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COURT FILE NUMBER 1401-05797

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF(S) LANNY K. McDONALD

DEFENDANT(S) BROOKFIELD ASSET MANAGEMENT INC.,
BROOKFIELD SPECIAL SITUATIONS
PARTNERS LTD., HAMMERSTONE
CORPORATION



DOCUMENT Transcript of Oral Questioning of
DAVID PETER JOHNSON
(on affidavit sworn July 15, 2014)

HELD AT Norton Rose Fulbright Canada LLP,
Calgary, Alberta

DATE August 19, 2014



1 For the Plaintiff

2 J. McDonald, Esq.
3 McDonald & Ross
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5
6 For the Defendants

7 H. A. Gorman, Q.C.
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10 Court Reporter
11 Kaeli Campbell, CSR(A)
Amicus Reporting Group
403-266-1744

12 _____
13 (Proceedings commenced at 9:01 a.m.)

14 DAVID PETER JOHNSON, sworn, questioned by Mr. Gorman:

15 Q. Could you please state your name for the record, sir?

16 A. David Johnson.

17 Q. And are you the David Johnson who swore an affidavit in
18 Alberta Court File 1401-05797, sworn July 15th, 2014?

19 A. Yes, I am.

20 Q. And you took an oath prior to swearing that affidavit
21 as to the truthfulness of its contents?

22 A. Correct.

23 Q. And you took an oath today with respect to your
24 intention to tell the truth with respect to any
25 questions during this questioning?

26 A. Correct.

27 Q. And both of those oaths are binding on your conscience,

1 sir?

2 A. They are.

3 Q. Now, I understand from your affidavit that you are a
4 computer investigator retained on behalf of the
5 plaintiff, Lanny K. McDonald, with respect to these
6 proceedings?

7 A. Correct.

8 Q. And can you very quickly give me your educational
9 background, sir?

10 A. I attended university in South Africa reading economics
11 and computer science.

12 Q. And did you obtain any degrees in those areas, sir?

13 A. No.

14 Q. Okay. Do you have any legal training?

15 A. No. I sub majored in law at university.

16 Q. Again, without obtaining a degree?

17 A. Correct.

18 Q. Do you have any accounting training?

19 A. No.

20 Q. Do you have any training with respect to financial
21 analysis or being a financial advisor?

22 A. No.

23 Q. And I understand your role with respect to this matter
24 is as a computer investigator, can you describe to me
25 what that has entailed to date?

26 A. Looking at various records, documents supplied via
27 computer, and various other documents supplied via the

1 Internet and various parties.

2 Q. And by "parties," do you mean Mr. McDonald?

3 A. Lanny McDonald.

4 Q. Lanny McDonald.

5 A. It gets confusing. Lanny McDonald has supplied some
6 and various other parties have supplied some documents.

7 We came into -- or I got -- was delivered a hard drive
8 some two months ago, which was apparently Mr. Rowe's
9 backup hard drive.

10 Q. R-O-W-E's.

11 A. Which contained some data. It was an Apple hard drive
12 which we haven't really done any great in depth
13 analysis on it, but it does appear that a lot of data
14 was deleted before it was handed over, so presumably it
15 will need data recovery service to extract whatever
16 data is missing.

17 Q. Okay. Now, sir, there are various definitions in
18 paragraphs 2 through 31 of your affidavit. I'll
19 attempt to use those examinations with some
20 distinction, and you'll understand that, sir?

21 A. Mm-hmm.

22 Q. Okay. You're going to have to say "yes" or "no", sir.

23 A. Yes.

24 Q. And the first definition I'm going to change, based on
25 the confusion you've just mentioned, is I'll try to
26 refer to the plaintiff as "the plaintiff McDonald" or
27 "Lanny McDonald", to distinguish him from other

1 McDonalds on this file even though he is defined as
2 "McDonald" in your pleadings; you understand that?

3 A. Yes.

4 Q. Now, sir, my understanding is that you were never a
5 shareholder of Birch Mountain?

6 A. That is correct.

7 Q. You never were a creditor of Birch Mountain?

8 A. That's correct.

9 Q. You've never attended a Birch Mountain shareholder
10 meeting?

11 A. That's correct.

12 Q. You've never attended at the Birch Mountain or
13 Hammerstone site?

14 A. That's correct.

15 Q. Have you ever spoken to any representatives of any of
16 the defendants?

17 A. Telephonically.

18 Q. Okay. Do you understand the defendants are Brookfield
19 and Tricap?

20 A. Oh, no, not the defendants. I've spoken to various
21 plaintiffs.

22 Q. Okay. Well, there is one plaintiff, sir, that's Lanny
23 McDonald?

24 A. Yeah, I understand that.

25 Q. Okay.

26 MR. McDONALD: He has spoken with Russ Gerrish,
27 who I think was involved with the receiver and the

1 numbered company Hammerstone at one time.

2 Do you recall that?

3 A. Yes.

4 Q. MR. GORMAN: Okay. Let's worry about answering
5 my questions instead of Mr. John McDonald's questions
6 for the time being, all right?

7 A. All right.

8 Q. Have you ever spoken to anyone from the Pattison Group?

9 A. No.

10 Q. Have you ever spoken to anyone from the court-appointed
11 receiver, PricewaterhouseCoopers?

12 A. No.

13 Q. Have you ever spoken to anyone from the Ontario
14 Securities Commission?

15 A. No.

16 Q. Have you ever spoken to anyone from the U.S. Securities
17 and Exchange Commission?

18 A. No.

19 Q. Have you ever spoken to anyone from the Toronto Stock
20 Exchange?

21 A. No.

22 Q. Have you ever spoken to anyone from the American Stock
23 Exchange?

24 A. No.

25 Q. And my understanding is that you have been a consultant
26 to Mr. John McDonald, plaintiff counsel, since
27 approximately the fall of 2010?

- 1 A. That's correct.
- 2 Q. And that would've been your first involvement with the
3 Birch Mountain matter?
- 4 A. Correct.
- 5 Q. Have you ever met Lanny McDonald?
- 6 A. Yes.
- 7 Q. Okay. And when did you meet Mr. McDonald?
- 8 A. Last evening.
- 9 Q. Was that the first time you've met with him?
- 10 A. That's correct.
- 11 Q. Had you corresponded or spoken to Mr. McDonald prior to
12 last evening?
- 13 A. Yes, very briefly.
- 14 Q. Okay. And when would that have been?
- 15 A. Probably about three weeks ago.
- 16 Q. Had you spoken to Mr. McDonald prior to the execution
17 of your affidavit? And, sorry, Lanny McDonald.
- 18 A. Yeah. I'm not entirely sure of the date when I first
19 spoke to him.
- 20 Q. Okay. Are any of the contents of your affidavit based
21 upon your conversations with Lanny McDonald?
- 22 A. No, not particularly.
- 23 Q. Now, you've mentioned a Mr. Gerrish, can you tell me
24 who he is that you've spoken to?
- 25 A. He was, I understand, the operations manager at Birch
26 prior to receivership.
- 27 Q. Okay. And when did you speak to Mr. Gerrish?

- 1 A. I spoke with him as well yesterday evening.
- 2 Q. Okay. And that --
- 3 A. Well, I met him for the first time.
- 4 Q. Okay. You met him for the first time yesterday
- 5 evening, had you spoken to him prior to --
- 6 A. Yes.
- 7 Q. Prior to your execution of the affidavit?
- 8 A. Possibly. I'm not certain of the exact date when I
- 9 first spoke with him.
- 10 Q. Is anything contained in your affidavit based upon your
- 11 conversations with Mr. Gerrish?
- 12 A. No, not particularly.
- 13 Q. Is anything in your affidavit based on any
- 14 conversations with any person related to the Birch
- 15 Mountain matter, be it shareholder, officer, director,
- 16 employee?
- 17 A. No, I don't believe so. The affidavit mostly comes
- 18 from the documentation.
- 19 Q. The documents that you've attached to the affidavit and
- 20 your interpretation of them is what your affidavit is?
- 21 A. Yes.
- 22 Q. The documents that the Court will have in front of it
- 23 to read and interpret on its own; is that fair?
- 24 A. You're talking about these documents here?
- 25 Q. Right. Your exhibits and Mr. Eng's exhibits are the
- 26 basis for the contents of your affidavit?
- 27 A. Correct.

1 Q. And those documents, you understand, are going to be
2 before the Court in these proceedings?

3 A. Absolutely.

4 Q. Now, sir, am I correct in my understanding that your
5 compensation will be a percentage of any fee that your
6 counsel -- that counsel for Mr. McDonald recovers?

7 A. Correct.

8 Q. Now, do you understand that the plaintiff, Lanny
9 McDonald, is resident here in Calgary?

10 A. Yes, I do.

11 Q. When you met him last night, did you understand or come
12 to learn that he could speak the English language?

13 A. Yes, he can.

14 Q. Okay. Were you aware of any impediment or infirmity
15 that would've prevented him from filing an affidavit in
16 these proceedings?

17 A. Not to my knowledge.

18 Q. In paragraph 4 of your affidavit you reference that
19 Lanny McDonald is a former director of Birch Mountain;
20 do you see that, sir?

21 A. Yes, I do.

22 Q. Do you know for what period of time?

23 A. I don't know the time.

24 Q. Okay. Do you know if he was a director from 1995
25 through to the date of receivership?

26 A. That, I do not know.

27 Q. Okay. You reference that he is a shareholder. Do you

1 have an understanding of when he acquired any shares?

2 A. No, I don't.

3 Q. Do you understand the number of shares that he held?

4 A. No, I don't.

5 Q. Do you have an understanding that it was less than 1
6 percent?

7 A. No.

8 Q. You mentioned that he is an unsecured trade creditor,
9 can you tell me the amount of that?

10 A. I believe that was \$19,000.

11 Q. Okay. And do you understand that that was with respect
12 to fees to be paid for various management meetings and
13 directors meetings he attended?

14 A. I do not know what it was for.

15 Q. Sir, I'm showing you a notice of meeting and management
16 information circular for a meeting to be held on May of
17 2005. Is that something that you had seen in your
18 review of the Birch Mountain records? And I'm putting
19 the witness to reference page 9, the reference to Lanny
20 K. McDonald having been a director since 1995, and to
21 assist in that regard.

22 A. Yeah. Yes, I see that.

23 Q. Sir, does that assist you in your understanding that
24 Mr. McDonald had been a director since 1995?

25 A. Yes, it did.

26 Q. And that he held at that point in time 171,666 shares,
27 which represented 0.3 percent of the shares issued at

1 that point in time?

2 A. That's what is on this document, correct.

3 Q. I would like you to undertake to follow up with
4 Mr. McDonald and tell me if either of those dates or
5 numbers are incorrect; will you do that, sir?

6 A. Yes.

7 Q. Don't worry about taking notes, sir, we'll send you a
8 transcript, and it will all be laid out easily for you.

9 A. Thank you.

10 Q. Thank you.

11 UNDERTAKING NO. 1 - To follow up with
12 Mr. McDonald and advise if the dates
13 and numbers in the following statement
14 are incorrect: Mr. McDonald had been a
15 director since 1995 and that he held at
16 that point in time 171,666 shares which
17 represented 0.3 percent of the shares
18 issued at that point in time.

19 MR. McDONALD: Mr. Gorman, can we keep this copy?

20 MR. GORMAN: Certainly.

21 Q. MR. GORMAN: Now, you do understand that
22 Mr. McDonald, Mr. Lanny McDonald was an officer in 2007
23 and 2008?

24 A. Yes.

25 Q. So he would've been a director who approved the
26 agreements with Brookfield Bridge Lending and then
27 subsequently with Tricap?

1 A. Yes.

2 Q. He was a director who approved the amendment of the
3 Tricap 2007 debenture?

4 A. I believe so, yes.

5 Q. He was one of the directors who unanimously recommended
6 the shareholders to approve the Tricap 2007 debenture
7 at the special shareholders meeting in 2008?

8 A. Yes.

9 Q. And he was one of the directors who consented to the
10 early enforcement and approved the appointment of the
11 receiver in November of 2008?

12 A. I have not seen a copy of the early enforcement, but he
13 was certainly a director at that time.

14 Q. Now, do you understand that Birch Mountain had retained
15 various advisors before and during the time of loans or
16 negotiations with Brookfield Bridge or Tricap?

17 A. Yes.

18 Q. Okay. And that included the law firm of Lawson
19 Lundell, including Mr. John Houghton, H-O-U-G-H-T-O-N?

20 A. Yes.

21 Q. And you knew Mr. Houghton was also an officer of the
22 company? I believe he was the secretary?

23 A. I was not aware of that.

24 Q. Okay. But you knew Mr. Houghton was advising?

25 A. Correct.

26 Q. Did you also know that Borden Ladner Gervais law firm
27 was advising Birch Mountain through 2007/2008?

- 1 A. I was familiar with them advising. I thought they were
2 the securities advisors.
- 3 Q. Okay. Did you also know if they involved a gentleman
4 named Patrick McCarthy, Q.C. who is an insolvency
5 lawyer?
- 6 A. No, I don't particularly know. I haven't come across
7 that name.
- 8 Q. Okay. Did you know that at one of your exhibits there
9 was a reference to Mr. Houghton having contacted David
10 Mann from the Dentons Firm?
- 11 A. Yes, I've seen that.
- 12 Q. Okay. And do you know that David Mann is an insolvency
13 lawyer?
- 14 A. Yes.
- 15 Q. And they were one of the advisors prior to the
16 receivership and the consent to the receivership?
- 17 A. I'm not sure certain of that. I was never able to
18 ascertain whether David Mann was actually retained.
- 19 Q. Okay. You do recall one of your exhibits included
20 Mr. Houghton saying he had briefed David Mann?
- 21 A. Yes, but nothing came out of that.
- 22 Q. Okay. We do know that RBC Capital Markets, who we'll
23 just call "RBC", were retained by the company?
- 24 A. Yes.
- 25 Q. Okay. Advising whilst they were in negotiations with
26 Brookfield and Tricap and leading up to the
27 receivership?

- 1 A. Yes.
- 2 Q. Okay. And that included Kent Ferguson. That's not a
3 name you recognize?
- 4 A. Kent Ferguson, yeah, I've seen the name.
- 5 Q. We might see it in some documents when we do a page
6 flip in a bit.
- 7 A. Okay.
- 8 Q. Do you know if it also included Richard Grudzinski?
- 9 A. Yes, that name is also familiar.
- 10 Q. Okay. Do you know Mr. Grudzinski's background?
- 11 A. No, I don't.
- 12 Q. Do you know that he was an insolvency practitioner
13 doing insolvency and recovery at KPMG before he went to
14 RBC?
- 15 A. I was unaware of that.
- 16 Q. All right. I'm going to ask you -- do you have
17 Mr. Eng's affidavit there as well?
- 18 MR. McDONALD: Yes.
- 19 Q. MR. GORMAN: Okay. And I'll be flipping back
20 and forth because some of Mr. Eng's affidavit exhibits
21 made it to yours and some didn't.
- 22 A. Okay.
- 23 Q. So I'll try to use your affidavit where I can, but this
24 is one that didn't. So I'm looking at Exhibit 'M',
25 okay. So do you have Exhibit 'M' from Mr. Eng's in
26 front of you, please?
- 27 MR. McDONALD: Yes.

1 A. Got it.

2 Q. MR. GORMAN: And this is the senior secured
3 convertible debenture between Birch Mountain and
4 Tricap?

5 A. Yes.

6 Q. And you understand that Birch Mountain entered into
7 this as an arm's length party to Tricap?

8 A. Yes.

9 Q. The directors, including Lanny McDonald, approved Birch
10 Mountain entering into this debenture?

11 A. Yes.

12 Q. And the directors, including Lanny McDonald,
13 unanimously recommended this to the shareholders?

14 A. Yes.

15 Q. And if we look at Exhibit 'O' to Mr. Eng's affidavit,
16 which is also Exhibit 17 to yours, which is easier for
17 you to flip to, there is a notice of meeting and
18 management information circular for the meeting to be
19 held on May 30th, 2008. That is one of the documents
20 you've reviewed in your investigations, sir?

21 A. Yes.

22 Q. Okay. And do you understand from this that -- I'm
23 looking at page 22 of the notice, which is page 246 in
24 your exhibit. You see, sir, in the paragraph with the
25 bold writing that: (as read)

26 The board has determined it is in the
27 best interest of the corporation for the

1 shareholders to approve the private
2 placement of the convertible debenture.

3 A. Yes.

4 Q. And: (as read)

5 With regard to the ability of Tricap to
6 convert the entire principal amount
7 thereof and unanimously recommend that
8 the shareholders vote in favour of the
9 resolution set forth before.

10 A. Yes.

11 Q. That is what the plaintiff, Lanny McDonald, and the
12 other directors recommended and advised the
13 shareholders with respect to the 2007 Tricap debenture?

14 A. Yes.

15 Q. And was this a document provided to the shareholders in
16 conjunction with what's in your affidavit that you
17 sometimes refer to as a full, true, and plain
18 disclosure?

19 A. Yes.

20 Q. This is Lanny McDonald and the other directors giving
21 full, plain, and true disclosure and the recommendation
22 to the shareholders?

23 A. Yes.

24 Q. And do you understand that following that report and
25 that recommendation there was a shareholders meeting?

26 A. What tab is that at?

27 Q. If you look at tab 'P', there is a report of voting

1 results?

2 A. Okay. Yes.

3 Q. Okay. And do you understand that -- well, at 2(ii),
4 Lanny McDonald was again among the slate --

5 A. Yes.

6 Q. -- of directors elected?

7 You have to let me finish the questions. It will
8 help the transcript read a little easier, okay.

9 A. Sorry.

10 Q. Okay. And do you also understand that 94 percent of
11 the votes cast voted in favour of the convertible
12 debenture issued to Tricap Partners Ltd.?

13 A. Yes.

14 Q. Do you know if Lanny McDonald voted in favour of that
15 resolution?

16 A. No.

17 Q. You don't know, or he voted no?

18 A. I don't know.

19 Q. But you do know he was one of the directors --

20 A. Yes.

21 Q. -- unanimously recommending it?

22 Okay. With respect to the notice of information
23 for the meetings, so I'm flipping back to document 'O',
24 can you confirm you've reviewed it, and there are no
25 representations from Tricap with respect to the meeting
26 and the vote?

27 A. Can you repeat the question?

1 Q. Can you confirm that there are no representations by
2 Tricap in the full, plain, and true disclosure
3 disclosed by Birch Mountain to the shareholders?

4 MR. McDONALD: Howard, Mr. Gorman, we're going to
5 have to read the document because we are aware of some
6 language in one of the documents, you know, that may
7 influence our answer, but we'll take that under
8 advisement.

9 Q. MR. GORMAN: Okay. So you'll review document
10 'O' and identify any representations by Tricap with
11 respect to the shareholder vote and recommendations
12 therein; is that right, sir?

13 A. Yes.

14 UNDERTAKING NO. 2 - To review document
15 'O' and identify any representations by
16 Tricap with respect to the shareholder
17 vote and recommendations therein -
18 TAKEN UNDER ADVISEMENT

19 Q. MR. GORMAN: And you agree there was no
20 references to a seven-year investment by Tricap?

21 A. In this document?

22 Q. Right.

23 A. No, I don't see that in this document.

24 Q. Okay. There was no references to TriCap's website or
25 code of ethics?

26 A. Not in this document to my recollection.

27 Q. Okay. Do you also recall that in the debenture itself

1 there was no references to a seven-year horizon or
2 TriCap's code of ethics or what they posted on their
3 website? It wasn't incorporated in the loan agreement
4 or debenture?

5 A. Not from my recollection.

6 Q. Okay. And the obligations with respect to Tricap were
7 as set out in the convertible debenture and the loan
8 agreement, that is what the shareholders were being
9 told?

10 A. That's what is in the agreement, yes.

11 Q. And that's what Lanny McDonald and the other directors
12 negotiated for, right?

13 A. That's what they signed.

14 Q. Okay. Now, do you understand from reviewing the Tricap
15 secured convertible debenture and what the shareholders
16 were told at the notice of the meeting that Tricap had
17 a right, but not an obligation, to convert its debt
18 into equity?

19 A. Yes, I did.

20 Q. The money was being advanced as a loan that was secured
21 where Tricap had a right to convert?

22 A. Yes.

23 MR. McDONALD: Excuse me. I need to correct
24 that. It was not a loan. It was an investment.

25 Mr. Johnson, could you think on that question and
26 if you want to rephrase it, please do so.

27 MR. GORMAN: Mr. John McDonald, if you want to

1 take a Bible in your hands and swear an affidavit, you
2 can start giving evidence; short of that, you cannot.

3 MR. McDONALD: I want your questions phrased
4 fairly and directly. You used the word "loan," and you
5 know it was an investment. Stop that behaviour and
6 stop it now.

7 Do you want to rephrase your question,
8 Mr. Johnson?

9 MR. GORMAN: Mr. Johnson is not asking
10 questions.

11 MR. McDONALD: His answer.

12 A. Yeah, I recall it being an investment.

13 Q. MR. GORMAN: You recall it because your lawyer
14 tried advising you of that in the last 30 seconds.
15 What is it called?

16 A. There are a number of documents here that refer to it
17 as -- to Tricap as investing.

18 MR. McDONALD: Don't worry about looking them up.
19 He is asking the questions.

20 A. Mountain ...

21 Q. MR. GORMAN: Okay. Sir, can you refer to
22 Exhibit 'N' in Mr. Eng's affidavit, which is also
23 included in paragraph 10 of yours, whichever you
24 prefer?

25 A. Paragraph 10.

26 Q. Okay. Sir, do you understand this to be the agreement
27 negotiated between Tricap and Birch Mountain for which

1 the convertible debenture was provided as security?

2 A. Yes.

3 Q. And would you be good enough to read me the title of
4 the document on the top of the first page?

5 A. (As read):

6 This loan agreement is dated with effect
7 date of 21st day of September, 2007.

8 Q. Okay. And would you be good enough to flip to page 92
9 of the agreement, which is the last page before the
10 next tab?

11 A. Yes, sir.

12 Q. I think 92 should be the signature page?

13 A. Oh, yes.

14 MR. McDONALD: I guess we don't have a signature
15 page here.

16 Q. MR. GORMAN: Okay. So I'm showing you from
17 Mr. Eng's affidavit the final page, which is the
18 signature page. Do you see that that was signed by
19 Birch Mountain?

20 A. Yes, I do.

21 Q. And that was with the authority and the direction of
22 the directors, including Lanny McDonald?

23 A. Yes.

24 Q. And, sir, the previous page, which is page 91, included
25 section 9.18 which is an entire agreement clause?

26 A. Yes, sir.

27 Q. And that clause was in there when Mr. Rowe with the

1 direction of the directors, including Lanny McDonald,
2 executed the agreement?

3 A. Yes.

4 Q. Now, sir, in your affidavit, switch back to your
5 affidavit, there are Exhibits 1 through 4?

6 A. Yes.

7 Q. Which include references to an AMEC, A-M-E-C, report
8 prepared for Birch Mountain?

9 A. Yes.

10 Q. And this report is the basis for various references in
11 your affidavit to a 1.6 billion before tax or 1.09
12 value after tax that is referenced on occasion in your
13 affidavit?

14 A. Yes.

15 Q. And that report was commissioned by Birch Mountain?

16 A. Yes.

17 Q. Okay. And that report since its receipt was in the
18 hands of Birch Mountain and its directors, including
19 Lanny McDonald, when they made all of their subsequent
20 business decisions?

21 A. Yes.

22 Q. Okay. And the first thing they did with that report
23 was they went out, and I am looking now at Exhibit 1 to
24 your affidavit, used it as the basis to go out and
25 raise \$36 million?

26 A. Okay. Yes.

27 Q. Okay. And that was pursuant to a short form

1 prospectus, which your affidavit says --

2 A. Yes.

3 Q. -- the defendants should've known contained full,
4 plain, and true disclosure, right?

5 A. Yes.

6 Q. This was years before Brookfield Bridge or Tricap were
7 involved with the company?

8 A. Yes.

9 Q. And based upon this they went out seeking to raise
10 money at \$4 a share?

11 A. Yes.

12 Q. Okay. And if you look at page 27, which is the last
13 page, you see that the underwriter was RBC Dominion
14 Securities Inc., and it was signed by Kent D. Ferguson?

15 A. Correct.

16 Q. And does that help remind you that Kent Ferguson from
17 RBC was helping the company right up to the
18 receivership?

19 A. Yes.

20 Q. Mr. Ferguson certainly was aware of the AMEC report?

21 A. Yes.

22 Q. Now, if you could turn to page 15 of this short form
23 prospectus?

24 A. Yes.

25 Q. Do you see from the consolidated capitalization of the
26 corporation chart that as at December 31, 2004, which
27 is before this raise, the company had 66 million shares

1 outstanding?

2 A. Yes.

3 Q. And the capital that the company had received with
4 respect to those 66 million shares was \$8,761,876?

5 A. Yes.

6 Q. Okay. So your understanding is that the company that
7 had raised capital of 8,761,000 possessed an asset
8 worth 1.6 billion before tax and 1 billion after?

9 A. That's what the report said.

10 Q. Okay. And Mr. McDonald and the other -- Lanny McDonald
11 and the directors and the advisors all had that report
12 by the time they issued this?

13 A. Yes.

14 Q. Okay. And do you see that their plan was to sell 9
15 million shares at \$4 each?

16 A. \$4 a share.

17 Q. Right. So that there would be 78 million shares once
18 the money had been raised?

19 A. Yeah.

20 Q. So at \$4 a share and 78 million shares, the market
21 capital of the company would be under \$300 million once
22 these shares were issued?

23 A. The math ain't here. Do you have the math for that?

24 Q. Well, 75 times 4 is 300?

25 A. 300, yeah.

26 Q. So you add another 3. It is 312 million. I misspoke
27 when I said it was under 300. It is just over 300. It

- 1 is 312 million?
- 2 A. Yes.
- 3 Q. You'd agree with that, sir?
- 4 A. Yes.
- 5 Q. Okay. Can you tell me why Lanny McDonald and the other
6 directors didn't go out and raise a billion dollars,
7 why they didn't price it for a billion dollar value?
- 8 A. No.
- 9 Q. Because can you tell me why they were issuing shares at
10 a quarter of the AMEC value?
- 11 A. No, I can't.
- 12 Q. But that is something that Lanny McDonald and the other
13 directors and their advisors did well before Tricap or
14 Brookfield Bridge were in the picture?
- 15 A. Yes. Brookfield were not in the picture.
- 16 Q. So the decision not to go out and raise \$1.6 billion
17 had nothing to do with anybody from Brookfield or
18 Tricap?
- 19 A. At that juncture in time.
- 20 Q. Right. Now, in the AMEC report at tab 3 of your
21 affidavit, do you understand that this is the summary
22 of the report and there were various schedules and
23 attachments to it?
- 24 A. Yes.
- 25 Q. Have you seen these schedules and attachments?
- 26 A. I don't believe I have, no.
- 27 Q. So you don't know what assumptions AMEC used in

1 preparing this report other than what is in the summary
2 that is attached?

3 A. Other than what is in summary, no.

4 Q. I'm looking at page 54, article 1.7, "Aggregate
5 Production."

6 A. Yes.

7 Q. It provides:

8 "In the Muskeg Valley Quarry operation,
9 aggregate production plants capable of
10 producing 7,000,000 tonnes/yr of
11 specific product or suite of products,
12 are currently being acquired and
13 assembled."

14 Do you see that reference, sir?

15 A. Yes, I do.

16 Q. And do you know, sir, that AMEC in preparing its report
17 was assuming that production would be 7 million tons a
18 year?

19 A. Yes.

20 Q. Okay. Do you know that actual production of the quarry
21 prior to receivership never reached 1 million tons a
22 year?

23 A. Yes. I'm not certain of the amount they got to prior
24 to receivership, but presumably the 7 million tons a
25 year is an ideal number that you build up to over time.

26 Q. Okay. Do you know that they never built up to that
27 amount?

1 A. No, I don't know what number they built up to.

2 Q. Okay. If you can turn to the next page 55, I'm looking
3 at 1.8. Did you understand that the capital costs to
4 build up the quarry were estimated to total some 576
5 million?

6 A. Yes.

7 Q. And at the time of the receivership Birch Mountain had
8 no money to build any of these items?

9 A. That's a little more complicated than that I think.
10 There seemed to be various amounts of money available
11 at the time of the receivership, but not \$576 million.

12 Q. Prior to the receivership the company and its advisors
13 failed to raise \$10 million in equity, right?

14 A. Yes.

15 MR. McDONALD: That's because Tricap didn't
16 follow through on a representation. Put your questions
17 fairly. You know there was a representation that
18 Tricap would invest between 50 million and half a
19 billion.

20 MR. GORMAN: Strike all of that. You cannot
21 speak on my transcript. You are not here to give
22 evidence. Stop it.

23 MR. McDONALD: If you don't put the questions
24 fairly.

25 MR. GORMAN: If you want to object to a
26 question, object to a question. Don't try inserting an
27 answer again.

1 MR. McDONALD: Okay. I object to that question
2 because you're not being fair to this witness. You
3 know that there was a representation, deal with it.

4 OBJECTION TAKEN to answering the question: Prior to the
5 receivership the company and its advisors failed to raise
6 \$10 million in equity, right?

7 Q. MR. GORMAN: Sir, can you confirm that by the
8 time of the receivership Activation Plant Number 1 had
9 not started construction, Line Plant Number 1 had not
10 started construction, and Line Plant Number 2 had not
11 started construction?

12 A. According to the schedule Activation Plants 2 and 3
13 were only supposed to start in 2013 and 2020 in any
14 event, and I don't know the status of Activation Plant
15 Number 1.

16 Q. Okay. Do you know the status of Activation Plant
17 Number 1, Line Plant Number 1, or Line Plant Number 2,
18 and my question was limited to the two item numbers
19 that had construction start in 2007 or 2008?

20 A. No. I don't know the status of them at that time.

21 Q. You've reviewed all of the corporate reports and press
22 releases that you've attached to your affidavit?

23 A. Yes.

24 Q. Did you see any reference to activation of Plant
25 Number 1, Line Plant Number 1, or Line Plant Number 2
26 in the disclosure that Birch Mountain provided that
27 you've reviewed?

1 A. Not that I can recall.

2 Q. Okay. If we return back to the short form prospectus,
3 which is your Exhibit Number 1. You understood this to
4 be full, plain, and true disclosure by Birch Mountain
5 and its director to the market who might acquire these
6 shares?

7 A. Yes.

8 Q. And that included on page 6 a full, plain, and true
9 disclosure that the corporation's actual results could
10 differ materially from those anticipated in these
11 forward-looking statements of the results of the risk
12 factors set forth below?

13 A. Yeah.

14 Q. And do you know that the actual results did in deed
15 differ materially from those anticipated in the
16 forward-looking statements?

17 A. Repeat that please.

18 Q. Are you aware that as per the warning, actual results
19 did differ materially from those anticipated in the
20 forward-looking statements?

21 A. Yes.

22 Q. Okay. And the full, plain disclosure included, and I
23 am looking at the highlighted part partway down,
24 page 6: (as read)

25 Investors should not place any undue
26 reliance on forward-looking statements
27 as the plans, intentions, or

1 expectations upon which they are based
2 might not occur.

3 That was a warning given to potential investors?

4 A. Yes.

5 Q. And that the forward-looking statements contained in
6 the prospectus are expressly qualified by the
7 cautionary language?

8 A. Yes.

9 Q. Okay. If we turn to page 18, sir, the warning given by
10 the company, its advisors, and the directors, including
11 Lanny McDonald, under risk factor said: (as read)

12 An investment in the offered shares is
13 suitable only for purchasers who
14 understand the risk factors associated
15 with this type of investment and who can
16 afford a loss of their entire
17 investment.

18 You saw that warning was provided?

19 A. Yes.

20 Q. And, sir, at Exhibit 2 there was the press release
21 related to this prospectus being issued?

22 A. Yes.

23 Q. And if we look at page 38 of the Bates numbered, it is
24 11 of the document, sir, again you see the warning that
25 these are forward-looking statements that may prove to
26 be inaccurate, and the actual results may differ
27 materially from the Birch Mountain's expectations?

- 1 A. Yes.
- 2 Q. And, again, as per the warning, in hindsight we know
3 they did differ materially; is that fair, sir?
- 4 A. Yes.
- 5 Q. Okay. Now, I'd like to talk about Mr. Pattison and his
6 companies for a moment, so we're changing topics.
- 7 A. Okay.
- 8 Q. From your Exhibit 36 you're aware that Mr. Pattison
9 attended at a site visit?
- 10 A. That's correct.
- 11 Q. And that occurred in 2008?
- 12 A. Yes.
- 13 Q. Okay. Did you understand that in 2006 the company
14 seeking more money issued \$36 million in debentures?
- 15 A. Yes.
- 16 Q. And that Mr. Pattison, through his companies, bought
17 approximately \$29 million?
- 18 A. Yes.
- 19 Q. And did you understand that that made Mr. Pattison or
20 his companies the biggest contributor of capital to
21 Birch Mountain?
- 22 A. Yes.
- 23 Q. Because we know the original shareholders were in for
24 11 million, there was a \$36 million share issuance
25 which was broadly held?
- 26 A. Yes, spread.
- 27 Q. Mr. Pattison put in, through his companies, \$29

1 million?

2 A. Yes.

3 Q. Biggest investor in the company at that time?

4 A. At that time.

5 Q. And you understood that he was invited on the site tour
6 by Birch Mountain and its advisors, Royal Bank?

7 A. Yes.

8 Q. This isn't something Brookfield or Tricap arranged. It
9 is something the company arranged?

10 A. Yes.

11 Q. And it was Royal Bank trying to find someone to give
12 the company more money, and the best candidate seemed
13 to be the current existing investors, right?

14 A. Well, I do not know what was going through their mind,
15 but that was arranged.

16 Q. Okay. Again, arranged by Birch Mountain --

17 A. Yes.

18 Q. -- and their advisors?

19 The person hosting it was Hugh Abercrombie, and
20 you understand him to be a director of Birch Mountain?

21 A. Yes.

22 Q. He was what they had assembled as the disclosure
23 committee? He was on the disclosure committee; did you
24 understand that?

25 A. No. I don't recall the disclosure committee.

26 Q. Okay. If in some of the exhibits there is reference to
27 him being on the disclosure committee, you don't

1 quarrel with what they put in the public record?

2 MR. McDONALD: No, we don't quarrel if it is in
3 the document, but we're not aware of a document to that
4 effect.

5 MR. GORMAN: It is one of his exhibits. I just
6 don't want to flip and find the page. It is not
7 material other than he is on the disclosure.

8 Q. MR. GORMAN: Okay. Do you know if Lanny
9 McDonald opposed or complained about this visit being
10 arranged?

11 A. No, I do not know.

12 Q. Did you understand Mr. Pattison did not make, through
13 his companies, a further investment in Birch Mountain?

14 A. Yes, to my knowledge he didn't invest further.

15 Q. Okay. And if we look at your Exhibit 61, that is an
16 assignment and option agreement between Mr. Pattison's
17 company Great Pacific Capital Corporate and Tricap
18 Partners?

19 A. Yes.

20 Q. And you understood this was entered into after the
21 appointment of the receiver earlier in November of
22 2008?

23 A. Yes.

24 Q. And you now understand that the option granted in it
25 expired without being exercised?

26 A. I'm not certain whether it was exercised or not.

27 Q. Well --

- 1 A. I hadn't seen a document that it was not exercised.
- 2 Q. Did you in your computer searches search early warning
3 reporting to see if there was any evidence that it had
4 been exercised?
- 5 A. I did not come across any evidence of that.
- 6 Q. And did you understand that to exercise the option
7 Mr. Pattison would have to further invest somewhere
8 between \$10 and \$15 million?
- 9 A. I don't believe it speaks to any number. It talks
10 about other consideration.
- 11 Q. Okay. If you look at paragraph 3(b)?
- 12 A. 3(b).
- 13 Q. Does it refresh your memory?
- 14 A. Okay. Yes.
- 15 Q. That the option price for the first period was
16 \$11,812,500, and then it was for the next period
17 \$11,812,500, plus additional amounts?
- 18 A. Yes.
- 19 Q. And then for the third period \$14,765,625, plus
20 additional amounts?
- 21 A. Yes.
- 22 Q. So this was not a free option, it would be \$10 million
23 plus just to exercise?
- 24 A. Okay. Yes.
- 25 Q. And if Mr. Pattison's company didn't exercise that
26 option he would lose his entire \$29.4 million
27 investment because he signed it away for \$10.

1 A. I think it says somewhere \$10 and other consideration,
2 but I guess we'd have to ...

3 Q. Did you understand that Mr. Pattison would and now
4 historically has been proven to have lost his entire
5 \$29 million investment in Birch Mountain?

6 A. Yes.

7 Q. And his investment was debt which is in priority to
8 shareholder equity?

9 MR. McDONALD: We have no evidence related to
10 that. We're aware of Mr. Eng's statement, but we have
11 no evidence.

12 Q. MR. GORMAN: All right. You're aware that
13 Mr. Pattison's company through Great Pacific, their
14 investment was debt which has priority to equity?

15 A. Yes.

16 MR. McDONALD: Well, they also understand there
17 was a convertible feature that it was on a non-secured
18 convertible debenture.

19 Q. MR. GORMAN: Do you have any evidence or
20 understanding that Great Pacific ever converted its
21 debt to equity?

22 A. No.

23 Q. When that conversion right was granted in 2006 by Birch
24 Mountain prior to any involvement of Tricap or
25 Brookfield, do you know what the conversion price was?

26 A. No, I don't recall that.

27 Q. Do you know if the conversion price would be at a

1 significant discount to the company being worth 1.6
2 billion or \$1 billion?

3 A. I don't know the amount, but can you point me at the
4 document with the conversion in it.

5 Q. I'm not sure if it is in evidence, so I'm asking if you
6 know if it was in the documents. Do you know if it was
7 below \$4?

8 A. No, I don't.

9 Q. Now, in your affidavit you reference the South Haul
10 Road --

11 A. Yes.

12 Q. -- do you recall that?

13 Now, do you understand that the South Haul Road
14 was a proposal to sell certain rights of way or
15 roadways to various oil companies for \$4.8 million?

16 A. I understand that it was to build a roadway.

17 Q. Okay. Did you understand that a portion of it was a
18 sale of the roadway to the oil companies for 4.8
19 million?

20 A. Yes.

21 Q. And that that roadway was subject to the Brookfield
22 security?

23 A. Yes.

24 Q. And do you understand that when the company Birch
25 Mountain asked Brookfield to approve it, Brookfield
26 opposed because the oil companies wanted a put right
27 that they could force the company to buy it back. Did

1 you understand that that was the issue with respect to
2 the Tricap approval?

3 A. No.

4 Q. Okay. Did you understand that Brookfield or Tricap
5 were concerned that if the oil companies exercised that
6 put right, Birch Mountain wouldn't have \$4.8 million to
7 give back to the oil company because they intended to
8 spend it? Do you understand that that was the concern?

9 A. No.

10 Q. Did you understand that based upon Brookfield's
11 resistance, the oil companies withdrew the demand for a
12 put right and completed the sale with Brookfield's
13 support?

14 A. No.

15 Q. Did you understand that the \$4.8 million came to be
16 distributed in accordance with an agreement between
17 Birch Mountain?

18 A. Yes.

19 Q. And Brookfield?

20 A. Yes.

21 Q. All as negotiated by Birch Mountain and its advisors
22 and approved by its directors, including the director
23 Lanny McDonald?

24 A. Yes.

25 Q. So that money ultimately did come in, the difference
26 being this put right had been removed to the benefit of
27 Birch Mountain; do you understand all of that?

1 A. I'm not aware if the put right was removed, but I do
2 know that the money came in.

3 Q. Do you understand that the 2008 operating and financial
4 results for Birch Mountain did not meet projections?

5 A. I have seen a note from one of the people in Birch
6 Mountain confirming that the third quarter was 104
7 percent projection.

8 Q. Did you understand that through the first half of the
9 year the company was losing money?

10 A. Yes.

11 Q. Okay. You've seen the December 31 financial statements
12 for the company?

13 A. Which year?

14 Q. 2007.

15 A. What document number?

16 MR. McDONALD: It may be 14.

17 Q. MR. GORMAN: Yes. If you look at Exhibit 14?

18 A. Okay.

19 Q. And I'm looking at page 169?

20 A. Yes.

21 Q. The second paragraph?

22 A. Yes.

23 Q. The second line: (as read)

24 The company has incurred a net loss of
25 24.5 million for the year end of
26 December 31, 2007, and has an
27 accumulated deficit of 42 million.

1 A. Yes.

2 Q. Okay. And then just a couple lines later it goes on:

3 (as read)

4 The company formally engaged RBC Capital

5 Markets to assist in the evaluation of

6 strategic alternatives which included

7 discussing debt and equity strategies

8 for its immediate and medium term needs.

9 Do you see that, sir?

10 A. Yes, I do.

11 Q. You're aware as of December 31, 2007 the accumulated

12 deficit was 42 million?

13 A. Yes.

14 Q. So, sir, if we turn to Mr. Eng's Exhibit 'D', which I

15 do not believe is in your affidavit. Do you have that,

16 sir?

17 A. Yes.

18 Q. And that's the second quarter 2008 financial report, so

19 for 6 months after the December 31, 2007?

20 A. Yes.

21 Q. Okay. And you understand that this was produced by

22 Birch Mountain as full, plain, and true disclosure; you

23 understand that, sir?

24 A. Is this an order to report?

25 Q. No. This is a Birch Mountain quarterly report.

26 A. Okay. So it is produced by Birch Mountain. And your

27 question was?

1 Q. Did you understand that that was prepared like the
2 other Birch Mountain documents to be full, plain, and
3 true disclosure?

4 A. Yes.

5 Q. All right. So if we look at page 3, sir, the top of it
6 we see that as of June 30th, 2008, Birch Mountain
7 incurred a net loss of 4.69 million for the three
8 months that ended. So in that three-month quarter they
9 lost 4.69 million?

10 A. Yes.

11 Q. And that the accumulated deficit was now 52.85?

12 A. Yes, I see that.

13 Q. Okay. And we knew at year end it was at 42, so it's
14 gone up 10.85 million in the first six months of 2008?

15 A. Yes.

16 Q. And, sir, if we look at page 4, then, with respect to
17 aggregate production, you see that's the second bold
18 point, sir?

19 A. Yes.

20 Q. It was reporting aggregate -- the company produced
21 378,000 tons, whereas in 2007 it was 546,000 tons of
22 aggregate?

23 A. Yes.

24 Q. That's what they produced in the first six months of
25 2008?

26 A. Yes.

27 Q. And do you recall AMEC talking about there being 7,000

1 tons produced annually in its report and its
2 assumptions?

3 A. Yes.

4 Q. 378,000 tons versus 7 million tons to add all of the
5 zeros, right? AMEC was projecting 7 million tons of
6 annual production and this 378,000, correct?

7 A. Yes.

8 Q. And, to be fair, this is six months not annually, but
9 if we were to double the 378, you would get 750,000
10 tons as opposed to 7 million tons?

11 A. Yes.

12 Q. And that would've been one of those actual results may
13 vary dramatically? That is one of various dramatic
14 actual versus projections that were disappointing?

15 A. Yes.

16 Q. Okay. Okay. And if we look at page 12 of the second
17 quarter 2008 reports of Exhibit 'D', and I'm looking at
18 the fourth paragraph, it says "The companies estimated
19 a future liability." Do you see that paragraph, sir?

20 A. The company is required to retain -- oh, fifth
21 paragraph.

22 Q. "The company estimated"?

23 A. Oh, yes, I've got it.

24 Q. And it says they had: (as read)

25 ...incurred a liability for shareholders
26 for flow-through shares issued in 2003
27 for which the company was not able to

1 incur qualifying expenses.

2 Do you understand that issue, sir?

3 A. No.

4 Q. Sir, did you understand that Birch Mountain issued
5 flow-through shares to shareholders promising to
6 renounce them in certain losses?

7 A. No.

8 Q. And that they couldn't because this wasn't an oil
9 company.

10 A. No.

11 Q. Do you have any understanding of that issue at all?

12 A. No.

13 Q. Okay. But do you take exception that the estimated
14 liability and personal income tax in the amount of \$2.4
15 million had been accrued?

16 A. Yes.

17 Q. You agree, or take exception, or don't know?

18 A. Don't know.

19 Q. Okay. Now, sir, you understand that by July 3rd, 2008
20 Birch Mountain was in breach of its financial
21 convenience to Tricap?

22 A. Yes.

23 Q. And they acknowledged that in a press release which,
24 again, was full, plain, and true disclosure by Birch
25 Mountain?

26 A. Yes.

27 Q. That is at your Exhibit 51, I believe -- no, sorry.

1 Sorry, sir, it is your Exhibit 20, page 255 in your
2 exhibit bundle. If you can turn to that page please,
3 sir?

4 A. Yes.

5 Q. And at that time the company, when Mr. Lanny McDonald
6 was still a director, issued a news release confirming
7 that: (as read)

8 As a consequence of the company being in
9 breach of a financial covenant under its
10 senior secured credit facility, the
11 lender Tricap Partners Ltd. has
12 exercised its right under the loan
13 agreement to direct computer share trust
14 company not to make the scheduled
15 interest payment until further notice
16 from the lender.

17 Do you see that, sir?

18 A. Yes, I do.

19 Q. Okay. And so at that point in time the company and
20 directors, including Lanny McDonald, recognized they
21 were in breach of a financial covenant to Tricap
22 Partners?

23 A. Yes.

24 Q. Under its senior credit facility to its lender Tricap
25 Partners?

26 A. Yes.

27 Q. So if you can, sir, turn to your Exhibit 27, page 29 in

1 your exhibit bundle?

2 A. Yes.

3 Q. This is another full, plain, and true disclosure from
4 Birch Mountain to the public through a press release?

5 A. Yes.

6 Q. And the company, including its directors, including
7 Lanny McDonald, confirm the previously disclosed breach
8 of the financial covenant, and this is as of July 31,
9 so the end of the month?

10 A. Yes.

11 Q. And it also -- I'm looking at the third paragraph: (as
12 read)

13 As previously announced on July 22,
14 2008, the company is pursuing an
15 immediate and focussed sales process to
16 maximize value. In the event that the
17 immediate sales process does not achieve
18 an acceptable price, the company intends
19 to work with its stakeholders to
20 recapitalize the balance sheet to
21 improve liquidity and permit delivery of
22 the business plan.

23 Is that an accurate description of what the company was
24 doing at that time, sir?

25 A. That's what they state they are doing, yes.

26 Q. Okay. Now, sir, there is a waiver and amending
27 agreement dated with effect of the 1st day of August,

1 2008 that is your Exhibit 31?

2 A. Yes.

3 Q. Sir, do you now have an understanding that this
4 agreement, although dated with effect of August 1, was
5 not signed until much later in the month?

6 Sir, I'll give you a heads up you're not going to
7 find it in that document. I'll have to take you
8 through some other matters. Do you know one way or the
9 other when it was signed?

10 A. No.

11 MR. McDONALD: And no.

12 Q. MR. GORMAN: I want to take a look at some of
13 your next exhibits. I want to take you through things
14 subsequently as you've assembled them.

15 A. No problem.

16 Q. The next exhibit I'd like to take you to is Exhibit 33,
17 which is a press release prepared by Birch Mountain,
18 dated August 14, 2008?

19 A. Yes.

20 Q. And this press release advises that the American Stock
21 Exchange has delisted Birch Mountain?

22 A. Yes.

23 Q. And that Birch Mountain does not intend to appeal the
24 staff's determination?

25 A. Yes.

26 Q. Okay. And it was the opinion of the American Stock
27 Exchange that: (as read)

1 The company sustained losses that are so
2 substantial in relation to overall
3 operation for its existing financial
4 condition or its financial condition has
5 become so impaired that it appeared
6 questionable as to whether the company
7 would be able to continue its operation
8 or meet its obligations as they mature.

9 That's in the second paragraph, sir?

10 A. Yes.

11 Q. And this is the determination and the delisting that
12 the company did not appeal?

13 A. Yes.

14 Q. If we turn to the next Exhibit 34, which is your Bates
15 stamp page 358, that is a letter from Lawson Lundell to
16 the Toronto Stock Exchange, dated August 15, 2008?

17 A. Yes.

18 Q. And this is Lawson Lundell, Mr. Houghton as legal
19 advisor to Birch Mountain, seeking an exemption from
20 the Toronto Stock Exchange?

21 A. Yes.

22 Q. And the exemption is to enter into the amending and
23 waiver agreement that is dated with effect of August 1?

24 A. Yes.

25 Q. So we know it wasn't signed before August 15, right,
26 sir?

27 A. Okay. Yes.

- 1 Q. And Mr. Houghton from Lawson Lundell delivered this
2 request with the approval of Birch Mountain and its
3 directors?
- 4 A. I haven't seen written confirmation of that, but yes.
- 5 Q. Okay. And, sir, if we look at the next exhibit, and
6 sorry, I'm going to take you back and forward. It is a
7 press release dated August 27th?
- 8 A. Yes.
- 9 Q. That's page 361?
- 10 A. Yes.
- 11 Q. Confirming that the waiver and amending agreement had
12 been signed?
- 13 A. Yes.
- 14 Q. And, sir, that's the context, I put it to you, it was
15 signed closer to August 27th than August 1st because
16 that is when the press release occurred and it was
17 after the TSX request arose?
- 18 A. Yes, sir.
- 19 Q. Okay. Now, if we turn back to the acknowledgement,
20 waiver, and amending agreement, which is your
21 Exhibit 31, you have that document in front of you,
22 sir?
- 23 A. Yes, I do.
- 24 Q. We know it was signed sometime in August of 2008?
- 25 A. Yes.
- 26 Q. Okay. And this was negotiated between Birch Mountain
27 with the input from its financial and legal advisors

1 and Tricap Partners?

2 A. Yes.

3 Q. And, sir, is the recital 'D' correct that: (as read)

4 Notwithstanding the aforesaid financial

5 difficulties and in order to facilitate

6 the board's previously announced July

7 23rd,

8 It should be 2008, but it says "3": (as read)

9 ...plans to immediate sale of the

10 borrower, the borrower requested the

11 release of the proceeds and that the

12 waiver by the lender of certain

13 financial covenants be granted.

14 A. Yes.

15 Q. This was an accommodation that Birch Mountain was

16 seeking from Tricap?

17 A. Yes.

18 Q. Because they were in default at that period of time and

19 Tricap was in a position to demand but for a waiver and

20 extension and holiday?

21 A. Yes.

22 Q. Okay. And this provided -- this was an opportunity for

23 Birch Mountain to go out and arrange a sale or arrange

24 certain equity to avoid a default, a demand, and a

25 receivership?

26 A. Yes, it bought time.

27 Q. Yeah. They bought time to avoid the receivership,

1 right?

2 A. Yes.

3 Q. Okay. Can you tell me, sir, in your affidavit at
4 paragraph 62, you conclude that the amending agreement,
5 which you just agreed bought the company time, was
6 designed to facilitate the Birch Mountain receivership?

7 A. Well, because it didn't give them enough time to
8 conclude anything in my opinion.

9 Q. It didn't facilitate the receivership. It extended the
10 ability of Birch Mountain to avoid it?

11 MR. McDONALD: Well, this lawsuit is also based
12 on a breach of representations. It was Tricap's job to
13 do the financing. They failed to do it. It is also
14 going to be our position that they already had the sale
15 completed. It was a sale to Tricap and Mr. Pattison.

16 MR. GORMAN: Please strike the non-witness'
17 attempt to answer questions.

18 Q. MR. GORMAN: Sir, my question related to the
19 amending agreement. How does the company negotiating
20 to buy time under the amending agreement facilitate the
21 Birch Mountain receivership? It gave the company an
22 opportunity to avoid it, correct?

23 MR. McDONALD: Madam Reporter, we will let
24 Justice Streikaf, who is going to hear the case
25 management, decide what is struck and what is not
26 struck. Can you confirm for me that that is your
27 understanding of how a transcript is done in the

1 province of Alberta.

2 THE COURT REPORTER: I will seek instruction from my
3 boss as to what to do in this situation. As of now,
4 everything is on the record.

5 MR. McDONALD: Well, I would like you to take
6 that under advisement with your boss because it should
7 be the case management judge, not Mr. Gorman or your
8 boss, that decides what is on the transcript.

9 THE COURT REPORTER: Right.

10 MR. McDONALD: If you decide in any other way, I
11 think that you need to refer to Madam Justice Streikaf
12 who is the case management judge.

13 THE COURT REPORTER: Understood.

14 MR. GORMAN: I would recommend you prepare two
15 transcripts; one with Mr. John McDonald's interjections
16 to attempt to put evidence on the record, which isn't
17 in evidence, and one without, and provide them both to
18 Madam Justice Streikaf.

19 MR. McDONALD: I object to that. That does not
20 leave the discretion with the judge.

21 Q. MR. GORMAN: Now, sir, you agreed with me that
22 the amending agreement provided a waiver and Birch
23 Mountain bought time?

24 A. At that juncture, yes.

25 Q. Okay. So it didn't facilitate the receivership, it
26 gave Birch Mountain an opportunity to avoid it, right?

27 A. Well, that particular moment in time, yes, but the

1 timing was too short, but ...

2 Q. You disagree with the business decision that the
3 company, the directors and their financial advisors,
4 made when they entered into the August 1 amending
5 agreement?

6 A. Yes.

7 Q. And this is based upon you not being involved with the
8 company at the time and your background as we
9 discussed?

10 A. Yes.

11 Q. You understand that it was Birch Mountain requesting
12 the waiver from Tricap?

13 A. Yes.

14 Q. Okay. Now, if we look at Exhibit 35, and we briefly
15 touched on it just with respect to timing, that is the
16 August 27th, 2008 press release from Birch Mountain?

17 A. Yes.

18 Q. And Mr. McDonald was still a director at the time?

19 A. Yes.

20 Q. Sorry, Mr. Lanny McDonald was still a director?

21 A. Yes.

22 Q. And this, again, was the company attempting to provide
23 full, fair, and frank disclosure to the public,
24 including its shareholders?

25 A. Yes.

26 Q. And it references the amending agreement?

27 A. Yes.

1 Q. And on page 362, looking at the third bullet, it
2 confirms that: (as read)

3 There will be the reinstatement of the
4 events of default under the loan
5 agreement and the granting of certain
6 board rights in favour of Tricap will
7 occur in the event that a sale agreement
8 or an equity financing of not less than
9 \$10 million is not concluded on or
10 before September 30, 2008, and a closing
11 of the said transaction does not occur
12 on or before October 31, 2008.

13 Do you understand see that, sir?

14 A. I see that.

15 Q. And that is fairly describing to the public what is in
16 the waiver and amending agreement?

17 A. That covers what is in the waiver agreement.

18 Q. Okay. And did you understand that pursuant to it, and
19 I'm looking at the first full paragraph, the company
20 could issue up to 86,250,000 common shares,
21 representing a delusion of 102 percent of the current
22 issued and outstanding shares, and that that is at a
23 price of 40 cents; you understood that, sir?

24 A. Yes.

25 Q. So if Tricap elected to exercise its conversion right
26 at 40 cents, it would own more than 50 percent of the
27 shares of the company because they were issuing

1 102 percent more shares?

2 A. Yes.

3 Q. Okay. And the company and its directors entered into
4 the waiver and amending agreement with the input from
5 its advisors?

6 MR. McDONALD: Well, is Tricap an advisor? Like,
7 they told the world they are, and they told this
8 company they were. Are they advisors?

9 Q. MR. GORMAN: The company entered into this
10 agreement with the input from Lawson Lundell and Royal
11 Bank of Canada?

12 A. I don't believe I saw Royal Bank of Canada mentioned
13 there; Lawson Lundell was.

14 Q. Okay. Do you remember that RBC Capital Markets,
15 Mr. Grudzinski, and Mr. Ferguson were around?

16 A. Yes.

17 Q. Now, can you tell me why Mr. McDonald and the other
18 directors and the management would give away 50 percent
19 of the company for \$31 million if they believed it was
20 worth over a billion dollars?

21 A. Probably because they were working on the
22 representations you made of -- or Tricap made of
23 long-term patient capital and they anticipated that
24 they would -- that matters would resolve themselves.

25 Q. Who told you that?

26 A. It was in any number of -- it is in any number of press
27 releases.

- 1 Q. Who told you that the amending agreement giving away
2 their option of Tricap to take over 50 percent of the
3 company for \$30 million was based on that?
- 4 MR. McDONALD: Tricap. Brookfield.
- 5 A. It is in all of the documentation, sir.
- 6 Q. MR. GORMAN: Okay.
- 7 A. It is in all of the representations.
- 8 Q. You understand that Tricap and Birch Mountain were
9 arm-length parties?
- 10 A. Yes.
- 11 Q. And you understand that this waiver and amending
12 agreement was entered into at the request of Birch
13 Mountain in August of 2008?
- 14 A. Yes.
- 15 Q. You understand that if 100 percent of the shares were
16 issued for \$30 million, that represents a \$60 million
17 market cap?
- 18 A. Yes.
- 19 Q. Not a \$1 billion market cap?
- 20 A. Yes.
- 21 Q. And this is what agreement Lanny McDonald and the other
22 directors and management and their advisors entered
23 into as it affected the shareholders?
- 24 A. Yes, they entered into it.
- 25 Q. And they knew of the AMEC agreement that was two years
26 old at the time that it had been provided to them?
- 27 A. Yes.

1 Q. And was Mr. McDonald and the other directors to your
2 understanding attempting to act in the best interest of
3 the company and its stakeholders?

4 A. Yes.

5 MR. GORMAN: Why don't we take a break, and
6 I'll reassemble my notes. We will be finished before
7 lunch.

8 (ADJOURNMENT)

9 Q. MR. GORMAN: Okay. Sir, to clarify my
10 understanding in your affidavit where you make
11 conclusions or assumptions with respect to intent or
12 motive, it is based upon you reading the documents and
13 your interpretation of reading those documents?

14 A. Yes.

15 Q. Okay. So, for example, in paragraph 71 of your
16 affidavit, you provide that: (as read)

17 As early as September 19th, 2008,
18 Brookfield, Tricap, and Pattison were
19 cementing their plans to eviscerate and
20 defeat the amending agreement by
21 assuring that no sale or \$10,000 equity
22 was executed by September 30th, 2008 as
23 evidenced by the following.

24 And then you list the South Haul Road agreement was
25 executed. What does that have to do with eviscerating
26 the amending agreement?

27 A. Well, they never received their funds on that. They

1 were withheld pending your buy by Tricap.

2 Q. In accordance with the amending agreement that the
3 company entered into and portions of them were
4 released?

5 MR. McDONALD: That's correct.

6 A. Yes.

7 Q. MR. GORMAN: Okay. A confidentiality agreement
8 was executed, that was between Birch Mountain and
9 Mr. Pattison's company?

10 A. Yes.

11 Q. How does that cement a plan to eviscerate and defeat
12 the amending agreement?

13 A. At that time I think in around about there they start
14 planning the trip.

15 Q. Birch Mountain invited them, right?

16 A. Yes.

17 Q. It's prior to the amending agreement and waiver being
18 executed?

19 A. My understanding is that -- and I don't have the
20 evidence on this. Birch Mountain invited them, and
21 then at the last minute Birch Mountain weren't included
22 in the trip itself.

23 MR. McDONALD: I don't think that's an accurate
24 statement, Mr. Johnson.

25 A. Sorry?

26 MR. McDONALD: I don't think that's an accurate
27 statement, Mr. Johnson.

- 1 A. Not yet.
- 2 Q. MR. GORMAN: Okay. What do you mean "not yet"?
3 When will it ever be accurate?
- 4 A. It is not.
- 5 Q. Wasn't it hosted by the Birch Mountain director, the
6 head of the communication committee?
- 7 A. Yes.
- 8 Q. Okay. On August 1st Brookfield and Pattison both filed
9 their quarterly reports. It wasn't a joint submission,
10 was it?
- 11 A. It was submitted by a filing agent out in New York.
- 12 Q. Not a joint submission, two separate submissions?
- 13 A. Correct.
- 14 Q. By the same filing agent?
- 15 A. Yes.
- 16 Q. Okay. And that was because it was required in the
17 event they exercise their conversion rights under the
18 two different agreements, neither of whom ever
19 exercised, right?
- 20 A. Yes.
- 21 Q. And how does that eviscerate and defeat an amending
22 agreement that hasn't been signed yet?
- 23 MR. McDONALD: Well, that is really a legal
24 question, but I can answer it if you'd like.
- 25 MR. GORMAN: No. He swore the affidavit.
- 26 MR. McDONALD: Yeah, that's true.
- 27 Q. MR. GORMAN: Okay. It is based upon these

1 documents and events, and nothing else that you've come
2 to a conclusion that you swore in an affidavit that
3 Brookfield, Tricap, and Pattison were cementing their
4 plans to eviscerate and defeat the amending agreement?
5 That's your affidavit, right?

6 A. Yes.

7 Q. And it is based solemnly upon those documents listed
8 below, right?

9 A. Yes.

10 Q. The amending agreement was something that Birch
11 Mountain asked for and that Tricap agreed to provide
12 based upon the negotiated terms, right?

13 A. Yes.

14 Q. Okay. Paragraph 73, the conclusions in the start of
15 the paragraph are based upon the exhibit and the quote
16 that follows; is that right?

17 A. Yes.

18 Q. And that's an October 3rd e-mail from Macleod Dixon to
19 Lawson Lundell?

20 A. Yes.

21 Q. Okay. Can you tell me what in that e-mail caused you
22 to conclude there was a cover-up effort of Brookfield
23 and Tricap to hide from public view the arrangement
24 with Brookfield, Tricap, and 1439442?

25 A. Well, because of the -- there was supposed to be a
26 second waiver and amending agreement which was
27 executed.

- 1 Q. Because Birch Mountain rejected the terms, right?
- 2 A. Yes.
- 3 Q. Okay. So the fact that Tricap was negotiating an
4 amending agreement which Birch Mountain rejected, you
5 looked at that and concluded that there was a cover-up
6 to hide from public view?
- 7 A. That was the conclusion I came to.
- 8 Q. Based upon?
- 9 A. There was a second waiver agreement that needed to get
10 signed.
- 11 Q. And it was never executed --
- 12 A. They send -- well, this form comes in, and it was not
13 signed.
- 14 Q. And that to you --
- 15 A. I don't believe we have copy of that.
- 16 Q. And that, to you, is evidence of a cover-up? Your
17 conclusion is based upon that, right, sir? It is your
18 affidavit, you used the words "cover-up"?
- 19 A. Yes, I did use the words "cover-up."
- 20 Q. And the judge in the court can read the same e-mail
21 exhibit and make a determination as to whether they
22 believe that constitutes a cover-up?
- 23 A. Yes. Well, it talks about no potential transactions in
24 view, and all of a sudden there is a transaction with
25 Tricap.
- 26 Q. Sorry, which transaction with Tricap?
- 27 A. With the receiver on the 9th of November. It is in one

1 of the exhibits here, which is not long after that
2 date.

3 Q. Okay. The 9th of November the receiver was appointed,
4 right?

5 A. The 5th.

6 Q. The 5th?

7 A. Yes.

8 Q. Okay. And what is the cover-up on October 3rd that
9 you're talking about?

10 A. It seemed to me this was prepared on October the 9th.
11 Presumably the reason that Birch Mountain did not go
12 with the second waiver agreement was that the terms
13 were too onerous. They went with the first one, and
14 that this is the beginning -- the terms have been
15 onerous that it is the beginning of trying to obtain
16 the company.

17 Q. The terms that --

18 A. And that's the way I read it, plain and simple.

19 Q. But you also read a cover-up into that?

20 A. Yes.

21 Q. And the terms that were onerous were the terms
22 negotiated by the directors, including Lanny McDonald,
23 and its advisors?

24 A. Correct.

25 Q. Okay. Now, do you know if there were continued
26 discussions through October of 2008 prior to the
27 demands being issued?

1 A. I would imagine discussions continued. Can you point
2 me to a document?

3 Q. No. I'm asking if in all of your preparation and
4 reviewing of hard drives and the investigations you
5 made, if you were aware if there were further
6 negotiations?

7 A. I can't recall that.

8 Q. Okay. Do you know if the company offered Tricap 98
9 percent of the equity if they would consent to a CCAA?

10 A. No, I'm not aware of that.

11 Q. No idea of what the discussion -- other than the e-mail
12 from October 3rd until the demands on October 31, no
13 knowledge?

14 A. Not that I recall.

15 Q. Okay. In paragraph 80 you reference that on
16 November 9th, 2008 Tricap was in control of Birch
17 Mountain. What leads you to that understanding, sir?

18 A. Well, that was the e-mail from --

19 MR. McDONALD: Read through the document and be
20 sure you know what the whole document is.

21 A. Okay. Thank you. Okay. Don Roberts is sending an
22 e-mail to Russ Gerrish copy Nakaska, and he says: (as
23 read)

24 As Tim Nakaska may have mentioned to you
25 we are optimistic that we can receive
26 some assurances that funding for the
27 receiver would be in place at least

1 until the sale mandate is concluded.
2 We're working towards that type of an
3 agreement with Tricap and hope to have
4 it in place this week. As a result we
5 are somewhat reluctant to have a meeting
6 with you tomorrow without having full
7 assurances that we have access to
8 funding.

9 Now, the way I look at that is the company went into
10 receivership on a Wednesday, which was the 5th, this
11 was written it says on the 9th, which is a Sunday, so
12 two days -- two business days or maybe three after the
13 receivership it went into the receivership, there
14 appears to be an agreement in the works for funding for
15 the receiver.

16 Q. MR. GORMAN: Okay.

17 A. I hope that answers your question.

18 Q. Okay. Do you understand that the receivership order
19 included the ability of the receiver to borrow money?

20 A. Yes. It is a court-appointed receiver.

21 Q. It's a court-appointed receiver who is in charge of the
22 company?

23 A. Yes.

24 Q. The receiver to continue operating the facility would
25 need to borrow money, right?

26 A. Okay.

27 Q. Okay. Do you have any experience with receiverships in

1 Alberta?

2 A. No, I do not.

3 Q. Do you know whether a receiver typically looks to the
4 existing creditor as the most likely lender to provide
5 its funds?

6 A. No, I do not.

7 Q. Do you know of anyone else? Mr. Lanny McDonald steps
8 up and lends the receiver millions of dollars to keep
9 the -- did he make that offer?

10 A. I have no idea, and I don't know what amount it is the
11 receiver might have needed. You know, did the receiver
12 need 2 million, 10 million? What did the receiver pick
13 up and seize the assets out of the company?

14 Q. Did you know that the receiver originally projected it
15 would require 2 million and went back to court to
16 increase that to 3 million?

17 A. No.

18 Q. You don't recall seeing that in any of the court
19 documents?

20 A. No, I don't believe I saw that.

21 Q. Okay. Now, do you understand that the sale was for
22 approximately \$500,000?

23 A. The K2 sale?

24 Q. Right.

25 A. It was a started sale as I understood from the
26 documents, yes.

27 Q. And similarly at Exhibit 22, there was a proposed

1 four-month sale?

2 A. Yes. And there was a trial.

3 Q. Right. And do you know how much dollar value was
4 involved in that?

5 A. I do not recall.

6 Q. Was it sufficient to stop the company that had lost \$24
7 million the previous year, \$10 million for the first
8 half of 2008? Was it enough to make it profitable?

9 A. What would've made the company profitable was if Tricap
10 had stuck by their representations of investing 50 to
11 500 million, half a billion dollars in the long-term
12 patient capital.

13 Q. Okay. So you believe that under the various agreements
14 Tricap should've put in half a billion dollars into
15 Birch Mountain?

16 A. They purport to put up to between 50 and 500 million.

17 Q. And in this company --

18 A. In this instance.

19 Q. -- their agreements were pursuant to the loan
20 agreements and the convertible debenture that Birch
21 Mountain signed?

22 A. Yes.

23 Q. Okay. Now --

24 MR. McDONALD: Well, that's not what the
25 Statement of Claim says, Mr. Gorman. I don't want to
26 interfere with your examination, but the Statement of
27 Claim says something else.

1 Q. MR. GORMAN: Do you recall reviewing the
2 various Birch Mountain press releases and circulars to
3 the shareholders where Mr. McDonald and the other
4 directors were providing full, plain, and frank
5 disclosure to the shareholders and the public?

6 A. Yes.

7 Q. Do you recall any reference to Tricap providing any
8 funding in addition to what was agreed under the
9 executed loan agreement and debenture?

10 A. No.

11 Q. Okay. Now, let's talk about the receivership.
12 Paragraph 75 of your affidavit provides that the Eng
13 affidavit is sworn and his affidavit withheld evidence
14 required to be considered with respect to the
15 appointment of a court-appointed receiver. What is
16 your basis for opining as to what is required to be
17 considered with respect to a court-appointed receiver?

18 A. I would imagine a receivership situation requires all
19 relevant financial data, potential prospects, etcetera
20 etcetera to be put in front of the receiver. It is
21 then up to the receiver to make the decision based on
22 full knowledge.

23 Q. You understand that the receiver was appointed by
24 Justice LoVecchio?

25 A. Yes.

26 Q. You understand that the company consented to the
27 appointment of the receiver?

1 A. No, I have not seen it.

2 MR. McDONALD: We have not seen that consent.

3 Produce it. We've seen a consent to the early
4 enforcement, but we've never seen a consent that talks
5 about the receivership, so please produce it. That's
6 on the record.

7 Q. MR. GORMAN: You understand they consented to
8 early enforcement?

9 A. Yes.

10 Q. You understand they did not oppose the application?

11 MR. McDONALD: We understand from the two
12 transcripts that we had translated from court that they
13 weren't represented.

14 A. Period.

15 Q. MR. GORMAN: You understand that they -- the
16 company was aware of the application and did not
17 oppose?

18 MR. McDONALD: No.

19 A. I don't.

20 MR. McDONALD: The company --

21 A. I'll answer that.

22 Q. MR. GORMAN: You're saying you don't know one
23 way or the other?

24 A. No. What I'm saying is that the -- number 1, they were
25 not represented; and, no, I don't know of any consent
26 to -- that was signed other than there is reference to
27 the early enforcement I think it was called.

- 1 Q. Correct.
- 2 A. Yeah.
- 3 Q. Okay. Do you know if Mr. Houghton and BLG were advised
4 of the receivership application and advised they would
5 not attend and oppose?
- 6 A. No. I haven't seen that documentation.
- 7 Q. You don't know one way or the other?
- 8 A. No, I do not know.
- 9 Q. Okay. Are all of the items in paragraph 75, which you
10 think is evidence withheld and required to be
11 considered, were they all known to Mr. Lanny McDonald
12 and the directors?
- 13 A. I don't -- okay, the AMEC report was known. I don't
14 think -- I do not know. To be honest, I don't think
15 they had necessarily the confidentiality agreement
16 with --
- 17 Q. You don't think they had the confidentiality agreement
18 between Birch Mountain and --
- 19 A. Lanny McDonald may not have seen it. Maybe it was
20 executed by Doug Rowe.
- 21 Q. It was executed by Birch Mountain?
- 22 A. Yes.
- 23 Q. Okay. It wasn't executed by Tricap?
- 24 A. Correct.
- 25 Q. Okay. Now, 'F': (as read)
26 Tricap's control of the receivership was
27 withheld from the Court.

1 How was Tricap in control of the receivership prior to
2 appointment of the receiver when Mr. Eng swore his
3 affidavit?

4 A. I'm looking at this e-mail from Don Roberts, and I'm
5 assuming discussions had to have taken place with
6 Tricap prior to receivership.

7 Q. Okay. So that is an assumption you're making based on
8 the documents with no prior Alberta receivership
9 experience, right?

10 A. Yes.

11 Q. Okay. The Pattison agreement was withheld from the
12 Court. You'll agree the Pattison agreement you're
13 talking about is dated later in November?

14 MR. McDONALD: And well before the sale
15 agreement, which was another court hearing. So, yes,
16 it was withheld from the Court.

17 Q. MR. GORMAN: Okay. You talk about the
18 appointment of the receiver, you talk about a
19 November 4th affidavit, right? How was Mr. Eng on
20 November 4th to incorporate an agreement that didn't
21 exist?

22 MR. McDONALD: It was already negotiated in our
23 position.

24 MR. GORMAN: Based on what?

25 MR. McDONALD: Well, based on -- I'll let
26 Mr. Johnson answer the question.

27 MR. GORMAN: Actually, you won't because you

1 haven't been.

2 Q. MR. GORMAN: What would you base any
3 understanding that the Pattison agreement which didn't
4 yet exist was withheld in a November 4th affidavit?

5 A. I am basing it on the fact that Pattison was already
6 discussing the situation with -- that existed with
7 Birch Mountain with Tricap presumably on the tour that
8 they took.

9 Q. Presumably, assumedly, or are you guessing? You have
10 no evidence of that?

11 MR. McDONALD: He was a director of Brookfield.
12 He was under a fiduciary duty. Phrase your questions
13 properly. You've already qualified this witness as not
14 being a receivership expert. He is not a lawyer. You
15 know about the directorship. You know about fiduciary
16 duties that directors owe. You know that Tricap is a
17 fully owned affiliate of Brookfield. On the record,
18 treat this witness fairly.

19 MR. GORMAN: On the record, you get the chance
20 to answer questions later. Quit trying to answer them
21 now.

22 MR. McDONALD: It may be too late if I don't
23 interject. You know that he is the director. You
24 didn't raise that with this gentleman. You know about
25 fiduciary duty; he doesn't. Phrase your questions
26 properly, and we'll let Justice Streikaf decide on some
27 of these issues.

1 Q. MR. GORMAN: Do you believe directors have
2 fiduciary duties to the shareholders?

3 A. Yes.

4 Q. And do you believe Mr. McDonald and the other Birch
5 Mountain directors had and were exercising their
6 fiduciary duties to the best of their ability when they
7 signed all the various agreements and issued all of the
8 various press releases?

9 A. Yes.

10 Q. Okay. And your concerns with respect to what you
11 suggest are misleading statements in Mr. Eng's
12 affidavit are as set out in subparagraphs and
13 paragraphs 76?

14 A. Yes.

15 Q. And that is based upon your reading the documents and
16 your belief as to what should happen in an Alberta
17 receivership proceeding?

18 A. Yes.

19 Q. And with respect to whether the waiver agreement
20 expired or not, that is based upon reading the
21 agreement?

22 A. Yes. I quote it.

23 Q. Yeah. And you understand that the waiver or the
24 holiday with respect to events of default had expired
25 on September 30th?

26 A. I am saying the waiver agreement had not expired
27 because there were dates later than that period in the

1 waiver agreement.

2 Q. Okay. But you understand --

3 A. That allows for -- sorry.

4 Q. You understand that they were in default and the waiver
5 of default expired September 30th?

6 A. In terms of the failure to conclude, yes.

7 Q. Right. And that's what the company had press released,
8 saying there will be a reinstatement of the events of
9 default if we don't conclude this deal?

10 A. Yes.

11 Q. Okay. Looking to Mr. Eng's affidavit Exhibit 'V', as
12 in Victor, is that a press release you recognize from
13 the Birch Mountain records, being a November 3rd, 2008
14 press release intending to be a full, frank, and plain
15 disclosure to the public, including the shareholders?

16 A. Yes.

17 Q. This is dated November 3rd, so the day before Mr. Eng's
18 affidavit?

19 A. Yes.

20 Q. And a couple of business days before the appointment of
21 the receiver application?

22 A. Correct.

23 Q. Okay. And is this correct when it says: (as read)

24 Birch Mountain is unable to repay its
25 indebtedness to Tricap at this time.

26 A. Yes.

27 Q. And it continues: (as read)

1 It is expected that Tricap will begin
2 enforcement proceedings this week.
3 Whether or not a receiver will be
4 appointed and whether or not such a
5 receiver would continue the business
6 operations of the corporation is not
7 known.

8 Do you see that, sir?

9 A. Yes, I see it.

10 Q. Okay. And do you agree with the company's disclosure:
11 (as read)

12 Members of the board and management have
13 worked very hard, but without success,
14 with an attempt to preserve value for
15 shareholders in light of the
16 corporation's continuing financial
17 difficulties.

18 Right?

19 A. Yes, I see that.

20 Q. And do you agree with that, sir?

21 A. Yes.

22 Q. And that: (as read)

23 Members of management intend to be
24 available to assist the receiver in
25 maximizing value for all stakeholders to
26 the extent possible in the
27 circumstances.

1 A. Well, that is, of course, a little confusing because it
2 starts off saying whether or not a receiver will be
3 appointed and then later on they are assuming one will
4 be appointed.

5 Q. Right. And then they continue to advise the public:
6 (as read)

7 At this time there appears to be very
8 little likelihood that there will be any
9 recovery by the shareholders in the
10 event of a liquidation or sale of the
11 corporation's assets.

12 You understand that is what they were advising?

13 A. Yes.

14 Q. They issued a press release knowing everything in the
15 company's knowledge, including the AMEC report,
16 including potential sales, that that was there
17 conclusion?

18 A. That is what they've stated here, yes.

19 Q. And this is Birch Mountain's conclusions, not Tricap's,
20 not the receiver's, right?

21 A. It is Birch Mountain press release, yes.

22 Q. And they issued it believing it to be true?

23 A. Yes.

24 Q. (As read):

25 At this time there appears to be little
26 likelihood that there be any recovery by
27 the shareholders in the event of a

1 liquidation or sale of the corporation's
2 assets.

3 Sorry, I already read that one: (as read)
4 Appointment of a receiver, the powers of
5 the board of directors will be suspended
6 and ongoing decisions related to the
7 corporation will be undertaken by the
8 receiver.

9 That was their understanding; is that your
10 understanding, sir?

11 A. Yes, that is what it says.

12 Q. In paragraph 77 of your affidavit?

13 A. Yes.

14 Q. You state that: (as read)

15 This was initiated in order to transfer
16 the assets of Birch Mountain to 1439442
17 a private wholly owned subsidiary of
18 Tricap.

19 That is based on what, sir, your review of the documents
20 we've already been talking about?

21 A. No. That was based on the appointment of the
22 receivership followed up by the transfer of the assets
23 to the 143 numbered company.

24 Q. Which didn't exist in November?

25 A. Correct, but it would be created whenever it was
26 incorporated.

27 Q. Okay. And you understand that the receiver appointed

1 by Justice LoVecchio is a court-appointed receiver and
2 is an officer of the court?

3 A. Correct, he is a court-appointed receiver.

4 Q. And they conducted a sales process following up on what
5 the company and RBC had been doing for the prior year?

6 A. I have not seen any evidence of the sales process such
7 as how much they offered the company for, and what
8 advertising they did, or anything like that.

9 Q. So you don't know what they did?

10 A. I have no knowledge of what they did.

11 Q. Do you know that Tricap put in a bid and were subject
12 to other companies putting in bids and beating them?

13 A. That would depend on what the sales process was in
14 order to get reasonable bids in.

15 Q. But you understand that ultimately in January of 2009,
16 the receiver brought an application going back to
17 court?

18 A. Yes.

19 Q. Okay. Now, before we go through to the sales process,
20 paragraph 78 talks about the receiver's press release
21 including the reference to the stay of proceedings and
22 then you emphasize: (as read)

23 The property are stayed and suspended
24 further order of this court.

25 What are you emphasizing there, sir?

26 A. Nothing can be -- that says as of November the 7th
27 nothing can take place.

- 1 Q. Sir, do you know what a stay of proceedings is?
- 2 A. Yes, it is halted.
- 3 Q. What is halted?
- 4 A. The proceeding.
- 5 Q. What proceeding?
- 6 A. It says there all proceedings that are currently under
7 way against or in respect of the corporation.
- 8 Q. So third parties can't sue the company or bring claims
9 against the assets?
- 10 A. Yes.
- 11 Q. Right?
- 12 A. Yes.
- 13 Q. And Mr. Roberts put that in his press release?
- 14 A. Yes.
- 15 Q. And that's in the order, right?
- 16 A. Yes.
- 17 Q. So that is a good thing, right, people can't bring
18 claims against the company or its assets in accordance
19 with the terms of the receivership order?
- 20 A. Yes.
- 21 Q. Now, sir, you've reviewed the receivership order?
- 22 A. Which one?
- 23 Q. There is one receivership order, appointment order is
24 your tab 51?
- 25 A. Tab 51, yes.
- 26 Q. And paragraph 8 is the no proceedings paragraph
27 that --

- 1 A. Yes.
- 2 Q. -- is referenced in your paragraph quoting from
3 Mr. Roberts' press release?
- 4 A. Yes.
- 5 Q. Okay. And do you understand this to be a standard
6 Alberta template receiver's report?
- 7 A. It certainly looks like it, yes.
- 8 Q. Okay. What knowledge do you have about the Alberta
9 template?
- 10 A. None.
- 11 Q. So how do you know what it looks like it?
- 12 A. Well, as you can see it is a boilerplate document. It
13 looks like it.
- 14 Q. Okay. So have you reviewed the receiver's report that
15 is attached as Exhibit 'C' to Mr. Eng's affidavit? It
16 says it is dated January 5th, 2008, but I believe that
17 is a typo. I believe it should be January 5th, 2009?
- 18 A. Okay. I have it in front of me.
- 19 Q. Have you reviewed that prior to today, sir?
- 20 A. Briefly, yes.
- 21 Q. Okay. And you're aware that this is the report that
22 the receiver prepared in support of the proposed sales
23 application to Tricap?
- 24 A. Yes.
- 25 Q. Do you know if this is a typical report in
26 Alberta proceedings --
- 27 A. No, I do not.

1 Q. You do know, however, that the Tricap Partners offer to
2 purchase is attached to it?

3 MR. McDONALD: Which page is that on?

4 Q. MR. GORMAN: We didn't Bates stamp
5 unfortunately. It is right after the receivership
6 order.

7 A. I got it.

8 Q. That is an offer to purchase date December 12th, 2008?

9 A. Yes.

10 Q. And you understand that to be the Tricap purchase offer
11 that was provided to the receiver?

12 A. Yes.

13 Q. Right. And do you see near the bottom of the page of
14 the first page of the December 12th offer, "The
15 purchaser currently directly or indirectly holds..."
16 Do you see that reference, sir?

17 A. Yes.

18 Q. And (a) is secured debt in the sum of \$36,300,000, that
19 is the Tricap 2007 debenture?

20 A. Yes.

21 Q. And it is also disclosing to the receiver that it owns
22 approximately 29,280 in principal of 6 percent
23 unsecured convertible debentures issued pursuant to a
24 debenture, you understand that to be the Pattison Great
25 Pacific debt?

26 A. Yes.

27 Q. So in the offer Tricap was disclosing that it then was

1 the holder of the debt which it acquired pursuant to
2 the November 27, agreement?

3 A. Yes.

4 Q. And it also disclosed publicly through early warning
5 reports the acquisition of that debt?

6 A. Yes.

7 Q. Okay. And this was included in the report provided to
8 the Court in consideration of the Tricap offer to
9 purchase?

10 A. Yes.

11 Q. That was an application brought by the Court, officer
12 PWC as court-appointed receiver?

13 A. Yes.

14 Q. And supported by this report that included the offer to
15 purchase?

16 A. Yes.

17 Q. Now, sir, in paragraph 102 of your affidavit you
18 reference the Ontario Court of Appeal application with
19 respect to the jurisdiction?

20 A. Yes.

21 Q. And when you quote Justice Laskin saying: (as read)

22 You may have a terrific lawsuit, but

23 that's not what's before us.

24 A. Yes.

25 Q. You believe that to be a comment on the merits of the
26 lawsuit?

27 A. It could well be.

- 1 Q. Okay.
- 2 A. It depends how you interpret it, but yes.
- 3 Q. Okay. That quote will be before the Court, and they
4 can interpret that and see if that is a comment on the
5 merits just as easily as you can?
- 6 A. Sure.
- 7 Q. With the training of being a judge, they will have that
8 enhanced ability when they consider whether that is a
9 comment on the merits?
- 10 A. They can come to their own decision.
- 11 Q. Okay. In paragraph 112 you provide that the defendants
12 knew or should've known that the common share
13 prospectus, and we've looked at that before, that's
14 your Exhibit 1, contained full, true, plain disclosure.
15 You'll agree that this prospectus came out before
16 Tricap or Birch Mountain were involved?
- 17 A. Yes.
- 18 Q. Or Tricap or Brookfield Bridge were involved, right?
- 19 A. Yes.
- 20 Q. But Lanny McDonald was involved back then, and you knew
21 that, right?
- 22 A. Yes.
- 23 Q. Can you tell me when Mr. Lanny McDonald first saw the
24 web page representations set out in paragraphs 117 and
25 118 of your affidavit?
- 26 A. I don't know what date he first saw them.
- 27 Q. You'll agree with me, sir, that these web pages or

1 receiver and manager, was contrived and
2 not reasonable in the circumstances.

3 What is that based on, sir?

4 A. That is based on the fact that I have not seen any
5 documentation relative to the sale being advertised,
6 the benefits of the company put forward, etcetera, and
7 also that PWC were already in negotiations with Tricap
8 for the funding of the receivership as of the 9th. I
9 mean, if the company goes into receivership on the 5th,
10 there is not a lot that you can do by the 9th in terms
11 of advertising, you know.

12 Q. Okay.

13 A. Trying to find purchasers.

14 Q. Do you have a distinction in your mind between the
15 receiver needing money to keep paying employees and
16 keep operating and selling the assets? You don't
17 distinguish those two?

18 A. Well, I think you have to look at them both at the same
19 time. I understand he needs to try to keep the ship
20 afloat, right, but ...

21 Q. Okay.

22 A. But it's ...

23 Q. Do you doubt that the receiver took any of the steps as
24 set out in its first report, which was Mr. Eng's
25 Exhibit 'C'?

26 A. I have not seen the adverts, and, you know, the steps
27 that they did take.

- 1 Q. Okay. Do you doubt that the receiver did what is set
2 out in its first report? I understand you may not have
3 seen the advertisements, but do you doubt that PWC did
4 what they said?
- 5 A. I doubt they could do it in the time between the 5th
6 and the 9th.
- 7 Q. Okay.
- 8 A. That's what I'm trying to say.
- 9 Q. Do you understand that the bids on the sales process
10 were due December 12th, not November 9th?
- 11 A. Okay.
- 12 Q. The receiver needed funding to keep alive until
13 December 12th, right?
- 14 A. All right.
- 15 Q. Do you doubt that the receiver, up until the bids were
16 received on December 12th, did what it said in the
17 report?
- 18 A. Until I see evidence of what they actually did do, then
19 I can't answer that either way.
- 20 Q. So in the absence of seeing evidence, you put in an
21 affidavit that the court officer acted in a contrived
22 manner? You're willing to do that, and you did do
23 that, right?
- 24 A. Yes.
- 25 Q. And Just LoVecchio, upon reviewing the report,
26 concluded it was sufficient to authorize the sale,
27 right?

1 A. Yes.

2 Q. Justice LoVecchio is a trained insolvency practitioner
3 who has been on the bench for many years, right?

4 A. If you say so.

5 Q. You, in your conclusion, without having seen all of the
6 documents, believe it is contrived and take exception
7 to the fact that Justice LoVecchio granted the order,
8 right?

9 A. Yes.

10 Q. Okay. And you think that order should be detached and
11 set aside, right?

12 A. No.

13 Q. You agree that the order is valid?

14 A. It is long gone. The asset is long gone.

15 Q. Okay. And it has never been appealed, right?

16 A. Not to my knowledge.

17 Q. And the sales order transferred the assets to Tricap or
18 its nominee, now called Hammerstone, free and clear
19 from all claims, right?

20 A. Yes.

21 Q. And you understood that when Tricap put in their
22 December 12th offer, they were subject to someone
23 offering more money to pay more creditors or to pay
24 shareholders if they issued more, right?

25 A. Yes.

26 Q. And Birch Mountain and RBC and its advisors and its
27 special committee have been trying to sell these assets

1 since at least January 1 with their special committee,
2 right?

3 A. Yes.

4 Q. Without success?

5 A. Yes. But ...

6 Q. And without going through every paragraph of your
7 affidavit, we've gone through several of them, I just
8 want you to confirm that where you made conclusions or
9 assumptions or allegations with respect to the conduct,
10 it is based upon your reading the documents that are
11 attached to your affidavit or Mr. Eng's affidavit,
12 right?

13 A. Yes.

14 Q. And it is your interpretation of them, right?

15 A. Yes.

16 Q. Okay. Let's talk about the death spiral stock trading
17 which starts at paragraph 170 on page 58 of your
18 affidavit. Okay. Do you have that page in front of
19 you, sir?

20 A. Yes.

21 Q. You've been an investigator working on this matter with
22 your computer investigation since September 2010?

23 A. Yeah.

24 Q. Birch Mountain shareholders set up a website seeking
25 exchange of information and other matters since before
26 you were involved, right?

27 A. Yes.

- 1 Q. What evidence do you have that any Brookfield entity
2 was involved in any death spiral trading of Birch
3 Mountain?
- 4 A. The only item I could -- Brookfield themselves only is
5 your question, correct?
- 6 Q. Brookfield or any affiliate of Brookfield: Brookfield,
7 Tricap, or Brookfield Bridge?
- 8 A. Any affiliate, okay. The only evidence I've come
9 across -- at this stage there is obviously a lot more
10 documents to go, and we don't have any of your
11 production, but the only document I've come across was
12 an e-mail that related to a non-short selling document.
- 13 Q. Okay.
- 14 A. Between -- and this was between -- so the answer is no
15 I don't have that evidence at this time.
- 16 Q. Okay. Do you have any evidence in your four years of
17 investigations that any of the defendants or their
18 affiliates ever bought shares in Birch Mountain?
- 19 A. No.
- 20 Q. There is no evidence that they ever sold shares in
21 Birch Mountain?
- 22 A. No.
- 23 Q. There is no evidence that they shorted shares in Birch
24 Mountain?
- 25 A. No.
- 26 Q. You have found nothing to contradict Mr. Eng's sworn
27 testimony that they did not trade in Birch Mountain

1 shares, right?

2 A. No.

3 Q. You said no.

4 A. Yeah.

5 Q. You'd agree it is correct, there is no evidence to
6 contradict Mr. Eng's statement.

7 With respect to the allegations in the
8 Statement of Claim --

9 A. Sorry.

10 Q. All right. With respect to the allegations in the
11 Statement of Claim, other than what is in your
12 affidavit or what we've discussed today, do you have
13 any other evidence of any alleged wrongdoing by the
14 defendants?

15 A. No.

16 Q. This is your chance to speak up before I conclude the
17 examination. Is there anything that we haven't gone
18 through that isn't in your affidavit or hasn't been
19 discussed in the cross-examination today?

20 A. Not at this time, correct.

21 Q. Thank you, sir. Then those are all of my questions.

22

23 (Proceedings ended at 11:38 a.m.)

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Certificate of Transcript

I, the undersigned, hereby certify that the foregoing pages 1 to 87 are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Calgary, Province of Alberta, this 21st day of August, 2014.

"Kaeli Campbell"

Kaeli Campbell, CSR(A)

Official Court Reporter

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- I N D E X -

DAVID PETER JOHNSON

AUGUST 19, 2014

The following is a listing of exhibits, undertakings and objections as interpreted by the Court Reporter.

The transcript is the official record, and the index is provided as a courtesy only. It is recommended that the reader refer to the appropriate transcript pages to ensure completeness and accuracy.

OBJECTIONS

OBJECTION TAKEN to answering the question: 28
Prior to the receivership the company and its advisors failed to raise \$10 million in equity, right?

UNDERTAKINGS REQUESTED

UNDERTAKING NO. 1 - To follow up with 11
Mr. McDonald and advise if the dates and numbers in the following statement are incorrect: Mr. McDonald had been a director since 1995 and that he held at that point in time 175,666 shares which represented 0.3 percent of the shares issued at that point in time.

1 UNDERTAKING NO. 2 - To review document 'O' and 18
2 identify any representations by Tricap with
3 respect to the shareholder vote and
4 recommendations therein - TAKEN UNDER
5 ADVISEMENT
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