

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: **MEMORANDA OF APPELLANT**
(New Evidence Application)

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Nature of application and relief sought:

1. An application to admit new evidence pursuant to Rule 14:45 of the Alberta Rules of Court related to various important issues in this class action.
2. The new evidence was obtained after the hearing of the Summary Judgment Motion before Justice Strekaf on October 09, 2014.
3. The new evidence was obtained when the hard drive of Birch Mountain's former president was obtained by the appellant and material and relevant evidence was acquired.

Grounds for making this application:

4. Kerans & Willey in Standards of Review summarized the test for fresh evidence on appeal as affirmed by the Supreme Court of Canada in *R. v. Palmer* [citation omitted]
 - “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.”
5. Kearns & Willey in Standards of Review also stated in relation to the test to be applied that the right to a fair trial may have been affected:
 - “Even in the adversarial context of a criminal appeal, the test is not a mechanical application of the Palmer criteria but the statutory test of the interest of justice. ... failure to meet the due diligence test should not ‘override accomplishing a just result.’”
6. In 2006, the Alberta Court of Appeal per Justice Ritter in *Stoddard v. Montague* stated:

“10 However, R. 516.2 contemplates that the panel ultimately hearing the appeal determine the issue of whether the evidence is admissible. That panel has the obvious advantage of reviewing the entire appeal and not just the minimal materials available to a motions judge sitting alone. Part of the *Palmer* test requires consideration of whether the evidence will affect the result. **The context of the entire appeal is crucial to that determination.**”

7. **It could not, with the exercise of due diligence, have been produced at trial (motion)**

- a. The new evidence was obtained after the hearing of the Summary Judgment Motion on October 09, 2014 when the computer hard drive of Mr. Douglas Rowe, a former President and CEO of Birch Mountain, was acquired and the evidence required to prove numerous important issues was obtained for the first time; and
- b. The Summary Judgment Motion was argued before document and question discovery and therefore the documents in the possession of Brookfield and Tricap were not accessible to the respondent on the Summary Judgment Motion.

8. **It must be relevant**

- a. In order to be successful in this action the BMR common shareholders must address numerous issues, including the three primary issues related to the three causes of action as pleaded: (i) negligent misrepresentation; (ii) the oppression remedy; and (iii) the good faith doctrine:
 - i. negligent misrepresentation: the five elements of the test for negligent misrepresentation are:
 - (1) duty of care based on a special relationship;
 - (2) misrepresentations were untrue, inaccurate, or misleading;

- (3) negligence in making the misrepresentations;
 - (4) detrimental reliance by not less than 500 class members; and
 - (5) resulting damages;
 - ii. the oppression remedy: the methodology applicable to the enforcement of the oppression remedy:
 - (1) the first stage is to determine the reasonable shareholder expectations of the BMR common shareholders; and
 - (2) the second stage is to assess whether the conduct was oppressive, unfairly prejudicial or **unfairly disregarded the reasonable shareholder expectations**;
 - iii. the good faith doctrine: the good faith doctrine is summarized as follows:
 - (1) after issuance of public documents (press releases, early warning reports, information circulars, etc) not act out of self interest or for a dishonest purpose; and
 - (2) the original purpose or expectations of the parties is to be considered and in this fact situation the BMR public common shareholders expected full, true and plain disclosure;
- b. The secondary issues related to all the three causes of action include:
 - i. the return of SHR sunk costs to Birch Mountain (BMR) issue;
 - ii. the contrived interest default issue;
 - iii. the control of press releases issue;
 - iv. the financial covenants compliance issue;

- v. the Pattison Hammerstone tour issue;
- vi. the Amending Agreement issue;
- vii. the Lawson Lundell LLP issue; and
- viii. the Tricap take over strategy issue.

9. **It must be reasonably capable of belief**

- a. The evidence set forth in the Johnson Affidavit was primarily obtained from: (i) the SEDAR data base maintained by the 13 provincial securities commissions (SEDAR is a registered trade mark of the Alberta Securities Commission); and (ii) the EDGAR data base maintained by United States Securities Exchange Commission and therefore believable;
- b. Mr. Lanny McDonald is a credible and subject to cross examination on the 75 tabs and 205 pages of new evidence summarized as follows:
 - i. 50 plus emails sent in the ordinary course of business;
 - ii. six Brookfield/Tricap letters/documents;
 - iii. two Hammerstone letters;
 - iv. two Macleod Dixon letters;
 - v. four BMR documents;
 - vi. one Computershare letter; and
 - vii. other miscellaneous documents;
- c. The credibility of Mr. Johnson was not compromised on the cross examination conducted on his Affidavit on August 19, 2014 and referred to at the hearing of

the Summary Judgment Motion on October 19, 2014.

10. **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.**

- a. The new evidence allows for proof of the numerous issues in this action for the first time since document discovery and question discovery had not taken place at the time of the Summary Judgment Motion heard October 09, 2014; and
- b. If the Alberta Court of Appeal determines that Justice Strekaf was in error with respect to the use of hearsay evidence by the respondent on the Summary Judgment Motion then the new evidence and the original evidence shall be available to prove the various issues identified above.

Material or evidence to be relied on:

New Evidence Application

Affidavit of Lanny McDonald re new evidence exhibits and evidence summary

Applicable Acts, regulations and rules:

11. Alberta Rules of Court
12. Admission of New Evidence - Rule 14.45
13. Format of Applications - Rule 14.53