

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

January 16, 2017

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: I Moore - Deputy Registrar - Court of Appeal - Calgary

Dear Deputy Registrar Moore:

McDonald v. Brookfield et al

Court of Appeal File Number 1501-0131AC

1. I respond to Norton Rose Fulbright letter dated January 13, 2017.
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 reasons for this statement have been reviewed numerous times and include the following facts, but not limited to the following facts:
  - a. the complaint to the Canadian Judicial Council, which raises the transcript issue, was mailed January 11, 2017 and we shall await their response to their investigation;
  - b. 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 of the Appeal Panel concerning the new/fresh evidence application;
  - c. it would be an act of negligence on my part to agree to any order until the precise wording of the Appeal Panel on the new/fresh evidence application and other issues of law and evidence are known;
  - d. the Appeal Panel, in the December 23, 2016 Judgment advised the class members as to the proper procedure to seek clarification to correct errors in the Judgment and we have followed this “proper procedure”:

“5 Secondly, it is rarely necessary or appropriate for the Court to provide "clarification" of the reasons for decision. The reasons must speak for themselves, and stand or fall based on the reasoning (or absence of reasoning) in them. In those rare cases where some clarification is appropriate, the proper procedure is to apply to the panel for clarification, not for counsel to sort through the oral argument in an attempt to supplement the formal written reasons.”
  - e. the Appeal Panel has chosen to ignore the law related to the deeming language issue as documented in the December 05, 2016 Judgment, for example:

i. “The Appeal Panel in the December 05, 2016 Judgment 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.”;

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

“they are deemed to be affiliated with each other” [ABCA section 2(1)(b)];

“votes that may be cast to elect directors” [ABCA section 2(2)(a)]; and

“votes ... sufficient, if exercised, to elect ... .” [ABCA section 2(2)(b)];

iii. 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. ... .”;

f. the Appeal Panel has chosen to ignore the evidence that the Appeal Panel confirmed was part of the evidentiary record and which evidence proves that there is a genuine issue requiring a trial:

i. the Appeal Panel in the December 05, 2016 Judgment 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. ... .”;

- ii. 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. ... .”

- iii. 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 it 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.~~”

- g. again, 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;
- h. my clients have come to the conclusion that there is no merit in debating with the

Appeal Panel related to the existence of “exceptional circumstances” requiring that the June 15, 2015 hearing transcript be released;

- i. the transcript issue is one of the reasons for the complaint to the Canadian Judicial Council and the transcript is required for this inquiry; and
- j. the transcript issue shall be raised in the Leave Application to the Supreme Court of Canada and we shall ask that the transcript become part of the public record.

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