

*COURT OF APPEAL OF ALBERTA*

REGISTRAR'S STAMP:

COURT OF APPEAL FILE NUMBER:

TRIAL COURT FILE NUMBER: 1401-05797

REGISTRY OFFICE: CALGARY

PLAINTIFF LANNY K. MCDONALD

STATUS ON APPEAL APPELLANT

DEFENDANTS BROOKFIELD ASSET MANAGEMENT INC.,

BROOKFIELD SPECIAL SITUATION  
PARTNERS LTD. AND

HAMMERSTONE CORPORATION

STATUS ON APPEAL RESPONDENT

*Brought under the Class Proceedings Act*

DOCUMENT

**CIVIL NOTICE OF APPEAL**

APPELLANT'S ADDRESS FOR  
SERVICE AND CONTACT  
INFORMATION

MCDONALD & ROSS  
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ATTENTION JOHN W. MCDONALD

WARNING

To The Respondent: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. *Particulars of Judgment, Order or Decision Appealed from:*

Date pronounced: April 30, 2015

Date entered: April 30, 2015

Date served: May 01, 2015  
Official citation: McDonald v. Brookfield Asset Management 2015 ABQB 281  
Order: Order filed May 25, 2015

2. *Indicate where the matter originated:*

X Court of Queens Bench  
Judicial Centre: Calgary  
Justice: The Honourable Madam Justice Streckf

3. *Details of Permission to Appeal, if required:*

Permission not required, or  granted

4. *Portion being appealed:*

Whole  
 Only specific part

5. *Provide a brief description of the issues:*

- a. the learned motion judge failed to properly consider *Court v. Debaie*, 2012 ABQB 640, that held the respondent to the application, who does not seek to dispose of the action but to have it proceed to trial, may rely on hearsay:
  - i. therefore 75 exhibits (556 pages) of the applicant held to be little or no evidentiary value were in fact material and relevant evidence;
- b. the learned motion judge, with respect to the use of hearsay evidence on the

motion, failed to consider the modern approach to the use of hearsay based on:

- i. the necessity and reliability criteria, *R v. Kahn*, [1990] 2 S.C.R. 531;
  - ii. business documents exception;
  - iii. public documents exception;
- c. the learned motion judge failed to properly consider the following evidence submitted by the respondent on the summary judgment motion and therefore the following documents were not referred to in the Reasons for Judgment:
- i. South Haul Road Agreement dated July 11, 2008;
  - ii. Pattison Group Confidentiality Agreement dated July 11, 2008;
  - iii. US Securities and Exchange Commission filings dated August 01, 2008;
  - iv. Tricap Early Warning Report dated August 07, 2008;
  - v. Pattison Group helicopter tour held September 08, 2008;
  - vi. Natural Resources Conservation Board verification of \$737 million investment when Brookfield/Tricap owned 100% of quarry;
- d. the learned motion judge failed to properly consider with respect to the negligent misrepresentation:
- i. the documents that the applicant referred to were not mentioned in the Reasons for Judgment for unknown reasons;
  - ii. insufficient analysis of the Brookfield/Tricap press releases;
  - iii. insufficient analysis of reliance on public press releases;
  - iv. no analysis of reliance on Securities and Exchange Commission filings;
  - v. no analysis of reliance on Early Warning Reports;
  - vi. omitted from Reasons for Judgment Supreme Court of Canada duty of care test in *Hercules v. Ernst Young*;

- vii. omitted from Reasons for Judgment Supreme Court of Canada duty of care test in *BCE Inc.*;
  - viii. no analysis of deemed reliance issue in class actions;
  - ix. no reference to *McKenna v. Gammon Gold* re deemed reliance;
- e. the learned motion judge failed to properly consider with respect to the oppression claim the definition of affiliate in the Alberta Business Corporations Act:
- i. no analysis of the definitions in Alberta Business Corporations Act;
  - ii. no analysis of words: “they are deemed to be affiliated with each other”;
  - iii. no analysis of words: “sufficient, if exercised,”;
  - iv. no analysis of the “investment” versus “security” definitions;
  - v. no analysis of evidence related to the use of the discretion subsections;
  - vi. no analysis of the creditor discretion definition in ABCA section 239 (b) (iii), for example, no analysis of the following evidence:
    - (1) the evidence that McDonald was a creditor of Birch Mountain;
    - (2) the evidence that McDonald was owed \$19,000 by Birch Mountain;
  - vii. no analysis of the discretion available in ABCA section 239 (b) (iv), for example, no analysis of the following evidence:
    - (1) the evidence of definition of “affiliate” in the Loan Agreement;
    - (2) the use of the “de facto control” definition to define affiliate;
- f. the learned motion judge failed to properly consider with respect to the good faith doctrine:
- i. the documents that the applicant referred to were not mentioned in the Reasons for Judgment for unknown reasons;
  - ii. no analysis of the Brookfield/Tricap web site negligent misrepresentations;
  - iii. no analysis of the South Haul Road Agreement dated July 11, 2008;

- iv. no analysis of Pattison Group Confidentiality Agr. dated July 11, 2008;
  - v. no analysis of Amending Agreement dated August 01, 2008;
- g. the learned motion judge failed to properly consider with respect to collateral attack analysis:
- i. that no remedy sought to set aside, vacate or appeal the receivership order;
  - ii. that Birch Mountain shareholders had no notice of the receivership order;
  - iii. the shareholders action is based on the three separate causes of action;
  - iv. the remedy sought by the Birch Mountain shareholders is damages;
- h. the learned motion judge failed to properly consider that without the “document discovery” and “question discovery” Birch Mountain shareholders have no ability to force document disclosure and therefore the only reliable source of documents are public filings, for example:
- i. Sedar and Edgar public document filings;
  - ii. Brookfield/Tricap/Birch Mountain public press releases;
  - iii. Securities and Exchange Commission Notices and Early Warning Reports;
  - iv. documents obtained voluntarily or through investigations;
  - v. appraisal reports including the following:
    - (1) AMEC Report 43-101 technical appraisal report #152547; and
    - (2) Norwest Corporation requisitioned by Brookfield #07-3194.
6. *Provide a brief description of the relief claimed:*
- a. reversal of motion decisions;
  - b. reinstatement of the action;
  - c. direction related to class action certification hearing.

7. *Is this appeal required to be dealt with as a fast track appeal?*

YES  No

8. *Does this appeal involve custody, access, parenting or support of a child?*

YES  No

9. *Will an application be made to expedite this appeal?*

YES  No

10. *Is Judicial Dispute resolution with a view to settlement or crystalization of issues appropriate.*

YES  No

11. *Could this matter be decided without oral argument?*

YES  No

12. Are there any restricted access orders or statutory provisions that affect the privacy of this file?

YES  No

13. *List respondent or counsel for the respondents, with contact information.*

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14. *Attachments*

- a. Order filed May 25, 2015 attached.