McKesson - Justice Boyle - Apprehension of Bias - Recusing - Appeal Factum

Apprehension of Bias - Recusing Judges - Appeal Factum

McKesson Canada Corporation v The Queen, 2014 TCC 226

In this decision, Justice Patrick Boyle, on his own motion, recused himself from the issues of costs and confidential information remaining after rendering a decision on the merits.

Justice Boyle was made aware of allegations of dishonesty, untruthfulness, impartiality, and untrue statements about what was said, heard, and argued at trial made by the Appellant, in the Appellant's factum in support of an appeal from Justice Boyle's decision, before the FCA. The decision being appealed from was *McKesson Canada Corporation v. The Queen*, 2013 TCC 404. The factum was brought to his attention by prominent tax attorneys and other judges of the TCC.

Justice Boyle, in a lengthy judgment, analyzed the allegations and claims made in the FCA factum - significantly undermining the arguments of the taxpayer and making the job of the Crown on appeal much easier.

The problem, as Justice Boyle identified, is not the zealous, fearless, complete advocacy of counsel in pursuit of his/her client's interests - as "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 [as t]hat is all of counsel’s choosing and to be ultimately considered and decided by the appellate court." (para 8).

It was the combined force of the unqualified allegations of dishonesty, deceitfulness, and impropriety - calling into question the professional integrity of the Trial Judge - that was the basis for Justice Boyle needing to decide, and deciding, on his own motion, whether (para 5):

> (i) [He] believe[s] that a reasonable person reading the Factum, [his] 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) [He] believe[s] [he] can impartially consider, weigh and decide the costs and confidential information issues before [him]; and
>
> (iii) whether the public challenge of [his] impartiality expressed by McKesson Canada and its co-counsel in the Factum is itself sufficient to warrant recusing [him]self at this stage.

It appears that counsel for the taxpayer did the taxpayer a disservice, and has gone beyond proper zealous advocacy, and outside of proper professional bounds.

Justice Boyle, at paragraph 138 stated:

> [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.

[See ALSO the Dentons discussion and Mr Matthew Wall's analysis of this rare type of decision]

- Sas Ansari, JD LLM PhD (exp)

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