Docket: 2008-2949(IT)G
2008-3471(IT)G

BETWEEN:

MCKESSON CANADA CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ORDER

In accordance with the attached reasons for recusal, I am recusing myself from completing the McKesson Canada proceeding in the Tax Court. This extends to the consideration and disposition of the costs submissions of the parties in this case, as well as to the 2010 confidential information order of Justice Hogan in this case and its proper final implementation by the Tax Court and its Registry.

Signed at Ottawa, Canada, this 4th day of September 2014.

"Patrick Boyle"

Boyle J.

Citation: 2014 TCC 266
Date: 20140904
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REASONS FOR RECUSAL

Boyle J.

[1] I rendered my Reasons and judgment on the merits of the Appellant's case on December 13, 2013. That decision has been appealed by the Appellant to the Federal Court of Appeal.

[2] I remain seized with the remaining issue of costs to be awarded in respect of the trial. I received written submissions on costs from the Respondent in March 2014 and from the Appellant in April 2014. On April 30, 2014, the Appellant confirmed to the Court that it did not want an oral hearing on costs, the Respondent having earlier communicated to the Court that it was not requesting an oral hearing on costs.

[3] I also remain seized with deciding the appropriateness of the parties' written proposal of April 2014 for dealing with the satisfactory identification of any notionally or actually sealed confidential information and the public versions of documents prior to this Court's file being made generally open to the public. This involves a reconsideration of the pre-trial confidential information order of Justice Hogan issued in March 2010.

[4] As detailed below, I have, of my own motion, decided that I am compelled to consider whether I need to recuse myself from the two remaining issues before

this Court. A consideration of this issue is required because I became aware that the Appellant and Appellant's counsel, together with its co-counsel in the Federal Court of Appeal in respect of the appeal of the trial decision, had made certain public written statements about me in its factum in the Federal Court of Appeal (the "Factum") which, upon reflection, appear to me 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 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.

[5] This requires me to consider whether:

(i) I believe that a reasonable person reading the Factum, my Reasons, and the relevant portions of the transcript would believe that the trial judge so strongly complained of by McKesson Canada might not be able to remain impartial in his consideration of costs and confidential information;

(ii) I believe I can impartially consider, weigh and decide the costs and confidential information issues before me; and

(iii) whether the public challenge of my impartiality expressed by McKesson Canada and its co-counsel in the Factum is itself sufficient to warrant recusing myself at this stage.

[6] Points (i) and (iii) above require the consideration of the matter from the point of view of a notional reasonable and fair minded person, who is informed on the issue, and who takes time to reflect on whether he or she has an apprehension or reasoned suspicion of bias, actual or perceived, on my part.

[7] It is not my habit to review the factums filed in the Federal Court of Appeal in respect of my decisions. In this case, 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.

[8] 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. Counsel on each side in the appellate court is free to make whatever arguments they wish, including claiming or denying support in the record, the use of emphasis and spin, or even trying to argue a case it thinks it can win instead of the case it has. That is all of counsel's choosing and to be ultimately considered and decided by the appellate court. 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").[1] 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.

1. Where it Appears in the Factum that McKesson Canada States that the Trial Judge is Untruthful and Deceitful

[9] This concern arises from paragraphs 84 through 89 of the Factum relating to the loss discount analysis, including my reliance upon the testimony of the Appellant's witness Barbara Hooper with respect to the objective and effect of two specific termination triggering events in the RSA, as well as to the issue of notional ongoing corporate control.

[10] In paragraphs 128 to 132 of the Reasons, I wrote the following on the issue of the relevance of notional ongoing corporate control:

> **(e) Factors that Exist Only because of the Non-Arm's Length Relationship**
>
> [128] Within a transfer pricing review, the question arises whether factors that exist only because of the non-arm's length relationship are assumed away in the notional arm's length analysis or remain relevant characteristics and circumstances.
>
> [129] This question may not arise to any extent in the context of a single purchase at a fixed price. The question does appear significant in the context of a

[1] Much of the underlined emphasis in the numerous passages quoted below has been added by me. I have also dropped numerous footnotes from the quoted passages.

long-term commitment to do things over a period of time. For example, in transactions such as those involving the RSA, does the Court assume a notional arm's length MIH would still enjoy the benefit of the Irish company loan supported by the MIH2 guarantee and indemnity? In looking at transactions like the RSA, does the Court assume the notional arm's length MIH still has the power throughout the term of 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? Does the Court assume that the notional arm's length purchaser still has the right to cause McKesson Canada to agree to change terms as they apply to future transactions under the agreement? Does the Court assume that the notional arm's length MIH still has access to all of the financial information of McKesson Canada and information regarding its receivables portfolio and its entire business even though it may not be specified or required in the RSA?

[130] This issue was addressed by Justice Pizzitelli in *Alberta Printed Circuits v. The Queen*, 2011 TCC 232:

> It is important to note that factors or circumstances that exist solely because of the non-arm's length relationship of the parties should not be ignored, otherwise the reasonable businessman would not be standing entirely in the Appellant's shoes. . .
>
> … In *General Electric*, the Federal Court of Appeal confirmed that no error of law was made in taking into consideration the Appellant in that case, as a sub of its larger parent company, stood in the position of having an implicit guarantee by its parent of its bank debts.

[131] Based on this, all circumstances, including those that arise from, derive from or are rooted in the non-arm's length relationship should be taken into account.

[132} I think the better view is therefore that the Court can and should consider notional continued control type rights in appropriate circumstances when looking at term or executory contract rights. Not to do so would be to not look at all of the relevant characteristics and circumstances of the relationships. If these were to be ignored by a Court, companies within wholly controlled corporate groups could enter into skeletal agreements conferring few rights and obligations to the non-resident participant, (such as financial information disclosure, use of funds, financial covenants et cetera), all with the view to obtaining a more favourable transfer price to reduce Canadian taxes. Not approaching this issue this way would seem entirely inconsistent with this Court and the Federal Court of Appeal in G.E. Capital having focused on implicit unwritten, unenforceable guarantees of

> the parent company of the borrower. However, in this case, I do not need to do so in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment, as detailed below. This too can be left for another day.

[11] In the Reasons I wrote the following on the issue of termination triggering events and their relevance to loss discount:

> [26] MIH could terminate its obligations to purchase any further McKesson Canada receivables upon the occurrence of certain defined termination events, generally designed to identify or anticipate deteriorating creditworthiness of McKesson Canada or its pool of customers generating the receivables. These events included financial defaults of McKesson Canada or its affiliates, increases in the delinquency ratio or loss ratio of the receivables beyond specific thresholds, a downgrade in the credit rating of McKesson U.S., McKesson Canada's name being changed to drop the word McKesson, McKesson Canada ceasing to be controlled by McKesson U.S., McKesson U.S. ceasing to guarantee McKesson Canada's bank and commercial paper lenders, and any event occurring which materially adversely affected the enforceability or collectibility of the receivables or MIH's rights under the agreements It can be noted that the termination events were not limited to things in McKesson Canada's control, and included events in the control of its direct and indirect shareholders/parent corporations.
>
> [. . .]
>
> **b) Termination Events**
>
> [59] TDSI is satisfied that the triggers in the RSA definition of termination event are within the range of normal in an arm's length transaction "of this nature". I repeat my earlier observations about her use of this phrase in the TDSI opinion.
>
> [60] The TDSI opinion makes specific reference to the role of such termination triggers as protection for poor performance of receivables or declining creditworthiness of the seller. It identifies McKesson Canada's creditworthiness as seller as relevant in part because of its obligations to remit collections to MIH. TDSI is of the express view that "because [McKesson Canada] is so closely tied and important to [McKesson U.S.], it is reasonable to use the public debt ratings of [McKesson U.S.] as an indication of [McKesson Canada's] creditworthiness".
>
> [61] The TDSI opinion goes on to specifically consider i) the receivables pool's delinquency ratio trigger in the RSA, and ii) the receivables pool's loss ratio trigger in the RSA.
>
> **(i) Delinquency Ratio Trigger**

[62] TDSI considered the improving two year historical trend in the delinquency ratio of McKesson Canada's receivables and the recently maintained 1.0% rate. The 2.5% trigger rate in the RSA would, in TDSI's opinion, represent a significant adverse deviation from the current steady state of 1% and so considered reasonable. TDSI highlighted the importance of the dynamic four-month rolling average approach to measuring the delinquency ratio in the RSA, and uses this approach in its analysis. TDSI confirmed that this is consistent with the three to six month periods generally used for such purposes.

(ii) Loss Ratio Trigger

[63] TDSI looked at three years of historic bad debt experience on McKesson Canada's receivables portfolio. TDSI identified the difference between accounting write-offs and the 90 day delinquency definition of losses for purposes of the loss ratio in the RSA, with the result that the latter ratio could be expected to exceed the former. TDSI opined that a dynamic loss ratio, which measured a four-month average 90 day delinquency, and with a trigger of 0.25%, appeared reasonable given that, although write-offs to sales on a monthly basis at times reached this level, it had never exceeded 0.10% on a four-month rolling average.[footnote 21: It was acknowledged in Ms. Hooper's cross-examination that, in fact, it had not exceeded 0.04%, much less 0.10%. That is, it was not that TDSI considered a 2.5 times multiple reasonable, it considered a 6 + times multiple reasonable but did not expressly say so.]

[. . .]

[194] Ms. Hooper added that the delinquent portfolio performance trigger serves as an early warning system. Typically with receivables one will see delinquencies increase in advance of seeing losses increase. For this reason, she explained one wants the trigger rate to permit termination of the agreement early enough for there to not be material losses. She clearly understood that when the transaction could be terminated would have a fairly significant affect on the overall risk that was being transferred. According to Ms. Hooper, portfolio performance triggers, delinquency and default rate triggers, were designed to limit the ultimate losses to the purchaser by ceasing the acquisition of new receivables that might not be expected to perform as well as receivables originated previously.

[. . .]

[306] The RSA was signed at a time when the receivables pool's write-offs to sales performance had been in the range of 0.04%. This was well known and tracked by McKesson Canada and McKesson Group. The RSA gave MIH an immediately exercisable termination right in the event the pool's Delinquency Ratio or Loss Ratio increased by specific measures.

[307] Ms. Hooper's evidence was that these two termination event triggers in particular were designed to effectively stop the transfer of additional receivables once the portfolio does not perform as well as it did in the past. The Delinquency Ratio was designed as an early warning system. Given that delinquencies can be expected to increase in advance of seeing losses increase, the termination right was designed to occur early enough that one is not going to have very material losses. According to Ms. Hooper's testimony, the Loss Ratio and Delinquency Ratio combined should allow the purchaser to stop acquiring additional receivables in time to not suffer materially higher losses than expected based on past performance. Ms. Hooper testified that she and her team at TDSI looked at both the historical loss and delinquencies in the McKesson Canada receivables pool as part of its engagement in preparing the TDSI Report.

[308] I do not necessarily accept the TDSI Report's opinions on the reasonableness, normalcy or arm's length nature of these two termination triggers in the RSA. Indeed, I would expect they might suffer from the same shortcomings as affects the rest of the TDSI Report, which is primarily that the RSA is not a securitization and is in that respect outside the expertise of Ms. Hooper and her group. In any event, given that these two ratios are defined in the RSA to include McKesson Canada financial information that is not in evidence, or at least certainly not adequately explained in the evidence, and that these defined ratios and their volatility leading up to the RSA were not put in evidence, I can not reach the conclusion that I am satisfied with the TDSI's Report's conclusions on their terms.

[309] However, I fully accept Ms. Hooper's explanation of their purpose and effectiveness as designed. That is, I find that the purpose and effect of the Delinquency Ratio termination event trigger and the Loss Ratio termination event trigger in the RSA were designed and fully expected to limit MIH's risk of purchasing any day's receivables from McKesson Canada that could be expected to have materially higher losses than had been experienced on the pool historically.

[310] The historic loss performance on McKesson Canada's receivables pool was in the range of 0.04%. I conclude from all of this that a notional arm's length MIH would have been able to and would have terminated its obligations under the RSA before it was obligated to purchase receivables that would have a materially higher credit loss risk than something in the range of 0.04%.

[311] Allowing for a 50% to 100% increase as an extremely generous interpretation of what Ms. Hooper could have meant by material (in part to compensate for the lack of elegance in this approach), I find that a notional arm's length MIH's credit loss risk on its continuing purchase of receivables is that, at some future point in the RSA term (but not in the very short term), it could have

purchased about four months of receivables with an anticipated write-offs to sales number in the range of 0.06% to 0.08%. These lesser quality receivables would only be expected to have been purchased in the last four months of the RSA prior to termination. Those bought on December 16, 2002 and for the other months prior to the four months preceding termination could continue to be expected to be of a better quality.

[312] Using this approach, the Court concludes that a Loss Discount component of the Discount Rate in the range of 0.06% to 0.08% is at the generous end of what a notional arm's length MIH and McKesson Canada would agree to.

[313] This range is consistent with the number arrived at by Mr. Finard's structured finance approach. That approach identified that the 0.04% historic write–offs to sales number for McKesson Canada's receivables pool was comparable to Moody's published information for companies rated between A and Baa, which in turn had credit risk spreads according to TDSI of 0.50% and 1.00% per annum, and was computed on a weighted average basis by Mr. Finard at 0.68%. Once adjusted for a DSO of 30 days, a 0.68% annual credit spread reflects a discount of 0.06%.

[314] For these reasons, the Court finds based upon what evidence was provided that an arm's length Loss Discount for purposes of the RSA would be in the range of 0.06% to 0.08%.

[12] In the Factum the Appellant stated, at paragraphs 73 and 83 to 89:

73. . . . the Trial Judge disregarded the consensus view of the taxpayer and the Crown and made a critical error: in his hypothetical transaction, he believed that he was required to assume that the hypothetical purchased somehow would control the supposedly unrelated hypothetical seller. . . .

83. The "loss discount" – the amount notionally included to compensate the purchaser (here, MIH) from assuming credit risk – was a key component in the discount rate. It is clear from the Trial Judge's analysis of this component that he concluded that MIH assumed no material risk in the transaction because, in the Trial Judge's misconstrued hypothetical, MIH could have triggered a termination event whenever it chose by simply changing McKesson Canada's name, for example. In so finding, the Trial Judge simply ignored the relevant contractual terms agreed by the parties and expressed in the Agreement, and the actual functional allocation and assumption of risk by the parties.

84. Such an approach may be entirely legitimate in a case involving GAAR, or paragraph 247(2)(b). But neither of these grounds for challenging the

Agreement was advanced by the Crown; they are not relevant to this litigation. 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. He has effectively treated the Agreement as a sham, without legal authority or evidentiary basis. Indeed, the weight of evidence adduced by the Crown suggested that a holdback or reserve of about 20% (or $90 million) would have been needed in order to eliminate MIH's risk.

85. In assuming his own version of the facts with respect to risk, and re-writing (by ignoring) critical terms of the Agreement related to risk, the Trial Judge priced a transaction that never occurred. The loss discount then identified and relied upon in the Trial Judge's Reasons can only be reconciled with a transaction in which the purchaser (here, MIH) assumes no risk. The Trial Judge says:

> I conclude from all of this that a notional arm's length MIH would have been able to and would have terminated its obligations under the [Agreement] before it was obligated to purchase receivables that would have a materially higher credit loss risk than something in the range of 0.04%. . .
>
> Using this approach, the Court concludes that a Loss Discount component of the Discount Rate in the range of 0.06% to 0.08% is at the generous end of what a notional arm's length MIH and McKesson Canada would agree to.

86. At no point in the trial did the Crown assert that, at arm's length, MIH "would have been able to" terminate its obligations under the Agreement whenever losses exceeded a "materially higher" threshold of 0.06%-0.08%. Nor did any of the Crown's expert witnesses provide evidence that would tend to support this erroneous proposition.

87. This assertion is in any event patently wrong. In fact, MIH was obliged under the Agreement to continue funding McKesson Canada for up to $900 million for the full five year term absent a defined termination event – including if losses increased significantly. The Trial Judge's suggestion that MIH "would have been able to" terminate the Agreement if losses exceeded 0.06-0.08% is palpably wrong. The threshold established under the plain terms of the Agreement for such termination was in fact 0.25%, not 0.06-0.08%. In fact, recent history was that losses exceeded 0.06%. How could MIH have been "able to" terminate if losses reached, for example, 0.10%?

88. Given that it is plainly inconsistent with the terms of the Agreement, the Trial Judge's assertion that, in the hypothetical transaction, a notional arm's

> length MIH would have terminated its obligations under the Agreement if losses exceeded 0.06%-0.08%, can only be explained as follows: The Trial Judge assumed that a notional, arm's length MIH would control McKesson Canada, and would therefore be in a position to trigger a termination event under the Agreement by causing McKesson Canada to default under its terms. This is so notwithstanding the Trial Judge's contention, at paragraph 132 of his Reasons, that "in this case, I do not need to [consider notional continued control] in order to fully dispose of the appeal with respect to the proper transfer pricing adjustment".
>
> 89. Indeed, in at least two place in his Reasons, the Trial Judge alludes specifically to MIH's ability – *qua* shareholder of McKesson Canada – to trigger termination of the Agreement: At paragraph 26, he notes the "termination events were not limited to things in McKesson Canada's control, and included events in the control of its direct and indirect shareholders/parent corporations". At paragraph 129, excerpted above, the Trial Judge asked himself "[i]n looking at transactions like the [Agreement], does the Court 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?" The Trial Judge did not, in fact, leave this question for another day, as he claims to have done. Rather, the Trial Judge answered this question in the affirmative in his analysis of the loss discount. This critical legal error undermines the Trial Judge's entire analysis.

[13] In these circumstances, I am deeply troubled by the statement by the Appellant in paragraph 89 of the Factum that "[t]he Trial Judge did not, in fact, leave this question for another day, as he claims to have done".

[14] I am similarly deeply troubled by the statement by the Appellant in paragraph 84 of the Factum that "[t]he 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".

[15] I am equally concerned by the statement of the Appellant in paragraph 88 of the Factum that "[t]his is so notwithstanding the Trial Judge's contention, at paragraph 132 of his Reasons, 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".

[16] There are no polite qualifiers in any of theses three sentences.

[17] These allegations of the Appellant are said in paragraphs 85 and 88 of the Factum to critically turn upon there being no other way to reconcile what I wrote, and that I therefore must have in fact done something different than I said I was doing.

[18] It appears to me that the Appellant has chosen to challenge my truthfulness, honesty and integrity in my Reasons in order to allow it to advance the argument that I was somehow, notwithstanding what I clearly said about ongoing corporate control issues being able to put entirely aside in deciding the appeal, (and what I clearly said about the Delinquency and Loss Ratios triggers and Ms. Hooper's evidence on their objective and effect) somehow doing just that.

[19] I believe that paragraphs 307-310 of the Reasons are very clear and do not permit of ambiguity, uncertainty, or any lacuna or leap for the reader to fill in. The only termination rights discussed were those triggered by breaches of the Delinquency Ratio and the Loss Ratio as defined and set out in the RSA. It is equally clear that I grounded my findings on the preceding paragraph which summarized the testimony of Ms. Hooper of TDSI, the Appellant's witness who issued the TDSI Report, on the purpose and effectiveness of these two termination right triggering events. There is no basis for the Appellant stating that the only way to reconcile my conclusion is that I did something entirely different, that I specifically said I wasn't doing, which was looking at continuing corporate control rights such as changing the company's name.

[20] For these Reasons, it is my view that the Appellant has wrongly accused me of being untruthful, dishonest and deceitful. I am simply unable to read their Factum or the Reasons any other way on this point.

[21] 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. I believe this clearly crosses the line as to what is appropriate.

[22] For purposes of deciding whether or not to recuse myself, it is my opinion and my view of the parties and their counsel that are relevant, along with what a reasonable person would apprehend my views and opinions to be. Whether my reading of the Factum is correct or not, like whether my decision on the merits is

correct or not (and whether or not I am reading the Factum correctly), remains for the appellate court and others to decide.

[23] On a related point, it is surely apparent to the Appellant from the evidence of its own witness, Ms. Hooper, the TDSI Report, and the Reasons, that historical losses expressed as write-offs to sales (historically in the 0.04 cents on the dollar range), are distinctly different in material ways from the Delinquency Ratios and the Loss Ratios which are defined in the RSA and which triggered MIH termination rights under the terms of the RSA. There is nothing whatsoever that appears unclear about this from paragraphs 194 and 306 and 307 of the Reasons. The Appellant does not in its Factum attempt to suggest or explain why that is in fact not the case.

[24] This appears to me to have been done in order to advance confusion not clarity or accuracy as they write in paragraph 87 of the Factum: "[t]he Trial Judge's [assertion] is palpably wrong. The threshold established under the plain terms of the Agreement for such termination was in fact 0.25%, not 0.06-0.08%. In fact, recent history was that losses exceeded 0.06%. How could MIH have been "able to" terminate if losses reached, for example, 0.10%?" I find it exceedingly hard to believe that the Appellant could remain unaware of the difference between historical loses computed as write-offs to sales on the one hand, and either a delinquency ratio which measures time to receive payment, or a deemed 90 day delinquency in computing loss ratios. (Indeed as noted below, they clearly understand this in other parts of their Factum and in the Appellant's written submissions at trial).

2. Where it Appears That the Appellant States in its Factum Untruthful Things About the Trial Judge

[25] Most of my concerns under this heading are rooted in the very first paragraph of the Appellant's Factum which states that:

> 1. In this case, the Trial Judge discarded the case pleaded and argued by the parties and decided the appeal on grounds that were not raised in the pleadings or argued at trial, but made their first appearance in the Trial Judge's Reasons well after the trial was over.

a) The Predominant Purpose and Intention was to Reduce McKesson Canada's Canadian Tax Liability

[26] In paragraph 18 of the Reasons I wrote that "the predominant purpose of McKesson Canada entering into the transactions was the reduction of its Canadian tax on its profits." I return to this in paragraph 274 of the Reasons using very similar language:

> [274] I find as a fact that the predominant purpose and intention of McKesson Canada participating in the RSA and related transactions with the other McKesson Group members was not to access capital or to lay off credit risk. Those were results of the transactions but did not motivate them. The purpose was to reduce McKesson Canada's Canadian tax liability (and therefore McKesson Group's worldwide tax liability) by paying the maximum discount under the RSA that McKesson Group believed it could reasonably justify. For the McKesson Group this appears to have been much more of a tax avoidance plan than a structured finance product. No reason was ever given for wanting to transfer risk to Luxembourg.

[27] In paragraph 7 of the Factum, the Appellant states:

> 7. First, the Trial Judge made key factual findings on matters that were not raised in the assessment or put in issue at trial: . . . that the receivable sale was devoid of commercial purpose and contrived to achieve a tax benefit. There was next to no hint at trial that these issues were of concern to the trial Judge. . . .

[28] The Appellant restates this in paragraph 42 of its Factum:

> 42. The Trial Judge's analysis and ultimate decision rely critically on three key propositions, each of which amounts to an error of law: . . . that the receivable sale was entirely tax-motivated and devoid of commercial purpose. . .

[29] In paragraph 43 of the Factum, the Appellant again states that this tax motivation proposition was "not put to McKesson Canada in the trial of this matter."

[30] The Appellant restates this another time in paragraph 53 of the Factum in Part B "The Trial Judge Erred In Law By Relying On Propositions That Were Never Put To McKesson Canada": "the receivable sale was entirely tax motivated, and devoid of commercial purpose."

[31] This point is referred to yet again in paragraph 65 of the Factum: "and, as the matter of motive was never in issue in the litigation, McKesson Canada was deprived of any opportunity to lead evidence and make submissions on the point".

[32] In paragraph 67 of the Factum, the Appellant continues this with "the taxpayer's motivation was never in issue . . . ."

[33] In paragraph 70 of the Factum, the Appellant states "…the Trial Judge's analysis is infected by his pejorative and unfair comments about McKesson Canada's motivation, a matter that was . . . never argued at trial."

[34] Was the issue never put to the Appellant? Was the Appellant deprived of the opportunity to address this in the proceedings? Let us turn to the record of the trial proceedings.

[35] On the third day of this trial (October 19, 2011), during the third day of testimony from the Appellant's first witness, Mr. Brennan, after listening to the Vice-President Tax's testimony in-chief, I was called upon to respond to an objection by Appellant's counsel to a line of questioning by Respondent's counsel in cross-examination. The objection is raised, debated and addressed on pages 58 through 62 of Volume 3 of the Transcript. On page 62 I said:

> And, frankly, this whole line of questioning, I note this was a tax oriented transaction, they did it for tax purposes. Mr. Brennan was absolutely clear about that in direct. And there is not a VP of tax in the world who didn't think about tax consequences.

[36] Appellant's counsel did not then or later challenge, address or even speak to my clear and early communication of my overall impression of his witness' testimony as lead by him in-chief. Appellant's counsel did not ask any questions at all in his opportunity for redirect.

[37] In course of the first morning of Appellant's oral argument, on January 31, 2012, I said to Appellant's counsel, who had just completed his summary of the background to the RSA and was turning to the RSA itself (at page 3514 of Volume 22 of the Transcript):

> Sorry, before the RSA, I believe in-chief Mr. Brennan acknowledged [that] with an Irish company, a couple of Luxembourg companies and a Nova Scotia unlimited liability company [,] this was a tax-driven structure. [While] it had the commercial purpose as you've outlined [,] I thought it was in-chief that he acknowledged that taxes play a part. Not that anything turns on it."

[38] To this, counsel's response (at page 3515) was "[o]ne of the advantages of this structure was tax advantages for sure. . . ."

[39] In the Appellant's first Supplemental Written Submissions filed with the Court after the hearing (those of March 2012), the Appellant devoted pages 39 to 43 to addressing, in counsel's words the "related question that arose in argument whether the approach being advocated by the Appellant, if accepted by this Court, might appear to condone abusive structures". In these five pages the Appellant relies upon the *Duke of Westminster* principle, and argues that the RSA transactions compare favourably to "plain vanilla" planning.

[40] It appears very clear to me that, while the Appellant may have every right to seek to challenge the evidentiary foundation of my conclusions and findings, they have simply told clear untruths about me and what I did or did not say when they state that McKesson's tax motivation was not ever put to them during the trial and that they were therefore deprived of any opportunity to address it.

[41] I certainly believe I clearly put it to Appellant's counsel during his first witness' testimony, and raised it again with counsel at the start of his oral argument. The Appellant made written submissions on the issue of tax planning as he acknowledges it arose in argument. One can read what they will into the Appellant's decision not to argue the point or conduct redirect examination, but it appears to me to be patently untrue that I did not raise it with the Appellant early, at times when they could respond with additional evidence, with a summary of the evidence to change my impression, or with whatever legal argument they chose.

[42] I would also note that I never said in my Reasons that the RSA transactions were devoid of commercial purpose. I believe it would take a very tortured reading of paragraph 18 of my Reasons (above) to find any support for that allegation, which is similarly repeated throughout the Factum.

[43] Further, I remain of the view that my Reasons accurately describe the evidence on motivation and use of funds where I wrote at paragraph 9 that:

> [9] At that time, McKesson Canada had no identified business need for a cash infusion or borrowing, nor did McKesson Group need McKesson Canada to raise funds for another member of the group. There was a so-called double-dip Nova Scotia Unlimited Liability Company or ULC financing which was coming to maturity and would need to be recapitalized in some fashion; this was for a fraction of the amount of the new receivables facility. McKesson Canada did not approach its traditional lenders or conventional financial institutions (nor anyone else) before entering into its own non-arm's length receivables facility and related transactions. The McKesson Group had previously put in place a tax-effective international corporate structure and inter-group transactions that allowed it to amass very large amounts of cash in Ireland. The non-Canadian members of the McKesson Group were able to use this money to finance all of the purchases of McKesson Canada's receivables under the facility.

And where I wrote at paragraph 214 that: "There was no evidence that McKesson Canada or McKesson Group was even interested in considering factoring its receivables to any arm's length financial institution player in factoring markets, presumably because profits would then have left the McKesson Group."

And where I wrote at paragraph 274 that: "No reason was ever given for wanting to transfer risk to Luxembourg."

And where I wrote at paragraph 348:

> [348] There was no satisfactory evidence tendered that would suggest that McKesson Canada was driven to seek receivables financing from a high cost of funds/high cost factoring company and not a better funded/lower yield/lower cost major financial player described in the taxpayer's own evidence. I was not, however, provided with evidence of the cost of capital associated with receivables factoring by major well-funded players.

b) The Reifsnyder Evidence on Credit Risk Insurance Expertise, Availability, and as a Means to Address Risk in Structured Finance Products, and the Absence of Evidence on Costs or Pricing Thereof

[44] The Appellant states in paragraph 37 of the Factum:

> 37(e) Similarly, the Trial Judge asserts that "[t]here is credit risk or credit default insurance available in the market from arm's length commercial players in the financial markets," and that he "found it somewhat surprising that neither side tendered any such evidence." With respect to Mr. Reifsnyder, he states "[n]otwithstanding his extensive knowledge, experience and presentations on credit insurance for structured finance transactions, and his reference to its availability in his testimony, Mr. Reifsnyder seemingly never considered the cost of insuring the receivables in his pricing approach, nor to test the results of his approach. Nor did he explain why he did not do so". This point was never raised at trial. . .

[45] The opening words of paragraph 37 of the Factum says this concern was ". . . never articulated at trial, such that McKesson Canada had no opportunity to respond to them. . . ."

[46] Was this never raised at trial? Did the Appellant have no opportunity to respond? Let us again turn to the record of the trial proceedings.

[47] At the outset of Mr. Reifsnyder's testimony during the trial, Appellant's counsel asked him to tell the Court what kind of consultant work he was doing. His response included (at pages 833-4 of Volume 7 of the Transcript):

> And now with my wife I am building a financial advisory risk management business for small businesses and individuals, focusing primarily on insurance solutions.

[48] From page 851 through page 859 of Volume 7 of the Transcript for October 27, 2012, Appellant's counsel led Mr. Reifsnyder through only his credit risk insurance experience with securities and structured finance over the period 1997 to 2008 working in senior roles for significant players in this market, namely,

- Capital Markets Assurance Corporation or CAP MAC and MBIA Insurance Corporation, where he ran the group that was "providing insurance on mortgage back securities and CDOs to people that had bought pieces of those without insurance and came to us and said would you please insure it"; he described CAP MAC and their leaders as having "a vision to take that kind of insurance [on municipal bonds and securities issued by public authorities] into the structured finance market. So they focused very heavily on insuring transactions, financial transactions that were structured finance

transactions: so receivables, loans, asset back deals of all sorts, that was their specialty";

- CFIG, where he "ran teams that insured financial transactions", and;

- a Bear Stearns subsidiary that was "intended to function like an insurance company taking on risks to corporate asset backed or CDO type risks in the financial market by writing credit derivative contracts."

Appellant's counsel later took Mr. Reifsnyder back to confirm that while at CAP MAC and MBIA, he worked on Canadian-related deals, being U.S. commercial paper deals managed by two of Canada's major banks.

[49] Later in his testimony (at pages 930 through 933 of Volume 9 of the Transcript), Appellant's counsel asked Mr. Reifsnyder to "elaborate about the different ways in which receivables get sold and what different structures can or cannot be used to address the issue of risk and price." In answering this question, Mr. Reifsnyder described three "ways you can treat risk in transactions like this". And later he continued:

> The third thing is you can sometimes [i]nsure away the risk in a transaction like this. You can get a third party to [i]nsure the performance of the receivables or the performance of some set of the assets. You can transfer the risk by reallocating risk in a deal to a third party that agreed to assume the risk for some price or you can absorb the risk.

[50] With respect to argument, there were several exchanges during the submissions of Appellant's counsel that addressed this issue.

[51] On January 31, 2012, the first day of oral argument, the following exchange appears on page 3651 of Vol 22 of the Transcript:

> Justice Boyle: McKesson has paid a remarkable premium to do this for the benefit of primarily shedding risk, including the risk of going up to 100% of receivables, but that is shedding risk. It's a lot more than the McKesson US borrows at. It's a lot more than what they were paying previously to the extent they used this money to refinance and aren't they paying much, much more to offload risk? And I don't have evidence of what the costs of laying off that risk would be. There are all sorts of other ways of moving the risks to see if X + Y should equal Z.

> Mr. Schabas: There could be that evidence. The Department of Justice hasn't called that evidence to suggest there was another alternative like the one you suggested that would be less expensive than that.

[52] Later, at pages 3653 and 3654 of the Transcript, this discussion continues:

> Justice Boyle: Don't I have evidence that McKesson Canada did a transaction when they needed [funds] to refinance with a cost of funds of Z?
>
> Mr. Schabas: Sure.
>
> Justice Boyle: I have evidence that their cost of funds up until then was X; McKesson US's rating and its facility which included a tranche available to Canada was in the range of X so I have a big delta between X and Z we'll call Y, and I'm having trouble seeing there was more than risk transfer they got for Y. So I am on the evidence up until there and can't Boyle say[:] what evidence do I have of whether Y is reasonable? Because that's a surprising delta.
>
> Mr. Schabas: No you can't start to get into – I submit you're getting into the slippery slope of saying this isn't a transaction that would be done, which has not been pleaded and on the law is not before you. The issue is there is this risk transfer, there is this virtually 100% financing and the benefits that come with it. The only thing left is to say what is the arm's length price? And the evidence before you is the arm's length price is what [Ms.] Hooper said it would be. You have to get away from the feeling of discomfort, well, they could have borrowed money at a lower rate so the financing charges would have been lower, but there are other benefits. It's not a comparable transaction. The economists say I can't compare this. Both of them do. That's the evidence. There is the evidence of a risk transfer and that's what this is about. None of these other transactions transfer risk and the experts are saying the price for transferring the risk in an arm's length transaction is this. If there was another comparable transaction that would transfer the risk it hasn't been led.
>
> So you don't have any basis to come to the conclusion there is some other lower price for the risk transfer. You just have the evidence that you have.
>
> Justice Boyle: Does that bring you to what is the onus on the taxpayer [to] show the assessment is wrong?

[53] This exchange continues for the next 4 pages of the Transcript. This continued exchange included my observation to Appellant's counsel: "We weren't identifying and avoiding risk. We need to price risk". It included Appellant's counsel reminding me that Mr. Reifsnyder "acted for buyers and sellers and issuers

and insurers of risk". It included my questioning Appellant's counsel as follows on Mr. Reifsnyder's use of a bond fund index: "Remind me, did he say he'd ever seen that done before or had done it himself before in all his experience?". It ended with the following exchange (at page 3657-58 of the Transcript):

> Justice Boyle: In direct, did he tell me this is how markets price risk; in a private deal they would use a junk bond? He doesn't say that. It's not up to Mr. Laperriere in cross. You're to be telling me on what arm's length parties would have done.
>
> Mr. Schabas: Mr. Reifsnyder said I looked at this. I looked at the credit quality. I had to figure out how do I price this. It's not a securitization. I'm not structuring a reserve. I've got these designated obligors which imposes risk and there is a credit risk there. I know how to do this. I have an unconcentrated pool of small obligors. What do I do for that? I think about market. Mr. Laperriere didn't go to him and say "why didn't you look at something else". My job is to present him [Mr. Reifsnyder] and explain what steps he followed and how he got there. It's not my job to say why didn't you do this and that.
>
> Justice Boyle: It's your job and his to tell me what terms and conditions would have been made between persons dealing at arm's length. I'm sure if he used this regularly in pricing private deals with unrated people and told them they were junk I would have heard about it.

[54] This discussion picked up again later. Pages 3669-70 the Transcript records the following:

> Justice Boyle: At 50,000 feet, the one paragraph summary of the issue raised by these facts is McKesson begins with a cost of funds nearing 5% and they do this transaction and the cost of the terms and conditions have multiples of that. Say it is 5 and 20, we have a 15, a quadrupling for risk. So am I wrong to think somehow I need to be made comfortable that paying that 15 percentage point premium was a reasonable valuation of the cost to McKesson of laying off that risk because that is what a market that takes on that risk does? And aren't [there] insurance markets and the whole credit derivative - -

[55] Later on February 1, at page 3785 of Volume 23 of the Transcript, the following is recorded:

> Justice Boyle: And I'm charged with deciding if McKesson paid too much to move that risk: Isn't that what I am charged with?

> Mr. Schabas: I think what you just said, I would agree with.

[56] It appears very clear to me that the issues of Mr. Reifsnyder's considerable expertise in credit risk insurance of receivables and other securities and structured financial transactions, and the availability of credit risk insurance to transfer risk with respect to receivables, was raised by the Appellant in evidence and in argument, and that Appellant's counsel took each as far as he wanted to, entirely unrestrained by me. For the Appellant to state in their Factum that I am the one who raised these issues, without them ever being raised at the trial, and that I raised them independently for the first time in my Reasons, appears to me to be the Appellant again telling clear untruths about me.

c) Notional Continued Corporate Control versus Termination Rights

[57] In paragraphs 42 and 44 of the Factum, the Appellant states:

> 42. Although the Trial Judge purports to proceed in accordance with the above principles, in fact the Trail Judge's calculation of an arm's length discount rate flows from a functional analysis premised on MIH assuming no material risk . . . The Trial Judge's analysis and ultimate decision rely critically on three key propositions . . .
>
> (iii) that, in applying paragraph 247(2)(a), and more specifically, in constructing the hypothetical transaction against which to compare the McKesson Canada-MIH transaction, the hypothetical purchaser would control the hypothetical vendor.
>
> [. . .]
>
> 44. As for proposition (iii), in determining whether arm's length parties would agree to the discount rate agreed by McKesson Canada and MIH, the Trial Judge said that the notional arm's length purchaser would have the power to "… change McKesson Canada's name, sell McKesson Canada, or do something else in order to trigger a termination event at will." . . .

[58] In paragraph 10 of the Factum, the Appellant asserts that the trial judge made a ". . . finding that MIH could effectively terminate the Agreement at will as a result of its status as McKesson Canada's sole shareholder".

[59] The Appellant also sets out in paragraph 38 (b) of the Factum that one of the four specific issues in their appeal is whether the Trial Judge erred when he held that he was to assume the purchaser MIH controlled the seller McKesson Canada.

[60] In paragraph 52 of the Factum, the Appellant states:

> 52. . . . Instead of deciding the case based on the way it was framed in the pleadings and evidence led at trial, he devised new theories, purporting to conduct quantitative analysis of his own . . . It is difficult indeed to discern much of a connection between the proceedings at trial and the independent analysis contained in the Trial Judge's Reasons.

[61] In paragraph 73 of the Factum (quoted from above) the Appellant wrote that a "critical error" made by the trial judge is that "in his hypothetical transaction, he believed that he was required to assume that the hypothetical purchaser somehow would control the supposedly unrelated hypothetical seller."

[62] Again, we can turn to the record of the trial proceedings to see if the judge said or held such things, made such a finding, or decided this issue otherwise than based on the evidence led at trial.

[63] The issue of notional continued corporate control rights and the termination event triggers were addressed during the course of the trial in at least the following exchanges.

[64] On January 31, pages 3540 and 3541 of Vol 22 of the Transcript record:

> Justice Boyle: If we had an open arm's length Dutch auction of the right to be MIH, the buyer --
>
> Mr. Schabas: But you don't. You have to accept the fact the guarantee comes from the parent that wholly owns and controls MIH. That's why I went to the transfer pricing methodology and the law that says you have to not just take the agreement, but accept the underlying facts that the guarantee comes from its wholly owned parent. We don't disregard that aspect of the underlying facts.
>
> Justice Boyle: What do we do with the flip side? It's a 5 year agreement, whether it is 5 year risk is [dependent] on how we define that, it's a 5 year agreement but terminable upon a number of events, including a change of name from McKesson. Since the buyer is the shareholder and has the right to change the name, do I

> assume that the arm's length buyer gets to terminate on demand by changing the name? Does the change of name go from the parent to my theoretical arm's length person?
>
> Mr. Schabas: I suppose it would in the sense it's economically relevant.
>
> [. . .]
>
> Justice Boyle: One of the terms defined, the second last one, is the change of name to remove the word "McKesson". Does my theoretical arm's length parent have the right the parent has to change the name? Do they have the right the shareholder parent has to access underlying financial information about the obligors that aren't provided for in the RSA?
>
> Mr. Schabas: Potentially, and I suppose that would be true in any transfer pricing case.

[65] At pages 3544 and 3545 of the Transcript, the following exchanges were recorded:

> Justice Boyle: Taking that to an arguably logical point, if I accept that, wouldn't virtually every Canadian subsidiary, private company, a subsidiary of a foreign multi-national, public or otherwise, be re-pricing to 5 year junk rates? We are not going to give you any information under the loan agreement, you are buying a pig in a poke under the loan agreement. You have access to everything else qua shareholder. You can only look to the loan agreement. G.E. will be redoing their deal the day after my Reasons come out. Everybody will be re-pricing to basically junk bond status.
>
> Mr. Schabas: I want to think about my answer to that.
>
> Justice Boyle: That's the difficulty I am having, why is there a compelling distinction? And I think you explained it, but why is there a compelling distinction between accepting the related group shareholding obligations and rights from the buyer's point of view but breaking it at the buyer seller, and I think your position was because the Act tells you that's the one relationship you have to assume is arm's length?
>
> Mr. Schabas: Right.
>
> Justice Boyle: If I assume that, why would you have conceded the buyer must also get the right to rename McKesson something else? Because that only comes from the same relationship?

> Mr. Schabas: It does.
>
> Justice Boyle: I think 247 looks really simple, and maybe in application to a widget or drug it may be, but when we get into financial services, it gets a lot more complicated. If you look at G.E., if you were right, how would this Court or the Court of Appeal have spent time addressing implicit support in G.E.? The implicit support is based upon G.E. being G.E.'s sub?
>
> Mr. Schabas: I'll come back to this. I want to reflect on this.

[66] Appellant's counsel returned to this beginning at page 3598 of the Transcript:

> Mr. Schabas: Related to this is the other question you left me with, which relates more generally to the arm's length principle and the termination provision, the parent company can change their name and terminate at any time. First, I would comment a provision like that is a provision arm's length parties would agree to.

[67] This exchange carried on through pages 3599, 3600 and 3601, wherein Appellant's counsel makes it clear that he doesn't think he can say anything more on this issue, and that this concludes what he wanted to say on the subject.

[68] The issue is raised again on page 3634 of the Transcript:

> Justice Boyle: The question I have been posing a couple of times today is this: It troubles me, whether it's non or low investment grade as between two experts, what is to prevent Boyle from stating the obvious, that MIH knows exactly the credit risk and position of MCC? We all know MCC is not rated because MCC didn't need a rating because MCC isn't in the public markets. So why would I be inclined to think either of those two approaches, low investment grade or non investment grade, are my two choices?
>
> Mr. Schabas: Because that's the evidence before you.
>
> Justice Boyle: That's the expert evidence. It's opinion. Am I bound to experts?
>
> Mr. Schabas: With respect, your Honour, I think you are bound to decide this case by the evidence. That's your job, to hear the evidence, not bring in some other theories and other approaches not defined by the pleadings on which evidence is not led. And that's why I said at the outset this is about laying the evidence before you as a factual matter and deciding which evidence is more persuasive and compelling. That's what a trial is. And you have to decide this case on the

> evidence. And that's the evidence that has been presented to you, for example, on this very point.
>
> Justice Boyle: It's not baseball arbitration; I don't have to choose between your expert and Mr. Laperriere's expert on this point, do I?
>
> I also have evidence that MIH is the parent and holds [100]% of shares of MCC and implicit in this is full access to its books and records in real time.
>
> Mr. Schabas: True enough. You have to divorce that from your assessment in this case.

[69] In one set of the Appellant's Supplementary Submissions filed after the hearing (that of March 2012), the Appellant returns to this discussion in argument and writes:

> 22. In oral argument, the following question (paraphrased here) was raised regarding the scope of the hypothetical situation: If the hypothetical requires the Court to treat the parties as if they were dealing at arm's length, is the Court required (or even permitted) to take account of any economically relevant factors that derive specifically from, or are rooted in, the non-arm's length relationship between the parties?

[70] Appellant's supplemental submissions on this question run from page 9 to page 18. After quoting from the *General Electric* case on the very question, Appellant's submission was:

> 24. Accordingly, <u>all circumstances, including those that derive from, or are rooted in, the non-arm's length relationship, must be taken into account</u>; the only fiction is that the relationship between the parties is replaced with the assumption that the parties are independent.

[71] The Appellant's submissions continued (in paragraph 31) that the application of this to the RSA transactions was the "the analysis must assume that, lacking any special relationship, each party would seek to negotiate a discount rate that maximized its own position."

[72] In my view, the exchanges during the trial are entirely consistent with and reflected in paragraph 128 through 132 of my Reasons, above. Further, as described already above, the exchanges at trial and these paragraphs of my

Reasons do not relate grammatically, actually or historically in any way to Ms. Hooper's evidence of the objective and effectiveness of the termination right trigger events based upon delinquency ratios and loss ratios[2].

d) The Trial Judge's Comments on Credibility of Witnesses and Weight, Including Expert Witnesses Generally and Mr. Reifsnyder Specifically

[73] In paragraph 9 of the Factum and the footnote to this sentence, the Appellant states:

> 9. . . . It is simply wrong to call into question the credibility and integrity of a party for failing to answer a case that was not put to it.
>
> > It is noteworthy that the Crown never argued that there was any issue as to the credibility of McKesson's witness, nor did the Trial Judge indicate any such concern during the trial. In fact, the Trial Judge's contemporaneous observation of the witnesses' credibility was as follows: "subject to ruminating until I affix my signature at the bottom of the page, I don't have a whole lot of doubts about the credibility of any of the witnesses in this trial …" … It appears that only after reframing the dispute and issues, and examining the evidence through this new prism, did the trial judge find that the witnesses were not credible.

[74] What I said to Appellant's counsel according to pages 3738 and 3739 of Volume 23 of the Transcript was:

> I can say this at this stage, subject to ruminating until I affix my signature at the bottom of the page, I don't have a whole lot of doubts about the credibility of any of the witnesses in this trial. I do question the relevance of parts of their testimony on certain points to how I'm currently viewing it. It doesn't mean that what they were telling me wasn't correct and was not credible. I find it less helpful than they

---

[2] Which I would again note are clearly different from the historic loss ratio results computed as write-offs to sales. Indeed, notwithstanding the Appellant's apparent factual confusion in paragraph 87 of the Factum discussed above, it appears to me to be clear from the Appellant's footnote 17 of the Factum that they do in fact understand the difference between delinquency ratio and loss ratio on the one hand and loss computed as a function of write-offs to sales on the other. Their clear understanding of the difference also appears evident throughout the Appellant's additional written submissions of April 2012 at pages 81 to 83 under their heading "The loss ratio termination trigger remains meaningful."

> seem to think it is or I'm being asked to accept it as. So I have weight and relevance issues, but I don't have any fundamental credibility issues with anybody at this stage, and it would be bizarre, it seems to me, for me and you to have agreed to allow a Crown's expert in, and then for me to find there was no credibility attached to anything they said for the first reason given they had this limited experience. That goes to weight.

[75] As detailed below, this was not the only exchange on the relationship between credibility and weight as Appellant's counsel several times advocated that I should find each of the Respondent's experts to not be credible at all or to attach no weight at all to anything they said.

[76] In paragraph 37(c) of the Factum, the Appellant states:

> McKesson Canada's expert, Mr. Reifsnyder is dismissed by the Trial Judge as "in large measure a partisan advocate quick to point out the specks in the Respondent's expert reports and downplaying, if not refusing to acknowledge, the weak points in his own. That conclusion is flatly inconsistent with the Trial Judge's comment in closing argument that "subject to ruminating until I affix my signature at the bottom of the page, I don't have a whole lot of doubts about the credibility of any of the witnesses in this trial. . ."

[77] My concern quoted in part in paragraph 37(c) of the Factum about Mr. Reifsnyder coming across as being in large measure a partisan advocate appears in paragraph 245 of my Reasons as subparagraph (r). The seventeen subparagraphs preceding that, (a) through (q), detail specific substantive concerns with his chosen approach and methodology detailed in his expert report and discussed in his supporting testimony at trial. Virtually all of these concerns came out at trial in the evidence, and/or in argument, raised either by Respondent's counsel in cross-examination and/or in argument, or by the trial judge in questioning the witnesses, or as a concern raised with Appellant's counsel during argument. Subparagraph (r) is the only subparagraph which briefly addresses the contrast between Mr. Reifsnyder's approach in his rebuttal reports and his testimony critiquing the Respondent's experts and their reports, with his own performance when his opinion or supporting testimony was questioned. I did not list specific examples in my Reasons and it would be inappropriate to supplement my Reasons at this stage. However, the record and Transcript speak for themselves.

[78] Paragraph 9 of the Appellant's Factum continues:

> As for the trial Judge's sharp conclusion that "never have I seen so much time and effort by an Appellant to put forward such an untenable position so strongly and seriously" McKesson Canada says that, had the Trial Judge focused on the propositions pleaded and contested by the parties, instead of reframing the case in his Reasons after the trial was over, he would not have found the taxpayer's case to be without merit.

[79] We need turn to the Reasons to see what the trial judge did say, and turn again to the record of the proceedings to see if the trial judge indicated any such concerns in the course of the trial.

[80] The Appellant has quoted from paragraph 246 of my Reasons in its paragraph 9. It immediately follows subparagraph 245(r) about my concern that Mr. Reifsnyder came across as a partisan advocate at the end of my listing of concerns with his chosen method. It is the final paragraph under subheading E The Reifsnyder Expert Report of heading 8, The Witnesses, The Expert Reports and the PwC Report. It is clearly a conclusion about the Reifsnyder approach and nothing else. I know with certainty that Appellant's co-counsel has re-read it carefully. To suggest in their Factum that I wrote this about the taxpayer's whole case as opposed to Mr. Reifsnyder's opinion is to be deliberately misleading. Maybe that is considered acceptable in professional appellate advocacy.

[81] However, for the Appellant to say I reached a conclusion about an expert report and a witness's testimony because I reframed the case after the trial was over appears to me to be saying another untruth about me.

[82] The issues of credibility and weight were the subject of several exchanges between Appellant's counsel and the trial judge. Appellant's counsel starts on the issue of credibility of experts on page 3700 of Volume 23 of the Transcript. On pages 3708 and 3709 I said:

> I can tell you the Court is very used to witnesses, including expert witnesses going on message track, and some loop more than others, but I'm not sure that the fact one wants to think they're entitled to stick to their message means they are not credible. It's clearly a popular style among witnesses in courts.

[83] Appellant's counsel went on urging me to disregard Mr. Glucksman's evidence and said at page 3709:

> Judges are the ones that have the opportunity to spend the days listening to three day cross-examinations that should have been a day and see someone that doesn't want to accept the facts give the answers that will hurt his case. And trial judges write decisions and say one of the Reasons I reject this witness or the reason I reject this witness is that he clearly came in with a bias and agenda and that was demonstrated repeatedly in cross-examination because he repeatedly fails to give answers to the most straight-forward questions instead of giving long, rambling and often incoherent answers. And I am paraphrasing passages in our brief and that applies over and over again to the evidence of Mr. Glucksman.

[84] On page 3711 I responded:

> It may be bad style and form, but not conceding the strength of the other side's case doesn't mean what he is telling me about his expert opinion is necessarily reflective of the fact it's not credible. One of the reasons I will list for accepting a witness's evidence, expert or otherwise, will often include a reference to whether they were evasive.

[85] And at page 3712 I responded:

> It's of great concern to this trial judge when they're evading giving the information that nobody else can give me. Then you start to wonder. Simply wanting to stick to his message doesn't drive me, necessarily. That's all I am saying.

[86] The following exchange is at page 3714 of the Transcript:

> Justice Boyle: All the nice legal statements aside, experts are paid advocates. It's a function of their role.
>
> Mr. Schabas: You have to cut through that. Sure they're paid and they come to conclusions, and the role of counsel is to see to what extent they're being an advocate as opposed to an expert, and that's the difference between Mr. Reifsnyder and Mr. Glucksman.

[87] The sentence of mine on credibility quoted in the Factum twice, which I set out in greater context above, was followed at page 3738 of the Transcript by:

> Justice Boyle: If nothing they said should be given [any] weight, we're not talking about weight, we're talking about expertise. We're past that point, aren't we?
>
> Mr. Schabas: I am not sure. My submission – -

> Justice Boyle: Zero's a number. I agree.
>
> Mr. Schabas: Where Mr. Glucksman's evidence differs from the evidence of [Ms.] Hooper or Mr. Reifsnyder, it should be completely disregarded.
>
> Justice Boyle: You said the whole thing?
>
> Mr. Schabas: I was going to finish my sentence. I was going to say that with respect to any other evidence he gave it should be given no weight. It just should be given no weight. And you don't need to give it any weight.
>
> Justice Boyle: I want people to know where I am on the issues so they can gauge their time accordingly. Which wasn't to shut you down. That may mean you have to beat me up more and make the obvious more apparent to me. That's where I am.
>
> Mr. Schabas: There is an evidentiary process at a trial where a witness' evidence contradicts, judges have to describe whose evidence is more compelling and the major aspect of that comes from assessing credibility. Because if you have conflicting numbers and approaches, then we look to the trier of fact, the trial judge, to assess the credibility and the rigor of their analysis and decide which evidence to prefer. And similarly, even when you have admitted someone with the qualifications to give an opinion, they give other testimony that based on their demeanour, their inconsistencies, the doubts you have about the rigor of their analysis or confusion that's exposed, the corrections, the unwillingness to acknowledge things, that's another thing we rely on the trier of fact to assess and decide that this witness, I just don't want to give this witness any weight, it's not reliable evidence. And that's up to you. You certainly have our submission.

[88] Appellant's co-counsel at trial, Mr. Gilliland, also addressed the weighing of evidence in the context of Mr. Schabas' use of the word "credibility" at pages 3821 and 3822 of the Transcript.

[89] The Appellant returns in paragraph 47 of its April 2012 further Supplemental Written Submissions to the relationship between "credibility" and "weight" when used in respect of experts.

[90] There are also several occasions in argument where I question Appellant's counsel regarding some of my significant concerns with Mr. Reifsnyder's approach.

[91] For example, on page 3752 I asked:

> But Reifsnyder goes out and he starts with the one thing that this absolutely isn't, a five year bond. And it's not in the public market. So it's the starting point I'm having trouble with picturing me writing my Reasons and justifying rationally in a way that everybody from the Supremes to an intelligent high school student could understand[,] faced with all of this information, Boyle started where[?]

[92] And at pages 3753-3754 I asked:

> Why does he go to the rating agencies? If I skip over that I know where you are going and how to write the rest of my Reasons, but why do I go to the rating agency for five year junk debt?

[93] And later on page 3754:

> It [Mr. Reifsnyder's chosen bond fund index] included a defaulted issuer whose implicit rate, what it was trading at, was 399 or 299 percent.

[94] In Volume 22 of the Transcript, at pages 3637-3638, the following exchange is recorded:

> Justice Boyle: Am I to close my eyes to the fact I think we all know private companies in Canada are not paying junk bond rates to their lender?
>
> Mr. Schabas: Sure.
>
> Justice Boyle: Even if they would be charged a junk bond rate if they tried to issue it into the public markets without getting a rating, whether it's the Katz's, the Reichmans before these people were in the public markets, we all know they weren't [paying] junk bond rates.

This continued through page 3639.

[95] At page 3661 of Volume 22 of the Transcript I said:

> The problem I'm having, and I'm sure you're sensing it, is Mr. Reifsnyder couldn't tell me he'd ever done a deal like this. He can tell me that's the way he thinks it might be priced from the lender's point of view working within a toolbox that begins with defaulting to ratings, but the fact he's never done one doesn't cause me to question his expertise or experience, but does cause me to think that that's because from the borrower's perspective they would say ["W]e're a very profitable, financially solvent private company. We didn't come to borrow money from you lender, as if we're going into the public markets, we're not. That's why

> we came to you, custom made private deal. You can't begin from telling me I should have gone to the markets and will charge me as though I went to the markets and failed. Look at my books. That's what the bond rating and other rating agencies would do. That's what a lender does[''].

[96] And at page 3662 I asked:

> 247 tells me to look at arm's length parties, both of them. The financier may well look at it that way but the fact he can't tell me they've ever done a deal, isn't it, to state the obvious, there's nobody on the other side that would do a deal like that unless they're worse than junk bond status?

[97] At pages 3755-3756 of Volume 23 of the Transcript the following exchange is recorded:

> Justice Boyle: The evidence is McKesson and Mr. Trossman in structuring a trade receivable transaction, they thought first of the securitization. They went to TD and [Ms.] Hooper didn't say[: w]hat are you here for? You want to talk to the Reifsnyders or my desk. My desk can tell you what your bonds are trading at.
>
> Mr. Schabas: She did talk to her desk.
>
> Justice Boyle: About one small aspect of dealing with the risk identification process of a trade receivable transaction. So this very player and its very sophisticated advisor, your firm, view this as a good starting point. You are not married to it, but how do I write my Reasons to get over that and say where I really want to go is start with Reifsnyder?
>
> Mr. Schabas: You don't have to reject one and adopt the other you can say they both got to the same result. That supports both analyses. Sure they approach them differently but got to the same range and Glucksman properly approached got there too. You don't have to say Reifsnyder is right and Hooper is wrong. Absolutely not.
>
> Justice Boyle: I'm not talking about in the analysis, it's in the starting point. My question remains why would I start with a public bond rating?

[98] At page 3766 of the Transcript I said:

> We've charged the man with looking at a hypothetical transaction, he [said] I've never priced one in this manner before, but I think I would price it this way. So he is taking a hypothetical approach to pricing a hypothetical transaction and coming up with a 25 and a 40 [percent adjustments]. I'm starting to feel not well tethered.

[99] At pages 3767-3768 I said to Mr. Schabas:

> He didn't tell me why it should be right. He acknowledged that was a key difference and it needed a significant adjustment and he gave me a range of numbers that looks pretty significant. Given that I'm also a little concerned about the starting point, to be needing to make a big adjustment, a big adjustment we can't explain or substantiate in a hypothetical [-] never used by him or in the market to his knowledge [-] pricing approach, his other adjustments may be as well supported and tethered as those, but I'm feeling untethered on this key point. You said that is as tethered as we can get with what he's able to tell me.

[100] At the end of Mr. Reifsnyder's testimony, I asked the witness a number of questions to more clearly and better understand his testimony, approach and opinion. I asked Mr. Reifsnyder about the lack of adjusting for actual historical performance of the receivables at any time on any basis during the five-year term at pages 1287-1288 of Volume 9 of the Transcript. I asked about the volatility of the numbers for and within his chosen bond fund index on page 1289, and about the extreme outliers within his bond fund index on page 1291. I asked whether he had looked to see if any of McKesson Canada's obligors had actually issued public debt in the time frame at page 1293, and he told me he had not looked. I asked him to reconcile how his 'smaller obligors are riskier' adjustment fit with a high yield junk bond index and whether that need be adjusted for at page 1293. I asked him to clarify whether he was saying that markets ignore history, or that markets should ignore history but don't, at page 1299; his answer speaks for itself. I asked him if he was aware of the terms of MIH's financing of its purchase of the receivables, including the guarantee from its parent company at page 1302, and he said he was not given that information nor information on MIH's financial condition. I asked Mr. Reifsnyder about his reference in his rebuttal report to Standard & Poor's structured finance trade receivables report's statement criteria that "the use of three year historical data is common" at page 1303.

[101] I then asked counsel at page 1306 if they had any questions arising out of any of my questions of Mr. Reifsnyder. Appellant's counsel said he did not.

[102] I need add that a substantial part of the Appellant's Supplemental Written Submissions of April 2012 address the limitations of Mr. Reifsnyder's approach and his evidence identified by the Respondent in its Supplemental Written Submissions, including starting with a bond fund index.

[103] It appears to me that my concerns with credibility and weight issues were communicated clearly on several occasions during the trial, as noted above with both Mr. Schabas and Mr. Gilliland, and as noted above with Mr. Reifsnyder at the end of his testimony. It appears to me that the Appellant writing that "nor did the trial Judge indicate any such concern during the trial", and that paragraph 245(r) of my Reasons is "flatly inconsistent" with my quoted comment are inherently and demonstrably untrue. That is, I believe the Appellant was telling untruths about me that go beyond the appellate advocacy craft of colour, spin and innuendo.

[104] I am also of the view that I clearly tabled my concerns with Mr. Reifsnyder while he was still able to better or fully explain himself or adjust his thinking, or for his counsel to conduct further redirect. Again, this means I am of the view it would be untrue to say that my concerns with Mr. Reifsnyder's approach and opinion arose only after I reframed the case after the trial was over.

(i) The Relationship Between Discounts and Interest When Expressed as Rates, and Whether the Trial Judge was "Inflammatory" and "Misleading" in his Reasons

[105] In paragraph 54 of the Factum, the Appellant accuses me of being misleading in the sentence in my Reasons wherein I deal with financing costs, discount rates and interest rates. Specifically footnote 87 to that paragraph in the Factum says:

> . . . The Trial Judge equates the assessed discount rate to an annual interest rate of 12-13 percent, when in fact almost all of the 1% percent discount rate consists of cost recovery, so it is not all equivalent to an interest rate. Similarly, the Trial Judge makes the inflammatory and misleading comment at paragraph 14 that the actual 2.2% discount rate was equivalent to a 27% annual interest rate.

[106] In my Reasons, paragraphs 14 and 16, and the footnotes thereto, refer to this issue. They read as follows:

> [14] The CRA has challenged these related party transactions for McKesson Canada's 2003 taxation year on the basis that the amounts paid to the non-Canadian McKesson entity pursuant to the receivables purchase transactions differ from those that would have been paid between arm's length persons transacting on arm's length terms and conditions. The discount upon the purchase of the receivables in accordance with the revolving facility was a 2.206% discount

> from the face amount. While this discount rate and the overall transactions between the parties are considered in greater detail below, this discount rate for receivables that on average were expected to be paid within about 30 days can be restated as an annual financing cost payable by McKesson Canada for its rights under the facility in the range of 27% per annum.
>
> [Footnote 5:] The discount was in fact recorded as a financing charge on McKesson Canada's financial statements. The Appellant's expert Mr. Reifsnyder confirmed that, while there are differences, one can look at annual interest rates and discount rates as being roughly the same thing.
>
> [16] The taxation year of McKesson Canada under appeal ending March 29, 2003 was a short taxation year of approximately three and a half months, having started upon its amalgamation as part of a Canadian restructuring of the McKesson Group's Canadian interests. Its taxation and financial year ends on the last Saturday in March of each year. Its financial year is divided into 13 four week Accounting Periods. CRA's 2003 transfer pricing adjustment was approximately $26,610,000, reflecting a 1.013% discount for the purchased receivables. [Footnote 6:] This works out to an annual effective financing cost rate in the range of 12%to 13%. This is more than twice the annual interest rates on the available credit lines described above. No transfer pricing penalty was assessed.

[107] It can be noted that in my Reasons I clearly equate the discount rate on the purchase of the receivables rate to an annual financing cost.

[108] As noted in footnote 5, Mr. Reifsnyder testified during the trial that one can look at annual interest rates and discount rates as being roughly the same thing.

[109] We need return to the record of the proceedings to see what each of Mr. Reifsnyder and Appellant's counsel said about the differences and equivalency of interest rates and discount rates in looking at financing costs.

[110] In Mr. Reifsnyder's testimony at pages 1005 and 1006 of the Transcript the following exchange of question and answers with Appellant's counsel in direct examination are recorded:

> Question: We'll come back to all of these points in detail and you['ve] given them on the next page. I just want to go back to one part of your report I haven't addressed prior to that, which is your discussion on pages 8, 9 and 10 about the yield rate and some discussions you have about time periods and things like that. Can you tell us what you're addressing here?

> Answer: Yes. When I talked about cash flow earlier I didn't mention the fact those of us who have been actively doing transactions for a long time are acutely sensitive to issues like time period, what is the so called day basis of the transaction.
>
> And also we're acutely sensitive to the difference between discounted rates and interest rates. They're not the same. They do not have the same numerical result. I wanted to think about those with this transaction and decide if it was critical to an analysis of this transaction to parse the transaction around those values and variables and, at the end of the day, what I am trying to say is in the report on pages 8 and 9.
>
> I think the way to look at this deal is to look at the days in each period as being roughly 28 days which is the number of days in a settlement period, the McKesson accounting period, and also to look at annual interest rates and discount rates as being roughly the same thing. So mathematically I acknowledge if you ran a calculation using a 28 day period or 32 day period you would come up with a different result, but in the context of this transaction I don't regard those adjustments as being meaningful in the context of negotiation of an overall price.

[111] The following exchange between Mr. Reifsnyder and the trial judge is recorded at page 1071 of Volume 8 of the Transcript:

> Justice Boyle: Can I interrupt for a second, just because I'm confused. The bottom of 15, the first two lines on the chart, the 1306 to the 1.0049.
>
> The Witness: Yes.
>
> Justice Boyle: This time we are converting a rate to a discount directly?
>
> The Witness: Yes.
>
> Justice Boyle: Maybe that's what I misunderstood, is the effective yield not expressed as a rate and - - it's a discount, not an interest rate?
>
> The Witness: Yes and as I stated yesterday - -.
>
> Justice Boyle: I remembered that. This time I thought you were converting, but you're not?
>
> The Witness: I'm not converting the effective interest to discount rate. I'm taking an annual interest rate and dividing it by 13 and saying good enough to consider this a discount rate.

> Justice Boyle: I knew it was either that or you were dividing by 12 after converting an interest rate to a discount rate. Did I confuse anybody? It certainly helped me. Thank you. Carry on.

[112] The following exchange is recorded during the cross-examination of Mr. Reifsnyder by Mr. Laperriere at page 1164 of the Transcript:

> Question: In your rebuttal report you criticize both the Finard and Glucksman reports for converting the discount rate on the RSA into an annual interest rate, remember those parts of your rebuttal?
>
> Answer: Yes.
>
> Question: I am asked again to ask you where, in either of the Glucksman reports or Finard reports, do they claim that the RSA has a stated annual rate of interest?
>
> Answer: I am not sure they make that statement. They simply characterize the financing costs as being equivalent to an annual interest rate, as I recall.

[113] And at page 1165:

> Question: Let me put the following question to you: have both of the reports just converted the discount rate on the RSA to an annual interest rate for the sake of comparison purpose to alternative financing arrangements?
>
> Answer: We compare to an annual interest rate in terms of index here. Let's be clear, this is a yield, a discounted yield on a portfolio. That's my only point.
>
> Question: In your experience do companies typically want to compare the potential financing costs they would obtain under different finance structures?
>
> Answer: Yes.
>
> Question: If a CFO was trying to understand related financing costs, if we take a receivable sales transaction similar to the RSA and, say, a bank loan, would it be necessary to convert the discount rate on the RSA into an annual interest rate?
>
> Answer: To an effective annual rate, yes. But depends - - I don't think it is to be confused with an interest rate. It's not a stated rate of interest. It's a risk related point. It's not earned at that rate until the transaction matures.
>
> Question: You also appreciate the purpose, that is to do a kind of an apples to apples comparison?

> Answer: Yes. Quick and dirty, as we say.

[114] I can restate what I said in footnote 5 above that the evidence was that the discount on the RSA was in fact recorded by McKesson Canada as a financing charge on its financial statements.

[115] When reading transcripts from the discovery into evidence following Mr. Reifsnyder's testimony, Appellant's counsel at pages 1310 and 1311 of Volume 9 of the Transcript said the following to me by way of walking me through the highlights of the read-ins (which were not read verbatim into the record, but were taken as read):

> Justice Boyle: I'll ask you now since it's lawyer and judge and no witness. What is the relevance of this? CRA was slow getting to the game and they had to really hurry up because they had a deadline and you think they screwed up. How does that help me?
>
> Mr. Schabas: It relates to context of the assumptions. At Tab 2A, it's again the fact that it wasn't until they meet with an economist that they realized that the 2.2 percent discount, if you accepted at a certain approach to this, could be equated to a much higher rate of interest and that's the point at 2A. 2B makes the point, as we'll get to later that the auditor - -.
>
> Justice Boyle: Have they worked through what Sears charges them on the balance every year?
>
> Mr. Schabas: That might come up in argument too, your Honour. Two is the auditor acknowledged she had not dealt with a factoring case and, again, at 2C is more references to the fact that it was Mr. St. Pierre, the economist who they met with in December, that brought to their attention that 2.2 was not an annual discount rate and they believe that was a reasonable discount rate until they met with him. That's specifically dealt with on page 356 of question 1633, they're saying until they met with the economist the team was operating on the basis that the discount rate was reasonable.
>
> Justice Boyle: You just told me that's because they thought it was 2.2 percent.
>
> Mr. Schabas: They didn't appreciate it could be equated to 28 percent, as far as the evidence goes.

[116] It appears to me to be very hard indeed based on this evidence from Mr. Reifsnyder and from McKesson Canada's financial statements, and on this

exchange with Appellant's counsel in argument, to imagine, that I was trying to mislead.

e) Were Both Approaches of the Glucksman Expert Report and Evidence Referred to in the Reasons?

[117] In paragraph 28 of the Factum filed by the Appellant they allege:

> 28. Myron Glucksman, the Crown's final expert, had two analyses: an "affirmative analysis" with a risk-shifting 18.5% reserve, and an alternative analysis that attempted to determine an arm's length discount rate under the Agreement without fundamentally altering the transaction. Under the second approach, never mentioned by the Trial Judge . . .

[118] In the Reasons both approaches are described by me in paragraph 265:

> [265] In addition to critiquing the Discount Rate approaches in the TDSI Report (and in the PwC Report), the Glucksman Report computes an Affirmative Estimate of an arm's length Discount Rate for the RSA.

[119] Since there are only two approaches set out in the Glucksman Expert Report and in his testimony (largely referred to during the hearing as the "as-is" approach and the "substantive" or "affirmative" approach), I believe it would be difficult for someone familiar with or informed of the proceedings to read this paragraph in my Reasons as not referring to and describing both of Mr. Glucksman's approaches.

[120] It is my view that paragraph 28 of the Factum filed on behalf of the Appellant states an untruth about me and what I did or did not say.

f) Did the Trial Judge Ignore a Concession by the Crown?

[121] In paragraph 4 of the Factum, the Appellant states:

> 4. By the end of the trial, however, the Crown had abandoned its idea of a 20 percent reserve, and effectively conceded that, without this (risk shifting) reserve, the Minister's original one percent discount rate was indefensible.

[122] Similarly, in paragraph 25 of the Factum, the Appellant writes:

> 25. The Crown ultimately relied on evidence that supported a conclusion that, without significant risk-shifting loss reserves, arm's length parties would have agreed to a discount rate of around 1.35 percent.

[123] Paragraph 28 of the Factum (already discussed under the preceding heading) refers to Mr. Glucksman's testimony about his reserve in this regard.

[124] In paragraphs 35 and 36 of the Factum, the Appellant states:

> 35. In his Reasons, the Trial Judge rejects the 20 percent reserve initially advocated by the Crown on the basis that adding such a term would be tantamount to rewriting the actual transaction; however, he ignores the impact the Crown conceded this would have on the discount rate. The Crown conceded that pricing the actual transaction without adding a risk shifting reserve would result in a discount rate as high as 1.35 percent.
>
> 36. Rather than consider the Crown's evidence or its position, the Trial Judge proceeded to arrive at a discount rate based on his own conjecture about what arm's length parties would or would not have agreed, and then concluded that the discount rate relied upon by the Minister in the reassessment fell within an arm's length range. The Trial Judge viewed a discount rate as low as 0.92 percent as producing an arm's length benchmark for McKesson Canada's transaction, one with no reserve, while the Crown's own witnesses (Mr. Finard and Mr. Glucksman) viewed a number in this order as acceptable only with a 90 million dollar reserve. [3]

[125] We can return to the record of the proceedings to see if the trial judge ignored any such concessions by the Crown or failed to consider the Crown's evidence on this point, and to see if any such concession was made by the Crown.

[126] It is clear from the record that the Respondent's counsel never conceded such a point, even after being reminded of Mr. Glucksman's testimony giving rise to the 1.3 and 1.35. (This appears to be indirectly acknowledged in the last sentence of paragraph 30 of the Factum.)

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[3] It should be noted that Appellant's counsel has either erred or overstated my lowest discount rate of 0.92 percent. Clearly it should be 0.959 percent given a straightforward reading of paragraphs 350 and 351 of my Reasons. Neither Mr. Finard nor Mr. Glucksman's evidence was given or drawn out in the context of the corrected DSO for the initial purchase during the short taxation year actually before the Court and addressed in paragraph 351 of my Reasons.

[127] The following exchange during argument with Appellant's counsel occurred towards the end of their second day of arguing the transfer pricing adjustment issue at pages 3806 and 3807 of Volume 23 of the Transcript:

> Justice Boyle: … I asked Mr. Laperriere the question[,] is 1.3 now my floor[,] for the reason you're advocating, but you're saying I have to. I'm asking the question. It puts pressure on him to ask the question.
>
> Mr. Gilliland: He's still thinking about it two days later. I don't disagree you could reject all the evidence and in however manner you see fit arrive at the 1.1. My submission is that on the evidence before you you'd be hard pressed to do that given the fact the Crown's own witness is 1.3 and my tag onto that is that if I'm right and we are at the 1.3, a gap between that those two preponderance of evidence.
>
> By now as Appellants we pushed you past 1.1. I am saying if we gotten there, it looks like we have gone a long way toward that given the evidence and the change of position. My only point is then we are at a preponderance of evidence. If we're not, the burden was on us to move things.
>
> Justice Boyle: The burden was on you to displace the assumptions of fact. I think that's been done. I don't think I'm going to hear argument to the contrary from Mr. Laperriere.
>
> Now you're in the position of every person bringing an application before a court, you have the burden on the balance of probabilities of showing me what they did was wrong and I'm saying what they did was still 1.1. You're saying it looks like practically and maybe legally it is 1.3. Apart from this disagreement, I think we are saying the same thing. They don't have to show me 1.1 is right even if the assumption is off the table. You have to show me it's wrong.

[128] I believe this last exchange speaks for itself. I believe it is untrue for the Appellant to say that I ignored a Crown concession and that I didn't consider the evidence of the Crown's expert on this point.

3. Where in the Factum McKesson Canada Challenges the Trial Judge's Impartiality.

[129] In paragraph 9 of the Factum, the Appellant writes about the trial judge's "palpable antipathy" towards the taxpayer, its witnesses and its counsel. They refer to one of my statements as "sharp".

[130] They conclude paragraph 34 by writing:

> What is clear from the Reasons is the unflattering view taken of McKesson Canada, its witnesses, and its counsel.

[131] In paragraph 70 they refer to my analysis being "infected by his pejorative and unfair comments".

[132] I have already addressed above under my first heading my concerns that in paragraphs 84, 88 and 89 the Appellant appears to be saying I was untruthful.

[133] I view these as public allegations by a party to the costs and confidential information matters remaining before this Court that, regardless of the merits of their reasoning or their thoughts, I am unable to decide the remaining matters impartially. I believe that a reasonable person reading only these phrases from the Factum, without reviewing my Reasons or the trial Transcript, would believe that such strong complaints by McKesson Canada and its counsel may give rise to a serious doubt that I will be seen to be able to dispose of the two remaining issues and discharge my duties on an impartial basis.

4. Erratum

[134] Before concluding, it appears appropriate for me to acknowledge an error in my Reasons that the Appellant has correctly identified in its Factum. In paragraph 56 of the Factum, the Appellant refers to the phrase in the sentence in paragraph 13 of my Reasons that "a portion was loaned for a period to another Canadian corporation to permit its tax losses to be used". I can confirm that they are correct in saying that there was no support in the evidence that the purpose of that loan was for the Vancouver affiliate to use its tax losses. I sincerely apologize for using the words "to permit its tax losses to be used". It will be for others to decide, of course, the relevance of my mistaken phrase to my overall Reasons and decision.

[135] By way of explanation and not excuse, I can see that I mistook a two-part question I had intended to ask Mr. Brennan by way of clarification at the end of his testimony, as a question and an answer. In his examination-in-chief, Mr. Brennan, the VP Tax at McKesson US, described the Vancouver affiliate as a large R&D centre, and later referred to it as a very large physical R&D practice that was well educated. He later described the 92 million dollars as being "we just lent it to one

of our companies that are located in Vancouver, Canada. We had the cash to have paid that immediately. We didn't have to do it, but we did it. And, you know, and, actually, this note was paid off over two years thereafter but we could have paid it off through Ireland much sooner if we wanted to." Later he said "all we did is we on-lent it to one of our Canadian subsidiaries." And "but, anyways, this is McKesson Canada's money, and we have asked it to lend it to its, not a subsidiary, it's an affiliate, a Canadian affiliate, and we can now do that because of the restructuring." That is all of the evidence I had. My question was to be, in these circumstances, why was this loan made. The second half of my question, had I asked it, was to be whether it was for tax loss utilization purposes. In the end, I decided not to ask Mr. Brennan the question at all. However, in preparing my Reasons it appears I confused the second half of my question for an answer to the first. Again, I was mistaken in this regard in my Reasons and I do apologize.

5. Conclusion

[136] For the Reasons identified above, I have decided I have to recuse myself from the remaining costs and confidential information issues in McKesson Canada's proceeding in this Court.

[137] It may be that some of the perceived untruths about the trial judge described above under heading II might individually not warrant recusal, and may be within an appellate advocate's licence to overstate through the use of absolutes like 'never', 'only' and 'any'.

[138] However, I am satisfied that a reasonable fair-minded Canadian, informed and aware of all the issues addressed above, would entertain doubt that I could remain able to reach impartial decisions. I believe that such a reasonable fair-minded and informed person, viewing this realistically and practically would, after appropriate reflection, be left with a reasoned suspicion or apprehension of bias, actual or perceived. Canadians should rightly expect their trial judges to have broad shoulders and thick skins when a losing party appeals their decision, but I do not believe Canadians think that should extend to accusations of dishonesty by the judge, nor to untruths about the judge. Trial judges should not have to defend their honour and integrity from such inappropriate attacks. English is a very rich language; the Appellant and its counsel could have forcefully advanced their chosen grounds for appeal without the use of unqualified extreme statements which attack the personal or professional integrity of the trial judge.

[139] For these reasons, I will be advising my Chief Justice that I am recusing myself from completing the McKesson Canada proceeding in the Tax Court. This extends to the consideration and disposition of the costs submissions of the parties in this case, as well as to the 2010 confidential information order of Justice Hogan in this case and its proper final implementation by the Tax Court and its Registry.

Signed at Ottawa, Canada, this 4th day of September 2014.

"Patrick Boyle"

Boyle J.

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