

COURT OF APPEAL OF ALBERTA

REGISTRAR'S STAMP:

COURT OF APPEAL FILE NUMBER: 1501- 0131AC

TRIAL COURT FILE NUMBER: 1401- 05797

REGISTRY OFFICE: CALGARY

PLAINTIFF/APPLICANT: LANNY K. MCDONALD

STATUS ON APPEAL: APPELLANT

DEFENDANTS/RESPONDENTS: BROOKFIELD ASSET MANAGEMENT INC.,
BROOKFIELD SPECIAL SITUATION
PARTNERS LTD. and
HAMMERSTONE CORPORATION

STATUS ON APPEAL: RESPONDENTS

DOCUMENT: **APPLICATION OF APPELLANT**
(New Evidence Application)

ADDRESS FOR SERVICE OF
APPELLANT AND CONTACT
INFORMATION OF PERSON
FILING DOCUMENT: MCDONALD & ROSS
9 BRANT ROAD SOUTH
CAMBRIDGE, ONTARIO N1S 2W4
TELEPHONE 519-622-0499
FACSIMILE 519-740-6368
ATTENTION: JOHN W. MCDONALD

CONTACT INFORMATION OF
RESPONDENT:

NORTON ROSE FULBRIGHT
3700 CANTERRA TOWER
400 THIRD AVENUE SW
CALGARY, ALBERTA T2P 4H2
TELEPHONE 403-267-8222
FACSIMILE 403-264-5973
ATTENTION: HOWARD A. GORMAN

WARNING

If you do not come to Court on the date and time shown below either in person or by lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those document in compliance with the Rules. (Rules 14.41 and 14.43)

Notice to Respondents

Date	Oral Argument
Time	Oral Argument
Where	2600, 450 - 1 st Street S.W. Calgary, Alberta
Before	Court of Appeal panel that hears appeal when scheduled

Nature of application and relief sought:

1. An application to admit new evidence pursuant to Rule 14:45 of the Alberta Rules of Court to be heard prior to the hearing of the Appeal.

Grounds for making this application:

2. The new evidence was obtained after the hearing of the summary judgment motion before Justice Streckf on October 09, 2014 (“Summary Judgment Motion”) when the computer hard drive of Birch Mountain’s former president was obtained by the appellant and material evidence was acquired.
3. The Summary Judgment Motion was heard before document discovery and question discovery and as a result it has been difficult to acquire the required documents but

fortunately volumes of new evidence have been obtained from the recovered hard drive.

4. The due diligence time line that resulted in the recovery of the new evidence is summarized as follows:
 - a. the computer hard drive of Mr. Rowe was obtained from Dr. Lois Silvester, the widow of Mr. Rowe in late June 2014, who while administering the estate, located the computer hard drive;
 - b. Mr. Johnson, a consultant to the Birch Mountain common shareholders, received the said hard drive during July, 2014 but the Apple Mac hard drive required extensive data recovery services to extract the required files;
 - c. a compatible Apple Mac computer was purchased in August 2014 and revealed that in 7,047 folders there existed 382,386 files (documents and emails) of which approximately 2,500 files are relevant to this action; and
 - d. the process of organizing the numerous documents and emails took approximately 14 months to result in a collection of evidence to prove numerous issues in this action.

5. Kerans & Willey in Standards of Review Employed by Appellate Courts summarized the test for fresh evidence on appeal as affirmed by the SCC in *R. v. Palmer* as follows:
 - “1. It could not, with the exercise of due diligence, have been produced at trial.”;
 - “2. It must be relevant.”;
 - “3. It must be reasonably capable of belief.”; and
 - “4. If believed, it must be said of it that it could reasonably have affected the result of the first hearing if it had then been heard, an assessment that takes into consideration the other evidence at that hearing.”

6. Mr. David Johnson filed the enclosure affidavit, based on information and belief, on the

Summary Judgment Motion. Justice Streckf ruled that the Johnson Affidavit consisted entirely of hearsay evidence and non expert document interpretation and was of little or no evidentiary value. Therefore Justice Streckf ignored the Johnson Affidavit consisting of 75 tabs and 556 pages and therefore dismissed the plaintiff's class action in its entirety.

7. Mr. Lanny McDonald filed the New Evidence Application Affidavit, based on personal knowledge and information and belief, since the Appellant is unsure as to the current state of the use of hearsay evidence on a Summary Judgment Motion in Alberta despite the following established law related to the use of hearsay evidence by the respondent on the Summary Judgment Motion:
 - a. in 2012, the Alberta Court of Queens Bench per Justice Ross in *Court v. Debaie*, 2012 CarswellAlta 1798, established the precedent that the rule prohibiting hearsay evidence only applies to the party seeking to dispose of the action, **it does not apply to the responding party to the application;**
 - b. in 1990, the Supreme Court of Canada per Justice McLachlin in *R. v. Kahn*, [1990] 2 S.C.R. 531, established the precedent **that hearsay evidence is admissible on a principled basis being its in reliability and its necessity;** and
 - c. further, for an extended period of time all Canadian courts have recognized the use of hearsay evidence based on the: (i) **business documents exception;** and (ii) **the public documents exception.**

8. The Memoranda of the Appellant develops each of the four tests for the admission of the new evidence which allows for proof of numerous issues related to this class action for the first time including the following:
 - a. the return of South Haul Road ("SHR") sunk costs to Birch Mountain Resources Limited ("BMR") issue: this issue is important since the Loan Agreement does not, directly or indirectly, deal with the return of the SHR proceeds to BMR as a

- return of sunk cost;
- b. the contrived interest default issue: the utilization of section 2.10 and section 6.4 of the Loan Agreement to have the SHR proceeds escrowed to the account of Macleod Dixon until the interest default press releases dated June 27, 2008 and July 03, 2008 were published;
 - c. the control of press releases issue: the issue as to whether Brookfield/Tricap “acted reasonably” can be proven by examining the new evidence:

Section 9:17 of the Loan Agreement provides:

“9:17 ... Any press release or other public disclosure relating to the Agreement or the Credit Facilities proposed to be issued by the Borrower shall be subject to the prior written approval of the Lender, **acting reasonably**,”;

- d. the financial covenants compliance issue: the fulfilment or compliance with the financial covenants of the Loan Agreement if the SHR proceeds were received by BMR can now be seriously questioned and explored on question discovery;
- e. the Pattison Hammerstone tour issue: the question of who arranged the Hammerstone tour on September 08, 2008 when as at July 11, 2008, Pattison was a party to the Confidentiality Agreement, a director of Brookfield and allegedly assisting with a proposed transaction can now be explored for the first time;
- f. the Amending Agreement issue: the withholding of the SHR proceeds from Birch Mountain until the Amending Agreement was executed is further evidence related to the misrepresentation of “long term patient capital” and can now be proven with further conclusive evidence;
- g. the Lawson Lundell LLP Issue: Lawson Lundell, and in particular lawyer Mr. John Houghton, provided legal services to Birch Mountain but their efforts were negated by Brookfield/Tricap who were focused on take over of Birch Mountain for a nominal price can now be discovered; and
- h. the Tricap take over strategy issue: the Tricap strategy to take over the

Hammerstone project by withholding financial resources from BMR in breach of the various representations can now be proven; and

- i. the receivership motion issue re ex parte status: was the receivership motion ex parte and did the motion commence at 9:30 as opposed to 10:00 am can now be explored with reference to specific documents.

Material or evidence to be relied on:

9. Application of Appellant to admit new evidence
10. Memorandum of Argument to admit new evidence
11. Justice Streckf, Reasons for Judgment dated April 30, 2015
12. McDonald, Civil Notice of Appeal dated May 28, 2015
13. Affidavit of Lanny McDonald re new evidence exhibits and evidence summary
14. Envelopes Marked New Evidence

Applicable Acts, regulations and rules:

15. Alberta Rules of Court - Rule as set forth below
16. Court of Appeal panels - Rule 14.38 (2) (b)
17. Application to Court of Appeal panels - Rule 14.42 (1)
18. Admission of New Evidence - Rule 14.45 (1) and (2)
19. Format of Applications - Rule 14.53

Remedy Sought

20. Admission of the New Evidence
21. Cost Order if New Evidence admission is opposed