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 MEMORANDAUM OF FACT AND LAW

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

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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 response from the judge. The 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 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]

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

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[1] Reasons for Recusal, at para. 8 [Supplementary Appeal Book, Tab 2]

> 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 those principles.

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 it was here, the integrity of *both* processes are tainted in such a way that only a new trial can restore the process.

7. The Appellant submits that the trial judge's improper intervention in the appeal has tainted the appearance of fairness in this process. The Recusal Reasons are a direct interference with the integrity of this Court's process and cannot merely be disregarded. Public confidence in the appellate process requires that such judicial interference be met with both clear 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 Honourable Justice Patrick Boyle on various dates between October 17, 2011 and February 3, 2012.

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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.

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 the Honourable 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.

15. Justice Boyle issued his Recusal Reasons on September 4, 2014. The Appellant brought a Motion to amend its Notice of Appeal and file this Supplementary Memorandum, which was granted by Stratas J.A. on December 9, 2014.[3]

The Recusal Reasons

16. Justice Boyle issued the Recusal Reasons of his own motion, and without notice to the parties. Only eight paragraphs of the 139-paragraph decision actually address the judge's recusal from the matters still pending before him. 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.

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[3] Order and Reasons of Stratas J.A. dated December 9, 2014 [Supplementary Appeal Book, Tab 1]

17. The Recusal Reasons read more like an act of partisan advocacy than judicial explication. In various passages the trial judge argues 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.***"[4] He asserts that there was "***no basis for the Appellant***" taking one position in its factum,[5] 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.[6]

18. The trial judge engages in a wide-ranging critique of the position advanced by the Appellant to this Court, opining that it "***does not in its Factum attempt to suggest or explain why [the trial judge's position] is in fact not the case.***"[7] He bolsters his argument in favour of his own ruling saying "***I remain of the view that my Reasons accurately describe the evidence …***"[8] on one point and then sets about bootstrapping his 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***").[9] 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].***"[10]

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. The judgment is replete with accusations of the Appellant deliberately making false statements. 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]

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[4] Reasons for Recusal, at para. 19 [Supplementary Appeal Book, Tab 2]
[5] Reasons for Recusal, at para. 19 [Supplementary Appeal Book, Tab 2]
[6] Reasons for Recusal, at para. 23 [Supplementary Appeal Book, Tab 2]
[7] Reasons for Recusal, at para. 23 [Supplementary Appeal Book, Tab 2]
[8] Reasons for Recusal, at para. 43 [Supplementary Appeal Book, Tab 2]
[9] Reasons for Recusal, at para. 46 [Supplementary Appeal Book, Tab 2]
[10] Reasons for Recusal, at para. 119 [Supplementary Appeal Book, Tab 2]
[11] Reasons for Recusal, at para. 4 [Supplementary Appeal Book, Tab 2]

20. 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.***"[12] Counsel's candour and competence are impugned. 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.***"[13]

21. The trial judge closes by saying that, "***Trial judges should not have to defend their honour and integrity from such inappropriate attacks.***"[14] 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

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

> ***Do the trial judge's Recusal Reasons compromise the appearance or 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

23. The trial judge's intervention in this appeal was improper. His Honour could have recused himself from the 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. In the Appellant's submission, the conduct is problematic in five ways:

- It flouts the principle that judges are to speak only through their judgments;

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[12] Reasons for Recusal, at para. 24 [Supplementary Appeal Book, Tab 2]
[13] Reasons for Recusal, at para. 25 [Supplementary Appeal Book, Tab 2]
[14] Reasons for Recusal, at para. 138 [Supplementary Appeal Book, Tab 2]

- 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 zealous advocacy for pointed personal attacks;
- It amounts to an attempt by a judge to plead his case before the Court of Appeal, thereby compromising the appearance of fairness at the trial and appeal levels; 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.

i. A trial judge must not descend into the fray

24. 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.

25. 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*, the leading judgment on this issue, Martin J.A. wrote:[15]

> 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.

26. 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*:[16]

> 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.

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[15] (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), at p. 232 [emphasis added]
[16] (1991), 62 C.C.C. (3d) 289 (Ont. C.A.), at p. 320

27. 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 sometimes even a duty – to intervene in the conduct of the trial to ensure a fair and accurate result. By contrast, a trial judge has no right or duty to intervene in the conduct of an appeal. The reasonableness of the judge's conduct – and the hypothetical observer's response to it – must be gauged with that fundamental distinction in mind.

28. 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 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.

29. 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."[17] That is 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

30. Though no case is directly on point, courts have provided guidance by commenting on the difficulties that arise when trial judges interfere in the appellate process in far less dramatic ways.[18] Some guidance can be drawn from the cases involving what is now s.

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

[18] 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

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.

31. The statutory remnant that still exists was examined by the Supreme Court in *R. v. E. (A.W.)*.[19] There, following a jury trial that ended in conviction, the trial judge took it upon himself to write a "report" to 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, is the Court's observation that the letter amounted to an unfair attempt to influence the result of the appeal.

32. 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:[20]

> 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

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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.

[19] [1993] 3 S.C.R. 155

[20] *Ibid.*, at para. 35 [emphasis added]

> 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.

33. 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.

34. 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:[21]

> 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.

35. 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. Accordingly, *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".[22] There is now a broad consensus that, in the words of Dubin J.A., a trial judge must not "put himself into the appellate arena."[23]

36. 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

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[21] *Ibid.*, at paras. 72-73 [emphasis added]

[22] 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. 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."

[23] *R. v. Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.)

of appeal, one by one. As he indicates, the Reasons are for the Court of Appeal's consideration.

37. 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 took offence to a Superior Court appeal decision overturning one of his judgments on the basis of a reasonable apprehension of bias.[24] Like Justice Boyle, he conflated an allegation of legal error with an attack on his personal integrity. He communicated by email with appellate Crown counsel recommending a further appeal and offering his assistance. The email exchange became public when the Crown determined that it needed to disclose the correspondence to defence counsel appearing before Douglas J. on impaired driving matters.

38. The accused in one such matter sought a writ of prohibition in Superior Court to prevent the trial from proceeding before Douglas J., alleging that there was an apprehension of bias arising out of his conduct in the prior case. The Superior Court granted the writ.[25]

39. 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:[26]

> 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

[24] *R. v. Moore*, [2004] O.J. No. 3128 (S.C.J.)
[25] *R. v. Musselman*, *supra*, at para. 14
[26] *In the matter of a complaint respecting the Honourable Justice Norman Douglas* (Ontario Judicial Council, 2006), at para. 41 [emphasis added]

> 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.

40. 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 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

41. 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. There, the Supreme Court held that reasons for judgment delivered 11 months after the result was announced, and after an appeal was underway, should *not* be considered in determining whether the verdict was supportable. Speaking for the majority, Charron J. observed:[27]

> 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.

42. 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." On the facts of *Teskey*, the majority was satisfied that a reasonable person would apprehend the reasons as an "after-the-fact justification for the verdicts rather than

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

the articulation of the reasoning that led to the decision."[28] The conviction was overturned.

43. Justice Boyle's Recusal Reasons raise even 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 would 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

44. The Appellant submits that the seriousness of the trial judge's conduct calls into question the fairness of the entire process and cannot be remedied by anything less than a new trial before a different judge.

i. The Recusal Reasons imperil the appearance of fairness on appeal

45. The Recusal Reasons are an explicit attempt by the trial judge to insert himself into the appellate process as an advocate against the Appellant and its lawyers. Their 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 would cause any reasonable person to "at least wonder"[29] whether this Court "was able to conduct its business free from the interference from other judges."[30]

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

46. The trial judge makes clear that this Court is an intended audience for the Recusal Reasons:[31]

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[28] *Ibid.*, at para. 23
[29] *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 78
[30] *Ibid.*, at para. 72
[31] Reasons for Recusal, at para. 8 [emphasis added] [Supplementary Appeal Book, Tab 2]

> 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"). 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.

47. The trial judge is no ordinary commentator. He was present at trial and enjoys a uniquely privileged position.[32] 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. How, then, should a *litigant* in the Appellant's position view the intervention of the trial judge in its appeal? 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.

48. Indeed, 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.

49. 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. 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".

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[32] The trial judge's position is "one of great power and prestige which gives his every word an especial significance": *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

50. The structure of the adversary system is essential to understanding why the intervention is so problematic. In our system, "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."[33] 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."[34]

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

52. 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:[35]

> 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

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[33] *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]
[34] *Ibid.*, at para. 39
[35] *Tobiass*, *supra*, at paras. 70-71 [emphasis added]

> 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.

53. In *Tobiass*, the Supreme Court found that the appearance of independence had been compromised when a Crown representative 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 troubling since it is a deliberate attempt to meddle in the case on its merits, not merely its timing.

54. Given that the Respondent had no role in the unfairness occasioned by the Recusal Reasons, it might be asked why it is 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's 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.

55. 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 has not been interfered with? 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?

b. The Recusal Reasons undermine the solicitor-client relationship

56. The Appellant is represented by senior and highly regarded members of the bar. In his Recusal Reasons, the trial judge 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 "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 (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).

57. A reasonable observer would conclude that the Recusal Reasons 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 soundness of the advice it had received from counsel in this regard; and (2) tarnishing Appellant counsel's reputation so as to negatively impact the Appellant's credibility before the Court of Appeal.

58. A reasonable person reading the allegations made against counsel could conclude that the trial judge has set up a credibility contest between himself and Appellant's counsel. In essence, the trial judge has suggested to this Court that it must choose between allowing the taxpayer's appeal and upholding the trial judge's honesty and integrity.

ii. The Recusal Reasons retrospectively reveal the trial judge's disposition against the Appellant

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

59. 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.

60. 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.

61. 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. The Factum merely explains why, in the Appellant's view, the trial judge committed reversible legal error: no more, no less.

62. It is difficult to see 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 been manifest in the trial proper.

63. 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"[36] and "[t]he Trial Judge, without acknowledging it, has challenged whether the written terms of the Agreement reflected the "real" allocation of

[36] Appellant's Factum, at para. 89 [emphasis Boyle J.'s]

risk between MIH and McKesson Canada."[37] However, even these phrases picked out by the trial judge to support his point have 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.[38] 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 *mala fides*.

64. In this case, however, Justice Boyle has characterized every claim of error as an allegation of impropriety or deceit. He points to the lack of any "polite qualifiers" in the Appellant's framing of his legal errors and states 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."[39] 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

65. 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. 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.

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[37] Appellant's Factum, at para. 84 [emphasis Boyle J.'s]

[38] 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.

[39] Reasons for Recusal, at para. 19 [Supplementary Appeal Book, Tab 2]

66. 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:[40]

> 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.

67. This 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. Apparently, the impetus for this charge was 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 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 paragraphs 307-310 are "very clear and do not permit of ambiguity."

68. However, even these instances singled out by the trial judge as paramount examples of appellate counsel's supposed mendacity would be seen by any reasonable observer as ordinary advocacy, devoid of the outrageous content perceived by the trial judge. Because the trial judge chose to enter the appellate fray in a manner that was so disproportionate to the alleged provocation, a "reasonable, right-minded and properly

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[40] Recusal Reasons, at para. 21 [emphasis added] [Supplementary Appeal Book, Tab 2]

informed person would think that the Trial Judge had bias against the Appellant during the trial."[41]

C. Conclusion

69. According to former Associate Chief Justice John Morden, the most important person in the courtroom is the "litigant who is going to lose."[42] 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 the Recusal Reasons and proceed to consider the substance of the appeal, a litigant in the Appellant's position could not reasonably believe it has received a fair shake from a process that produced such an extraordinary intervention in the appeal by the trial judge. A new trial is required.

PART IV – ORDER SOUGHT

70. 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 5th day of January, 2015

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

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PART V – LIST OF AUTHORITIES

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