Court File Number

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

BETWEEN:

LANNY K. MCDONALD

Applicant
(Appellant)

and

BROOKFIELD ASSET MANAGEMENT INC., BROOKFIELD SPECIAL SITUATION PARTNERS LTD. and HAMMERSTONE CORPORATION

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

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APPLICANT'S MEMORANDUM OF ARGUMENT

28. PART I - STATEMENT OF FACTS

29. In this fact situation the Hammerstone Project valued at approximately $1.6 billion was transferred from Birch Mountain to Brookfield and Tricap for less than $50 million through an orchestrated default and by extirpating minority shareholders.

30. This statement of facts focuses on the contrived interest default and other limited facts since the Memorandum of Argument is limited to twenty pages:

31. Jan 01, 2005 the Brookfield/Tricap Internet web site posted the following restructuring representations which stated:

> "Restructuring Brookfield's restructuring operation invests in and provides strategic assistance to companies experiencing financial or operational difficulty.";
>
> "Tricap Partners Ltd. invests in companies where it can capitalize upon Brookfield's operating experience and long term perspective to drive change and build value. Investment candidates typically have attractive tangible assets with significant operating capacity and a proven operating history but are experiencing short term duress. Focus industries include real estate, financial, manufacturing, forest products metals and mining, energy, and power generation."; and
>
> Tricap targets transactions in which it can invest between $50 million and $500 million in either debt and equity capital. When Tricap makes an equity investment, it seeks to play a meaningful role in the restructuring process and governance of the recapitalized company. Tricap has a 3 to 7 year investment horizon. Our team includes operating, finance and legal professionals with extensive experience in reorganizations under Canadian and U.S. legislation. [emphasis added]";

Despite Brookfield's representations set forth above and contrary to Birch Mountain common shareholders "reasonable expectations" none of the representations were realized. For example, the investment was less than $50 million and lasted only 10 months 10 days as a result of the receivership order.

32. Aug 26, 2005 — the Short Form Prospectus qualified for distribution 9,000,000 Birch Mountain common shares at a price of $4.00 per share;

On May 25, 2006, the price of Birch Mountain common shares on the TSX was $7.99 per share but in November 2008 the price of the common shares dropped to $0.01 per share.

33. Aug 01, 2006 — the revised AMEC 2006 Report estimated the asset value as follows: (i) the project's pre-tax NPV at a discount rate of 7.5% at $1.6 billion and after-tax NPV as $1.0 billion and (ii) estimates +/- 1 billion tonnes of reserves for over 50 years of production;

Later valuations of the asset exceeded $2 billion with more limestone product streams and lower aggregate tonnage than the original analyses.

34. Dec 21, 2007 — section 9.17 of the Loan Agreement sets forth the publicity clause and the legal requirement to approve press releases by "acting reasonably":

> "9.17 Publicity The Borrower authorizes and consents to the Lender, following the Closing Date, announcing in financial publications the successful placement of the Credit Facilities. Any press release or other public disclosure relating to this 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, and the Borrower agrees to send a draft of any such proposed release to the Lender as far in advance as possible prior to the proposed issuance thereof. [emphasis added]";

Neither the Chambers Judge nor the Appeal Panel analyzed section 9:17 of the Loan Agreement or the words "acting reasonably" with respect to the evidence of the contrived interest default and therefore the existence of this genuine issue for trial.

35. Dec 24, 2007 Birch Mountain press release announced the issuance of the Senior Secured Convertible Debenture and represented to the Birch Mountain common shareholders, with wording added by Tricap:

> "Tricap Partners Ltd. was established by Brookfield Asset Management to provide long term patient capital to companies with potential for value creation and need to recapitalize. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in building value over the long term. [emphasis added]";

Neither the Chambers Judge nor the Appeal Panel analyzed the impact of the press releases on the collapse of the Birch Mountain market price. Brookfield would benefit from a lower price since the conversion to common shares was based on the market price. Brookfield was never a source of long term patient capital.

36. Jul 03, 2008 Birch Mountain (Rowe) email re meeting with Brookfield/Tricap (Reid and Eng) stated:

> "Jim [Tricap/Reid] responded that we had 30 days to rectify the payment and he [Tricap/Reid] was confident we [Birch Mountain] could do it within this time. He [Tricap/Reid] seemed surprised to read the draft news release that we [Birch Mountain] were waiting their [Tricap/Reid] approval to pay the interest. I [Birch Mountain/Rowe] noted that ComputerShare had the cheque and we had the funds set aside to make the payments. ... .";

Again, neither the Chambers Judge nor the Appeal Panel analyzed the contrived interest default. The SCC shall determine if this overlooked evidence is a palpable and overriding

error and therefore constitute a genuine issue for trial.

37. Jul 03, 2008 the email string related to the draft press release stated:

Birch Mountain (Clarke) email to Tricap (Eng) sent at 2:13 pm enclosed a clean copy of the draft press release and stated:

"This might be faster....just edit this....and I was asked to remind you that our counsel advised us that if you allow Computershare to go ahead with the payment today no news release is necessary...."

the clean copy would have read as follows:

"CALGARY, July 3, 2008 - Birch Mountain Resources Ltd. ("Birch Mountain" or the "Company") (BMD: TSX and AMEX) announces that it has not made the scheduled June 30, 2008, interest payment to the holders of the Convertible Unsecured Subordinate Debentures. As a consequence of it being in breach of a single minor loan covenant under its senior secured credit facility, which it is working to rectify, the Company has applied to and is waiting for its secured lender, Tricap Partners Ltd., to authorize release of the interest payment by Computershare Trust Company.";

Tricap (Eng) email to Birch Mountain (Clarke) sent at 3:36 pm marked up the clean copy of the Clarke email and stated:

"We refer to section 9:17 of our loan agreement re: Publicity. See our changes below per our discussion."

Tricap (Eng) email to Birch Mountain (Clarke) sent at 3:36 pm as edited by Tricap (Eng) stated:

"CALGARY, July 3, 2008 - Birch Mountain Resources Ltd. ("Birch

> Mountain" or the "Company") (BMD: TSX and AMEX) announces that it has not made the scheduled June 30, 2008, interest payment to the holders of the Convertible Unsecured Subordinate Debentures. As a consequence of ~~it~~ THE COMPANY being in breach of a ~~single minor loan~~ FINANCIAL covenant under its senior secured credit facility, THE LENDER, TRICAP PARTNERS LTD. HAS EXERCISED ITS RIGHT UNDER THE LOAN AGREEMENT TO DIRECT COMPUTERSHARE TRUST COMPANY NOT TO MAKE THE SCHEDULED INTEREST PAYMENT UNTIL FURTHER NOTICE FROM THE LENDER. BIRCH MOUNTAIN ~~which it~~ is working to rectify THE BREACH AND SECURE THE NECESSARY LIQUIDITY TO MAKE THE INTEREST PAYMENT.~~, the Company has applied to and is waiting for its secured lender, Tricap Partners Ltd., to authorize release of the interest payment by Computershare Trust Company.~~";

Neither the Chambers Judge nor the Appeal Panel analyzed the contrived interest default based on the fact that Computershare had the cheque to pay the interest and Birch Mountain had the funds set aside. This evidence should confirm, with an impartial Appeal Panel, the existence of a genuine issue for trial on a summary judgment motion.

38. Jul 03, 2008 the final press release stated:

> "CALGARY, July 3, 2008 - Birch Mountain Resources Ltd. ("Birch Mountain" or the "Company") (BMD: TSX and AMEX) announces that it has not made the scheduled June 30, 2008, interest payment to the holders of the Convertible Unsecured Subordinate Debentures. As a consequence of the company being in breach of a financial covenant under its senior secured credit facility, the lender, Tricap Partners Ltd. has exercised its right under the loan agreement to direct Computershare Trust Company not to make the scheduled interest payment until further notice from the lender. Birch Mountain is working to rectify the breach and secure the necessary additional liquidity to make the interest payment.";

Again, neither the Chambers Judge nor the Appeal Panel analyzed, for unknown reasons,

the effect of the press release which announced the contrived default that allowed Brookfield to extinguish the Birch Mountain minority common shareholders.

39. Jul 10, 2008 Tricap served a Notice of Event of Default which, in part, stated:

> "Further to our letter dated June 23, 2008 providing notice of default to you respecting Birch Mountain's breach of the minimum shareholders' equity covenant Section 6.3 (a) of the Loan Agreement (the "Default"), we hereby provide notice that you are currently subject to an Event of Default for same given that the Default has not been cured within 10 days after our written notice.";

The Event of Default did not respect the negotiated 10 day grace period and this contrivance was the primary reason for the demise of Birch Mountain.

40. Aug 01, 2008 the Amending Agreement was part of the plan to extirpate Birch Mountain by implementing onerous amendment terms:

- the aggregate principal amount is increased from $31.5 million to $34.5 million to accommodate a $3 million loan amendment fee;
- the applicable interest rate is increased from a variable interest rate of prime plus 4% to an interest rate of 20%;
- the minimum change of control redemption price was increased to 200% from 120%; and
- the amendment directing the South Haul Road funds of $4.8 million to Norton Rose was in breach of the Loan Agreement.

The Amending Agreement was designed to accelerate the receivership before Birch Mountain attained break even cash flow. The TSX hardship exemption was relied upon by Brookfield to avoid shareholder approval of the Amending Agreement.

41. Aug 07, 2008 the Early Warning Report is confirmation of the contrived interest default by Brookfield/Tricap despite the fact that Computershare Trust had the cheque and the monies to pay the interest, the private equity proceeds to pay the interest, the availability of the South Haul Road proceeds of $4.8 million and the expectation of financial assistance from Brookfield as discussed and documented;

The four methods to completely avoid any interest default, clearly set forth in the Birch Mountain (Rowe) email to Brookfield/Tricap (Reid and Eng) dated July 03, 2008, were blocked by Brookfield to cause the contrived interest default;

42. Nov 04, 2008 Eng's Receivership Affidavit filed in support of the receivership orders failed to inform the Court with respect to the following minimum facts:

- the appraisal of the asset at $1.6 billion was withheld from Court;
- the Hammerstone EIA reports were withheld from the Court;
- the overall state of the quarry infrastructure was misrepresented;
- the Amending Agreement was not explained to the Court;
- the recent product shipments, involving records sales and doubling previous yearly sales, were withheld from the Court;
- timing and value of existing orders and contracts, exceeding $20 million, were withheld from the Court;
- the recent financial reports showing continuous improvement into gross profitability were withheld from the Court;
- the Brookfield Pattison relationship was misrepresented to the Court, and the Confidentiality Agreement and the Pattison Agreement were withheld from the Court;

Birch Mountain was effectively at a breakeven point with a continuously improving financial outlook and then the receivership was implemented within 10 months 10 days with an investment of less than $50 million in order to seize the asset.

43. PART II - STATEMENT OF ISSUE

44. Does McDonald qualify as a complaint and do the facts support oppression?

45. Was the stare decisis doctrine breached by the Appeal Panel?

46. Is there palpable and overriding error?

47. PART III - ARGUMENT

48. Critical Evidence Overlooked

49. In order to acquire the Hammerstone Project, Brookfield and Tricap contrived an interest default by thwarting at least four methods available to avoid any interest default and thereby any receivership proceedings as follows:

First Method: allow the interest, that had been paid by Birch Mountain, to be forwarded to the debenture holders by Computershare to avoid the interest default

> "Jim [Tricap/Reid] responded that we had 30 days to rectify the payment and he [Tricap/Reid] was confident we [Birch Mountain] could do it within this time. He [Tricap/Reid] seemed surprised to read the draft news release that we [Birch Mountain] were waiting their [Tricap/Reid] approval to pay the interest. I [Birch Mountain/Rowe] noted that ComputerShare had the cheque and we had the funds set aside to make the payments. ... .";

Second Method: allow the interest to be paid from the proceeds of a private placement of

equity raised by management and family members:

> "We [Birch Mountain/Rowe] could pay the interest with the cash in the bank.";

Third Method: allow the South Haul Road proceeds of $4.8 million to cure the default:

> "In addition, I [Birch Mountain/Rowe] noted that we were awaiting a decision [from Tricap] on the disposition of the funds from the SHR.";

Fourth Method: had Brookfield/Tricap fulfilled the representations made to Birch Mountain management on numerous occasions:

> "They [Tricap/Reid] are thinking about solutions and ways to get the company past these issues. Jim [Tricap/Reid] feels that we need about $20 million more to get the company on a firm footing for the future."

50. Oppression Remedy

51. The oppression remedy was an equitable remedy until the equitable remedy became a statutory remedy. Now the definition of a complainant is one of the qualifying tests for access to the oppression remedy.

52. The Appeal Panel in the Judgment dated December 05, 2016 stated:

> "[38] ... Whether companies are affiliates for the oppression remedy depends on the definitions in the statute, not the terms of the loan agreement between them."

53. The Appeal Panel then failed to interpret the following definitions referred to in section 2 of the ABCA:

a. "they are deemed to be affiliated with each other" [ABCA section 2(1)(b)];

b. "votes that may be cast to elect directors" [ABCA section 2(2)(a)]; and

c. "votes ... sufficient, if exercised, to elect ... ." [ABCA section 2(2)(b)].

54. The reasoning of the Appeal Panel in the Judgment dated December 05, 2016 related to this issue has resulted in the following conclusion which needs to be corrected:

> "[37] A person holding unexercised rights to convert securities into voting shares has no votes, much less 50% of the votes. Such a person does not have the ability to elect a majority of the directors. Absent "control" as defined in the statute, there is no affiliation. ... ."

55. The Chambers Judge at paragraph [42] also exhibited flawed logic when the Justice stated:

> "[42] I do not accept this submission as the Convertible Debentures were never converted into Birch Mountain shares and, until that occurred, the affiliate test was not met. ... ".

56. The Transcript of the proceedings conducted June 15, 2016, if available, would clarify the discussion surrounding the deeming language of the ABCA to define the term affiliate and the qualification as a complainant pursuant to the oppression section of the ABCA.

57. The SCC has not addressed the deeming language as it pertains to Canadian shareholder investments cases involving the ABCA and related securities statutes. The Appeal Panel failed to comment on the following case law or the deeming language issue:

a. in 1960, the Manitoba Court of Appeal per Justice Schultz in St. Leon Village v. Ronceray with respect to the meaning of the words "shall be deemed to be" stated:

> "26 I think a consideration of these cases indicates that in deciding whether or not the use of the words "deem" or "deemed" establishes a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of

ensuring that such purpose is served."; [9]

b. in 1978, the Supreme Court of Canada per Justice Beetz in R. v. Verrette with respect to the meaning of deeming language stated:

"15 A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word "includes" in certain definitions; however, "includes" would be logically inappropriate and would sound unreal because of the fictional aspect of the provision.";

c. in 2007, the Ontario Court of Appeal per curiam in Dam Investments v. Ontario commented on the interpretation of the following words "shall be deemed to be" and the word "if":

"11 The modern approach to statutory interpretation is simply stated: The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.";

"14 The defining language in this section is "shall be deemed to". This language indicates that without this section, one company does not beneficially own securities actually owned by another company. But for the purpose of determining whether one company controls another and is therefore an affiliate of the other within the definition in this section and for the purposes of the Act, s. 1(6) deems something to be the case, which is otherwise in fact not the case. It is a section that deems a thing to fall within a definition or category for the purpose of the section or the Act, when it would not otherwise be so characterized. In contrast, the use of the conditional word "if" in conjunction with "shall be deemed to be", signifies an exclusive definition."; and

"16 The deeming provision in subsection 1(3) of the Securities Act states how 'control' is defined for the purposes of the LTTA — on the basis of majority voting rights. It says nothing of de facto control. Had the legislature intended that 'control'

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[9] [1960] M.J. No. 29, 1960 CarswellMan 15

would include de facto control in addition to de jure control, as defined in subsection 1(3), it would have said so and not made specific reference to subsection 1(3) of the Securities Act which references only de jure control. See Regulvar Canada Inc., supra, at para. 14. The language is clear and admits of no ambiguity. [emphasis added]";

d. in 2010, the Ontario Superior Court, Divisional Court per Justice Pierce in Murphy v. Stefaniak held that any decision dealing with the definition of affiliated body corporate must conduct a careful analysis of the various definitions:

"24 These include ... section 1 (1) (definition of "affiliated"), section 1 (4) (definition of "an affiliated body corporate") and, especially, section 1 (5) ("control"). Without a careful analysis of these provisions, it would have been practically impossible for him to apply the law correctly to the motion before him. [emphasis added]" [10]

58. Issue: Is section 2 (2)(a) of the ABCA re 50% + control fulfilled? At all material times, Brookfield, Tricap and Pattison were thorough in calculating the percentage of equity ownership if the Convertible Debentures were converted to Birch Mountain common shares for the purpose of 50% control requirement:

Aug 01, 2008	Tricap SEC 13D filing	55.0%;
Aug 07, 2008	Tricap Early Warning Report	55.0%;
Dec 16, 2008	Tricap SEC Form 13D/A filing	97.6%.

59. Issue: Is section 2 (2)(a) of the ABCA re investment requirement fulfilled? The Unsecured Subordinated Convertible Debentures and the Senior Secured Convertible Debentures were held by "way of investment" and not held by "way of security" with numerous confirmations of the investment, including but not limited to the following:

a. the Restructuring Representations posted on the internet web site;

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[10] 2010 ONSC 3859, 2010 CarswellOnt 4837

b. Tricap per Jim Reid press release dated December 24, 2007;

c. Tricap per Jim Reid Early Warning Report dated December 24, 2007;

d. Birch Mountain press release dated December 24, 2007; and

e. Tricap's Early Warning Report dated December 10, 2008.

60. Issue: Is section 2 (1)(b) of the ABCA re affiliation fulfilled? Birch Mountain and Tricap were both controlled by Brookfield and therefore affiliated as the following chart illustrates:

Brookfield

(100% control) (50% + control)

Tricap Birch Mountain

(100% control)

Hammerstone

61. Issue: Is section 242 (2) of ABCA fulfilled? If the action is allowed to proceed the Court must determine if the following facts qualify as "reasonable shareholder expectations" or "oppressive conduct":

a. no three to seven year investment horizon;

b. no "patient long term capital";

c. no reasonable effort to drive change and build value;

d. no reasonable effort to resolve short term duress;

e. no investment between $50 million and $500 million;

f. no meaningful role in the restructuring process and governance;

g. no operating, finance and legal assistance;

h. the Brookfield/Tricap web site removed when litigation initiated;

i. the appraisal of the asset at $1.6 billion was withheld from the court;

j. the Hammerstone EIA approval, key to unlocking value, was withheld;

k. the overall state of the quarry infrastructure was misrepresented to the Court;

l. the much improved product shipments were withheld from the Court;

m. the significant value of existing orders and contracts was withheld from the Court;

n. the continuously improving financial reports were withheld from the Court;

o. the Confidentiality Agreement was withheld from the Court;

p. the Amending Agreement was not explained to the Court;

q. the Pattison Agreement was withheld from the Court;

r. the significance of the Pattison/Brookfield relationship not presented to Court;

s. the contrived interest default not addressed by any Court;

t. the portrayal of Birch Mountain as a "failing company" is a misrepresentation;

u. the redrafting of press releases not reviewed by any Court;

v. oppressive actions within the 10 day cure period not addressed by the Court;

w. the fact that Tricap took court action when they said they would not;

x. the seizure of the $4.8 million South Haul Road proceeds;

y. onerous conditions imposed in Amending Agreement to prevent success; and

z. the fact that Tricap extinguished all Birch Mountain minority shareholders.

62. Is the stare decisis doctrine applicable?

63. The following cases were presented to the Appeal Panel but the Appeal Panel failed to comment on this case law which would be verified if a Transcript were available:

a. R. v. Verrette, SCC per Justice Beetz:

> "15 A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word "includes" in certain definitions; however, "includes" would be logically inappropriate and would sound unreal because of the fictional aspect of the provision.";

b. R. v. Khan, SCC per Chief Justice McLachlin:

see Appellant's Factum, paragraph 34, page 11;

Second Ground of Appeal: Justice Strekaf failed to consider the modern approach to the use of hearsay based on: (i) R. v. Kahn, ... which provides that hearsay evidence is admissible on a principled basis being reliability (SEDAR and EDGAR securities commission data bases) and its necessity (more than 25 information sources) of the evidence; ... .";

c. Hercules v. Ernst Young, SCC per Justice La Forest

this SCC duty of care two part test not followed;

see Appellant's Factum, paragraph 55, page 16;

"Where negligent misrepresentation is claimed, a relationship of sufficient proximity will be found where the defendant ought reasonably to have foreseen that the plaintiff would rely on his or her representation, and where such reliance would be reasonable. Reasonable reliance is indicated where the defendant had a financial interest in the transaction in respect of which the representation was made; the defendant was a professional or someone who possessed special skill or knowledge; the information was provided in the course of the defendant's business; the information was given deliberately; and the information was given in response to a specific inquiry."

d. C.U.P.E. v. City of Toronto, SCC per Justice Arbour:

the following passage may be applicable to remedy this injustice;

"53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against re litigation, either through the doctrine of res judicata or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision [citation omitted]."

e. BCE Inc., SCC per Chief Justice McLachlin:

the SCC test for reasonable expectations not followed;

see Appellant's Factum, paragraph 57, page 17;

"(vi) Representations and Agreements "80 Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications ... ."

64. Palpable and Overriding Errors

65. The Appeal Panel would not consider the Johnson Affidavit based on the hearsay rule, and the McDonald Affidavit based on the R. v. Palmer test for fresh evidence does not end the evidentiary issue. The email string dated July 03, 2008, admitted during the hearing by the Appeal Panel, is part of the record and presents a genuine issue for trial. [11]

66. The SCC should consider that on a summary judgment motion the majority of the critically important documents are in the possession of the Receiver and Brookfield/Tricap and are not required to be disclosed by Brookfield and Tricap if the summary judgment motion is brought before document disclosure and discovery disclosure.

67. Any reliance on the Lameman [Papaschase Indian Band v. Canada] should account for the fact that putting "ones best foot forward" is a relative concept and a function of time, a function of access to documents confiscated in the receivership, and a function of discovery of the Brookfield/Tricap documents.

68. This case should be contrasted with the following precedents:

a. Hercules v. Ernst Young - a summary judgment motion - argued after document discovery and after 40 days of examination for discovery;

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[11] See both the R. v. Palmer para 22 and Stoddard v. Montague para 8, as highlighted

b. Murphy Oil v. Predator Corp - a summary judgment motion - argued after document discovery and after 46 days of examination for discovery; and

c. CIBC v. Deloitte - a summary judgment motion - argued after document discovery - motion material 7,100 pages and after 40 days of examination for discovery. [12]

69. Avoidance of Johnson Affidavit based on Hearsay Ruling

70. The Appeal Panel paragraph [18] stated, in part:

> "[18] ... It is, however, too narrow a reading of the reasons to conclude that the only objection to the evidence was its hearsay nature. The chambers judge's overall assessment of the evidence was that it had no probative value for many reasons, including the fact that it deserved little weight because it was all hearsay: Murphy Oil Co. v. Predator Corp. ... [citations deleted]"

71. The statement completely avoided the modern approach to hearsay set forth in R. v. Kahn, which provides that hearsay evidence is admissible on a principled basis being reliability and necessity:

a. all of the evidence which proved that multiple sources of funds were available to pay the critical interest payment to cure the interest default was ignored;
b. the Johnson affidavit of 75 exhibits and 556 pages (264 pages in extracts of evidence) was excluded based on the mis-interpretation of the hearsay rule;
c. during the extensive cross-examination of Mr. Johnson the hearsay evidence was not an issue or the nature of the enclosure affidavit;
d. the test on a summary judgment motion is a low bar but for unknown reasons the Appeal Panel has set an extremely high bar;
e. Court v. Debaie is settled Alberta law that the respondent to the summary

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[12] 2015 ONSC 7685, 2015 CarswellOnt 19194

judgment application, who does not seek to dispose of the action but to have it proceed to trial, may rely on hearsay; [13]

f. most of the 75 exhibits were from either SEDAR or EDGAR securities commission data bases or business emails and therefore reliable; and

g. the necessity requirement was met since more than 25 information sources were developed in the Johnson Affidavit.

72. Avoidance of McDonald Affidavit based on Fresh Evidence Ruling

73. The test for a summary judgment motion is a low bar but for unknown reasons the Appeal Panel was determined to dismiss the new evidence application despite the following facts:

a. Court v. Debaie is settled Alberta law that the respondent to the summary judgment application, who does not seek to dispose of the action but to have it proceed to trial, may rely on hearsay evidence;

b. R. v. Kahn is settled Canadian Law that speaks to the modern approach to the use of hearsay: (i) which provides that hearsay evidence is admissible on a principled basis being reliability (securities commission documents, business documents and public documents are reliable) and (ii) necessity (more than 25 information sources in the Johnson affidavit) of the evidence.;

c. Murphy Oil v. Predator Corp. was the distinguishable hearsay precedent relied on by the Appeal Panel which dealt with a person "facial expression" changing with a general comment and the evidence of "unknown witnesses". [14]

d. the McDonald affidavit composed of 75 exhibits and 205 pages was excluded based on the mis-application of the new/fresh evidence rules;

e. during the cross-examination of Mr. McDonald the due diligence argument was not

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[13] See Court v. Debaie, paragraph 34

[14] See Murphy Oil v. Predator Corp paragraphs 38, 39 and 40

a dominant issue related to the fresh evidence application; and

f. the fresh evidence application consisted of 75 exhibits totaling 205 pages which addressed numerous critical issues in this action.

74. The email string containing the press release dated July 03, 2008 makes clear reference to the fact that Birch Mountain had applied to Tricap, the secured lender, and was waiting for Tricap to authorize the release of the interest payment by Computershare Trust Company.

75. Examples of an Error in Fact

76. The Appeal Panel in the Judgment dated December 05, 2016 stated:

> "[42] ... Birch Mountain did not have the funds available to pay the interest, but Tricap consented to the interest being paid out of a new issue of equity. ... ."

77. The Appeal Panel, for unknown reasons, overlooked the following evidence set forth in the July 03, 2008 Birch Mountain email (Extracts of Key Evidence, exhibit 19, which was discussed at length during the oral argument):

> "Jim [Tricap/Reid] responded that we had 30 days to rectify the payment and he [Tricap/Reid] was confident we [Birch Mountain] could do it within this time. He [Tricap/Reid] seemed surprised to read the draft news release that we [Birch Mountain] were waiting their [Tricap/Reid] approval to pay the interest. I [Birch Mountain/Rowe] noted that ComputerShare had the cheque and we had the funds set aside to make the payments. ... ."

78. The Appeal Panel in the Judgment dated December 23, 2016, confirmed that the Appeal Panel admitted as evidence the draft press release dated July 03, 2008, as confirmed at paragraph [9] of the said Judgment which stated:

> "[09] ... "The draft press release of July 3, 2008 was added at the oral argument on the consent of the respondents."

79. The draft press release of July 03, 2008, edited by Brookfield/Tricap, set above at paragraph 37, deleted the wording, highlighted by strikeout, and added the capitalized and bold blue wording, and thereby created the contrived interest default.

80. The significance of the deletion by Tricap [Eng] from the draft press release of July 03, 2008 is that the draft press release is evidentiary proof that Brookfield and Tricap orchestrated the contrived interest default to acquire the Birch Mountain asset valued at $1.6 billion for less than $50 million.

81. The Appeal Panel has been invited on numerous occasions to address the palpable and overriding error in paragraph [42] of the Judgment dated December 05, 2016 as set forth in the following correspondence;

a. McDonald letter to Appeal Panel et al dated December 19, 2016;
b. McDonald letter to Appeal Panel dated December 30, 2016;
c. McDonald letter to Canadian Judicial Council dated January 11, 2017; and
d. McDonald letter to Appeal Panel dated January 16, 2017.

82. The refusal of the Appeal Panel and flawed reasoning of the Appeal Panel related to the contrived interest default issue has resulted in the following statements which need to be corrected:

> "[27] ... There is, however, no evidence that any press release was inaccurate, or negligently prepared, or that any member of the shareholder class reasonably relied on one."; and
>
> "[46] There is no merit to the claim that there was an artificial default, nor that it was generated by any actionable misconduct of the defendants. ... . [conclusions that ignore section 9:17 of the Loan Agreement and the critical evidence admitted to the record by the Appeal Panel]"

83. PART IV - SUBMISSIONS ON COSTS

84. At the discretion of the Court.

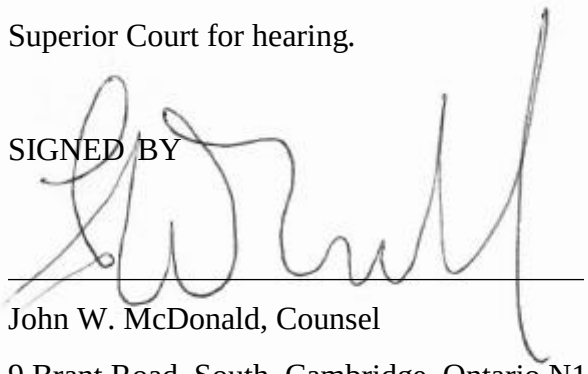
85. PART V - ORDERS SOUGHT

86. An order that all previous orders of the Chambers Judge and the Appeal Panel related to summary judgment application be reversed.

87. An order that the Transcript of the hearing before the Appeal Panel on June 15, 2016 be released.

88. An order that the certification motion of this class action by transferred back to the Ontario Superior Court for hearing.

SIGNED BY



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89. PART VI - TABLE OF AUTHORITIES

1.	R. v. Verrette, [1978] 2 S.C.R. 838	May 01, 1978
2.	R. v. Palmer, [1980] 1 S.C.R. 759	Dec 21, 1979
3.	R. v. Khan, [1990] 2 S.C.R. 531	Sep 13, 1990

4.	Hercules v. Ernst Young, [1997] 2 S.C.R. 165	May 22, 1997
5.	C.U.P.E. v. City of Toronto, [2003] 3 S.C.R. 77	Nov 06, 2003
6.	Regulvar Canada v. Ontario, 2004 CarswellOnt 3263	May 04, 2004
7.	Murphy Oil v. Predator Corp., 2006 ABCA 69	Feb 28, 2006
8.	Stoddard v. Montague, 2006 CarswellAlta 72	Jan 26, 2006
9.	Dam Investments v. Ontario, 2007 CarswellOnt 4334	Jun 21, 2007
10.	BCE Inc., [2008] 3 S.C.R. 560	Dec 19, 2008
11.	Court v. Debaie, 2012 CarswellAlta 1798	Oct 17, 2012

12. PART VII - LEGISLATION

13. The ABCA defines "affiliate" as follows

> "2(1) For the purposes of this Act,
>
> (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person, and
>
> (b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.
>
> 2(2) For the purposes of this Act, a body corporate is controlled by a person if
>
> (a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and
>
> (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate."

14. The ABCA defines "complainant" as follows

> "239 In this Part,

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor ... , or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part."

15. The ABCA defines "oppression" as follows:

"242(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of."

Dated at the City of Cambridge in the Province of Ontario, February 01, 2017

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NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in reply to this application for leave within 30 days clear days after service of the application. If no reply is filed in that time, the registrar will submit this application for leave to the Court for consideration pursuant to section 43 of the Supreme Court Act. SOR/94-748, s. 3.

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