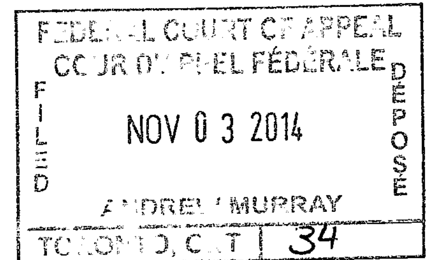
Court of Appeal File No. A-48-14
(consolidated with A-49-14)



FEDERAL COURT OF APPEAL

BETWEEN:

McKESSON CANADA CORPORATION

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

WRITTEN REPRESENTATIONS

(Motion to File Amended Notice of Appeal & Supplementary Memorandum)
In Accordance with Rule 70 of the *Federal Court Rules*

PART I – OVERVIEW

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

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

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

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

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

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

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

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

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

PART II – PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

PART III – ARGUMENT

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

A. The Reasons for Recusal are Properly Before this Court

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

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

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

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

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

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

B. Relevant Precedent

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

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[9] Reasons for Recusal, at para. 8

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

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

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

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

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

C. The Supplementary Memorandum Should be Received

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

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

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

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

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

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

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

PART IV – ORDER SOUGHT

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

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

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

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

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

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PART V – LIST OF AUTHORITIES

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

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

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

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