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PART I - NATURE OF THE APPEAL

1. This is the factum of the Respondents, Brookfield Asset Management Inc. ("**Brookfield AM**"), Brookfield Special Situations Partners Ltd. (at all material times, Tricap Partners Ltd. ("**Tricap**")), and 1439442 Alberta Ltd. (now Hammerstone Corporation ("**Hammerstone**")).

2. The Appellant, Wanda Bond (the "**Appellant**", or "**Bond**"), appeals from the Order of the Honourable Mr. Justice Perell ("**Perell J.**") dated April 26, 2011, staying the within action (the "**Action**") on the grounds that: (a) there is no real and substantial connection between the Action and Ontario; and (b) Ontario is *forum non conveniens*, Alberta being the proper forum for the Action.

Order of the Honourable Justice Perell dated April 26, 2011, Appellant's Appeal Book and Compendium (Appellant's Compendium"), Tab 2, pp. 6-8.

Notice of Appeal dated May 25, 2011 ("**Notice of Appeal**"), Appellant's Compendium, Tab 1, pp. 1-5.

3. The Action is a putative class action brought on behalf of certain shareholders of an Alberta company called Birch Mountain Resources Limited ("**Birch Mountain**"), alleging that certain conduct, including the transfer of Birch Mountain's Alberta property pursuant to a final order of the Court of Queen's Bench of Alberta (the "**Alberta Court**"), was oppressive under the Ontario *Business Corporations Act*, R.S.O. 1990 c. B. 16 (the "**OBCA**").

Reasons for Decision of the Honourable Justice Perell dated April 26, 2011 ("**Reasons for Decision**"), para. 2, Appellant's Compendium, Tab 3, pp. 9-10.

4. The Appellant is the proposed representative plaintiff. She has not sued Birch Mountain. Instead, she has sued Hammerstone, an Alberta corporation, and Tricap, an Ontario corporation, both of whom were court-approved transferees of Birch Mountain's Alberta property. The Appellant has also sued Brookfield AM, an Ontario corporation, although she has made no allegations against Brookfield AM in the Statement of Claim.

Reasons for Decisions, paras. 10 and 25-27, Appellant's Compendium, Tab 3, pp. 10 and 12.

5. Perell J. stayed the Action on the grounds that it had no connection to Ontario, finding:
- (a) that "Ms. Bond [was] a resident of the United States" and that "she and many of the putative class members [had] no personal connection to Ontario";
 - (b) that "all of the events took place in Alberta";
 - (c) that "[t]he critical event involved a court order made in Alberta about a contract governed by the law of Alberta made with an Alberta corporation carrying on business in Alberta and forced by the [Alberta Court] to sell its assets, also located in Alberta";
 - (d) that Ms. Bond's main argument that the parties and the matter are connected to Ontario through the oppression provisions of the OBCA was untenable because, in fact, Birch Mountain was not a corporation to which the OBCA applied, and the Respondents were not affiliates of Birch Mountain; and
 - (e) that the location of the majority of the parties, witnesses, and evidence were overwhelmingly in favour of Alberta as the convenient forum.

Reasons for Decision, paras. 51 - 66, Appellant's Compendium, Tab 3, pp. 17-19.

6. It is the Appellant's submission that in staying the Action, Perell J.:
- (a) failed to properly consider the evidence of jurisdiction *simpliciter*;
 - (b) failed to properly consider the application of the oppression provisions in the OBCA to the Action; and
 - (c) failed to properly consider the evidence of *forum non conveniens*.

Notice of Appeal, Appellant's Compendium, Tab 1, pp. 1-5.

7. As evidenced by the Reasons for Decision, Perell J. properly considered the law and evidence before him, and correctly concluded that Ontario does not have jurisdiction *simpliciter* over the Action, and is *forum non conveniens*.

8. As described below, there was simply no basis on which his Honour could have found that there was a substantial connection between the Action and Ontario, or that the oppression provisions of the OBCA could be applied to the Action by a shareholder of an Alberta Corporation. Likewise in respect of his decision on *forum non conveniens*, there was simply no, or no reasonable basis on which his Honour could have found that Ontario was

forum conveniens, especially where "Ms. Bond provided no evidence...", and the Respondents provided "overwhelming" evidence in favour of Alberta.

Reasons for Decision, paras. 55 - 66, Appellant's Compendium, Tab 3, p. 19.

PART II - FACTS

A. Parties

(i) Proposed Class

9. The proposed class is a worldwide class comprised of all primary and secondary market purchasers (AMEX and TSX) of common shares of Birch Mountain who held shares between April 1, 2005 and November 5, 2008.¹

Reasons for Decision, para. 9, Appellant's Compendium, Tab 3, p. 10.

Statement of Claim, para. 4(I), Appellant's Compendium, Tab 4, p. 27.

(ii) Proposed Representative Plaintiff - Bond

10. The Statement of Claim does not even allege that Bond is or was a Birch Mountain shareholder. Further, it is not clear on the record whether Bond ever held shares in Birch Mountain because:

- (a) Bond did not file an affidavit in response to the Respondents' jurisdiction motion, thus avoiding cross-examination on the issue; and
- (b) the only evidence tendered by Bond was an affidavit sworn by David Johnson (the "**Johnson Affidavit**"), a computer research consultant whose compensation is dependent on the outcome of the Action. Mr. Johnson had never met Bond and did not know whether she was, or is, a shareholder of Birch Mountain. Mr. Johnson is not a shareholder of Birch Mountain.

Reasons for Decision, paras. 5 - 6, Appellant's Compendium, Tab 3, p. 10.

Affidavit of David Johnson sworn January 29, 2011 ("**Johnson Affidavit**"), Respondents' Compendium, Tab 2, pp. 51-55.

¹ The plaintiff has not sought leave to proceed with a secondary market claim under s. 138.8 of the Ontario *Securities Act*, R.S.O. 1990, CHAPTER S.5.

Excerpt from the Cross-Examination of David Johnson held March 14, 2011 ("Johnson Examination"), Respondents' Compendium, Tab 1, pp. 4-8, q. 12-37; p. 9-10, q. 48-49; p. 12, q. 102-105

11. Bond is a citizen of the United States and a resident of Marysville, Washington.

Reasons for Decision, para. 5, Appellant's Compendium, Tab 3, p. 10.

Johnson Examination, Respondents' Compendium, Tab 1, pp. 6-7, q. 27-29.

12. Bond is a self-described "shareholder advocate", who regularly "blogs" about Birch Mountain and the Respondents from the United States. Other Bond blogs indicate that she has concerns about short-selling ruining the country (presumably the United States).

Reasons for Decision, para. 5, Appellant's Compendium, Tab 3, p. 10.

Johnson Examination, Respondents' Compendium, Tab 1, pp. 22-25, q. 367-376.

Exhibits to the Johnson Examination, Respondents' Compendium, Tabs 1A to 1L, pp. 26-50.

(iii) Birch Mountain

13. In the Statement of Claim, Bond claims relief pursuant to the oppression provisions of the Ontario *Business Corporations Act* ("OBCA"). It appears that Bond claims status as a complainant as a shareholder of Birch Mountain, and indeed, for the purposes of considering the jurisdiction motion, Perell J. "assum[ed] that Ms. Bond would qualify as a "complainant" under the [OBCA] as a shareholder in Birch Mountain."

Reasons for Decision, para. 54, Appellant's Compendium, Tab 3, pp. 17-18.

14. Birch Mountain was incorporated under the Alberta Business Corporations Act ("ABCA"), was based in Calgary, and was independent of, and at arm's length from the Respondents.

Reasons for Decision, para. 7, Appellant's Compendium, Tab 3, p. 10.

Eng Affidavit, para. 13 and Exhibit 'E', Respondents' Compendium, Tab 3, p. 58 and Tab 4, pp. 64-67.

15. Birch Mountain owned and operated a limestone mine located in northern Alberta.

Eng Affidavit, para. 14, Respondents' Compendium, Tab 3, p. 58.

(iv) The Respondents

16. Hammerstone is an Alberta corporation based in Calgary which was incorporated under the ABCA specifically to do business in Alberta. Hammerstone has three directors, two of whom are resident in Calgary, and one of whom is resident in Vancouver.

Reasons for Decision, para. 26, Appellant's Compendium, Tab 2, p. 10.

Eng Affidavit, para. 48, Respondents' Compendium, Tab 3, p. 63.

17. Tricap is an Ontario corporation with an office in Calgary, Alberta. Tricap was a lender to Birch Mountain in Alberta pursuant to a convertible debenture governed by Alberta law (the "Tricap Debenture") which Tricap administered from its Calgary office. Tricap was the plaintiff in the Alberta receivership proceedings.

Reasons for Decision, paras. 10-11, Appellant's Compendium, Tab 3, pp. 10-11.

Excerpt from Senior Secured Convertible Debenture ("Tricap Debenture"), Eng Affidavit, para. 22 and Exhibit "I", Respondents' Compendium, Tab 3, pp. 59-60, and Tab 5, p. 70.

Eng Affidavit, paras. 2, 9 and 47, Respondents' Compendium, Tab 3, pp. 56-57 and 62.

18. Brookfield AM is an Ontario corporation which owned Tricap during the period in question. As mentioned above, despite naming Brookfield AM as a defendant in the Action, Bond makes no allegations against Brookfield AM in the Statement of Claim.

Reasons for Decision, para. 27, Appellant's Compendium, Tab 3, p. 4.

B. Background to the Impugned Alberta Receivership Proceedings

19. On November 5, 2008, with the consent of Birch Mountain, the Honourable Mr. Justice S.J. LoVecchio of the Alberta Court ordered the appointment of PricewaterhouseCoopers Inc. as the interim receiver and manager (the "Alberta Receiver") over all of Birch Mountain's assets and undertakings. Ultimately, on the recommendation of the Alberta Receiver, the Alberta Court ordered that Birch Mountain's Alberta property be sold to Hammerstone, and Tricap. The order was not appealed by Birch Mountain or any other party.

Reasons for Decision, paras. 18 and 22-25, Appellant's Compendium, Tab 3, pp. 11-12.

Approval and Vesting Order of the Queen's Bench of Alberta dated January 8, 2009 ("Approval and Vesting Order"), Eng Affidavit, para. 35 and Exhibit 'C', Respondents' Compendium, Tab 3, p. 61 and Tab 6, pp. 72-79.

20. Birch Mountain is still in receivership and its affairs continue to be managed by the Alberta Receiver in Alberta.

Reasons for Decision, para. 33, Appellant's Compendium, Tab 3, p. 14.

21. All of Birch Mountain's public disclosure was issued from Calgary, Alberta, including a consultant's report released by Birch Mountain in August 2006, which Bond references extensively in the Statement of Claim. The Statement of Claim pleads that Birch Mountain's public disclosure informed the reasonable expectations of the company's shareholders.

Eng Affidavit, para. 15-17 and Exhibits 'F' and 'G', Respondents' Compendium, Tab 3, pp. 58-59, Tab 7, pp. 80-97, Tab 8, pp. 98-255.

Johnson Affidavit, paras. 8-9, and Exhibits '7' and '8', Respondents' Compendium, Tab 2, p. 53, Tab 9, pp. 256-283, Tab 10, pp. 284-286.

Johnson Examination, Respondents' Compendium, Tab 1, pp. 12-14, q. 106-118.

Statement of Claim, paras. 34-37, Appellant's Compendium, Tab 4, p. 22-81.

22. In December 2007, Birch Mountain and Tricap announced from Calgary that Tricap had subscribed for the Tricap Debenture. The Tricap Debenture provided, among other things, that it would be governed by the laws of Alberta.

Birch Mountain Press Release dated December 24, 2007, Eng Affidavit, para. 22, and Exhibit 'J', Respondents' Compendium, Tab 3, pp. 59-60, Tab 11, pp. 287-289.

Tricap Debenture, Eng Affidavit, para. 22 and Exhibit "I", Respondents' Compendium, Tab 3, pp. 59-60, and Tab 5, p. 70.

23. The Birch Mountain board of directors recommended that the Birch Mountain shareholders vote to approve the conversion right under the Tricap Debenture in a Management Information Circular dated April 25, 2008. The Birch Mountain shareholders approved the Tricap Debenture on May 30, 2008, at a shareholders' meeting held in Calgary.

Reasons for Decision, para. 12, Appellant's Compendium, Tab 3, p. 11.

Notice of Meeting and Management Information Circular dated April 25, 2008, Eng Affidavit, para. 25 and Exhibit 'L', Respondents' Compendium, Tab 3, p. 60, and Tab 12, p. 330.

Report of Voting Results, Eng Affidavit, para. 26 and Exhibit 'M', Respondents' Compendium, Tab 3, p. 60, and Tab 13, p. 317.

24. In June 2008, Birch Mountain defaulted under the Tricap Debenture.

Reasons for Decision, para. 14, Appellant's Compendium, Tab 3, p. 11.

Birch Mountain Press Release dated August 27, 2008 ("August 2008 Press Release"), Eng Affidavit, para. 29 and Exhibit 'O', Respondents' Compendium, Tab 3, pp. 60-61, and Tab 14, p. 319.

25. In August 2008, Birch Mountain and Tricap entered an agreement to amend the Tricap Debenture. Birch Mountain's public disclosure stated: "The amendments to the Debenture will accommodate the continuous pursuit of an immediate sale of the Company or its assets or additional equity financing to unlock the maximum value for its shareholders as previously announced"

Reasons for Decision, para. 15, Appellant's Compendium, Tab 3, p. 11.

August 2008 Press Release, Eng Affidavit, para. 29 and Exhibit 'O', Respondents' Compendium, Tab 3, pp. 60-61, and Tab 14, p. 319.

26. Ultimately, Birch Mountain's sale process failed.

27. In November 2008, Birch Mountain announced from Calgary that it had received a demand from Tricap, and that it expected Tricap to commence enforcement proceedings that week.

Reasons for Decision, para. 17, Appellant's Compendium, Tab 3, p. 11.

Press Release dated November 3, 2008 ("November 3 Press Release"), Eng Affidavit, para. 31 and Exhibit 'P', Respondents' Compendium, Tab 3, p. 61, and Tab 15, p. 328.

28. Tricap commenced proceedings against Birch Mountain before the Alberta Court. On hearing, and with the consent of Birch Mountain, the Alberta Court granted an order (the "Alberta Receivership Order") appointing the Alberta Receiver and authorizing the Alberta Receiver to market Birch Mountain's assets.

Reasons for Decision, para. 18, Appellant's Compendium, Tab 3, p. 11.

Receivership Order of the Queen's Bench of Alberta dated November 5, 2008 ("Alberta Receivership Order"), Eng Affidavit, para. 10, and

Exhibit 'B', Respondents' Compendium, Tab 3, pp. 57-58, and Tab 16, p. 329-341.

29. Birch Mountain publicly disclosed the Alberta receivership proceedings, and further that: "... there appears to be little likelihood that there will be any recovery by the shareholders in the event of a liquidation or sale of the Corporation's assets."

November 3 Press Release, Eng Affidavit, para. 31 and Exhibit 'P', Respondents' Compendium, Tab 3, p. 61, and Tab 15, p. 327-328.

30. The Alberta Receiver conducted a court supervised sales process with a view to obtaining the highest bid for Birch Mountain's assets. On January 5, 2009, the Alberta Receiver filed a report with the Alberta Court which, among other things: (a) noted that its independent legal counsel had opined that Tricap's security was valid and enforceable; (b) detailed the sales processes that Birch Mountain and then the Alberta Receiver had undertaken, including contacting 98 possible purchasers in a first effort, and 48 more in a second effort; (c) reported that Tricap had made the only offer to purchase Birch Mountain's assets; and (d) recommended that it be authorized to accept the Tricap offer.

Reasons for Decision, para. 23, Appellant's Compendium, Tab 3, p. 12.

Excerpt from the Receiver's First Report dated January 6, 2009 ("Receiver's First Report"), Eng Affidavit, para. 11 and Exhibit 'D', Respondents' Compendium, Tab 3, p. 58, and Tab 17, p. 349-351.

31. The Alberta Receiver applied to the Alberta Court for authority to accept the Tricap offer. On January 8, 2009, the Honourable Mr. S.J. LoVecchio of the Alberta Court approved the Tricap offer and granted the Approval and Vesting Order.

Reasons for Decision, para. 25, Appellant's Compendium, Tab 3, p. 12.

Receiver's First Report, Eng Affidavit, para. 11 and Exhibit 'D', Respondents' Compendium, Tab 3, p. 58, and Tab 17, p. 351.

Approval and Vesting Order, Eng Affidavit, para. 35 and Exhibit 'C', Respondents' Compendium, Tab 3, p. 61 and Tab 6, pp. 72-79.

C. Justice Perell's Decision

32. In light of the facts described above, and upon the application of the real and substantial connection test described below, Perell J. found that there was no connection between the Action and Ontario because:

- (a) Bond, and many of the other putative class members, were not resident in, and had no connection to, Ontario; and
- (b) all of the events, including the critical events involving the Alberta Court, the Alberta Receivership Order and the Approval and Vesting Order took place in Alberta.

Reasons for Decision, para. 51, Appellant's Compendium, Tab 3, p. 17.

33. Perell J. also rejected the Appellant's argument of alleged connections between the Action and Ontario based on: Birch Mountain having traded its shares on the Toronto Stock Exchange (the "TSX"); two of the three Respondents being resident in Ontario; two of the Respondents having made decisions in Toronto; and the application of the oppression provisions in the OBCA. "Specifically, Perell J. held that the oppression provisions of the OBCA did not apply to the Action both because Birch Mountain was not a "corporation" as defined in the OBCA for a shareholder to be a complainant, and because the Respondents were not "affiliates" of Birch Mountain as defined by the OBCA.

Reasons for Decision, para. 52-53 and 57-62, Appellant's Compendium, Tab 3, pp. 17-19.

34. In respect of *forum non conveniens*, Perell J. decided that Alberta was the natural and proper forum for the Action given:

- (a) that the witnesses are located predominately in Alberta;
- (b) that Birch Mountain's management was based in Alberta;
- (c) that the issues raised in the Action concern an Alberta corporation, its Alberta property and events that happened in Alberta;
- (d) that the Tricap Debenture was made and administered in Alberta, was governed by the laws of Alberta and approved by Birch Mountain's board and shareholders in Alberta;
- (e) that there are outstanding proceedings in Alberta; and

(f) that Alberta's oppression remedy is similar to Ontario's.

Reasons for Decision, para. 63-66, Appellant's Compendium, Tab 3, pp. 19-20.

PART III - ISSUES ON APPEAL

35. The issues raised by the Appellant on this appeal can be summarized as follows:
- (a) Did the learned trial judge fail to properly consider the evidence of jurisdiction *simpliciter* presented by the Appellant?
 - (b) Did the learned trial judge fail to properly consider the application of the oppression provisions in the OBCA?
 - (c) Did the learned trial judge fail to properly consider the evidence of *forum non conveniens* presented by the Appellant? and
 - (d) Did the learned trial judge fail to properly consider an appropriate cost order?

PART IV - LAW & ARGUMENT

A. Standard of Review

36. The standard of review for a decision based on jurisdiction *simpliciter* is different from the standard of review for a decision based on *forum non conveniens*.

Black v. Breeden, [2010] O.J. No. 3423 at paras. 19 and 77 (C.A.) (QL) ("*Black*"), leave to appeal granted, [2010] SCCA No. 387 (QL), Respondents' Brief of Authorities ("Respondents' Authorities"), Tab 1.

Reasons for Decision, para. 37, Appellant's Compendium, Tab 3, p. 14.

37. Jurisdiction *simpliciter* is a question of law and the standard of review is correctness.

Black cited to the C.A., para. 19, Respondents' Authorities, Tab 1.

Reasons for Decision, para. 37, Appellant's Compendium, Tab 3, p. 14.

38. A decision based on *forum non conveniens* is an exercise of judicial discretion and is entitled to deference:

On appeal, the usual principle of deference to discretionary decision applies: an appeal court should intervene only if the trial judge errs in principle, misapprehends or fails to take account of material evidence, or reaches an unreasonable decision.

Black, para. 77, citing *Young v. Tyco International of Canada Ltd.* (2008), 92 O.R. (3d) 161 (C.A.) at para. 27, Respondents' Authorities, Tab 1.

Reasons for Decision, para. 37, Appellant's Compendium, Tab 3, p. 14.

B. Jurisdiction *Simpliciter* - No Real and Substantial Connection to Ontario

39. In finding that Ontario did not have jurisdiction *simpliciter* over the Action, Perell J. applied the well-established real and substantial connection test as recently clarified by the Ontario Court of Appeal in *Van Breda v. Village Resorts Ltd.* ("*Van Breda*").

Reasons for Decision, paras. 38-42, Appellant's Compendium, Tab 3, pp. 14-15.

Van Breda v. Village Resorts Ltd., [2010] O.J. No. 402 (C.A.) at paras. 41-49 (QL) ("*Van Breda*"), leave to appeal granted, [2010] SCCA No. 174 (QL), Respondents' Authorities, Tab 2.

Black, para. 20-25, Respondents' Authorities, Tab 2.

40. In *Van Breda*, the Court confirmed that the test for jurisdiction *simpliciter* remains whether there is a real and substantial connection between the claim and Ontario, and established a two-part analysis in the regard.

Reasons for Decision, paras. 39 and 47, Appellant's Compendium, Tab 3, pp. 14 and 46.

Van Breda, paras. 43-46 and 84, Respondents' Authorities, Tab 2.

41. As described by Perell J., the first part of the analysis is a category-based presumption of jurisdiction based on the rules for service *ex juris* under the *Rules of Civil Procedure*, namely Rule 17.02. Specifically, the analysis mandates that where one of the connections listed in Rule 17.02 exists, save for subsections (h) ("damages sustained in Ontario") and (o) ("a necessary and proper party"), there will be a presumption that the action has a real and substantial connection to Ontario. However, the presumption is rebuttable where the defendant can show that in the "particular circumstances of the case", the real and substantial test has not been met.

Reasons for Decision, paras. 41-42 and 46, Appellant's Compendium, Tab 3, pp. 15-16.

Van Breda, paras. 71-80, Respondents' Authorities, Tab 2.

42. In respect of the second stage of the analysis, the fundamental questions remains whether there is a sufficient real and substantial connection which justifies the assumption of

jurisdiction. In order to make this determination, the Court in *Van Breda* recognized a number of factors which should be considered, although none are definitive. As noted by Perell J., these factors include:

- (a) the connection, if any, between Ontario and the plaintiff's claim;
- (b) the connection, if any, between Ontario and the defendant;
- (c) fairness of assuming or refusing jurisdiction;
- (d) the involvement of others, if any, in the action;
- (e) the Ontario Court's willingness to recognize and enforce an extra-provincial judgment made on the same jurisdictional basis;
- (f) whether the case is interprovincial in nature; and
- (g) comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Reasons for Decision, paras. 40 and 47, Appellant's Compendium, Tab 3, pp. 15-16.

***Van Breda*, para. 109, Respondents' Authorities, Tab 2.**

43. Perell J. correctly applied the two-stage test in *Van Breda* to the facts before him as follows.

(i) No Presumption of Jurisdiction

44. Perell J. rejected Bond's reliance on Rule 17.02 (n) ("service authorized by statute") and (p) ("person ordinarily carrying on business in Ontario") as creating a presumption of jurisdiction over Hammerstone (an Alberta corporation).

45. In respect of Rule 17.02(n), Perell J. found that Bond's claim was based on the oppression provisions of the OBCA and that because the OBCA did not authorize a claim to be made against a person outside of Ontario, there was no presumption of jurisdiction against Hammerstone under Rule 17.02(n).

46. In respect of Rule 17.02(p), Perell J. found that Hammerstone was never ordinarily resident in Ontario, and had never carried on business in Ontario. As a result, Perell J. found that Rule 17.02(p) did not apply to Hammerstone.

47. In paragraphs 83 through 87 of the Appellant's factum, the Appellant argues that Perell J. erred in finding that there was no presumption of jurisdiction over Hammerstone under Rules 17.02(n) and (p) because his Honour failed to properly apply the definitions of "body corporate" and "affiliated body corporate" under the OBCA to the Respondents. The Appellant's argument is without merit for the following reasons.

48. First, in respect of Rule 17.02(n), the OBCA does not speak to service *ex juris* and cannot, therefore, authorize service of the Action on Hammerstone outside of Ontario, or create a presumption of jurisdiction in favour of Ontario in accordance with *Van Breda*. Accordingly, Perell J. was correct in finding that Rule 17.02(n) did not apply to Hammerstone.

Reasons for Decision, paras. 44-45, Appellant's Compendium, Tab 3, p. 16.

49. Second, in respect of Rule 17.02(p), the Appellant appears to be suggesting that there is a correlation between an "affiliated body corporate" for the purposes of the OBCA and a "person ordinarily resident or carrying on business in Ontario" for the purposes of Rule 17.02(p), and that if Perell J. had not erred in finding that the Respondents were not "affiliated body corporates" under the OBCA, he would have found that Hammerstone was a "person ordinarily resident or carrying on business in Ontario". There is simply nothing to support this assertion, and in any event, Hammerstone was not ordinarily resident and was not carrying on business in Ontario.

50. To the contrary, the only evidence before Perell J. was that: (a) Hammerstone is an Alberta Corporation based in Calgary which was incorporated under the Alberta *Business Corporations Act* to do business in Alberta; and (b) that two of Hammerstone's three directors are resident in Calgary, the third being resident in Vancouver. Accordingly, Perell J. correctly found that Rule 17.02(p) did not apply to Hammerstone and that there was no presumption of jurisdiction in favour of Ontario in accordance with *Van Breda*.

Reasons for Decision, paras. 44-46, Appellant's Compendium, Tab 3, p. 16.

(ii) Real and Substantial Connection to Ontario

Evidence of Jurisdiction *Simpliciter*

51. Under the second stage of the test, Perell J. considered the factors delineated in *Van Breda* as described above, and concluded that none of them supported a real and substantial connection between the Action and Ontario. In particular he found that there was no connection between Ontario and the Action because:

- (a) Bond, and many of the other putative class members, were not resident in, and had no connection to, Ontario; and
- (b) all of the events, including the critical events involving the Alberta Court, the Alberta Receivership Order and the Approval and Vesting Order took place in Alberta.

Reasons for Decision, para. 51, Appellant's Compendium, Tab 3, p. 17.

52. It is clear from paragraphs 7 through 34 of his Reasons for Decision that Perell J. considered all of the arguments put forward by the Appellant in respect of jurisdiction *simpliciter*, whether supported by evidence, or not. Notably, Perell J. considered the following as highlighted by the Appellant in her factum:

- (a) allegations of oppression in the Statement of Claim;
- (b) allegations of death spiral stock trading on the TSX;
- (c) that Brookfield AM and Tricap are Ontario corporations with registered offices in Ontario;
- (d) that Brookfield AM is the parent corporation to Tricap;
- (e) the public disclosures filed by Birch Mountain; and
- (f) Birch Mountain's reliance on the financial hardship exemption pursuant to section 604(e) of the TSX Company Manual.

Reasons for Decision, paras. 7-34, Appellant's Compendium, Tab 3, pp. 10-14.

53. Perell J. carefully considered the arguments and evidence put forward by the Appellant regarding jurisdiction *simpliciter*. Nothing shows a real and substantial connection between

the Action and Ontario because the key events still revolved around an Alberta company, an Alberta Receivership Order and an Approval and Vesting Order made by the Alberta Court.

No Jurisdiction under the OBCA

54. At paragraphs 63 through 81 of the Appellant's factum, the Appellant confuses and misapplies the definitions of "corporation", and "body corporate" as they relate to the oppression provisions under the OBCA.

55. The OBCA defines "body corporate" to mean any body corporate whether or not it is a corporation to which the OBCA applies. Asian, European or Australian corporate entities with no business dealings in Canada or Ontario are a "body corporate" but are not subject to the OBCA, or its oppression provisions. A resident of Belgium, Frankfurt or Sydney are all "persons", but are not necessarily subject to the Ontario Court.

56. For the oppression remedy to apply and for a Plaintiff to be a "complainant", there must be shareholdings in a corporation, which is a body corporate with share capital to which the OBCA applies. The putative class of the Appellant allege shareholdings only in Birch Mountain, which is a body corporate established under Alberta law, but not a corporation with share capital to which the OBCA applies.

57. Perell J.'s careful analysis of the OBCA lead him to the correct conclusion that the OBCA did not apply to the Action.

58. First, Perell J. assumed, for the purposes of his analysis, that Bond would qualify as a "complainant" under section 245 of the OBCA as a shareholder of Birch Mountain. Perell J. had to make this assumption because, as described above, Bond did not allege in her Statement of Claim that she was a shareholder of Birch Mountain, or tender any evidence in this regard. Despite this assumption, the Appellant suggests at paragraphs 90 -93 of her factum that Perell J. failed to consider her as a complainant under the OBCA.

59. Section 245 of the OBCA defines "complainant" as follows:

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

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. [Emphasis added.]

Reasons for Decision, para. 54, Appellant's Compendium, Tab 3, pp. 17-18.

60. Second, Perell J. noted that, in accordance with s. 248 of the OBCA, for Bond to have a tenable oppression claim, she needed to show both that: (a) Birch Mountain was a "corporation" under the OBCA; and (b) the Respondents would qualify as "affiliates" of Birch Mountain. Section 248(2) of the OBCA provides:

Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. [Emphasis added.]

61. Third, Perell J. considered the definitions of "corporation" and "affiliate" under the OBCA and applied them to the facts before him as follows.

Reasons for Decision, para. 55, Appellant's Compendium, Tab 3, p. 18.

62. The OBCA defines "corporation" as "a body corporate with share capital to which this Act applies." Subsection 2(1) of the OBCA provides that the Act applies as follows:

This Act, except where it is otherwise expressly provided, applies to every body corporate with share capital,

(a) incorporated by or under a general or special Act of the Parliament of the former Province of Upper Canada;

(b) incorporated by or under a general or special Act of the Parliament of the former Province of Canada that has its registered office and carries on business in Ontario; or

(c) incorporated by or under a general or special Act of the Legislature,
but this Act does not apply to a corporation within the meaning of the *Loan and Trust Corporations Act* except as provided by that Act.

63. That is to say, a "corporation" to which the OBCA oppression provisions apply is a corporation incorporated under the laws of Ontario. Because Birch Mountain is incorporated under the ABCA, and subject to the ABCA oppression provisions, Perell J. correctly found that Birch Mountain is not a corporation for the purposes of the OBCA:

That the Ontario Defendants made decisions in Ontario, alleged to be oppressive and unfair to Birch Mountain shareholders, does not make Birch Mountain an Ontario Corporation subject to the Ontario Act.

Reasons for Decision, paras. 55-56, Appellant's Compendium, Tab 3, p. 17.

64. Despite finding that Birch Mountain was not a corporation under the OBCA, Perell J. also considered the analysis as if Birch Mountain were a corporation under the OBCA. He noted that if that were the case, then for Bond to have an oppression claim against the Respondents, she would still have to establish that the Respondents were "affiliates" of Birch Mountain under the OBCA.

Reasons for Decision, paras. 57, Appellant's Compendium, Tab 3, p. 18.

65. The OBCA defines "affiliate" as "an affiliated body corporate within the meaning of subsection (4)." "Body corporate" is defined as "any body corporate with or without share capital and whether or not it is a corporation to which this Act applies." Subsection 1(4) of the OBCA provides:

Affiliated Body Corporate

For the purposes of this Act, one body corporate shall be deemed to be affiliated with another body corporate if, but only if, one of them is the

subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person. [Emphasis added.]

66. As held by Perell J., there is no suggestion that any of the Respondents were subsidiaries of Birch Mountain. As such, the only remaining question was whether Birch Mountain and the Respondents were under common control. Subsection 1(5) of the OBCA provides:

Control

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

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

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

Reasons for Decision, paras. 58-59, Appellant's Compendium, Tab 3, p. 18.

67. The Appellant conceded before Perell J. that none of the Respondents held any voting shares of Birch Mountain, and Perell J. found that:

Only Tricap had a conversion right to obtain such shares under its Debenture; however, the right was never exercised and thus the deemed control provisions of the Act [were] never triggered and none of the [Respondents] became an affiliate of Birch Mountain.

Reasons for Decision, para. 60, Appellant's Compendium, Tab 3, pp. 18-19.

Statement of Claim, paras. 59, 64, 66, 76-81, Appellant's Compendium, Tab 4, pp. 49-53 and 58-60.

68. Perell J. also rejected Bond's argument that the Tricap Debenture was not "held other than by way of security only" just because the Tricap Debenture could potentially become a voting security. He held that such an interpretation would read out the exception and make it impossible to have a convertible debenture be other than by voting security.

Reasons for Decision, para. 61, Appellant's Compendium, Tab 3, p. 19.

69. At paragraphs 98 through 105 of the Appellant's factum, the Appellant argues that Perell J. failed to consider that Brookfield AM and Tricap had referred to the Tricap Debenture as an investment and that had he done so, he would have found that the Respondents had control over Birch Mountain such that they were its affiliates. The mere use of the word investment does not change the actual nature of the Tricap Debenture. It was a convertible debenture and the right to convert was never exercised. Accordingly, the Respondents never held any voting shares of Birch Mountain such that they had any control over Birch Mountain or could be considered affiliates of Birch Mountain under the OBCA.

70. In light of the foregoing, it is the respectful submission of the Respondents that Perell J. was correct in finding that: (a) the OBCA did not apply to Hammerstone or the Action; and (b) the Ontario Court did not have jurisdiction *simpliciter*. Accordingly, Perell J.'s decision should not be overturned.

C. Ontario is Forum Non Conveniens

71. Although Perell J. found that Ontario did not have jurisdiction *simpliciter* over the Action, he went on to consider whether the Ontario Court should exercise jurisdiction over the Action in any event, or if Ontario was *forum non conveniens*.

72. First, Perell J. noted the factors laid out in *Muscutt v. Courelles* that should be considered in determining the most appropriate forum for an action, including:

- (a) the location of the majority of the parties;
- (b) the location of key witnesses and evidence;
- (c) contractual provisions that specify applicable law or accord jurisdiction;
- (d) the avoidance of multiplicity of proceedings;
- (e) the applicable law and its weight in comparison to the factual questions to be decided;
- (f) geographical factors suggesting the natural forum; and

- (g) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage.

Reasons for Decision, para. 64, Appellant's Compendium, Tab 3, p. 19.

Van Breda, paras. 49, Respondents' Authorities, Tab 2.

73. Perell J. considered these factors in light of the evidence put forward by the Respondents in the Affidavit of Rick Eng, and concluded that they overwhelmingly favoured Alberta as the proper forum for the Action.

Reasons for Decision, para. 66, Appellant's Compendium, Tab 3, pp. 19-20.

74. Perell J. also noted that Bond provided no evidence in respect of *forum conveniens*. It is the Appellant's submission that Perell J.'s finding in this regard indicates that he overlooked the Appellant's evidence as listed in paragraph 115 of her factum. It is beyond question that Bond has not filed an affidavit or any "evidence" (not even any evidence of any shareholdings in Birch Mountain). The Johnson Affidavit is not demonstrative and did not stand up to cross-examination.

75. The evidence listed by the Appellant in paragraph 115 of her factum is irrelevant to the issue of *forum conveniens*, and for the most part is not evidence that the Appellant put before Perell J. Rather, it is a laundry list of allegations and supposed issues in the Action for which the Appellant has offered no evidentiary basis. For example:

- (a) As evidence regarding the location of the majority of parties, the Appellant asserts that Hammerstone was incorporated one day prior to the execution of the Pattison Agreement and that Hammerstone was incorporated for the sole purpose of acquiring Birch Mountain's assets. As mentioned above, Hammerstone is an Alberta corporation which was incorporated for the sole purpose of doing business in Alberta. In addition, two of its three directors are resident in Calgary, the other is in Vancouver. This evidence supports Alberta as the appropriate forum for the Action; and
- (b) As evidence regarding the location of key witnesses, the Appellant states that the OSC and the TSX's witnesses are located in Toronto, and that "Mr. Flatt" and "Mr. Madon" who are, respectively, principles of Brookfield AM and Tricap are located in Toronto. There is no evidence indicating that any of the parties to the Action will call witnesses from the OSC or the TSX, or that Mr. Flatt or Mr.

Madon will be called as witnesses. Again, these are just unsupported assertion made by the Appellants. Furthermore, Perell J. did consider the fact that Brookfield AM and Tricap's directors resided in Ontario, but concluded that this did not outweigh the other overwhelming evidence which favoured Alberta as the proper forum.

Reasons for Decision, paras. 65-66, Appellant's Compendium, Tab 3, pp. 19-20.

76. In addition, the Appellant's position that the location of the TSX and the Ontario Securities Commission (the "OSC") is somehow relevant to the issue of *forum non conveniens* is contrary to the position taken by the Appellant on Mr. Johnson's examination:

Q. Sir, is it your understanding that the lawsuit should be in Ontario because the Toronto-Dominion Bank, the Royal Bank, Pricewaterhouse Coopers, the [TSX] and the [OSC] are in Ontario?

A. I am not a lawyer. I can't speak to that.

Q. You have reviewed the Statement of Claim?

A. Yes, I have.

Q. None of the Toronto-Dominion Bank, the Royal Bank, Pricewaterhouse Coopers, the [TSX] or the OSC are parties?

A. That is correct.

Q. Ok. So as a researcher, do you disagree with the contention that the lawsuit should be in Ontario because those institutions are in Ontario

Mr. McDonald: Yes, he does.

Mr. Gorman: Do you agree?

A. Yes.

Q. Sir, it references ----

Mr. McDonald: Otherwise he agrees that the lawsuit should be in Ontario....

Johnson Examination, Respondents' Compendium, Tab 1, pp. 19-20, qq. 340 - 345.

77. In any event, none of the "evidence" listed by the Appellant in her factum changes the fact that, as found by Perell J.,:

Birch Mountain's management was based in Alberta. The issues raised in the action concern an Alberta corporation, its Alberta property, and events that happened in Alberta. The Debenture was made and administered in Alberta. It was governed by Alberta law and was approved by Birch Mountain's board and shareholders in Alberta. There are outstanding proceedings in Alberta. The Alberta Act's oppression remedy is similar to Ontario's.

Reasons for Decision, para. 66, Appellant's Compendium, Tab 3, pp. 19-20.

78. In light of the foregoing, it is the respectful submission of the Respondents that Perell J. did not err in finding that Ontario was *forum non conveniens*. As a result, his decision is entitled to deference and should be upheld.

D. Justice Perell's Cost Award

79. At paragraph 117 of her factum, the Appellant submits that Perell J. failed to consider an appropriate costs award. The Appellant offers no basis for this submission, and there is no basis for this submission as Perell J. has yet to release his decision on costs. His Reasons for Decision simply state that if the parties cannot agree as to costs, they can make written submission to him in that regard. The parties have made their submissions and are waiting for the decision.

PART V - ADDITIONAL ISSUES RAISED BY THE RESPONDENT

80. On its face, the Statement of Claim is a collateral attack on the Alberta receivership proceedings and the orders of the Alberta Court. Bond alleges that the orders of the Alberta Court were "contrived". During Mr. Johnson's cross-examination, counsel for Bond acknowledged that the "whole point" of the action was to ensure that what they believe to be the complete record in respect of the transfer of Birch Mountain's assets to Tricap be put before the Court:

157. Q. But you understand that that asset sale was approved by Justice Lovecchio of the Alberta Court of Queens Bench?

MR. McDONALD: Yes, we do. None of the information that was important to the justice was put before him. The whole point of this is that what was important to making a judicial decision is

that complete information be put before the judge. It was not in this case. That's what this action is about. [emphasis added]

Johnson Examination, Respondents' Compendium, Tab 1, pp. 16-17, q. 157.

81. It is well settled that a challenge to the appointment of a receiver by a court must be made before that court, or to the appellate court with jurisdiction over that court. The challenge may not be made collaterally in subsequent proceedings, let alone proceedings in another jurisdiction.

Nash v. CIBC Trust Co., [1996] O.J. No. 3940 at paras. 31-38 (Gen. Div.) (QL), aff'd [1997] O.J. No. 1001 (C.A.) (QL) ("Nash"), Respondents' Authorities, Tab 3.

Abacus Cities v. Bank of Montreal, (1988) 80 A.J. No. 833 at p. 4 (C.A.) (QL), leave to appeal denied, [1988] S.C.C.A. No. 24 (QL), Respondents' Authorities, Tab 4.

82. Further, judicial acts, such as the appointment of a receiver, are not actionable.

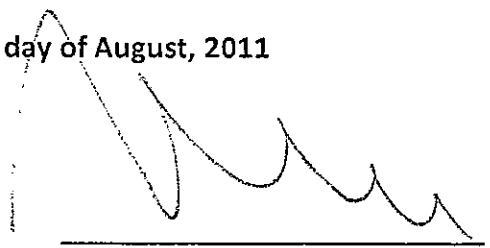
Nash cited to the Gen Div., para. 39, Respondents' Authorities, Tab 3.

PART VI - RELIEF SOUGHT

83. The Respondents respectfully request an Order:

- (a) dismissing the Appellant's appeal; and
- (b) costs on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of August, 2011



HOWARD A. GORMAN