

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

FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

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FEDERAL COURT OF APPEAL COURT APPEL FÉDÉRALE	
NOV 24 2014	
PAUL CUZZOLINO	
TORONTO, ONT	40

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

WRITTEN REPRESENTATIONS IN REPLY

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

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

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

BETWEEN:

McKESSON CANADA CORPORATION

Appellant (Moving Party)

* and *

HER MAJESTY THE QUEEN

Respondent (Responding Party)

WRITTEN REPRESENTATIONS IN REPLY

In accordance with Rule 369(3) of the *Federal Courts Rules*

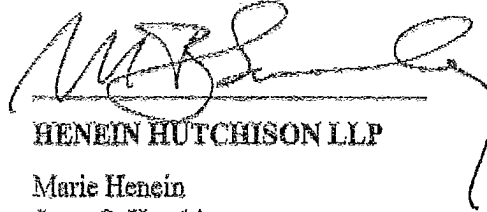
1. On November 17, 2014, the Respondent filed its Written Representations in respect of the Appellant's Motion to file an Amended Notice of Appeal and Supplementary Memorandum of Fact and Law.
2. Pursuant to Rule 368(3), the Appellant files these Written Representations in Reply.
3. The Respondent takes the remarkable position that the unprecedented Recusal Reasons by the trial judge are somehow not properly part of the record that should be before the Federal Court of Appeal. This cannot be right. By any measure, the Recusal Reasons amount to a dramatic development in the course of this litigation. The panel hearing the appeal must not be deprived of an opportunity to consider what if any impact they have had on the fairness of the process.
4. The Respondent has not asserted that any prejudice would flow from granting the Appellant's motion. That is not surprising. Granting the motion will not delay the hearing

of the appeal, given that the supplementary factum the Appellant proposes to file has already been provided to the court on this motion. The Appellant is prepared to set a date for the hearing of the appeal forthwith.

5. To be clear, the only question to be determined on this motion is whether a panel of the Federal Court of Appeal should be entitled to consider the implications of the Recusal Reasons. It is *not* whether the fairness of the trial or appeal was *actually* compromised. That is properly a matter for the panel. The Appellant has met any reasonable threshold requirement for allowing it to argue the issue as part of the appeal. It would be unfair to pre-emptively decide the substantive issue at the motion stage, which is what the Respondent effectively urges. Indeed, to insulate the Recusal Reasons from any meaningful review would only compound the harm which, in the Appellant's submission, has already been occasioned to the administration of justice by the Recusal Reasons.
6. The Respondent's contention that the court's traditions of integrity and impartiality should defeat the motion is misplaced. In *every case* in which a party has successfully argued that an apprehension of bias should lead to a new trial, the reviewing court has had to first overcome the presumed integrity of the court in question. Accordingly, that cannot be an obstacle to the apprehension of bias argument even being advanced in the first place.
7. In short, the Respondent's suggestion that the main appeal is unaffected by the Recusal Reasons issued by the trial judge should be rejected at this stage. The Recusal Reasons are unprecedented and, indeed, have garnered extensive notice in the legal community. If they are not even entertained on appeal, the effect would be to give trial judges licence to issue decisions of this nature, secure in the knowledge that they would be immune from review.
8. The Recusal Reasons make serious and (in the Appellant's submission) unfounded allegations of misconduct against the Appellant and its counsel. That being the case, it cannot be right that they be shielded from appellate scrutiny.

9. Just as importantly, the Recusal Reasons engage the Appellant's fundamental interest in a fair process. The panel of this Court hearing the Appellant's appeal must be given the opportunity to adjudicate their legal effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November, 2014.



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MCKESSON CANADA CORPORATION
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and

HER MAJESTY THE QUEEN
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WRITTEN REPRESENTATIONS IN REPLY
(Leave to File Amended Notice of Appeal &
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in accordance
with Rule 364 of the Federal Court Rules

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of this Court on the _____

day of NOV 25 2014 A.D. 20
Dated this _____ day of _____ 20

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