

Application to Amend Notice of Appeal - FCA - Rule 75

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McKesson Canada Corp v Canada, [2014 FCA 290](#)

The Appellant brought an application, under Rule 75, to amend its pleadings on the basis of Justice Boyle's recusal reasons in [2014 TCC 266](#). The Appellant wished to add a new ground of appeal and relief on the basis that Justice Boyle in his recusal reasons responded in detail to the appellant's factum, thereby improperly injecting himself into the appeal. The Crown argued that the recusal reasons are irrelevant to the merits of the TCC decision, and neither affect the appearance of the reality of a fair appeal before the FCA.

ANALYSIS

The FCA noted that it has never set out the principles applying to a Rule 75 motion to amend a notice of appeal. It held that the principles that apply to amending trial pleadings, set out in [Canderel Ltd. v. Canada](#), [1994] 1 F.C. 3 (C.A.), apply with modification with reference to Rule 3 (injecting into the analysis the concepts of fairness, avoidance of delay, cost-effectiveness, and a preference for adjudication of the real merits of cases) (para 7).

A court must consider:

- is the amendment directed to the real merits at stake in the case, based on,
 - the nature of the parties' case;
 - an assessment of the relevance of the amendments to the determination of the case; or
 - whether the new ground asserted can possibly succeed.

In determining whether a new ground can possibly succeed, the task of the motions judge is different than the appeal panel. The motions judge must consider whether it is "clear cut or obvious that the new ground will fail" and if so not allow the amendment, or where "reasonable minds would differ on the merits of a new ground" then the motions judge should allow the amendment. See analogous matter on evidentiary points in *Collins v. Canada*, [2014 FCA 240](#) at paragraph 6.

Under Rule 75, even if reasonable minds would differ, the Court can refuse an amendment if the moving party has been "dilatatory, or considerations of fairness or prejudice lean against the amendment and those considerations cannot be satisfactorily addressed by way of terms" (para 10).

The FCA held that the recusal reasons departed from the norm because of their response to the appellant's memorandum of fact and law. They became part of the real issue at stake, and it

was not clear cut or obvious that the new ground will fail. The new grounds were allowed entry into the appeal.

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