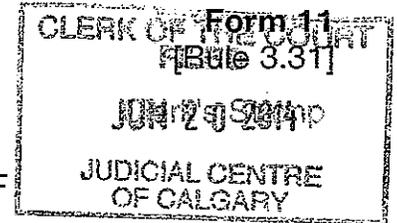


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COURT FILE NUMBER

1401-05797

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

PLAINTIFF(S)

~~Wanda Bond~~
LANNY K. MCDONALD

DEFENDANT(S)

Lanny K. McDonald,
BROOKFIELD ASSET
MANAGEMENT INC., BROOKFIELD
CAPITAL PARTNERS LTD., and
HAMMERSTONE CORPORATION

DOCUMENT

STATEMENT OF DEFENCE OF THE DEFENDANTS

PARTY FILING THIS
DOCUMENT

DEFENDANTS

ADDRESS FOR SERVICE
AND
CONTACT INFORMATION
OF
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Attention: Howard Gorman Q.C. and Allison Kuntz

File No. 01133155-0049

Box No. 39

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. Except so far as is expressly admitted herein, the defendants, Brookfield Asset Management Inc. ("**Brookfield AM**"), Brookfield Capital Partners Ltd. ("**Tricap**"), and Hammerstone Corporation ("**Hammerstone**", and collectively with the other defendants, the "**Defendants**"), deny each and every allegation of fact, and all claims for relief, contained in the Amended Statement of Claim.

The Defendants

2. Brookfield AM is a corporation incorporated under the Ontario *Business Corporations Act*, RSO 1990, c. B. 16 (the "**OBCA**"). Brookfield AM is a global asset manager, with a history of owning and operating assets with a focus on property, renewable energy, infrastructure and private equity.
3. Brookfield Capital Partners Ltd., which is defined as Tricap above, is a corporation incorporated under the OBCA. It was formerly known as Brookfield Special Situations Partners Ltd., and was previously, at all material times, named and known as Tricap Partners Ltd. Tricap's business included providing debt and equity capital to companies through private equity funds. Tricap was and remains a subsidiary of Brookfield AM. Tricap is an affiliate of Brookfield Bridge Lending Inc. another subsidiary of Brookfield AM which provides shorter term debt capital to companies through investments that generally have a lower risk and lower return profile than that targeted by Tricap.
4. Hammerstone is a corporation incorporated under the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9 ("**ABCA**"). Hammerstone's business includes the development of certain properties in the Athabasca oil sands region north of Fort McMurray, in northeastern Alberta. Hammerstone's assets include substantial limestone reserves within the Muskeg Valley Quarry. At all material times, Hammerstone was a subsidiary of Tricap.
5. None of the Defendants were ever shareholders, or short sellers, of Birch Mountain.

Overview

6. This is a putative class action on behalf of persons who owned common shares of Birch Mountain Resources Limited ("**Birch Mountain**" or the "**Company**") from April 1, 2005 to November 5, 2008.
7. A related proceeding was first commenced on September 22, 2010, in the Ontario Superior Court of Justice (the "**Ontario Court**") as Court File No. CV-10-410910 (the "**Ontario Action**"). As described below, the Ontario Action was stayed pursuant to an Order of the Ontario Court, which was upheld on appeal. The Ontario Action was then transferred and re-filed with a different representative Plaintiff in the Alberta Court of Queen's Bench (the "**Alberta Court**") pursuant to a Case Management Order of Madame Justice Streckaf dated April 15, 2014.
8. The Plaintiff has not sued Birch Mountain or its officers and directors. Instead, the Plaintiff has sued two court-appointed transferees of Birch Mountain's property, Hammerstone and Tricap, and Brookfield AM, the parent company of Tricap.

9. Birch Mountain consented to a Receivership Order on November 5, 2008. Birch Mountain is still in receivership.
10. Contrary to the allegations in the Amended Statement of Claim, the Defendants did not use convertible debentures, death spiral stock trading, nor avoid shareholder approvals in order to transfer the assets of Birch Mountain to Tricap and Hammerstone. Rather, Birch Mountain's assets were transferred to Tricap and Hammerstone pursuant to an Alberta Court mandated and supervised receivership process.

Birch Mountain Resources Limited

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

Birch Mountain Financial Reporting

13. Between 1995 and 2008, Birch Mountain had minimal revenues and incurred operating losses every year. Birch Mountain's operating losses were disclosed in its annual audited financial statements. Birch Mountain's main source of funding was from the issuance of equity and debt.
14. Between 2004 and 2008, Birch Mountain issued multiple public disclosures in respect of its operations and finances.
15. All of Birch Mountain's public disclosure included cautionary language regarding the inherent risks and uncertainties of the forward-looking statements contained therein.

Brookfield Bridge Facility

16. On March 30, 2007, Birch Mountain negotiated a \$15.5 million senior secured one-year term credit facility with Brookfield Bridge Lending Fund Inc. ("**Brookfield BL**" and the "**Brookfield Bridge Facility**").
17. The Brookfield Bridge Facility resulted from the efforts of Birch Mountain's agent, Acumen Capital, to secure financing for the Company. During the negotiations, Birch Mountain advised that it needed financing to bridge towards an expected significant ramp up in sales (5,925,000 tonnes of budgeted sales for April through December 2007). Ultimately, however, the Company achieved sales of only approximately 750,000 tonnes, while at the same time ramping up costs and incurring losses.

18. Between May and September 2007, Birch Mountain committed repeated Events of Default under the Brookfield Bridge Facility. Birch Mountain asked Brookfield BL to waive the defaults, and requested more funding. Brookfield BL agreed.
19. On November 14, 2007, Birch Mountain posted its Third Quarter 2007 Financial Report dated September 30, 2007 on Sedar, which explained, among other things, that Birch Mountain was in violation of certain financial covenants under the Brookfield Bridge Facility, that Brookfield BL had waived the violations, and that Brookfield BL had allowed Birch Mountain to draw down another \$4 million on the Brookfield Bridge Facility.
20. In December 2007, the Brookfield Bridge Facility was repaid and replaced by the \$31,500,000.00 Loan Agreement and the Tricap December 2007 Debenture described below.

Birch Mountain Special Committee

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

The Loan Agreement and Tricap December 2007 Debenture

23. Tricap and Birch Mountain entered into a loan agreement dated December 21, 2007 (the "**Loan Agreement**"), which resulted in Tricap issuing to Birch Mountain certain credit facilities.
24. In accordance with the terms of the Loan Agreement, Tricap made available and Birch Mountain drew down the sum of CDN. \$31,500,000.00 effective December 21, 2007.
25. Birch Mountain announced the issuance on December 24, 2007, advising that the proceeds from the financing had been used to repay and replace the Brookfield Bridge Facility, and that the remaining funds would be used to facilitate ongoing development.
26. As security for the amounts advanced pursuant to the Loan Agreement, Birch Mountain granted a General Security Agreement dated December 21, 2007, to Tricap (the "**GSA**"). Under the terms of the GSA, Birch Mountain granted to Tricap security in all of the Company's present and after-acquired property.

27. In addition to the GSA, Birch Mountain executed a Secured Convertible Debenture in the sum of \$31,500,000.00 (the "**Tricap December 2007 Debenture**") and a Negative Pledge and Undertaking in favour of Tricap.
28. On December 21, 2007, Birch Mountain also executed a Promissory Note in the sum of \$31,500,000.00 in favour of Tricap.
29. The Birch Mountain Board of Directors (including the proposed representative Plaintiff) approved and also solicited shareholder approval of the Tricap December 2007 Debenture in a Notice of Meeting and Management Information Circular dated April 25, 2008.
30. The terms of the Loan Agreement and the Tricap December 2007 Debenture were well known and available to Birch Mountain shareholders, both having been posted on Sedar on January 9, 2008.
31. On May 30, 2008, Birch Mountain's shareholders approved the Tricap December 2007 Debenture at a shareholders' meeting.

Birch Mountain Announces Defaults

32. In June and July 2008, Birch Mountain defaulted under the Loan Agreement and the Tricap December 2007 Debenture. Birch Mountain issued press releases in respect of these defaults on July 3 and 31, 2008.
33. Tricap wrote to Birch Mountain about the defaults and engaged in discussions with Birch Mountain and its financial advisors.
34. On August 1, 2008, Tricap and Birch Mountain entered into an Acknowledgement, Waiver and Amending Agreement (the "**Amending Agreement**") pursuant to which Tricap waived Birch Mountain's defaults and increased the principal amount of indebtedness under the Loan Agreement and the Tricap December 2007 Debenture.
35. The TSX waived the requirement for shareholder approval of the Amending Agreement at Birch Mountain's request under its *Financial Hardship Exemption* provisions. The recital to the Amending Agreement and Birch Mountain's press release of August 27, 2008 stated, among other things, that the Company was experiencing serious financial difficulty. Birch Mountain's public disclosure further stated: "The amendments to the Debenture will accommodate the continuous pursuit of an immediate sale of the Company or its assets or additional equity financing to unlock the maximum value for its shareholders as previously announced on July 23, 2008."
36. Despite the efforts of Birch Mountain and its advisors, no such sale was completed. On behalf of Birch Mountain, RBCDS made extensive sales efforts between January 1, 2008 and November 5, 2008, contacting over 100 parties across a broad range of industries, 10 of which entered into confidentiality

agreements to obtain further information about Birch Mountain, but none of which made an offer to purchase.

Alberta Receivership

37. On October 31, 2008, Tricap delivered to Birch Mountain a demand for repayment and a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*. Birch Mountain subsequently executed a waiver of the notice period.
38. On November 3, 2008, Birch Mountain announced that it had received the demand from Tricap, and that it expected Tricap to commence enforcement proceedings that week.
39. On November 4, 2008, Tricap commenced an action against Birch Mountain in the Alberta Court, and brought an application to appoint a Receiver (the "**Receivership Proceeding**").
40. On November 5, 2008, with the consent of Birch Mountain, the Honourable Mr. Justice S.J. LoVecchio of the Alberta Court ("**Justice LoVecchio**") granted a receivership order (the "**Receivership Order**") over all of Birch Mountain's assets and undertakings. The Receivership Order appointed PricewaterhouseCoopers Inc. as the receiver and manager of Birch Mountain (the "**Receiver**").
41. On December 10, 2008, pursuant to an Assignment and Option Agreement dated November 27, 2008, Tricap acquired certain Convertible Unsecured Subordinate Debentures (the "**Subordinate Debentures**") from a company controlled by a Director of Brookfield AM (the "**Pattison Agreement**" and the "**Pattison Group**" respectively).
42. In January 2009, following a year-long intensive sales process, initially undertaken by Birch Mountain, its officers, directors and advisors and then by the Court appointed Receiver, and on the recommendation of the Receiver, Justice LoVecchio authorized and directed the sale of the assets of Birch Mountain pursuant to a Court approved credit bid, to Tricap and its nominee, Hammerstone. The Sales Order was not appealed.
43. Birch Mountain remains in receivership.

Any matters that defeat the claim of the Plaintiff(s):

No Standing Under the ABCA for an Oppression Remedy and No Oppression

44. The Plaintiff pleads that he is a former director and registered shareholder of Birch Mountain. Regardless, the Plaintiff does not have standing as a "complainant" for the purposes of the oppression provisions under the ABCA because he is not a shareholder or former director of any of the Defendants and the Defendants are not and never were "affiliates" of Birch Mountain:

239 (b) "complainant" means

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

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates...

45. The ABCA defines affiliate as "an affiliated body corporate within the meaning of subsection 2(1)." Subsection 2(1) provides, in part:

(a) one "body corporate" is affiliated with another body corporate 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, and

(b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

46. The Defendants are not and have never been subsidiaries, or affiliates, of Birch Mountain, nor have the Defendants and Birch Mountain ever been under common control, which is defined in s. 2(2) of the ABCA as follows:

2(a) For the purposes of this Act, a body corporate is controlled by a person if

(a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body.

47. Contrary to the allegations in paragraphs 99 to 109 of the Amended Statement of Claim, the definition of affiliate in the Loan Agreement is not relevant to the

analysis of whether the Plaintiff has standing to bring an oppression claim under the ABCA. The terms of the ABCA dictate standing under the ABCA.

48. Contrary to the allegation in paragraph 129 of the Amended Statement of Claim none of the Defendants held any common shares or other voting securities of Birch Mountain. Only Tricap had a conversion right under the Tricap December 2007 Debenture; however, that right was never exercised.
49. Contrary to the allegations in paragraphs 68 and 69 of the Amended Statement of Claim, the Tricap December 2007 Debenture and the Subordinate Debentures were not held "other than by way of security."
50. The Defendants did not become affiliates of Birch Mountain because Tricap had an unexercised conversion right to obtain voting shares, or otherwise.
51. Contrary to allegations made throughout the Amended Statement of Claim, general references to the debentures being an "investment" in Tricap's disclosure, or statements made therein in respect of what Tricap's ownership and control would be *if* it exercised the debentures, does not change the fact that Tricap did *not* exercise the debentures and does not impact the true nature of the debentures under the ABCA nor the lack of any shareholding or control by any of the Defendants in Birch Mountain.
52. The Ontario Court confirmed that the Defendants are not affiliates of Birch Mountain in the Ontario Action under the comparable oppressions provisions of the Ontario *Business Corporations Act*. In a decision in the Ontario Action dated April 26, 2011, Justice Perell held:

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

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

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

53. These findings were upheld by the Ontario Court of Appeal in Court File No. C53770:

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

54. Leave to appeal to the Supreme Court of Canada was denied.
55. This holding applies equally to the Subordinate Debentures because it is based on the finding that an unexercised convertible debenture cannot be considered a voting security and cannot, therefore, give the holder control over the issuer.
56. There is no basis on which the Plaintiff could or should be given standing as a complainant under the ABCA.
57. Even if the Alberta Court could and did disagree with the Ontario Courts, the Defendants deny that they acted in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the interests of the Birch Mountain common shareholders.

Brookfield AM and Tricap Representations

58. Contrary to the allegations in paragraphs 85 to 87 of the Amended Statement of Claim, there was no special relationship, or any relationship whatsoever, between Brookfield AM, Tricap and the Birch Mountain shareholders, and Brookfield AM and Tricap did not owe a duty of care to the Birch Mountain shareholders.
59. Tricap's only relationship was with Birch Mountain, and at all times, their relationship was governed by the express terms in the various agreements between them, including the Tricap December 2007 Debenture.
60. No statement alleged or referred to by the Plaintiff in the Amended Statement of Claim constitutes a representation guaranteeing a certain course of action by either Brookfield AM or Tricap with respect of Birch Mountain or otherwise, nor could they reasonably be interpreted or relied upon by the Plaintiff, or anyone, as such.
61. The relationship and obligations between Birch Mountain and the Defendants was, and is expressly, governed by the express terms of the agreements amongst the parties.

Good Faith Doctrine

62. Contrary to the allegations in paragraphs 80 to 82 of the Amended Statement of Claim, the Defendants deny that they acted contrary to the "good faith doctrine in the performance of agreements" as alleged by the Plaintiff, or at all, if such doctrine or obligations even exist.
63. At all times, the Defendants acted within the express terms of the agreements in issue, and the pursuant to the direction and Orders of the Alberta Court.

Irrelevant, Baseless and Vexatious Allegations

64. The Defendants deny that they misfiled any affidavits or information, or withheld any pertinent information from the Court in the context of the Receivership Proceeding, or otherwise.
65. The Defendants deny that they contrived with the Pattison Group, or otherwise, to force Birch Mountain into receivership and to gain complete control of the company, or that they improperly withheld information about the Pattison Agreement.
66. The Pattison Agreement is entirely irrelevant to this action and was entirely irrelevant to the Receivership Proceeding because:
 - a) it was entered into after the Receivership Proceedings were commenced. Contrary to the allegation in paragraph 136(c) of the Amended Statement of Claim, any agreement was not in violation of s. 9 of the Receivership Order, which served to prevent parties from exercising rights and remedies against Birch Mountain or the "Property" without consent or leave, not from selling or purchasing a creditor interest in Birch Mountain;
 - b) it did not form the basis of any of the rights exercised by Tricap in the Receivership Proceeding, or otherwise; and
 - c) it was in respect of Subordinated Debentures whose conversion rights were never exercised by any party and as such, never gave any party control over Birch Mountain.
67. In any event, the Pattison Group never exercised any option or other rights under the Pattison Agreement.

No Conversion or Dilution

68. Contrary to the allegations in paragraphs 115 to 117 of the Amended Statement of Claim, there is no basis on which to conclude that Tricap's conversion rights, alone or coupled with any alleged death spiral stock trading, caused the collapse of the common share price of Birch Mountain.

69. Contrary to the allegations in paragraph 119 of the Amended Statement of Claim, Tricap did not misuse debentures to control Birch Mountain.
70. Rather, Tricap merely exercised its rights under the Loan Agreement and the Tricap December 2007 Debenture once Birch Mountain was in default.

No Death Spiral Stock Trading

71. The Defendants have no knowledge of and did not participate in any "death spiral" trading or any trading in Birch Mountain shares.
72. Contrary to the allegations in paragraphs 121 to 125 of the Amended Statement of Claim, Brookfield AM and Tricap deny that they deliberately caused or participated in any death spiral trading of Birch Mountain common shares at any time, or that there was any death spiral trading of Birch Mountain common shares.
73. The Defendants deny that they were short sellers of Birch Mountain shares.

No Contrived Default or Receivership

74. The Defendants deny that Birch Mountain's default under the Loan Agreement and the Tricap December 2007 Debenture, or the Receivership, were contrived to ensure that they would gain access to Birch Mountain's assets through foreclosure, or otherwise.
75. Birch Mountain and its directors (including the proposed representative Plaintiff) acknowledged the default under the Loan Agreement and consented to the Receivership Order being granted.

The Defendants met Reasonable Shareholder Expectations

76. Birch Mountain shareholders had no right to maintain any expectation of the Defendants' conduct, of whom they are not shareholders.
77. In the alternative, if Birch Mountain shareholders had a right to maintain any expectation of the Defendants, the Defendants deny that they failed to meet such expectations in respect of the matters raised in the Amended Statement of Claim, or otherwise.
78. To the extent Birch Mountain shareholder expectations were not met, the shareholder expectations were not reasonable and are not actionable.

Collateral Attack, Res Judicata, Judicial Acts and Abuse of Process

79. This action constitutes a collateral attack on the Decisions and Orders of Justice LoVecchio of the Alberta Court in the Receivership Proceeding.

80. The matters surrounding the sale of Birch Mountain to Hammerstone and Tricap were fully addressed and finally determined before Justice LoVecchio in the context of the Receivership Proceeding. In these circumstances, the Plaintiff is estopped and precluded from maintaining any claim against the Defendants for any matters related to these activities and sales, as the matters are *res judicata* and estopped.
81. The appointment of the Receiver and the sale of Birch Mountain's assets pursuant to the Order of Justice LoVecchio, were judicial acts and are, therefore, not actionable.
82. Finally, in light of Justice LoVecchio's Orders, and the decisions from the Ontario Superior Court of Justice and the Ontario Court of Appeal described above, this action is frivolous, improper and an abuse of process.

No Damages

83. The Plaintiff and other Birch Mountain shareholders suffered no damages as a result of the actions of the Defendants. The decline in Birch Mountain operations and share value arose prior to and independent of any involvement of the Defendants or the Alberta Courts with Birch Mountain.

No Basis for Punitive or Aggravated Damages

84. The Defendants deny that their conduct was in any way improper, unacceptable, unlawful, reckless or egregious, either as alleged or at all. The Defendants deny that the Plaintiff or the putative class members are entitled to punitive or aggravated damages, and put them to the strict proof thereof.

Class Proceeding Criteria Are Not Satisfied

85. The Plaintiff has failed to meet the criteria for a class proceeding as mandated under the *Class Proceedings Act*. Specifically:
 - a) the pleadings do not disclose a cause of action;
 - b) the Plaintiff has not plead an identifiable class of 2 or more persons;
 - c) the Plaintiff has not identified any common issues, to the extent the Plaintiff has identified any common issues, the Defendants deny that such issues are common issues as the circumstances under which the common shareholders of Birch Mountain would have relied on the Defendants' alleged representations will vary and depend on a number of factors;
 - d) The Defendants deny that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues;

- e) The Defendants deny that Mr. McDonald as a former Birch Mountain Director, would fairly and adequately represent the interests of the proposed class; and
- f) The Defendants deny that there is a workable method of advancing the proceedings.

86. The Defendants plead and rely upon the *Class Proceedings Act*, SA 2003, c C-16.5, as amended.

Remedy sought:

87. The Defendants accordingly request that this action be dismissed as against them with costs on a solicitor client basis.