

COURT FILE NUMBER 1401-05797
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF LANNY K. MCDONALD
DEFENDANT BROOKFIELD ASSET MANAGEMENT INC., BROOKFIELD CAPITAL PARTNERS LTD., and HAMMERSTONE CORPORATION
DOCUMENT **AFFIDAVIT**

Clerk's Stamp



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Affidavit of Rick Eng sworn June 19th, 2014

I, Rick Eng, of the City of Vancouver, in the Province of British Columbia, MAKE OATH AND SAY THAT:

1. I am a duly authorized representative of the Defendants. I have personal knowledge of the matters deposed to herein, except where stated to be based on information and belief, and where so stated I verily believe the same to be true.
2. At all material times, I was the Vice-President of the defendant Brookfield Special Situations Partners Ltd., which at all material times was called Tricap Partners Ltd. ("Tricap"). I worked in that capacity with respect to the loans, legal proceedings, and the subsequent court-approved commercial transactions that are the subject of the within Amended Statement of Claim.

Overview

3. I have reviewed the Amended Statement of Claim.
4. This is a putative class action on behalf of persons who owned common shares of Birch Mountain Resources Limited ("**Birch Mountain**" or the "**Company**") from April 1, 2005 to November 5, 2008.
5. The proposed representative Plaintiff pleads that he is a former director and registered shareholder of Birch Mountain.
6. A related proceeding was first commenced on September 22, 2010, in the Ontario Superior Court of Justice (the "**Ontario Court**") as Court File No. CV-10-410910 (the "**Ontario Action**"). As described below, the Ontario Action was stayed pursuant to an Order of the Ontario Court, which was upheld on appeal. The Ontario Action was then transferred and re-filed with a different representative Plaintiff in the Alberta Court of Queen's Bench ("**Alberta Court**") pursuant to a Case Management Order of Madame Justice Strekaf dated April 15, 2014.
7. The Plaintiff has not sued Birch Mountain or its officers and directors, of which he was one. Instead, the Plaintiff has sued two court-appointed transferees of Birch Mountain's property, Hammerstone Corporation ("**Hammerstone**") and Tricap, and Brookfield Asset Management Inc. ("**Brookfield AM**"), the parent company of Tricap.
8. Birch Mountain consented to a Receivership Order (defined below) on November 5, 2008. Birch Mountain is still in receivership.
9. Birch Mountain's assets were transferred to Tricap and Hammerstone pursuant to an Alberta Court mandated and supervised receivership process and an Order of the Alberta Court.
10. The Defendants were never shareholders, nor short sellers, of Birch Mountain.

Nature of Motion

11. I swear this affidavit in support of the Defendants' motion for an Order for Summary Judgment dismissing, or an Order striking, this proposed class action (the "**Action**") on the grounds that it is without merit, is a collateral attack on Decisions and Orders of the Alberta Court, is *res judicata*, and also a frivolous, irrelevant, improper Action that constitutes an abuse of process.

Alberta Proceedings and Receivership Order

12. Tricap was a lender to Birch Mountain under certain loan agreements. Birch Mountain defaulted, and Tricap commenced proceedings in the Alberta Court to enforce its security (the "**Receivership**" or the "**Receivership Proceeding**").

13. Birch Mountain consented to the grant of a receivership order by the Alberta Court. On November 5, 2008, the Honourable Mr. Justice S.J. LoVecchio of the Alberta Court granted a receivership order (the "**Receivership Order**"), a true copy of which is attached as **Exhibit 'A'**. The Receivership Order appointed PricewaterhouseCoopers Inc. as the receiver and manager of Birch Mountain (the "**Receiver**").
14. In January 2009, following a year-long intensive sales process, initially undertaken by Birch Mountain, its officers, directors and advisors and then by the Receiver, and on the recommendation of the Receiver, the Alberta Court authorized the transfer of the assets of Birch Mountain to Tricap and Tricap's subsidiary, Hammerstone, who at the time was named 1439422 Alberta Ltd. ("**143 Alberta**"). A true copy of the Sales Order of the Alberta Court is attached as **Exhibit 'B'**. A true copy of the report of the Receiver is attached as **Exhibit 'C'**.
15. The Amended Statement of Claim in this proceeding challenges the propriety of, and is a collateral attack on, the above-noted Orders of the Alberta Court. In light of the breadth of the pleadings in the Amended Statement of Claim, I discuss the background to the Receivership Proceeding in this affidavit.

Birch Mountain Resources Limited

16. Birch Mountain was incorporated in December 1995 under the Alberta *Business Corporations Act*, and had been headquartered in Calgary, Alberta since that time to the date of the Receivership.
17. As of 2003, Birch Mountain focused its business on the development of a limestone quarry in the Athabasca region of Northern Alberta.

Birch Mountain Financial Reporting

18. Between 1995 and 2008, Birch Mountain had minimal revenues and incurred operating losses every year. Birch Mountain's main source of funding was from the issuance of equity and debt. Attached as **Exhibit 'D'** is the Birch Mountain Management Discussion and Analysis ("**MD&A**") for the period ended August 12, 2008 in this regard.
19. Between 2004 and 2008, Birch Mountain issued and filed numerous public disclosures including MD&A, financial statements and press releases confirming its financial predicament and disappointing operating and financial results.
20. Birch Mountain's public disclosure included cautionary language regarding the inherent risks and uncertainties of the forward-looking statements contained therein. See for example, **Exhibit 'D'**.

Brookfield Bridge Facility

21. On March 30, 2007, Birch Mountain negotiated a \$15.5 million senior secured one-year term credit facility with Brookfield Bridge Lending Fund Inc. ("**Brookfield BL**") (the "**Brookfield Bridge Facility**").
22. The Brookfield Bridge Facility resulted from the efforts of Birch Mountain's agent, Acumen Capital, to secure financing for the Company. During the negotiations, Birch Mountain advised that it needed financing to bridge towards an expected significant ramp up in sales from its operations (5,925,000 tonnes of budgeted sales for April through December 2007). Ultimately, however, the Company achieved sales of only approximately 750,000 tonnes, while at the same time ramping up costs and incurring losses.
23. Birch Mountain committed several Events of Default under the Brookfield Bridge Facility. Specifically, in both May and June 2007, Birch Mountain breached its covenant to maintain a minimum shareholders' equity of not less than \$30,000,000. Birch Mountain requested that Brookfield BL waive the Event in Default. Brookfield Agreed. Attached hereto and marked as **Exhibit 'E'** is a true copy of the Brookfield BL waiver dated August 27, 2007, in that regard.
24. Birch Mountain committed the same Event of Default in July and August 2007, and the additional Event of Default of failing to maintain a consolidated working capital ratio of not less than 1.0 to 1.0. Again, Birch Mountain asked Brookfield BL to waive the Events of Default and, again, Brookfield BL agreed. Attached hereto and marked as **Exhibits 'F'** and **'G'** are true copies of the Brookfield BL waivers dated September 27, 2007, and November 14, 2007, in that regard.
25. In addition to asking that Brookfield BL waive the Events of Default, Birch Mountain also asked Brookfield BL to release additional funds under the Brookfield Bridge Facility. Brookfield BL agreed, allowing Birch Mountain to draw down an additional \$4 million on or about September 18, 2007. Birch Mountain announced this additional draw in a press release and in a Material Change Report, both dated September 18, 2007, which were posted on Sedar, and are attached hereto as, respectively, **Exhibits 'H'** and **'I'**
26. Birch Mountain further explained the situation with Brookfield BL in its Third Quarter 2007 Financial Report dated September 30, 2007, which advised, among other things, that Birch Mountain was in violation of certain financial covenants under the Brookfield Bridge Facility, that Brookfield BL had waived the violations, and that Brookfield BL had allowed Birch Mountain to draw down another \$4 million on the facility. Attached hereto and marked as **Exhibit 'J'** is an excerpt from the Third Quarter 2007 Financial Report in that regard.
27. Ultimately, Birch Mountain advised Brookfield BL that Birch Mountain was falling short on its business plan and would not be able to repay the Brookfield Bridge Facility. Following a series of discussions and negotiations, Brookfield BL's

affiliate Tricap, agreed to provide a new \$31,500,000.00 loan to repay the Brookfield BL loan and provide Birch Mountain with additional capital, all as described in detail below.

Birch Mountain Special Committee

28. On September 20, 2007, Birch Mountain announced that it had established an independent special committee of the Board of Directors, and that the special committee would explore strategic alternatives for the Company with the assistance of RBC Dominion Securities Inc. ("**RBCDS**") as financial advisor. A true copy of the press release is attached as **Exhibit 'K'**.
29. Birch Mountain's press release specifically stated that: "[t]here can be no assurances that any of these activities will result in consummation of an agreement or transaction", and included the typical cautionary language regarding forward-looking statements.

The Tricap December 2007 Debenture

30. In the context of their inability to repay the Brookfield BL loan and the announced strategic alternatives process, Birch Mountain proposed that Tricap provide certain credit facilities in order to fund various corporate obligations going forward. Tricap agreed, subject to the loan being premised on covenants that Birch Mountain would perform to an agreed standard. The agreements governing the loan were as follows.
31. On December 21, 2007, Tricap subscribed for a \$31,500,000.00 convertible secured senior debenture (the "**Tricap December 2007 Debenture**"). Attached as **Exhibits 'L'** and **'M'** are the Birch Mountain press release dated December 24, 2007, in that regard, and a copy of the Tricap December 2007 Debenture.
32. The subscription was further documented by a loan agreement, also dated December 21, 2007 (the "**Tricap Loan Agreement**"). Attached as **Exhibit 'N'** is a copy of the Tricap Loan Agreement.
33. **The Tricap December 2007 Debenture and the Tricap Loan Agreement were posted on Sedar on January 9, 2008, and were, therefore, available to Birch Mountain shareholders.**
34. As security for the indebtedness, Birch Mountain granted to Tricap security in all of the Company's present and after-acquired property by way of a General Security Agreement (not attached).
35. Birch Mountain drew down the full sum of \$31,500,000.00 under the Tricap December 2007 Debenture.
36. The Birch Mountain Board of Directors approved the Tricap December 2007 Debenture and also solicited shareholder approval of same in a Notice of

Meeting and Management Information Circular dated April 25, 2008 (the "**April 2008 Notice**"), a true copy of which is attached as **Exhibit 'O'**.

37. On May 30, 2008, Birch Mountain's shareholders approved the Tricap December 2007 Debenture at a shareholders' meeting. Attached as **Exhibit 'P'** is a Birch Mountain Report of Voting Results dated June 3, 2008.

Alberta Receivership

38. In June and July 2008, Birch Mountain defaulted under the Tricap December 2007 Debenture. Attached as **Exhibits 'Q'** and **'R'**, respectively, are Birch Mountain press releases dated July 3 and 31, 2008, in that regard.
39. Tricap wrote to Birch Mountain about the default and engaged in discussions with Birch Mountain and its financial advisors.
40. On August 1, 2008, Tricap and Birch Mountain entered into an Acknowledgement, Waiver and Amending Agreement (the "**Waiver Agreement**") pursuant to which Tricap waived Birch Mountain's defaults and increased the principal amount of indebtedness under the Tricap December 2007 Debenture. A true copy of the Waiver Agreement is attached as **Exhibit 'S'**.
41. As stated in the Waiver Agreement, Birch Mountain's defaults were acknowledged to include insufficient shareholders equity, insufficient working capital, failure to pay interest and failure to pay trade creditors, all in contravention to the Tricap Loan Agreement.
42. The TSX waived the requirement for shareholder approval of the Waiver Agreement under its *Financial Hardship Exemption* provisions. The recital to the Waiver Agreement and Birch Mountain's press release of August 27, 2008 stated, among other things, that the Company was experiencing serious financial difficulty. Birch Mountain's public disclosure further stated: "The amendments to the Debenture will accommodate the continuous pursuit of an immediate sale of the Company or its assets or additional equity financing to unlock the maximum value for its shareholders as previously announced on July 23, 2008." True copies of Birch Mountain's press releases of August 27, and September 12, 2008 and Tricap's press release of September 19, 2008 are attached as **Exhibit 'T'**.
43. On October 31, 2008, Tricap delivered to Birch Mountain a demand for repayment and a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*. Birch Mountain subsequently executed a waiver of the minimum notice period, a copy of this Notice and Waiver is attached as **Exhibit 'U'**.
44. On November 3, 2008, Birch Mountain announced that it had received a demand from Tricap, and that it expected Tricap to commence enforcement proceedings that week. A copy of the press release is attached as **Exhibit 'V'**.

45. On November 4, 2008, Tricap commenced an action against Birch Mountain in the Alberta Court, and brought an application to appoint the Receiver. Birch Mountain consented to the appointment and did not defend. The Alberta Court appointed the Receiver, as noted above. See **Exhibit 'A'**.

Unsecured Convertible Debentures

46. On November 27, 2008, after the issuance of the Receivership Order, Tricap entered into an Assignment and Option Agreement (the "**Assignment and Option Agreement**") with 143 Alberta, and Great Pacific Capital Corp. ("**GPCC**"), a company owned and controlled by James Pattison, who was a Board Member of Brookfield AM. A true copy of the Assignment and Option Agreement dated November 27, 2008 (the "**Assignment and Option Agreement**"), is attached as **Exhibit 'W'**.
47. Pursuant to the Assignment and Option Agreement, Tricap acquired \$29,280,000.00 aggregate principal amount of 6.0% convertible unsecured subordinated debentures of Birch Mountain (the "**Subordinate Debentures**").
48. On December 10, 2008, Tricap filed an Early Warning Report announcing that it had acquired the Subordinate Debentures. A true copy of the Early Warning Report is attached as **Exhibit 'X'**.
49. The Assignment and Option Agreement related to Birch Mountain indebtedness, not shareholding or equity interests.
50. In return for the assignment of debt, GPCC obtained an option to acquire a participating interest in Hammerstone. **This Option has now expired without being exercised by GPCC.**
51. **The Subordinated Debentures were subordinated to the Tricap December 2007 Debenture security, but in priority to any Birch Mountain shareholder or equity claims.**
52. **The Subordinate Debentures were not included in the Tricap Offer and were not reduced or affected by the Sales Order. The claims under the Subordinated Debentures remain outstanding as against Birch Mountain. See **Exhibit 'C'**.**

Alberta Court Approves Sale of Birch Mountain's Assets

53. Following up on the RBCDS sales process, the Receiver attempted and leveraged the RBCDS sales process in order to find buyers for Birch Mountain's assets. On January 5, 2009, the Receiver filed a report together with a Notice of Motion for an Order approving an offer made by Tricap to purchase all of Birch Mountain's assets in exchange for a reduction in Birch Mountain's debt under the Tricap December 2007 Debenture (the "**Tricap Offer**"). See **Exhibit 'C'**.

54. The Receiver's report described a year-long intensive sale process which had begun on or about January 1, 2008, when Birch Mountain had retained RBCDS. By February 2008, RBCDS had contacted 98 parties; only 8 had executed a confidentiality agreement; and none had provided an expression of interest. RBCDS had commenced a second sale process in July 2008, contacting 48 parties; only 2 executed a confidentiality agreement; but again, there had been no expressions of interest. **The Receiver concluded that RBCDS had conducted a thorough sales process.**
55. The Receiver's motion was heard on January 8, 2009. As noted above, the Court granted an Order vesting all of Birch Mountain's assets free and clear, subject to the interest of one other party (i.e. Canadian Western Bank), to Tricap or its designated nominee, at the time 143 Alberta, now Hammerstone. See **Exhibit 'B'**. There was no appeal.

Ontario Proceedings

56. This Action was originally commenced in the Ontario Court with a different proposed representative plaintiff. The Defendants moved to have the Ontario Action stayed on the grounds of jurisdiction, and were successful in that regard before both the Ontario Superior Court of Justice and the Ontario Court of Appeal. Attached hereto as **Exhibits 'Y'** and **'Z'** in that regard are decisions of the Ontario Courts dated, respectively, April 26, 2011 and November 16, 2011.
57. While the decisions in Ontario stemmed from jurisdiction arguments, the Ontario Courts made findings in respect of the former plaintiff's lack of standing as a complainant under the comparable oppression provisions of the Ontario *Business Corporations Act*.
58. In a decision dated April 26, 2011, Justice Perell held:

[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.

[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).

[62] In my opinion, it is not the case that Birch Mountain is an Ontario corporation and the Defendants are not affiliates of Birch Mountain...

59. These findings were upheld by the Ontario Court of Appeal in Court File No. C53770, in a decision dated November 16, 2011:

We agree with the motion judge that on this record Birch Mountain could not be an affiliate of Tricap simply because Tricap had an unexercised conversion right to obtain voting shares.

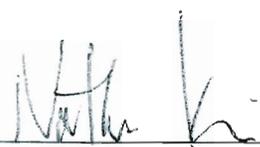
60. Leave to appeal to the Supreme Court of Canada was denied.

Conclusion

61. At no time did Tricap or Hammerstone exercise any right to convert any Birch Mountain debt into Birch Mountain shares. Again, none of the Defendants have ever owned any shares, or been a short seller, of Birch Mountain.
62. The Defendants have no knowledge of and did not participate in any "death spiral" trading or any trading in Birch Mountain shares.
63. The Defendants did not file any misleading information or affidavits with the Alberta Court, securities regulators, or otherwise, and did not withhold any pertinent information from the Alberta Court in the Receivership Proceeding, or otherwise.
64. As of the date of this affidavit, Birch Mountain is still in receivership, and its affairs are still being managed by the Receiver. The Receiver filed its last report on May 14, 2013. A true copy of that report is attached as **Exhibit 'AA'**.
65. I do verily believe that the within Amended Statement of Claim is a frivolous, irrelevant and improper claim that constitutes an abuse of process as an improper collateral attack on prior Orders of the Alberta Court.

66. Based on the foregoing, there is no merit to the claim, or any part of it, under the Amended Statement of Claim.

SWORN or AFFIRMED BEFORE ME)
on June, 19, 2014,)
at Vancouver, British Columbia.)



A Notary Public in and for the)
Province of British Columbia)



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