JOHN W. MCDONALD, B.A., M.A., LL.B.

DALE M. ROSS, B.A., B.Ed., LL.B.

Barristers & Solicitors

9 Brant Road, South
Cambridge, Ontario, N1S 2W4
Telephone 519-622-0499
Facsimile 519-740-6368

30 December 2016

By Facsimile Only

Alberta Court of Appeal
TransCanada Pipelines Tower, 2600
450 1st - Street. S. W.
Calgary, Alberta T2P 5H1
Facsimile 403-297-5294
Attention: Deputy Registrar - Court of Appeal - Calgary

Dear Sir/Madam:

McDonald v. Brookfield et al
Court of Appeal File Number 1501-0131AC

1. Please direct this correspondence to the Appeal Panel. I was surprised to receive the Memorandum of Judgment dated December 23, 2016. A request for a copy of a transcript is ordinarily a simple uncontested issue.

2. Since the Appeal Panel has declined to provide a copy of the transcript this letter shall be

attached to the Notice of Application for Leave to Appeal. We also have been instructed to raise this transcript issue with the Canadian Judicial Council.

3. I thank the Appeal Panel for clarifying that the draft press release dated July 3, 2008 is part of the evidentiary record. The fact that the Appeal Panel has overlooked the interest being available to be paid to avoid any default should be enough for release of the transcript.

4. Exceptional Circumstances: In our opinion, the fact that a critically important piece of evidence was entirely overlooked by the Appeal Panel does constitute an "exceptional circumstance" for the following reasons:

   a. in paragraph [1] of the Judgment dated December 23, 2016, the Appeal Panel has identified that a transcript will be provided if "exceptional circumstances" exist;

   b. in paragraph [9] of the Judgment dated December 23, 2016, the Appeal Panel stated: "The draft press release of July 3, 2008 was added at the oral argument on the consent of the respondents.";

   c. the Judgment dated December 5, 2016 overlooked this critical piece of evidence and the significance of the default created by Tricap not authorizing 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~~.";

   d. the statement of the Appeal Panel in the Judgment dated December 5, 2016 at paragraph [42] is incorrect and overlooks the critical evidence that allowed Brookfield and Tricap to create the contrived interest default:

"[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. ... .";

e. the Appellant's Factum at paragraph 19 set forth this critical evidence which was overlooked by the Appeal Panel:

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

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

f. the significance of the deletion from the draft press release of July 3, 2008 is that this deletion or strikeout 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.

5. Access to Justice: Access to justice is a fiction if the availability of a transcript is opposed when the truth of important facts could be proved by a written transcript, including but not limited to the following examples:

a. the contrived interest default was created by Brookfield and Tricap not allowing the interest to be paid by Computershare to avoid the interest default;

b. the contrived interest default was compounded when the 30 day grace period was rescinded without notice:

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

"Jim [Reid] responded that we had 30 days to rectify the payment and he was confident we could do it within this time.";

c. BMR (Rowe) email to BMR (Houghton et al) dated July 03, 2008 may be evidence of bad faith and support the conclusion that Brookfield were not "acting reasonably" as mandated by section 9.17 of the Loan Agreement related to the July 3, 2008 press release:

"However, he [Reid] was quick to stress that they [Brookfield and Tricap] would not take any precipitous actions whatsoever such as court actions etc."; and

d. NRCB issue related to the future investment of $737 million when 100% of the control of the Hammerstone Project was controlled by Brookfield and Tricap:

Hammerstone (Owen) letter to NRCB dated October 26, 2009:

"The only change since the Notice of Application was published is that the proponent has changed from Birch Mountain Resources Ltd. to Hammerstone Corporation. Otherwise it is the same project being undertaken in the same way, by many of the same people. ... "; and

"It has been unfortunate that the Hammerstone Project has been delayed due to Birch Mountain's difficulties. Hammerstone Corporation, on the other hand, is fully committed to undertaking the project and has access to the required capital [$737,000,000] to successfully build and operate a project of this nature."

6. Judgment dated December 23, 2016: The Judgment was presented without any submission by the Appellant or the Respondent other than three letters addressing the request for the transcript. The Judgment is questionable for the following reasons:

a. *R. v. Stolar* is favourable to the admission of new evidence since paragraph 14 is clear that new evidence should be admitted if it would clearly affect the resulting decision and the evidence related to Computershare having the required funds would affect the result of the Judgment;

b. the evidence presented and overlooked by the Appeal Panel is that Computershare had the cheque and Birch Mountain had the funds set aside to make the interest payment but required the approval of Tricap for Computershare to release the cheque and avoid the interest default;

c. *Armoyan* is distinguished since the reference to paragraph 132 is a reference to the procedure followed in the Province of Nova Scotia not the Province of Alberta;

d. *Toliver v. Koepke* is distinguished since this case involved an application for leave to re-argue the appeal and does not deal with the issue of a request for a transcript; and

e. Rule 14.38 (2) (b) does not state what the Judgment at paragraph [6] states and a copy of the transcript is required to resolve the new evidence application prior to approving the Judgment:

> "(2) The following applications must be heard by a panel of the Court of Appeal: ... (b) an application for new evidence, unless a panel of the Court of Appeal directs that the application be heard by a single appeal judge:"

7. Canadian Judicial Council ("CJC"): Our thought is that there must be a reason why critically important evidence has been overlooked by both Justice Strekaf and the Appeal Panel on a summary judgment motion where the test is a low bar. I have been instructed to file a complaint with the Canadian Judicial Council to seek their advice with respect to obtaining the transcript prior to filing the Notice of Application for Leave to the SCC.

The complaint shall address the following concerns:

a. leave to appeal to the SCC is extremely difficult in any situation without the existence of an important national public issue and the transcript is required, not to question the Appeal Panel opinions or questions during oral argument;

b. the transcript is required to demonstrate that all arguments directed to the Appeal Panel by this writer related to the deeming language issue and the interest payment issue were entirely ignored by the Appeal Panel;

c. the CJC cannot change judicial decisions in court cases, compensate individuals, grant appeals, or address demands for a new trial but may be able to facilitate access to justice;

d. the CJC shall require the transcript to be released in order that both the CJC and the SCC can evaluate why critical evidence and critical argument was not considered by the Appeal Panel on June 15, 2016 and addressed in the Judgments dated December 5, 2016 and December 23, 2016;

e. the CJC may consider the following Statement of Policy from the SCC:

> "The SCC will provide access to court records in any judicial proceeding before the Court to members of the public, media and parties to the judicial proceedings in a manner that balances the constitutional requirement of open courts against other rights and interests of the public and participants to judicial proceedings, namely privacy and security of individuals and the proper administration of justice."; and

f. the CJC may consider that the transcript of the oral argument before Justice Strekaf of the Alberta Court of Queens Bench on the summary judgment motion was released when requested and the that the transcript before Justice Bielby of

the Alberta Court of Appeal was released when requested. Both transcripts were released without any references to “exceptional circumstances”.

Yours truly,

John McDonald

cc: Norton Rose Fulbright Canada LLP
400 Third Avenue SW
3700 Canterra Tower
Calgary, Alberta T2P 4H2
Facsimile 403-264-5973
Attention: Howard Gorman - Counsel - Brookfield