COURT OF APPEAL OF ALBERTA

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REGISTRY OFFICE:	CALGARY
PLAINTIFF/APPLICANT:	LANNY K. MCDONALD
STATUS ON APPEAL:	APPELLANT
DEFENDANTS/RESPONDENTS:	BROOKFIELD ASSET MANAGEMENT INC., BROOKFIELD SPECIAL SITUATION PARTNERS LTD. and HAMMERSTONE CORPORATION
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**FACTUM**

Appeal from the Order of
The Honourable Madam Justice Strekaf
Dated and filed April 30, 2015

For the Appellant
John W. McDonald
McDonald & Ross
9 Brant Road, South
Cambridge, Ontario, N1S 2W4
Telephone 519-622-0499
Facsimile 519-740-6368

For the Respondents
Howard A. Gorman
Norton Rose Fulbright
400 3rd Avenue SW, Suite 3700
Calgary, Alberta, T2P 4H2
Telephone 403-267-8222
Facsimile 403-264-5973

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1. **PART 1 FACTS**

2. **Definitions**

3. The definitions used in the Affidavit of the Responding Party sworn July 15, 2014 before Justice Strekaf on October 09, 2014 are incorporated by reference in this Factum. [1]

4. **Overview**

5. In this fact situation the Hammerstone Project valued at approximately $1.6 billion was transferred from Birch Mountain to Brookfield/Tricap/1439442 for less than $50 million.

6. Brookfield/Tricap were aware of the Hammerstone Project value based, in part, on: (i) the Natural Resources Conservation Board Decision dated June 2010 that confirmed the volume of product sales over quarry life of 50 years; [2] and (ii) the Norwest Report commissioned by Brookfield and BMR as an independent report that confirmed that BMR had a resource with great potential if properly developed and marketed. [3]

7. In order to acquire the Hammerstone Project, Brookfield/Tricap contrived an interest default by withholding a significant portion of the South Haul Road proceeds of $4.8 million obtained as a return of sunk costs from Suncor Energy, Imperial Oil and Husky Oil and previously paid by BMR to develop the SHR. [4]

8. In complete contrast to the various representations, immediately after the Hammerstone

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[1] Extracts Evidence, exhibit A, page A 01

[2] Extracts Evidence, exhibit 72, page A 241

[3] Extracts Evidence, exhibit 49, page A 192

[4] Extracts Evidence, exhibit 23, page A 110

Project was owned 100% by Brookfield/Tricap/1439442 on January 08, 2009, Brookfield and Tricap committed to invest $737 million in the Hammerstone Project to realize on the immense value. This fact is documented in NRCB correspondence. [5]

9. **Summary of Material Facts**

10. The revised AMEC Report effective August 01, 2006 is the starting point for any analysis of the various issues that must be resolved: (i) the AMEC Report was prepared as National Instrument 43-101 Technical Report for Birch Mountain; (ii) the AMEC Report estimates 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 (iii) the AMEC Report estimates +/- 1 billion tonnes of reserves for over 50 years of production based on the updated product demand and sales forecast. [6]

11. The Short Form Prospectus dated August 26, 2005 qualified for distribution 9,000,000 Birch Mountain common shares at a price of $4.00 per share and referred to the AMEC 2005 Report which qualifies as a report pursuant to provincial securities legislation. [7] This class action defines the Class as all persons who owned Birch Mountain common shares during the period from April 01, 2005 through to November 05, 2008.

12. At all material times the Brookfield/Tricap Internet web site under the marketing representation 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.

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[5] Extracts Evidence, exhibit 72, page A 541

[6] Extracts Evidence, exhibit 03, page A 64

[7] Extracts Evidence, exhibit 01, page A 62

> 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]" [8]

13. On December 24, 2007, the Tricap Press Release and the Birch Mountain Press Release announced the issuance of the $31,500,000 Senior Secured Convertible Debenture and represented to the Birch Mountain common shareholders that Tricap was as a source of long term patient capital as follows:

> "**Tricap Partners Ltd. was established by Brookfield Asset Management to provide a source of patient, long term capital and strategic assistance to mid-market companies based in North America. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in building value over the long term**. [emphasis added]" [9]

14. Section 9.17 of the Loan Agreement sets forth the publicity clause which creates the linkages between the Loan Agreement and the Brookfield/Tricap Press Releases and the reliance by the Birch Mountain common shareholders on the various restructuring representations:

> "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

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[8] Extracts Evidence, exhibit 06, page A 67

[9] Extracts Evidence, exhibit 11, page A 91

> 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. [Justice Strekaf did not analyse section 9:17 of the Loan Agreement or the words "acting reasonably".] [emphasis added]" [10]

15. On July 11, 2008, the South Haul Road Agreement, an important agreement in Birch Mountain's development, was executed with Suncor Energy, Imperial Oil and Husky Oil and provided Birch Mountain with proceeds of $4.8 million as a partial return of sunk costs for the road construction. [Justice Strekaf did not analyse the South Haul Road Agreement and the use of the proceeds.] [11]

16. The Loan Agreement does not specifically identify any security on assets which are a return of sunk costs. Justice Strekaf did not analyse the wording of section 2.10 or 6.4 of the Loan Agreement used to seize the return of $4.8 million of sunk costs and trigger the contrived interest default. [Justice Strekaf did not analyse the contrived interest default mechanics.]

17. During June / July / August, 2008, the contrived interest default was implemented by Brookfield/Tricap to gain 100% control of the Hammerstone Project and proved by numerous key documents and documented steps. [Again, Justice Strekaf did not analyse the contrived interest default and the take over strategy based on the interest default.]

18. On June 06, 2008, Birch Mountain (Jarding) letter to Brookfield (Eng) with respect to the SHR Agreement stated:

> "We acknowledge receipt of a letter from your counsel, Macleod Dixon, yesterday in which you have refused to consent to the assignment of certain interests by Birch Mountain in support of the South Haul Road ("SHR") Agreement.

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[10] Extracts Evidence, exhibit 10, page A 89

[11] Extracts Evidence, exhibit 23, page A 110

> Based upon the foregoing we believe that it is a clear and compelling conclusion that the SHR Agreement is not only in the best interest of Birch Mountain, but pivotal in terms of its continuing sustainability and success**. Should the SHR Agreement not be concluded as a result of your refusal to consent to the modest interests being assigned, Birch Mountain will almost certainly suffer irreparable damage to its economic sustainability and its commercial credibility**. Accordingly we request in the strongest terms that you reconsider and reverse your decision and consent to and permit the assignment of the interests and the signature to the SHR Agreement by Birch Mountain as soon as possible. We remain available to discuss these or any other points at any time. [Justice Strekaf did not analyse this email or the SHR issue and the other issues related to the SHR.] [emphasis added]" [12]

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

> "Jim responded that we had 30 days to rectify the payment and he was confident we could do it within this time. He 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. [Justice Strekaf did not analyse this email related to the interest payment issue]" [13]

20. On July 03, 2008, Birch Mountain Press Release (as required by Brookfield/Tricap pursuant to section 9.17 of the Loan Agreement) announced that it had not made the scheduled June 30, 2008 interest payment on the Unsecured Subordinate Convertible Debentures despite the monies being available:

> "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

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[12] Extracts Evidence, exhibit 18, page A101

[13] Extracts Evidence, exhibit 19, page A105

> liquidity to make the interest payment. [Justice Strekaf did not analyse the July 03 Press Release or section 9.17 of the Loan Agreement]" [14]

21. On July 10, 2008, Tricap served a Notice 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. [Justice Strekaf did not analyse the fact that the grace period may have been 20 days and not 10 days or that the 10 day grace period was not respected.]" [15]

22. On July 11, 2008, the SHR Agreement was executed with Suncor Energy, Imperial Oil and Husky Oil which resulted in a payment to Tricap of $4,800,000 as the party with the security on all Birch Mountain assets. [Again, Justice Strekaf did not analyse the SHR Agreement or the importance of the $4.8 million proceeds.] [16]

23. On July 11, 2008, the Confidentiality Agreement was executed with the Pattison Group (Great Pacific Capital) to explore a potential transaction ("Potential Transaction") and eventually lead to the Hammerstone Tour on September 08, 2008 by Pattison, Brookfield and other potential investors. [Justice Strekaf did not analyse the Confidentiality Agreement or Mr. Pattison's restructuring efforts to facilitate a "Potential Transaction".] [17]

24. On August 01, 2008, United States SEC joint filings were important to establish the relationship between Brookfield, Tricap and Pattison and may provide an explanation for

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[14] Extracts Evidence, exhibit 20, page A 107

[15] Extracts Evidence, exhibit 21, page A 108

[16] Extracts Evidence, exhibit 23, page A 110

[17] Extracts Evidence, exhibit 24, page A 113

the Pattison Group actions and the Pattison Agreement executed November 27, 2008. [Justice Strekaf did not analyse to the SEC joint filings or analyse the significance of the SEC filings related to the disclosure and take over issue.] [18]

25. August 01, 2008, the Amending Agreement was part of the contrived interest default and implemented the following onerous terms on Birch Mountain:

a. the aggregate principal amount is increased from $31.5 million to $34.5 million to accommodate a $3 million loan amendment fee;
b. the applicable interest rate is increased from a variable interest rate of prime plus 4% to an interest rate of 20%;
c. the first $4.8 million of new equity to be raised by private placement to be escrowed by BMR to Tricap;
d. the conversion price of the Senior Secured Convertible Debenture is reduced to the lower of $0.40 per Common Share and the current market;
e. should the Company issue equity securities below $0.40 per share, or securities convertible into equity securities with an exercise price below $0.40 per security, the conversion price was to be reduced to such lower amount per security;
f. the restriction on conversion of the Senior Secured Convertible Debenture prior to December 31, 2008 was removed, such that the debenture were convertible into common shares at any time throughout the term of the Convertible Debenture;
g. the minimum change of control redemption price pursuant to the Convertible Debentures will be amended from its current rate of 120% to 150% and on January 1, 2009, the minimum redemption price was increased to 200%; and
h. the reinstatement of the events of default and the granting of certain board rights commencing November 30, 2008, in the event that a sale agreement or an equity financing of not less than $10 million was not concluded.

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[18] Extracts Evidence, exhibits 28, 29 and 39, pages A 124, A 125, A 126

26. August 07, 2008, the Tricap Early Warning Report is critically important because this Early Warning Report is confirmation of the contrived interest default by Brookfield/Tricap despite the availability of the South Haul Road proceeds of $4.8 million and the private equity proceeds to pay the interest default. [Justice Strekaf did not analyse the Tricap Early Warning Report dated August 07, 2008] [19]

27. On September 08, 2008, the Hammerstone Tour was conducted by Pattison and other potential investors to provide the required financing for Birch Mountain to potentially cure and protect against any future interest or principal default. [Justice Strekaf did not analyse to the Hammerstone Tour as it related to the Pattison Potential Transaction] [20]

28. On September 19, 2008, the Brookfield Press Release, without reference to the Amending Agreement, continued to represent to Birch Mountain and the Birch Mountain common shareholders that Brookfield was as a source of long term patient capital as follows:

> "**Tricap Partners Ltd. was established by Brookfield Asset Management to provide a source of patient long term capital and strategic assistance to mid-market companies based in North America. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in building value over the long term**. [emphasis added]" [21]

29. On November 04, 2008, Eng's Receivership Affidavit failed to inform the Court with respect to the following minimum facts:

a. the appraisal of the asset at $1.6 billion was withheld from Court;

b. the EIA applications, key to unlocking value, were withheld from the Court;

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[19] Extracts Evidence, exhibit 32, page A 150

[20] Extracts Evidence, exhibits 36 and 37, pages A 160 and A 162

[21] Extracts Evidence, exhibit 39, page A 177

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

d. the recent product shipments were withheld from the Court;

e. the value and timing various orders were withheld from the Court;

f. the recent financial reports were withheld from the Court;

g. the Confidentiality Agreement was withheld from the Court;

h. the Amending Agreement was not explained to the Court; and

i. the Pattison Agreement was withheld from the Court.

30. On November 27, 2008, the Pattison Agreement was executed which granted Pattison, as a director of Brookfield, preferences and advantages not available to other Birch Mountain debenture holders and Birch Mountain common shareholders :

a. Brookfield, Tricap and Pattison dealt without restriction with BMR asset;

b. may have breached various insider trading rules and material change rules;

c. the grant of the option and the terms of the option are set forth in paragraph 3 of the Pattison Agreement were not disclosed to Court or to the public;

d. the terms of the option, paragraph 3 (a) (i), allow for the conversion by Pattison of 30% of the Unsecured Subordinated Convertible Debentures to a portion of the Senior Secured Convertible Debenture; and

e. the terms of the option, paragraph 3 (a) (ii), allow for the acquisition by Pattison after the receivership is completed to acquire 30% of 1439442 or 30% of the Hammerstone Project. [Justice Strekaf did not analyse the Pattison Agreement and the preferential treatment afforded Pattison] [22]

31. On December 10, 2008, Tricap/1439442 filed the Early Warning Report dated December 10, 2008 which was a complete cover up of the Brookfield/Tricap/1439442/Pattison arrangements and entirely misleading as a securities disclosure filing, for example, :

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[22] Extracts Evidence, exhibit 61, pages A 214

a. Pattison is not mentioned as a joint actor with Tricap;

b. Pattison is not referenced as a director of Brookfield;

c. the preferences set forth in the Pattison Agreement are completely avoided; and

d. this Early Warning Report does not inform the public of important facts. [Justice Strekaf did not analyse the Early Warning Report dated December 10, 2008 and the cover up of the Brookfield/Tricap/1439442/Pattison arrangements] [23]

32. On April 03, 2009, the Brookfield Press Release that announced the launch of Hammerstone Corporation and the acquisition of the Birch Mountain assets from the receiver PwC continued to represent to the general public that Brookfield was as a source of long term patient capital as follows:

> "**Tricap Partners Ltd. was established by Brookfield Asset Management to provide a source of patient long term capital and strategic assistance to mid-market companies based in North America. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in building value over the long term**. [emphasis added]" [24]

33. **PART 2 GROUNDS OF APPEAL**

34. The grounds of appeal are:

First Ground of Appeal: Justice Strekaf failed to consider *Court v. Debaie* ... 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. Therefore the correctness (concurrence) standard is applicable if the Court of Appeal holds that *Court v. Debaie* is settled Alberta law.

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[23] Extracts Evidence, exhibit 62, page A 225

[24] Extracts Evidence, exhibit 70, page A 238

[citation omitted] [25]

Second Ground of Appeal: Justice Strekaf failed to consider the modern approach to the use of hearsay based on: (i) *R. v. Kahn*, [1990] 2 S.C.R. 531 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; (ii) business documents exception and (iii) public documents exception. Again, the correctness standard is applicable if the Court of Appeal holds that *R. v. Kahn* and the other hearsay exceptions are settled Alberta law.

Third Ground of Appeal: Justice Strekaf failed to properly consider all the evidence related to the contrived interest default in the July/August/September 2008 time frame. Both the correctness standard and the absence of reasons standard are applicable.

Fourth Ground of Appeal: Justice Strekaf failed to properly consider the tests for negligent misrepresentation set forth by the Supreme Court of Canada in both *Hercules v. Ernst Young* and *BCE Inc.* Again, both the correctness standard and the absence of reasons standard are applicable. Further all the critical evidence adduced at the motion was documentary evidence and cross examination evidence not testimonial evidence and therefore reassessment is feasible.

Fifth Ground of Appeal: Justice Strekaf failed to properly consider with respect to the oppression claim the definition of affiliate in the *Alberta Business Corporations Act* and several key phrases which require judicial interpretation. Again, both the correctness standard and the absence of reasons standard are applicable.

Sixth Ground of Appeal: Justice Strekaf referred to the incorrect documents and

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[25] Appellant Authorities, tab 05, page 34

therefore failed to properly consider the application of the good faith doctrine. Again, both the correctness standard and the absence of reasons standard are applicable.

Seventh Ground of Appeal: Justice Strekaf failed to properly consider with respect to collateral attack that: (i) no remedy is sought to set aside, vacate or appeal the receivership order; (ii) the shareholders action is based on the three separate causes of action; and (iii) the remedy sought by the Birch Mountain shareholders is damages. Again, both the correctness standard and the absence of reasons standard are applicable.

Eighth Ground of Appeal: Justice Strekaf failed to consider that without the "document or question discovery" Birch Mountain shareholders had limited ability to force document disclosure and therefore the only reliable source of documents were public filings and now reliance on the new evidence obtained after the motion hearing. [26]

35. **PART 3 STANDARD OF REVIEW**

36. In 2002, the Supreme Court of Canada per Justices Iacobucci and Major in *Housen v. Nikolaisen* commented on the universality or *stare decisis* principle:

> "9 There are at least two underlying reasons for employing the correctness standard to matters of law ... First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. ... A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans and Willey ... ." [27]

37. In 2002, the Supreme Court of Canada per Justice Binnie in *R. v Sheppard* developed six reasons for the conclusion that a failure to give reasons is a reviewable error and stated:

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[26] Appeal Record, Civil Notice of Appeal, part 2, tab 3

[27] *Housen v. Nikolaisen*, 2002 SCC 33

> "1 The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decisions is owed to the public at large.";
>
> "3 The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal."; and
>
> "6 Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, ..." [28]

38. In 2006, Kerans and Willey in Standards of Review Employed by Appellate Courts commented on the need to decide whether to apply the correctness standard or the reasonableness standard."

> "Consideration that lead to review for Concurrence (Correctness) (i) Does the decision of the first tribunal clearly fail to follow an established and unquestioned governing rule? (ii) Aside entirely from the decision on the first tribunal, does the case raise a new question about a rule of law that must be stated or revised for the general benefit of society?" [29]

39. In 2011, the Supreme Court of Canada per Justice Rothstein in *Masterpiece v. Alavida* set forth the standard with respect to review of documentary evidence:

> "103 ... the "bulk of the critical evidence adduced at trial was documentary, not testimonial" which made the reassessment feasible. Here, this Court has a similarly complete record on which to make a redetermination, ... In order to avoid further protracting the proceedings between these parties, I believe that the interests of justice would be served by this Court finally deciding the matter." [30]

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[28] *R. v. Sheppard*, 2002 SCC 26,

[29] Kerans and Willey, Standards of Review Employed by Appellate Courts, page 108

[30] Appellant's Authorities, tab 04, page 24, paragraph 103

40. **PART 4 ARGUMENT**

41. **Law related to Summary Judgment**

42. In 2014, the Alberta Court of Appeal per curiam in *Windsor v. Canadian Pacific Railway* stated:

> "12 ... The test is whether there is "a reasonable prospect that the claim will succeed", not whether it is "plain and obvious" that no claim is disclosed (paragraphs. 17, 21)." [31]

43. Again, the principle issues to be determined which require a trial are: (i) is there an actionable negligent misrepresentation? (ii) is there an actionable oppression remedy claim? and (iii) is the good faith doctrine applicable?

44. In 2014, the Ontario Court of Appeal per Justice Feldman in *Green v. CIBC* commented on the document discovery and question discovery issue as follows:

> "89 Of course, the evidentiary record for the leave and certification motions is quite different. For the leave motion, each side may file affidavit evidence upon which there can be cross-examination. But, as has been pointed out by both Strathy J. and van Rensburg J., the motion is brought before discovery and production of documents, with the result that the evidence may or may not be the same at the trial. ... ." [32]

45. **Law related to Action Estoppel**

46. Justice Strekaf held that the res judicata doctrine was not applicable:

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[31] 2014 ABCA 108

[32] 2014 ONCA 90, 2014 CarswellOnt 1143

> "36 ... However, his decision on a procedural issue and his *obiter* comments on the meaning of "affiliate" under the OBCA, while they may be persuasive, do not give rise to *res judicata* in respect of an action brought in Alberta under the ABCA by another plaintiff." [33]

47. **Law related to Issue Estoppel**

48. Justice Strekaf held that the issue estoppel doctrine was not applicable:

> "37 ... The essence of the Ontario decision was a procedural determination that Alberta, rather than Ontario, was the appropriate forum. The Plaintiff and the proposed class were not parties to the receivership action. As a result, this doctrine does not apply in the circumstances." [34]

49. **Law related to Collateral Attack**

50. Justice Strekaf with respect to collateral attack and stated:

> " 33 To the extent that this action purports to challenge the propriety of the sale of the Birch Mountain assets to Hammerstone, it constitutes a collateral attack on the order for sale granted in the receivership action and the Defendants are entitled to summary dismissal of those aspects of the claim." [35]

51. There is no remedy sought to set aside, vacate or appeal the Receivership Order appointing PwC as receiver and manager.

52. Again, there has been no adjudication related to the three principal causes of action which seek an order compensating the plaintiff class in damages.

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[33] 2015 ABQB 281

[34] 2015 ABQB 281

[35] Justice Strekaf, Reasons for Judgment, paragraph 33

53. **Law related to Negligent Misrepresentation**

54. In 1993, the Supreme Court of Canada per Justice Iacobucci in *Queen v. Cognos* identified the five elements of the test for negligent misrepresentation that must be pleaded and satisfied in order to succeed in an action for negligent misrepresentation. [36]

55. In 1997, the Supreme Court of Canada per Justice La Forest in *Hercules v. Ernst Young* outlined the two part test for establishing the duty of care (reference from headnote):

> "(1) Is there sufficient proximity between the parties that the defendant would reasonably contemplate that carelessness might cause damage to plaintiff?"; and
>
> "(2) If yes, are there any considerations that should limit the scope of that duty?
>
> **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**." [Justice Strekaf never commented on the bold and underlined portion although set forth in plaintiff's factum and the SCC judgment at see paragraphs 41, 42 and 43] [37]

56. The reasonable reliance test in *Hercules v. Ernst Young* can be summarized as follows:

a. Brookfield/Tricap had a financial interest in the transaction in respect of which the representation was made based on the following evidence: (i) the Loan Agreement; and (ii) the Amending Agreement;

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[36] Justice Strekaf, Reasons for Judgment, paragraph 48

[37] [1997] 2 S.C.R. 165, 1997 CarswellMan 198

b. Brookfield/Tricap were professionals or corporations that possessed special skill or knowledge based on the following evidence: (i) the Brookfield/Tricap internet web site; and (ii) various Brookfield/Tricap press releases and other communication to BMR common shareholders;

c. the information was provided in the course of the Brookfield/Tricap's business, based on the following evidence: (i) the fact that Brookfield/Tricap are senior commercial financiers; and (ii) the SEC filings, more specifically, confirm the Brookfield/Tricap commercial finance business;

d. the information was given deliberately, again, based on the following evidence: (i) the Loan Agreement; and the Amending Agreement and (ii) various Brookfield/Tricap press releases and other public filings; and

e. the information was given in response to a specific inquiry: (i) the Birch Mountain Short Form Prospectus; and (ii) various Brookfield/Tricap press releases.

57. In 2008, the Supreme Court of Canada per curiam in *BCE Inc.* summarized the criteria related to representations and stated:

> "***(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 ... ."** [Justice Strekaf never commented on the bold and underlined portion related marketing representations in promotional materials] [38]

58. Justice Strekaf in her Reasons for Judgment conducted limited analysis related to the promotional representations test in *BCE Inc*. related to the internet representations and completely ignored Eng's cross-examination related to the misrepresentations conducted on June 19, 2014, for example:

a. Brookfield/Tricap confirmed the marketing exercise to market the financial

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[38] 2008 SCC 69, 2008 CarswellQue 12595, para 80

services of Tricap to Canadian businesses utilizing the Internet:

> 22 Q. ... I just now want to bounce back, if I can, to
> 23 get an understanding of why this representation would
> 24 be made. Why would you make a representation? ...
> 14 A. But it is very much driven as a marketing exercise so
> 15 that people understand whether they may want to call up
> 16 Tricap, maybe want to talk to Tricap; [39]

b. no investment between $50 million and $500 million:

> 11 [I] just want to ask questions on the 50 million to 500
> 13 million representation, and that's in the first
> 14 sentence.
> 21 Q. So can you tell me -- and I think you can reference
> 22 from your memory, and I don't want to tab it up, the
> 23 receivership report, but did Tricap invest upwards of
> 24 $50 million?
> 25 A. The investment was less than $50 million.
> 26 Q. Correct. Thank you; [40]

c. no three to seven year investment horizon:

> 10 Q. MR. McDONALD: What was the length of the Tricap
> 11 investment? Can you answer that for me?
> 12 A. It would've -- the loan would've been closed at the end
> 13 of December 2007 and the company was in receivership in
> 14 November of 2008.
> 15 Q. So I calculate that as, I'll round it off, less than 12
> 16 months; am I correct? [actually 10 months 10 days]
> 17 A. Yes.
> 18 Q. And also, when I look at this statement on -- so Tricap
> 19 did not make it to the three-year period on this
> 20 investment?

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[39] Extracts Evidence, exhibit 77, A 257

[40] Extracts Evidence, exhibit 78, page A 259

21 A. It was less than three years;
22. Q. Correct; [41]

d. no reasonable effort to drive change and build value:

6 Q. Okay. So it says: (as read)
17 Tricap invests in companies where it can
18 capitalize upon Brookfield's operating
19 experience and long-term perspective to
20 drive change and build value.
21 What in your experience -- or not your experience, but
22 what do you understand those words to mean where it
23 says "...long-term perspective to drive change and
24 build value"? What do those words mean to you?
25 A. That's what we would look to do, and that's it. I
26 mean, there's not much else to say other than the words
27 there in the materials; [42]

e. no meaningful role in the restructuring process and governance:

23 Q. ... That would be tab 6 in my materials, and so I'm at the
24 second sentence when it says: (as read)
25 When Tricap makes an equity investment,
26 it seeks to play a meaningful role in
27 the restructuring process and governs
1 the recapitalized company.
2 You know, what -- in your words, you know: (as read)
3 A meaningful role in the restructuring
4 process and governance of the
5 recapitalized company,
6 what does that mean?
7 A. That's just what it describes there. If an equity
8 investment is made, Tricap plays a meaningful role in
9 the restructuring process and governance; [43]

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[41] Extracts Evidence, exhibit 79, page A 260

[42] Extracts Evidence, exhibit 80, page A 261

[43] Extracts Evidence, exhibit 81, page A 262

f. no patient long term capital investment:

> A. The company was simply just including however Tricap describes itself, and Birch Mountain cut and paste into their press release to let people know who Tricap is.
> Q. Right. But it appears to me it is something more than that, you know, they are describing, you know, the focus of Brookfield Asset Management to provide long-term patient capital. That tells us if they put it in their press release that is what they expected Brookfield to do. Could you comment on that?
> A. No.
> Q. Okay. We'll let Justice Strekaf interpret that for us.

59. Justice Strekaf in her Reasons for Judgment conducted no analysis related to the following deemed reliance cases:

a.	*CC&L v. Fisherman*	2001 CarswellOnt 4206	2001
b.	*Lawrence v. Atlas Cold Storage*	2006 CarswellOnt 5716	2006
c.	*McCann v. CP Ships Ltd.*	2009 Doc. 46098 CP (OSC)	2009
d.	*McKenna v. Gammon Gold*	2010 CarswellOnt 1460	2010
e.	*Silver v. Imax*	2011 CarswellOnt 877	2011

60. Justice Strekaf in her Reasons for Judgment conducted no analysis related to the certification of class actions based on negligent misrepresentation, for example:

a.	*Menegon v. Philip Services*	1999 CarswellOnt 3240	1999
b.	*CC&L v. Fisherman*	2001 CarswellOnt 4206	2001
c.	*Lawrence v. Atlas Cold Storage*	2006 CarswellOnt 5716	2006
d.	*Silver v. Imax*	2011 CarswellOnt 877	2011

61. **Law related to Statutory Interpretation**

62. 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.” [44]

63. 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' 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

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[44] 23 D.L.R. (2d) 32, 1960 CarswellMan 15

> *Regulvar Canada Inc.*, *supra*, at para. 14. The language is clear and admits of no ambiguity. [emphasis added]" [45]

64. In 2010, the Ontario Superior Court, Divisional Court 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]" [46]

65. **Law related to Oppression Remedy**

66. The oppression remedy was an equitable remedy until the equitable remedy became a statutory remedy. Now the definition of a compliant is one of the qualifying test for access to the oppression remedy.

67. If Birch Mountain is an "affiliate" of Brookfield and/or Tricap, then the first two definitions of "complainant" are applicable.

68. If Birch Mountain is not an "affiliate" of Brookfield or Tricap, then the Court may exercise its discretion under the second two definitions of "complainant".

69. **ABCA Definition of Affiliate**

70. Section 239 of the ABCA states: "Definitions In this part,"complainant" means:

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[45] Appellant's Authorities, tab 03, page 04, paragraphs 11, 14 and 16

[46] 320 D.L.R. (4th) 352, 2010 CarswellOnt 3550, paragraph 24

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

(b) (ii) a director or former director of a corporation or any of its affiliates;

71. ABCA section 2(1)(a): Subsection 2(1)(a) is the lead off section and simply states that:

> "one body corporate is affiliated with another body corporate if ... each of them is controlled by the same person."

72. ABCA Section 2(1)(b): The words "they are deemed to be affiliated with each other" set forth in Subsection 2(1)(b) must be interpreted to properly apply this section:

> "if 2 bodies corporate are affiliated with the same body corporate at the same time, **they are deemed to be affiliated with each other**." [emphasis added]

73. ABCA section 2(2)(a): The 50% of the votes issue set forth in subsection 2(2)(a) of the BCA "may be cast" or eligible to be cast and therefore "sufficient, if exercised":

> "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 ... ."

74. ABCA section 2(2)(a): The Convertible Debentures held as an investment:

> "securities of the body corporate ... are held, other than by way of security only, by or for the benefit of that person ... ."

75. ABCA Section 2(2)(b): The words "sufficient if exercised" set forth in subsection 2(2)(b) must be interpreted to properly apply this section:

> "the votes attached to those securities are **sufficient, if exercised** to elect a

majority of the board of directors of the body corporate. [emphasis added]"

[Justice Strekaf failed to address the words "they are deemed to be affiliated with each other" or the words "sufficient, if exercised" in her Reasons for Judgment.]

76. The Court of Appeal needs to interpret and consider the following words: "they are deemed to be affiliated with each other". **If the Convertible Debentures had to first be exercised to apply the deeming section then there would be no requirement for a deeming provision and the subsection would not have been inserted in the ABCA**.

77. The Court of Appeal also needs to consider the following words: "sufficient, if exercised": **If the Convertible Debentures had to first be exercised to apply the deeming section the word "sufficient" and the comma would not have been inserted in the ABCA**.

78. At all material times, Brookfield, Tricap and Pattison were thorough in calculating the percentage of 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%.

79. 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:

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

80. 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

81. **Loan Agreement - Definition of Affiliate**

82. Section 239 of the ABCA states: "Definitions In this part,"complainant" means:

(b) (iii) a creditor ... (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv); or

(b) (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part." [47]

83. If the definition of "affiliate" in the ABCA is not applicable, the court could exercise its discretion under either ABCA 239 (b) (iii) or 239 (b) (iv). [Justice Strekaf failed to address either of the above sections in her Reasons for Judgment.]

84. The Senior Secured Convertible Debenture does not define the word "affiliate" but refers to the Loan Agreement;

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[47] *Alberta Business Corporations Act*

> "Affiliate" has the meaning ascribed to that term in the [Loan] Credit Agreement;"; and
>
> "[Loan] Credit Agreement" means the credit agreement dated December 21, 2007 between the Issuer (Birch Mountain) and the Holder (Tricap), as may be amended, restated or supplemented from time to time;". [48]

85. The Amending Agreement does not define the word "affiliate" but refers to the Loan Agreement:

> "Recital A The parties entered into a loan agreement (the "Loan Agreement") dated December 21, 2007, and the Senior Secured Convertible Debenture ... (as those agreements are defined in the Loan Agreement);". [49]

86. The following definitions in the Loan Agreement dated December 21, 2007 are applicable:

> "Affiliate" means, in respect of any Person, any Person which, directly or indirectly, controls or is controlled by or is under common control with such first mentioned Person; and for the purpose of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with") **means the power (including *de facto* control) to direct, or cause to be directed, the management and policies of the Person, whether through the ownership of voting shares or units or by contract or otherwise**, ...";
>
> "Convertible Securities" means all subscriptions, options, calls, warrants, commitments, contracts, pre-emptive rights, rights of first refusal, demands, conversion rights or other agreements, arrangements or securities of any character or nature whatsoever under which the Borrower is or may be obliged to issue any Common Shares or securities directly or indirectly convertible into, or exercisable or exchangeable for, Common Shares."; and
>
> "Debenture Shares" means the Common Shares that may be issued from time to time upon any conversion or redemption of the Senior Secured Debenture in

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[48] Applicant Affidavit, exhibit N

[49] Applicant Affidavit, exhibit S

accordance with its terms. [emphasis added]" [50]

87. Various words in the definition of affiliate are words that refer to the concept of *de facto* control, for example:

> "directly or indirectly, controls or is controlled by or is under common control";
>
> "the power (including *de facto* control) to direct, or cause to be directed, the management and policies of [Birch Mountain]"; and
>
> "whether through the ownership of voting shares or units or by contract or otherwise".

88. In order for *de facto* control or factual control to exist, Brookfield/ Tricap must have enough influence to control the management and policies of Birch Mountain in place of the Birch Mountain common shareholders who have the *de jure* control or the legal control.

89. The particulars of *de facto* control include the following:

a. section 6.1 of the Loan Agreement defines the "affirmative covenants - general" which relate to *de facto* control pursuant to the terms of the contract;

b. section 6.2 of the Loan Agreement defines the "affirmative covenants - financial" which relate to *de facto* control pursuant to the terms of the contract;

c. section 6.3 of the Loan Agreement defines the financial covenants and is the *de facto* control related to cash flow and other financial considerations:

> "So long as any Obligations remain outstanding and unless the Lender

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[50] Extracts Evidence, exhibit 10, page 72

> otherwise consents in writing, the Borrower covenants and agrees with the Lender that it will at all times maintain: (a) Minimum Shareholders' Equity of not less than $10,000,000; and (b) A Consolidated Working Capital Ratio of not less than 1.0 to 1.0."; [51]

d. section 6.4 of the Loan Agreement defines the negative covenants which are extremely restrictive and exercise *de facto* control of not less than 27 corporate decisions;

90. Both section 239 (b) (iii) and (b) (iv) of the ABCA are subject to the discretion of the Court. In addition to the above referenced evidence the Court may wish to consider the following facts prior to exercising its discretion:

a. material information withheld from the Court;
b. the misleading nature of the Eng's Receivership Affidavit;
c. the preferential treatment afforded Pattison as a Brookfield director;
d. the use of Early Warning Report disclosure to cover up Pattison's involvement;
e. the fact that McDonald is a former Birch Mountain director and creditor;
f. the purpose of the basket provision to avoid technicalities;
g. the fact that the plaintiff has not had the benefit of document discovery; and
h. the fact that the plaintiff has not had question discovery. [Justice Strekaf in her Reasons for Judgment conducted no analysis related to the oppression remedy based on her findings related to the definition of complainant.]

91. 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 reasonable effort to drive change and build value;
b. no reasonable effort to resolve short term duress;

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[51] Loan Agreement, section 6.3, page 73

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

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

e. no three to seven year investment horizon;

f. no "patient long term capital";

g. no operating, finance and legal assistance; and

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

92. Justice Strekaf in her Reasons for Judgment conducted no analysis related to the certification of the following cases based on the oppression remedy:

a.	*Stern v. Imasco*	1999 CarswellOnt 3546	1999
b.	*Joncas v Spruce Falls*	2000 CarswellOnt 1689	1999
c.	*Shaw v. BCE Inc.*	2004 CarswellOnt 85	2004
d.	*Jellema v. American*	2010 CarswellBC 2966	2010

93. **LAW RELATED TO THE GOOD FAITH DOCTRINE**

94. In 2014, the Supreme Court of Canada per Justice Cromwell in *Bhasin v. Hrynew* ruled on the Good Faith Doctrine related to commercial agreements which deals primarily with behaviour that eviscerates or defeats executed agreements:

> "73 ... I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters **directly linked to the performance of the contract**. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; **it is a simple requirement not to lie or mislead the other party about one's contractual performance**. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: ... . [emphasis added]" [52]

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[52] 2014 SCC 71, 2014 CarswellAlta 2046

95. Justice Strekaf in her Reasons for Judgment failed to comment on the documents "directly linked to the performance of the contract" that the Appellant/Plaintiff argued were eviscerated and defeated, for example:

a. the Brookfield/Tricap restructuring representations;
b. the press releases issued to the Birch Mountain common shareholders;
c. the SEC filings relied on by BMR shareholders; and
d. the Early Warning reports filed on SEDAR and Edgar and relied upon.

96. Justice Strekaf referred instead to the following documents which were not referred to by the Appellant/Plaintiff:

a. the Loan Agreement;
b. the Unsecured Subordinated Convertible Debenture; and
c. Senior Secured Convertible Debenture.

97. **PART 5 RELIEF SOUGHT**

98. An order reversing the order that the claim is frivolous, irrelevant, improper and constitutes an abuse of process.

99. An order respecting costs of the Summary Judgment application and this appeal and such further and other order as counsel may advise and this Honourable Court may permit.

November 18, 2015

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John W. McDonald