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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.

2. Without a copy of the transcript of the Court of Appeal hearing held June 15, 2016 we cannot approve the wording of the orders to be dated December 05, 2016 and December 23, 2016.

3. The complaint to the Canadian Judicial Council, which raises the transcript issue and other complaints, was mailed January 11, 2017.

4. My clients were present at the Court of Appeal hearing and their memories differ with the Appeal Panel on many significant issues including the statement set forth in paragraph [8] of the Judgment dated December 23, 2016 concerning the new/fresh evidence application:

> "[8] When appellant's counsel asked, the panel confirmed (after the routine morning break) that he was at liberty to refer to the fresh evidence during the oral argument, on the basis that its admissibility would be considered along with the disposition of the substance of the appeal. The panel never ruled during the oral argument that the fresh evidence was admissible, and merely confirmed that it could be referred to."

The transcript would be definitive as to the wording used by the Chief Justice related to the new/fresh evidence application.

5. As the Appeal Panel commented in paragraph [3] of the Judgment dated December 23, 2016, in my client's opinion, numerous errors are apparent on a review of the Judgment dated December 05, 2016. Two specific errors, one example related to law and one example related to evidence, are commented on below.

> "[3] Firstly, the reasoning of the Court is found in the Memorandum of Judgment. Any reviewable errors, and any issues of national importance justifying leave to appeal will be found in that Memorandum. If issues or evidence were overlooked, that will be apparent from a review of the Memorandum."

In my previous experiences, when errors are raised with a judge or judges, the errors are addressed. Since an Application to the Supreme Court is seldom granted in commercial cases could the following issues be addressed by the Appeal Panel?

6. Oppression Remedy

7. 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."

8. 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)].

9. The transcript of the proceedings conducted June 15, 2016 is required to 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.

10. Contrived Interest Default

11. 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. ... ."

12. 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 [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. ... ."

13. 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."

14. The draft press release of July 03, 2008, edited by Brookfield/Tricap, deleted the following sentence highlighted by strikeout and thereby created the contrived interest default:

> ""CALGARY, July 3, 2008 - Birch Mountain Resources Ltd. ("Birch Mountain" or the "Company") (BMD: TSX and AMEX) announces that is has not made the scheduled June 30, 2008, interest payment to the holders of the Convertible Unsecured Subordinate Debentures. As a consequence ~~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 rights 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.~~"

15. The significance of the deletion 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.

16. In our opinion, the draft press release dated July 03, 2008 is evidence that there is merit to

this class action which is the test on a summary judgment motion.

17. The transcript of the proceedings conducted June 15, 2016 is required to clarify the discussion surrounding the contrived interest default.

Yours truly,

John McDonald

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