Was Canadian Judge's Recusal in McKesson Out of Bounds?

It's not often that transfer pricing litigation sparks water-cooler conversations beyond the tax community, but the latest development in the Canadian case involving McKesson Canada Corp. has even non-tax practitioners and academics buzzing that they've never seen a trial judge defend himself so vigorously against a party's claims of unfairness.

On September 4, Tax Court of Canada Judge Patrick J. Boyle issued an order in *McKesson Canada Corp. v. The Queen* (2014 TCC 266) in which he recused himself from completing further proceedings in the case, including consideration of costs and a 2010 confidential information order. Boyle said his recusal was necessary because a reasonable person reading the suggestions of "deceitful and untruthful conduct" and unfairness expressed by McKesson Canada in its memorandum of fact and law (factum) filed June 11 with the Federal Court of Appeal (FCA) in its appeal of Boyle's decision might believe Boyle is unable to remain impartial in his consideration of the remaining issues in the case.

The order quickly circulated by e-mail to tax practitioners, many of whom expressed amazement at its length (45 pages) and level of detail. Boyle painstakingly countered McKesson Canada's grounds of appeal by citing to specific statements in the trial transcripts and his December 2013 judgment that Boyle contends show that the company's claims are meritless.

Tax Analysts spoke with several tax practitioners on the appropriateness of Boyle's order. They were candid in expressing their views but didn't want to comment on the record because of the sensitivity in discussing the conduct of a judge they appear before. Given that the order raises questions about the boundaries of judicial ethics, Tax Analysts spoke with some of Canada's leading experts in the field. They said Boyle's order could open up an interesting debate on the limits of a lawyer's duty to advocate on his client's behalf and a judge's duty to sit and decide the matter before him.

Controversy

The case, which centers on a December 2002 receivables sales agreement between McKesson Canada and its immediate Luxembourg-based parent company, has been closely followed by the international tax community. Practitioners' interest spiked after Boyle's 100-page judgment was made public in late 2013. In concluding that the parties' agreed-upon discount rate for factoring accounts receivable did not reflect an arm's-length result, Boyle gave what some observers believed was an unusually harsh critique of McKesson Canada's expert witnesses and its handling of the case.

In its factum to the FCA, McKesson Canada "took the gloves off" – in the words of some practitioners – by arguing that Boyle's conduct was so unfair that a new trial is warranted. The company contended that Boyle's transfer pricing analysis and conclusion on the arm's-length discount rate relied on three key propositions that were not part of the government's pleadings, or of its case presented at trial. McKesson Canada argued that Boyle's decision-making process deprived the company of its right to know the case it had to meet and its right to a fair opportunity to meet that case.

McKesson Canada also highlighted as unfair Boyle's "palpable antipathy" towards the company, its witnesses, and its counsel stemming from his belief that the company's evidence was selective and disingenuous. "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," the company said.

In its own factum filed August 11, the government contended that Boyle committed no reviewable error and that his findings are amply supported by the evidence.

In his Reasons for Recusal, Boyle said he's not in the habit of reviewing factums against his 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," he wrote.

Boyle acknowledged that a trial judge has no role in the appeal of a trial decision, and that counsel on both sides in the appellate court are free to make any 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."

Boyle said he would therefore restrict himself to McKesson Canada's factum and statements from the trial transcripts and judgment to explain his reasons for recusing himself. "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," he wrote.

He then addressed three main areas of concern:

- "Where it Appears in the Factum that McKesson Canada States that the Trial Judge is Untruthful and Deceitful";
- "Where it Appears That the Appellant States in its Factum Untruthful Things About the Trial Judge";
- "Where in the Factum McKesson Canada Challenges the Trial Judge's Impartiality."

Boundaries of Judicial Ethics

Brent Cotter, a professor at the College of Law at the University of Saskatchewan who specializes in legal ethics and professional responsibility, said it's unusual that a Tax Court order has attracted so much attention in the wider legal community in such a short amount of time. The order has become fodder for debate among tax and non-tax practitioners and academics alike, he said.

Cotter is a co-author and co-editor of *Lawyers' Ethics and Professional Regulation*, the main case book used to teach legal ethics at Canadian law schools. He said that a discussion of Boyle's order will likely be included in the chapter on "Judges' Ethics, Lawyers' Dilemmas" when the case book is next updated. Cotter said the detailed nature of the order and Boyle's defense of his judgment is almost unprecedented.

"It seems to have arisen from a unique set of circumstances," he said. "It's as though ancillary matters that still remain before him gave him an opportunity that wouldn't otherwise be available to enter into the fray, so to speak, in the appellate process. Obviously this is a tax case, but this dimension of it is much less a tax case and more of a 'What are the boundaries of judicial ethics?' kind of case."

Gavin MacKenzie, a litigator with the Toronto office of Davis LLP who has served as an expert witness on professional responsibility and litigation in the United States and Canada, said that other judges have issued lengthy decisions explaining whether they should or should not recuse themselves because of a reasonable apprehension of bias. "What's unprecedented in this case, certainly in my experience, is a judge writing a 45-page decision when there wasn't even a request that he recuse himself," he said.

"And the other aspect of it that's unprecedented is the judge is commenting on the factum filed by the appellant from his own judgment in the very case," MacKenzie said. "I must say I've been practicing for 37 years and I've never seen that before."

MacKenzie said that Boyle's critique of the merits of McKesson Canada's grounds of appeal could set a dangerous precedent. "Certainly if there was a request that the judge recuse himself, and the basis of that related to the conduct of the trial or possible ill will between the judge and the lawyer in the case, I can see that the existence of that conflict could be the basis for recusal," he said. "But it struck me as I was reading this order that it was completely unnecessary for the judge to express his views on the merits of the arguments made by the appellant about his judgment."

Cotter said the order could complicate the FCA proceedings. “Judges are understood to be impartial arbiters of legal matters, and this has the flavor of a trial judge entering into the appellate arena and responding to an appellant’s submission, when that’s normally what respondents do,” he said. “It’s almost like the appellant now has to contend with both the respondent and the trial judge.”

Boyle’s vigorous defense of his judgment arguably crosses the line between providing legitimate commentary and abandoning his duty of impartiality, said Cotter. “My sense is that this engagement by the judge raises questions about whether impartiality has been preserved in this case,” he said.

“In this kind of case, an appellant has to be critical of the trial judge if it’s suggesting a lack of impartiality,” Cotter said. “Normally the judge has to just take the criticism and let the process unfold. Justice Boyle seems unprepared to do that.”

Cotter noted that the Canadian Judicial Council, a federal body created in 1971 to oversee the conduct of federally appointed judges, provides guidance to judges in *Ethical Principles for Judges*, a document first published in 1998. The council has the power to investigate complaints made by members of the public or the Attorney General about a federal judge’s conduct. After the council has completed its review and investigation of a complaint, it can make recommendations, including to Parliament through the Minister of Justice, that a judge be removed from office.

Whether anyone will file a complaint about Boyle’s recusal order is anyone’s guess, Cotter said. “This has gotten the attention of lots of people who were surprised at the nature of the order,” he said.

Limits of Appellate Advocacy

Richard Devlin, a professor at the Schulich School of Law at Dalhousie University in Halifax who specializes in legal and judicial ethics (and is, along with Cotter, a co-author and co-editor of *Lawyers' Ethics and Professional Regulation*), said that McKesson Canada’s factum could spark an interesting debate on the limits of appellate advocacy.

“A conversation could be had on how far should a lawyer go in criticizing a trial-level judge when writing a factum,” Devlin said. “That’s an interesting and challenging question. Most factums that I’ve seen, even when they are critical of judges, would’ve been more nuanced and less adversarial than McKesson’s.”

Canadian lawyers tend to be less zealous than their American counterparts in their advocacy, Devlin said. “Canadian culture has been one of great nuances and not a hard-edged, in-your-face style,” he said.

Devlin said he felt that McKesson Canada's factum could have been written in a more respectful manner. "The same points could've been made without using the precise language that the lawyers used in the factum," he said. "They didn't have to go as far as they did."

MacKenzie disagreed that the factum was too harsh. "I didn't find anything inappropriate at all in the factum," he said. "It struck me as a perfectly legitimate argument that can be accepted or rejected by the Court of Appeal on the merits. I didn't read it as being in any way inappropriately disrespectful of the judge."

Devlin conceded that one could argue that McKesson Canada was compelled to go hard on Boyle because Boyle himself used unusually harsh language when rejecting the company's trial position and evidence. However, Devlin said he believes that the tone required of a judge differs from that required of a lawyer.

"Certainly when making credibility decisions, judges have to be very explicit in their reasons because they need to lay the evidentiary foundation if there is an appeal," he explained. "Judges have an obligation to give clear reasons. I actually like it when judges are as clear as possible, because that does lay any foundation for appellate decision-making."

"If judges are more nuanced or subtle," Devlin continued, "it actually doesn't give the Court of Appeal much to work with. So I would be one of those people who are in favor of judicial candor and directness."

MacKenzie, however, said he felt that Boyle's judgment went too far in criticizing McKesson Canada's lawyers. He cited as particularly unfair Boyle's comments in paragraph 246 of the judgment ("Overall I can say that never have I seen so much time and effort by an Appellant to put forward such an untenable position so strongly and seriously. This had all the appearances of alchemy in reverse.").

Civility

Both MacKenzie and Devlin said that the debate over "tone" in the McKesson case comes at a time when there is growing concern in Canada about the civility of the legal profession and what constitutes excessive advocacy.

MacKenzie said he has recently participated in panels where both judges and lawyers made the point that civility is an obligation of everyone involved in the legal process. "When reading that paragraph [246] in Justice Boyle's judgment, I think that can raise a legitimate question about the civility of the judge in this case," he said.

Devlin suggested that Boyle's recusal is an example of a judge stuck between a rock and a hard place. "Who's going to speak for a judge when he perceives he's been attacked?" he said. "Clearly he could just sit and be quiet and leave it to the Court of Appeal to handle. But at the same, it's not always clear to me that judges need to be silent."

Judges can be left in a difficult position when a lawyer's obligation to advocate on his client's behalf clashes with a judge's duty to hear the matter before him, Devlin said. Under the duty to sit doctrine, unless a judge is required by law to disqualify himself, he cannot simply choose to recuse himself and must remain on the case. "But if you're a trial-level judge and you see a factum like this one [in McKesson], and you're still sitting on the case, what do you do when you believe the lawyers have gone too far in criticizing your conduct?" Devlin said.

"Judges do have a duty to sit," Devlin said. "At the same time, however, if a judge believes that the relationship between himself and the lawyers has become so poisoned that he believes he might have a hard time, or there would be a perception that he might not be the right judge for this, then maybe he should recuse himself."

"I guess I'm not as convinced as others," Devlin said. "Justice Boyle's order is clearly very unusual, if not unprecedented. However, I'm not sure I'd automatically say that it was inappropriate for him to do this."

McKesson Canada Stands By Factum

McKesson Canada's counsel, Al Meghji of the Toronto and Calgary offices of Osler, Hoskin & Harcourt LLP, declined to comment on Boyle's recusal, saying he cannot discuss the case while it is still before the court.

Kris Fortner, a spokesman for McKesson Corp. (McKesson Canada's ultimate U.S. parent), said in a statement, "We stand by our factum, which firmly and properly advances compelling arguments grounded in the law and the facts, that Justice Boyle's judgment should be overturned by the Court of Appeal. We are unable to offer any further comment at this time because the matter is before the courts."