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

RESPONDENT'S SUPPLEMENTARY MEMORANDUM OF FACT AND LAW

(In accordance with subsection 70 of the *Federal Courts Rules*)

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OVERVIEW

1. The Order and Reasons for Recusal have not irreparably compromised the appearance of fairness of the trial or the appeal. The Reasons for Recusal do not provide any insight into the trial judge's state of mind either during the trial or in rendering Judgment. There is likewise nothing in the Court record or in the Reasons for Judgment that reveals any bias against the appellant by the trial judge at any time during the trial or at the time the Judgment was issued. A new trial on this ground is unwarranted.

2. The Order and Reasons for Recusal were issued almost nine months after the trial judge delivered his Judgment and Reasons for Judgment. The documents they reference, namely the appellant's Memorandum of Fact and Law, the judgment under appeal and the trial transcript, are already before this Court. The articulation of the reasoning that led to the dismissal of the appeal is found in the Reasons for Judgment, not in the Reasons for Recusal.

3. The trial judge's Reasons for Judgment reveal a careful and fulsome analysis of the evidence adduced at trial. Trial judges are expected to make findings as to the cogency, reliability and soundness of a party's evidence and make a determination as to the weight it should be given. This is what the trial judge did in this case, within the limits of the transfer pricing case framed by the parties.

4. Whether the trial judge erred in rendering his decision on the merits can fairly be the subject of appellate review by this Court without regard to the Order and Reasons for Recusal. This would ensure that the trial judge's post-judgment comments do not, as the appellant fears, interfere with the appellate process.

PART I - FACTUAL BACKGROUND

5. This appeal arises from a transfer pricing reassessment in respect of transactions involving the sale of accounts receivable. It also relates to the timeliness of a secondary assessment under Part XIII of the *Income Tax Act*.

6. 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. The last set was filed on December 3, 2012.

7. The Tax Court of Canada issued its Judgment and Reasons for Judgment on December 13, 2013.[1] The Reasons for Judgment consist of almost 400 paragraphs and contain an extensive review of the evidence before the Court. The respondent was successful on both issues and the appeal was dismissed with costs.

8. Thereafter, the trial judge remained seized of two issues, the confidentiality of the trial record and a request by the respondent for an award of enhanced costs.

9. McKesson appealed the Judgment and filed its Memorandum of Fact and Law in June 2014. The respondent filed her Memorandum of Fact and Law in August 2014.

10. On September 4, 2014, after the appellant's Memorandum of Fact and Law was brought to his attention "by several prominent Canadian tax lawyers as well as by a colleague on the Court",[2] the trial judge recused himself on his own motion from disposing of the issues remaining before the Tax Court.

11. In his Reasons for Recusal, the trial judge stated that the appellant's Memorandum of Fact and Law appeared to him 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

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1 Judgment and Reasons for Judgment of the Tax Court of Canada dated December 13, 2013, Appeal Book, vol. 1, tab 3.

2 Reasons for Recusal, Supplementary Appeal Book, tab 2, para. 7.

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".[3]

12. 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.[4]

13. The trial judge concluded that his recusal was necessary because a reasonable fair-minded person, informed and aware of all the issues, would entertain doubt that he could remain able to reach impartial decisions on the remaining questions before him, given the statements in the appellant's Memorandum of Fact and Law. [5]

14. 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.

15. On December 9, 2014, this Court issued an Order allowing the appellant to amend its Notice of Appeal and directing the parties to file Supplementary Memoranda of Fact and Law.[6]

PART II – POINT IN ISSUE

16. The appellant's Amended Notice of Appeal filed on December 16, 2014 raises the following additional 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 of fairness of both the trial and the appeal."

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3 Reasons for Recusal, Supplementary Appeal Book, tab 2, para. 4.

4 *Id.*, paras. 8, 22 and 77.

5 *Id.*, para. 138.

6 Order and Reasons for Order of Stratas J.A. dated December 9, 2014, Supplementary Appeal Book, tab 1.

PART III – STATEMENT OF SUBMISSIONS

A. The Reasons for Recusal do not compromise the appearance and reality of fairness of the appeal

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".[7] A reasonable person, informed of these traditions, would presume that all judges carry out their oath of office.[8]

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. A reasonable person, well-informed of this judicial practice and of the judicial traditions of integrity and impartiality, would be confident that this Court could examine the case on its merits free from influence by the trial judge's Order and Reasons for Recusal.

19. The Supreme Court of Canada's decision in *R. v. E. (A.W.)* is instructive in this regard.[9] In that case, the trial judge had provided an unsolicited report expressing his view that the guilty verdict of the jury was unsafe.[10] Based in part on this report, the Court of Appeal had ordered a new trial.[11]

20. The majority of the Supreme Court of Canada 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 that the report should not have been considered in rendering its decision.[12] 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

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7 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 111; *R. v. Teskey*, [2007] 2 S.C.R. 267, para. 19 (Justice Charron for the majority) and para. 29 (Justice Abella in dissent).

8 *R. v. S. (R.D.), supra,* paras. 111 and 117; *R. v. Teskey, supra,* para. 33.

9 *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155.

10 *Id.*, para. 5.

11 *Id.*, paras. 8-11.

12 *Id.*, para. 75.

guilty verdict was unreasonable". As a result, the Supreme Court restored the conviction.[13]

21. The Supreme Court of Canada was evidently not troubled about its ability, or that of the Court of Appeal, to not take the trial judge's report into account, although well aware of its existence and contents.

22. To the extent that the Reasons for Recusal might be viewed as supplementary reasons for judgment, as a refutation of certain arguments made by the appellant in its Memorandum of Fact and Law or as a clarification or explanation of the trial judge's reasons,[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 on the merits of the case.

23. For example, in *Breslaw*, 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 oral reasons delivered in open court".[15] Other appellate courts have reached the same conclusion.[16]

24. In this case, the Reasons for Recusal were issued well after the trial judge delivered his judgment on the merits of the appeal. The documents they reference, namely the appellant's Memorandum of Fact and Law, the judgment under appeal and the trial transcript, are already before this Court. The articulation of the reasoning that led to the dismissal of the appeal is found in the Reasons for Judgment, not in the Reasons for Recusal.

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13 *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, paras. 44 (Chief Justice Lamer) and 78 (Justice Cory).

14 Appellant's Supplementary Memorandum of Fact and Law, para. 16.

15 *Breslaw v. Canada*, 2005 FCA 355, paras. 26 and 27.

16 *Wilde v. Archean 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, pp. 3 et seq. (Ont. CA).

B. The Reasons for Recusal do not retrospectively reveal a disposition by the trial judge against the appellant

25. The Reasons for Recusal do not provide any insight into the trial judge's state of mind either during the trial or in rendering his Judgment. Contrary to the appellant's submissions,[17] they would not lead a reasonable and informed observer to apprehend that the trial judge had bias against the appellant in rendering his Judgment.

1. The applicable test for reasonable apprehension of bias

26. The test articulated by the Supreme Court of Canada for establishing an apprehension of bias is an objective one, that is: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[18]

27. Judges and judicial decisions benefit from a strong presumption of judicial integrity and impartiality[19] – "a presumption that the judge has done his job as he is sworn to do."[20] The burden of demonstrating a reasonable apprehension of bias lies with the person who is alleging its existence.[21] The threshold which an applicant must meet to establish real or perceived bias is very high[22] and the presumption of judicial integrity and impartiality can only be rebutted by cogent evidence.[23] In *R. v. S. (R.D.),* the Supreme Court of Canada stated:

> Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some

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17 Appellant's Supplementary Memorandum of Fact and Law, paras. 59 to 68.

18 This test was set out in the dissenting reasons of de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, p. 394 and consistently endorsed by the Supreme Court of Canada, notably in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, paras. 31 and 111. See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, para. 60.

19 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 32; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, paras. 59 and 76.

20 *Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, para. 15.

21 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 114.

22 *Id.*, para. 113; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at paras. 59 and 76.

23 *R. v. S. (R.D.)*, *supra*, para. 117.

> clear evidence that the judge in question had improperly used his or her perspective *in the decision-making process*.[24]

28. A determination whether a reasonable apprehension of bias exists requires a review of the context. Allegations of perceived judicial bias will generally not succeed unless the impugned conduct, considered in the context of the circumstances and in light of the whole proceeding, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice.[25]

2. The trial proceedings raise no apprehension of bias

29. The appellant has not satisfied the burden of demonstrating a reasonable apprehension of bias. There is nothing in the trial judge's Reasons for Recusal, or anywhere in the Court's record pertaining to this case, that reveals any particular disposition the trial judge might have had toward the appellant at the time of trial and in rendering his Judgment.

30. The Judgment was rendered almost nine months prior to the Order and Reasons for Recusal. While the latter were plainly issued as a reaction to certain assertions in the appellant's Memorandum of Fact and Law, they do not raise any inference of *animus* against the appellant by the trial judge either in conducting the trial or in rendering his Judgment.

31. A review of the trial proceedings confirms that there is no evidence to sustain a finding of reasonable apprehension of bias on the part of the trial judge in disposing of the appeal. Indeed, the appellant's Supplementary Memorandum of Fact and Law does not make reference to any excerpts from the transcript of the hearing that would create an impression that the trial judge was biased. This is because there is nothing in the transcript of the hearing that could create any such impression.

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[24] *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, para. 49 (emphasis added).

[25] *Id.*, para. 141. See also paras. 104-105.

32. Questions by the trial judge to the witnesses were generally asked after examinations by counsel and followed by an offer to the parties to ask further questions if they wished.[26]

33. Similarly, in argument, the trial judge specifically drew the attention of counsel for the appellant to a number of questions that were then of concern to him, such as:

(a) the incidence of a notional continued group control in the determination of the Discount Rate – a question which ultimately played no role in the trial judge's transfer pricing analysis and his determination of the Discount Rate;[27]

(b) the tax motivation of the transaction – a matter which, again, had no impact on the judge's transfer pricing analysis and on his Discount Rate range;[28]

(c) the cogency, reliability and soundness of the credit risk cost valuation presented by the appellant's main expert, Mr. Reifsnyder, which used data from a high yield public bond index to compute the Discount Rate – an approach that the witness had never previously used to value the credit risk cost of accounts receivable and that the trial judge rejected for valid and stated reasons; [29] and

(d) the possibility that Mr. Reifsnyder would have had to consider the cost of insuring the receivables in his pricing approach, or to test the results of his approach – which Mr. Reifsnyder did not do in any event.[30]

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26 See for instance Brennan testimony, Transcript Book 1, p. 418 line 17 to p. 419 line 25; Hooper testimony, Transcript Book 2, p. 568 line 13 to p. 588, line 25; Frisch testimony, Transcript Book 3, p. 825 line 7 to p. 831 line 7; Reifsnyder testimony, Transcript Book 4, p. 1280, line 9 to p. 1307 line 14.

27 Transcript Book 11, p. 3541 line 15 to p. 3545 line 21 and p. 3634 line 5 to p. 3635 line 15; Reasons for Judgment, paras. 128-132; Respondent's Memorandum of Fact and Law, paras. 81-88.

28 Transcript Book 11, p. 3514 line 20 to p. 3515 line 6; Reasons for Judgment, Appeal Book, vol. 1, tab 3, paras. 274-276; Respondent's Memorandum of Fact and Law, paras. 72-80.

29 Transcript Book 11, p. 3661, line 15 to p. 3663, line 6; pp. 3752, lines 14-23; p. 3766, lines 16-22; p. 3767 line 25 to p. 3768 line 13. See also Reasons for judgment, Appeal Book, vol. 1, tab 3, paras. 243 to 246; Respondent's Memorandum of Fact and Law, paras. 91-101.

30 Transcript Book 11, p. 3651, lines 2-18 and p. 3669 line 21 to p. 3670 line 8. Reifsnyder report, Appeal Book, vol. 12, tab 58, pp. 3731-3764.

34. At the end of the trial, the judge allowed both parties to file additional written submissions.[31] Both parties availed themselves of this offer and three sets of additional written submissions were filed.[32] Those submissions addressed the merits of the case. No suggestion was made in any of the appellant's submissions that the trial judge had bias against the appellant during the trial.

35. Shortly after the Supreme Court of Canada rendered its judgment in *GlaxoSmithKline*,[33] the trial judge offered the parties an opportunity to submit further written submissions, which the parties did.[34] This offer by the trial judge, made 10 months after oral argument, reveals that he still had an open mind and was not disinclined to persuasion.

3. The trial judge properly performed his role as the trier of fact

36. In his Reasons for Judgment, the trial judge made a number of unfavorable findings regarding the cogency, reliability and soundness of the fact and opinion evidence tendered by the appellant. Those findings, largely supported by the criticisms expressed in the reports and testimony of the respondent's experts and by the cross-examinations of the appellant's witnesses, are those that a trial judge is called upon to make when faced with conflicting evidence. The trial judge's role would be rendered meaningless if deprived of the possibility of making findings on the cogency, reliability and soundness of evidence.

37. The trial judge's unfavorable findings must be viewed in the context of the whole proceedings.[35] The appellant's evidence showed that in the summer of 2002, McKesson had been advised that, given the uniqueness of the RSA transaction, a transfer pricing

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31 Transcript Book 13, p. 4329 line 24 to p. 4331, line 8.

32 Appellant's and Respondent's Supplementary Submissions, Appeal Book, vols. 20 and 21, tabs 30 to 35.

33 *Canada v. GlaxoSmithKline*, [2012] 3 S.C.R. 3, rendered on October 18, 2012.

34 Letter by the Tax Court of Canada and Appellant's and Respondent's Supplementary Submissions, Appeal Book, vol. 21, tabs 36 to 38.

35 *R. v. S. (R.D.), supra,* para. 141.

study should be obtained from an expert in that field.[36] Yet, neither McKesson U.S., nor McKesson Canada sought a formal pricing study.[37] Rather, McKesson and its advisors relied on a last minute, not fully informed letter of opinion by TDSI which admittedly exceeded its author's field of expertise[38] and was riddled with shortcomings.[39]

38. The PriceWaterhouseCoopers report of December 2005 was similarly plagued by a selective reliance on data, as well as other deficiencies.[40] The Reifsnyder report's main conclusion on the key issue of the credit risk cost was likewise based on an untenable approach that the expert himself had never before used to price a trade receivables financing transaction. There was also no attempt to back-test his conclusions.[41]

39. A party relying on deficient evidence exposes itself to criticism and invites skepticism on the part of the trial judge regarding its choice of evidence. The trial judge's findings in this case reflect those made from time to time in judgments rendered in valuation matters, such as "advocacy",[42] "wishful thinking"[43] and statements that an opinion was "greatly discredited".[44] Such assessments express the conclusions of the trier of fact on the reliability and weight to be given to the expert evidence and flow from the fact-finding role assigned to trial judges.

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36 Reasons for Judgment, Appeal Book, vol. 1, tab 3, para. 183; Brennan testimony, Transcript Book 1, p. 311 line 12 to p. 315 line 9.

37 Reasons for Judgment, Appeal Book, vol. 1, tab 3, para. 183; Brennan testimony, Transcript Book 1, p. 315 lines 1-9.

38 Reasons for Judgment, Appeal Book, vol. 1, tab 3, paras. 53-55, 185 and 191. For a review of the evidence bearing on TDSI's lack of expertise in the pricing of non-recourse or limited recourse transactions, see respondent's Memorandum of Fact and Law, para. 103.

39 Reasons for Judgment, Appeal Book, vol. 1, tab 3, paras. 48-110 and 184-199; Respondent's Memorandum of Fact and Law, paras. 102-118.

40 Reasons for Judgment, Appeal Book, vol. 1, tab 3, paras. 200-215.

41 Reasons for Judgment, Appeal Book, vol. 1, tab 3, paras. 243-246; Respondent's Memorandum of Fact and Law, paras. 91-101.

42 See for instance *Shulkov v. The Queen*, 2012 TCC 457, para. 74 and *Shearsmith v. Houdek*, 2008 BCSC 997 at para. 11, a case bearing on the valuation of personal injury damages: "Dr. Piper impressed upon me that he was more of an advocate for ICBC than an objective expert, and I therefore attach little weight to his evidence."

43 *Brocke Estate v. Crowell*, 2013 NSSC 259, para. 66.

44 *Beaudry v. The Queen*, 2008 TCC 17, para. 142, varied on unrelated grounds at 2009 FCA 48.

40. The appellant's contention that the trial judge did not indicate any concerns during trial as to the credibility of the appellant's witnesses[45] is undercut by the trial judge's numerous comments during trial that, while he did not have fundamental "credibility issues at this stage", he had "weight and relevance issues".[46] Similarly, the appellant's suggestion that " ... the Crown never argued that there was any issue as to the credibility of McKesson Canada's witnesses ..."[47] is inaccurate and incomplete. In fact, the respondent argued that there were a number of issues with the appellant's evidence, including its cogency, reliability and soundness, all of which greatly impacted the weight it should be accorded.[48]

41. The trial judge had ample reason to express dissatisfaction with the evidence. In particular, the absence of key personnel from McKesson Canada at trial, namely its Chief Financial Officer and its Director of Credit and Collections, compounded the difficulty and made the appellant vulnerable to further criticism of its choice of evidence.[49] The trial judge's criticisms of the appellant's case is not an indication that he was not "detached"[50] as alleged by the appellant, but rather a reflection of the shortcomings and selective reliance on data in the evidence adduced by the appellant.

42. Even the appellant's post-trial written submissions reveal the limitations of its own evidence. For instance, the appellant attempted to shore up the Reifsnyder high yield bond index approach by advancing a new "Investment Decision" theory that was never put to its expert at trial, even though it attempted to justify a cost of capital discount

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45 Appellant's Memorandum of Fact and Law, para. 37(c) and para. 9, footnote 2.

46 Transcript Book 11, p. 3737 line 16 to p. 3738 line 8. See for instance the series of questions by the trial judge to Appellant's counsel as to why he should accept the Reifsnyder "junk bond" approach as a starting point in determining a credit risk cost: Transcript Book 11, p. 3752 lines 14-23; p. 3753 line 22 to p. 3754 line 1; p. 3755 line 21 to p. 3756 line 3; p. 3756 lines 12 to 15.

47 Appellant's Memorandum of Fact and Law, para. 9, footnote 2.

48 See for instance Respondent's Written Submissions, Appeal Book, vol. 20, tab 29, p. 6385 (para. 65) and p. 6390 (para. 68). See also Respondent's additional submissions of March 5, 2012, Appeal Book, vol. 20, tab 31, pp. 6510-6511 (paras. 8-9), p. 6521 (para. 32), p. 6537 (para. 69), pp. 6541-6543 (paras. 78-82) and pp. 6547-6550 (paras. 90-97).

49 Reasons for Judgment, Appeal Book, vol. 1, tab 3, paras. 168 and 297. It should be recalled that a direct result of McKesson's chosen Discount Rate is that McKesson Canada reported a tax loss in the 2003 taxation year in issue. In later years similarly, McKesson Canada's profits were significantly reduced: Reasons for Judgment, Appeal Book, vol. 1, tab 3, para. 15.

50 Appellant's Supplementary Memorandum of Fact and Law, para. 65.

based on this expert's numbers.[51] Likewise, the appellant suggested that hypothetical buyers under the receivables sales agreement would tend to have high funding costs, an unsupported theory contradicted by the evidence, including its own.[52] The trial judge rightly ignored the first theory and rejected the second.[53]

43. Ultimately, the potential sensitivity to criticism of an expert or a party cannot be an impediment to a trial judge fulfilling his or her fact-finding role. As U.S. Court of Appeal Judge Jerome Frank put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence."[54] A meaningful assessment of the opinions expressed before the Court and a determination of the weight to be given to them is central to trials involving valuation issues.

44. In its Supplementary Memorandum of Fact and Law, the appellant also reiterates its earlier claim that the trial judge did not decide the case as framed by the parties.[55] This claim is unfounded. As demonstrated in the respondent's Memorandum of Fact and Law, the trial judge properly performed his role as trier of fact and decided the case strictly within the boundaries of the issues pleaded by the parties. For instance:

(a) in order to determine the arm's length discount rate formula under the RSA, the trial judge analyzed each component of the total Discount Rate following the structure of the RSA, largely as proposed by the witnesses for both the appellant and the respondent;[56]

(b) the witnesses for both parties testified on a range of detailed approaches and discount rates, and each component of the arm's length discount rate formula

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51 Supplementary Submissions of the Appellant in the Tax Court, March 5, 2012, Appeal Book, vol. 20, tab 30, pp. 6480-6482 (paras. 68-72); Response to Appellant's Supplementary Submissions, April 4, 2012, Appeal Book, vol. 21, tab 33, p. 6781 (paras. 61-63).

52 Supplementary Submissions of the Appellant in the Tax Court, March 5, 2012, Appeal Book, vol. 20, tab 30, p. 6479 (para. 64, lines 3-6 and lines 8-9); Response to Appellant's Supplementary Submissions, April 4, 2012, Appeal Book, vol. 21, tab 33, pp. 6773-6777 (paras. 45-53).

53 Reasons for Judgment, Appeal Book, vol. 1, tab 3, para. 348.

54 Cited by the United Stated Supreme Court (Scalia J. for himself and four other Justices) in *Liteky v. United States*, 510 U.S. 540 (1994), p. 551.

55 Appellant's Supplementary Memorandum of Fact and Law, para. 1.

56 Reasons for Judgment, AB, vol. 1, tab 3, para. 270; Respondent's Memorandum of Fact and Law, paras. 46-48.

ultimately determined by the trial judge is within the range that was presented in evidence before him;[57]

(c) the trial judge's analysis is based entirely on the relevant financial data entered into evidence at trial, including historical performance data bearing on the accounts receivable portfolio sold under the RSA;[58]

(d) although the trial judge did not adopt the evidence of any one expert in its entirety but relied on all of their testimony to inform his extensive financial analysis, it was within the realm of his judicial discretion to do so; his duty was to analyze and evaluate the expert evidence before him and to draw his own conclusions;[59]

(e) the trial judge correctly interpreted critical provisions of the contractual agreement between the parties and considered the views of witnesses from both parties regarding their impact on the risks in the transaction;[60]

(f) the appellant's claim that the respondent's case of an arm's length discount rate of 1.0127% was based on the introduction of reserves in the RSA, inaccurately depicts the proceedings in the Tax Court;[61] and

(g) the trial judge's decision is based on the tax provisions invoked by the parties, namely paras. 247(2)(*a*) and (*c*) of the Act.

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57 Respondent's Memorandum of Fact and Law, paras. 46-51 and 55; TDSI report at p. 10, Appeal Book, vol. 4, tab 37, p. 1148; Reifsnyder report at p. 23, Appeal Book, vol. 12, tab 58, p. 3754; Glucksman report at p. 44 – Table 2, Appeal Book, vol. 17, tab 69, p. 5237; Finard report at p. 30 – Figure 12, "Discount Spread" and "Yield Rate" and p. 35 – Figure 16, Appeal Book, vol. 15, tab 37, pp. 4856 and 4861; Becker report at Tables 10 and 15, Appeal Book, vol. 14, tab 17, pp. 4563 and 4568.

58 Reasons for Judgment, Appeal Book, vol. 1, tab 3, pp. 74-89; Respondent's Memorandum of Fact and Law, pp. 21-34.

59 Reasons for Judgment, Appeal Book, vol. 1, tab 3, para. 269; Respondent's Memorandum of Fact and Law, para. 89 and footnote 121. See also *Hallatt v. R.*, 2004 FCA 104, para. 17; *CIT Financial Ltd. v. R.*, 2004 FCA 201, paras. 13-14, leave to appeal refused: [2004] 3 S.C.R. vii.

60 In that regard, the respondent adduced substantial evidence on the risk inherent in McKesson Canada's receivables portfolio and on the termination features of the RSA such as the Loss Ratio and Delinquency Ratio Triggers. See Respondent's Memorandum of Fact and Law, paras. 82-87 and 120-125.

61 Respondent's Memorandum of Fact and Law, paras. 47-48.

45. The appellant's depiction of the Judgment as though the trial judge would have exclusively viewed the case through the prism of continued group control, tax avoidance and lack of need for funds, mischaracterizes the Reasons for Judgment and is devoid of any foundation. As demonstrated in the respondent's Memorandum of Fact and Law, these factors were either *obiter*[62] or played no role in the trial judge's calculations of the arm's length discount rate. The trial judge made no adjustments to the arm's length discount rate as a result of these factors.[63] The appellant has offered no basis on which to disturb the presumption that the trial judge's Reasons for Judgment are honest explanations for the conclusions that he reached.[64]

C. The remedy sought is unwarranted

46. Serious remedies such as a new trial require serious justification.[65] The Reasons for Recusal have not irreparably compromised the appearance of fairness of the appeal. Indeed, by recognizing that the Reasons for Recusal ought not to play any role in determining the outcome of this appeal, this Court will remedy any perceived impact on the appellate process.

47. The Reasons for Recusal do not establish that the trial judge had an *animus* against the appellant in rendering his Judgment. They clearly arise from statements in the appellant's Memorandum of Fact and Law and do not reflect the trial judge's state of mind during the trial or at the time he rendered his decision on the merits, nor would a reasonable person perceive otherwise.

48. A new trial on the ground that the appearance and reality of a fair process have been compromised is unwarranted in the circumstances of this case.

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62 Quite obviously, *obiter* cannot result in detriment to either party: *Heron Bay Investments Ltd. v. R.*, 2010 FCA 203, para. 39.

63 Respondent's Memorandum of Fact and Law, paras. 71-88; Reasons for Judgment, paras. 277 to 351.

64 *R. v. Teskey*, [2007] 2 S.C.R. 267, paras. 19 and 36. Accordingly, the trial judge's calculation of the arm's length Discount Rate is not based on the formulation of new issues. Rather, it is based on questions that are rooted in or that are components of an existing issue, namely the impact of the Loss Ratio and Delinquency Ratio termination rights on the quantification and remuneration of a purchaser's credit risk. See by analogy *R. v. Mian,* 2014 SCC 54, paras. 33-35 and *Heron Bay Investments Ltd. v. R.*, 2010 FCA 203, para. 24.

65 *R. v. Sheppard*, [2002] 1 S.C.R. 869, para. 22.

PART IV – STATEMENT OF THE ORDER SOUGHT

49. The appeal should be dismissed with costs.

Montréal, this 26th day of January 2015

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Solicitor for the Respondent

per: _____

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PART V – LIST OF AUTHORITIES

STATUTES

CASE LAW

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