

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

FEDERAL COURT OF APPEAL

10#59

COUR D'APPEL FÉDÉRALE
FEDERAL COURT OF APPEAL
DÉPOSÉ
NOV 18 2014
Evelyne Thomassian
MONTREAL, QC 38
FILED

BETWEEN:

MCKESSON CANADA CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

RESPONDENT'S WRITTEN REPRESENTATIONS

PART I - OVERVIEW

1. The appellant's motion for leave to file an Amended Notice of Appeal and a Supplementary Memorandum of Fact and Law should be dismissed. The Order and Reasons for Recusal issued by the Tax Court of Canada judge in relation to the outstanding issues of costs and the confidentiality of the trial record in this transfer pricing case were rendered long after the present appeal was filed, long after the contents of the appeal book were settled, and at a time when both parties had already filed their Memoranda of Fact and Law.

2. The Order and Reasons for Recusal are irrelevant to the issues to be decided on the appeal of the Tax Court of Canada's judgment on the merits and do not properly form part of this Court's record. Furthermore, the traditions of impartiality and integrity that judges of this Court are understood to uphold are such that neither the appearance nor the reality of a fair appeal can be said to be compromised by the fact that the Order and Reasons for Recusal are in the public domain.

## PART II – STATEMENT OF FACTS

3. The McKesson Canada Corporation case deals with a transfer pricing reassessment with respect to highly complex financial transactions involving the sale of accounts receivable as well as a secondary adjustment under Part XIII of the *Income Tax Act*.
4. The Tax Court of Canada trial was held on various dates over a five month period between October 2011 and February 2012. Two factual witnesses and five expert witnesses testified. Both parties made oral submissions and filed several sets of written arguments.
5. The Tax Court of Canada issued its Judgment and Reasons for Judgment on December 13, 2013.<sup>1</sup> The Reasons for Judgment contain an extensive review of the evidence before the Court. The respondent was successful on both issues and the appeal was dismissed with costs.
6. Thereafter, the Tax Court of Canada judge remained seized of two issues: the confidentiality of the trial record and a request by the respondent for an award of enhanced costs.

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<sup>1</sup> Judgment and Reasons for Judgment of the Tax Court of Canada dated December 13, 2013, respondent's Motion Record, Tab 2.

7. McKesson Canada Corporation appealed the Judgment of the Tax Court to this Court on January 10, 2014. The appellant filed its Memorandum of Fact and Law with this Court on June 11, 2014 and the respondent filed her Memorandum of Fact and Law on August 8, 2014.
8. On September 4, 2014, after having read the Memorandum of Fact and Law filed by the appellant in this Court, the trial judge recused himself from disposing of the issues remaining before the Tax Court of Canada. He issued an Order and Reasons for Recusal. In his Reasons for Recusal, the trial judge stated that he rightly has no role in the appeal of his decision, that it would be inappropriate for him to supplement his reasons at this stage, and that he would restrict his analysis “to statements in the Factum, statements in the Reasons, and statements from the trial transcripts ...” out of considerations of fairness to the parties and the appellate court.<sup>2</sup>
9. By Notice of Motion dated November 3, 2014, the appellant sought leave to file an Amended Notice of Appeal and a 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?”
10. The Amended Notice of Appeal dated November 3, 2014 contained in the appellant’s Motion Record seeks to add the following ground of appeal: “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 [*sic*] of both the trial and the appeal.”

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<sup>2</sup> Reasons for Recusal, appellant’s Motion Record, Tab 5, paras. 8, 22 and 77.

PART III – SUBMISSIONS

- A. **The Order and Reasons for Recusal are not relevant to this appeal and do not and should not form part of the record before this Court**
11. The Order and Reasons for Recusal on which the appellant's motion is premised do not, contrary to the appellant's submission in paragraph 20 of its Written Representations, properly form part of the record before this Court.<sup>3</sup> An order issued in the court below, notwithstanding that it was issued by the trial judge with respect to matters of which he remains seized, does not automatically form part of the record in an appeal before this Court.
12. Rule 343(2) of the *Federal Courts Rules* limits the contents of the appeal book to those documents required to dispose of the issues on appeal.<sup>4</sup> The Order and Reasons for Recusal are not presently in the appeal book and the appellant has not brought a motion to adduce new evidence pursuant to Rule 351 of the *Federal Courts Rules*.<sup>5</sup> To the extent that the appellant wishes to rely on the Reasons for Recusal to provide a factual foundation for a new ground of appeal, it is obliged to do so.
13. The Order and Reasons for Recusal are, in any event, not required to dispose of this appeal. They were issued almost nine months after the trial judge issued his judgment on the merits of the appeal and the documents they reference, namely the appellant's Memorandum of Fact and Law, the judgment under appeal and the trial transcript, already form part of the appeal book before this Court.

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<sup>3</sup> It is also not clear whether the amendment to the Notice of Appeal sought by the appellant is that set out in its Notice of Motion or that set out in the Amended Notice of Appeal.

<sup>4</sup> Rule 343 of the *Federal Courts Rules*, SOR/2004-283, s. 2.

<sup>5</sup> *Ratiopharm v. Pfizer Ltd.*, 2009 FCA 338, para. 7.

14. Both this Court and other appellate courts have concluded that comments made by a trial judge after judgment should not be considered by them. For example, in the tax case of *Breslaw v. Canada*, this Court ordered that the written edited version of oral reasons rendered at trial, be removed from the appeal book on the ground that they “differed in a substantive way from the reasons delivered in open court”.<sup>6</sup> Other appellate courts have reached similar conclusions.<sup>7</sup>

15. The Order and Reasons for Recusal are not relevant to the existing grounds of appeal and therefore not necessary to dispose of the appeal. The substantive transfer pricing issues under appeal can and should be decided on the basis of the existing record and the Memoranda of Fact and Law filed by the parties before they were issued. Furthermore, the Order and Reasons for Recusal do not cast any doubt on the fairness of the trial process. They are simply a response to assertions in the appellant’s Memorandum of Fact and Law and do not provide any insight into the trial judge’s state of mind either during the trial or when he rendered his decision.

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<sup>6</sup> *Breslaw v. Canada*, 2005 D.T.C. 5683, 2005 FCA 355, paras. 26 and 27.

<sup>7</sup> *White v. Archeon Energy Ltd.*, 2007 ABCA 385, para. 24 (Alta. CA); *Alers-Hankey v. Teixeira*, 2000 BCCA 196, paras. 15-17; *Crocker and Crocker v. Sipus*, [1992] OJ No 1863, paras. 5-7 (Ont. CA).

**B. The Order and Reasons for Recusal do not compromise the appearance and reality of a fair process in this appeal**

16. Rule 75 of the *Federal Courts Rules* provides that the Court may at any time allow a party to amend "on such terms as will protect the rights of all parties". In the context of an amendment to a Notice of Appeal at the appellate level, the court will have regard to whether the amendment is necessary and will serve the interests of justice.<sup>8</sup> The interests of justice will be served in this case by proceeding with the appeal on the basis of the existing record rather than on the basis of post-judgment comments by the trial judge.
17. It is well recognized that judges work within "traditions of integrity and impartiality" and that "impartiality is one of the duties that judges swear to uphold".<sup>9</sup> A reasonable person, informed of these traditions, would presume that all judges carry out their oath of office.<sup>10</sup>
18. In rendering their decisions, judges routinely put out of their minds inadmissible evidence, publications such as newspaper articles and potentially influential pieces of information that are not and should not be before the court. To suggest that an appellate court could be so influenced by the trial judge's Order and Reasons for Recusal or by the subsequent media attention as to lose its independence undermines the confidence that must be afforded to the appeal process and to the integrity and impartiality of appellate judges.
19. The Supreme Court of Canada's decision in *R. v. E. (A.W.)* is instructive in this regard.<sup>11</sup> In that case, the trial judge had provided to the Court of Appeal

<sup>8</sup> *Ratiopharm v. Pfizer Ltd.*, 2009 FCA 338, paras. 7-8.

<sup>9</sup> *R. v. R.D.S.*, [1997] 3 S.C.R. 484, para. 111.

<sup>10</sup> *Ibid.*, paras. 111 and 117.

<sup>11</sup> *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, [1993] S.C.J. No. 90.

a report containing unsolicited comments expressing his view that the verdict of the jury was unsafe.<sup>12</sup> Based in part on this report, the Court of Appeal had ordered a new trial.<sup>13</sup>

20. The majority of the Supreme Court held that the trial judge's report pertained exclusively to evidence already in the record of the trial which was before the Court of Appeal and should not have been considered in rendering its decision.<sup>14</sup> The Supreme Court concluded that, were it not for the comments contained in the report, it was "highly unlikely that the Court of Appeal would have concluded that the guilty verdict was unreasonable" and restored the conviction.<sup>15</sup>

21. The Supreme Court of Canada was evidently not troubled about its ability, or that of the Court of Appeal, not to take the report into account, although well aware of its existence and contents. The comments by this Court and other appellate courts to the effect that comments made by a trial judge after judgment should not be considered on appeal (referenced in paragraph 14 of these Written Representations) also support this view.

22. Furthermore, while the appellant is of the view that the Reasons for Recusal are explicitly directed to this Court, the trial judge stated that he specifically limited them due to considerations of fairness to the parties and the appellate court.<sup>16</sup> In any event, regardless of whether the trial judge intended to direct his Reasons for Recusal to this Court, it is for this Court to determine whether they are to form part of the record before it.

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<sup>12</sup> *Ibid.*, para. 75.

<sup>13</sup> *Ibid.*, paras. 8-11 and 68.

<sup>14</sup> *Ibid.*, para. 75.

<sup>15</sup> *R. v. E. (A.W.)*, *supra*, paras. 44 (Chief Justice Lamer) and 78 (Justice Cory writing for the majority).

### **C. Conclusion**

23. The Order and Reasons for Recusal do not and should not form part of the record before this Court. Their existence in the public domain does not compromise either the ability of this Court to adjudicate the appeal or the appearance and reality of a fair process.

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<sup>16</sup> Reasons for Recusal, appellant's Motion Record, Tab 5, para. 8.



PART IV - RELIEF SOUGHT

24. The respondent requests:

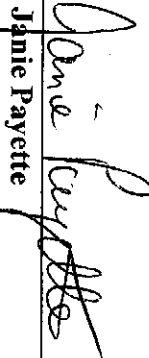
- 1) that the appellant's motion be dismissed with costs to the respondent;
- 2) in the event that the motion is granted, leave to file a Supplementary Memorandum of Fact and Law within 60 days of this Court's decision.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Montréal, this 17<sup>th</sup> day of November 2014

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