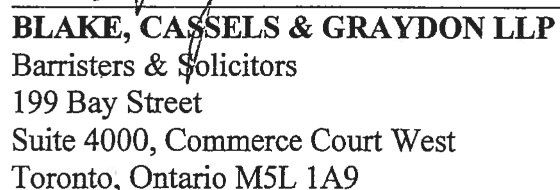
> *Do the trial judge's Recusal Reasons compromise the appearance and reality of a fair process in this case such that a new trial is necessary?*

9. The Appellant also asserts such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Notice of Motion;
2. Affidavit of Christine Hennings, sworn November 3, 2014;
3. Reasons for Recusal of Justice Boyle dated September 4, 2014;
4. Amended Notice of Appeal;
5. Appellant's Written Submissions in Support of the Motion; and
6. Draft Supplementary Memorandum of Fact and Law.

November 3, 2014



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Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

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M5X 1B8

Al Meghji & Amanda Heale

HENEIN HUTCHISON LLP
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Toronto, Ontario
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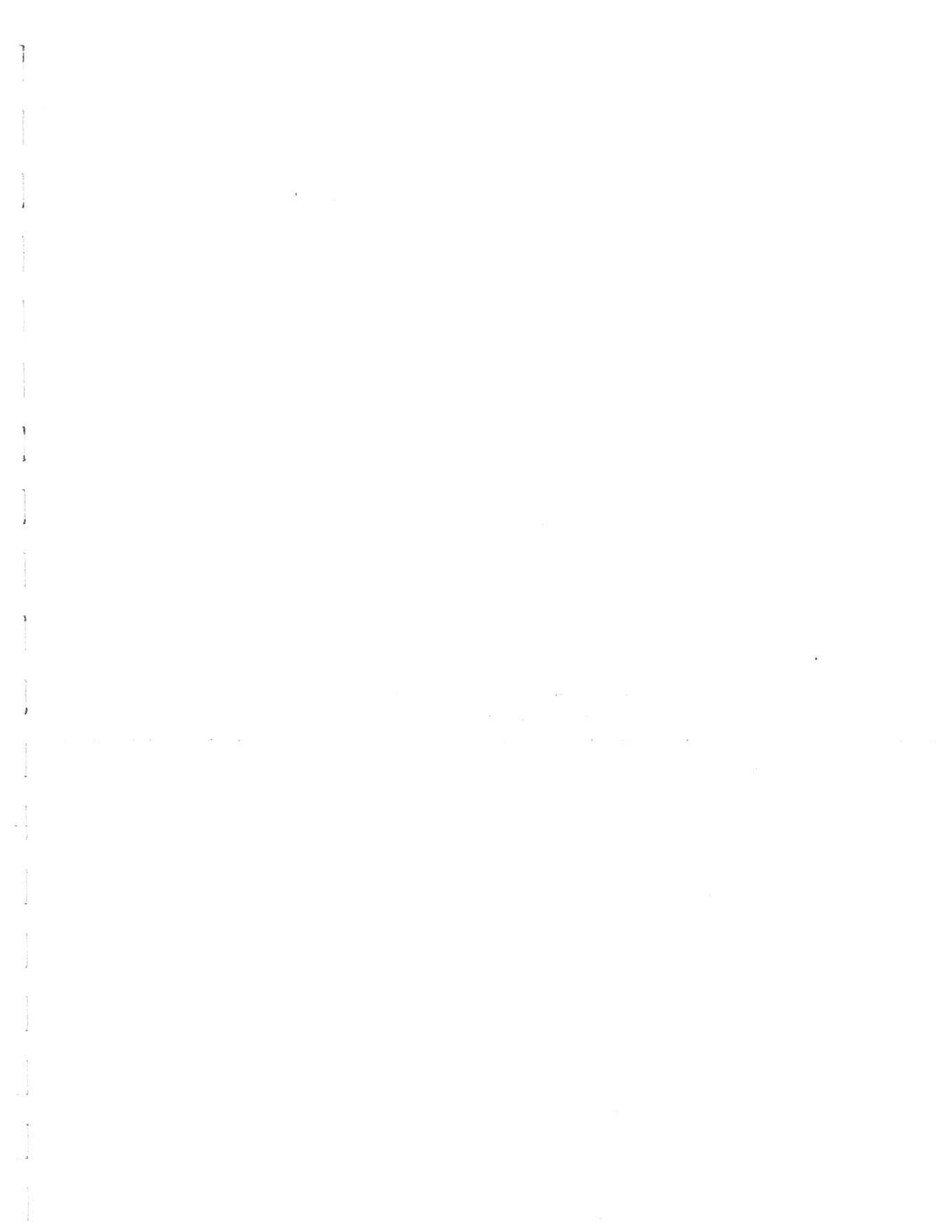
Matthew Gourlay

Counsel for the Appellant



Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AMENDED NOTICE OF APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment of the Honourable Justice Boyle of the Tax Court of Canada (the "**Trial Judge**") dated December 13, 2013 in Docket 2008-2949(IT)G by which the Court dismissed the Appellant's appeal from the reassessments under Part I and Part XIII of the *Income Tax Act* (the "**Act**") of the Appellant for its 2003 taxation year.

THE APPELLANT ASKS that:

A. The appeal be allowed with costs to the Appellant in this Court and the Tax Court of Canada;

B. The matters under appeal by referred back to the Minister for reconsideration and reassessment:

(i) With respect to the reassessment made by the Minister of the taxes payable by the Appellant under part I of the Act for its 2003 taxation year, on the basis that the terms and conditions of the Receivables Sale Agreement ("**RSA**") entered into by the Appellant and its immediate parent company, McKesson International Holdings III S. à r. l. ("**MIH**"), effective as of December 16, 2002, did not differ

from the terms and conditions that would have been agreed between persons dealing at arm's length; and

(ii) With respect to the reassessment by the Minister of the taxes payable by the Appellant under Part XIII of the Act for its 2003 taxation year, on the basis that no amount paid or credited or deemed to have been paid or credited by the Appellant to MIH under the RSA was subject to tax under Part XIII of the Act, or alternatively, that even if any such amount was otherwise subject to such tax, the Minister was prohibited from assessing such tax by virtue of Article 9(3) of the *Canada-Luxembourg Income Tax Convention* (the "**Treaty**").

THE GROUNDS OF APPEAL are as follows:

1. The Trial Judge erred in finding that paragraphs 247(2)(a) and (c) of the Act applied to adjust the terms and conditions (including the discount rate) agreed to by the Appellant and MIH in the RSA when in fact such terms and conditions (including the discount rate) did not differ from the terms and conditions that would have been agreed to between persons dealing at arm's length.
2. The Trial Judge erred in finding that the discount rate that would have been agreed to in the RSA between persons dealing at arm's length would not have exceeded 1.0127%.
3. The Trial Judge erred in law by failing to properly apply the standard of arm's length dealing contemplated by paragraphs 247(2)(a) and (c) of the Act.
4. The Trial Judge erred in law by failing to review and weigh competing evidence introduced in the course of the hearing, instead appropriating to himself the role of subject-matter expert and reaching conclusions that were unsupported by, and inconsistent with the evidence.
5. The Trial Judge erred in finding that the implementation of the RSA in accordance with its terms resulted in the conferral of a benefit on MIH for purposes of subsections 15(1) and 214(3) of the Act.
6. The Trial Judge erred in finding that the 5-year limitation period in Article 9(3) of the Treaty did not apply to prohibit the assessment of Part XIII tax.

7. The Trial Judge erred in finding that the Appellant had failed to meet and onus to "demolish" the "assumption" that the discount rate that would have been agreed to by persons dealing at arm's length would not have exceeded 1.0127%, when in fact the discount rate that would have been agreed to between persons dealing at arm's length in not an assumption of fact which the taxpayer bears an onus to rebut.

8. The Trial Judge's Reasons for Recusal dated September 4, 2014 interfere with the fairness of the appellate process and compromise the appearance and reality fairness of both the trial and appeal.

9. Such further and other grounds as counsel may advise and this Honourable Court permits.

November 3, 2014

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario
M5L 1A9

Paul Schabas LSUC #26355A
Tel: 416-863-4274
paul.schabas@blakes.com

Ryder Gilliland LSUC #45662C
Tel: 416-863-5849
ryder.gilliland@blakes.com

Jeffrey Trossman LSUC #32491O
Tel: 416-863-4290
jeffrey.trossman@blakes.com

Kaley Pulfer LSUC #58413T
Tel: 416-863-2756
kaley.pulfer@blakes.com

OSLER, HOSKIN & HARCOURT
Box 50, First Canadian Place
Toronto, Ontario
M5X 1B8

Al Meghji
Tel: 416-862-5677
ameghji@osler.com

Amanda Heale
Tel: 416-862-6780
aheale@osler.com

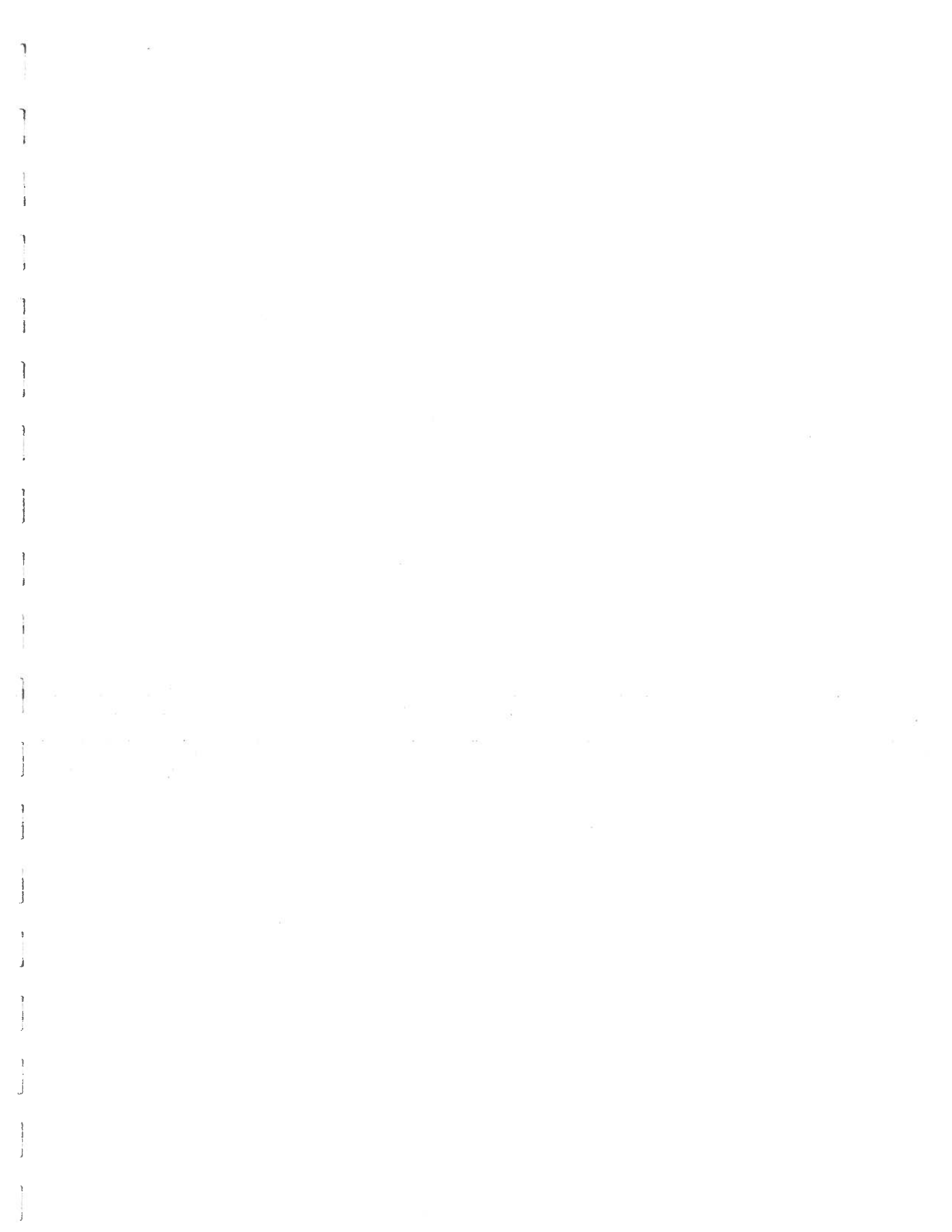
HENEIN HUTCHISON LLP
3rd Floor, 235 King Street East
Toronto, Ontario
M5A 1J9

Marie Henein
Tel: 416-368-5000
mhenein@hhllp.ca

Scott C. Hutchison
Tel: 416-368-5000
shutchison@hhllp.ca

Matthew Gourlay
Tel: 416-368-5000
mgourlay@hhllp.ca

Counsel for the Appellant



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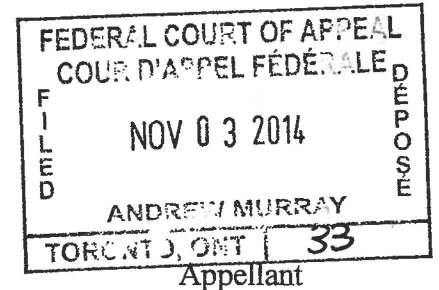
FEDERAL COURT OF APPEAL



BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AFFIDAVIT OF CHRISTINE HENNINGS

1. I am the senior legal assistant in the law firm Henein Hutchison LLP, counsel for the Appellant on this Motion. This affidavit is based on information received in this capacity, and I believe it to be true.

2. The Appellant appealed a reassessment under the *Income Tax* Act to the Tax Court of Canada. The matter was heard before the Honourable Justice Patrick Boyle on various dates between October 17, 2011 and February 3, 2012.

3. On December 13, 2013, Justice Boyle dismissed the appeal, with costs. On the same day, he ordered that the parties file written submissions on costs and the reconsideration of a pre-trial confidential information order that had been made by Justice Hogan in March 2010.

4. On January 10, 2014, the Appellant filed a Notice of Appeal to the Federal Court of Appeal, seeking relief from Justice Boyle's judgment dated December 13, 2013.

5. In or about March 2014, the Respondent submitted written submissions on costs to Justice Boyle. In or about April 2014, the Appellant filed written submissions on costs.

6. In or about April 2014, both parties made written submissions regarding the pre-trial confidentiality order.

7. On June 11, 2014, the Appellant filed with the Federal Court of Appeal its Memorandum of Fact and Law on the appeal of the merits.

8. The Respondent filed its Memorandum of Fact and Law with this Court on August 8, 2014.

9. On September 4, 2014, Justice Boyle issued a 139-paragraph decision explaining why he was recusing himself from hearing the pending costs and confidentiality matters of which he had remained seized.

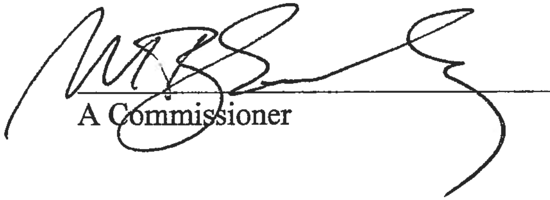
10. I am aware that Justice Boyle's Recusal Reasons have garnered substantial media attention. For example, on September 23, 2014, the *Financial Post* published an article on this case headlined "Tax judge issues rare ruling in his own defence." This article is attached as **Exhibit A**.

11. On September 26, 2014, the *Lawyers Weekly* published an article titled "Judge slams counsel, then recuses himself." I attach this article as **Exhibit B**.

12. On September 22, 2014, the *Law Times* published an article titled "Bar shocked at 'unprecedented' recusal: Judge suggests appeal factum claimed 'untruthful conduct'." This article is attached as **Exhibit C**.

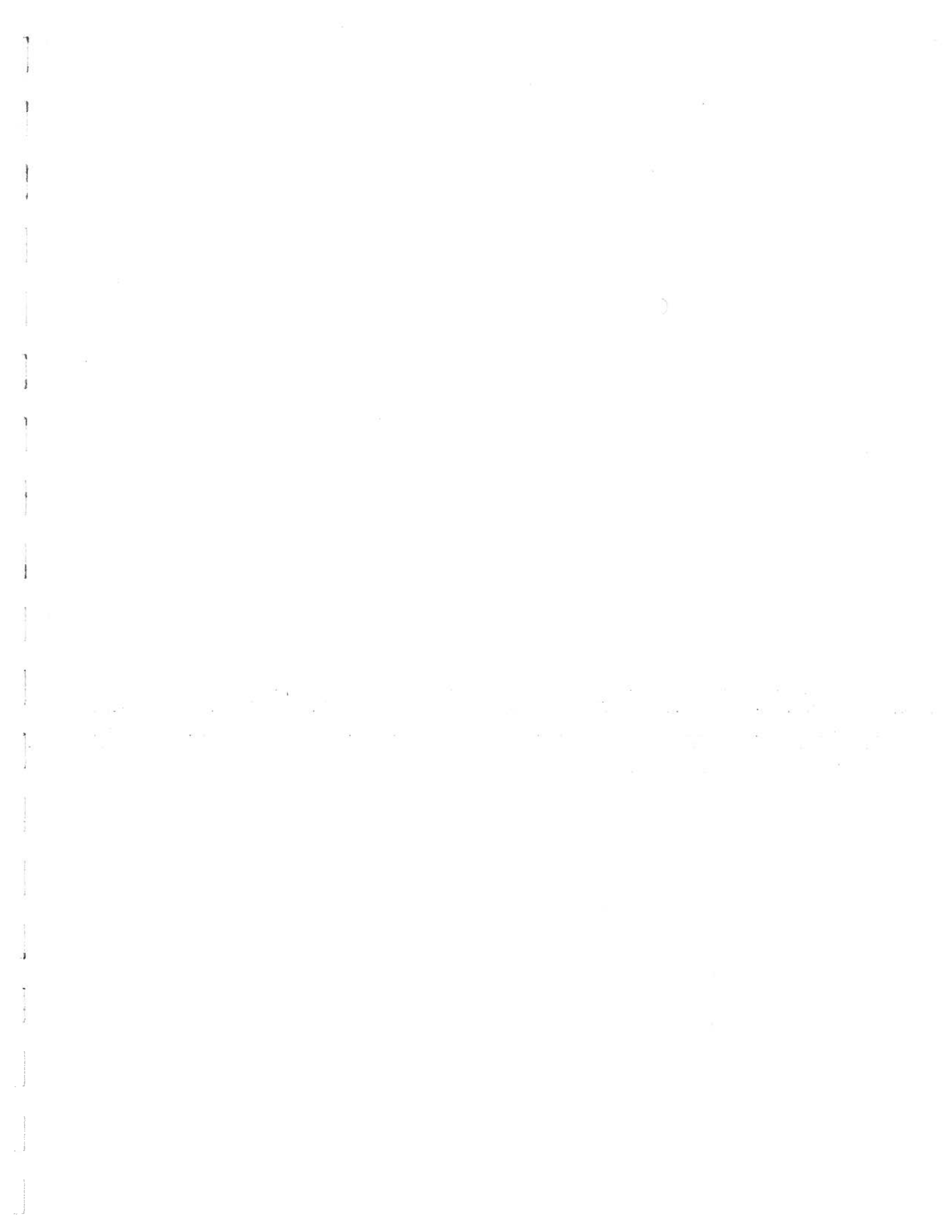
13. On October 8, 2014, counsel for the Appellant wrote to counsel for the Respondent indicating the intention to bring the present motion for leave to file a Supplementary Factum addressing the Reasons for Recusal. This letter is attached as **Exhibit D**.

SWORN BEFORE ME at	)
the City of Toronto, in the	)
Province of Ontario, this 3rd day	)
of November, 2014.	)



A Commissioner

Christine Hennings



This is Exhibit A referred to in the affidavit of Christine Hennings sworn before me, this 3 day of November 2014

A COMMISSIONER FOR TAKING AFFIDAVITS

FINANCIAL POST

September 23, 2014

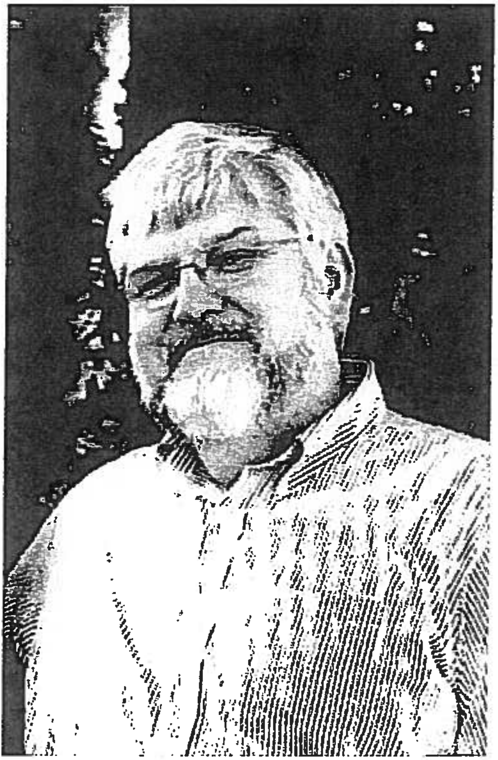
Tax judge issues rare ruling in own defence

By Drew Hasselback

A Tax Court judge has commented on the merits of an appellant's argument against his ruling. Lawyers say that's never happened before

In the tradition of Canadian jurisprudence, the standard protocol for judges is to remain silent when their rulings are appealed to a higher court. And there are few courts more straitlaced than the Tax Court of Canada.

Little wonder then why Canada's legal community has been transfixed in recent days over the unusual actions of Mr. Justice Patrick J. Boyle - a federal Tax Court judge so perturbed by a written argument submitted in an ongoing appeal of one of his cases, that he has issued a subsequent 47-page written decision, defending himself against what he believed were unfair characterizations of him, and removing himself from future hearings in the matter.



AP Photo/Bill Gorman Judge Patrick Boyle.

While it is possible for judges to recuse themselves from cases before issuing a judgment, it's unprecedented for a Canadian judge to use a recusal decision to make such a dramatic and public response to an appeal of his own trial decision.

Judge Boyle says the written argument or "factum" the appellant filed in the Federal Court of Appeal, in the case of *McKesson Canada Corp. v. The Queen*[1], alleges that the judge was "untruthful and deceitful" in his written decision, and that the factum contains "clear untruths about me" and makes "allegations of impartiality on my part."

"It is my view that the Appellant has wrongly accused me of being untruthful, dishonest and deceitful. I am simply unable to read their Factum or the Reasons any other way on this point," Judge Boyle wrote in his decision, issued Sept. 4. "I believe they have wrongly written these things in the Appellant's Factum about me intentionally under the guise of fearlessly advancing and representing the interests of McKesson Canada. I believe this clearly crosses the line as to what is appropriate."

The appellant's lawyer, Al Meghji of Osler, Hoskin & Harcourt LLP in Toronto, is unable to comment on the case as the matter remains before the Court of Appeal.

But other lawyers are talking about the unique situation of a judge inserting himself into an appeal of his own ruling - something the legal system is not set up for. Once a ruling is appealed, it is supposed to remain a matter strictly between the parties and the appellate court.

And while it's technically true that Judge Boyle's recusal decision isn't officially part of the appellate process, his ruling will likely have that effect.

Mr. Boyle's extraordinary ruling is now "in the judicial domain," says Vern Krishna, a tax lawyer and law professor at the University of Ottawa who's in his 50th year of practice. "It is on the street. Any tax lawyer or tax judge is aware of it."

Judge Boyle's name has been in the public domain before, for unrelated issues. In 2009, he and his wife were put under police protection after their Ottawa home was ransacked in a suspected break-in. In 2012, his son, Joshua Boyle, and his son's American wife, Caitlan Coleman, were taken captive in Afghanistan. The Canadian and U.S. governments continue to work for their release.

Judge Boyle's legal work includes some of the biggest and most complicated cases before the tax court.

McKesson Canada Corp. v. The Queen involves a controversial subject called transfer pricing. This is a technique in which multinational corporations move or "transfer" revenue and expenses from their subsidiaries in higher-tax jurisdictions to their subsidiaries in lower-tax countries. Canadian tax law allows this, but only if the transfers are "bona fide" deals booked at fair-market value. In December 2013, Judge Boyle issued a 105-page trial verdict that said McKesson Canada incorrectly priced some transfers in its 2003 tax return.

McKesson Canada is appealing that ruling on the grounds that it didn't get a fair trial. The company's lawyer, Mr. Meghji, argues in his factum that Judge Boyle's ruling was based on evidence and arguments that were not made during the trial.

This is definitely an appeal with some edge. No judge takes kindly to the suggestion that he or she is unfair. Judge Boyle seems particularly irked by Mr. Meghji's choice of language. At one point, after citing three sentences from Mr. Meghji's factum that raise questions about the judge's handling of the trial, Judge Boyle writes: "There are no polite qualifiers in any of these three sentences."

To be sure, Judge Boyle acknowledges in his recusal decision that his detailed response to the appellant's factum is unusual. "Canadians should rightly expect their trial judges to have broad shoulders and thick skins when a losing party appeals their decision, but I do not believe Canadians think that should extend to accusations of dishonesty by the judge, nor to untruths about the judge," he writes. "Trial judges should not have to defend their honour and integrity from such inappropriate attacks."

Some lawyers who specialize in appeals are surprised that Judge Boyle took such offence to the appellant's factum. Gavin MacKenzie, a partner in the Toronto office of Davis LLP, said he doesn't think Mr. Meghji's factum was over the top. He said appellate courts often prefer direct, candid language that cuts to the chase.

"I thought the criticism of the appellants for the way they presented their argument in the Court of Appeal in the factum was unfair," Mr. MacKenzie said. "There's certainly no requirement to insert qualifiers, polite or otherwise, in the argument. The Court of Appeal can consider the matter on the merits. In general, they will find it much more helpful if they have your argument unadorned with qualifiers and in as direct a way as possible."

Whether Mr. Meghji's factum crosses a line will ultimately be up to the Federal Court of Appeal to decide. It has yet to hear oral arguments in this case.

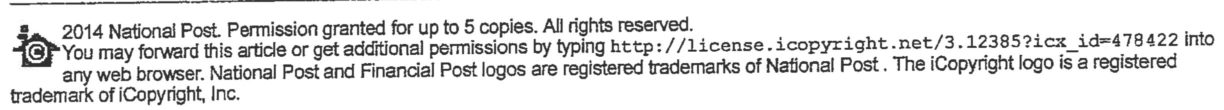
dhasselback@nationalpost.com

twitter.com/legalpost

References

1. www.canlii.org/en/ca/tcc/doc/2014/2014tcc266/2014tcc266.html

National Post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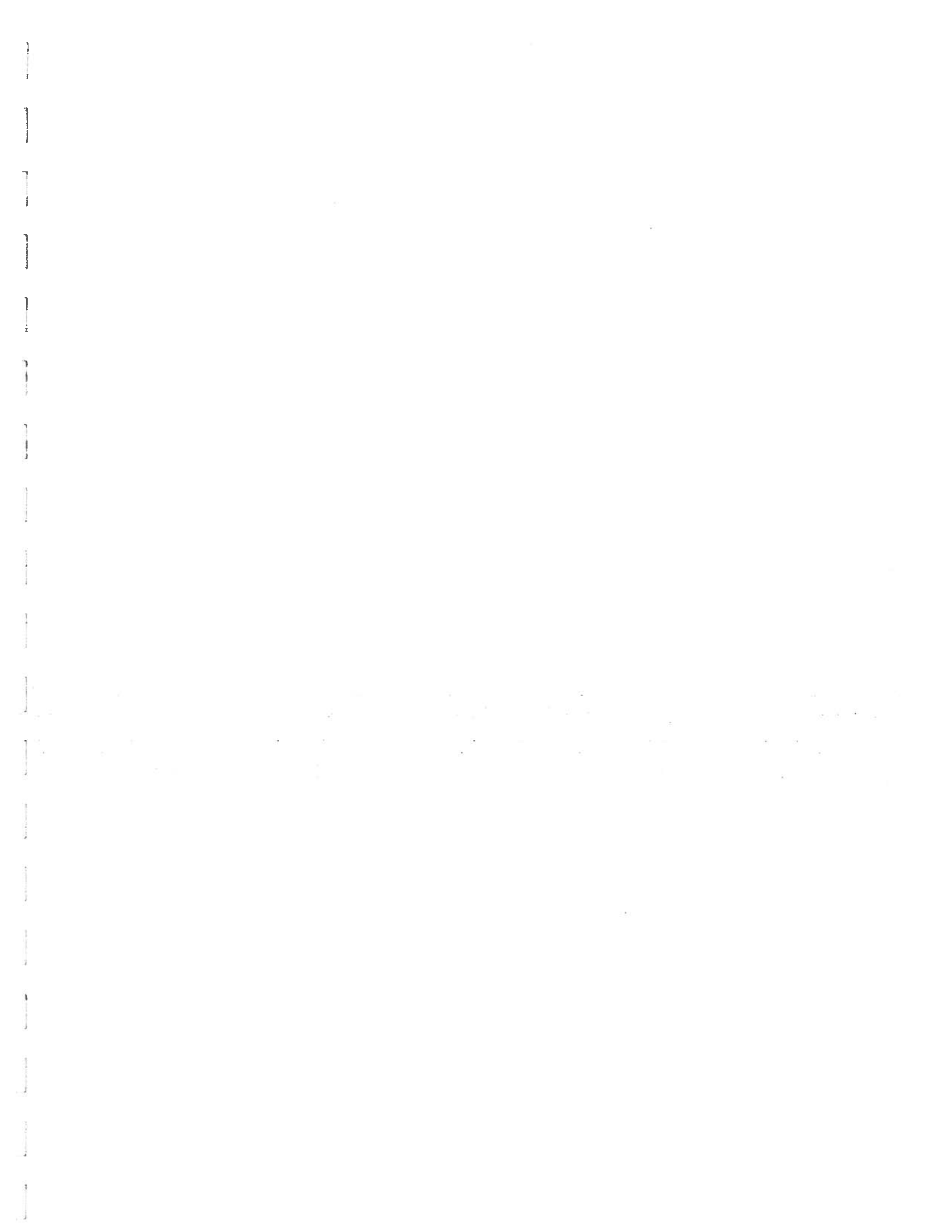


This is Exhibit B referred to in the affidavit of Christine Hennings sworn before me, this 3 day of November 2014

THE LAWYERS WEEKLY

Judge slams counsel, then recuses himself

By Cristin Schmitz

September 26 2014 issue

A cloud of uncertainty looms over the appeal of an important Tax Court transfer-pricing decision after the trial judge took the "absolutely unprecedented" step of publicly defending himself and his decision against what he called "deliberately misleading" allegations in the appeal factum.

Tax Court Justice Patrick Boyle's Sept. 4 reasons for deciding to recuse himself from further involvement in the multimillion-dollar case of *McKesson Canada Corp. v. The Queen* have sparked debate about whether the factum in question exceeded the bounds of acceptable appellate advocacy, and whether the judge moved from arbiter to advocate when he wrote 45 single-spaced pages contesting and correcting what he argued are demonstrable "untruths" in the factum.

Justice Boyle wrote that he was "deeply troubled" by a number of McKesson's assertions in the factum appealing his 2013 ruling upholding transfer-pricing adjustments made by the Canada Revenue Agency under s. 247 of the *Income Tax Act*.

"It is my view that the appellant has wrongly accused me of being untruthful, dishonest and deceitful," Justice Boyle explained in recusing himself, on his own initiative *ex parte*, from deciding costs and confidentiality issues in the *McKesson* case.

He held that the appellant's factum filed with the Federal Court of Appeal last June would leave a reasonable, fair-minded and informed person "with a reasoned suspicion or apprehension of bias, actual or perceived."

McKesson contends the judge decided unfairly, and acted unfairly during the 32-day trial, including unfairly displaying "palpable antipathy" to the company's witnesses and counsel because he found their evidence to be disingenuous.

The judge's reasons for recusal challenge a number of the appellant's assertions, including by quoting statements made during the trial by the judge and counsel, and parts of his transfer-pricing judgment.

"I believe the appellant was telling untruths about me that go beyond the appellate advocacy craft of colour, spin and innuendo," Justice Boyle said of the appeal factum prepared by Toronto's Al Meghji and Amanda Heale of Osler, and Blakes' Paul Schabas and Kaley Pulfer (who were also trial counsel).

"Canadians should rightly expect their trial judges to have broad shoulders and thick skins when a losing party appeals their decision," the judge said. "But I do not believe Canadians think that should extend to accusations of dishonesty by the judge, nor to untruths about the judge. Trial judges should not have to defend their honour and integrity from such inappropriate attacks. English is a very rich language; the appellant and its counsel could have forcefully advanced their chosen grounds for appeal without the use of unqualified extreme statements which attack the personal or professional integrity of the trial judge."

Justice Boyle's decision to revisit, and arguably augment his 105-page trial decision muddies the legal waters, commented University of Ottawa tax law professor Vern Krishna.

"I have never seen — and our system doesn't work on the basis of — a trial judge, in effect, writing a supplementary judgment defending his original judgment."

He argued the ruling casts "a pall of unfairness" over the impending appeal.

However, Richard Devlin, a legal ethics professor with the Schulich School of Law at Dalhousie University in Halifax, said that the factum's "unusually aggressive" tone, and some of its wording, target the judge in a "close-to-*ad hominem* way."

"It seems to me that rarely would a factum ever go this far in trashing a judge," Devlin said. "In Canada I think there has always been a sense that we do not treat law as a blood sport. One's got to be a resolute advocate for one's client. One's got to put forward the best arguments possible, so it's not that one sort of pulls one's punches, in a sense, but...you can still make your point stick without having to quite go as far as in this case."

Devlin noted there is much less ethical guidance on what lawyers can say in factums versus in court or on the courthouse steps. He suggested *McKesson* "represents a useful opportunity to reflect upon the limits of the adversarial advocacy."

However, Krishna argued that, as a rule, trial judges who feel they or their decisions are being unjustly criticized "have to suck it up in the sense that there is an appellate procedure, and [the trial judge] is protected from on high by the Court of Appeal."

Krishna suggested Justice Boyle would better have explained his reasons for recusal by succinctly highlighting the contents of the factum he considered impugned his impartiality — without defending himself by plunging into the appeal's merits.

Devlin wasn't so sure that the judge went too far in his reasons.

"It is unprecedented, but I guess I'm not convinced that this is absolutely inappropriate," he said. "Are judges meant to 'suffer in silence' in these situations?...If a judge feels that their own personal integrity has been called into question, again that raises questions within the bar: 'Is this factum poisoning the well for this judge in other cases?'"

Krishna focused on the impact on the litigation. "This entire judgment of Boyle places [the appellant] in an extremely unfair and untenable position in that, if [it] is not allowed to file a supplementary factum [with the Federal Court of Appeal it] is basically precluded from rebutting Boyle's public allegations in his judgment," he said.

He argued the judgment is "more advocacy than it is judicial" and "almost speaks to the need for a new trial."

McKesson's appeal requests a new trial before a different judge, arguing Justice Boyle "discarded the case pleaded and argued by the parties and decided the appeal on grounds that were not raised in the pleadings or argued at trial, but made their first appearance in the trial judge's reasons well after the trial was over."

McKesson's counsel declined to say whether the company will file a motion seeking a new trial based on the judge's latest reasons.

"I am not prepared at this time, because the matter is before the Court of Appeal, to comment on what, if any, specific steps we plan to take," said Meghji, one of the appellate counsel.

He said he "respectfully disagrees" that the factum went beyond the bounds of appropriate appellate advocacy.

McKesson said in a statement that it stands by its factum "which firmly and properly advances compelling arguments grounded in the law and the facts" to overturn the trial decision.

McKesson complains the trial judgment "is highly critical of almost every aspect of McKesson's case" but "these complaints were never articulated at trial, such that McKesson had no opportunity to respond to them."

Justice Boyle pointedly states in his recusal reasons that counsel are "free to make whatever arguments they wish, including claiming or denying support in the record, the use of emphasis and spin, or even trying to argue a case it thinks it can win instead of the case it has."

However under "the guise of fearlessly advancing and representing the interests of McKesson Canada," he said the appellant crossed the line of what is appropriate by wrongly and intentionally challenging his "truthfulness, honesty and integrity."

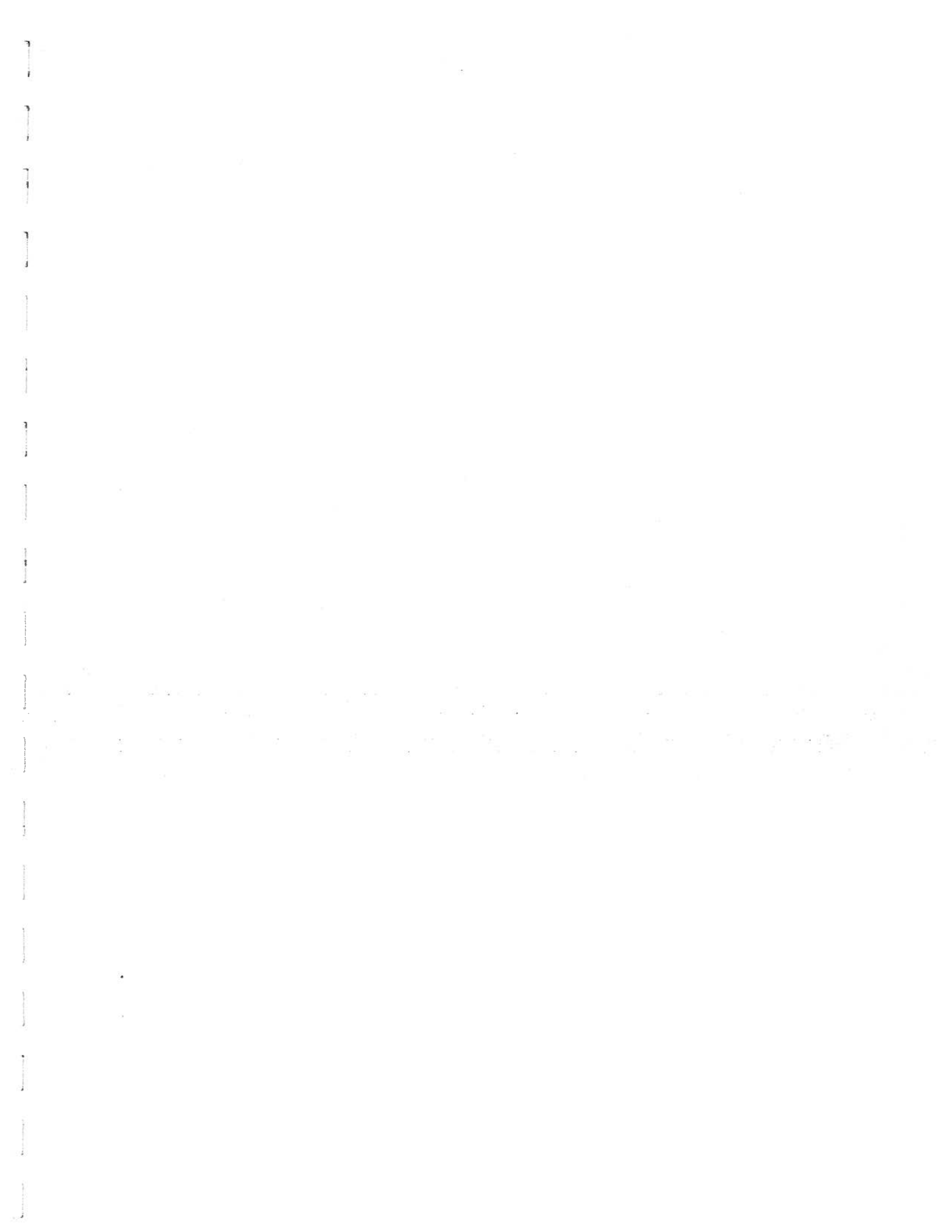
Bolstering his assertion with quotes from the trial transcript, Justice Boyle said that "while the appellant may have every right to seek to challenge the evidentiary foundation of my conclusions and findings they have simply told clear untruths about me and what I did or did not say when they state that McKesson's tax motivation was not ever put to them during the trial and that they were therefore deprived of any opportunity to address it."

McKesson contends that Justice Boyle's negative view towards its whole case is illustrated by his "sharp conclusion" in his transfer-pricing decision that "never have I seen so much time and effort by an appellant to put forward such an untenable position so strongly and seriously." But the judge calls it "deliberately misleading" to "suggest in their factum that I wrote this about the taxpayer's whole case as opposed to [one of its expert's] opinion."

Last December, Justice Boyle upheld the CRA's reduction to 1.013 per cent the rate that McKesson Canada and its parent company, MIH, used to discount the face value of McKesson Canada's receivables

when MIH purchased them in 2002. This increased McKesson Canada's tax payable in 2003 by boosting its income by $26.6 million. The judge did not accept that the parties' agreed-on discount rate of 2.206 per cent was within the range of what they would have agreed if they'd been dealing at arm's length.

Close



This is Exhibit C referred to in the affidavit of Christine Hennings sworn before me, this 3 day of November 2014.

A COMMISSIONER FOR TAKING AFFIDAVITS

Bar shocked at 'unprecedented' recusal
Judge suggests appeal factum claimed 'untruthful conduct'

Monday, 22 September 2014 08:00 | Written By Yamri Taddese

In a move some lawyers are calling unprecedented, Tax Court of Canada Justice Patrick Boyle has recused himself from completing further proceedings in a case after finding appeal materials filed in the matter had accused him of "deceitful and untruthful conduct."

"I think it's unprecedented, certainly, and I've been doing this for 37 years," says Davis LLP litigation lawyer Gavin MacKenzie of Boyle's Sept. 4 order in *McKesson Canada Corp. v. Her Majesty the Queen*.

It's unusual for a judge to comment on the merits of an appeal factum filed in a case he already tried, says Gavin MacKenzie. Photo: Robin Kuniski

Boyle had rendered a decision last year in favour of the government in McKesson, a case about transfer-price adjustments between McKesson Canada and its parent company, McKesson International Holdings (MIH). But in the recent order, Boyle said he would no longer sit on the case in order to wrap up further issues such as costs because the statements made in McKesson Canada's appeal factum filed with the Federal Court of Appeal had cast a doubt over his neutrality.

"It is not my habit to review the factums filed in the Federal Court of Appeal in respect of my decisions," wrote Boyle, who noted "prominent tax lawyers" and a colleague on the court had sent him McKesson Canada's factum.

But after seeing it, he said he had to ask whether "a reasonable person reading the factum, my reasons, and the relevant portions of the transcript would believe that the trial judge so strongly complained of by McKesson Canada might not be able to remain impartial in his consideration of costs and confidential information."

What many lawyers find extraordinary is that in the 45-page ruling, Boyle went on to respond in detail to statements McKesson Canada made in its appeal, some of which he said he was "deeply troubled by."

"For these reasons, it is my view that the appellant has wrongly accused me of being untruthful, dishonest and deceitful. I am simply unable to read their factum or the reasons any other way on this point. I believe they have wrongly written these things in the appellant's factum about me intentionally under the guise of fearlessly advancing and representing the interests of McKesson Canada. I believe this clearly crosses the line as to what is appropriate," wrote Boyle.

He added: "I am satisfied that a reasonable fair-minded Canadian, informed and aware of all the issues addressed above, would entertain doubt that I could remain able to reach impartial decisions. I believe that such a reasonable fair-minded and informed person, viewing this realistically and practically would, after appropriate reflection, be left with a reasoned suspicion or apprehension of bias, actual or perceived."

It's very unusual for a judge to comment on the merits of an appeal factum filed in a case he already tried, says MacKenzie, who's also the author of a book on professional responsibility.

"I think it's very ill-advised for a trial judge to comment in a decision, or for that matter out of court, on the merits of an appeal from the judge's own decision."

Boyle's decision "reads more like a respondent's factum," adds MacKenzie. While the judge criticized McKesson Canada's appeal factum for lacking "polite qualifiers," MacKenzie says he found nothing inappropriate in it.

"I thought the criticisms of the appellant's counsel were very unfair. Based on the passages that the trial judge quoted from the appellant's factum, which he found objectionable, I have to say I disagreed entirely," he says.
The issue for Boyle, it seems, was how the appellant had worded the factum.

"English is a very rich language; the appellant and its counsel could have forcefully advanced their chosen grounds for appeal without the use of unqualified extreme statements which attack the personal or professional integrity of the trial judge," he wrote.

In the ruling, Boyle quoted three specific sentences he took issue with:

- "In these circumstances, I am deeply troubled by the statement by the Appellant in paragraph 89 of the Factum that '[t]he Trial Judge did not, in fact, leave this question for another day, as he claims to have done.'"

- "I am similarly deeply troubled by the statement by the Appellant in paragraph 84 of the Factum that '[t]he Trial Judge, without acknowledging it, has challenged whether the written terms of the Agreement reflected the 'real' allocation of risk between MIH and McKesson Canada.'"

- "I am equally concerned by the statement of the Appellant in paragraph 88 of the Factum that '[t]his is so notwithstanding the Trial Judge's contention, at paragraph 132 of his Reasons, that 'in this case, I do not need to [consider notional continued corporate control] in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment.'"

Despite Boyle's emphasis in underlining his concerns, MacKenzie says that when advancing appeals, the best approach, and the one courts of appeal appreciate, is a direct one.

"If you're arguing that the trial judge was wrong, say so, explain why you say so. There's certainly no requirement that your argument be modified or qualified in any way," he says.

Tax lawyer Robert Kreklewetz of Millar Kreklewetz LLP says he, too, has never seen anything like Boyle's decision.

"It's a very unique decision," he says. Part of the surprise, he says, is that no one had brought a motion to recuse the judge.

"If you're sitting there as the appellant's counsel, you're probably sitting there saying, 'Wow, what just happened?'" he says.

"This was on his own motion."

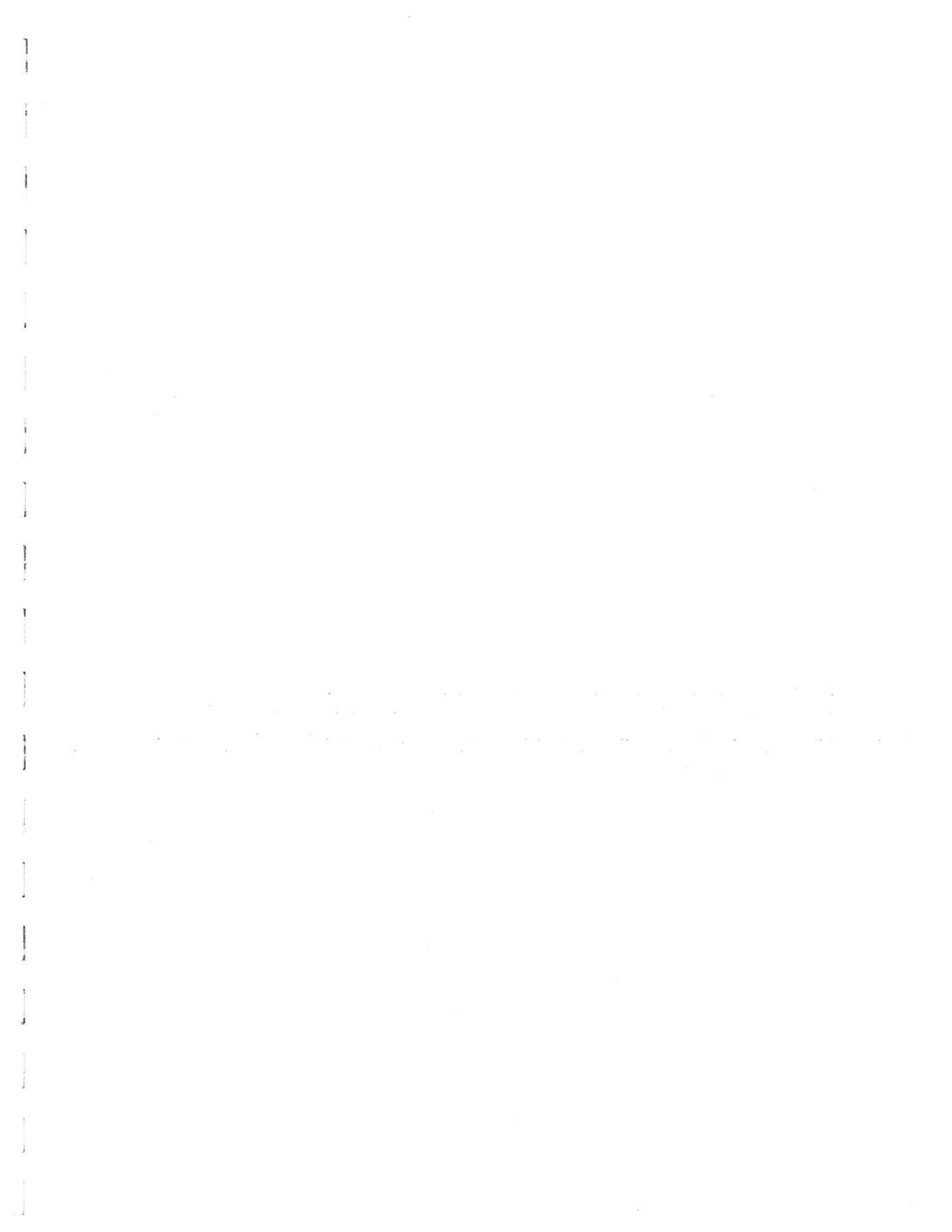
While the issue of recusal does give the judge leeway to talk about what a party has said in a factum, Kreklewetz wonders whether the judge could have arrived at the same decision without the analysis he did on the brief in this case.

"He seems to spend a lot of time more or less setting out his particular side of the story and more or less indicating why he thought some of the statements in the appeal are either not correct or supportable, but I was left wondering whether he really needed to say that," says Kreklewetz.

"One wonders if he could have said: 'Let's assume the statements are correct. If they are correct, should I recuse myself from potentially mishandling the Tax Court case? And if they're not correct, should I recuse myself because a reasonable person might be very upset having read these incorrect statements about him?'

"You begin to wonder if he needed the detailed reasons or not. I'm not saying he shouldn't have, [but] you're just left wondering if he could have gotten to the same point without all the detailed analysis."

Kreklewetz says what happens next in the case will be interesting. "The note I made after reading it is that I really wanted to read the Federal Court of Appeal's decision on it," he says.



Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

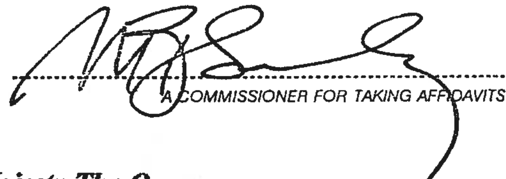
Toronto
Montréal
Ottawa
Calgary
New York

October 8, 2014

Al Meghji
Direct Dial: 416.862.5677
ameghji@osler.com
Our Matter Number: 1151031

SENT BY FACSIMILE

This is Exhibit D referred to in the affidavit of Christine Thomas sworn before me, this 3 day of November 20 14



A COMMISSIONER FOR TAKING AFFIDAVITS

Janie Payette
Department of Justice
Quebec Regional Office
East Tower, 9th Floor
200 Rene-Levesque Blvd. West
Montreal, Quebec H2Z 1X4

Dear Ms. Payette:

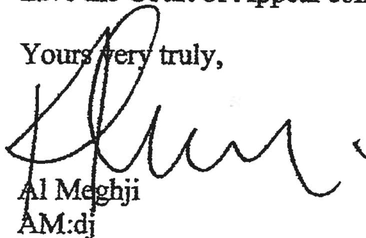
McKesson Canada Corporation v. Her Majesty The Queen
Court File Number A-48-14

We have now had an opportunity to review the reasons given by Justice Boyle on his decision to recuse himself. We have determined that we will be obliged to file a Supplementary Notice of Appeal. The conduct of the judge here undermines the appellate process and raises significant issues related to his partiality and bias, as well as the issue of the appropriate limits on the role of a trial court.

We anticipate being in a position to file a Supplementary Notice of Appeal and factum before the end of the month. We would be grateful if you could consider your position. Given the unprecedented nature of the Court's ruling and the obvious issues it engages, we would hope that the Crown would consent to the filing of the additional materials. I note that we expect to move expeditiously and do not anticipate that this step will delay the hearing of the appeal.

Can we hear from you before October 17, 2014, so that we can know whether we will be obliged to prepare for a contested motion before our client will have an opportunity to have the Court of Appeal consider these issues.

Yours very truly,



Al Meghji
AM:dj

c: Paul Schabas and Jeffrey Trossman, *Blakes*
Amanda Heale, *Osler*

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Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.862.2111 MAIN
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Al Meghji 416.862.5677 ameghji@osler.com	2175 / 1151031	October 8, 2014	2 (including cover)

McKesson Canada Corporation v. Her Majesty The Queen
Court File Number A-48-14

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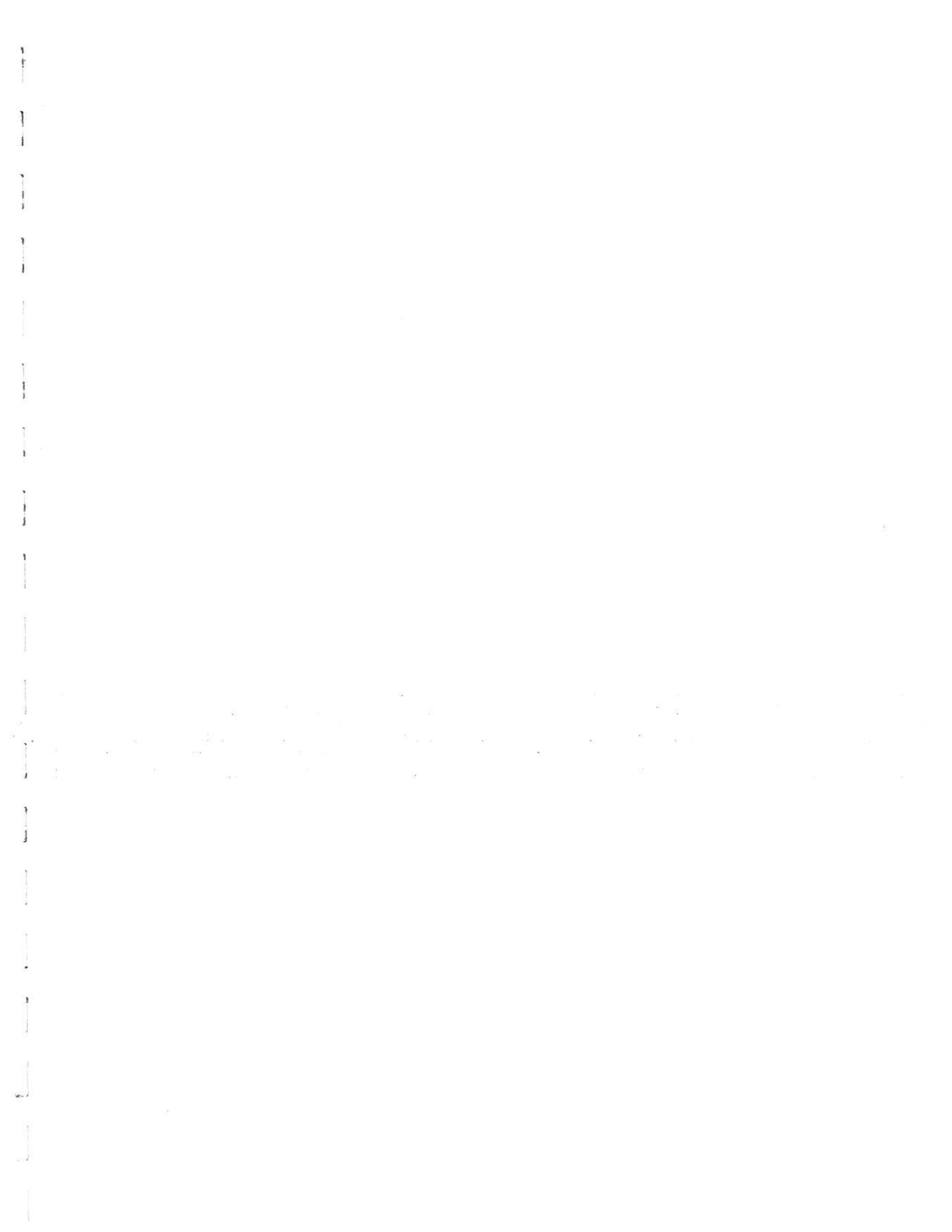

Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL
COUR D'APPEL FÉDÉRALE
FILED / DÉPOSÉ
NOV 0 3 2014
ANDREW MURRAY
TORONTO, ONT 34

FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

WRITTEN REPRESENTATIONS

(Motion to File Amended Notice of Appeal & Supplementary Memorandum)

In Accordance with Rule 70 of the *Federal Court Rules*

PART I – OVERVIEW

1. These are written submissions under Rule 369 of the *Federal Courts Rules* in support of the Appellant's motion to file an Amended Notice of Appeal and a Supplementary Memorandum of Fact and Law. A draft of the Supplementary Memorandum of Fact and Law which the Appellant proposes to file is attached at Tab 6 for the Court's consideration.

2. In this appeal, the Appellant seeks relief from a decision of the Honourable Justice Patrick Boyle of the Tax Court of Canada dated December 13, 2013. A Notice of Appeal was filed with this Court in January 2014, as well as a Memorandum of Fact and Law in June 2014. They set out several reasons why, in the Appellant's respectful submission, the Reasons for

Judgment contain errors of law requiring a new trial to be ordered. A hearing date has not yet been set.

3. By this Motion, the Appellant seeks to advance a further ground of appeal that was not apparent – and could not have been apparent – at the time that the appeal was perfected. The further ground arises out of a decision issued by Justice Boyle on September 4, 2014, on his own motion and without notice to the parties, several months after the Appellant's materials were filed with this Court.

4. In that decision, Justice Boyle recused himself from hearing outstanding issues relating to costs and a pre-trial confidentiality order of which he had remained seized. He recounted that "the Appellant's Factum was drawn to my attention or sent to me by several prominent Canadian tax lawyers as well as by a colleague on the Court."[1] Having read it, he felt he could no longer remain impartial in the eyes of the reasonable person. Justice Boyle took strong issue with the arguments advanced by the Appellant in its Factum, which he claimed constituted an attack on his personal and judicial integrity.

5. The Recusal Reasons are not primarily about recusal at all. Rather, they are a lengthy and detailed critique of the arguments raised by the Appellant in this case and of counsel's conduct in having raised them. They were explicitly directed to the Court of Appeal.[2] In effect, they urge this Court to defend the trial judge's integrity and dismiss the appeal. The trial judge has, through his recusal reasons, put this court in the position of having to make a choice between the credibility and honesty of the trial judge, on the one hand, and the merits of the Appellant's argument and the honesty and integrity of its counsel on the other.

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[1] Recusal Reasons, at para. 7 [Motion Record, Tab 5]
[2] Recusal Reasons, at para. 7 [Motion Record, Tab 5]

6. In our respectful submission, Justice Boyle's Reasons for Recusal compromise the appearance and reality of fairness in this case and require that a new trial be held before a differently constituted court. In the guise of Recusal Reasons, the trial judge has in fact joined issue with the Appellant on the appeal and written what amounts to a lengthy factum purporting to rebut the Appellant's arguments. This improper intervention in the appellate forum has, in the Appellant's submission, compromised the integrity of the appeal process.

7. The Appellant accordingly seeks to file an Amended Notice of Appeal and a Supplementary Memorandum of Fact and Law addressing this new ground of appeal.

PART II – PROCEDURAL HISTORY

8. The Appellant appealed a reassessment under the *Income Tax* Act to the Tax Court of Canada. The matter was heard before the Honourable Justice Patrick Boyle on various dates between October 17, 2011 and February 3, 2012.[3]

9. On December 13, 2013, Justice Boyle dismissed the appeal with costs. On the same day, he ordered that the parties file written submissions on costs and the reconsideration of a pre-trial confidential information order that had been made by Justice Hogan in March 2010.

10. On January 10, 2014, the Appellant filed a Notice of Appeal to the Federal Court of Appeal.

11. In or about March 2014, the Respondent submitted written submissions on costs to Justice Boyle. In or about April 2014, the Appellant filed written submissions on costs.

[3] See, generally, the Affidavit of Christine Hennings, Motion Record, at Tab 3.

12. In or about April 2014, both parties made written submissions regarding the pre-trial confidentiality order.

13. On June 11, 2014, the Appellant filed with the Federal Court of Appeal its Memorandum of Fact and Law on the appeal of the merits.

14. The Respondent filed its Memorandum of Fact and Law with this Court on August 8, 2014.

15. On September 4, 2014, to the parties' surprise, Justice Boyle issued a 139-paragraph decision explaining why he was recusing himself from hearing the pending costs and confidentiality matters.

16. In short, Justice Boyle explained that his recusal was prompted by his review of the Appellant's Factum filed on June 11, 2014, which was sent to him "by several prominent Canadian tax lawyers as well as by a colleague on the Court."[4] Justice Boyle held that the Appellant's Memorandum alleged that he was "untruthful and deceitful", stated "clear untruths about me", and made "allegations of impartiality [sic]."[5] He purported to refute, at great length and with detailed references to the trial record, arguments advanced by the Appellant in its Factum. In the result, Justice Boyle decided that a reasonable person, aware of this "attack [on] the personal or professional integrity of the trial judge", would not believe that he could remain impartial.[6] He acknowledged that his Reasons were lengthier than we would have liked, but that this was "necessitated by considerations of fairness to the parties and the appellate court."[7] Indeed, in accordance with their anticipated audience, the Reasons take on the form and tenor of

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[4] Reasons for Recusal, at para. 7.
[5] Reasons for Recusal, at para. 4.
[6] Reasons for Recusal, at para. 138.
[7] Reasons for Recusal, at para. 8

an appellate factum as Justice Boyle defends at length his conduct of the proceeding and the content of his original Reasons.

PART III – ARGUMENT

17. The new ground of appeal raised by Justice Boyle's Reasons for Recusal is elaborated in the Amended Notice of Appeal and Supplementary Memorandum of Fact and Law that the Appellant proposes to file. Here, the Appellant sets out why it ought to be able to file the additional materials necessary to address that ground. The Recusal Reasons are a dramatic and unusual intervention by the trial judge in the appeal of his own decision. Fairness dictates that the Appellant be given a proper opportunity to address the impact of this intervention on the process. More fundamentally, this Court must be able to assess, after full argument, what effect the Recusal Reasons have had on the appeal and what remedy, if any, should follow.

A. The Reasons for Recusal are Properly Before this Court

18. Typically, where an appellant seeks to file additional materials based on new grounds that arise after the trial judgment but before an appeal is to be heard, the appellant is seeking to adduce fresh evidence under Rule 351 of the *Federal Court Rules*. Under that rule, the new evidence must meet the well-known criteria of due diligence, relevance, credibility, and decisiveness to the outcome.[8]

19. Were it necessary to frame this as a fresh evidence application, the Appellant submits that all such criteria are plainly met here. Clearly Justice Boyle's Reasons for Recusal were not known to the parties before they were issued last month; no want of due diligence can possibly be asserted. The Reasons are also obviously credible, in the sense that there is no doubt Justice

[8] *Beck v. Canada (Attorney General)*, 2012 FCA 310, at para. 2.

Boyle wrote them. And, as set out in the proposed Supplementary Memorandum, they are relevant and decisive to issues in the appeal.

20. However, in these circumstances, resort to Rule 315 is inappropriate. The Reasons for Recusal are not extrinsic evidence, or evidence of any kind – they are a decision issued *in this proceeding.* When he issued his Reasons for Recusal, Justice Boyle remained seized of issues in the case. His decision therefore properly forms part of the record before this Court. Notably, Justice Boyle explicitly identified this Court as an intended audience for his Recusal Reasons.[9]

21. While typically decisions related to post-trial issues such as costs are not germane to the appeal, Justice Boyle's Recusal Reasons do not address costs or other issues irrelevant to the appeal. They do not even deal with recusal – their ostensible subject – at any length. Instead, they address, in detail, errors the Appellant says Justice Boyle made in his trial judgment. In one sense, the Reasons function as a supplementary judgment on the merits; in another they amount to a second Respondent's Factum. Either way, it is only fair that the Appellant be permitted to file a Supplementary Memorandum to address what effect this unprecedented intervention has had on the proceedings. This Court should have the benefit of a full record and full argument on what consequences should flow from the Recusal Reasons.

B. Relevant Precedent

22. As indicated, the circumstances of this case appear to be unique. The Appellant is unaware of any other case where a trial judge has by judgment expressly sought to refute a party's appeal factum (much less while the appeal remains outstanding). Nevertheless, some analogous case law may assist.

[9] Reasons for Recusal, at para. 8

23. In *R. v. E.(A.W.)*[10] the Alberta Court of Appeal heard an appeal from a criminal conviction. After the appellate hearing, and while judgement was still reserved, the trial judge sent a letter to the Chief Justice of the Court of Appeal, stating: "Were I sitting alone, I would not have found the accused guilty on the evidence at trial."[11] The Court of Appeal forwarded copies of this letter to the Crown prosecutor and defense counsel, and invited them to make further submissions.[12] Ultimately, the Court of Appeal quashed the conviction and explicitly referred to the letter in support of its conclusion.

24. The Crown appealed to the Supreme Court of Canada, which restored the conviction.[13] While the Court split 5-2 on whether the conviction should be reinstated, the majority (*per* Cory J.) and dissent (*per* Lamer C.J.) both explained at length why a trial judge's expression of an opinion on the merits of an appeal undermines the fairness of the process. The relevance of this case to the issues raised by the Recusal Reasons is fleshed out more fully in the Appellant's draft Supplementary Memorandum. For our purposes on this Motion, however, *E.(A.W.)* makes one thing clear: where a trial judge broadcasts to the appellate court his feelings on the outcome of an appeal – while the appeal is outstanding – the appellate court is entitled to entertain submissions from the parties on the relevance of the trial judge's missive.

25. In addition, as further outlined in the proposed Supplementary Memorandum, a number of other authorities consider the effects of post-trial comments by the trial judge on an appeal. For instance, *R. v. Teskey*,[14] the Supreme Court addressed the effect of a trial judge delivering reasons long after rendering a decision. While the Court split on whether the Crown could

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[10] [1991] A.J. No. 1031 (C.A.)
[11] *R. v. E.(A.W.)*, [1993] 3 S.C.R. 155, at para. 5
[12] *Ibid.*, at para. 6.
[13] *Ibid.*
[14] [2007] 2 S.C.R. 267, 2007 SCC 25

ultimately rely on the reasons to support the conviction, there was no doubt that the reasons were properly the subject of submissions by counsel and consideration by the Court. In the case of Justice Norman Douglas, which ended up before the Ontario Judicial Council, the trial judge's hostile commentary about an appellate court that had overturned him led to a successful recusal application in a later, similar case.[15] All of these examples demonstrate the force of the general principle that judges are expected to speak only through their judgments and not enter the appellate fray in defence of their own decisions.

C. The Supplementary Memorandum Should be Received

26. Of course, the above precedents are just analogies. The Appellant is aware of ***no prior case*** in which a trial judge has intervened in an appeal of his decision in such a sustained and forceful manner. But that very lack of precedent is itself a compelling reason for this Court to hear submissions on what impact the intervention has had on the appearance and reality of fairness in this process. It simply cannot be denied that the issuance of the Recusal Reasons was a significant development in this process which deserves to be addressed before the Panel.

27. The Recusal Reasons have garnered substantial attention in the mainstream and legal media. For example, a September 23, 2014 article in the *Financial Post* states that the legal community has been "transfixed" by the "unusual actions" of Justice Boyle in breaching the convention that trial judges remain silent when their rulings are appealed.[16] An article in the *Law Times* likewise characterizes the bar as "shocked" at the "unprecedented" Recusal Reasons.[17] A

[15] *R. v. Musselman*, [2004] O.J. No. 4226 (S.C.J.)
[16] Affidavit of Christine Hennings, Tab A [Motion Record, Tab 3]
[17] Affidavit of Christine Hennings, Tab A [Motion Record, Tab 3]

Lawyers Weekly article quotes a number of leading practitioners and academics addressing the novelty of the issues raised by Justice Boyle's intervention.[18]

28. The substantial attention and commentary already attracted by the Recusal Reasons provides further indication that the Panel hearing the appeal should have the opportunity to address the matter. Indeed, the bar and the public will rightly expect the issue to be dealt with in some manner by this Court, and it would be a disservice to the panel to deprive it of considered written submissions by both sides.

29. Finally, the delivery of a Supplementary Memorandum by the Appellant – and a responding Memorandum by the Respondent – will not delay the hearing of the appeal. A draft Supplementary Memorandum is included in this Motion; the Appellant only requires leave to file it. The Respondent has indicated that it wishes to have this issue dealt with before setting a date for a hearing, but it is clear that the date will be well into 2015. The Respondent will, accordingly, have ample time to file its responding Memorandum well in advance of the hearing.

30. In short, the impact of the Recusal Reasons is manifestly a legal issue that the parties ought to be permitted to address before this Court. The Reasons raise novel and challenging questions of law. In the Appellant's submission, they significantly compromise the fairness of this process. But either way, the Court is entitled to the assistance of the parties in deciding what if any effect the Recusal Reasons should have on the disposition of the appeal.

PART IV – ORDER SOUGHT

31. The Appellant seeks an order of this Court granting leave to the Appellant to:

[18] Affidavit of Christine Hennings, Tab A [Motion Record, Tab 3

(a) File the Amended Notice of Appeal set out at Tab 2 of the Motion Record; and

(b) File the Appellant's Supplementary Memorandum of Fact and Law set out at Tab 6 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2014

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario
M5L 1A9

Paul Schabas & Jeffrey Trossman

OSLER, HOSKIN & HARCOURT
Box 50, First Canadian Place
Toronto, Ontario
M5X 1B8

Al Meghji & Amanda Heale

HENEIN HUTCHISON LLP
3rd Floor, 235 King Street East
Toronto, Ontario
M5A 1J9

Marie Henein, Scott C. Hutchison &
Matthew Gourlay

Counsel for the Appellant

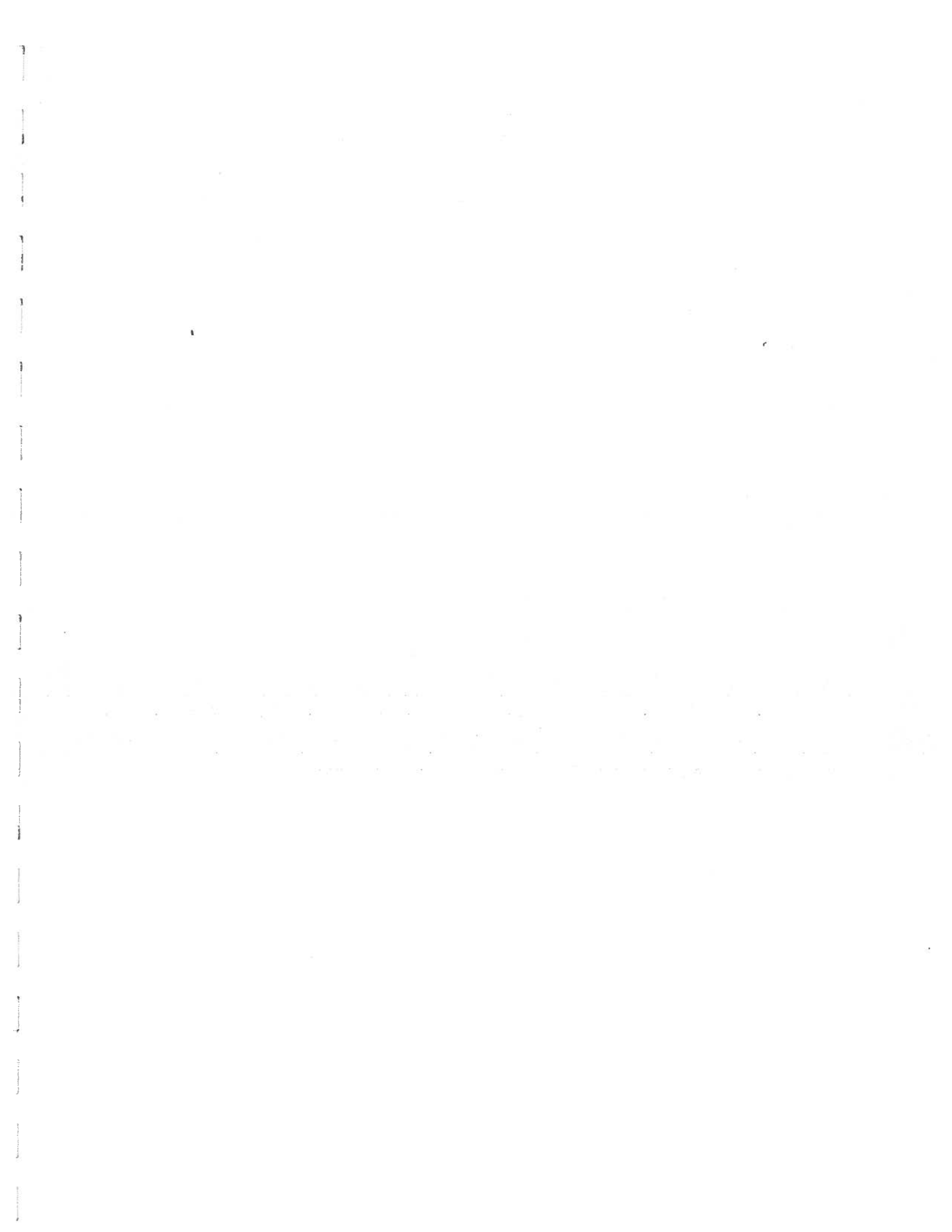
PART V – LIST OF AUTHORITIES

Beck v. Canada (Attorney General), 2012 FCA 310

R. v. E.(A.W.), [1991] A.J. No. 1031 (C.A.), rev'd [1993] 3 S.C.R. 155

R. v. Teskey, [2007] 2 S.C.R. 267, 2007 SCC 25

R. v. Musselman, [2004] O.J. No. 4226 (S.C.J.)



Docket: 2008-2949(IT)G
2008-3471(IT)G

BETWEEN:

MCKESSON CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

2014 TCC 266 (CanLII)

ORDER

In accordance with the attached reasons for recusal, I am recusing myself from completing the McKesson Canada proceeding in the Tax Court. This extends to the consideration and disposition of the costs submissions of the parties in this case, as well as to the 2010 confidential information order of Justice Hogan in this case and its proper final implementation by the Tax Court and its Registry.

Signed at Ottawa, Canada, this 4th day of September 2014.

"Patrick Boyle"

Boyle J.

Citation: 2014 TCC 266
Date: 20140904
Docket: 2008-2949(IT)G
2008-3471(IT)G

2014 TCC 266 (CanLII)

BETWEEN:

MCKESSON CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR RECUSAL

Boyle J.

[1] I rendered my Reasons and judgment on the merits of the Appellant's case on December 13, 2013. That decision has been appealed by the Appellant to the Federal Court of Appeal.

[2] I remain seized with the remaining issue of costs to be awarded in respect of the trial. I received written submissions on costs from the Respondent in March 2014 and from the Appellant in April 2014. On April 30, 2014, the Appellant confirmed to the Court that it did not want an oral hearing on costs, the Respondent having earlier communicated to the Court that it was not requesting an oral hearing on costs.

[3] I also remain seized with deciding the appropriateness of the parties' written proposal of April 2014 for dealing with the satisfactory identification of any notionally or actually sealed confidential information and the public versions of documents prior to this Court's file being made generally open to the public. This involves a reconsideration of the pre-trial confidential information order of Justice Hogan issued in March 2010.

[4] As detailed below, I have, of my own motion, decided that I am compelled to consider whether I need to recuse myself from the two remaining issues before

this Court. A consideration of this issue is required because I became aware that the Appellant and Appellant's counsel, together with its co-counsel in the Federal Court of Appeal in respect of the appeal of the trial decision, had made certain public written statements about me in its factum in the Federal Court of Appeal (the "Factum") which, upon reflection, appear to me to clearly include:

(i) allegations that I was untruthful and deceitful in my Reasons;

(ii) clear untruths about me, what I said and heard in the course of the trial, as well as the existence of evidentiary foundations supporting what I wrote in my Reasons; and

(iii) allegations of impartiality on my part.

[5] This requires me to consider whether:

(i) I believe that a reasonable person reading the Factum, my Reasons, and the relevant portions of the transcript would believe that the trial judge so strongly complained of by McKesson Canada might not be able to remain impartial in his consideration of costs and confidential information;

(ii) I believe I can impartially consider, weigh and decide the costs and confidential information issues before me; and

(iii) whether the public challenge of my impartiality expressed by McKesson Canada and its co-counsel in the Factum is itself sufficient to warrant recusing myself at this stage.

[6] Points (i) and (iii) above require the consideration of the matter from the point of view of a notional reasonable and fair minded person, who is informed on the issue, and who takes time to reflect on whether he or she has an apprehension or reasoned suspicion of bias, actual or perceived, on my part.

[7] It is not my habit to review the factums filed in the Federal Court of Appeal in respect of my decisions. In this case, the Appellant's Factum was drawn to my attention or sent to me by several prominent Canadian tax lawyers as well as by a colleague on the Court.

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[8] A trial judge's job on the merits ends with the rendering of reasons and judgment. There is rightly no role for the trial judge in the appeal of the trial decision. Counsel on each side in the appellate court is free to make whatever arguments they wish, including claiming or denying support in the record, the use of emphasis and spin, or even trying to argue a case it thinks it can win instead of the case it has. That is all of counsel's choosing and to be ultimately considered and decided by the appellate court. For that reason, I will limit myself to only considering the specific issues set out above, and will restrict myself to statements in the Factum, statements in the Reasons, and statements from the trial transcripts (the "Transcript").[1] This does have the effect of making these reasons more lengthy, more clinical, and more awkward than they might otherwise be, but I believe this is necessitated by considerations of fairness to the parties and the appellate court.

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1. Where it Appears in the Factum that McKesson Canada States that the Trial Judge is Untruthful and Deceitful

[9] This concern arises from paragraphs 84 through 89 of the Factum relating to the loss discount analysis, including my reliance upon the testimony of the Appellant's witness Barbara Hooper with respect to the objective and effect of two specific termination triggering events in the RSA, as well as to the issue of notional ongoing corporate control.

[10] In paragraphs 128 to 132 of the Reasons, I wrote the following on the issue of the relevance of notional ongoing corporate control:

> **(e) Factors that Exist Only because of the Non-Arm's Length Relationship**
>
> [128] Within a transfer pricing review, the question arises whether factors that exist only because of the non-arm's length relationship are assumed away in the notional arm's length analysis or remain relevant characteristics and circumstances.
>
> [129] This question may not arise to any extent in the context of a single purchase at a fixed price. The question does appear significant in the context of a

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[1] Much of the underlined emphasis in the numerous passages quoted below has been added by me. I have also dropped numerous footnotes from the quoted passages.

long-term commitment to do things over a period of time. For example, in transactions such as those involving the RSA, does the Court assume a notional arm's length MIH would still enjoy the benefit of the Irish company loan supported by the MIH2 guarantee and indemnity? In looking at transactions like the RSA, does the Court assume the notional arm's length MIH still has the power throughout the term of the notional arm's length contract to change McKesson Canada's name, sell McKesson Canada, or do something else in order to trigger a termination event at will? Does the Court assume that the notional arm's length purchaser still has the right to cause McKesson Canada to agree to change terms as they apply to future transactions under the agreement? Does the Court assume that the notional arm's length MIH still has access to all of the financial information of McKesson Canada and information regarding its receivables portfolio and its entire business even though it may not be specified or required in the RSA?

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[130] This issue was addressed by Justice Pizzitelli in *Alberta Printed Circuits v. The Queen*, 2011 TCC 232:

> It is important to note that factors or circumstances that exist solely because of the non-arm's length relationship of the parties should not be ignored, otherwise the reasonable businessman would not be standing entirely in the Appellant's shoes. . .
>
> … In *General Electric*, the Federal Court of Appeal confirmed that no error of law was made in taking into consideration the Appellant in that case, as a sub of its larger parent company, stood in the position of having an implicit guarantee by its parent of its bank debts.

[131] Based on this, all circumstances, including those that arise from, derive from or are rooted in the non-arm's length relationship should be taken into account.

[132} I think the better view is therefore that the Court can and should consider notional continued control type rights in appropriate circumstances when looking at term or executory contract rights. Not to do so would be to not look at all of the relevant characteristics and circumstances of the relationships. If these were to be ignored by a Court, companies within wholly controlled corporate groups could enter into skeletal agreements conferring few rights and obligations to the non-resident participant, (such as financial information disclosure, use of funds, financial covenants et cetera), all with the view to obtaining a more favourable transfer price to reduce Canadian taxes. Not approaching this issue this way would seem entirely inconsistent with this Court and the Federal Court of Appeal in G.E. Capital having focused on implicit unwritten, unenforceable guarantees of

the parent company of the borrower. However, in this case, I do not need to do so in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment, as detailed below. This too can be left for another day.

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[11] In the Reasons I wrote the following on the issue of termination triggering events and their relevance to loss discount:

> [26] MIH could terminate its obligations to purchase any further McKesson Canada receivables upon the occurrence of certain defined termination events, generally designed to identify or anticipate deteriorating creditworthiness of McKesson Canada or its pool of customers generating the receivables. These events included financial defaults of McKesson Canada or its affiliates, increases in the delinquency ratio or loss ratio of the receivables beyond specific thresholds, a downgrade in the credit rating of McKesson U.S., McKesson Canada's name being changed to drop the word McKesson, McKesson Canada ceasing to be controlled by McKesson U.S., McKesson U.S. ceasing to guarantee McKesson Canada's bank and commercial paper lenders, and any event occurring which materially adversely affected the enforceability or collectibility of the receivables or MIH's rights under the agreements It can be noted that the termination events were not limited to things in McKesson Canada's control, and included events in the control of its direct and indirect shareholders/parent corporations.
>
> [. . .]
>
> **b) Termination Events**
>
> [59] TDSI is satisfied that the triggers in the RSA definition of termination event are within the range of normal in an arm's length transaction "of this nature". I repeat my earlier observations about her use of this phrase in the TDSI opinion.
>
> [60] The TDSI opinion makes specific reference to the role of such termination triggers as protection for poor performance of receivables or declining creditworthiness of the seller. It identifies McKesson Canada's creditworthiness as seller as relevant in part because of its obligations to remit collections to MIH. TDSI is of the express view that "because [McKesson Canada] is so closely tied and important to [McKesson U.S.], it is reasonable to use the public debt ratings of [McKesson U.S.] as an indication of [McKesson Canada's] creditworthiness".
>
> [61] The TDSI opinion goes on to specifically consider i) the receivables pool's delinquency ratio trigger in the RSA, and ii) the receivables pool's loss ratio trigger in the RSA.
>
> **(i) Delinquency Ratio Trigger**

[62] TDSI considered the improving two year historical trend in the delinquency ratio of McKesson Canada's receivables and the recently maintained 1.0% rate. The 2.5% trigger rate in the RSA would, in TDSI's opinion, represent a significant adverse deviation from the current steady state of 1% and so considered reasonable. TDSI highlighted the importance of the dynamic four-month rolling average approach to measuring the delinquency ratio in the RSA, and uses this approach in its analysis. TDSI confirmed that this is consistent with the three to six month periods generally used for such purposes.

(ii) Loss Ratio Trigger

[63] TDSI looked at three years of historic bad debt experience on McKesson Canada's receivables portfolio. TDSI identified the difference between accounting write-offs and the 90 day delinquency definition of losses for purposes of the loss ratio in the RSA, with the result that the latter ratio could be expected to exceed the former. TDSI opined that a dynamic loss ratio, which measured a four-month average 90 day delinquency, and with a trigger of 0.25%, appeared reasonable given that, although write-offs to sales on a monthly basis at times reached this level, it had never exceeded 0.10% on a four-month rolling average.[footnote 21: It was acknowledged in Ms. Hooper's cross-examination that, in fact, it had not exceeded 0.04%, much less 0.10%. That is, it was not that TDSI considered a 2.5 times multiple reasonable, it considered a 6 + times multiple reasonable but did not expressly say so.]

[. . .]

[194] Ms. Hooper added that the delinquent portfolio performance trigger serves as an early warning system. Typically with receivables one will see delinquencies increase in advance of seeing losses increase. For this reason, she explained one wants the trigger rate to permit termination of the agreement early enough for there to not be material losses. She clearly understood that when the transaction could be terminated would have a fairly significant affect on the overall risk that was being transferred. According to Ms. Hooper, portfolio performance triggers, delinquency and default rate triggers, were designed to limit the ultimate losses to the purchaser by ceasing the acquisition of new receivables that might not be expected to perform as well as receivables originated previously.

[. . .]

[306] The RSA was signed at a time when the receivables pool's write-offs to sales performance had been in the range of 0.04%. This was well known and tracked by McKesson Canada and McKesson Group. The RSA gave MIH an immediately exercisable termination right in the event the pool's Delinquency Ratio or Loss Ratio increased by specific measures.

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[307] Ms. Hooper's evidence was that these two termination event triggers in particular were designed to effectively stop the transfer of additional receivables once the portfolio does not perform as well as it did in the past. The Delinquency Ratio was designed as an early warning system. Given that delinquencies can be expected to increase in advance of seeing losses increase, the termination right was designed to occur early enough that one is not going to have very material losses. According to Ms. Hooper's testimony, the Loss Ratio and Delinquency Ratio combined should allow the purchaser to stop acquiring additional receivables in time to not suffer materially higher losses than expected based on past performance. Ms. Hooper testified that she and her team at TDSI looked at both the historical loss and delinquencies in the McKesson Canada receivables pool as part of its engagement in preparing the TDSI Report.

[308] I do not necessarily accept the TDSI Report's opinions on the reasonableness, normalcy or arm's length nature of these two termination triggers in the RSA. Indeed, I would expect they might suffer from the same shortcomings as affects the rest of the TDSI Report, which is primarily that the RSA is not a securitization and is in that respect outside the expertise of Ms. Hooper and her group. In any event, given that these two ratios are defined in the RSA to include McKesson Canada financial information that is not in evidence, or at least certainly not adequately explained in the evidence, and that these defined ratios and their volatility leading up to the RSA were not put in evidence, I can not reach the conclusion that I am satisfied with the TDSI's Report's conclusions on their terms.

[309] However, I fully accept Ms. Hooper's explanation of their purpose and effectiveness as designed. That is, I find that the purpose and effect of the Delinquency Ratio termination event trigger and the Loss Ratio termination event trigger in the RSA were designed and fully expected to limit MIH's risk of purchasing any day's receivables from McKesson Canada that could be expected to have materially higher losses than had been experienced on the pool historically.

[310] The historic loss performance on McKesson Canada's receivables pool was in the range of 0.04%. I conclude from all of this that a notional arm's length MIH would have been able to and would have terminated its obligations under the RSA before it was obligated to purchase receivables that would have a materially higher credit loss risk than something in the range of 0.04%.

[311] Allowing for a 50% to 100% increase as an extremely generous interpretation of what Ms. Hooper could have meant by material (in part to compensate for the lack of elegance in this approach), I find that a notional arm's length MIH's credit loss risk on its continuing purchase of receivables is that, at some future point in the RSA term (but not in the very short term), it could have

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purchased about four months of receivables with an anticipated write-offs to sales number in the range of 0.06% to 0.08%. These lesser quality receivables would only be expected to have been purchased in the last four months of the RSA prior to termination. Those bought on December 16, 2002 and for the other months prior to the four months preceding termination could continue to be expected to be of a better quality.

[312] Using this approach, the Court concludes that a Loss Discount component of the Discount Rate in the range of 0.06% to 0.08% is at the generous end of what a notional arm's length MIH and McKesson Canada would agree to.

[313] This range is consistent with the number arrived at by Mr. Finard's structured finance approach. That approach identified that the 0.04% historic write-offs to sales number for McKesson Canada's receivables pool was comparable to Moody's published information for companies rated between A and Baa, which in turn had credit risk spreads according to TDSI of 0.50% and 1.00% per annum, and was computed on a weighted average basis by Mr. Finard at 0.68%. Once adjusted for a DSO of 30 days, a 0.68% annual credit spread reflects a discount of 0.06%.

[314] For these reasons, the Court finds based upon what evidence was provided that an arm's length Loss Discount for purposes of the RSA would be in the range of 0.06% to 0.08%.

[12] In the Factum the Appellant stated, at paragraphs 73 and 83 to 89:

73. . . . the Trial Judge disregarded the consensus view of the taxpayer and the Crown and made a critical error: in his hypothetical transaction, he believed that he was required to assume that the hypothetical purchased somehow would control the supposedly unrelated hypothetical seller. . . .

83. The "loss discount" – the amount notionally included to compensate the purchaser (here, MIH) from assuming credit risk – was a key component in the discount rate. It is clear from the Trial Judge's analysis of this component that he concluded that MIH assumed no material risk in the transaction because, in the Trial Judge's misconstrued hypothetical, MIH could have triggered a termination event whenever it chose by simply changing McKesson Canada's name, for example. In so finding, the Trial Judge simply ignored the relevant contractual terms agreed by the parties and expressed in the Agreement, and the actual functional allocation and assumption of risk by the parties.

84. Such an approach may be entirely legitimate in a case involving GAAR, or paragraph 247(2)(b). But neither of these grounds for challenging the

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Agreement was advanced by the Crown; they are not relevant to this litigation. The Trial Judge, without acknowledging it, has challenged whether the written terms of the Agreement reflected the "real" allocation of risk between MIH and McKesson Canada. He has effectively treated the Agreement as a sham, without legal authority or evidentiary basis. Indeed, the weight of evidence adduced by the Crown suggested that a holdback or reserve of about 20% (or $90 million) would have been needed in order to eliminate MIH's risk.

85. In assuming his own version of the facts with respect to risk, and re-writing (by ignoring) critical terms of the Agreement related to risk, the Trial Judge priced a transaction that never occurred. The loss discount then identified and relied upon in the Trial Judge's Reasons can only be reconciled with a transaction in which the purchaser (here, MIH) assumes no risk. The Trial Judge says:

> I conclude from all of this that a notional arm's length MIH would have been able to and would have terminated its obligations under the [Agreement] before it was obligated to purchase receivables that would have a materially higher credit loss risk than something in the range of 0.04%...
>
> Using this approach, the Court concludes that a Loss Discount component of the Discount Rate in the range of 0.06% to 0.08% is at the generous end of what a notional arm's length MIH and McKesson Canada would agree to.

86. At no point in the trial did the Crown assert that, at arm's length, MIH "would have been able to" terminate its obligations under the Agreement whenever losses exceeded a "materially higher" threshold of 0.06%-0.08%. Nor did any of the Crown's expert witnesses provide evidence that would tend to support this erroneous proposition.

87. This assertion is in any event patently wrong. In fact, MIH was obliged under the Agreement to continue funding McKesson Canada for up to $900 million for the full five year term absent a defined termination event – including if losses increased significantly. The Trial Judge's suggestion that MIH "would have been able to" terminate the Agreement if losses exceeded 0.06-0.08% is palpably wrong. The threshold established under the plain terms of the Agreement for such termination was in fact 0.25%, not 0.06-0.08%. In fact, recent history was that losses exceeded 0.06%. How could MIH have been "able to" terminate if losses reached, for example, 0.10%?

88. Given that it is plainly inconsistent with the terms of the Agreement, the Trial Judge's assertion that, in the hypothetical transaction, a notional arm's

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length MIH would have terminated its obligations under the Agreement if losses exceeded 0.06%-0.08%, can only be explained as follows: The Trial Judge assumed that a notional, arm's length MIH would control McKesson Canada, and would therefore be in a position to trigger a termination event under the Agreement by causing McKesson Canada to default under its terms. This is so notwithstanding the Trial Judge's contention, at paragraph 132 of his Reasons, that "in this case, I do not need to [consider notional continued control] in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment".

89. Indeed, in at least two place in his Reasons, the Trial Judge alludes specifically to MIH's ability – *qua* shareholder of McKesson Canada – to trigger termination of the Agreement: At paragraph 26, he notes the "termination events were not limited to things in McKesson Canada's control, and included events in the control of its direct and indirect shareholders/parent corporations". At paragraph 129, excerpted above, the Trial Judge asked himself "[i]n looking at transactions like the [Agreement], does the Court assume the notional arm's length contract to change McKesson Canada's name, sell McKesson Canada, or do something else in order to trigger a termination event at will?" The Trial Judge did not, in fact, leave this question for another day, as he claims to have done. Rather, the Trial Judge answered this question in the affirmative in his analysis of the loss discount. This critical legal error undermines the Trial Judge's entire analysis.

[13] In these circumstances, I am deeply troubled by the statement by the Appellant in paragraph 89 of the Factum that "[t]he Trial Judge did not, in fact, leave this question for another day, as he claims to have done".

[14] I am similarly deeply troubled by the statement by the Appellant in paragraph 84 of the Factum that "[t]he Trial Judge, without acknowledging it, has challenged whether the written terms of the Agreement reflected the "real" allocation of risk between MIH and McKesson Canada".

[15] I am equally concerned by the statement of the Appellant in paragraph 88 of the Factum that "[t]his is so notwithstanding the Trial Judge's contention, at paragraph 132 of his Reasons, that "in this case, I do not need to [consider notional continued corporate control] in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment".

[16] There are no polite qualifiers in any of theses three sentences.

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[17] These allegations of the Appellant are said in paragraphs 85 and 88 of the Factum to critically turn upon there being no other way to reconcile what I wrote, and that I therefore must have in fact done something different than I said I was doing.

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[18] It appears to me that the Appellant has chosen to challenge my truthfulness, honesty and integrity in my Reasons in order to allow it to advance the argument that I was somehow, notwithstanding what I clearly said about ongoing corporate control issues being able to put entirely aside in deciding the appeal, (and what I clearly said about the Delinquency and Loss Ratios triggers and Ms. Hooper's evidence on their objective and effect) somehow doing just that.

[19] I believe that paragraphs 307-310 of the Reasons are very clear and do not permit of ambiguity, uncertainty, or any lacuna or leap for the reader to fill in. The only termination rights discussed were those triggered by breaches of the Delinquency Ratio and the Loss Ratio as defined and set out in the RSA. It is equally clear that I grounded my findings on the preceding paragraph which summarized the testimony of Ms. Hooper of TDSI, the Appellant's witness who issued the TDSI Report, on the purpose and effectiveness of these two termination right triggering events. There is no basis for the Appellant stating that the only way to reconcile my conclusion is that I did something entirely different, that I specifically said I wasn't doing, which was looking at continuing corporate control rights such as changing the company's name.

[20] For these Reasons, it is my view that the Appellant has wrongly accused me of being untruthful, dishonest and deceitful. I am simply unable to read their Factum or the Reasons any other way on this point.

[21] I believe they have wrongly written these things in the Appellant's Factum about me intentionally under the guise of fearlessly advancing and representing the interests of McKesson Canada. I believe this clearly crosses the line as to what is appropriate.

[22] For purposes of deciding whether or not to recuse myself, it is my opinion and my view of the parties and their counsel that are relevant, along with what a reasonable person would apprehend my views and opinions to be. Whether my reading of the Factum is correct or not, like whether my decision on the merits is

correct or not (and whether or not I am reading the Factum correctly), remains for the appellate court and others to decide.

[23] On a related point, it is surely apparent to the Appellant from the evidence of its own witness, Ms. Hooper, the TDSI Report, and the Reasons, that historical losses expressed as write-offs to sales (historically in the 0.04 cents on the dollar range), are distinctly different in material ways from the Delinquency Ratios and the Loss Ratios which are defined in the RSA and which triggered MIH termination rights under the terms of the RSA. There is nothing whatsoever that appears unclear about this from paragraphs 194 and 306 and 307 of the Reasons. The Appellant does not in its Factum attempt to suggest or explain why that is in fact not the case.

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[24] This appears to me to have been done in order to advance confusion not clarity or accuracy as they write in paragraph 87 of the Factum: "[t]he Trial Judge's [assertion] is palpably wrong. The threshold established under the plain terms of the Agreement for such termination was in fact 0.25%, not 0.06-0.08%. In fact, recent history was that losses exceeded 0.06%. How could MIH have been "able to" terminate if losses reached, for example, 0.10%?" I find it exceedingly hard to believe that the Appellant could remain unaware of the difference between historical loses computed as write-offs to sales on the one hand, and either a delinquency ratio which measures time to receive payment, or a deemed 90 day delinquency in computing loss ratios. (Indeed as noted below, they clearly understand this in other parts of their Factum and in the Appellant's written submissions at trial).

2. Where it Appears That the Appellant States in its Factum Untruthful Things About the Trial Judge

[25] Most of my concerns under this heading are rooted in the very first paragraph of the Appellant's Factum which states that:

> 1. In this case, the Trial Judge discarded the case pleaded and argued by the parties and decided the appeal on grounds that were not raised in the pleadings or argued at trial, but made their first appearance in the Trial Judge's Reasons well after the trial was over.

a) The Predominant Purpose and Intention was to Reduce McKesson Canada's Canadian Tax Liability

[26] In paragraph 18 of the Reasons I wrote that "the predominant purpose of McKesson Canada entering into the transactions was the reduction of its Canadian tax on its profits." I return to this in paragraph 274 of the Reasons using very similar language:

> [274] I find as a fact that the predominant purpose and intention of McKesson Canada participating in the RSA and related transactions with the other McKesson Group members was not to access capital or to lay off credit risk. Those were results of the transactions but did not motivate them. The purpose was to reduce McKesson Canada's Canadian tax liability (and therefore McKesson Group's worldwide tax liability) by paying the maximum discount under the RSA that McKesson Group believed it could reasonably justify. For the McKesson Group this appears to have been much more of a tax avoidance plan than a structured finance product. No reason was ever given for wanting to transfer risk to Luxembourg.

[27] In paragraph 7 of the Factum, the Appellant states:

> 7. First, the Trial Judge made key factual findings on matters that were not raised in the assessment or put in issue at trial: . . . that the receivable sale was devoid of commercial purpose and contrived to achieve a tax benefit. There was next to no hint at trial that these issues were of concern to the trial Judge. . . .

[28] The Appellant restates this in paragraph 42 of its Factum:

> 42. The Trial Judge's analysis and ultimate decision rely critically on three key propositions, each of which amounts to an error of law: . . . that the receivable sale was entirely tax-motivated and devoid of commercial purpose. . .

[29] In paragraph 43 of the Factum, the Appellant again states that this tax motivation proposition was "not put to McKesson Canada in the trial of this matter."

[30] The Appellant restates this another time in paragraph 53 of the Factum in Part B "The Trial Judge Erred In Law By Relying On Propositions That Were Never Put To McKesson Canada": "the receivable sale was entirely tax motivated, and devoid of commercial purpose."

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[31] This point is referred to yet again in paragraph 65 of the Factum: "and, as the matter of motive was never in issue in the litigation, McKesson Canada was deprived of any opportunity to lead evidence and make submissions on the point".

[32] In paragraph 67 of the Factum, the Appellant continues this with "the taxpayer's motivation was never in issue . . . ."

[33] In paragraph 70 of the Factum, the Appellant states "...the Trial Judge's analysis is infected by his pejorative and unfair comments about McKesson Canada's motivation, a matter that was . . . never argued at trial."

[34] Was the issue never put to the Appellant? Was the Appellant deprived of the opportunity to address this in the proceedings? Let us turn to the record of the trial proceedings.

[35] On the third day of this trial (October 19, 2011), during the third day of testimony from the Appellant's first witness, Mr. Brennan, after listening to the Vice-President Tax's testimony in-chief, I was called upon to respond to an objection by Appellant's counsel to a line of questioning by Respondent's counsel in cross-examination. The objection is raised, debated and addressed on pages 58 through 62 of Volume 3 of the Transcript. On page 62 I said:

> And, frankly, this whole line of questioning, I note this was a tax oriented transaction, they did it for tax purposes. Mr. Brennan was absolutely clear about that in direct. And there is not a VP of tax in the world who didn't think about tax consequences.

[36] Appellant's counsel did not then or later challenge, address or even speak to my clear and early communication of my overall impression of his witness' testimony as lead by him in-chief. Appellant's counsel did not ask any questions at all in his opportunity for redirect.

[37] In course of the first morning of Appellant's oral argument, on January 31, 2012, I said to Appellant's counsel, who had just completed his summary of the background to the RSA and was turning to the RSA itself (at page 3514 of Volume 22 of the Transcript):

> Sorry, before the RSA, I believe in-chief Mr. Brennan acknowledged [that] with an Irish company, a couple of Luxembourg companies and a Nova Scotia unlimited liability company [,] this was a tax-driven structure. [While] it had the commercial purpose as you've outlined [,] I thought it was in-chief that he acknowledged that taxes play a part. Not that anything turns on it."

[38] To this, counsel's response (at page 3515) was "[o]ne of the advantages of this structure was tax advantages for sure. . . ."

[39] In the Appellant's first Supplemental Written Submissions filed with the Court after the hearing (those of March 2012), the Appellant devoted pages 39 to 43 to addressing, in counsel's words the "related question that arose in argument whether the approach being advocated by the Appellant, if accepted by this Court, might appear to condone abusive structures". In these five pages the Appellant relies upon the *Duke of Westminster* principle, and argues that the RSA transactions compare favourably to "plain vanilla" planning.

[40] It appears very clear to me that, while the Appellant may have every right to seek to challenge the evidentiary foundation of my conclusions and findings, they have simply told clear untruths about me and what I did or did not say when they state that McKesson's tax motivation was not ever put to them during the trial and that they were therefore deprived of any opportunity to address it.

[41] I certainly believe I clearly put it to Appellant's counsel during his first witness' testimony, and raised it again with counsel at the start of his oral argument. The Appellant made written submissions on the issue of tax planning as he acknowledges it arose in argument. One can read what they will into the Appellant's decision not to argue the point or conduct redirect examination, but it appears to me to be patently untrue that I did not raise it with the Appellant early, at times when they could respond with additional evidence, with a summary of the evidence to change my impression, or with whatever legal argument they chose.

[42] I would also note that I never said in my Reasons that the RSA transactions were devoid of commercial purpose. I believe it would take a very tortured reading of paragraph 18 of my Reasons (above) to find any support for that allegation, which is similarly repeated throughout the Factum.

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[43] Further, I remain of the view that my Reasons accurately describe the evidence on motivation and use of funds where I wrote at paragraph 9 that:

> [9] At that time, McKesson Canada had no identified business need for a cash infusion or borrowing, nor did McKesson Group need McKesson Canada to raise funds for another member of the group. There was a so-called double-dip Nova Scotia Unlimited Liability Company or ULC financing which was coming to maturity and would need to be recapitalized in some fashion; this was for a fraction of the amount of the new receivables facility. McKesson Canada did not approach its traditional lenders or conventional financial institutions (nor anyone else) before entering into its own non-arm's length receivables facility and related transactions. The McKesson Group had previously put in place a tax-effective international corporate structure and inter-group transactions that allowed it to amass very large amounts of cash in Ireland. The non-Canadian members of the McKesson Group were able to use this money to finance all of the purchases of McKesson Canada's receivables under the facility.

And where I wrote at paragraph 214 that: "There was no evidence that McKesson Canada or McKesson Group was even interested in considering factoring its receivables to any arm's length financial institution player in factoring markets, presumably because profits would then have left the McKesson Group."

And where I wrote at paragraph 274 that: "No reason was ever given for wanting to transfer risk to Luxembourg."

And where I wrote at paragraph 348:

> [348] There was no satisfactory evidence tendered that would suggest that McKesson Canada was driven to seek receivables financing from a high cost of funds/high cost factoring company and not a better funded/lower yield/lower cost major financial player described in the taxpayer's own evidence. I was not, however, provided with evidence of the cost of capital associated with receivables factoring by major well-funded players.

b) The Reifsnyder Evidence on Credit Risk Insurance Expertise, Availability, and as a Means to Address Risk in Structured Finance Products, and the Absence of Evidence on Costs or Pricing Thereof

[44] The Appellant states in paragraph 37 of the Factum:

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> 37(e) Similarly, the Trial Judge asserts that "[t]here is credit risk or credit default insurance available in the market from arm's length commercial players in the financial markets," and that he "found it somewhat surprising that neither side tendered any such evidence." With respect to Mr. Reifsnyder, he states "[n]otwithstanding his extensive knowledge, experience and presentations on credit insurance for structured finance transactions, and his reference to its availability in his testimony, Mr. Reifsnyder seemingly never considered the cost of insuring the receivables in his pricing approach, nor to test the results of his approach. Nor did he explain why he did not do so". This point was never raised at trial. . .

[45] The opening words of paragraph 37 of the Factum says this concern was ". . . never articulated at trial, such that McKesson Canada had no opportunity to respond to them. . . ."

[46] Was this never raised at trial? Did the Appellant have no opportunity to respond? Let us again turn to the record of the trial proceedings.

[47] At the outset of Mr. Reifsnyder's testimony during the trial, Appellant's counsel asked him to tell the Court what kind of consultant work he was doing. His response included (at pages 833-4 of Volume 7 of the Transcript):

> And now with my wife I am building a financial advisory risk management business for small businesses and individuals, focusing primarily on insurance solutions.

[48] From page 851 through page 859 of Volume 7 of the Transcript for October 27, 2012, Appellant's counsel led Mr. Reifsnyder through only his credit risk insurance experience with securities and structured finance over the period 1997 to 2008 working in senior roles for significant players in this market, namely,

- Capital Markets Assurance Corporation or CAP MAC and MBIA Insurance Corporation, where he ran the group that was "providing insurance on mortgage back securities and CDOs to people that had bought pieces of those without insurance and came to us and said would you please insure it"; he described CAP MAC and their leaders as having "a vision to take that kind of insurance [on municipal bonds and securities issued by public authorities] into the structured finance market. So they focused very heavily on insuring transactions, financial transactions that were structured finance

transactions: so receivables, loans, asset back deals of all sorts, that was their specialty";

- CFIG, where he "ran teams that insured financial transactions", and;
- a Bear Stearns subsidiary that was "intended to function like an insurance company taking on risks to corporate asset backed or CDO type risks in the financial market by writing credit derivative contracts."

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Appellant's counsel later took Mr. Reifsnyder back to confirm that while at CAP MAC and MBIA, he worked on Canadian-related deals, being U.S. commercial paper deals managed by two of Canada's major banks.

[49] Later in his testimony (at pages 930 through 933 of Volume 9 of the Transcript), Appellant's counsel asked Mr. Reifsnyder to "elaborate about the different ways in which receivables get sold and what different structures can or cannot be used to address the issue of risk and price." In answering this question, Mr. Reifsnyder described three "ways you can treat risk in transactions like this". And later he continued:

> The third thing is you can sometimes [i]nsure away the risk in a transaction like this. You can get a third party to [i]nsure the performance of the receivables or the performance of some set of the assets. You can transfer the risk by reallocating risk in a deal to a third party that agreed to assume the risk for some price or you can absorb the risk.

[50] With respect to argument, there were several exchanges during the submissions of Appellant's counsel that addressed this issue.

[51] On January 31, 2012, the first day of oral argument, the following exchange appears on page 3651 of Vol 22 of the Transcript:

> Justice Boyle: McKesson has paid a remarkable premium to do this for the benefit of primarily shedding risk, including the risk of going up to 100% of receivables, but that is shedding risk. It's a lot more than the McKesson US borrows at. It's a lot more than what they were paying previously to the extent they used this money to refinance and aren't they paying much, much more to offload risk? And I don't have evidence of what the costs of laying off that risk would be. There are all sorts of other ways of moving the risks to see if X + Y should equal Z.

Mr. Schabas: There could be that evidence. The Department of Justice hasn't called that evidence to suggest there was another alternative like the one you suggested that would be less expensive than that.

[52] Later, at pages 3653 and 3654 of the Transcript, this discussion continues:

Justice Boyle: Don't I have evidence that McKesson Canada did a transaction when they needed [funds] to refinance with a cost of funds of Z?

Mr. Schabas: Sure.

Justice Boyle: I have evidence that their cost of funds up until then was X; McKesson US's rating and its facility which included a tranche available to Canada was in the range of X so I have a big delta between X and Z we'll call Y, <u>and I'm having trouble seeing there was more than risk transfer they got for Y.</u> So I am on the evidence up until there and can't Boyle say[:] what evidence do I have of whether Y is reasonable? Because that's a surprising delta.

Mr. Schabas: No you can't start to get into – I submit you're getting into the slippery slope of saying this isn't a transaction that would be done, which has not been pleaded and on the law is not before you. The issue is there is this risk transfer, there is this virtually 100% financing and the benefits that come with it. The only thing left is to say what is the arm's length price? And the evidence before you is the arm's length price is what [Ms.] Hooper said it would be. You have to get away from the feeling of discomfort, well, they could have borrowed money at a lower rate so the financing charges would have been lower, but there are other benefits. It's not a comparable transaction. The economists say I can't compare this. Both of them do. That's the evidence. There is the evidence of a risk transfer and that's what this is about. None of these other transactions transfer risk and the experts are saying the price for transferring the risk in an arm's length transaction is this. If there was another comparable transaction that would transfer the risk it hasn't been led.

So you don't have any basis to come to the conclusion there is some other lower price for the risk transfer. You just have the evidence that you have.

Justice Boyle: Does that bring you to what is the onus on the taxpayer [to] show the assessment is wrong?

[53] This exchange continues for the next 4 pages of the Transcript. This continued exchange included my observation to Appellant's counsel: "We weren't identifying and avoiding risk. We need to price risk". It included Appellant's counsel reminding me that Mr. Reifsnyder "acted for buyers and sellers and issuers

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and insurers of risk". It included my questioning Appellant's counsel as follows on Mr. Reifsnyder's use of a bond fund index: "Remind me, did he say he'd ever seen that done before or had done it himself before in all his experience?". It ended with the following exchange (at page 3657-58 of the Transcript):

> Justice Boyle: In direct, did he tell me this is how markets price risk; in a private deal they would use a junk bond? He doesn't say that. It's not up to Mr. Laperriere in cross. You're to be telling me on what arm's length parties would have done.
>
> Mr. Schabas: Mr. Reifsnyder said I looked at this. I looked at the credit quality. I had to figure out how do I price this. It's not a securitization. I'm not structuring a reserve. I've got these designated obligors which imposes risk and there is a credit risk there. I know how to do this. I have an unconcentrated pool of small obligors. What do I do for that? I think about market. Mr. Laperriere didn't go to him and say "why didn't you look at something else". My job is to present him [Mr. Reifsnyder] and explain what steps he followed and how he got there. It's not my job to say why didn't you do this and that.
>
> Justice Boyle: It's your job and his to tell me what terms and conditions would have been made between persons dealing at arm's length. I'm sure if he used this regularly in pricing private deals with unrated people and told them they were junk I would have heard about it.

[54] This discussion picked up again later. Pages 3669-70 the Transcript records the following:

> Justice Boyle: At 50,000 feet, the one paragraph summary of the issue raised by these facts is McKesson begins with a cost of funds nearing 5% and they do this transaction and the cost of the terms and conditions have multiples of that. Say it is 5 and 20, we have a 15, a quadrupling for risk. So am I wrong to think somehow I need to be made comfortable that paying that 15 percentage point premium was a reasonable valuation of the cost to McKesson of laying off that risk because that is what a market that takes on that risk does? And aren't [there] insurance markets and the whole credit derivative - -

[55] Later on February 1, at page 3785 of Volume 23 of the Transcript, the following is recorded:

> Justice Boyle: And I'm charged with deciding if McKesson paid too much to move that risk: Isn't that what I am charged with?

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Mr. Schabas: I think what you just said, I would agree with.

[56] It appears very clear to me that the issues of Mr. Reifsnyder's considerable expertise in credit risk insurance of receivables and other securities and structured financial transactions, and the availability of credit risk insurance to transfer risk with respect to receivables, was raised by the Appellant in evidence and in argument, and that Appellant's counsel took each as far as he wanted to, entirely unrestrained by me. For the Appellant to state in their Factum that I am the one who raised these issues, without them ever being raised at the trial, and that I raised them independently for the first time in my Reasons, appears to me to be the Appellant again telling clear untruths about me.

c) Notional Continued Corporate Control versus Termination Rights

[57] In paragraphs 42 and 44 of the Factum, the Appellant states:

> 42. Although the Trial Judge purports to proceed in accordance with the above principles, in fact the Trail Judge's calculation of an arm's length discount rate flows from a functional analysis premised on MIH assuming no material risk . . . The Trial Judge's analysis and ultimate decision rely critically on three key propositions . . .
>
> (iii) that, in applying paragraph 247(2)(a), and more specifically, in constructing the hypothetical transaction against which to compare the McKesson Canada-MIH transaction, the hypothetical purchaser would control the hypothetical vendor.
>
> [. . .]
>
> 44. As for proposition (iii), in determining whether arm's length parties would agree to the discount rate agreed by McKesson Canada and MIH, the Trial Judge said that the notional arm's length purchaser would have the power to "... change McKesson Canada's name, sell McKesson Canada, or do something else in order to trigger a termination event at will." . . .

[58] In paragraph 10 of the Factum, the Appellant asserts that the trial judge made a ". . . finding that MIH could effectively terminate the Agreement at will as a result of its status as McKesson Canada's sole shareholder".

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[59] The Appellant also sets out in paragraph 38 (b) of the Factum that one of the four specific issues in their appeal is whether the Trial Judge erred when he held that he was to assume the purchaser MIH controlled the seller McKesson Canada.

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[60] In paragraph 52 of the Factum, the Appellant states:

> 52. . . . Instead of deciding the case based on the way it was framed in the pleadings and evidence led at trial, he devised new theories, purporting to conduct quantitative analysis of his own . . . It is difficult indeed to discern much of a connection between the proceedings at trial and the independent analysis contained in the Trial Judge's Reasons.

[61] In paragraph 73 of the Factum (quoted from above) the Appellant wrote that a "critical error" made by the trial judge is that "in his hypothetical transaction, he believed that he was required to assume that the hypothetical purchaser somehow would control the supposedly unrelated hypothetical seller."

[62] Again, we can turn to the record of the trial proceedings to see if the judge said or held such things, made such a finding, or decided this issue otherwise than based on the evidence led at trial.

[63] The issue of notional continued corporate control rights and the termination event triggers were addressed during the course of the trial in at least the following exchanges.

[64] On January 31, pages 3540 and 3541 of Vol 22 of the Transcript record:

> Justice Boyle: If we had an open arm's length Dutch auction of the right to be MIH, the buyer --
>
> Mr. Schabas: But you don't. You have to accept the fact the guarantee comes from the parent that wholly owns and controls MIH. That's why I went to the transfer pricing methodology and the law that says you have to not just take the agreement, but accept the underlying facts that the guarantee comes from its wholly owned parent. We don't disregard that aspect of the underlying facts.
>
> Justice Boyle: What do we do with the flip side? It's a 5 year agreement, whether it is 5 year risk is [dependent] on how we define that, it's a 5 year agreement but terminable upon a number of events, including a change of name from McKesson. Since the buyer is the shareholder and has the right to change the name, do I

> assume that the arm's length buyer gets to terminate on demand by changing the name? Does the change of name go from the parent to my theoretical arm's length person?
>
> Mr. Schabas: I suppose it would in the sense it's economically relevant.
>
> [. . .]
>
> Justice Boyle: One of the terms defined, the second last one, is the change of name to remove the word "McKesson". Does my theoretical arm's length parent have the right the parent has to change the name? Do they have the right the shareholder parent has to access underlying financial information about the obligors that aren't provided for in the RSA?
>
> Mr. Schabas: Potentially, and I suppose that would be true in any transfer pricing case.

[65] At pages 3544 and 3545 of the Transcript, the following exchanges were recorded:

> Justice Boyle: Taking that to an arguably logical point, if I accept that, wouldn't virtually every Canadian subsidiary, private company, a subsidiary of a foreign multi-national, public or otherwise, be re-pricing to 5 year junk rates? We are not going to give you any information under the loan agreement, you are buying a pig in a poke under the loan agreement. You have access to everything else qua shareholder. You can only look to the loan agreement. G.E. will be redoing their deal the day after my Reasons come out. Everybody will be re-pricing to basically junk bond status.
>
> Mr. Schabas: I want to think about my answer to that.
>
> Justice Boyle: That's the difficulty I am having, why is there a compelling distinction? And I think you explained it, but why is there a compelling distinction between accepting the related group shareholding obligations and rights from the buyer's point of view but breaking it at the buyer seller, and I think your position was because the Act tells you that's the one relationship you have to assume is arm's length?
>
> Mr. Schabas: Right.
>
> Justice Boyle: If I assume that, why would you have conceded the buyer must also get the right to rename McKesson something else? Because that only comes from the same relationship?

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Mr. Schabas: It does.

Justice Boyle: I think 247 looks really simple, and maybe in application to a widget or drug it may be, but when we get into financial services, it gets a lot more complicated. If you look at G.E., if you were right, how would this Court or the Court of Appeal have spent time addressing implicit support in G.E.? The implicit support is based upon G.E. being G.E.'s sub?

Mr. Schabas: I'll come back to this. I want to reflect on this.

[66] Appellant's counsel returned to this beginning at page 3598 of the Transcript:

Mr. Schabas: Related to this is the other question you left me with, which relates more generally to the arm's length principle and the termination provision, the parent company can change their name and terminate at any time. First, I would comment a provision like that is a provision arm's length parties would agree to.

[67] This exchange carried on through pages 3599, 3600 and 3601, wherein Appellant's counsel makes it clear that he doesn't think he can say anything more on this issue, and that this concludes what he wanted to say on the subject.

[68] The issue is raised again on page 3634 of the Transcript:

Justice Boyle: The question I have been posing a couple of times today is this: It troubles me, whether it's non or low investment grade as between two experts, what is to prevent Boyle from stating the obvious, that MIH knows exactly the credit risk and position of MCC? We all know MCC is not rated because MCC didn't need a rating because MCC isn't in the public markets. So why would I be inclined to think either of those two approaches, low investment grade or non investment grade, are my two choices?

Mr. Schabas: Because that's the evidence before you.

Justice Boyle: That's the expert evidence. It's opinion. Am I bound to experts?

Mr. Schabas: With respect, your Honour, I think you are bound to decide this case by the evidence. That's your job, to hear the evidence, not bring in some other theories and other approaches not defined by the pleadings on which evidence is not led. And that's why I said at the outset this is about laying the evidence before you as a factual matter and deciding which evidence is more persuasive and compelling. That's what a trial is. And you have to decide this case on the

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> evidence. And that's the evidence that has been presented to you, for example, on this very point.
>
> Justice Boyle: It's not baseball arbitration; I don't have to choose between your expert and Mr. Laperriere's expert on this point, do I?
>
> I also have evidence that MIH is the parent and holds [100]% of shares of MCC and implicit in this is full access to its books and records in real time.
>
> Mr. Schabas: True enough. You have to divorce that from your assessment in this case.

[69] In one set of the Appellant's Supplementary Submissions filed after the hearing (that of March 2012), the Appellant returns to this discussion in argument and writes:

> 22. In oral argument, the following question (paraphrased here) was raised regarding the scope of the hypothetical situation: If the hypothetical requires the Court to treat the parties as if they were dealing at arm's length, is the Court required (or even permitted) to take account of any economically relevant factors that derive specifically from, or are rooted in, the non-arm's length relationship between the parties?

[70] Appellant's supplemental submissions on this question run from page 9 to page 18. After quoting from the *General Electric* case on the very question, Appellant's submission was:

> 24. Accordingly, <u>all circumstances, including those that derive from, or are rooted in, the non-arm's length relationship, must be taken into account</u>; the only fiction is that the relationship between the parties is replaced with the assumption that the parties are independent.

[71] The Appellant's submissions continued (in paragraph 31) that the application of this to the RSA transactions was the "the analysis must assume that, lacking any special relationship, each party would seek to negotiate a discount rate that maximized its own position."

[72] In my view, the exchanges during the trial are entirely consistent with and reflected in paragraph 128 through 132 of my Reasons, above. Further, as described already above, the exchanges at trial and these paragraphs of my

Reasons do not relate grammatically, actually or historically in any way to Ms. Hooper's evidence of the objective and effectiveness of the termination right trigger events based upon delinquency ratios and loss ratios[2].

d) The Trial Judge's Comments on Credibility of Witnesses and Weight, Including Expert Witnesses Generally and Mr. Reifsnyder Specifically

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[73] In paragraph 9 of the Factum and the footnote to this sentence, the Appellant states:

> 9. . . . It is simply wrong to call into question the credibility and integrity of a party for failing to answer a case that was not put to it.
>
> It is noteworthy that the Crown never argued that there was any issue as to the credibility of McKesson's witness, nor did the Trial Judge indicate any such concern during the trial. In fact, the Trial Judge's contemporaneous observation of the witnesses' credibility was as follows: "subject to ruminating until I affix my signature at the bottom of the page, I don't have a whole lot of doubts about the credibility of any of the witnesses in this trial …" … It appears that only after reframing the dispute and issues, and examining the evidence through this new prism, did the trial judge find that the witnesses were not credible.

[74] What I said to Appellant's counsel according to pages 3738 and 3739 of Volume 23 of the Transcript was:

> I can say this at this stage, subject to ruminating until I affix my signature at the bottom of the page, I don't have a whole lot of doubts about the credibility of any of the witnesses in this trial. I do question the relevance of parts of their testimony on certain points to how I'm currently viewing it. It doesn't mean that what they were telling me wasn't correct and was not credible. I find it less helpful than they

---

2 Which I would again note are clearly different from the historic loss ratio results computed as write-offs to sales. Indeed, notwithstanding the Appellant's apparent factual confusion in paragraph 87 of the Factum discussed above, it appears to me to be clear from the Appellant's footnote 17 of the Factum that they do in fact understand the difference between delinquency ratio and loss ratio on the one hand and loss computed as a function of write-offs to sales on the other. Their clear understanding of the difference also appears evident throughout the Appellant's additional written submissions of April 2012 at pages 81 to 83 under their heading "The loss ratio termination trigger remains meaningful."

> seem to think it is or I'm being asked to accept it as. So I have weight and relevance issues, but I don't have any fundamental credibility issues with anybody at this stage, and it would be bizarre, it seems to me, for me and you to have agreed to allow a Crown's expert in, and then for me to find there was no credibility attached to anything they said for the first reason given they had this limited experience. That goes to weight.

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[75] As detailed below, this was not the only exchange on the relationship between credibility and weight as Appellant's counsel several times advocated that I should find each of the Respondent's experts to not be credible at all or to attach no weight at all to anything they said.

[76] In paragraph 37(c) of the Factum, the Appellant states:

> McKesson Canada's expert, Mr. Reifsnyder is dismissed by the Trial Judge as "in large measure a partisan advocate quick to point out the specks in the Respondent's expert reports and downplaying, if not refusing to acknowledge, the weak points in his own. That conclusion is flatly inconsistent with the Trial Judge's comment in closing argument that "subject to ruminating until I affix my signature at the bottom of the page, I don't have a whole lot of doubts about the credibility of any of the witnesses in this trial. . ."

[77] My concern quoted in part in paragraph 37(c) of the Factum about Mr. Reifsnyder coming across as being in large measure a partisan advocate appears in paragraph 245 of my Reasons as subparagraph (r). The seventeen subparagraphs preceding that, (a) through (q), detail specific substantive concerns with his chosen approach and methodology detailed in his expert report and discussed in his supporting testimony at trial. Virtually all of these concerns came out at trial in the evidence, and/or in argument, raised either by Respondent's counsel in cross-examination and/or in argument, or by the trial judge in questioning the witnesses, or as a concern raised with Appellant's counsel during argument. Subparagraph (r) is the only subparagraph which briefly addresses the contrast between Mr. Reifsnyder's approach in his rebuttal reports and his testimony critiquing the Respondent's experts and their reports, with his own performance when his opinion or supporting testimony was questioned. I did not list specific examples in my Reasons and it would be inappropriate to supplement my Reasons at this stage. However, the record and Transcript speak for themselves.

[78] Paragraph 9 of the Appellant's Factum continues:

> As for the trial Judge's sharp conclusion that "never have I seen so much time and effort by an Appellant to put forward such an untenable position so strongly and seriously" McKesson Canada says that, had the Trial Judge focused on the propositions pleaded and contested by the parties, instead of reframing the case in his Reasons after the trial was over, he would not have found the taxpayer's case to be without merit.

[79] We need turn to the Reasons to see what the trial judge did say, and turn again to the record of the proceedings to see if the trial judge indicated any such concerns in the course of the trial.

[80] The Appellant has quoted from paragraph 246 of my Reasons in its paragraph 9. It immediately follows subparagraph 245(r) about my concern that Mr. Reifsnyder came across as a partisan advocate at the end of my listing of concerns with his chosen method. It is the final paragraph under subheading E The Reifsnyder Expert Report of heading 8, The Witnesses, The Expert Reports and the PwC Report. It is clearly a conclusion about the Reifsnyder approach and nothing else. I know with certainty that Appellant's co-counsel has re-read it carefully. To suggest in their Factum that I wrote this about the taxpayer's whole case as opposed to Mr. Reifsnyder's opinion is to be deliberately misleading. Maybe that is considered acceptable in professional appellate advocacy.

[81] However, for the Appellant to say I reached a conclusion about an expert report and a witness's testimony because I reframed the case after the trial was over appears to me to be saying another untruth about me.

[82] The issues of credibility and weight were the subject of several exchanges between Appellant's counsel and the trial judge. Appellant's counsel starts on the issue of credibility of experts on page 3700 of Volume 23 of the Transcript. On pages 3708 and 3709 I said:

> I can tell you the Court is very used to witnesses, including expert witnesses going on message track, and some loop more than others, but I'm not sure that the fact one wants to think they're entitled to stick to their message means they are not credible. It's clearly a popular style among witnesses in courts.

[83] Appellant's counsel went on urging me to disregard Mr. Glucksman's evidence and said at page 3709:

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> Judges are the ones that have the opportunity to spend the days listening to three day cross-examinations that should have been a day and see someone that doesn't want to accept the facts give the answers that will hurt his case. And trial judges write decisions and say one of the Reasons I reject this witness or the reason I reject this witness is that he clearly came in with a bias and agenda and that was demonstrated repeatedly in cross-examination because he repeatedly fails to give answers to the most straight-forward questions instead of giving long, rambling and often incoherent answers. And I am paraphrasing passages in our brief and that applies over and over again to the evidence of Mr. Glucksman.

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[84] On page 3711 I responded:

> It may be bad style and form, but not conceding the strength of the other side's case doesn't mean what he is telling me about his expert opinion is necessarily reflective of the fact it's not credible. One of the reasons I will list for accepting a witness's evidence, expert or otherwise, will often include a reference to whether they were evasive.

[85] And at page 3712 I responded:

> It's of great concern to this trial judge when they're evading giving the information that nobody else can give me. Then you start to wonder. Simply wanting to stick to his message doesn't drive me, necessarily. That's all I am saying.

[86] The following exchange is at page 3714 of the Transcript:

> Justice Boyle: All the nice legal statements aside, experts are paid advocates. It's a function of their role.
>
> Mr. Schabas: You have to cut through that. Sure they're paid and they come to conclusions, and the role of counsel is to see to what extent they're being an advocate as opposed to an expert, and that's the difference between Mr. Reifsnyder and Mr. Glucksman.

[87] The sentence of mine on credibility quoted in the Factum twice, which I set out in greater context above, was followed at page 3738 of the Transcript by:

> Justice Boyle: If nothing they said should be given [any] weight, we're not talking about weight, we're talking about expertise. We're past that point, aren't we?
>
> Mr. Schabas: I am not sure. My submission --

Justice Boyle: Zero's a number. I agree.

Mr. Schabas: Where Mr. Glucksman's evidence differs from the evidence of [Ms.] Hooper or Mr. Reifsnyder, it should be completely disregarded.

Justice Boyle: You said the whole thing?

Mr. Schabas: I was going to finish my sentence. I was going to say that with respect to any other evidence he gave it should be given no weight. It just should be given no weight. And you don't need to give it any weight.

Justice Boyle: I want people to know where I am on the issues so they can gauge their time accordingly. Which wasn't to shut you down. That may mean you have to beat me up more and make the obvious more apparent to me. That's where I am.

Mr. Schabas: There is an evidentiary process at a trial where a witness' evidence contradicts, judges have to describe whose evidence is more compelling and the major aspect of that comes from assessing credibility. Because if you have conflicting numbers and approaches, then we look to the trier of fact, the trial judge, to assess the credibility and the rigor of their analysis and decide which evidence to prefer. And similarly, even when you have admitted someone with the qualifications to give an opinion, they give other testimony that based on their demeanour, their inconsistencies, the doubts you have about the rigor of their analysis or confusion that's exposed, the corrections, the unwillingness to acknowledge things, that's another thing we rely on the trier of fact to assess and decide that this witness, I just don't want to give this witness any weight, it's not reliable evidence. And that's up to you. You certainly have our submission.

[88] Appellant's co-counsel at trial, Mr. Gilliland, also addressed the weighing of evidence in the context of Mr. Schabas' use of the word "credibility" at pages 3821 and 3822 of the Transcript.

[89] The Appellant returns in paragraph 47 of its April 2012 further Supplemental Written Submissions to the relationship between "credibility" and "weight" when used in respect of experts.

[90] There are also several occasions in argument where I question Appellant's counsel regarding some of my significant concerns with Mr. Reifsnyder's approach.

[91] For example, on page 3752 I asked:

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But Reifsnyder goes out and he starts with the one thing that this absolutely isn't, a five year bond. And it's not in the public market. So it's the starting point I'm having trouble with picturing me writing my Reasons and justifying rationally in a way that everybody from the Supremes to an intelligent high school student could understand[,] faced with all of this information, Boyle started where[?]

[92] And at pages 3753-3754 I asked:

Why does he go to the rating agencies? If I skip over that I know where you are going and how to write the rest of my Reasons, but why do I go to the rating agency for five year junk debt?

[93] And later on page 3754:

It [Mr. Reifsnyder's chosen bond fund index] included a defaulted issuer whose implicit rate, what it was trading at, was 399 or 299 percent.

[94] In Volume 22 of the Transcript, at pages 3637-3638, the following exchange is recorded:

Justice Boyle: Am I to close my eyes to the fact I think we all know private companies in Canada are not paying junk bond rates to their lender?

Mr. Schabas: Sure.

Justice Boyle: Even if they would be charged a junk bond rate if they tried to issue it into the public markets without getting a rating, whether it's the Katz's, the Reichmans before these people were in the public markets, we all know they weren't [paying] junk bond rates.

This continued through page 3639.

[95] At page 3661 of Volume 22 of the Transcript I said:

The problem I'm having, and I'm sure you're sensing it, is Mr. Reifsnyder couldn't tell me he'd ever done a deal like this. He can tell me that's the way he thinks it might be priced from the lender's point of view working within a toolbox that begins with defaulting to ratings, but the fact he's never done one doesn't cause me to question his expertise or experience, but does cause me to think that that's because from the borrower's perspective they would say ["W]e're a very profitable, financially solvent private company. We didn't come to borrow money from you lender, as if we're going into the public markets, we're not. That's why

> we came to you, custom made private deal. You can't begin from telling me I should have gone to the markets and will charge me as though I went to the markets and failed. Look at my books. That's what the bond rating and other rating agencies would do. That's what a lender does['].

[96] And at page 3662 I asked:

> 247 tells me to look at arm's length parties, both of them. The financier may well look at it that way but the fact he can't tell me they've ever done a deal, isn't it, to state the obvious, there's nobody on the other side that would do a deal like that unless they're worse than junk bond status?

[97] At pages 3755-3756 of Volume 23 of the Transcript the following exchange is recorded:

> Justice Boyle: The evidence is McKesson and Mr. Trossman in structuring a trade receivable transaction, they thought first of the securitization. They went to TD and [Ms.] Hooper didn't say[: w]hat are you here for? You want to talk to the Reifsnyders or my desk. My desk can tell you what your bonds are trading at.
>
> Mr. Schabas: She did talk to her desk.
>
> Justice Boyle: About one small aspect of dealing with the risk identification process of a trade receivable transaction. So this very player and its very sophisticated advisor, your firm, view this as a good starting point. You are not married to it, but how do I write my Reasons to get over that and say where I really want to go is start with Reifsnyder?
>
> Mr. Schabas: You don't have to reject one and adopt the other you can say they both got to the same result. That supports both analyses. Sure they approach them differently but got to the same range and Glucksman properly approached got there too. You don't have to say Reifsnyder is right and Hooper is wrong. Absolutely not.
>
> Justice Boyle: I'm not talking about in the analysis, it's in the starting point. My question remains why would I start with a public bond rating?

[98] At page 3766 of the Transcript I said:

> We've charged the man with looking at a hypothetical transaction, he [said] I've never priced one in this manner before, but I think I would price it this way. So he is taking a hypothetical approach to pricing a hypothetical transaction and coming up with a 25 and a 40 [percent adjustments]. I'm starting to feel not well tethered.

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[99] At pages 3767-3768 I said to Mr. Schabas:

> He didn't tell me why it should be right. He acknowledged that was a key difference and it needed a significant adjustment and he gave me a range of numbers that looks pretty significant. Given that I'm also a little concerned about the starting point, to be needing to make a big adjustment, a big adjustment we can't explain or substantiate in a hypothetical [-] never used by him or in the market to his knowledge [-] pricing approach, his other adjustments may be as well supported and tethered as those, but I'm feeling untethered on this key point. You said that is as tethered as we can get with what he's able to tell me.

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[100] At the end of Mr. Reifsnyder's testimony, I asked the witness a number of questions to more clearly and better understand his testimony, approach and opinion. I asked Mr. Reifsnyder about the lack of adjusting for actual historical performance of the receivables at any time on any basis during the five-year term at pages 1287-1288 of Volume 9 of the Transcript. I asked about the volatility of the numbers for and within his chosen bond fund index on page 1289, and about the extreme outliers within his bond fund index on page 1291. I asked whether he had looked to see if any of McKesson Canada's obligors had actually issued public debt in the time frame at page 1293, and he told me he had not looked. I asked him to reconcile how his 'smaller obligors are riskier' adjustment fit with a high yield junk bond index and whether that need be adjusted for at page 1293. I asked him to clarify whether he was saying that markets ignore history, or that markets should ignore history but don't, at page 1299; his answer speaks for itself. I asked him if he was aware of the terms of MIH's financing of its purchase of the receivables, including the guarantee from its parent company at page 1302, and he said he was not given that information nor information on MIH's financial condition. I asked Mr. Reifsnyder about his reference in his rebuttal report to Standard & Poor's structured finance trade receivables report's statement criteria that "the use of three year historical data is common" at page 1303.

[101] I then asked counsel at page 1306 if they had any questions arising out of any of my questions of Mr. Reifsnyder. Appellant's counsel said he did not.

[102] I need add that a substantial part of the Appellant's Supplemental Written Submissions of April 2012 address the limitations of Mr. Reifsnyder's approach and his evidence identified by the Respondent in its Supplemental Written Submissions, including starting with a bond fund index.

[103] It appears to me that my concerns with credibility and weight issues were communicated clearly on several occasions during the trial, as noted above with both Mr. Schabas and Mr. Gilliland, and as noted above with Mr. Reifsnyder at the end of his testimony. It appears to me that the Appellant writing that "nor did the trial Judge indicate any such concern during the trial", and that paragraph 245(r) of my Reasons is "flatly inconsistent" with my quoted comment are inherently and demonstrably untrue. That is, I believe the Appellant was telling untruths about me that go beyond the appellate advocacy craft of colour, spin and innuendo.

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[104] I am also of the view that I clearly tabled my concerns with Mr. Reifsnyder while he was still able to better or fully explain himself or adjust his thinking, or for his counsel to conduct further redirect. Again, this means I am of the view it would be untrue to say that my concerns with Mr. Reifsnyder's approach and opinion arose only after I reframed the case after the trial was over.

(i) The Relationship Between Discounts and Interest When Expressed as Rates, and Whether the Trial Judge was "Inflammatory" and "Misleading" in his Reasons

[105] In paragraph 54 of the Factum, the Appellant accuses me of being misleading in the sentence in my Reasons wherein I deal with financing costs, discount rates and interest rates. Specifically footnote 87 to that paragraph in the Factum says:

> . . . The Trial Judge equates the assessed discount rate to an annual interest rate of 12-13 percent, when in fact almost all of the 1% percent discount rate consists of cost recovery, so it is not all equivalent to an interest rate. Similarly, the Trial Judge makes the inflammatory and misleading comment at paragraph 14 that the actual 2.2% discount rate was equivalent to a 27% annual interest rate.

[106] In my Reasons, paragraphs 14 and 16, and the footnotes thereto, refer to this issue. They read as follows:

> [14] The CRA has challenged these related party transactions for McKesson Canada's 2003 taxation year on the basis that the amounts paid to the non-Canadian McKesson entity pursuant to the receivables purchase transactions differ from those that would have been paid between arm's length persons transacting on arm's length terms and conditions. The discount upon the purchase of the receivables in accordance with the revolving facility was a 2.206% discount

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> from the face amount. While this discount rate and the overall transactions between the parties are considered in greater detail below, this discount rate for receivables that on average were expected to be paid within about 30 days can be restated as an annual financing cost payable by McKesson Canada for its rights under the facility in the range of 27% per annum.
>
> [Footnote 5:] The discount was in fact recorded as a financing charge on McKesson Canada's financial statements. The Appellant's expert Mr. Reifsnyder confirmed that, while there are differences, one can look at annual interest rates and discount rates as being roughly the same thing.
>
> [16] The taxation year of McKesson Canada under appeal ending March 29, 2003 was a short taxation year of approximately three and a half months, having started upon its amalgamation as part of a Canadian restructuring of the McKesson Group's Canadian interests. Its taxation and financial year ends on the last Saturday in March of each year. Its financial year is divided into 13 four week Accounting Periods. CRA's 2003 transfer pricing adjustment was approximately $26,610,000, reflecting a 1.013% discount for the purchased receivables. [Footnote 6:] This works out to an annual effective financing cost rate in the range of 12%to 13%. This is more than twice the annual interest rates on the available credit lines described above. No transfer pricing penalty was assessed.

[107] It can be noted that in my Reasons I clearly equate the discount rate on the purchase of the receivables rate to an annual financing cost.

[108] As noted in footnote 5, Mr. Reifsnyder testified during the trial that one can look at annual interest rates and discount rates as being roughly the same thing.

[109] We need return to the record of the proceedings to see what each of Mr. Reifsnyder and Appellant's counsel said about the differences and equivalency of interest rates and discount rates in looking at financing costs.

[110] In Mr. Reifsnyder's testimony at pages 1005 and 1006 of the Transcript the following exchange of question and answers with Appellant's counsel in direct examination are recorded:

> Question: We'll come back to all of these points in detail and you['ve] given them on the next page. I just want to go back to one part of your report I haven't addressed prior to that, which is your discussion on pages 8, 9 and 10 about the yield rate and some discussions you have about time periods and things like that. Can you tell us what you're addressing here?

Answer: Yes. When I talked about cash flow earlier I didn't mention the fact those of us who have been actively doing transactions for a long time are acutely sensitive to issues like time period, what is the so called day basis of the transaction.

And also we're acutely sensitive to the difference between discounted rates and interest rates. They're not the same. They do not have the same numerical result. I wanted to think about those with this transaction and decide if it was critical to an analysis of this transaction to parse the transaction around those values and variables and, at the end of the day, what I am trying to say is in the report on pages 8 and 9.

I think the way to look at this deal is to look at the days in each period as being roughly 28 days which is the number of days in a settlement period, the McKesson accounting period, and also to look at annual interest rates and discount rates as being roughly the same thing. So mathematically I acknowledge if you ran a calculation using a 28 day period or 32 day period you would come up with a different result, but in the context of this transaction I don't regard those adjustments as being meaningful in the context of negotiation of an overall price.

[111] The following exchange between Mr. Reifsnyder and the trial judge is recorded at page 1071 of Volume 8 of the Transcript:

Justice Boyle: Can I interrupt for a second, just because I'm confused. The bottom of 15, the first two lines on the chart, the 1306 to the 1.0049.

The Witness: Yes.

Justice Boyle: This time we are converting a rate to a discount directly?

The Witness: Yes.

Justice Boyle: Maybe that's what I misunderstood, is the effective yield not expressed as a rate and - - it's a discount, not an interest rate?

The Witness: Yes and as I stated yesterday - -.

Justice Boyle: I remembered that. This time I thought you were converting, but you're not?

The Witness: I'm not converting the effective interest to discount rate. I'm taking an annual interest rate and dividing it by 13 and saying good enough to consider this a discount rate.

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Justice Boyle: I knew it was either that or you were dividing by 12 after converting an interest rate to a discount rate. Did I confuse anybody? It certainly helped me. Thank you. Carry on.

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[112] The following exchange is recorded during the cross-examination of Mr. Reifsnyder by Mr. Laperriere at page 1164 of the Transcript:

Question: In your rebuttal report you criticize both the Finard and Glucksman reports for converting the discount rate on the RSA into an annual interest rate, remember those parts of your rebuttal?

Answer: Yes.

Question: I am asked again to ask you where, in either of the Glucksman reports or Finard reports, do they claim that the RSA has a stated annual rate of interest?

Answer: I am not sure they make that statement. They simply characterize the financing costs as being equivalent to an annual interest rate, as I recall.

[113] And at page 1165:

Question: Let me put the following question to you: have both of the reports just converted the discount rate on the RSA to an annual interest rate for the sake of comparison purpose to alternative financing arrangements?

Answer: We compare to an annual interest rate in terms of index here. Let's be clear, this is a yield, a discounted yield on a portfolio. That's my only point.

Question: In your experience do companies typically want to compare the potential financing costs they would obtain under different finance structures?

Answer: Yes.

Question: If a CFO was trying to understand related financing costs, if we take a receivable sales transaction similar to the RSA and, say, a bank loan, would it be necessary to convert the discount rate on the RSA into an annual interest rate?

Answer: To an effective annual rate, yes. But depends - - I don't think it is to be confused with an interest rate. It's not a stated rate of interest. It's a risk related point. It's not earned at that rate until the transaction matures.

Question: You also appreciate the purpose, that is to do a kind of an apples to apples comparison?

Answer: Yes. Quick and dirty, as we say.

[114] I can restate what I said in footnote 5 above that the evidence was that the discount on the RSA was in fact recorded by McKesson Canada as a financing charge on its financial statements.

[115] When reading transcripts from the discovery into evidence following Mr. Reifsnyder's testimony, Appellant's counsel at pages 1310 and 1311 of Volume 9 of the Transcript said the following to me by way of walking me through the highlights of the read-ins (which were not read verbatim into the record, but were taken as read):

> Justice Boyle: I'll ask you now since it's lawyer and judge and no witness. What is the relevance of this? CRA was slow getting to the game and they had to really hurry up because they had a deadline and you think they screwed up. How does that help me?
>
> Mr. Schabas: It relates to context of the assumptions. At Tab 2A, it's again the fact that it wasn't until they meet with an economist that they realized that the 2.2 percent discount, if you accepted at a certain approach to this, could be equated to a much higher rate of interest and that's the point at 2A. 2B makes the point, as we'll get to later that the auditor - -.
>
> Justice Boyle: Have they worked through what Sears charges them on the balance every year?
>
> Mr. Schabas: That might come up in argument too, your Honour. Two is the auditor acknowledged she had not dealt with a factoring case and, again, at 2C is more references to the fact that it was Mr. St. Pierre, the economist who they met with in December, that brought to their attention that 2.2 was not an annual discount rate and they believe that was a reasonable discount rate until they met with him. That's specifically dealt with on page 356 of question 1633, they're saying until they met with the economist the team was operating on the basis that the discount rate was reasonable.
>
> Justice Boyle: You just told me that's because they thought it was 2.2 percent.
>
> Mr. Schabas: They didn't appreciate it could be equated to 28 percent, as far as the evidence goes.

[116] It appears to me to be very hard indeed based on this evidence from Mr. Reifsnyder and from McKesson Canada's financial statements, and on this

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exchange with Appellant's counsel in argument, to imagine, that I was trying to mislead.

e) Were Both Approaches of the Glucksman Expert Report and Evidence Referred to in the Reasons?

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[117] In paragraph 28 of the Factum filed by the Appellant they allege:

> 28. Myron Glucksman, the Crown's final expert, had two analyses: an "affirmative analysis" with a risk-shifting 18.5% reserve, and an alternative analysis that attempted to determine an arm's length discount rate under the Agreement without fundamentally altering the transaction. Under the second approach, never mentioned by the Trial Judge . . .

[118] In the Reasons both approaches are described by me in paragraph 265:

> [265] In addition to critiquing the Discount Rate approaches in the TDSI Report (and in the PwC Report), the Glucksman Report computes an Affirmative Estimate of an arm's length Discount Rate for the RSA.

[119] Since there are only two approaches set out in the Glucksman Expert Report and in his testimony (largely referred to during the hearing as the "as-is" approach and the "substantive" or "affirmative" approach), I believe it would be difficult for someone familiar with or informed of the proceedings to read this paragraph in my Reasons as not referring to and describing both of Mr. Glucksman's approaches.

[120] It is my view that paragraph 28 of the Factum filed on behalf of the Appellant states an untruth about me and what I did or did not say.

f) Did the Trial Judge Ignore a Concession by the Crown?

[121] In paragraph 4 of the Factum, the Appellant states:

> 4. By the end of the trial, however, the Crown had abandoned its idea of a 20 percent reserve, and effectively conceded that, without this (risk shifting) reserve, the Minister's original one percent discount rate was indefensible.

[122] Similarly, in paragraph 25 of the Factum, the Appellant writes:

> 25. The Crown ultimately relied on evidence that supported a conclusion that, without significant risk-shifting loss reserves, arm's length parties would have agreed to a discount rate of around 1.35 percent.

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[123] Paragraph 28 of the Factum (already discussed under the preceding heading) refers to Mr. Glucksman's testimony about his reserve in this regard.

[124] In paragraphs 35 and 36 of the Factum, the Appellant states:

> 35. In his Reasons, the Trial Judge rejects the 20 percent reserve initially advocated by the Crown on the basis that adding such a term would be tantamount to rewriting the actual transaction; however, he ignores the impact the Crown conceded this would have on the discount rate. The Crown conceded that pricing the actual transaction without adding a risk shifting reserve would result in a discount rate as high as 1.35 percent.
>
> 36. Rather than consider the Crown's evidence or its position, the Trial Judge proceeded to arrive at a discount rate based on his own conjecture about what arm's length parties would or would not have agreed, and then concluded that the discount rate relied upon by the Minister in the reassessment fell within an arm's length range. The Trial Judge viewed a discount rate as low as 0.92 percent as producing an arm's length benchmark for McKesson Canada's transaction, one with no reserve, while the Crown's own witnesses (Mr. Finard and Mr. Glucksman) viewed a number in this order as acceptable only with a 90 million dollar reserve. [3]

[125] We can return to the record of the proceedings to see if the trial judge ignored any such concessions by the Crown or failed to consider the Crown's evidence on this point, and to see if any such concession was made by the Crown.

[126] It is clear from the record that the Respondent's counsel never conceded such a point, even after being reminded of Mr. Glucksman's testimony giving rise to the 1.3 and 1.35. (This appears to be indirectly acknowledged in the last sentence of paragraph 30 of the Factum.)

---

[3] It should be noted that Appellant's counsel has either erred or overstated my lowest discount rate of 0.92 percent. Clearly it should be 0.959 percent given a straightforward reading of paragraphs 350 and 351 of my Reasons. Neither Mr. Finard nor Mr. Glucksman's evidence was given or drawn out in the context of the corrected DSO for the initial purchase during the short taxation year actually before the Court and addressed in paragraph 351 of my Reasons.

[127] The following exchange during argument with Appellant's counsel occurred towards the end of their second day of arguing the transfer pricing adjustment issue at pages 3806 and 3807 of Volume 23 of the Transcript:

> Justice Boyle: ... I asked Mr. Laperriere the question[,] is 1.3 now my floor[,] for the reason you're advocating, but you're saying I have to. I'm asking the question. It puts pressure on him to ask the question.
>
> Mr. Gilliland: He's still thinking about it two days later. I don't disagree you could reject all the evidence and in however manner you see fit arrive at the 1.1. My submission is that on the evidence before you you'd be hard pressed to do that given the fact the Crown's own witness is 1.3 and my tag onto that is that if I'm right and we are at the 1.3, a gap between that those two preponderance of evidence.
>
> By now as Appellants we pushed you past 1.1. I am saying if we gotten there, it looks like we have gone a long way toward that given the evidence and the change of position. My only point is then we are at a preponderance of evidence. If we're not, the burden was on us to move things.
>
> Justice Boyle: The burden was on you to displace the assumptions of fact. I think that's been done. I don't think I'm going to hear argument to the contrary from Mr. Laperriere.
>
> Now you're in the position of every person bringing an application before a court, you have the burden on the balance of probabilities of showing me what they did was wrong and I'm saying what they did was still 1.1. You're saying it looks like practically and maybe legally it is 1.3. Apart from this disagreement, I think we are saying the same thing. They don't have to show me 1.1 is right even if the assumption is off the table. You have to show me it's wrong.

[128] I believe this last exchange speaks for itself. I believe it is untrue for the Appellant to say that I ignored a Crown concession and that I didn't consider the evidence of the Crown's expert on this point.

3. Where in the Factum McKesson Canada Challenges the Trial Judge's Impartiality.

[129] In paragraph 9 of the Factum, the Appellant writes about the trial judge's "palpable antipathy" towards the taxpayer, its witnesses and its counsel. They refer to one of my statements as "sharp".

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[130] They conclude paragraph 34 by writing:

> What is clear from the Reasons is the unflattering view taken of McKesson Canada, its witnesses, and its counsel.

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[131] In paragraph 70 they refer to my analysis being "infected by his pejorative and unfair comments".

[132] I have already addressed above under my first heading my concerns that in paragraphs 84, 88 and 89 the Appellant appears to be saying I was untruthful.

[133] I view these as public allegations by a party to the costs and confidential information matters remaining before this Court that, regardless of the merits of their reasoning or their thoughts, I am unable to decide the remaining matters impartially. I believe that a reasonable person reading only these phrases from the Factum, without reviewing my Reasons or the trial Transcript, would believe that such strong complaints by McKesson Canada and its counsel may give rise to a serious doubt that I will be seen to be able to dispose of the two remaining issues and discharge my duties on an impartial basis.

4. Erratum

[134] Before concluding, it appears appropriate for me to acknowledge an error in my Reasons that the Appellant has correctly identified in its Factum. In paragraph 56 of the Factum, the Appellant refers to the phrase in the sentence in paragraph 13 of my Reasons that "a portion was loaned for a period to another Canadian corporation to permit its tax losses to be used". I can confirm that they are correct in saying that there was no support in the evidence that the purpose of that loan was for the Vancouver affiliate to use its tax losses. I sincerely apologize for using the words "to permit its tax losses to be used". It will be for others to decide, of course, the relevance of my mistaken phrase to my overall Reasons and decision.

[135] By way of explanation and not excuse, I can see that I mistook a two-part question I had intended to ask Mr. Brennan by way of clarification at the end of his testimony, as a question and an answer. In his examination-in-chief, Mr. Brennan, the VP Tax at McKesson US, described the Vancouver affiliate as a large R&D centre, and later referred to it as a very large physical R&D practice that was well educated. He later described the 92 million dollars as being "we just lent it to one

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of our companies that are located in Vancouver, Canada. We had the cash to have paid that immediately. We didn't have to do it, but we did it. And, you know, and, actually, this note was paid off over two years thereafter but we could have paid it off through Ireland much sooner if we wanted to." Later he said "all we did is we on-lent it to one of our Canadian subsidiaries." And "but, anyways, this is McKesson Canada's money, and we have asked it to lend it to its, not a subsidiary, it's an affiliate, a Canadian affiliate, and we can now do that because of the restructuring." That is all of the evidence I had. My question was to be, in these circumstances, why was this loan made. The second half of my question, had I asked it, was to be whether it was for tax loss utilization purposes. In the end, I decided not to ask Mr. Brennan the question at all. However, in preparing my Reasons it appears I confused the second half of my question for an answer to the first. Again, I was mistaken in this regard in my Reasons and I do apologize.

5. Conclusion

[136] For the Reasons identified above, I have decided I have to recuse myself from the remaining costs and confidential information issues in McKesson Canada's proceeding in this Court.

[137] It may be that some of the perceived untruths about the trial judge described above under heading II might individually not warrant recusal, and may be within an appellate advocate's licence to overstate through the use of absolutes like 'never', 'only' and 'any'.

[138] However, I am satisfied that a reasonable fair-minded Canadian, informed and aware of all the issues addressed above, would entertain doubt that I could remain able to reach impartial decisions. I believe that such a reasonable fair-minded and informed person, viewing this realistically and practically would, after appropriate reflection, be left with a reasoned suspicion or apprehension of bias, actual or perceived. Canadians should rightly expect their trial judges to have broad shoulders and thick skins when a losing party appeals their decision, but I do not believe Canadians think that should extend to accusations of dishonesty by the judge, nor to untruths about the judge. Trial judges should not have to defend their honour and integrity from such inappropriate attacks. English is a very rich language; the Appellant and its counsel could have forcefully advanced their chosen grounds for appeal without the use of unqualified extreme statements which attack the personal or professional integrity of the trial judge.

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[139] For these reasons, I will be advising my Chief Justice that I am recusing myself from completing the McKesson Canada proceeding in the Tax Court. This extends to the consideration and disposition of the costs submissions of the parties in this case, as well as to the 2010 confidential information order of Justice Hogan in this case and its proper final implementation by the Tax Court and its Registry.

Signed at Ottawa, Canada, this 4th day of September 2014.

"Patrick Boyle"

Boyle J.

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APPEARANCES:

Counsel for the Appellant:	Paul B. Schabas Ryder Gilliland Jeffrey Trossman Ilan Braude Kaley Pulfer
Counsel for the Respondent:	Guy Laperrière Janie Payette Sylvain Ouimet Chantal Roberge

COUNSEL OF RECORD:

For the Appellant:

Name:	Paul B. Schabas, Ryder Gilliland Jeffrey Trossman, Ilan Braude Kaley Pulfer
Firm:	Blake, Cassels & Graydon LLP Toronto, Ontario
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada

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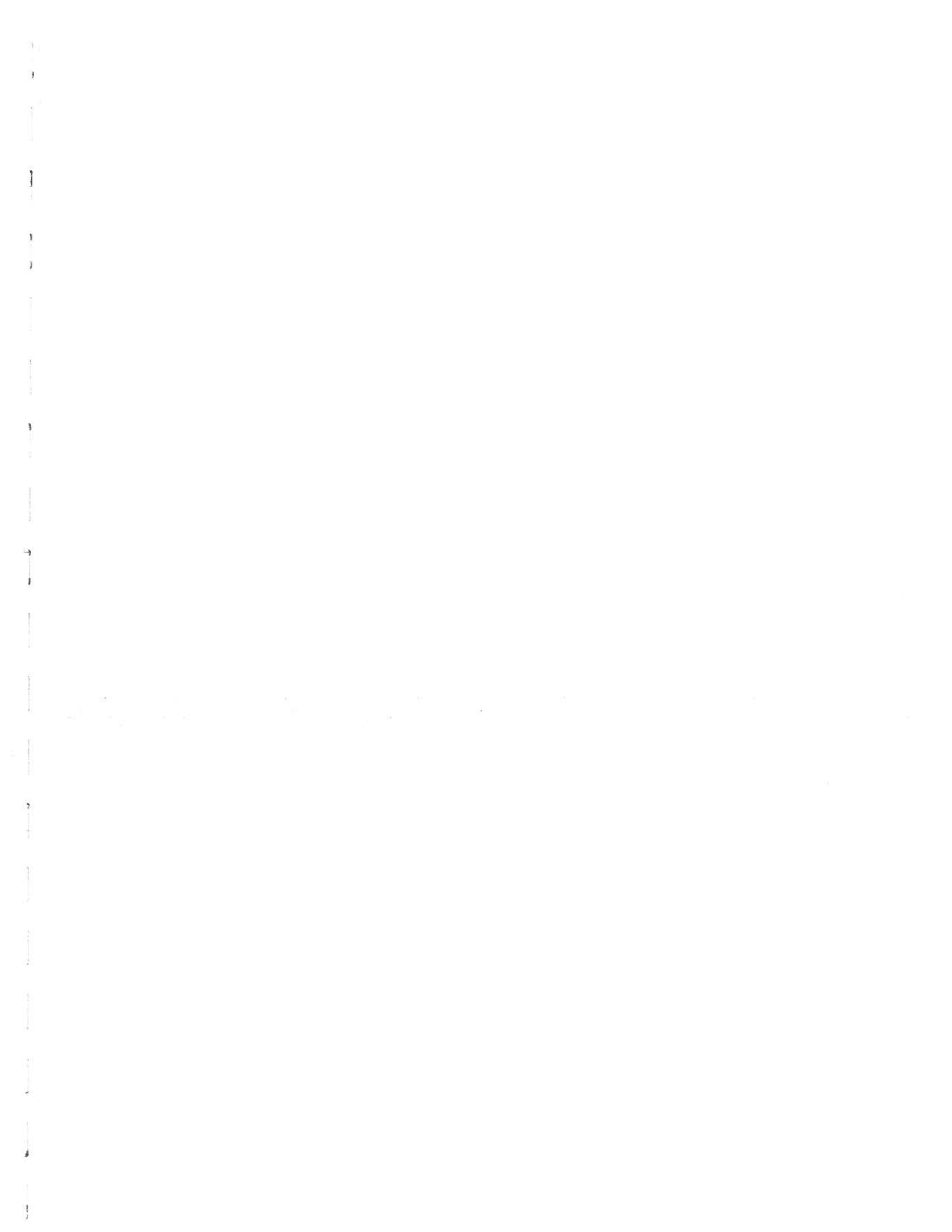

Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

APPELLANT'S SUPPLEMENTARY MEMORANDUM OF FACT AND LAW

(In accordance with Rule 70 of the *Federal Court Act*)

PART I—THE FACTS

A. Overview

1. Judges are expected to decide cases as framed by the parties, then step back and allow the appellate process to unfold. In this case, the trial judge did neither.

2. After the rendering of judgment and the filing of an appeal, the Appellant's Factum was brought to the trial judge's attention. That document was a routine piece of appellate advocacy, but it produced an extraordinary – indeed, unprecedented – response from the judge. That response was styled as "Reasons for Recusal" but in fact amounted to an attack on the Appellant's arguments raised on appeal, an attack on the Appellant's counsel, and a compendium of additions, clarifications and commentary on his reasons for judgment. The trial judge explicitly indicated that his audience for this rebuttal included not only the Appellant, its counsel, and the Respondent's counsel, but also, most problematically, the Court of Appeal.[1]

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[1] Reasons for Recusal, at para. 8

3. Near the start of his Recusal Reasons, the trial judge wrote:

> A trial judge's job on the merits ends with the rendering of reasons and judgment. There is rightly no role for the trial judge in the appeal of the trial decision.

4. That is obviously correct. But any reader of the balance of the Reasons could be forgiven for concluding that the trial judge did not abide by these principles. Indeed, it is apparent that he went on to flout these very principles in a most sustained and egregious fashion over the course of his Recusal Reasons. The Appellant submits that the trial judge's improper intervention in the appeal has so tainted the appearance of fairness that a new trial is required on this basis alone.

5. According to the Canadian Judicial Council's *Commentaries on Judicial Conduct*:[2]

> Long-standing tradition in Canada and in Great Britain is that a judge speaks but once on a given case and that is in the Reasons for Judgment. Thereafter, the judge is not free to explain, or defend, or comment upon the judgment or even to clarify that which critics have perceived to be ambiguous.

6. This convention makes good sense. No appellant should have to face *two* adversaries in the Court of Appeal – and certainly not when one of them is wearing a judicial sash. A trial judge who enters the appellate arena as an advocate in his own cause necessarily undermines *prospectively* the appearance and reality of a fair appeal process, and *retrospectively* casts a shadow on the presumed fairness of the trial from which the appeal arose. If the intervention is blatant and sustained, as in the instant case, the integrity of *both* processes – trial and appeal – are tainted in such a way that only a new trial can restore the process.

7. It is not sufficient for this Court to merely disabuse itself of the Recusal Reasons and proceed to adjudicate the appeal as if the Reasons never existed. The Recusal Reasons are a direct interference with the integrity of this Court's appellate process and cannot be disregarded. The Recusal Reasons are problematic in tone, character, and content. It is difficult to imagine how a reasonable observer would be satisfied that they played no role

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[2] Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, Quebec: Les Éditions Yvon Blais Inc.), at p. 86. This statement of principle has been endorsed by a number of courts: see *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.); *R. v. Musselman*, [2004] O.J. No. 4226 (S.C.J.), at para. 50; *R. v. Fauteux* (1997), 54 Alta L.R. (3d) 43 (Q.B.), at para. 27.

in the conduct and in the ultimate decision of the appeal. Public confidence in the appellate process requires that such judicial interference is met with both clear appellate disapproval and a meaningful remedy. That remedy is a new trial.

B. Summary of the Facts

8. The Appellant taxpayer appealed a reassessment under the *Income Tax Act* to the Tax Court of Canada. The matter was heard by the trial judge, the Honourable Justice Patrick Boyle, on various dates between October 17, 2011 and February 3, 2012.

9. On December 13, 2013, Justice Boyle dismissed the appeal, with costs. On the same day, he ordered that the parties file written submissions on costs and the reconsideration of a pre-trial confidential information order that had been made by Justice Hogan in March 2010.

10. On January 10, 2014, the Appellant filed a Notice of Appeal to the Federal Court of Appeal, seeking relief from Justice Boyle's judgment dated December 13, 2013.

11. In or about March 2014, the Respondent submitted written submissions on costs to Justice Boyle. In or about April 2014, the Appellant filed written submissions on costs.

12. In or about April 2014, both parties made written submissions regarding the pre-trial confidentiality order.

13. On June 11, 2014, the Appellant filed with the Federal Court of Appeal its Memorandum of Fact and Law on the appeal of the merits.

14. The Respondent filed its Memorandum of Fact and Law with this Court on August 8, 2014. It did not raise any complaints about the propriety or honesty of the Appellant's position, such as those later advanced by the trial judge in his Recusal Reasons.

The Recusal Reasons

15. On September 4, 2014, Justice Boyle issued – of his own motion, and without notice to the parties – a decision recusing himself from hearing the pending costs and confidentiality matters of which he had remained seized. Only eight paragraphs of the 139-paragraph decision actually address the judge's recusal. The balance of the Reasons comprise a sustained rebuttal of the arguments advanced in the Appellant's Factum, a clarification or explanation of his Reasons for Judgment, and an attack on the Appellant's counsel.

16. The Appellant's Factum on the appeal proper does not contain the errors and untruths alleged by the trial judge. (Indeed, the Respondent did not advance that view of the Appellant's factum.) That document speaks for itself and the Appellant will not enter into a debate with the trial judge on the substance of the appeal.

17. With respect, the Recusal Reasons read much more like an act of partisan advocacy than judicial explication. In various passages the trial judge clearly attempts to argue the merits of the appeal. He declares that, contrary to the Appellant's position, his trial reasons were "***very clear and do not permit of ambiguity, uncertainty, or any lacuna or leap for the reader to fill in.***"[3] He asserts that there was "***no basis for the Appellant***" taking one position in its factum,[4] and then attempts to rebut another ground of appeal saying that "***There is nothing whatsoever that appears unclear…***" about the passage with which the Appellant had taken issue.[5]

18. The trial judge engages in a wide-ranging and prolonged critique of the position advanced by the Appellant to this Court, saying that it "***does not in its Factum attempt to suggest or explain why [the trial judge's position] is in fact not the case.***"[6] He bolsters his argument in favour of his own ruling saying "***I remain of the view that my Reasons accurately describe the evidence …***"[7] on one point and then sets about bootstrapping his

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[3] Reasons for Recusal, at para. 19
[4] Reasons for Recusal, at para. 19
[5] Reasons for Recusal, at para. 23
[6] Reasons for Recusal, at para. 23
[7] Reasons for Recusal, at para. 43

original reasons with further references intended to respond to the position taken by the Appellant in its submissions to this Court. Clearly disparaging the Appellant's arguments, the trial judge repeatedly invites the reader to look to the trial record to attempt to rebut the position of the appellant ("***Let us again turn to the record of the trial proceedings***").[8] He notes elsewhere that "***I believe it would be difficult for someone familiar with or informed of the proceedings to read this paragraph in my Reasons [as the Appellant urges the Court of Appeal to read them].***"[9]

19. The trial judge sets about mounting a defence of his reasons (the sort of defence normally reserved for a respondent's factum) by reference to passages in the record that were not in his original reasons. On one point he says "***It is equally clear that I grounded my findings on the preceding paragraph ...on...[a theory that assisted the Crown].***"[10]

20. The judgment is replete with accusations of deliberately making false statements or, to use the vernacular, lying. He asserts that the Appellant's counsel has told "***clear untruths about me, what I said and heard in the course of the trial.***"[11] This is not mere advocacy in the trial judge's eyes; rather, what counsel have done "***clearly crosses the line as to what is appropriate.***"[12]

21. Counsel's approach to the case is indicted as unprofessional and misleading, with the trial judge alleging that "***This appears to me to have been done in order to advance confusion not clarity or accuracy.***"[13] Counsel's candour and competence are impugned again when the trial judge says, "***I find it exceedingly hard to believe that the Appellant could remain unaware of [a factual distinction that plays a role in the decision].***"[14]

22. Indeed, there is an entire section of the Reasons entitled "***Where it Appears That the Appellant States in its Factum Untruthful Things About the Trial Judge.***"[15] In this

[8] Reasons for Recusal, at para. 46
[9] Reasons for Recusal, at para. 119
[10] Reasons for Recusal, at para. 19.
[11] Reasons for Recusal, at para. 4
[12] Reasons for Recusal, at para. 21
[13] Reasons for Recusal, at para. 24
[14] Reasons for Recusal, at para. 24
[15] Reasons for Recusal, at para. 25

section the trial judge says that "***It appears very clear to me that ... [the Appellant] have (sic) simply told clear untruths about me.***"[16] He attacks the core position of the Appellant in its arguments before this Court, describing the submissions of counsel as "***patently untrue***"[17] and, pointing directly at the factum prepared for this Court, says "***the Appellant [is] telling clear untruths about me***"[18] and is being "***deliberately misleading***."[19]

23. The trial judge then offers a sardonic comment disparaging the Appellant's arguments in the Court, saying "***Maybe that is considered acceptable in professional appellate advocacy***."[20]

24. In passage after passage, the attack on counsel's integrity continues: one of grounds of appeal "appears to me to be saying ***another untruth about me,***"[21] and "***the Appellant was telling untruths about me that go beyond the appellate advocacy craft of colour, spin and innuendo.***"[22] In another passage, according to the trial judge, "***the Appellant states an untruth about me and what I did or did not say***."[23]

25. In order to mount this attack on the Appellant's position, the trial judge mischaracterizes it, saying that the grounds of appeal "***appear to me to clearly include: (i) allegations that I was untruthful and deceitful in my Reasons; ... (iii) allegations of impartiality [sic] on my part.***"[24] He further states, "***[i]t appears to me that the Appellant has chosen to challenge my truthfulness, honesty and integrity***..."[25] and that the Appellant has "***wrongly accused me of being untruthful, dishonest and deceitful***."[26]

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[16] Reasons for Recusal, at para. 40
[17] Reasons for Recusal, at para. 41
[18] Reasons for Recusal, at para. 56
[19] Reasons for Recusal, at para..80
[20] Reasons for Recusal, at para. 80
[21] Reasons for Recusal, at para. 81
[22] Reasons for Recusal, at para. 103
[23] Reasons for Recusal, at para. 120
[24] Reasons for Recusal, at para. 4
[25] Reasons for Recusal, at para. 18
[26] Reasons for Recusal, at para. 20

26. The trial judge closes by saying that, "***Trial judges should not have to defend their honour and integrity from such inappropriate attacks***."[27] As developed below, the Appellant's argument on appeal simply cannot reasonably be seen as the kind of personal attack the trial judge mistook it for. Furthermore, in responding as he did, the trial judge has compromised the fairness of the process.

PART II—ISSUES

27. This Supplementary Memorandum raises a single issue for this Court's consideration:

> ***Do the trial judge's Recusal Reasons compromise the appearance and reality of a fair process in this case such that a new trial is necessary?***

PART III—ARGUMENT

A. The Role of the Trial Judge

28. There can be little doubt that the trial judge's intervention in this appeal was ill-advised and improper. The trial judge could have recused himself from the relatively trivial matter of costs with a simple, succinct set of reasons. Instead, he chose to intervene in the appeal by offering a full-scale critique of the Appellant's legal arguments, an unwarranted attack on Appellant's counsel and supplementary clarifications and corrections of his Reasons for Judgment. The Recusal Reasons have the effect of compromising the appeal and calling into question his impartiality at trial.

29. In the Appellant's submission, the conduct is problematic in five distinct ways:

- It flouts the principle that judges are to speak only through their judgments;
- It disregards the rule that trial judges are forbidden to enter the appellate arena;
- It misrepresents the Appellant's actual argument, mistaking the normal language of advocacy for pointed personal attacks;

[27] Reasons for Recusal, at para. 138

- It amounts to an attempt by a trial judge to plead his case before the Court of Appeal, thereby compromising the appearance of fairness at the trial and appeal levels alike; and

- The Reasons make serious and unfounded allegations against the taxpayer's appellate counsel, undermining the fundamental relationship between counsel and client and tainting the appellate process.

In short, this conduct interferes with the institutional integrity of the judicial process so as to warrant a new trial.

i. A trial judge must not descend into the fray

30. There is a strong line of case law dealing with the point at which a trial judge's intervention in the conduct of the trial will result in an appearance of unfairness and require the result to be set aside on appeal. Those cases speak to the importance of ensuring that trial judges in an adversarial system always remain (and appear to remain) above the fray, and provide important guidance for the circumstances in the case at bar.

31. Typically, this doctrine is invoked when a trial judge engages in extensive questioning of witnesses such that he or she appears to have descended into the arena and assumed the role of advocate. In *R. v. Valley* (1986) 26 C.C.C. (3d) 207 (Ont. C.A.), the leading judgment on this issue, Martin J.A. wrote:

> Interventions by the Judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present through the trial would consider that the accused had not had a fair trial.

32. Mr. Justice Martin also observed that "[a] criminal trial is, in the main, an adversarial process, not an investigation by the judge of the charge against the accused," as further support for the proposition that the judge's interventions in the conduct of the trial should be measured and restrained. The same can be said – only more so – for a civil case, where the system is founded on principles of party autonomy and party control.

33. Whether a trial judge's interventions 'cross the line' in a given case is a judgment call for the appellate court, guided by the reasonable person standard. As Doherty J.A. stated in *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.), at p. 320:

> It is a question of degree. At some point, incidents which, considered in isolation, may be excused as regrettable but of no consequence, combine to create an overall appearance which is incompatible with our standards of fairness.

34. Of course, one reason why it is a question of *degree* in the trial context is that a trial judge has an established right – and in some circumstances even a duty – to intervene in the conduct of the trial to ensure a fair and accurate result.

35. In contrast, a trial judge has no right or duty to intervene in the conduct of an appeal from one of his or her own decisions. The reasonableness of the judge's conduct – and the hypothetical observer's response to it – must be gauged with that fundamental distinction in mind.

36. In assessing this conduct by the trial judge, one must keep in mind that this was not a momentary lapse, such as an ill-advised email or comment made in a moment of pique. This was a major undertaking. The trial judge combed through a 4000-page trial record to meticulously assemble his rebuttal to the Appellant's arguments, paragraph by paragraph, word by word. Inexplicably, the trial judge resorted to this unprecedented measure without notifying the parties. Had he done so, there can be little doubt that *both* parties would have objected to him entering the appellate fray in this way.

37. The rule against judges publicly defending their decisions is grounded in a systemic concern for finality and the proper demarcation between advocacy and adjudication. It protects the process and the parties from inappropriate interventions, however subtle, by a judge whose decision is subject to the sort of subsequent scrutiny contemplated by our system of appellate review. The rule against post-judgment commentary supports the judiciary's institutional need to ensure the appearance and reality of impartiality and independence in the appellate process. A judge must be seen to stand above the fray. A judge who speaks out in defence of a judgment becomes a "partisan supporting his or her

own cause."[28] That danger helps explain why a trial judge is accorded no role in an appeal.

ii. A trial judge must not interfere with the appeal of his or her own decision

38. There does not appear to be any appellate authority specifically discouraging a trial judge from scrutinizing an appellant's factum and writing a response – presumably because the impropriety of such conduct is obvious. Nonetheless, courts have had occasion to comment on the difficulties that arise when trial judges interfere in the appellate process in far less dramatic ways.[29]

39. Important guidance can be drawn from the cases involving what is now s. 682 of the *Criminal Code*, which allows for a report to be made by the trial judge to the appellate court in a criminal appeal. The section is an artifact from an earlier time when transcripts of criminal trials were not always available.

40. The statutory remnant that still exists was examined by the Supreme Court in *R. v. E. (A.W.).*[30] There, following a jury trial that ended in conviction, the trial judge took it upon himself to write a "report" to the Chief Justice of the Court of Appeal to express his view that the jury was wrong and that the accused ought to have been acquitted. In the Supreme Court, all justices agreed that the trial judge's report found no authority in s. 682 because the Court of Appeal did not "request" it. More significant, however, are the

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[28] Hon. James Thomas, *Judicial Ethics in Australia* (LexisNexis, 2009), at p. 134

[29] There likewise appears to be very little American precedent concerning a trial judge's interference with an appeal of his or her judgment. Perhaps the closest analogue is found in the decision of the U.S. Court of Appeals for the Third Circuit in *Alexander v. Primerica Holdings, Inc.* 10 F.3d 155 (3rd Cir. 1993). In that case, a federal district judge in a large class action case had his decision granting summary judgment to the defendant overturned. The case was remanded to the district judge, who proceeded to express his frustration with having been reversed in a number of ways, leading to an unsuccessful recusal motion. The plaintiffs petitioned the Court of Appeals to remove the district judge via a writ of *mandamus*. The district judge reviewed the plaintiff's appellate brief and wrote a lengthy letter to counsel purporting to rebut the arguments made therein. The Court of Appeals granted the writ, criticizing the judge's conduct in strong terms and observing that the rule against such intervention is "intended to prevent a district court judge from assuming, or being perceived to assume, an adversarial position." See also *Harrington v. State*, 584 N.E.2d 558 (Indiana S.C. 1992), which was similarly critical of a trial judge for "forsaking his stance of neutrality" by writing to a Deputy Attorney General and a judge of the appellate court after a successful appeal of a matter he presided over.

[30] [1993] 3 S.C.R. 155

Supreme Court's observation that the letter amounted to an unfair attempt to influence the result of the appeal.

41. Though dissenting in the result, Lamer C.J. wrote comprehensive reasons addressing the history and purpose of the trial judge's report to the appellate court:

> The concern that, by the mechanism of the report, trial judges might influence rather than assist the appeal process has echoed through the case law from the very first attempts to interpret this statutory power. [...]
> The principle that a trial judge should not be permitted by virtue of a report on the case, to insert him or herself in the appellate arena, is articulately set forth in *R. v. Mathieu*, [1967] 3 C.C.C. 237 (Que. Q.B.), at p. 243, *per* Casey J.:
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>> I cannot believe that this section of the *Code* imposes on a trial Judge the duty or gives him the right to explain or justify, ex parte, his decision. I find it difficult to believe that this report which the *Code* appears to intend only for the Court of Appeal, should contain anything more than the trial Judge's views on such things as the incidents of the trial or the credibility of the accused and of the witnesses. It is inconceivable that any Judge should have the right to plead before the Court of Appeal: and yet this is exactly what happens every time a trial Judge undertakes to answer the grounds of appeal urged by the person whom he has convicted.

42. Indeed, Parliament appeared to acknowledge the impropriety of a trial judge appearing to "plead before the Court of Appeal" when, in 1972, it removed the requirement that the trial judge provide his "opinion" as a component of the report. On the facts of *E. (A.W.)*, Lamer C.J. was satisfied that the report constituted an improper opinion that added nothing to the record already before the appellate court.

43. Writing for the majority, Cory J. took an even more critical view of trial judges' reports, deeming them to be for the most part an "historical anachronism." He continued:[31]

> **As a general rule the trial judge's report introduces an element of unfairness into the appeal procedure**. The trial judge is being requested to give his or her subjective view of what transpired. With the very best of intentions the trial judge may subconsciously be influenced to write a report which justifies decisions made and actions taken during the course of the trial. **It will be very difficult if not impossible for counsel opposed to the view of events taken by the trial judge to argue against the judge's version**. Further the request puts a trial judge in an embarrassing if not invidious position. Is the trial judge to be encouraged to report that in his view the decision of the jury was unsafe? There is an obvious danger in taking that position. First the immediate response is why then bother with a jury if the judge can override its verdict by means of a

[31] *Ibid.*, at paras. 72-73

report? Secondly, what if the situation presented in this case were reversed and the jury had acquitted despite the trial judge's strongly held views that there should have been a conviction? In those circumstances should the report of the trial judge requested by the Court of Appeal have an influence upon the decision?

To request the report, as a general rule, is to encourage a situation fraught with the possibilities of unfairness. It is only in those rare situations where something occurred which is not reflected in the record and upon which opposing counsel cannot agree that a report from a trial judge might be requested. For example, a desire for comments with regard to the demeanour of a witness should not justify a request for a report. The assessment of the demeanour of a witness should fall within the exclusive domain of the jurors as the triers of the facts. Indeed jurors are routinely instructed at the opening of a criminal trial that they should closely observe the demeanour of the witnesses during the course of the trial. To ask for a trial judge's comment to the Court of Appeal on this issue would I think be superfluous and improper.

44. Even the pressing interest in protecting the innocent against imprisonment was not, in the Court's view, sufficient to outweigh the overwhelming systemic imperative that the trial judge not interfere in the appellate process. Indeed, *E.(A.W.)* effectively sounded the death knell for the practice of the trial judge expressing substantive views on the appeal in the guise of a s. 682 "report".

45. Appellate skepticism of this practice has a much longer lineage, however. The issue was of concern to the Supreme Court as far back as *R. v. Baron*, [1930] S.C.R. 194, where Anglin C.J. wrote:

S. 1020 provides that, as part of the material to be put before the court of appeal, the trial judge or magistrate shall furnish to the court "his notes of the trial" and shall also send "a report giving his opinion upon the case or upon any point arising in the case" and apparently contemplates this being done immediately after the trial, or at least, so soon as an appeal is lodged. **It was never intended by this section to enable the trial judge, after an appeal had been argued, to put before the court of appeal by way of certificate or otherwise, whether *proprio motu* or by direction of the court of appeal, his answer to the various points taken upon the appeal.** That, in substance, is what has been done in this case. We cannot regard such a certificate of the trial judge as having been properly given, nor as a report within s. 1020. That being so, we are left with nothing authentic and regularly before the court to establish that the charge was not what the stenographic transcription shews; and upon that, as already stated, the misdirection is so plain and so fatal in its consequences that a new trial is inevitable. Justice requires that a conviction where there is such grave uncertainty as to the propriety of the direction under which it was made should not be allowed to stand.

46. That is, even during the period where a report from the trial judge was a functional necessity on appeal, the Supreme Court insisted that its content be strictly limited to *information* useful to the appellate court and not an argumentative "answer to the various

points taken upon the appeal."[32] In the words of Dubin J.A., when a trial judge expresses his views on the merits to the Court of Appeal, it would not be unreasonable for the accused to feel that the learned trial Judge has put himself into the appellate arena in support of his conviction."[33]

47. That is precisely what happened here. In his Recusal Reasons, Justice Boyle "put himself into the appellate arena" in a direct and sustained manner. The Reasons do not merely express the judge's indignation at the allegations of error in the Appellant's Factum; rather, the judge *responds* to each ground of appeal, one by one. As he indicates, the Reasons are for the Court of Appeal's consideration. They are the product of a judge who has failed to appreciate the conventional limits on his role that serve to protect the integrity of the trial and appellate process alike.

48. Perhaps the closest analogue to Justice Boyle's conduct in this case is the imbroglio concerning Justice Norman Douglas of the Ontario Court of Justice and his offer of assistance to the Crown in appealing a judgment overturning one of his own decisions. Justice Douglas' response to certain comments of the appellate court that seemed to impugn his integrity led to successful recusal motions against him in subsequent cases and ultimately a proceeding before the Ontario Judicial Council.

49. Justice Douglas was offended by a Superior Court of Justice summary conviction appeal decision overturning one of his decisions on the basis of a reasonable apprehension of bias.[34] Like Justice Boyle, he conflated an allegation of legal error with an attack on his personal integrity. As a result of his frustration at having been impugned, he sent an email to appellate counsel at the Crown Law Office – Criminal to ask whether a further appeal was planned and offer his assistance. After a brief exchange of emails, Crown counsel advised Douglas J. that the communication was inappropriate and the interaction ceased. However, the exchange became public when the Crown determined that it needed

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[32] See also: *R. v. Pressley* (1948), 94 C.C.C. 29 (B.C.C.A.), where the Court expressed concern that "a report of this kind partakes more of the character of a brief supporting a conviction under attack, rather than a statement of what was said and done at the time of the trial and conviction."
[33] *R. v. Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.)
[34] *R. v. Moore*, [2004] O.J. No. 3128 (S.C.J.)

to disclose the correspondence to defence counsel appearing before Douglas J. on impaired driving matters.

50. The accused in one such matter sought a writ of prohibition in Superior Court to prevent the trial from proceeding before Justice Douglas, alleging that there was an apprehension of bias arising out of his conduct in the prior case. Justice Corbett granted the writ, explaining:[35]

> I am impelled to the conclusion that the learned trial judge has now entered the "fray", on his own behalf, and has so personalized the *Moore* decision, and the impact of that decision on the perception of his ability to try "over 80" cases impartially, that an atmosphere has been created where it appears that the trial judge has matters of his own reputation and integrity in mind when approaching these cases, rather than the dispassionate adjudication of the underlying cases.

51. A complaint to the Ontario Judicial Council followed. The Hearing Panel, chaired by Mr. Justice Borins of the Ontario Court of Appeal, endorsed the findings of Justice Corbett in coming to the conclusion that Justice Douglas' intervention was improper. The Panel made important comments on the expectation that trial judges refrain from becoming personally invested in an appeal of their decisions:[36]

> Judges are sensitive about having their decisions overturned by higher courts. Indeed, there may be nothing more disconcerting to a trial judge than to have his or her decision set aside by an appellate tribunal on the ground that he or she exhibited an apprehension of bias in deciding the case. **But this is all part of a trial judge's job**. From time to time, a trial judge's reasons will be reviewed and found wanting by an appellate court. The job of an appellate court is to correct errors made by trial judges. As they embark on their judicial careers, newly appointed judges are instructed that they will on occasion have a decision overturned by an appellate court, and that when this happens, the judge must, as best he or she can, accept that fact. **They are not to take issue in public with the decision of the appellate court, nor in their rulings or reasons for judgment in other cases. Nor should the judge contact the losing party to encourage it to appeal the decision, and to offer to assist in the appeal.**

52. The same principle that prohibits a trial judge from taking issue in public with an adverse appellate decision after it is rendered forbids a judge from entering the fray and lobbying for a particular result while the appeal is before the court. As elaborated below, a trial

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[35] *R. v. Musselman*, *supra*, at para. 14

[36] *In the matter of a complaint respecting the Honourable Justice Norman Douglas* (Ontario Judicial Council, 2006), at para. 41

judge arguing his case to the Court of Appeal risks calling into question not only the fairness of the trial over which he presided, but also the integrity of the appellate process.

iii. A trial judge is prohibited from publishing a post-hoc rationalization of a trial judgment

53. There is precedent for considering whether a judge's post-judgment comments undermine the appearance and reality of judicial impartiality. The Supreme Court's judgment in *Teskey* demonstrates that a trial judge's conduct following judgment can, in certain circumstances, cast doubt on the fairness of the trial and require the judgment to be set aside. In that case, after a five-day criminal trial, the trial judge convicted the accused and indicated that reasons for judgment would follow. Unfortunately, he failed to produce the reasons for over 11 months, during which time an appeal was launched.

54. The Supreme Court determined that the late-arriving reasons should *not* be considered in determining whether the verdict was supportable. Speaking for the majority, Charron J. observed:[37]

> Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it. [...] Further, if an appeal from the verdict has been launched, as here, and the reasons deal with certain issues raised on appeal, this may create the appearance that the trial judge is advocating a particular result rather than articulating the reasons that led him or her to the decision.

55. Justice Charron went on to discuss the presumption of impartiality enjoyed by trial judges, as expounded in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. That presumption is robust. Nonetheless, the law requires that "fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer."[38] If the claimant can show that *either* were absent, the presumption is displaced and the judgment must be set aside. On the facts of *Teskey*, the majority was satisfied that a reasonable person would apprehend the reasons as an "after-the-fact

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[37] *R. v. Teskey*, [2007] 2 S.C.R. 267, 2007 SCC 25, at para. 18

[38] *Ibid.*, at para. 21

justification for the verdicts rather than the articulation of the reasoning that led to the decision."[39] The conviction was overturned.

56. Justice Boyle's Recusal Reasons raise more serious concerns and would cause any reasonable observer to doubt the impartiality of the judge who authored them. Indeed, the bulk of the Recusal Reasons are spent on expanding the Reasons for Judgment, explaining them or using the trial record to support them. Like the trial judge's reasons in *Teskey*, the Recusal Reasons can only be seen by a reasonable observer as a post-hoc attempt to *justify* to an appellate court a decision given many months earlier.

B. Why the Recusal Reasons Imperil the Appearance and Reality of Fairness in this Case

57. The Appellant submits that the seriousness of the trial judge's impropriety in inserting himself into the appeal calls into question the fairness of both the trial and appellate processes and cannot be remedied by anything less than a new trial before a different judge.

i. Recusal Reasons Imperil the Appearance of Fairness on Appeal

58. The Recusal Reasons are nothing less than an explicit attempt by the trial judge to insert himself into the appellate process as an advocate against the Appellant and its lawyers. Their mere existence calls into question the appearance of a fair and independent appeal. They amount to a second responding factum opposing the Appellant at the appellate level. They are a detailed attempted refutation of many, if not all, of the Appellant's arguments on appeal and a stinging criticism of counsel for having made them. The existence of these reasons, their publication on the Internet and elsewhere, and most importantly, their content, would cause any reasonable person to "at least wonder"[40] whether this Court "was able to conduct its business free from the interference from other judges."[41]

[39] *Ibid.*, at para. 23
[40] *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 78
[41] *Ibid.*, at para. 72

a. The Recusal Reasons are an improper attempt to influence the Court of Appeal

59. The trial judge makes clear that this Court is an intended audience for the Recusal Reasons:[42]

> For that reason, I will limit myself to only considering the specific issues set out above, and will restrict myself to statements in the Factum, statements in the Reasons, and statements from the trial transcripts (the "Transcript").[1] This does have the effect of making these reasons more lengthy, more clinical, and more awkward than they might otherwise be, but I believe this is necessitated by considerations of fairness to the parties and **the appellate court**.

60. The trial judge is no ordinary commentator. His detailed submissions on the particular grounds of appeal and arguments would be seen, by any layperson, as having special relevance and credibility with the Court of Appeal. For one, he was there and enjoys the "privileged position of the trial judge". The deference owed to the trial judge on appeal underscores the unique prestige of the position. The Ontario Court of Appeal has described the position of a trial judge as follows:[43]

> The proper conduct of a trial judge is circumscribed by two considerations. On the one hand his position is one of great power and prestige which gives his every word an especial significance. The position of established neutrality requires that the trial judge should confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions…

61. How, then, should a *litigant* in the Appellant's position view the intervention of the trial judge in its appeal? It is not some piece of gratuitous punditry that a member of the public would safely assume could simply be disregarded by his colleagues on the appellate court. The existence of the Recusal Reasons means that the Appellant must not only challenge the Reasons for Judgment and answer the Respondent's submissions, but must also attempt to refute the arguments made by the trial judge in a document prepared for the Court of Appeal.

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[42] Reasons for Recusal, at para. 8

[43] *R. v. Torbiak* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.), at para. 5, cited with approval by the Court in *Brouillard Also Known As Chatel* v. The Queen, [1985] 1 S.C.R. 39, at p.45

62. It is hard to imagine a more powerful voice entering the arena and pronouncing on the merits of the Appellant's grounds of appeal. The futility of challenging the trial judge's subjective view of what transpired at trial was recognized by the Supreme Court in *E. (A.W.)*, in which Cory J. observed that "***[i]t will be very difficult if not impossible for counsel opposed to the view of events taken by the trial judge to argue against the judge's version***." The Recusal Reasons appear to "stack the deck" against the Appellant.

63. The difficulty in refuting the trial judge's own perception of the course of the trial is particularly stark on these facts. The Appellant has advanced several "notice-based" arguments on appeal. It claims that the trial judge dealt with witnesses and interpreted evidence in his reasons for judgment in a manner that bore little to no relationship to the way the matter was litigated before him. For example, the Appellant argued in its factum that the trial judge erred when he made negative credibility findings against its expert witness even though he had expressly stated that credibility was not in issue.[44] In his Recusal Reasons, the trial judge has essentially responded to the Appellant's argument on appeal with an in-depth, detailed, and essentially unchallengeable, "No I didn't".

64. The structure of the adversary system is essential to understanding the impact of the Recusal Reasons. An important feature of the adversary system is the principle of party presentation "under which courts rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[45] The adversary process is not suspended when a party exercises its right of appeal. To the contrary, the Supreme Court has only recently re-affirmed its centrality to the appeal process, observing that "[w]hen a judge or appellate panel of judges intervenes in a case and departs from the principle of party presentation, the risk is that the intervention could create an apprehension of bias."[46]

65. Consistent with those principles, an appellant is entitled to frame its appeal as it sees fit. The Respondent, in turn, is entitled to respond in the manner that best accords with its

[44] Appellant Factum at para. 37 (c)
[45] *R. v. Mian*, 2014 SCC 54, at para. 38, quoting *Greenlaw v. United States*, 554 U.S. 237 (2008), at p. 243, *per* Ginsburg J. [internal quotation marks omitted]
[46] *Ibid.*, at para. 39

litigation objectives. It may wish to focus on one issue raised by the Appellant at the expense of another. It may wish to concede error on one or more grounds but contend that the error was harmless. It may wish to raise new issues in defence of the judgment below.

66. An intervention by the trial judge interferes with the autonomy of the parties to frame the issues before the Court of Appeal on their own terms. Not only does the trial judge's contribution create an unfairness, actual or apparent, by multiplying the adversaries faced by the appellant – it also redefines the very issues at stake and, in so doing, distorts the adversarial balance that is inherent in the process. By virtue of the Recusal Reasons, the ability to define the live issues on appeal has wrongly been taken from the Appellant taxpayer *and* the Respondent Crown. Inevitably, the appeal is no longer just about whether the Appellant's grounds of appeal have legal merit, but also about whether what the trial judge said about the Appellant's grounds of appeal is accurate, whether the Appellant can muster an effective response, and so on. This is not only distracting and unhelpful, but also contrary to how appeals are supposed to proceed in our adversary system.

67. It cannot be said that the recusal reasons were not "received" by this Court and therefore no unfairness attaches. As a judicial pronouncement in the proceeding under appeal, they must be considered to be part of the record in this case. Moreover, the trial judge was clear that they were designed to "assist" this Court. As discussed below, the real question is whether the conduct of the trial judge has impaired the *appearance* of fairness on appeal. Certainly, a reasonable observer would think that the Recusal Reasons were aimed at interference with the appellate process, given that:

- The trial judge refers to and refutes particular paragraphs in the Appellant's factum before this Court;

- The Court of Appeal was an intended audience, the trial judge noting that he prepared his Recusal Reasons the way he did "out of fairness to the appellate court."

- The trial judge frequently refers to the practice of appellate advocacy and uses either sarcasm or rhetoric to disparage the Appellant's counsel's arguments;

- The timing of the recusal reasons (prior to the hearing of the appeal) is suggestive of interference;

- There was no good reason for the trial judge to offer such detailed and lengthy reasons in support of his recusal decision. Indeed the reasons have very little to do with the law of recusal and virtually everything to do with providing a response to the Appellant's arguments;

68. While this is not strictly a case about judicial independence, it does implicate the institutional integrity of this Court's appellate process. In this respect, the independence jurisprudence is instructive in highlighting the very real danger that arises when a judge tries to interfere with an adjudicative process not before him or her. That was the Supreme Court's concern in *Tobiass*, where the following test for the appearance of judicial independence was enunciated:[47]

> The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised. As Lamer C.J. wrote in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139, "[t]he overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality".
>
> The essence of judicial independence is freedom from outside interference. Dickson C.J., in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, described the concept in these words, at p. 69:
>
>> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual **or even another judge** – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

69. In *Tobiass*, the Supreme Court found that the appearance of independence had been compromised when the government (a party to the litigation) met and exchanged letters with the Chief Justice of the Federal Court regarding scheduling, and the slow pace of various matters including Mr. Tobiass' case. Nothing in *Tobiass* suggests that a more stringent test would be applied when the attempt to interfere with litigation is perpetrated by a judge as opposed to a party. In this case, of course, the attempt to interfere is more

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[47] *Tobiass, supra*, at paras. 70-71

troubling since it is a deliberate attempt to meddle on the merits of the case, not merely its timing.

70. The publication of the Reasons for Recusal strikes a blow to the appearance of independence of this Court. The Reasons were aimed at this Court and deal with the very issues to be determined on appeal. This Court must fashion an appropriate remedy.

71. Given that the Respondent had no role in the unfairness occasioned by the Recusal Reasons, it might be asked why it's fair to put the Respondent to the expense of a new trial. In this respect it should be noted that while this is a civil case, the Crown is not an ordinary private party. The repute of the administration of justice has more to lose from the *Crown* appearing to benefit from the trial judge's impropriety than it would if the Respondent were a private litigant unencumbered by the Crown's public responsibilities to ensure that justice is seen to be done. Finally, it must be kept in mind that the Appellant is not asking for a windfall in the form of a final judgment in its favour. It is only seeking an opportunity to make its case at trial, free of the unfairness that has now tainted this proceeding.

72. It is no answer to the impact on the appearance of fairness to say that the Recusal Reasons can merely be disregarded by the reviewing court. The appearance of institutional integrity has been irreparably compromised. In light of the Recusal Reasons, how could a member of the public reasonably be confident that the appellate process had not been interfered with? How can the Appellant reasonably expect to refute the opinion of the trial judge on its grounds of appeal? How can the Respondent in its submissions broach any of the issues raised in the Recusal Reasons without creating an appearance that it is receiving an "assist" from the trial judge?

73. In short, there is simply no way to proceed at this Court that could meaningfully mitigate the damage done to the process. This Court must act to protect the integrity of its own process. The only remedy to cure the damage caused by the conduct of the trial judge is a new trial.

b. The Recusal Reasons undermine the solicitor-client relationship

74. The Appellant is represented by senior and highly regarded members of the bar. In his Recusal Reasons, the trial judges makes the following completely unfounded allegations against counsel's honesty, candor, *bona fides* and professionalism:

- That counsel has written "clear untruths" about him (at paras. 4, 40, 56, 81. 103, 120, 128, 138);

- That counsel has "wrongly accused [the Trial Judge] of being untruthful, dishonest, and deceitful" (at para. 20);

- That counsel's written argument is inappropriate:

  > I believe they have wrongly written these things in the Appellant's Factum about me intentionally under the guise of fearlessly advancing and representing the interests of McKesson Canada. I believe this clearly crosses the line as to what is appropriate." (at para. 21)

- That counsel's argument was made in order to "advance confusion not clarity or accuracy" (at para. 24);

- That counsel's argument is deliberately misleading:

  > I know with certainty that Appellant's co-counsel has re-read it carefully. To suggest in their Factum that I wrote this about the taxpayer's whole case as opposed to Mr. Reifsnyder's opinion is to be deliberately misleading. Maybe that is considered acceptable in professional appellate advocacy. (at para. 80)

- That counsel's submissions "go beyond the appellate advocacy craft of colour, spin and innuendo" (at para. 103);

- That counsel's submissions attacked the "personal or professional integrity of the trial judge" (at para. 138).

75. A reasonable observer would conclude that the Recusal Reasons would have the effect of: (1) harming the Appellant's relationship with its counsel, potentially causing it to reconsider the wisdom of an appeal and even to question the integrity and soundness of the advice it had received from counsel in this regard; or (2) so tarnish Appellant counsel's reputation as to negatively impact the Appellant's credibility before the Court of Appeal.

76. The impropriety of the Trial Judge's attack on Appellant's counsel can be seen through analogy to cases in other areas of law. In the context of a criminal suspect's right to counsel, for example, the Courts have always been clear that police officers should refrain from denigrating counsel because of the corrosive effect it is bound to have on the very important relationship between counsel and client:[48] Likewise, in jury trials the trial judge is to refrain from abusing counsel in the presence of the jury.[49]

77. Civility on the part of counsel is essential to a fair and efficient process – but it is a "two-way street."[50] While occasional instances of discourtesy or impatience with counsel are inevitable, when they cross the line into impugning counsel's integrity they can amount to a reversible error. To quote again from Justice Martin in *Valley*:

> [...] The authorities have consistently held that mere discourtesy, even gross discourtesy, to counsel cannot by itself be a ground for quashing a conviction. Where, however, the trial judge's comments suggest that counsel is acting in a professionally unethical manner for the purpose of misleading the jury, the integrity and good faith of the defence may be denigrated and the appearance of an unfair trial created. [citations omitted]

78. Here too, one can see the damaging impact the Recusal Reasons would have on the Appellant's confidence in its counsel as it exercises its statutory right of appeal. The counsel of record before this Court are the very same counsel this Trial Judge says are dishonest, misleading, and unprofessional. Even if the Appellant's trust in its counsel is not shaken, the appearance of fairness in the Appellate process has been compromised: one may reasonably expect the Recusal Reasons to compel the Appellant to re-examine the behavior of its counsel, thereby disrupting its process of preparing to argue the underlying merits of its appeal.

79. A reasonable person reading the allegations made against counsel would also conclude that the trial judge had interfered with the independence of the Court of Appeal by setting up a credibility contest between himself and Appellant's counsel. In essence, the trial judge has thrown down the gauntlet and suggested to this Court that it must choose

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[48] *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 14

[49] *R. v. Bisson* (1997), 114 C.C.C. (3d) 154 (Que. C.A.); see also: *R. v. Callocchia* (2000) 149 C.C.C. (3d) 215 (Que. C.A)

[50] John W. Morden, "The 'Good' Judge" (Spring 2005), 23 Advocates' Soc. J. No. 4, 13-24, at para. 29

between allowing the taxpayer's appeal and upholding the trial judge's honesty and integrity. With respect, the Court of Appeal cannot countenance this kind of interference with its adjudicative process. The only way to remedy the unfairness is to start afresh with a new trial.

ii. Recusal Reasons Retrospectively Reveal Trial Judge's Disposition Against the Appellant

a. **The Recusal Reasons fundamentally misconstrue the Appellant's arguments on appeal**

80. The Appellant's Factum is critical of Justice Boyle's trial judgment, alleging significant errors of law and fact. This is the bread-and-butter of appellate advocacy. Within the bounds of decorum and civility, an appeal court expects counsel to mount a vigorous challenge to the judgment below. It expects respondent's counsel to undertake an equally spirited defence of the judgment. That is simply how the system works.

81. No trial judge enjoys being accused of having committed legal error or having produced a procedural unfairness. But the trial judge's hurt feelings can be no impediment to the appeal court fulfilling its error-correcting mandate. *A fortiori*, such sensitivities cannot inhibit counsel in advancing those arguments to the appellate court in the first place.

82. What the Appellant's Factum does *not* contain is any of the allegations that so outraged Justice Boyle and motivated him to write his Recusal Reasons. There is no allegation of untruthfulness, deceit or *mala fides* on the part of Justice Boyle. There is no attack on the trial judge's integrity. There is no allegation that he misconducted himself. The Factum merely explains why, in the Appellant's submission, the trial judge committed reversible legal error: no more, no less.

83. It is difficult to say how an experienced judge approaching the matter with any measure of judicial evenhandedness could have so profoundly misconstrued the appellate argument – not just its details, but its entire thrust. A reasonable person would conclude that this trial judge harbours some animus against the Appellant (and certainly its counsel) that pre-dates the trial judge's reading of the Factum. In other words, the trial

judge's response was so disproportionate to the ostensible impetus that it must have had a pre-existing source.

84. The trial judge should not have initiated an argument with the Appellant over his judgment and the Appellant does not propose to continue it. To the extent that the issues addressed in the Recusal Reasons are substantive, they are addressed in the Appellant's Factum.

85. As for the Appellant's supposed allegations of dishonesty, the trial judge points to statements like "[t]he Trial Judge did not, in fact, leave this question for another day, as he claims to have done"[51] and "[t]he Trial Judge, without acknowledging it, has challenged whether the written terms of the Agreement reflected the "real" allocation of risk between MIH and McKesson Canada"[52] He writes:[53]

> It appears to me that the Appellant has chosen to challenge my truthfulness, honesty and integrity in my Reasons in order to allow it to advance the argument that I was somehow, notwithstanding what I clearly said about ongoing corporate control issues being able to put entirely aside in deciding the appeal, (and what I clearly said about the Delinquency and Loss Ratios triggers and Ms. Hooper's evidence on their objective and effect) somehow doing just that.

86. However, even the choice phrases picked out by the trial judge to support his point have absolutely nothing to do with a challenge to his "truthfulness, honesty and integrity." Arguments that a trial judge recited one legal test but applied another are standard fare in appeal courts across the country.[54] Sometimes they are successful, sometimes not. But even if substantiated, such complaints do not raise eyebrows, make headlines, or result in judicial conduct proceedings – as they undoubtedly would if they actually involved an allegation of judicial corruption or *mala fides*.

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[51] Appellant's Factum, at para. 89
[52] Appellant's Factum, at para. 84
[53] Reasons for Recusal, at para. 18
[54] Consider, for example, the voluminous case law resulting from the Supreme Court's decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. One of the most frequently arising complaints in criminal appeals is that the trial judge purported to apply the test in *W.(D.)* but in fact reversed the burden of proof: see, e.g., *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, 2008 SCC 2.

87. In all areas of law, appellate courts are routinely confronted with variations on the argument that a trial judge claimed to be applying a given legal test but went astray in his or her analysis. The Appellant is unaware of any trial judge, prior to this case, ever recusing himself after taking personal offence to an appellant's argument that the judge had stated one test and applied another. And no trial judge has ever used the occasion to issue reasons contesting the validity and propriety of any such arguments made on appeal.

88. In this case, however, Justice Boyle has characterized every claim of error as an allegation of impropriety or deceit. He writes:[55]

> For these Reasons, it is my view that the Appellant has wrongly accused me of being untruthful, dishonest and deceitful. I am simply unable to read their Factum or the Reasons any other way on this point.

89. Among these reasons are the lack of any "polite qualifiers" in the Appellant's framing of his legal errors and his view that certain paragraphs of his trial reasons are "very clear and do not permit of ambiguity, uncertainty or any lacuna or leap for the reader to fill in."[56] But a disagreement over the clarity or meaning of a judge's reasons, whether couched in polite qualifiers or not, is simply not an attack on the judge's honour or integrity.

b. The Reasons raise an inescapable inference of *animus* against the Appellant

90. Whether this Court agrees or disagrees with the arguments found in the original Appellant's Factum, there is simply nothing there that could reasonably support Justice Boyle's characterization of those arguments, or his statements impugning the professionalism of the taxpayer's lawyers. The Appellant submits that no reasonable person, acquainted with the appellate process and viewing the matter objectively, could share Justice Boyle's view of what the Appellant's Factum alleged, nor would a reasonable observer consider it to be proper for the trial judge to respond in the manner he did.

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[55] Reasons for Recusal, at para. 20
[56] Reasons for Recusal, at para. 19

91. The strikingly disproportionate character of his response to these perceived slights therefore, in the Appellant's submission, amounts to compelling confirmation that Justice Boyle was *not* detached and even-handed in how he dealt with this case.

92. The Recusal Reasons are cast in terms that appear calculated not only to argue why the Appellant should lose the appeal, but also to persuading *the Appellant* that its legal advisors have done something very improper in framing the argument in the manner chosen. In other words, and whatever the trial judge's intent, the Reasons seem designed to drive a wedge between client and counsel by attacking at length – without notice and without justification – counsel's conduct.

93. Unlike the arguments in the Appellant's Factum, which are assertions of legal error rather than *mala fides*, the trial judge levels serious allegations of professional misconduct against Appellant's counsel in his Recusal Reasons. For instance:[57]

> I believe they have wrongly written these things in the Appellant's Factum about me intentionally under the guise of fearlessly advancing and representing the interests of McKesson Canada.

94. The seriousness of this suggestion must not be understated. It is an assertion that Appellant's counsel attempted to perpetrate a dishonest ruse on the Court of Appeal, in breach of the most basic duties of counsel as officers of the court. And what was the impetus for this charge? Apparently, the following:

- Para. 13: The Appellant's claim (A.F. para. 89) that the trial judge did not leave for another day "as he claims to have done" the question of whether the court should "assume the notional arm's length contract to change McKesson Canada's name, sell McKesson Canada, or do something else in order to trigger a termination event at will?"

- Para. 14: The Appellant's statement (A.F. para. 84) that the trial judge, "without acknowledging it, has challenged whether the written terms of the Agreement reflected the 'real' allocation of risk between MIH and McKesson Canada."

- Para. 15: The Appellant's assertion (A.F. para. 88) that the trial judge allowed his skepticism about the real allocation of risk to influence his reasoning

[57] Recusal Reasons, at para. 21

notwithstanding his contention that "in this case, I do not need to [consider notional continued corporate control] in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment".

- Para. 19: The fact that the Appellant made this argument even though paras. 307-310 are "very clear and do not permit of ambiguity."

95. It is striking that these instances – which are singled out by the trial judge as paramount examples of appellate counsel's mendacity – would be seen by any reasonable and informed observer as mundane, devoid of the outrageous content unaccountably perceived by the trial judge.

96. Since there is no reason why the submissions made by the Appellant would in themselves trigger such a heated response from the trial judge, a reasonable inference is that some other animus towards the Appellant had its genesis at the trial. Though the Appellant's Factum frames the appeal as involving a procedural unfairness in the trial judge's handling of the case, the Recusal Reasons cast those irregularities in a different light and raise at least a reasonable apprehension of bias on the part of the trial judge. Because he chose to enter the appellate fray in such a manner and did so in a way that was so disproportionate to the alleged provocation, a "reasonable, right-minded and properly informed person would think that the Trial Judge had bias against the Appellant during the trial."[58]

C. Conclusion

97. According to former Associate Chief Justice John Morden – echoing the sentiments of the English judge R.E. Megarry – the most important person in the courtroom is the "litigant who is going to lose."[59] That is because the system depends for its legitimacy on the perception that even the losing litigant has gotten a fair shake. Respectfully, the trial judge's intervention in this case undermines that ideal. Regardless of how much this Court might wish to disregard Justice Boyle's Recusal Reasons and proceed to consider the substance of the appeal, a litigant in the position of the Appellant could not

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[58] *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 73
[59] John W. Morden, "The 'Good' Judge," *supra*, at para. 8; R.E. Megarry, "Temptations of the Bench" (1978), 16 Alta. L. Rev. 406 at 410

reasonably believe it has received a fair shake from a process that produced such an extraordinary, improper intervention in the appeal by the trial judge. A new trial is required.

PART IV – ORDER SOUGHT

98. The Appellant requests that the appeal be allowed with costs in this Court and the Tax Court of Canada, and that the matter be remitted to the Tax Court for a new trial before a different judge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2014.

____

HENEIN HUTCHISON LLP

Marie Henein
Scott C. Hutchison
Matthew Gourlay

Third Floor, 235 King St. East,
Toronto, ON M5A 1J9
Tel: (416) 368-5000
Fax: (416) 368-6640

Counsel for the Appellant

TO: The Administrator
Federal Court of Appeal

AND TO: Janie Payette
Chantal Roberge
Sylvain Ouimet

Department of Justice
Quebec Regional Office
Tax Litigation Section
Guy-Favreau Complex
200 Rene-Levesque Blvd. West
East Tower, 9th Floor
Montreal, PQ H2Z 1X4

Tel: (514) 283-6941
(514) 283-3120
(613) 670-6488
Fax: (514) 283-3101

Counsel for the Respondent

PART V – LIST OF AUTHORITIES

Cases

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Court of Appeal File No. A-48-14
(consolidated with A-49-14)

FEDERAL COURT OF APPEAL

BETWEEN:

MCKESSON CANADA CORPORATION
Appellant

and

HER MAJESTY THE QUEEN
Respondent

MOTION RECORD

(Leave to File Amended Notice of Appeal & Supplementary Memoranda)
in accordance
with Rule 364 of the Federal Court Rules

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Paul Schabas & Jeffrey Trossman

OSLER, HOSKIN & HARCOURT
Box 50, First Canadian Place
Toronto, ON M5X 1B8

Al Meghji & Amanda Heale

HENEIN HUTCHISON LLP
235 King Street E., 3rd Floor
Toronto, ON M5A 1J9

Marie Henein, Scott C. Hutchison
And Matthew Gourlay

Counsel for the Appellant

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the ______

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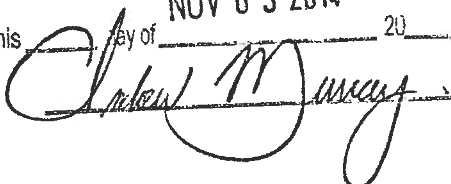

Dated this ____ day of NOV 03 2014 20____