Court of Appeal File No. C53770

COURT OF APPEAL FOR ONTARIO

BETWEEN:

Wanda Bond

Appellant (Plaintiff)

- and -

Brookfield Asset Management Inc.
Brookfield Special Situations Partners Ltd.
1439442 Alberta Ltd.

Respondents (Defendants)

Proceeding Commenced Under the Class Proceeding Act, 1992

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Part I

Part II

Part III

Part IV

Part V

1. **PART I**

2. **Order Appealed From**

3. The appellant appeals from the judgment of Justice Perell dated April 26, 2011 made at Toronto, where the learned trial judge stayed the appellant's action.

4. **Definitions**

5. "Bond Class Action" means the action commenced in the OSCJ in Toronto.

6. "Bond" means Ms Wanda Bond the proposed representative plaintiff.

7. "OSA" means the Ontario *Securities Act*.

8. "OSC" means the Ontario Securities Commission.

9. "OSCJ" means the Ontario Superior Court of Justice.

10. "OBCA" means the Ontario *Business Corporations Act*.

11. "CPA" means the Ontario *Class Proceedings Act*.

12. "Birch Mountain and/or BMD" means Birch Mountain Resources Ltd.

13. "MVQ" means the Birch Mountain Muskeg Valley Quarry.

14. "Hammerstone Project" means the project to develop the limestone reserves by 1439442.

15. "CERI" means Canadian Energy Research Institute.

16. "RBC" means RBC Dominion Securities Inc.

17. "Brookfield" means Brookfield Asset Management Inc.

18. "Brookfield Lending" means Brookfield Bridge Lending Fund Inc.

19. "Tricap" means Brookfield Special Situations Partners Ltd., formerly known as Tricap Partners Ltd.

20. "Loan Agreement" means the Loan Agreement dated December 21, 2007 between Tricap and Birch Mountain.

21. “Pattison” means Mr. James Pattison a director of Brookfield and the principal owner of Great Pacific Capital Corp.

22. “PwC” means PricewaterhouseCoopers LLP.

23. “1439442" means 1439442 Alberta Ltd.

24. “Receivership Court” means the receivership court of the Queen’s Bench of Alberta that granted the “Receivership Order”.

25. “Class” means all those persons who owned Birch Mountain Common Shares during the period from April 01, 2005 through to November 05, 2008.

26. “Convertible Secured Senior Debentures” means the $31,500,000 (increased subsequently to $34,500,000) aggregate principal amount convertible secured senior debentures issued December 31, 2007 and due June 30, 2012 of Birch Mountain.

27. “Convertible Unsecured Subordinated Debentures” means the $30,000,000 aggregate principal amount 6% convertible unsecured subordinated debentures issued December 06, 2006 and due December 31, 2011 of Birch Mountain.

28. “Convertible Debentures” means both the Convertible Secured Senior Debentures and the Convertible Unsecured Subordinated Debentures.

29. “Pattison Agreement” means the Assignment and Option Agreement made with Pattison’s holding company, Great Pacific Capital Corp. which assigns the Convertible Unsecured Subordinated Debentures for valuable consideration.

30. “Shareholders Rights Plan” means the Shareholders Rights Plan Agreement dated May 17, 2000 and the amended Shareholders Rights Plan Agreement dated March 28, 2005 that guaranteed that Birch Mountain common shareholders will be treated equally and fairly.

31. “TSX” means the Toronto Stock Exchange.

32. "AMEX" means the American Stock Exchange.

33. **PART II**

34. **Overview**

35. This claim involves the fact situation where the assets of a public company, Birch Mountain, worth an estimated $1.6 billion dollars were transferred to a private company, 1439442, for a cash outlay of less than $50.0 million dollars.

36. The methods used to accomplish this transfer of ownership have been employed numerous times by Brookfield and/or Tricap with devastating results for the Birch Mountain common shareholders and include the use of Convertible Debentures, death spiral stock trading, avoidance of shareholder approvals, failure to disclose materials changes and insider trading.

37. The preferential treatment afforded Pattison because of his status as a director of Brookfield breaches the material change rules and the insider trading rules and is an act of oppression and should merit a severe sanction.

38. The death spiral stock trading of the Birch Mountain common shares during the period from May 25, 2006 to November 05, 2008 caused the share price of the Birch Mountain common shares on TSX to collapse from $7.99 on May 25, 2006 to $0.01 on November 05, 2008.

39. This action challenges the asset transfer from Birch Mountain to 1439442 pursuant to the oppression remedy and more specifically challenges the methods used to dilute Birch Mountain common shareholders to 2.4% of the outstanding Birch Mountain common shares based on the assumption of the conversion of Convertible Debentures to common shares.

40. On November 05, 2008, Tricap initiated through the Queen's Bench of Alberta the appointment of PwC as the receiver of Birch Mountain, to transfer the assets of Birch Mountain to 1439442,

a private wholly-owned subsidiary of Tricap.

41. This action is based on the oppression remedy which is an equitable remedy that seeks to ensure fairness and implement a just and equitable remedy. The oppression remedy gives the court broad equitable jurisdiction to enforce not just what is legal but what is fair in the circumstances of each case.

42. **Standard of Review**

43. In 2011, the SCC in *Masterpiece v. Alavida* briefly summarized the *Housen v. Nikolaisen* standard of review as follows:

a. "102 The determination of whether a likelihood of source confusion exists [trade mark confusion issue subject of appeal] is a fact-finding and inference-drawing exercise, and thus, appellate courts should generally defer to the trial judge's fact findings and inferences, unless the facts and inferences were based on an error of law or constituted a palpable or overriding error of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.)"

Appellant's Authorities Brief, tab 08, page 155

44. In 2007, the OCA in *Dam Investments v. Ontario* commented on the modern approach to statutory interpretation:

a. "11. ... [T]he 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."

Appellant's Authorities Brief, tab 03, page 026

45. In 2007, the OCA in *Murphy v. Stefanik* set forth the standard to review discretion driven decisions:

a. "22. ... A discretionary order will stand on appeal **unless it is predicated on a misapprehension of material evidence, represents a failure to apply the applicable principles guiding the exercise of the discretion, or is unreasonable in all of the circumstances**. [emphasis added]

Appellant's Authorities Brief, tab 04, page 033

46. In 2011, the SCC in *Masterpiece v. Alavida* set forth the standard with respect to review of documentary evidence:

a. "103. ... In *Hollis*, 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, having concluded that the expert evidence was of little or no use to the issue of confusion. 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."

Appellant's Authorities Brief, tab 08, page 155

47. **PART III**

48. **Bond Class Action**

49. The Bond Class Action involves numerous issues three of which are summarized:

a. non disclosure of material facts to the receivership court;

b. insider trading by Pattison a director of Brookfield; and

c. death spiral stock trading on the TSX.

50. **Non Disclosure of Material Facts to the Receivership Court**

51. On November 05, 2008, Tricap initiated through the Receivership Court the appointment of PwC as the receiver of Birch Mountain and the Receivership Order raises numerous questions based on the information that was not placed before the Receivership Court.

52. Mr. Eng's affidavit sworn November 04, 2008 in support of the Receivership Order does not disclose the following information:

a. the various appraisal reports related to the value of the BMD asset;

b. the various environmental reports related to the BMD asset;

c. the product shipment records related to the BMD asset;

d. the third quarter financial results for BMD; and

e. the Pattison Agreement and the preferential treatment afforded Pattison.

Appeal Book and Compendium, tab 5-10, page 178

53. **Preferential Treatment afforded Pattison**

54. Pattison is a director of Brookfield. The Pattison Agreement is summarized as follows:

a. recital A confirms in writing that Pattison was the owner and the assignor of the Convertible Unsecured Subordinated Debenture;

b. recital B confirms in writing that Tricap is the owner and the assignor of the Convertible Secured Senior Debenture;

c. recital C confirms in writing that Pattison knew that Tricap demanded repayment of its loan on October 31, 2008 and appointed a receiver on November 05, 2008;

d. the recital D confirms in writing that Pattison knew that Tricap was a wholly owned subsidiary of Brookfield;

e. the grant of the option and the terms of the option are set forth in paragraph 3 of the Pattison Agreement;

f. pursuant to paragraph 3 (a) (i) Pattison had an option to acquire 30% Birch Mountain's Convertible Unsecured Subordinated Debenture and Convertible Secured Senior Debenture for the option price defined in paragraph 3 (b); and

g. pursuant to paragraph 3 (a) (ii) Pattison had an option to acquire 30% of 1439442's shares outstanding after the Birch Mountain asset was transferred to 1439442 for the option price defined in paragraph 3 (b).

Appeal Book and Compendium, tab 5-12, page 290

55. The Pattison Agreement was not disclosed to the Receivership Court as part of the receivership disclosure and the Pattison Agreement raises numerous questions:

a. was Pattison in compliance with the various sections of the Receivership Order that prevented various persons from dealing with the assets of Birch Mountain?

b. was Pattison in compliance with the various material change notification rules and the various insider trading rules in view of the fact that he was a director of Brookfield and was assigning his Convertible Unsecured Subordinated Debentures to Tricap/1439442 and in return receiving various options not available to other shareholders, creditors and debenture holders? and

c. was the Early Warning Report dated December 10, 2008 a cover up of the failure to disclose material changes and the insider trading and an effort to mislead the general public and more specifically the common shareholders of Birch Mountain?

56. **Death Spiral Stock Trading on the TSX**

57. The death spiral stock trading of the Birch Mountain common shares on the TSX during the period from May 25, 2006 to November 05, 2008 was critical to Brookfield and/or Tricap gaining effective control of Birch Mountain.

58. The death spiral stock trading of the Birch Mountain common shares during the period from May 25, 2006 to November 05, 2008 caused the share price of the Birch Mountain common shares on TSX to collapse from $7.99 on May 25, 2006 to $0.01 on November 05, 2008.

Appeal Book and Compendium, tab 04, page 055

59. **The Convertible Debentures**

60. The Convertible Secured Senior Debentures and the Convertible Unsecured Subordinated Debentures were hybrid securities and therefore treated by both Brookfield and Tricap as an

investment for analyzing control and take over disclosure related to Birch Mountain.

61. Convertible Debentures offer investors a senior security with preferences on liquidation, interest payments and other rights senior to common shares, while offering the investors the right to convert such Convertible Debentures into shares at a time when the conversion to equity security is more advantageous to the investors.

62. At all times Brookfield and Tricap relied on their right to convert the Convertible Debentures to voting common shares as evidenced by following public filings:

a. Tricap's Early Warning Report dated August 08, 2008, announced: "Assuming conversion of the entire Debenture at an exercise price of approximately $0.31, the conversion price in effect as at July 23, 2008, Tricap would have ownership and control over 102,960,197 Common Shares representing approximately 55.0% of the aggregate issued and outstanding Common Shares as of March 31, 2008.";

b. Tricap's Early Warning Report dated September 19, 2008 announced: "Assuming conversion of the entire Debenture at an exercise price of $0.40, Tricap would have ownership and control over 86,250,000 Common Shares representing approximately 50.5% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture."; and

c. "Tricap's SEC filing dated December 16, 2008 described the dilution as follows: "As a result of both investments, Tricap may be deemed to be the sole beneficial owner of 3,458,872,727 of Common Shares that would be issuable upon the conversion of the Unsecured Subordinated Convertible Debentures and the Secured Senior Convertible Debentures, which represent 97.6% of the Common Shares outstanding."

Appeal Book and Compendium, tab 04, page 041 (see statement of claim, paragraphs 27, 66 c and 66 d"

63. **PART IV**

64. **THE "BODY CORPORATE" DEFINITION ISSUE**

65. The Notice of Appeal questioned whether Justice Perell used the appropriate definition to

resolve the affiliated body corporate issue being “body corporate” as opposed to “corporation”.

66. The Notice of Appeal also questioned whether Justice Perell failed to properly consider the purpose of deeming provisions in the OBCA and to then use the principle of statutory interpretation that all statutory provisions, such as the words “shall be deemed to be”, “if but only if” and “if exercised”, must be interpreted in a way that is compatible with the purpose of the section.

67. ***Ontario Business Corporations Act*** **Definitions**

68. Definitions 1. (1) In this Act,

"affiliate" means an **affiliated body corporate** within the meaning of subsection (4);

"body corporate" means **any body corporate** with or without share capital and **whether or not it is a corporation to which this Act applies**;

"corporation" means a **body corporate** with share capital **to which this Act applies**;

Affiliated **body corporate** 1. (4) For the purposes of this Act, one **body corporate** shall be deemed to be affiliated with another **body corporate** if, but only if, one of them is the subsidiary of the other or both are subsidiaries of the same **body corporate** or each of them is controlled by the same person.

Control 1. (5) For the purposes of this Act, a **body corporate** shall be deemed to be controlled by another person or by two or more **bodies corporate** if, but only if,

(a) voting securities of the first-mentioned **body corporate** carrying more than 50 per cent of the votes for the election of directors are held, other than by way of security only, by or for the benefit of such other person or by or for the benefit of such other **bodies corporate**; and

(b) the votes carried by such securities are sufficient, if exercised, to elect a majority of the board of directors of the first-mentioned **body corporate**. [emphasis added]

69. ***Murphy v. Stefaniak***

70. In 2010, the OSCJ, Divisional Court 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]

Appellant's Authorities Brief, tab 06, page 081

71. ***Dam Investments v. Ontario***

72. In 2007, the OCA in *Dam Investments v. Ontario* commented on the interpretation of the following words "shall be deemed to be", "if but only if" and "if exercised":

a. the words "shall be deemed to be" are deeming words: "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.";

b. the word "if" is a conditional word : "In contrast, the use of the conditional word "if" in conjunction with "shall be deemed to be", signifies an exclusive definition."; and

c. the words "if but only if" are exclusion words: "That language read: "a body corporate shall be deemed to be controlled by another person or by two or more bodies corporate if, *but only if* ... ."

Appellant's Authorities Brief, tab 03, page 026

73. Therefore, what is being deemed and made conditional on the exercise of votes carried by a specific security is the control of one corporation by another corporation.

a. the deeming purpose of the section should be taken into account when considering the definition of the words "if exercised";

b. 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

c. the existence of the deeming provision is the reason that Tricap calculated the percentage of voting shares held if the Convertible Debentures were exercised.

74. Justice Perell, in paragraph 60, makes an error in law when he fails to properly apply the

deeming provisions of the OBCA by stating that the Convertible Debentures must be converted to common shares for the deeming provisions to apply:

a. "60. In this case, it is conceded that none of the Defendants held any voting shares of Birch Mountain. Only Tricap had a conversion right to obtain such shares under its Debenture; however, the right was never exercised and thus the deemed control provision of the Act have never been triggered and none of the Defendants became an affiliate of Birch Mountain."

75. **Loan Agreement**

76. The definition of "affiliate" in the Loan Agreement is even more comprehensive then the definition of affiliate in the OBCA, for example:

a. "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" ... 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, ..."

Appeal Book and Compendium, tab 10-A, page 183

77. **Error of Justice Perell related to "Body Corporate"**

78. Justice Perell, in paragraph 56, makes an error in law when he uses the definition "corporation" which is defined as a body corporate with share capital incorporated only under the OBCA as opposed to "body corporate" which is defined to include any body corporate incorporated under another act other than the OBCA:

a. "56. Since Birch Mountain is not a "corporation" for the purposes of the Ontario Act, the Defendants cannot be "affiliates" of that corporation for the purposes of the Ontario Act. That the Ontario Defendants made decisions in Ontario, alleged to be oppressive and unfair to Birch Mountain shareholders, does not make Birch Mountain an Ontario corporation subject to the Ontario Act."

79. Justice Perell, in paragraph 54, repeats an error in law when he again uses the definition

"corporation" which is defined as a body corporate with share capital incorporated only under the OBCA as opposed to "body corporate" which is defined to include any body corporate incorporated under another act other than the OBCA:

a. "54. I will assume that Ms. Bond would qualify as a "complainant" under the Ontario Act as a shareholder in Birch Mountain. However, for her to have a tenable claim under the Ontario Act for the oppressive conduct of Birch Mountain, she would have to establish both that: (a) Birch Mountain was a "corporation" under the Ontario Act; and also (b) that one of Hammerstone, Tricap, or Brookfield Management would qualify as an "affiliate" of Birch Mountain. Ms. Bond, however, cannot establish either prerequisite and both must be established."

80. A translation of section 1 (4) of the OBCA would read as follows: "Birch Mountain shall be deemed to be affiliated with Tricap if, but only if, Birch Mountain is the subsidiary of Tricap."

81. A translation section 1 (5) of the OBCA would read as follows: "Birch Mountain shall be deemed to be controlled by Tricap if, but only if,

(a) voting securities of Birch Mountain carrying more than 50 per cent of the votes for the election of directors are held, other than by way of security only, by or for the benefit of Tricap; and

(b) the votes carried by the Convertible Debentures are sufficient, if exercised, to elect a majority of the board of directors of Birch Mountain."

82. **RULE 17 of the RULES of CIVIL PROCEDURE**

83. Justice Perell, in paragraphs 44, uses the wrong definition to resolve the affiliated body corporate issue and therefore the service issues. Justice Perell should have used the definition of "body corporate" but in error used the definition of "corporation".

84. Justice Perell, in paragraph 44, makes an error in law related to the application of Rule 17.02 (n) when he uses the wrong definition to define a "body corporate" which is defined to include a body corporate incorporated under another act other than the OBCA:

a. "44. With respect to rule 17.02 (n), Ms. Bond's claim is based on the oppression remedy of the Ontario *Business Corporations Act*. That Act, however, does not authorize a claim to be made against a person outside Ontario, and thus rule 17.02 (n) does not apply to Hammerstone."

85. Justice Perell, in paragraph 44, makes another error in law related to the application of Rule 17.02 (p) when he fails to properly apply the definition of "affiliated body corporate" to Brookfield, Tricap and 1439442. Brookfield owns 100 % of Tricap and Tricap owns 100% of 1439442. The three "body corporates" are affiliated body corporates under the OBCA:

a. "44. Hammerstone was never ordinarily resident in Ontario and has never carried on business in Ontario, and thus rule 17.02 (p) does not apply to Hammerstone."

86. If the correct definition is used then Birch Mountain, an Alberta corporation, is an affiliate of Tricap, an Ontario corporation, and 1439442, an Alberta corporation, is an affiliate of Tricap, an Ontario corporation, for the purposes of the oppression remedy under the OBCA.

87. It then follows that Rule 17 of the Rules of Civil Procedure is applicable and service outside of Ontario is authorized under the following Rules of Civil Procedure:

a. "17.02 Service Outside Ontario Without Leave A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

n. Authorized by Statute - authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario; and

p. Person Resident or Carrying on Business in Ontario - against a person ordinarily resident or carrying on business in Ontario."

Schedule B

88. Brookfield and Tricap are properly served under Rule 17.02 p and 1439442 is properly served under Rule 17.02 n.

89. **SECTION 245 (c) of the OBCA ISSUE**

90. 245. Definitions In this part,"complainant" means:

a. 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. a director or an officer or a former director or officer of a corporation or of any of its affiliates; and

c. any other person who, in the discretion of the court, is a proper person to make an application under this Part.

Schedule B

91. Justice Perell failed to consider that Bond is a complainant under section 245 (a) of the OBCA because Bond is a former registered holder or beneficial owner, of a security of Birch Mountain or any of its affiliates.

92. Justice Perell also failed to consider the application of section 245 (c) of the OBCA, generally referred to as the basket provision, which provides that a complainant, such as Bond, can also mean any other person who, in the discretion of the court, is a proper person to make an application for an oppression remedy.

93. In 2010, the Divisional Court per Justice Power in *Murphy v. Stefaniak* in a dissenting opinion on another point stated:

a. “39 The principal authority relied on for this proposition is the decision of *Fortnum v.*

Royal City Plymouth Chrysler (1991) Ltd., [2006] O.J. No. 5154 (Ont. S.C.J.) where Leitch J. notes that a complainant includes, as aforesaid, "any other person who, in the discretion of the court, is a proper person to make an application under this Part." At paragraphs 13 and 14 of her decision, Leitch J. said:

> The position of the applicant is that it is well established that a creditor has status to bring an application as a complainant pursuant to s. 245(1)(c) of the *OBCA*."; and

b. "40 The applicant also relies on *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.) in asserting his position as a complainant within the meaning of s. 248 of the *OBCA*. In *Downtown Eatery*, the party seeking to obtain an oppression remedy was a party who obtained a judgment for damages for wrongful dismissal but was unable to collect on his judgment because the debtor corporation and related entities had reorganized several years after the action commenced. The applicant in that case was successful in obtaining an oppression remedy on the basis that he had a reasonable expectation that the company's affairs would be conducted with a view to protect his interests."

Appellant's Authorities Brief, tab 06, page 083

94. **TSX COMPANY MANUAL SECTION 604 EXEMPTION ISSUE**

95. Birch Mountain applied to the TSX for an exemption from the requirement to obtain shareholder approval for the amendment to the Loan Agreement on the basis of the financial hardship exemption pursuant to section 604 of the TSX Company Manual.

96. The use of the section 604 Exemption is an issue in this action since material information was not disclosed to the TSX such as the preferential treatment afforded to Pattison.

97. The exemption is granted based on a written application that is submitted to the TSX and this application will be central to the issue as to whether exemption from shareholder approval was properly granted:

a. section 604 (e) iii) provides that "the transaction is designed to improve the listed

issuer's financial situation";

b. section 604 (e) iv) provides that "the transaction is reasonable for the listed issuer in the circumstances.";

c. the Court will be required to determine if the following amendments were designed to improve the financial condition of Birch Mountain and were reasonable in the circumstances:

   i. the payment of a $3 million loan amendment fee;

   ii. an increase in the interest from a variable interest rate of prime plus 9% to a fixed interest rate of 20%;

   iii. the reduction of the conversion price of the Debenture from a fixed conversion price to the current market price at the time of conversion;

   iv. the removal of the restriction on conversion of the Debenture prior to December 31, 2008 such that the Debenture will be convertible into Common Shares at any time throughout the term of the Debenture;

   v. the amendment of the minimum Change of Control Redemption Price (the "Minimum Redemption Price") pursuant to the Debenture; and

   vi. the reinstatement of the events of default under the Loan Agreement and the granting of certain broad rights in favour of Tricap in the event that a sale agreement or an equity financing of not less than $10 million is not concluded before September 30, 2008 and a closing of the said transaction does not occur before October 31, 2008.

Appeal Book and Compendium, tab 10-F, page 246

98. **SECURITIES held for INVESTMENT ISSUE**

99. Justice Perell failed to properly consider that in paragraph 61 that Brookfield and Tricap had admitted in writing in numerous filings that they had made an investment in Birch Mountain and that the Convertible Debentures were made as an investment and not a debt obligation held only by way of security:

a. "61. As an operative fact, Tricap's Debenture was not "held other than by way of security only." Ms. Bond would have it, however, that because the Debenture could potentially become a voting security because of the conversion right, it cannot be held by way of security only. This reading of s. 1 (5) reads out the exception and makes it impossible to have a convertible debenture be other than a voting security. In my opinion, this is not a correct interpretation of s. 1 (5).

100. Justice Perell failed to consider that the Convertible Debentures and more specifically the "Debentures Shares" as defined in the Loan Agreement dated December 31, 2007 had been conditionally approved for listing on the TSX which is strong indication of the investment nature of the Convertible Debentures.

101. The early warning reports filed pursuant to National Instrument 62-103 are confirmation that the investments were made for take over purposes. The following definitions are set forth in Schedule B which indicate that National Instrument 62-103 is the early warning system related to take-over bids and insider trading issues.

102. For example, the following definitions are related to investments for take over purposes and not related to debt security: "acquisition announcement provisions", "control, "effective control", "offeror", "offeror's securities"

Schedule B

103. Justice Perell did not appear to understand the function served by the various early warning reports and other filings made by Tricap:

a. Tricap's Early Warning Report dated August 08, 2008 **claimed ownership and control of 55.0%** of the aggregate issued and outstanding BMD common shares; and

b. Tricap's Early Warning Report dated September 19, 2008 **claimed ownership and control of 50.5%** of the aggregate issued and outstanding BMD common shares.

Appeal Book and Compendium, tab 04, page 050

104. Various SEC filings were also filed to comply with various filings related to take over bids. Justice Perell did not appear to focus on the description of the Convertible Debentures as an investment as opposed to a debt obligation:

a. Tricap's SEC filing dated December 16, 2008 described the ownership and control as follows: "As a result of **both investments**, Tricap may be deemed to be the sole beneficial owner of 3,458,872,727 of Common Shares that would be issuable upon the conversion of the Unsecured Subordinated Convertible Debentures and the Secured Senior Convertible Debentures, which represent 97.6% of the Common Shares outstanding."; and

b. Tricap's Early Warning Report dated December 10, 2008 described both 1439442 and Tricap as an "offeror" which is a defined term that signifies **an investment** and would necessitate OSC and SEC take over bid filings.

Appeal Book and Compendium, tab 04, page 052

105. Various Birch Mountain press releases also described the Convertible Debentures as an investment as opposed to a debt obligation:

a. Birch Mountain press release dated December 24, 2007, in part, stated: "Tricap has acquired the Convertible Debenture **as an investment** in Birch Mountain and we welcome their proven industry and financial expertise in value creation."; and

b. Birch Mountain press release dated December 24, 2007, in part, stated: "Tricap Partners Ltd. was established by Brookfield Asset Management to provide **long term patient capital** to companies with potential for value creation and need to recapitalize. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in reaching their full potential."

Appeal Book and Compendium, tab 08, page 171

106. **SUMMARY of EVIDENCE OVERLOOKED by JUSTICE PERELL**

107. Justice Perell's statement in paragraph 51 that "All of the events took place in Alberta" and his statement in paragraph 65 that "Ms. Bond provided no evidence with respect to *forum conveniens*" indicates that he overlooked all the evidence provided by Bond.

108. If Justice Perell did not review the evidence provided by Bond then the order should be set aside on the grounds of natural justice and fair procedure. Bond filed extensive evidence related to both the jurisdiction *simpliciter* issue and the *forum conveniens* issue which was not considered by Justice Perell. The evidence presented is summarized in the following table:

Appeal Book Compendium tab page	Document Reference and Description of Applicable Evidence
tab 04, page 022	Statement of Claim - allegations of numerous Ontario connections - for example, allegation of oppression based on OBCA - for example, allegation of death spiral stock trading on TSX
tab 02, page 088	Brookfield Asset Management Inc. - Corporation Profile Report - evidence of Ontario registered office and mailing address - evidence of Ontario directors and officers including Bruce Flatt - evidence that Pattison is director of Brookfield
tab 03, page 103	Brookfield Bridge Lending Fund Inc. - Corporation Profile Report - evidence of Ontario registered office and mailing address - evidence of Ontario directors and officers including Cyrus Madon - evidence that 14 of 21 directors are resident in Ontario
tab 04, page 111	Brookfield Special Situation Partners - Corporation Profile Report - evidence of Ontario registered office and mailing address - evidence of Ontario directors and officers including Cyrus Madon - evidence that all directors are resident in Ontario
tab 05, page 119	Tricap Partners Ltd., Brookfield representations re Tricap - evidence of representations to class member - evidence of Ontario connection since published from Toronto - evidence that both Brookfield and Tricap made representations
tab 06, page 121	Brookfield Code of Conduct and Ethics - evidence of material change representations - evidence of insider trading representations - evidence of Ontario connection since published from Toronto
tab 07, page 143	Short Form Prospectus $36,000,000 - evidence of TSX listing and of reliance on OSA - evidence of reliance on Ontario investment legislation - Pension Benefits Act (Ontario) - Loan and Trust Corporations Act (Ontario) - Trustee Act (Ontario) - evidence of CERI valuation report based on National Inst 43-101 - evidence of early warning report based on National Inst 62-103

tab 08, page 171	Birch Mountain Press Release re representations - evidence that Convertible Debentures are “investments” - evidence of continuous amendment to conversion formula - evidence on reliance on Brookfield representations
tab 09, page 174	Lawson Lundell letter re TSX 604 (e) exemption - evidence of reliance on TSX section 604 hardship exemption - evidence of non disclosure of Pattison Agreement - evidence that use of TSx exemption is major issue
tab 10, page 178	Rick Eng Receivership Affidavit - evidence of non disclosure to the Receivership Court - evidence of definition of affiliate - evidence of conditional list of debenture shares on TSX
tab 11, page 284	Notice of Receiver to Various stakeholders - evidence of use of book value of $51,402,006 - evidence that Pattison is an unsecured creditor for $29,325,000 - evidence of non disclosure of any Pattison Agreement
tab 12, page 296	Pattison Assignment and Option Agreement - evidence of material change non disclosure - evidence of insider trading and non filing for personal gain - evidence of very favourable option pricing
tab 13, page 302	Financial Post Magazine “Piling up the profits ...” - evidence that key management decisions made in Toronto - evidence that Mr. Cyrus Madon is part of Key Management - evidence related to the Burch Mountain liquidation
tab 14, page 310	Tricap Early Warning Report re Convertible Debentures acquisition - based on National Instrument 62-103 re take over disclosure - evidence of cover up of the Pattison Agreement - all answers are misleading in reporting material facts
tab 15, page 314	Tricap Offer to Purchase BMD assets from PwC - evidence conveyance from public to private company - evidence that reliance placed on Convertible Debentures - evidence that no material change in value of Asset
tab 16, page 329	Receiver’s First Report re sale to Tricap - evidence of oppression - evidence that material facts withheld from the Receivership Court - evidence that PwC value asset at book value not appraised value

tab 17, page 355	Notice of Motion re sale order to Tricap - again, evidence of oppression - evidence of conveyance to newly incorporated 1439442 - evidence of very quick time frame to avoid any dissents
tab 18, page 367	Canadian Business, Brookfield "A Perfect Predator" - evidence that key management decisions made in Toronto - evidence that Mr. Bruce Flatt is part of key management - evidence that Mr. Cyrus Madon is part of Key Management

109. **THE ISSUES to be RESOLVED in the BOND CLASS ACTION**

110. Again, the following issues are central to the litigation and support a real and substantial connection to Ontario:

a. is the oppression remedy of the OBCA available?

b. was the key management by Brookfield and Tricap exercised from Ontario?

c. does the listing of the BMD shares on the TSX have any impact?

d. does the listing of the BMD debentures on the TSX have any impact?

e. will OSC officials be required to prove the death spiral stock trading?

f. will TSX officials be required to prove the death spiral stock trading?

g. will TSX officials be required to prove the improper use of the 604 exemption?

h. is the Class likely to be composed of Ontario and US residents?

i. was the interest default contrived and the instructions given from Ontario?

j. was the receivership contrived and the instructions given from Ontario?

k. is the timing of various events proper or contrived to acquire the Hammerstone Project?

Nov 05, 2008	Receivership Order of Justice Lovecchio;
Nov 26, 2008	Incorporation of 1439442 Alberta Ltd.
Nov 27, 2008	Pattison Assignment and Option Agreement executed;
Dec 10, 2008	Tricap debenture acquisition from Pattison completed;
Dec 12, 2008	Tricap Offer to Purchase BMD assets issued; and
Jan 05, 2009	Motion for sale order to Tricap heard.

l. did the Pattison Agreement impact Ontario and US residents?

m. were various appraisal reports withheld from the Court and BMD shareholders?

n. was reliance on book value of properties of $51,402,006 reasonable?

o. was reliance placed on the $1.6 billion valuation for the lease assets?

111. **JURISDICTION *SIMPLICITER* ISSUE**

112. Justice Perell failed to consider the evidence of jurisdiction *simpliciter* primarily because Justice Perell failed to understand the definition of the words “affiliated body corporate” and “control” in the application of the oppression remedy:

a. again a “body corporate” is defined to include a body corporate incorporated under another business corporations act or an Alberta corporation; and

b. the definition of “affiliated body corporate” does not include the word “corporation’ which would exclude an Alberta Corporation.

113. Justice Perell made an error in law in paragraph 51 when he stated “All of the events took place in Alberta” which statement indicates that he overlooked the following evidence:

Connection between the forum and plaintiff's claim

a. Brookfield was ordinarily resident and carrying on business in Toronto, Ontario at the time of the commencement of the proceeding;

b. Tricap was ordinarily resident and carrying on business in Toronto, Ontario at the time of the commencement of the proceeding;

c. Brookfield Lending was ordinarily resident and carrying on business in Toronto, Ontario at the time of the commencement of the proceeding;

d. at all material times Birch Mountain was controlled by Brookfield and Tricap and therefore controlled from Toronto, Ontario;

e. 1439442 is a wholly subsidiary of Tricap, an Ontario corporation and at all material times therefore controlled from Toronto, Ontario;

f. the Convertible Secured Senior Debenture was marketed in Ontario and reliance was placed on various Ontario statutes related to the marketing;

g. the Birch Mountain common shares were listed and posted for trading on the TSX and on the AMEX under the symbol “BMD”;

h. the Birch Mountain Convertible Secured Senior Debentures were conditionally listed and posted for trading on the TSX and on the AMEX under the symbol “BMD.DB”;

i. at all times Brookfield, Tricap and 1439442 were affiliates and Brookfield and Tricap relied on their right to convert the Convertible Debentures to common shares;

j. Birch Mountain applied to the TSX for an exemption from the requirement to obtain shareholder approval for an important amendment to the Loan Agreement on the basis of the financial hardship exemption;

k. the Brookfield and Tricap website is maintained from Toronto and lists the contact as Toronto Gary Franko 416-359-8629 gfranko@brookfield.com;

l. an article in the Financial Post Magazine dated December 02, 2008 confirms the effective control of Birch Mountain resides in Toronto:

   i. "Enter Tricap's co-head, Cyrus Madon. ... After lending Birch Mountain $31.5 million last December, Madon and his team had run out of patience.";

m. another an article in Canadian Business dated August 16, 2010 confirms the effective control of Birch Mountain resides in Toronto:

   i. "Despite the dramatic shift in direction, Brookfield's leadership didn't change much. ... . It's an unusually collegial group, and the most senior people - especially top lieutenants such as Cyrus Madon, ...";

n. the corporation profile report for Brookfield lists 21 directors and officers of which 14 reside in Ontario or 67% of the directors reside in Ontario;

o. the corporation profile report for Tricap lists seven directors and officers of which all seven reside in Ontario or 100% of the directors reside in Ontario;

Unfairness to the plaintiff in not assuming jurisdiction

p. the OSC officials required to prove death spiral stock trading are located in Toronto;

q. the TSE officials required to prove death spiral stock trading are located in Toronto;

r. the TSE officials required to prove misuse of TSX hardship exemption are in Toronto;

s. proof of death spiral stock trading is based on the trading on the TSX;

t. Brookfield and Tricap key management are located in Toronto;

Involvement of other parties to the suit

u. the OSC and their key witnesses are located in Toronto, Ontario;

v. the TSE and their key witnesses are located in Toronto, Ontario;

Willingness to enforce an extra-provincial judgment

w. reciprocal enforcement legislation exists between Alberta and Ontario;

x. reciprocal enforcement legislation exists between Canada and the United States;

Whether the case is interprovincial or international in nature

y. BMD common shares were listed on both TSX and AMEX;

z. the class is most likely both interprovincial and international;

Comity and International Standards

aa. the Memorandum of Understanding between the OSC and the SEC announced June 10, 2010 provided for co-operation between the OSC and the SEC;

bb. the Alberta Stock Exchange and the Alberta Securities Commission does not have a similar arrangement;

cc. in order to prove various issues such as the death spiral stock trading the investigations of the SEC, OSC and the TSX shall be critical;

dd. in *McKenna* the diverse geography was considered and is applicable to this situation:

i. "114 The real and substantial connection test does not require a finding that Ontario has *the most* real and substantial connection. As the cause of action is for prospectus misrepresentation, however, Ontario's connection with the claim as a whole is greater than any other jurisdiction and is both *real* and *substantial.* Having come to Ontario for the purposes of making and closing the public offering, and having listed the shares on the TSX, it seems to me that Gammon can reasonably be taken to have submitted itself to Ontario jurisdiction for the purposes of the determination of its rights and liabilities under the Prospectus."

ee. in McKenna the principle of order and fairness was considered and is applicable:

i. "115 The second issue is whether the principles of order and fairness support the extension of the court's jurisdiction to require class members out of the jurisdiction to either opt out or be bound by the result. Following the example

> given by Sharpe J.A., in *Currie*, where non-resident class members have engaged in a cross-border transaction, acquiring securities of a Canadian company, in Canada, through a Canadian underwriter, they can reasonably expect that their legal rights in relation to that acquisition would be subject to Canadian jurisdiction and, in this case, a jurisdiction with a real and substantial connection to the defendants and the issues. The same could reasonably be said of Class Members in other provinces. For this reason, subject to appropriate safeguards with respect to representation and notice, it is appropriate to certify a class that would include non-residents who made purchases from the underwriters in Canada and under the Prospectus.
>
> appellant's authorities brief, tab 4, page 120

ff. opt out provisions prevent prejudice, section 9 of the CPA sets forth opt out provisions to protect potential members of the class; and

gg. notice provisions prevent prejudice, section 17 of the CPA sets forth an exhaustive notice section to any prejudice to a potential member of the class not receiving notice.

114. ***FORUM CONVENIENS*** **ISSUE**

115. Justice Perell made an error in law in paragraph 51 when he stated "Ms. Bond provided no evidence with respect to *forum conveniens*" which statement indicates that he overlooked the following evidence:

Location of the majority of the parties

a. Brookfield was ordinarily resident and carrying on business in Toronto, Ontario;

b. Tricap was ordinarily resident and carrying on business in Toronto, Ontario;

c. 1439442 was incorporated one day prior to execution of the Pattison Agreement;

d. 1439442 incorporated for the sole purpose of acquiring the asset: and

Location of key witnesses and evidence

e. the OSC's witnesses located in Toronto, Ontario;

f. the TSE's witnesses located in Toronto, Ontario;

g. Brookfield's Mr. Flatt is located in Toronto, Ontario;

h. Tricap's Mr. Madon is located in Toronto, Ontario;

i. Ms Mazurkewich is located in Toronto, Ontario and may be a witness;

j. other journalists may be called as witnesses that reside in Toronto, Ontario;

k. the majority of Brookfield directors reside in Ontario; and

l. all Tricap directors reside in Ontario;

Contractual provisions that specify applicable law or accord jurisdiction

m. most contracts provide for "non-exclusive jurisdiction";

n. not applicable since Class members were not a party to the contractual agreements;

Avoidance of a multiplicity of proceedings

o. other Ontario debenture holders located in Toronto may now commence an action;

p. at this time American counsel are working with Ontario counsel; and

q. only one action is presently contemplated with American counsel;

Applicable law and its weight in comparison to the factual questions to be decided

r. the oppression provisions of the Alberta and Ontario Acts are virtually identical;

Geographical factors suggesting the natural forum

s. no trial issue with real and substantial connection to Alberta;

t. very doubtful that a site inspection will be required;

u. the Receivership Order is not the subject of any procedure to be set aside;

v. PwC is not a party to the action;

Whether declining jurisdiction would deprive the plaintiff of a juridical advantage

w. the proximity of OSC officials and proof of the death spiral stock trading;

x. the proximity to TSE officials and the use of financial hardship exemption;

y. Memorandum of Understanding is between the OSC and the SEC;

z. the stock exchanges are the TSX and AMEX and not the Alberta Stock Exchange.

116. **COST ORDER ISSUE**

117. The learned trial judge failed to properly consider an appropriate cost order and the appellant requested leave to appeal the cost order when issued pursuant to Rule 61.03.1 (17) of the *Rules of Civil Procedure*.

118. In 2007, the OCA in *Dam Investments v. Ontario* commented on the cost issue:

a. "20. The application judge awarded costs against the Minister on a substantial indemnity scale. The respondent concedes in this court that there was no conduct on the part of the Ministry that would justify an award on that scale. That said, this case raised a novel point of statutory interpretation. When awarding costs, the novelty of an issue is a proper consideration both at first instance and on appeal. See Re Canada 3000 [*Hare v. Hare*] (2006), 83 O.R. (3d) 766 (Ont. C.A.) at paras. 9-10. In addition to the novelty of the issue, we note that the positions of both parties were reasonable and there is a public interest in having the relevant statutory provisions clarified. In these circumstances, in our view, it is appropriate that each side bear its own costs. Accordingly, we make no order as to costs, here or below."

Appellant's Authorities Brief, tab 03, page 028

119. **PART V**

120. **Orders Requested**

121. The stay be set aside and the action reinstated.

122. The plaintiff be granted her costs of the jurisdictional motion and of this appeal.

123. **Solicitor's Certificate**

124. John W. McDonald and John W. Findlay certify that (a) an Order under subrule 61.09 (2) of the Rules is not required and (b) estimate the time required by the appellants/plaintiffs' counsel for oral argument is two hours.

125. All of which is respectfully submitted.

126. June 29, 2011

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Schedule A

1.	Oct 15, 1999	*Royal Bank v. Got Electric*	SCC
2.	May 04, 2004	*Regulvar Canada v. Ontario*	OCA
3.	Jun 21, 2007	*Dam Investments v. Ontario*	OCA
4.	Oct 23, 2007	*Murphy v. Stefaniak*	OCA
5.	Feb 02, 2010	*Van Breda v. Village Resort*	OCA
6.	Feb 03, 2010	*Murphy v. Stefaniak*	Div Ct
7.	Mar 16, 2010	*McKenna v. Gammon Gold*	OSC
8.	May 26, 2011	Masterpiece v. Alavida Lifestyles	SCC
9.	current text	TSX Company Manual	TSE
10.	Apr 30, 2010	National instrument 62-103	OSC
11.	Jun 10, 2010	Memorandum of Understanding OSC and SEC	OSC

Schedule B

1. ***Ontario Business Corporations Act*** **Definitions**

2. Definitions 1. (1) In this Act,

"affiliate" means an affiliated body corporate within the meaning of subsection (4);

"body corporate" means any body corporate with or without share capital and whether or not it is a corporation to which this Act applies;

"corporation" means a body corporate with share capital to which this Act applies;

"debt obligation" means a bond, debenture, note or other similar obligation or guarantee of such an obligation of a body corporate, whether secured or unsecured;

"person" includes an individual, sole proprietorship, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, and a natural person in his or her capacity as trustee, executor, administrator, or other legal representative;

"voting security" means any security other than a debt obligation of a body corporate carrying a voting right either under all circumstances or under some circumstances that have occurred and are continuing;

Subsidiary body corporate 1. (2) For the purposes of this Act, a body corporate shall be deemed to be a subsidiary of another body corporate if, but only if, (a) it is controlled by, (i) that other, or (ii) that other and one or more bodies corporate each of which is controlled by that other, or (iii) two or more bodies corporate each of which is controlled by that other; or (b) it is a subsidiary of a body corporate that is that other's subsidiary.

Holding body corporate 1. (3) For the purposes of this Act, a body corporate shall be deemed to be another's holding body corporate if, but only if, that other is its subsidiary.
Affiliated body corporate 1. (4) For the purposes of this Act, one body corporate shall be deemed to be affiliated with another body corporate if, but only if, one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person.

Control 1. (5) For the purposes of this Act, a body corporate shall be deemed to be controlled by another person or by two or more bodies corporate if, but only if,

(a) voting securities of the first-mentioned body corporate carrying more than 50 per cent of the votes for the election of directors are held, other than by way of security only, by or for the

benefit of such other person or by or for the benefit of such other bodies corporate; and

(b) the votes carried by such securities are sufficient, if exercised, to elect a majority of the board of directors of the first-mentioned body corporate. [emphasis added]

3. **Section 604 of the TSX Company Manual**

4. Section 604 of the TSX Company Manual states:

"(a) In addition to any specific requirement for the security holder approval, TSX will generally require security holder approval as a condition of acceptance of a notice under section 602 if in the opinion of TSX, the transaction:

i. materially affects control of the listed issuer; or

ii. provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer and has not been negotiated at arm's length.

If any insider of the listed issuer has a beneficial interest, direct or indirect, in the proposed transaction which differs from other security holders of the same class TSX will regard such a transaction as not having been negotiated at arm's length.

"(e) Upon written application, ... a listed issuer meeting continued listing requirements as set forth in Part VII of this Manual will be exempted from security holder approval requirements if the application is accompanied by a resolution of the listed issuer's board of directors stating that:

i. the listed issuer is in serious financial difficulty;

ii. the application is made upon the recommendation of a committee of board member(s), free from any interest in the transaction and unrelated to the parties involved in the transaction;

iii. the transaction is designed to improve the listed issuer's financial situation"; and

iv. based on the determination of the committee referred to in ii) above, "the transaction is reasonable for the listed issuer in the circumstances.

Listed issuers using this exemption will be required to issue a press release at least five (5) business days in advance of the closing of the transaction disclosing the material terms of the transaction and that the listed issuer has relied upon this exemption. The press release must be cleared with TSX."

5. **National Instrument Number 62-103**

"Definitions (1) In this Instrument"

"acquisition announcement provisions" means the requirement in securities legislation for an offeror to issue a news release if, during a formal bid for voting or equity securities of a reporting issuer by an entity other than the offeror, the offeror acquires ownership of, or control over, securities of the class subject to the bid that, together with the offeror's securities of the class, constitute an amount equal to or greater than the amount specified in securities legislation;

"control" means, for a security

(a) when used in connection with the insider reporting requirements, the takeover bid requirements and related definitions and the early warning requirements, the power to exercise control or direction over the security, or similar term or expression used in securities legislation; and

(b) when used in connection with the control block distribution definition, holding the security, or similar term or expression used in securities legislation;

"effective control" means, for a reporting issuer, the control in fact of the reporting issuer by an entity through the ownership of, or control over, voting securities of the reporting issuer, other than securities held by way of security only;

6. **Ontario Securities Act**

Ontario Securities Act 89. (1) Definitions – In this Part

"offeror" means a person or company who makes a take-over bid, an issuer bid or an offer to acquire and, for the purposes of section 101, includes a person or company who acquires a security, whether or not by way of a take-over bid, issuer bid or offer to acquire;

Ontario Securities Act 89. (1) Definitions – In this Part

"offeror's securities" means securities of an offeree issuer beneficially owned, or over which control or direction is exercised, on the date of an offer to acquire, by an offeror or any person or company acting jointly or in concert with the offer or;".

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