**PATENTED MEDICINE PRICES REVIEW BOARD**

**IN THE MATTER OF the *Patent Act*,**
**R.S.C. 1985, c. P-4, as amended**

**AND IN THE MATTER OF**
**Alexion Pharmaceuticals Inc. (the "Respondent")**
**and the medicine "Soliris"**

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# WRITTEN REPRESENTATIONS OF BOARD STAFF

## (ALLEGED CONFLICT OF ISABEL JAEN RAASCH)

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# PART I – OVERVIEW

1. Ms. Jaen Raasch is a lawyer who was employed at Gowlings in Ottawa until June of 2015. In July of 2015, she joined the staff of the Patented Medicine Prices Review Board ("the PMPRB") as General Counsel and Director at which time she became involved in this litigation in her capacity as the senior "in house" lawyer at the PMPRB.

2. When Ms. Jaen Raasch left Gowlings (Ottawa) she had no knowledge of Alexion, this litigation or of the representation of Alexion by Gowlings lawyers in another city (Toronto). Accordingly, she also had no information (confidential or otherwise) about Alexion or this litigation. Alexion has admitted that it is not suggesting that Ms. Jaen Raasch has ever had such information.

3. Consequently, Ms. Jaen Raasch cannot be "tainted" by knowledge that could affect the litigation (she has none) and cannot therefore be in a conflict of interest. It follows that counsel for the Board Staff cannot be "tainted" by the involvement of Ms. Jaen Raasch since she does not have any information which could "taint" said counsel.

4. In addition, Ms. Jaen Raasch has not breached any alleged duty of loyalty to Alexion because she does not owe Alexion any such duty. No case law exists that supports Alexion's assertion that a duty of loyalty applies to the facts of this case. Alexion is not Ms. Jaen Raasch's current client, and Ms. Jaen Raasch was never counsel for Alexion while she was at Gowlings nor did she know about

Alexion or this proceeding at that time. Imposing a duty of loyalty under these circumstances would be unprecedented. The Hearing Panel is being asked by Alexion to create a new duty upon lawyers that could significantly affect their employment mobility. It should not do so.

5. Moreover, even if Ms. Jaen Raasch owed any duty of loyalty to Alexion (which is denied) due to her former employment at Gowlings, there is no logical reason (and, of course, no jurisprudence) for any such duty to attach to counsel who have never worked at Gowlings, such as Ms. Shah, Mr. Migicovsky and Mr. Morris.

6. Finally, the relief Alexion seeks lacks proportionality. Alexion has not alleged (in argument or through evidence) that it is prejudiced in any tangible way by Ms. Jaen Raasch's continued involvement in this litigation. Alexion is not claiming that Ms. Jaen Raasch has knowledge or information that could prejudice it. Instead, the closest Alexion comes to such allegations is its claim that Ms. Jaen Raasch's involvement in the case "undermines" the "integrity of the administration of justice" without specifying how Alexion itself will be adversely affected by her involvement (or the involvement of other counsel who have spoken to her).

7. In the absence of any tangible prejudice, Alexion then seeks the draconian relief of disqualifying Ms. Jaen Raasch and <u>all</u> of the Board Staff's current lawyers in this litigation. Alexion is essentially seeking to preclude any possibility the continuation of the litigation continuing on its merits by depriving the Board Staff

of both in-house and outside counsel. In other words, Alexion is seeking to cause extreme prejudice to the Board Staff.

## PART II - STATEMENT OF FACTS

8. Alexion has been represented in this litigation by Messrs Malcolm Ruby and Alan West of the Gowlings Toronto office. Board Staff have been represented by Parul Shah (an in-house lawyer at the Board),Christopher Morris and David Migicovsky (partners at Perley-Robertson, Hill & McDougall LLP).

9. Gowlings has over 700 legal professionals. It operates in 10 offices across Canada and around the world, including its offices in Ottawa and in Toronto.

10. Up until June 4, 2015, Isabel Jaen Raasch was a partner at Gowlings office in Ottawa. She was a member of the intellectual property litigation group. Messrs. Ruby and West are not members of this practice group.

11. Ms. Jaen Raasch ceased her employment at Gowlings in Ottawa on June 4, 2015. However, she submitted her resignation on May 19, 2015, at which time she advised the managing partner of Gowlings Ottawa that she would be joining the Board as General Counsel.

12. While employed as a lawyer at Gowlings in Ottawa, Ms. Jaen Raasch had no knowledge of Alexion, of any matters relating to this litigation or to the representation of Alexion by Gowlings in Toronto. Ms. Jaen Raasch had never acted for Alexion in any matter while employed at Gowlings. She has no

information (confidential or otherwise) regarding Alexion and Alexion has not suggested otherwise.

13. On July 7, 2015, Ms. Jaen Raasch commenced her employment as Director of Legal Services and General Counsel at the PMPRB. The PMPRB publicly announced her appointment.

14. Ms. Jaen Raasch is the most senior in-house lawyer at the PMPRB and is responsible for supervising all of the legal work related to Board Staff, including the supervision of other in-house lawyers, the instruction of outside counsel, and the provision of legal advice related to proceedings or proposed proceedings before the Board as well as other matters such as administrative, corporate and employment law. There are two other lawyers in the legal services branch of the Board, Ms. Shah and Ms. Lewis, who both report to Ms. Jaen Raasch. In the course of their day to day work, all three lawyers have had discussions regarding this litigation.

15. On July 13, 2015, Alexion was aware that Ms. Jaen Raasch was involved in this litigation. As Ms. Jaen Raasch advised Gowlings that she was joining the PMPRB much earlier, it is likely that Messrs Ruby and West were already aware of this fact.

16. On July 17, 2015, Mr. West advised the Board (but did not advise Ms. Jaen Raasch, Ms. Shah or Messrs Morris and Migicovsky) that in his view, Ms. Jaen Raasch should not be involved in the present case. The letter alleged that

because Ms. Jaen Raasch was a former partner at Gowlings in Ottawa, the knowledge that Messrs West and Ruby had of the litigation must be imputed to her (Alexion is no longer advancing this allegation).

17. On July 20, 2015, Messrs West and Ruby served and filed an Amended Response to the Statement of Allegations of Board Staff ("the Amended Response"). Although Messrs West and Ruby should have been aware that Ms. Jaen Raasch had joined the PMPRB, no motion was brought to prohibit her from having any involvement in this matter. Similarly, no motion was brought to disqualify Ms. Shah and Messrs Morris and Migicovsky as counsel for Board Staff.

18. Paragraphs 37(h) and (i) of the Amended Response allege that Board Staff breached professional ethics by allowing Ms. Jaen Raasch to become involved in the litigation. This was the first notice to counsel for Board Staff that there was an issue relating to Ms. Jaen Raasch.

19. On July 27, 2015, counsel for Board Staff wrote to Messrs Ruby and West advising them that while employed as a lawyer at Gowlings in Ottawa Ms. Jaen Raasch had no information (confidential or otherwise) regarding Alexion or this litigation.

20. On July 31, 2015 counsel for Board Staff served Messrs Ruby and West with a motion to strike paragraphs 37 and 38 of the Amended Response. Messrs Ruby and West did not bring any motion challenging the involvement of Ms. Jaen

Raasch in the litigation or seeking to disqualify Ms. Shah and Messrs Morris and Migicovsky as counsel of record for Board Staff.

21. On August 21, 2015, Alexion finally served a motion seeking to disqualify Ms. Jaen Raasch, as well as Ms. Shah and Messrs Morris and Migicovsky as counsel of record for Board Staff.

22. In its motion, Alexion does not challenge the fact that while employed at Gowlings in Ottawa, Ms. Jaen Raasch had no knowledge of Alexion, or of any information (confidential or otherwise) regarding Alexion or of matters relating to the litigation or of the representation of Alexion by Gowlings in Toronto. Similarly, Alexion does not allege that it will be specifically prejudiced by the continued involvement of Ms. Jaen Raasch in this matter or the continued representation of Board Staff by Ms. Shah and Messrs Morris and Migicovsky.

23. In its Written Representations, Alexion no longer asserts that Ms. Jaen Raasch must be imputed with the knowledge of Messrs West and Ruby. Rather what Alexion now asserts is that as a former partner at Gowlings in Ottawa, Ms. Jaen Raasch owes a vague "duty of loyalty" not to act in a matter against Gowlings clients such as Alexion, even though she had no knowledge of Alexion or this litigation while she was at Gowlings Ottawa.

# PART III – STATEMENT OF LAW AND ARGUMENT

## (i) Ms. Jaen Raasch Has No Confidential Information

24. Ms. Jaen Raasch does not possess any information about Alexion (confidential or otherwise) and Alexion is not alleging that she either does or could have any such information. As such, she cannot be disqualified on the basis of knowledge that she does not have. Furthermore, there is no specific demonstrable prejudice to Alexion.

25. The leading case on this issue is the Supreme Court of Canada in *MacDonald Estate v. Martin* wherein the plaintiff commenced proceedings against the defendant accounting firm. The defendant accounting firm was representing by a senior and junior lawyer who (unlike the situation regarding Ms. Jaen Raasch) had a considerable amount of confidential information from their client. Several years later the junior lawyer who had been representing the defendant accounting firm joined the law firm representing the plaintiff. The defendant sought to have the plaintiff's law firm removed as solicitors on the basis of a conflict of interest. The junior lawyer swore an affidavit that he had not discussed the case with the lawyers at his new firm.

> ***MacDonald Estate v Martin*, [1990] 3 SCR 1235, 1990 CarswellMan 233 [*MacDonald*], Authorities Brief, Tab 3**

26. At paragraph 48 the Court noted that in these types of cases there were two questions to be answered:

    i. Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter; and

ii. Is there a risk that it would be used to the prejudice of the client?

27. The Court held that in determining whether a disqualifying conflict existed it was necessary to balance three competing values: maintaining high standards of the profession and integrity of the judicial system; the right of litigants not to be deprived of their counsel; and the desirability of permitting reasonable mobility in the legal profession.

28. The Court held that once a previous solicitor-client relationship is found to exist, there is an inference that there was confidential information imparted to lawyers at a law firm. However, this inference disappears if the "applicant client" (in this case – Alexion) admits that no confidential information relevant to the current matter was disclosed to the actual lawyer it seeks to disqualify. Here, Alexion has admitted that it does not allege that Ms. Jaen Raasch has confidential information relevant to the current matter. Consequently, Alexion cannot meet the first part of the *MacDonald Estate* test for disqualification. Ms. Jaen Raasch cannot be the "tainted lawyer" referenced by the Court in *MacDonald Estate*.

***MacDonald Estate v Martin*, *supra*, Authorities Brief, Tab 3**

29. In addition, because Alexion is not alleging that Ms. Jaen Raasch had any confidential information prior to her departure from Gowlings, Alexion also cannot

meet the "prejudice" part of the *MacDonald Estate* test because there is no confidential information whose use can prejudice Alexion.[1]

30. Consequently, there is no rationale for the Board to set up "ethical walls" to now prevent Ms. Jaen Raasch from disclosing confidential information that she never had. The only purpose of an "ethical wall" is to prevent the disclosure of confidential information between the parties divided by the "wall" in question.

### (ii) There is no duty of Duty of Loyalty owed by Ms. Jaen Raasch to Alexion

31. A lawyer owes a duty of loyalty to his or her current client to avoid conflicts of interest. This is not the case here. Ms. Jaen Raasch was never Alexion's counsel and does not possess any information from Alexion from her time at Gowlings.

32. No case law exists that addresses the question of whether a lawyer owes a duty of loyalty to a client of her former law firm where that lawyer never personally acted for the client while at the former law firm and does not possess any relevant confidential information.[2]

33. The duty of loyalty that Alexion is now relying upon in support of its motion to disqualify Ms. Jaen Raasch and counsel for Board Staff has never been

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[1] Alexion is no longer arguing that Ms. Jaen Raasch should be imputed with the knowledge that Mr. Ruby and Mr. West had. This is not surprising given the observation by Binnie J. in paragraph 50 of *MacDonald Estate* that this was unrealistic in the era of the mega-firm. *MacDonald Estate, supra*, Authorities Brief, Tab 3

[2] The fact situation in *McKercher LLP* 2013 SCC 39 (*McKercher*) provides an example of the type of situation in which a lawyer should be disqualified from acting because of a conflict of interest in relation to his or her duty of loyalty. The Court found that it was a conflict of interest and a breach of the duty of loyalty for a law firm to represent different clients, where the interests of one client are directly adverse to the immediate interests of another client, even if the two matters are not related. *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, Authorities Brief, Tab 2

extended to an analogous situation to the present matter. There is no principled basis or rationale for expanding the duty in this way. To do so would be unreasonable, without precedent and would impede professional mobility.

34. Alexion references three cases for its novel argument, none of which applies to this case. The first (see Paragraph 32 of Alexion's Written Representations) is the decision of the Ontario Court of Appeal in *Consulate Ventures v. Amico*, [2010] ONCA 788 ("*Consulate*"). In *Consulate,* the Court held that it would be a breach of the duty of loyalty for the same lawyer who had been consulted by the the Respondent to then change roles and act for the Appellant in the very same litigation. The Court noted that a duty of loyalty separate from a duty of confidentiality existed under these circumstances because "what is of concern is the spectre of a lawyer attacking or undermining in a subsequent retainer the legal work which the lawyer did for the former client or of a lawyer effectively changing sides by taking an adversarial position against a former client with respect to a matter that was central to the previous retainer."

***Consulate Ventures v. Amico*, [2010] ONCA 788**

35. The decision does not apply to this case. Ms. Jaen Raasch never acted for Alexion. Alexion never consulted Ms. Jaen Raasch on this matter nor provided her with confidential information. Ms. Jaen Raasch never did any "legal work for the former client" which she is "attacking or undermining in a subsequent retainer". Ms. Jaen Raasch does not therefore owe Alexion a duty of loyalty.

36. The second case Alexion relies upon is *R. v. Neil.* Unlike this case, in *R. v. Neil* the client to whom the duty of loyalty applied was a *current* client of the lawyer

whose disqualification was sought. Namely, the lawyer was, *at the same time*, representing Mr. Neil in criminal proceedings and a Ms. Lambert in a divorce in a circumstance in which it was foreseeable that Ms. Lambert would eventually become a co-accused with Mr. Neil in the criminal matter. The lawyer who was representing Ms. Lambert in the divorce was also gathering information which could eventually be used against Mr. Neil. In addition, the law firm had taken steps to encourage one of its clients to report Mr. Neil's criminal actions.

***R. v. Neil,* [2002] 3 S.C.R. 631, at para. 32, Authorities Brief, Tab 4**

37. The Court found that although there was no issue of confidential information, the duty of loyalty prevented the firm from acting for one of Mr. Neil's alleged victims in the civil matter given the solicitor-client relationship that existed with Mr. Neil.

38. The third case Alexion relies upon is *R. v. A.(I).* Significantly, Alexion does <u>not</u> provide the factual context that is necessary to understand the quote contained in paragraph 33 of Alexion's Written Representations. The accused in that case was charged with sexual interference and assault with a weapon. The victim was his daughter. The Crown brought a motion to disqualify the lawyer for the accused on the basis that he had previously represented a key Crown witness (the victim's mother and common law wife of the acused) in criminal proceedings against her several years ago. The nature of the charges against her was such that the lawyer would have conducted extensive background interviews at the time. The theory of the defence was that the victim's mother had convinced her daughter to make false allegations against the accused.

*R. v. A.(I.),* [2015] O.J. No. 1325, para. 34

39. The Court found that the accused's lawyer should be removed. Critical to the Court's decision was the possibility that the lawyer had confidential information about the victim's mother (his former client) which he might be able to use in his cross-examination. Equally important to the Court in deciding that the lawyer was in a conflict of interest and the nature of the all-out attack he intended to conduct on his former client who had taken him into her trusted confidence and who now found herself under attack. Equally important to the Court's decision was that this was a jury trial. It was likely, therefore, that the jury would learn that the lawyer had previously acted for the victim's mother and might conclude, from the lawyer's all-out attack on his former client, that he was in a better position than the jury to know what she would do.

***R. v. A.(I.),* [2015] O.J. No. 1325, Alexion's Written Representations**

40. Again, none of these risks apply in this case. Ms. Jaen Raasch has never received "confidences" from Alexion and the credibility of Alexion as a party is not under attack.

41. As discussed above, none of the jurisprudence Alexion relies on in support of this motion addresses a situation that is factually analogous or even comparable to this motion. Indeed, the case that comes closest to addressing this situation is not cited by Alexion and is contrary to Alexion's argument.

42. In *Basque v. Stranges* 2010, ONSC 5605, the plaintiff retained a lawyer (Mr. Budgell) from a law firm to represent her following a motor vehicle accident. Mr.

Graham was a partner at Chown Cairns in same office in St. Catherines as Mr. Budgell. He left the firm shortly after Mr. Budgell was retained. Mr. Budgell and Mr. Graham had not had any conversations about the plaintiff's matter while Mr. Graham was a partner at the firm. Subsequently, Mr. Graham was retained by the defendant's insurer to defend the action commenced by Chown Cairns on behalf of the plaintiff. The Court dismissed the motion to remove Mr. Graham as counsel for the defendant.

43. At paragraph 28, the Court noted the right of a party to be represented by counsel of choice and that courts must be cautious in interfering with such rights. The Court noted that Mr. Graham did not have any confidential information and concluded at paragraph 48 that "no reasonably informed member of the public would sensibly conclude that Graham is tainted with a disqualifying conflict of interest". The same statement can be made in this case.

> ***Basque v. Stranges* 2010, ONSC 5605, at paras. 28, 48, Authorities Brief, Tab 1**

44. Alexion has failed to demonstrate that it would be prejudiced by Ms. Jaen Raasch's continued involvement in these proceedings. At the end of the day the test for determining whether there is a breach of the duty of loyalty and a disqualifying conflict of interest is simple and was expressed by the Supreme Court of Canada in *Neil* at paragraph 31 where Binnie J. stated:

> ... I adopt, in this respect, the notion of a "conflict" in s. 121 of the *Restatement Third, The Law Governing Lawyers* (2000), vol. 2, at pp. 244-45, as a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person".
>
> ***R. v. Neil, supra*, at para. 31, Authorities Brief, Tab 4**

45. There is no risk that Alexion's representation or its rights would be affected or compromised as a result of Ms. Jaen Raasch's involvement in this litigation. As such, Alexion's motion must be denied.

### (i) The Relief Sought By Alexion is Disproportionate

46. In *MacDonald Estate*, Sopinka J. commented on the need for the conflict rules to take into consideration mobility in the legal profession. In *Neil*, Binnie J. elaborated on this at paragraph 15:

> ... In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. Yet is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests. [emphasis added]

***R. v. Neil*, *supra*, at para. 15, Authorities Brief, Tab 4**

47. The relief sought by Alexion does exactly what Binnie J. cautioned should not occur – expand the duty of loyalty to impose obligations upon a lawyer formerly employed at Gowlings in Ottawa (Ms. Jaen Raasch) in the absence of her having any information about Alexion. Moreover, Alexion then seeks to extend the duty

of loyalty to encompass counsel of record for Board Staff. This is neither sensible nor necessary.

48. As discussed above, there is no basis for disqualifying Ms. Jaen Raasch and there is no articulable prejudice that results from Ms. Jaen Raasch's continued involvement in this litigation. On the other hand, there is prejudice to the PMPRB. Alexion is seeking to disqualify Ms. Jaen Raasch and all of the Board Staff's current lawyers in this litigation.

49. The relief sought is out of proportion. Indeed, even in cases where there is a breach of the duty of loyalty, there are a number of requirements that must be met before a Court can decide whether disqualification is the proper remedy. For example, in *McKercher*, the Court noted that even in circumstances where there is a breach of the duty of loyalty, it is necessary to go on to consider whether the appropriate remedy is to disqualify the lawyer. In this regard the Court noted that there were three circumstances in which disqualification may be required:

> ...(1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.
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> ***Canadian National Railway Co. v. McKercher LLP,* 2013 SCC 39, at para. 61, Authorities Brief, Tab 2**

50. The Court went on to consider when disqualification is required in the third circumstance noted above. At paragraph 65 the Court noted that where there is no risk of misuse of confidential information, there will generally not be a concern of prejudice to a complaining party. Courts faced with a motion for disqualification

based on the assertion that it is necessary to maintain the repute of the administration of justice must therefore consider the following:

> ...(i) behavior disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.
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> ***Canadian National Railway Co. v. McKercher LLP, supra,* at para. 65, Authorities Brief, Tab 2**

51. In this case, Alexion (i) took no steps to bring the alleged conflict to the attention of the very individuals whom it now alleges breached their duty of loyalty, (ii) only raised the alleged conflict with counsel for Board Staff in the context of a pleading (the Amended Response) to allegations of excessive pricing, and (iii) chose not to bring a motion to disqualify Ms. Jaen Raasch and counsel for Borad Staff until faced with a motion by Board Staff to strike the offending paragraphs in the Amended Response. Moreover, Alexion has not alleged any prejudice to its interest in retaining its counsel of choice.

52. This Hearing Panel should not countenance actions by Alexion which are designed to, and have the effect of impairing the representation of Board Staff in this matter. The disqualification of Ms. Jaen Raasch and all individuals who have discussed this litigation with her (notwithstanding the uncontradicted fact that there is no confidential information regarding Alexion that Ms. Jaen Raasch ever had), creates an almost insurmountable roadblock to the continuation of this litigation – the very definition of extreme prejudice.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of September, 2015

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