



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

Brought under the Class Proceedings Act

DOCUMENT AMENDED STATEMENT OF CLAIM

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NOTICE TO DEFENDANTS You are being sued. You are a defendant. Go to the end of this document to see what you can do and when you must do it.

Statement of Facts Relied Upon

1. **CLAIM**

2. The plaintiff claims against the defendants as follows:

- a. an order pursuant to the CPA certifying this action as a class proceeding;
- b. an order pursuant to the CPA appointing Mr. Lanny K. McDonald as the representative plaintiff;
- c. an order pursuant to BCA section 242 (2) declaring that the defendants acted in a manner that was oppressive, unfairly prejudicial to and unfairly disregarded the interests of the Birch Mountain Resources Ltd. common shareholders as security holders of Birch Mountain;
- d. an order for compensatory damages compensating the plaintiff and all the other members of the Class pursuant to BCA section 242 (3) for damages incurred;
- e. an order for punitive damages for filing misleading affidavits and filings to obtain Court Orders and other misleading actions;
- f. pre-judgment and post-judgment interest;
- g. the costs of this action; and
- h. such further and other relief as this Honourable Court may deem just.

3. **DEFINITIONS**

4. In this claim:

- a. “McDonald” means Mr. Lanny K. McDonald, the plaintiff, a former director, a registered shareholder and an unsecured trade creditor of Birch Mountain and the proposed representative plaintiff for the proposed Class in this class action;

- b. “Great Pacific Capital” means Great Pacific Capital Corporation, a British Columbia corporation controlled by the Pattison Group and a party to the Pattison Agreement;
- c. “Confidentiality Agreement” means the Confidentiality Agreement made as of July 11, 2008 between Birch Mountain Resources Ltd. and Great Pacific Capital Corp.;
- d. “Pattison Agreement” means the Assignment and Option Agreement made as of November 27, 2008 between Great Pacific Capital Corp., 1439442 Alberta Ltd. and Tricap Partners Ltd.;
- e. “Pattison and/or the Pattison Group” means Mr. James Pattison an owner of Great Pacific Capital, a director of Brookfield and the former beneficial owner of the Unsecured Subordinated Convertible Debenture;
- f. “BCA” means the Alberta Business Corporations Act;
- g. “CPA” means the Alberta Class Proceedings Act;
- h. “Birch Mountain” means Birch Mountain Resources Ltd., an Alberta corporation;
- i. “MVQ” means the Birch Mountain Muskeg Valley Quarry;
- j. “Hammerstone Project” means the project to develop the limestone reserves;
- k. “CERI” means Canadian Energy Research Institute;
- l. “RBC” means RBC Dominion Securities Inc.;

- m. “Brookfield” means Brookfield Asset Management Inc.;
- n. “Tricap” means Brookfield Special Situations Partners Ltd. formerly known as Tricap Partners Ltd.;
- o. “PWC” means PriceWaterhouseCoopers LLP;
- p. “1439442” means 1439442 Alberta Ltd., now Hammerstone Corporation;
- q. “Class” means all those persons who owned Birch Mountain Common Shares during the period from April 01, 2005 through to November 05, 2008. ‘Person’ shall include all individuals (including, former officers and directors of Birch Mountain), corporations, trusts and institutions that purchased Birch Mountain Common Shares, but shall exclude the defendants; any subsidiary or affiliate of any defendants; officers and directors of the defendants, their subsidiaries or affiliates; members of the immediate family of the officers and directors of such defendants, subsidiaries or affiliates; any entity of which any excluded person has controlling interest and the legal representatives, heirs, successors and assigns of any excluded persons; or such other description of the class that may be disclosed on the motion to certify this action as a class proceeding;
- r. “Unsecured Subordinated Convertible Debentures” means the \$30,000,000 aggregate principal amount 6% unsecured subordinated convertible debentures issued December 06, 2006 and due December 31, 2011 of Birch Mountain;
- s. “Senior Secured Convertible Debentures” means the \$31,500,000 aggregate principal amount senior secured convertible debentures issued December 31, 2007 and due June 30, 2012 of Birch Mountain;

- t. “Convertible Debentures” means both the Unsecured Subordinated Debentures and the Senior Secured Convertible Debentures;
- u. “Loan Agreement” means the Loan Agreement dated December 21, 2007 between Tricap and Birch Mountain;
- v. “General Security Agreement” means the General Security Agreement dated December 21, 2007 between Tricap and Birch Mountain;
- w. “Amending Agreement” means the Acknowledgement, Waiver and Amending Agreement dated August 01, 2008 between Tricap and Birch Mountain;
- x. “Shareholders Rights Plan” means the Shareholders Rights Plan Agreement dated April 01, 2005 and the amended Shareholders Rights Plan Agreement dated March 28, 2005 that guaranteed that Birch Mountain common shareholders will be treated equally and fairly;
- y. “TSX” means the Toronto Stock Exchange; and
- z. “AMEX” means the American Stock Exchange.

5. **OVERVIEW STATEMENT**

- 6. This claim involves the fact situation where the assets of a public company, Birch Mountain, worth an estimated \$1.6 billion dollars were transferred to a private company, 1439442, for a cash outlay of less than \$50.0 million dollars.
- 7. The various methods used to accomplish this transfer of ownership have been employed numerous times by Brookfield and/or Tricap with devastating results for the Birch Mountain common shareholders and include the use of convertible debentures, death

spiral stock trading and avoidance of shareholder approvals.

8. The death spiral stock trading of the Birch Mountain common shares during the period from May 25, 2006 to November 05, 2008 caused the share price of the Birch Mountain common shares on TSX to collapse from \$7.99 on May 25, 2006 to \$0.01 on November 05, 2008.
9. This action challenges the transfer pursuant to the oppression remedy and more specifically challenges the methods used to dilute the Birch Mountain common shareholders to approximately 2.4% of the outstanding Birch Mountain common shares based on the assumption of the conversion of two debentures to common shares.
10. On November 05, 2008, Tricap initiated through the Court of Queen's Bench of Alberta the appointment of PWC as the receiver of Birch Mountain, in order to transfer the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap.
11. This action is based on the oppression remedy which is an equitable remedy that seeks to ensure fairness and implement a just and equitable remedy. The oppression remedy gives the court broad equitable jurisdiction to enforce not just what is legal but what is fair in the circumstances of each case.
12. This action is also based on the good faith doctrine in the performance of agreements where the courts have implied a duty of good faith to securing the performance of agreements and that Brookfield and Tricap cannot act in a way that eviscerates or defeats the objectives of the executed agreements between the parties.
13. This action is also based on the tort of negligent misrepresentation based on the written misrepresentations made by Brookfield and Tricap related to their willingness to be involved for a period of 3 to 7 years, to invest between \$50 million to \$500 million and to assist with governance of an under funded corporation in developing a \$1.6 billion asset

with a book value of approximately \$50 million.

14. **CORPORATE HISTORY**

15. In 2002, Birch Mountain discovered a major limestone deposit on its extensive Alberta oil sands property. During the period from approximately December 10, 2002 through to October 02, 2003 Birch Mountain completed a number of private placements to develop the deposit.
16. On October 03, 2003, Birch Mountain retained Acumen Capital Finance Partners Limited as financial advisor to provide Birch Mountain with assistance and advice in structuring Birch Mountain and financing the proposed limestone quarry and quicklime project.
17. On April 01, 2005, Birch Mountain executed the Shareholder Rights Plan to ensure that in the context of a bid for control of Birch Mountain through an acquisition of outstanding common shares, the Birch Mountain common shareholders will be treated equally and fairly.
18. On June 15, 2005, Birch Mountain retained RBC as financial advisor to provide Birch Mountain with assistance and advice in structuring Birch Mountain and financing the proposed limestone quarry and quicklime project.
19. On September 02, 2005, Birch Mountain completed a financing with RBC as the lead underwriter and the underwriting syndicate composed of RBC, TD Securities Inc., Acumen Capital Finance Partners Limited and Westwind Partners Inc. for 9,000,000 Birch Mountain common shares at \$4.00 per share for gross proceeds of \$36,000,000. The above financing was completed pursuant to the Short Form Prospectus dated August 26, 2005.
20. On February 06, 2006, Birch Mountain announced an increase in the size of the

Hammerstone project with new products that include asphalt rock for road surfacing and reagent grade limestone that has many applications collectively valued at over CDN \$1.6 billion.

21. On December 06, 2006, Birch Mountain completed a financing with RBC as the lead underwriter and the underwriting syndicate composed of RBC, Westwind Partners Inc. and Acumen Capital Finance Partners Limited initially for \$30,000,000 (subsequently increased to \$34,500,000) secured by Unsecured Subordinated Convertible Debenture due December 31, 2011. The above financing was completed pursuant to the Short Form Prospectus dated November 28, 2006.
22. On April 02, 2007, Birch Mountain announced it completed a \$15,500,000 senior secured credit facility with Brookfield Bridge Lending Fund Inc. to provide financing for the continued development and construction of the South Haul Road.
23. On September 20, 2007, RBC Capital Markets was appointed financial advisor to assist Birch Mountain with numerous strategic and financial issues.
24. On December 24, 2007, Birch Mountain announced the issuance of a \$31,500,000 Senior Secured Convertible Debenture with Tricap described as follows:
 - a. “Tricap Partners Ltd. was established by Brookfield Asset Management to provide long term patient capital to companies with the potential for value creation and need to recapitalize. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in reaching their full potential.”
25. On December 27, 2007, Tricap announced the investment in Birch Mountain and described the investment as follows:
 - a. “Tricap has acquired the Debenture for investment purposes and in connection with the refinancing of the existing credit facility extended to the Corporation

[Birch Mountain] by an affiliate lender of Tricap.

Tricap Partners Ltd. was established by Brookfield Asset Management to provide a source of patient long term capital and strategic assistance to mid-market companies based in North America. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in building value over the long term.”

26. On December 31, 2007, Birch Mountain completed a \$31,500,000 Senior Secured Convertible Debenture with Tricap to refinance the existing facility with Brookfield and Birch Mountain agreed to numerous changes dictated by Brookfield and/or Tricap.
27. On July 03, 2008, Birch Mountain announced that it has not made the scheduled June 30, 2008, interest payment on the Unsecured Subordinate Convertible Debenture described as follows:
 - a. “As a consequence of the Company being in breach of a financial covenant under its senior secured credit facility, the lender, Tricap Partners Ltd., has exercised its right under the loan agreement to direct Computer Share Trust Company not to make the scheduled interest payment until further notice from the lender. Birch Mountain is working to rectify the breach and secure the necessary additional liquidity to make the interest payment.”
28. On July 11, 2008, Birch Mountain and Great Pacific Capital executed a Confidentiality Agreement which disclosed confidential information to Pattison related to a potential transaction.
29. On July 23, 2008, the special committee of independent directors and the board of directors announced the proposed sale of Birch Mountain to increase liquidity and unlock shareholder value.
30. On July 31, 2008, Birch Mountain announced that it has not made the scheduled June 30, 2008, interest payment on the Unsecured Subordinated Convertible Debenture described as follows:

- a. “As disclosed in the news release dated July 3, 2008, as a consequence of the Company being in breach of a financial covenant under its senior secured credit facility, the lender, Tricap Partners Ltd., has exercised its right under the loan agreement to direct The Trustee, Computershare Trust Company of Canada not to make the scheduled interest payment until further notice from the lender. The Trustee has issued a notice of default to the Company under the trust indenture.”
31. On August 01, 2008, Mr. James Pattison at 17:05 pm filed a SEC 13G form claiming a 5.5% interest in Birch Mountain on August 29, 2007 and 10.1% interest in Birch Mountain on October 11, 2007 through New York filing agent Weil, Gotshal & Manges.
32. On August 01, 2008, Mr. James Pattison at 17:06 pm filed a SEC 13G/A form claiming a 12.4% interest in Birch Mountain on December 31, 2007 through New York filing agent Weil, Gotshal & Manges.
33. On August 01, 2008, Tricap at 17:07 pm filed a SEC 13D form claiming a 55.0% interest in Birch Mountain for July 23, 2008 jointly owned by Brookfield, Brascan and Tricap, through New York filing agent Weil, Gotshal & Manges.
34. On August 07, 2008, Tricap’s Early Warning Report announced:
 - a. “On May 30, 2008 the Corporation’s shareholders approved the terms of the Debenture, including the anti-dilution adjustment provisions and conversion provisions. Consequently, the stock exchange requirements applicable to the Corporation would no longer limit the issuance of Common Shares to Tricap upon conversion of the Debenture to 20% or less of the outstanding Common Shares.”; and
 - b. Assuming conversion of the entire Debenture at an exercise price of approximately \$0.31, the conversion price in effect as at July 23, 2008, Tricap would have ownership and control over 102,960,197 Common Shares representing approximately 55.0% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture.”

35. On August 08, 2008, Brookfield's Press Release announced:

- a. "Tricap is in discussions with the management and directors of the Corporation [Birch Mountain] and its financial advisors regarding the event of default under the Debenture and the Loan Agreement.

The Corporation also announced that in the event an immediate sales process does not achieve an acceptable price, the Corporation intends to work with its stakeholders to recapitalize the balance sheet to improve liquidity and permit delivery of the business plan.

Tricap Partners Ltd. was established by Brookfield Asset Management to provide a source of patient long term capital and strategic assistance to mid-market companies based in North America. With strong industry and financial management expertise, Tricap is well positioned to assist these companies in building value over the long term."

36. On September 08, 2008, representatives of the Pattison Group including Pattison, the Brookfield/Tricap group and the RBC Capital Markets group toured the Hammerstone Project from approximately 9:00 am through 5:00 pm.

37. On or about October 15, 2008, Birch Mountain retained Adair Morse by paying a \$20,000 retainer fee to conduct an investigation of Birch Mountain stock manipulation.

38. Subsequent to October 15, 2008 and prior to November 05, 2008, Tricap inquired about the retainer of Adair Morse and then proceeded with the appointment of PWC as Birch Mountain's receiver.

39. On November 05, 2008, Tricap initiated through the Court of Queen's Bench of Alberta the appointment of PWC as the receiver of Birch Mountain, in order to transfer the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap.

40. On November 26, 2008, 1439442 was incorporated since both Tricap and 1439442 were required parties to the Pattison Agreement and 1439442 was to receive all of the assets of

Birch Mountain to be jointly owned by Brookfield/Tricap and the Pattison Group.

41. On November 27, 2008, the Pattison indebtedness and security was assigned to Tricap and in return the Pattison Group received various preferences and options not available to other shareholders, creditors and debenture holders of Birch Mountain.
42. On December 10, 2008, 1439442 announced that it had acquired \$29,280,000 of the 6.0% Unsecured Subordinated Convertible Debentures for nominal cash consideration and other non-cash consideration.
43. On December 12, 2008, the Tricap Offer to Purchase was made to PWC attention: Don Roberts and the said Offer to Purchase is silent with respect to the Pattison Agreement and the favourable preferences and options granted to Pattison by Tricap.
44. On December 12, 2008, the counsel for Tricap (the Purchaser) was Macleod Dixon (now Norton Rose Fulbright) the same law firm that drafted the receivership documentation, incorporated 1439442, drafted the Pattison Agreement and the defendant's counsel.
45. On December 16, 2008, Tricap was in control of Birch Mountain and PWC was taking instructions from Tricap and as an example arranging meetings for Tricap to discuss cash flow projections for the 2009 period.
46. On December 16, 2008, Tricap, in a SEC filing, stated that it may be deemed to be the sole beneficial owner of 3,458,872,727 Birch Mountain common shares that would be issuable upon the conversion of the Convertible Debentures, which represent 97.6% of the Birch Mountain common shares.
47. On December 17, 2008, Tricap's offer to purchase all of the assets of Birch Mountain was accepted by PWC who had been appointed as the receiver of Birch Mountain on November 05, 2008.

48. On January 05, 2009, PWC's First Report was filed and PWC used the historical cost of the 1,000,000 acre leases as \$51.4 million and not the AMEC value dated August 01, 2006 prepared in accordance with National Instrument 43-101 as \$1.6 billion.
49. On January 05, 2009, in PWC's First Report, PWC makes no reference to the Pattison Agreement and the anticipated sale to Tricap, Great Pacific Capital and 1439442 as previously planned on or about November 26, 2008.
50. On January 05, 2009, in PWC's First Report, which required the Court approval, PWC withheld from the Court any and all information required by the Court to make an informed decision with respect to the sale of the assets to the Pattison Group.
51. On January 05, 2009, the Notice of Motion to convey all of the assets of Birch Mountain to Tricap, 1439442 and the Pattison Group was also filed but no reference whatsoever was made to the Pattison Agreement.
52. On January 28, 2009, 1439442 changed its name to Hammerstone Corporation and this corporation continues to develop and operate the Hammerstone Project.
53. **COMMON SHARE PROSPECTUS DATED AUGUST 26, 2005**
54. The defendants knew, or should have known, that the Common Share Prospectus contained full, true and plain disclosure related to the Birch Mountain underwriting for 9,000,000 Birch Mountain common shares at \$4.00 per share for a total of \$36,000,000.
55. The Common Share Prospectus contained full, true and plain disclosure related to Capital Cost at page 12, Regulatory Status at page 13, and Use of Proceeds at page 16.
 - a. *“Capital Cost* The estimated cost to construct, install and commission the initial

phase of the Hammerstone Project is \$130 million, which includes the capital cost of blasting, crushing and stockpiling equipment for operating the MVQ. ... The total capital cost estimate over the life of the project is \$291 million.

Regulatory Status Birch has largely completed the geological and environmental fieldwork to be used in the regulatory filings for the Hammerstone Project EIA and application, which the Corporation expects to file later in 2005. Engineering, environmental and regulatory to complete and file this application in 2005 are projected to be approximately \$2.4 million. As this is a preliminary estimate, the final cost for regulatory approval of the Hammerstone Project could be higher if referred to a public hearing.

Use of Proceeds The estimated net proceeds to the Corporation from the offering, ... will be approximately \$33,720,000. Birch intends to use the net proceeds of this offering to fund initial operations of the MVQ, the first stages in the development of the Hammerstone Project and for working capital estimated as follows:

Site preparation of the MVQ	\$ 2,300,000
Initial operations of the MVQ	800,000
First stages of development of Hammerstone Project	11,000,000
Aggregate processing equipment	8,000,000
Working capital	<u>11,620,000</u>
Total	<u>\$33,720,000</u>

None of the proceeds from the offering will be applied to re-payment of the debt by the Corporation to the Lender.”

56. **UNSECURED SUBORDINATED CONVERTIBLE DEBENTURES**

57. The defendants knew, or should have known, that the Unsecured Subordinated Convertible Debentures Prospectus dated November 28, 2006 contained full, true and plain disclosure related to the value of Birch Mountain resources on page 14 of the said Prospectus:

- a. “Updated limestone reserves reported in the 2006 Technical Report are 1.0 billion tonnes (net of mining losses), with 460 Mt of proven limestone reserves and 539 Mt of probable limestone reserves. These reserves are consumed over the projected 55-year quarry life from 2006 to 2060. Initial development capital required prior to 2013 to construct the Hammerstone quarry and aggregate plant,

the first activation and the first two calcining kilns, and the first hydrating plant, is estimated in the 2006 Technical Report to be \$270 million. Total development capital spending over the life of the project is estimated to be \$577 million, with a further \$443 million in sustaining capital to be spent over the life of the project.

The discounted cash flow net present value (“NPV”) of the Hammerstone Project in constant 2006 dollars, using a discount rate of 7.5%, is \$1,669 million on a pre-tax basis and \$1,099 million on an after-tax basis. The internal rate of return (“IRR”) pre-tax is 36.2% and after tax is 31.2% while the payback period is estimated to be 5.9 years from first production in January 2006. All operating and capital costs are deducted from revenues in calculating the annual cash flows used to arrive at the NPV.”

58. The defendants knew, or should have known, that the Unsecured Subordinated Convertible Debentures Prospectus contained full, true and plain disclosure related to the business of Birch Mountain on page 13 of the said Prospectus:

- a. “Birch’s principal operations are located north of Fort McMurray, Alberta, in the heart of the expanding Canadian oil sands industry, where the Corporation holds extensive metallic and industrial mineral properties underlying a significant part of the Athabasca oil sands region. Since 2002, Birch has worked to commercialize the industrial mineral potential of limestone deposits that occur on its mineral holdings in the Athabasca region. In December 2005, Birch opened the Muskeg Valley Quarry (“MVQ”), its initial limestone quarry and aggregate operation, with sales commencing in the second quarter of 2006. In May 2006, Birch filed an application with provincial regulatory authorities for the Hammerstone Project, to integrate the existing MVQ with an expanded quarry and aggregate plant, as well as a limestone-processing complex to produce limestone-based reagent products.

Two principal product classes have been identified for MVQ and the Hammerstone Project: limestone aggregate products used in construction and limestone-based reagent products such as reagent limestone, quicklime and hydrated lime. The primary sources of demand for limestone aggregate and reagent products in the Fort McMurray region are the numerous oil sands bitumen extraction and upgrading projects and the related infrastructure and municipal development.

Aggregate products are in increasingly short supply in the area and the MVQ and the Hammerstone Project are new, long-lived sources of high-quality aggregates for constructing and operating oil sands facilities and building the necessary supporting infrastructure, including home and road construction. Limestone is

also in demand for its chemical properties, either as reagent limestone or in its processed form as quicklime and hydrated lime. The closest alternate source of quicklime or hydrated lime is located in Exshaw, Alberta, approximately 900 kilometres away.

Limestone reagent products are used in a range of industrial and environmental applications. Flue gas desulphurization (“FGD”) is required when bitumen or other sulphur-bearing alternative fuels are burned as fuel. In FGD, exhaust gases containing sulphur dioxide are treated with reagent limestone or quicklime to capture the sulphur as calcium sulphate or gypsum. Hydrated lime is used in warm and hot lime softening systems for treating boiler feed water for SAGD in-situ recovery projects.

In August 2006, an updated independent NI 43-101 technical report entitled Hammerstone Project, Alberta: Qualified Person’s Review and Technical Report (the “2006 Technical Report”) was released, based on an update of the pre-feasibility study. The 2006 Technical Report was authored by AMEC Americas Limited and Phoenix Process Engineering, Inc. and is incorporated by reference into this Prospectus.

The 2006 Technical Report describes and values the Hammerstone Project, which will ultimately cover an area of approximately 1,500 hectares (3,700 acres). Aggregate processing facilities within the quarry will supply the needs of the oil sands industry, local infrastructure and municipal demand, as well as providing feedstock for the proposed limestone-processing complex. Limestone aggregate and reagent product average yearly sales are projected to reach an ultimate level of 19 Mt. The limestone-processing complex includes a quicklime plant that will be built in stages, projected to reach a production capacity 1 Mt per year. Some of the quicklime will be further processed into hydrated lime in a plant with a capacity of 400,000 tonnes per year.”

59. The defendants knew, or should have known, that the Unsecured Subordinated Convertible Debentures Prospectus contained full, true and plain disclosure related to recent business developments of Birch Mountain on page 14 of the said Prospectus:
- a. *“Update on Aggregate Sales and Orders* To the end of the third quarter of 2006, Birch reported sales of 288,345 tonnes of aggregate. The majority of the aggregate reported, 276,635 tonnes, was sold in the third quarter of 2006 and consisted primarily of sub-base aggregate. At the end of the third quarter of 2006, and over and above the reported sales, Birch had orders in place for 619,530 tonnes of aggregate, including orders for construction and base aggregates as well as concrete rock, with a weighted average price of approximately \$9.50 per tonne.

In addition to sales made from the MVQ, an oil sands producer excavated and used 1.24 Mt of Birch limestone without authorization from Birch. The limestone was uncovered at the base of an oil sands mine where Birch holds mineral rights to the limestone beneath the oil sands deposit. Birch and the oil sands producer agree on Birch's ownership of the limestone and the tonnage of limestone taken, but negotiations on the price for the limestone taken have failed. Birch has filed a statement of claim against the oil sands producer.

Construction of the South Haul Road Birch has submitted an application to Alberta regulatory authorities to construct 12 kilometres of road (the "South Haul Road") south from the MVQ, along the eastern side of the proposed Hammerstone Project. The road will connect to the proposed East Athabasca Access Road. Subject to regulatory approval, the Corporation plans to clear trees this winter followed by road construction in 2007.

The East Athabasca Access Road is an industry-led initiative to provide 54 kilometres of all-weather highway and a new bridge to serve the new and expanding oil sands developments east of the Athabasca River. Management believes the South Haul Road will position Birch to provide materials for the construction of the new highway and bridge, and to supply the long-term aggregate and reagent product requirements of the east side oil sands operators. The new road and bridge will also shorten the haul distance by several kilometres from Birch's quarry and planned quicklime plant to the oil sands operators on the west side of the Athabasca River and the City of Fort McMurray.

Reagent Product Business Plan Since filing the 2006 Technical Report in August 2006, Birch has continued to refine and optimize its reagent products start-up plan for Hammerstone. The Corporation is currently evaluating a number of development cases that have the potential to lower the capital required to enter the reagent products business. To date, a total of \$5.4 million has been spent on site preparation for the limestone-processing complex and purchasing, dismantling, and moving quicklime kiln components to the project site.

Conditional Approval to List on the TSX The TSX has conditionally approved the listing of the Common Shares and Debentures subject to the completion of a financing in the amount of not less than \$30,000,000 and fulfilling all of the listing requirements of the TSX.

Capital Lease The Corporation is in the process of purchasing a crushing spread for the MVQ at a cost of \$6,922,050. The Corporation plans to finance the purchase through a capital lease that it is negotiating for this purpose. The Corporation expects delivery and commissioning of the equipment to be completed in 2006."

60. The defendants knew, or should have known, that the Unsecured Subordinated Convertible Debentures Prospectus contained full, true and plain disclosure related to the risk factors of Birch Mountain on pages 41 and 43 of the said Prospectus:

- a. “*RISK FACTORS* A prospective investor should consider carefully the risk factors set forth in the AIF as well as the additional risk factors set out below before making an investment in Debentures of the Corporation.
- b. *The Muskeg Valley Quarry is in Operation and the Hammerstone Project is currently in the Development Stage*

Birch opened the MVQ in December 2005, under the regulatory approvals and operating permits received in August 2005. The MVQ is fully operational, providing and selling a range of limestone aggregate products. First commercial sales occurred in the second quarter of 2006.

In May 2006, Birch filed an application with the provincial regulatory authorities for the Hammerstone Project, to integrate the existing MVQ with an expanded quarry and aggregate plant, as well as a limestone processing complex to produce limestone-based reagent products.

There are risks that the MVQ’s ongoing operations may experience slowdowns and production interruptions and that operating costs may be higher than estimated.

Similarly, there are risks that the Hammerstone Project may be delayed or that the limestone processing complex may not commence operation.

The current operation and construction schedules may not proceed as planned, there may be delays and the development of the Hammerstone Project may not be completed on budget. Any such delays will likely increase the costs and may require additional financing, which financing may not be available. Actual costs to construct and develop the Hammerstone Project will vary from estimates and such variances may be significant.

Given the stage of development of the Hammerstone Project, various changes may be made prior to completing construction. Based upon current scheduling, the Hammerstone Project is not expected to start commercial quicklime operations until 2009. The information contained herein, including, without limitation, reserve and economic evaluations, is conditional upon receipt of all regulatory approvals and no material changes being made to the planned MVQ operations and the Hammerstone Project.”

61. **SENIOR SECURED CONVERTIBLE DEBENTURES**

62. On December 21, 2007, Tricap subscribed for the Secured Senior Convertible Debenture dated December 21, 2007 in the principal amount of \$31,500,000 offered by way of a private placement by Birch Mountain. This Secured Senior Convertible Debenture was an important instrument in conveying the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap.

63. The Tricap's Early Warning Report dated December 24, 2007 stated:

- a. "2. On December 21, 2007, Tricap Partners Ltd. ("Tricap") subscribed for a convertible debenture in the principal amount of \$31,500,000 to be offered by way of a private placement (the "Debenture") by Birch Mountain Resources Ltd. (the "Corporation").

The Debenture will have a maturity date of June 30, 2012 and an interest rate of prime rate plus 4.0 %, calculated daily and compounded and payable monthly. The initial principal amount of the Debenture will be convertible, at the election of the holder, in whole or in part, into common shares of the Corporation ("Common Shares"), at an exercise price equal to the lower of (i) \$0.80 per common share and, (ii) the current market price at the time of conversion, subject to certain anti-dilution adjustments; provided, however, that prior to December 31, 2008, the Debenture is convertible only in the event of a change of control of the Corporation or event of default under the Debenture. Until approval by a majority of shareholders of the Corporation is obtained (which the Corporation has covenanted to use commercially reasonable efforts to obtain no later than June 11, 2008), Tricap may only convert such portion of the Debenture that would not result in Tricap holding more than 20% of the then outstanding Common Shares, except upon the occurrence of a change of control, whereby Tricap may exercise the conversion right in full. Interest amounts owing on the Debenture may also be converted into Common Shares at the election of the holder.

Assuming conversion of the entire Debenture at an exercise price of \$0.80, Tricap would have ownership and control over 39,375,000 Common Shares representing approximately 31.4% of the aggregate issued and outstanding Common Shares as of December 21, 2007. The conversion price may be lower than \$0.80 depending on current market price at the time of conversion. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture.

6. Tricap acquired the Debenture for investment purposes, and to refinance the existing credit facility extended to the Corporation by an affiliate lender of Tricap.

9. Tricap has subscribed for the Debenture in the principal amount of \$31,500,000.”

64. The Tricap’s Early Warning Report dated August 07, 2008 stated:

- a. “2. On May 30, 2008 the Corporation’s shareholders approved the terms of the Debenture, including the anti-dilution adjustment provisions and conversion provisions. Consequently, the stock exchange requirements applicable to the Corporation would no longer limit the issuance of Common Shares to Tricap upon conversion of the Debenture to 20% or less of the outstanding Common Shares.

Assuming conversion of the entire Debenture at an exercise price of approximately \$0.31, the conversion price in effect as at July 23, 2008, Tricap would have ownership and control over 102,960,197 Common Shares representing approximately 55.0% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture.

6. The Debenture was originally acquired for investment purposes and in connection with refinancing of a prior credit facility that had been extended to the Corporation by an affiliate lender of Tricap.

On June 23, 2008, Tricap issued a notice of a default to the Corporation with respect to financial covenant non-compliance by the Corporation under a loan agreement between of Tricap and the Corporation dated December 21, 2007 (the “Loan Agreement”). As the default remained uncured, it became an event of default on July 3, 2008. As of July 23, 2008, Tricap has the ability to convert the Debenture into Common Shares due to the passage of an additional 20 days without the Corporation having cured the event of default.

On July 23, 2008, the Corporation publicly announced that a special committee of its independent directors and board of directors determined that it was imperative to pursue an immediate sale of the Corporation to unlock maximum value for its shareholders. The Corporation also announced that in the event an immediate sales process does not achieve an acceptable price, the Corporation intends to work with its stakeholders to recapitalize the balance sheet to improve liquidity and permit delivery of the business plan.

Tricap is in discussions with the management and directors of the Corporation and its financial advisors regarding the event of default under the Debenture and the Loan Agreement.”

65. The Tricap’s Early Warning Report dated September 19, 2008 stated:

- a. “2. Tricap and the Corporation entered into an Acknowledgement, Waiver and Amending Agreement effective August 1, 2008 (the “Amending Agreement”) amending, among other things, the aggregate principal amount of the Debenture from \$31.5 million to \$34.5 million.

Pursuant to the Amending Agreement, the Debenture will have a maturity date of June 30, 2012 and an interest rate of 20.0 %, calculated daily and compounded and payable monthly. The principal amount of the Debenture will be convertible at any time throughout the term of the debenture, at the election of the holder, in whole or in part, into common shares of the Corporation (“Common Shares”), at an exercise price equal to the lower of (i) \$0.40 per Common Share (the “Initial Price”) and, (ii) the current market price at the time of conversion, subject to certain anti-dilution adjustments; provided, however, that should the Corporation issue equity securities at a price below \$0.40 per equity security, or securities convertible into equity securities with a strike or exercise price below \$0.40 per equity security, the Initial Price will be reduced to such lower amount per equity security. Interest amounts owing on the Debenture may also be converted into Common Shares at the election of the holder. The minimum change of control redemption price under the Debenture has been amended from 120% to 150% and will increase to 200% on January 1, 2009.

Assuming conversion of the entire Debenture at an exercise price of \$0.40, Tricap would have ownership and control over 86,250,000 Common Shares representing approximately 50.5% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture. A greater number of Common Shares may be issued to Tricap should the conversion price be less than the Initial Price of \$0.40.

6. Tricap intends to review, on a continuous basis, various factors related to its investment, including (but not limited to) the price of the Common Shares, subsequent developments affecting the Corporation and its business, the Corporation’s sale process, and general market and economic conditions. Based upon these and other factors, Tricap may decide to purchase additional securities of the Corporation or may decide in the future to sell all or part of its investment.

9. Tricap originally subscribed for the Debenture in the principal amount of

\$31,500,000. Pursuant to the Amending Agreement, the principal amount was increased to \$34,500,000 to accommodate a \$3 million loan amendment fee.”

66. The Tricap’s Early Warning Report dated December 10, 2008 stated:

- a. “2. 1439442 Alberta Ltd. (“1439442”), a wholly-owned subsidiary of Tricap Partners Ltd. (“Tricap”), acquired \$29,280,000 aggregate principal amount of 6.0% convertible unsecured subordinated debentures (the “Unsecured Debentures”) of Birch Mountain Resources Ltd. (the “Corporation”). The Unsecured Debentures were acquired by way of private agreement.

Assuming conversion of the entire principal amount of the Unsecured Debentures at their conversion price of \$3.30, 1439442 would have ownership and control over 8,872,727 common shares of the Corporation (“Common Shares”), representing approximately 9.5% of the aggregate issued and outstanding Common Shares.

4. (a) As reported in the early warning report filed September 19, 2008, Tricap, the sole shareholder of 1439442, owns a convertible debenture of the Corporation in the aggregate principal amount of \$34.5 million, convertible into Common Shares at the lower of \$0.40 per Common Share and current market price at the time of conversion (the “Debenture”). Given the Corporation’s current receivership proceedings, neither Tricap nor 1439442 currently intends to exercise any conversion rights under the Debenture or the Unsecured Debentures.

6. 1439442 paid nominal cash consideration and other non-cash consideration to acquire the Unsecured Debentures.

7. The Unsecured Debentures were acquired to provide Tricap, as a creditor in the Corporation’s current receivership proceedings, with greater flexibility.”

67. **CONVERTIBLE DEBENTURES HELD FOR INVESTMENT**

68. The Unsecured Subordinated Convertible Debentures and the Senior Secured Convertible Debentures were held by “way of investment” and not held by “way of security”.

69. The particulars that the Debentures were purchased and held as an investment follows:

- a. Tricap per Jim Reid press release dated December 24, 2007, in part, stated:

“Tricap has acquired the Debenture for investment purposes, and in connection with refinancing of the existing credit facility extended to the Corporation by an affiliate lender of Tricap.”;

- b. Tricap per Jim Reid early warning report dated December 24, 2007, in part, stated:

“Tricap acquired the Debenture for investment purposes, and to refinance the existing credit facility extended to the Corporation by an affiliate lender of Tricap.”;

- c. Birch Mountain press release dated December 24, 2007, in part, stated:

“Joel Jarding, Birch Mountain’s President and COO states, “Tricap has acquired the Convertible Debenture as an investment in Birch Mountain and we welcome their proven industry and financial expertise in value creation.”;

- d. Tricap’s Early Warning Report dated August 08, 2008 claimed ownership and control of 55.0% of the aggregate issued and outstanding Birch Mountain common shares and confirmed the investment nature of the Convertible Debentures;

- e. Tricap’s Early Warning Report dated September 19, 2008 claimed ownership and control of 50.5% of the aggregate issued and outstanding Birch Mountain common shares and confirmed the investment nature of the Convertible Debentures;

- f. Tricap’s Early Warning Report dated December 10, 2008 filed pursuant to National Instrument 62-103 “The Early Warning System and Related Take-Over Bid and Insider reporting Issues” described both 1439442 and Tricap as an

“offeror” et al which is a defined term that signifies an investment and would necessitate OSC and SEC take over bid filings; and

- g. Tricap’s SEC Schedule 13D/A filing dated December 16, 2008 described the ownership and control as follows:

“Effective December 3, 2008 Tricap purchased, by way of a private agreement, a portion of the Issuer’s unsecured subordinated convertible debentures in the principal amount of 29,280,000 Canadian dollars (“C\$”) (the “Unsecured Subordinated Convertible Debentures”) for nominal cash consideration and other non-cash consideration.”; [the Pattison Agreement]

“As previously reported , on December 21, 2007, Tricap purchased the Issuer’s secured senior convertible debentures due June 30, 2012 (the “Secured Senior Convertible Debentures”) in the principal amount of C\$31,500,000 from the Issuer.”; [the Loan Agreement]

“As a result of both investments, Tricap may be deemed to be the sole beneficial owner of 3,458,872,727 of Common Shares that would be issuable upon the conversion of the Unsecured Subordinated Convertible Debentures and the Secured Senior Convertible Debentures, which represent 97.6% of the Common Shares outstanding.”; [the dilution completed] and

“ ... Brascan and Brookfield may be deemed to have shared power to vote or dispose, or direct the vote or disposition, of Common Shares that would be issuable upon conversion of both the Senior Secured Convertible Debentures and the Unsecured Subordinated Convertible Debentures owned by Tricap.” [deemed control acknowledged]

- h. the Senior Secured Convertible Debentures and more specifically the “Debentures Shares” as defined in the Loan Agreement dated December 21, 2007 had been conditionally approved for listing on the TSX which is strong indication of the investment nature of the Senior Secured Convertible Debentures.

70. **BIRCH MOUNTAIN BUSINESS PLAN MATURING**

71. The Unsecured Subordinated Convertible Debenture Prospectus dated November 28,

2006 verified the value of the asset in excess of one billion dollars:

- a. “The discounted cash flow net present value (“NPV”) of the Hammerstone Project in constant 2006 dollars, using a discount rate of 7.5%, is \$1,669 million on a pre-tax basis and \$1,099 million on an after-tax basis.”

72. The Birch Mountain’s Material Change Report dated January 08, 2008 verified that senior management personnel were available to Birch Mountain:

- a. “January 8, 2008 — Birch Mountain Resources Ltd. (“Birch Mountain” or the “Company”) (BMD: TSX and AMEX) announces that John A Clarke, CIA, MBA, FCA has been appointed to the position of Vice President and Chief Financial Officer. In addition, the formal supplemental information response for the Hammerstone Project has been filed with Alberta Environment. Joel Jarding, President and Chief Operating Officer states, “I am very pleased that John has joined the Company as CFO. The board and the management team will benefit from his many years of experience in senior financial and business management positions. John has spent the last 25 years in the Alberta oil sands industry and has hands-on experience in strategic planning and field operations with Synenco Energy Inc., Syncrude Canada Ltd., and Jacobs Canada Ltd. in many capacities including Treasurer and Project Controller.”

73. The Birch Mountain’s Material Change Report dated April 02, 2008 verified that total sales were starting to improve:

- a. “Total sales for 2007 were \$7.7 million as compared to \$1.54 million for 2006. Aggregate sales tonnages for 2007 were significantly below management’s expectations because anticipated orders did not materialize, particularly in the second half of the year. The Company continued to bid on requests for quotations during the year, but received much lower than expected orders as a result of a number of market factors.

The Company is in early production stage operations at the MVQ, producing and selling limestone aggregates products to various demand specifications. 2007 was the second year and the first full year of quarry sales and the Company experienced periods of significant fluctuations in sales as the market proved to be unpredictable.

Birch Mountain had a modest start to the year due to weather related slowdowns

and began building up deliveries during late spring with the quarry having its highest performance month in June, operating 24 hours a day, seven days a week and shipping up to 20,000 tonnes per day.

In June, the Company signed a three-year aggregate supply agreement with Suncor Energy Inc. to supply various construction aggregates from the MVQ.”

74. The Birch Mountain’s Material Change Report dated April 14, 2008 again verified that total sales were starting to improve:
- a. “April 14, 2008 — Birch Mountain Resources Ltd. (“Birch Mountain”, or the “Company”) (BMD: TSX and AMEX) has orders for over one million dollars of limestone aggregate products for delivery at the start of the Q2 construction season. Shipments are under way and these orders are expected to be completed during April and May.”
75. The Birch Mountain’s Material Change Report dated May 05, 2008 verified that environmental approvals were being obtained:
- a. “Birch Mountain Resources Ltd. announces that Alberta Environment (“AENV”) has declared the Hammerstone Project Environmental Impact Assessment (“EIA”) to be “complete”.
- “We are proud to achieve this regulatory milestone and I congratulate the staff and consulting team that have worked so hard on the EIA,” says Joel Jarding, President and Chief Operating Officer of Birch Mountain. “The Hammerstone Project includes a six-fold expansion of our approved and operating Muskeg Valley Quarry, and encompasses all of the limestone reserves and the processing facilities needed to make quicklime and hydrated lime defined in the 2006 Technical Report”.
- In addition, the Hammerstone Project Includes plans to produce cement, and to provide facilities for the reprocessing and environmental management of limestone-based by-products produced by the oil sands industry. “Opportunities to create useful products from materials currently considered to be waste, and full life cycle management of other by-products within our reclamation plan, reflect Birch Mountain’s emphasis on effective environmental management and performance for our customers and our own operations,” adds Don Dabbs, Senior Vice President.

The Hammerstone EIA completeness decision is a significant step in Alberta’s

regulatory process, moving the application into the approvals phase. The Natural Resources Conservation Board will now make a “public interest” decision which, if favourable, clears the way to the final approval and operating permits for the Hammerstone Project,” explains Mr. Dabbs.”

76. The Birch Mountain’s Material Change Report dated July 10, 2008 verified that the concept of reagent limestone for treating air emissions was viable:
- a. “July 10, 2008 - Birch Mountain Resources Ltd. (“Birch Mountain” or the “Company”) (BMD: TSX and AMEX) announces that it has received an order from a major oil sands producer to conduct a 4-month, full-scale trial of Birch Mountain’s reagent limestone for treating air emissions from a coke-fired power plant. Throughout the trial period, which begins immediately, Birch Mountain will supply the reagent limestone requirements for this facility.
- “The primary use for our reagent limestone is to purify air emissions when fuels that contain sulphur are burned,” explains Hugh Abercrombie, Vice President Business Development. In the air emissions purification process, sulphur in the combustion gases reacts with the limestone to produce gypsum, a naturally occurring, environmentally benign mineral. Birch Mountain’s proposed Hammerstone Project will include a facility to permanently store this gypsum. “Our customers are excited with the opportunity to return the gypsum to us and we are pleased that they are recognizing the advantages of our full life-cycle approach to by-product management,” adds Hugh.
- Birch Mountain sold limited quantities of reagent limestone beginning late in 2007. The full-scale trial is the next step in demonstrating to our customers the superior quality of our reagent products. Based on inquiries from oil sands proponents, Birch Mountain believes that reagent limestone, along with quicklime and hydrated lime, will become increasingly important to the oil sands industry for air emissions purification. In addition, quicklime and hydrated lime are used by the power and oil sands industries to purify water for steam generation.”
77. The Birch Mountain’s Material Change Report dated July 23, 2008 again verified that the Birch Mountain common shares were significantly undervalued:
- a. “July 23, 2008 - Birch Mountain Resources Ltd. (“Birch Mountain” or the “Company”) (BMD: TSX and AMEX) announces that the Special Committee of independent directors and the Board have determined that it is imperative to pursue an immediate sale of the Company to unlock maximum value for its shareholders. The Company believes that the current lack of liquidity has

compressed Birch Mountain's share price to a level significantly below its underlying value.

The Company reports that it has received notice of an event of default in connection with the financial covenants in the loan agreement with its senior secured lender. Discussions are ongoing with the senior secured lender through the Special Committee and its financial advisor RBC Capital Markets.

It is the Company's belief that an immediate and focused sale process will maximize value. In the event this immediate sales process does not achieve an acceptable price, the Company intends to work with its stakeholders to recapitalize the balance sheet to improve liquidity and permit delivery of the business plan.

In other news, Birch Mountain is pleased to announce that it has signed an agreement with the East Athabasca Highway Proponents led by Suncor Energy, for the acquisition, construction and operation of the South Haul Road ("SHR"). The sale price is \$4.8 million plus Birch Mountain will sell aggregates from inventory for the construction of the 9 kilometers to be built and will have unlimited use of the SHR into the future."

78. The Birch Mountain's Material Change Report dated August 15, 2008 again verified that total sales were starting to improve:

- a. "August 15, 2008 - Birch Mountain Resources Ltd. ("Birch Mountain" or the "Company") (BMD: TSX and AMEX) yesterday reported financial results for the second quarter ended June, 30, 2008, and they are filed at www.sedar.com and at www.sec.gov.

Sales in the second quarter of 2008 were \$5.6 million, an increase of \$0.8 million or —16% compared to sales of \$4.8 million reported for the second quarter of 2007. The Company reports a loss of \$4.7 million for the second of quarter of 2008, a decrease of \$1.2 million or —20% compared to the loss of \$5.9 million reported for the second quarter of 2007. Debentures of \$59.5 million are reclassified as Current Liabilities due to the breach of covenants and non-payment of the interest due June 30th, 2008."

79. **THE GOOD FAITH DOCTRINE**

80. The plaintiff relies on the good faith doctrine in the performance of an agreement and/or

contract where the courts have implied a duty of good faith with a view to securing the performance and enforcement of the agreement and/or contract and that Brookfield and/or Tricap do not act in a way that eviscerates or defeats the objectives of the agreement and/or contract that Brookfield and/or Tricap have entered into.

81. The legal particulars that supports the theory of the case based on the good faith doctrine are set forth as follows:

a. in 1986, the Ontario Court of Appeal per Justice Grange in *LeMesurier v. Andrus* commented on the development of good faith doctrine:

“23 The approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts,”;

b. in 1998, the Ontario Superior Court per Justice Webber in *364511 Ontario v. Darena Holdings* commented on the obligation to perform an executed agreement:

“64 A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him,”;

c. in 2003, the Ontario Court of Appeal per Justice O’Connor in *Transamerica Life v. ING Canada* commented on the good faith doctrine in the performance of a contract:

“53 Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into:”; and

d. in 2012, the British Columbia Supreme Court per Justice Pearlman in *Cruise*

Connections Canada v. Cancellieri commented on the good faith doctrine:

“204 A party will breach the duty of good faith where he or she acts out of self interest, ill will or for a dishonest purpose, or exercises a power granted under the contract in a way that "substantially nullifies the contractual objectives or causes significant harm to the other [party] contrary to the original purposes or expectations of the parties:”

82. The factual particulars of the breach of the good faith doctrine include the following:
- a. the Loan Agreement was executed in good faith by Birch Mountain and then the defendants, for their personal and corporate monetary gain, completely eviscerated or defeated by the objectives of the said Loan Agreement;
 - b. the Unsecured Subordinated Convertible Debenture was executed in good faith by Birch Mountain and then the objectives of the said Debenture were completely eviscerated or defeated by the defendants for their monetary gain and the specific monetary gain of the Pattison Group; and
 - c. the Senior Secured Convertible Debenture was executed in good faith by Birch Mountain and then the objectives of the said Convertible Debenture was completely eviscerated or defeated by the defendants for their monetary gain and the specific monetary gain of Pattison a director of Brookfield.

83. **THE NEGLIGENT MISREPRESENTATIONS**

84. All five elements of the test for negligent misrepresentation must be pleaded and satisfied in order to succeed in an action for negligent misrepresentation.

85. **(1) Duty of Care based on a Special Relationship:**

86. Birch Mountain, Brookfield, Tricap and Pattison were in a special relationship and a duty of care was owed by Brookfield and Tricap to the Birch Mountain common shareholders.
87. The particulars of the special relationship include the following:
- a. the terms and conditions of the various agreements including the following agreements: the Loan Agreement, the Unsecured Subordinated Convertible Debentures and the Senior Secured Convertible Debentures; and
 - b. the nature of the special relationship between the wealthy professional investor and the under funded developing borrower.
88. **(2) Misrepresentations were Untrue, Inaccurate, or Misleading**
89. The misrepresentations were made in writing on the Brookfield web site with the address of “www.brookfield.com” for an extended period from approximately December 03, 2003 to September 14, 2009.
90. The following misrepresentations were untrue, inaccurate or misleading and this fact was known or should have been known to Brookfield and/or Tricap:
- a. “Brookfield's restructuring operation invests in and provides strategic assistance to companies experiencing financial or operational difficulty.

Tricap Partners Ltd. invests in companies where it can capitalize upon Brookfield's operating experience and long term perspective to drive change and build value. Investment candidates typically have attractive tangible assets with significant operating capacity and a proven operating history but are experiencing short term duress. Focus industries include: real estate, financial, manufacturing, forest products, metals and mining, energy, and power generation.

Tricap targets transactions in which it can invest between \$50 million and \$500 million in either debt and equity capital. When Tricap makes an equity investment, it seeks to play a meaningful role in the restructuring process and

governance of the recapitalized company. Tricap has a 3 to 7 year investment horizon. Our team includes operating, finance and legal professionals with extensive experience in reorganizations under Canadian and U.S. legislation.”

91. **(3) Negligence in making the Misrepresentations**

92. The negligent making of the misrepresentations include the following:

- a. no strategic assistance was provided as promised;
- b. no long term perspective to drive change and build value was provided;
- c. required investment known to exceed \$50 million not invested as represented;
- d. Tricap’s investment can be summarized as follows:
 - i. total investment \$34,500,000
 - ii. minus Tricap loan amendment fee 3,000,000
 - iii. minus Tricap non-refundable work fee 997,500
 - iv. minus repayment of Brookfield bridge financing 15,500,000
 - v. total monies received \$15,002,500
- e. the time horizon was approximately 1 year not 3 to 7 years as represented;
- f. no meaningful role in the restructuring process and the governance of BMD: and
- g. no team of operating, finance and legal professionals was provided.

93. **(4) Detrimental Reliance:**

94. The detrimental reliance by Birch Mountain on the negligent misrepresentations was reasonable in the circumstances, the particulars are as follows:

- a. various press releases of Brookfield, Tricap and Birch Mountain made repeated references to the misrepresentations and the deemed reasonable reliance on the said misrepresentations;

- b. Birch Mountain press release dated December 24, 2007, in part, stated:

“Tricap Partners was established by Brookfield Asset Management to provide long term patient capital to companies with potential for value creation and need to recapitalize. With strong industry and financial expertise, Tricap is well positioned to assist these companies in reaching their full potential.”; and

- c. Brookfield and Tricap removed the misrepresentations from their internet web sites as soon as Brookfield and Tricap realized that Birch Mountain was relying on the said representations.

95. **(5) Resulting Damages**

- a. it was reasonably foreseeable that, if Brookfield and Tricap were negligent in making the misrepresentations and the misrepresentations were untrue and/or inaccurate, that Birch Mountain common shareholders would suffer damages;
- b. the assets of a public company, Birch Mountain, worth an estimated \$1.6 billion dollars were transferred to a private company, 1439442, for a undervalued purchase price of less than \$50.0 million dollars; and
- c. the Birch Mountain common shareholders have suffered damages as set forth below and the damages are composed of both compensatory damages related to lost investments and punitive damages.

96. **THE OPPRESSION REMEDY**

97. The defendants, as affiliates of Birch Mountain and the controlling shareholders of Birch Mountain, acted in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the interests of the Birch Mountain common shareholders as Birch Mountain

security holders based on the following particulars.

98. **Birch Mountain is Affiliated with Brookfield, Tricap & 1439442**
99. The definition of “affiliate” set forth in the Loan Agreement is the central definition to determine who are the affiliates of Birch Mountain and in turn the application of the oppression remedy.
100. Pursuant to section 239 of the BCA "complainant" means:
- (b) (i) 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; and
- (b) (ii) a director or former director of a corporation or any of its affiliates,”
101. The following definitions in the Loan Agreement dated December 21, 2007 are applicable:
- a. “Affiliate” means, in respect of any Person, any Person which, directly or indirectly, controls or is controlled by or is under common control with such first mentioned Person; and for the purpose of this definition, “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”) means the power (including de facto control) to direct, or cause to be directed, the management and policies of the Person, whether through the ownership of voting shares or units or by contract or otherwise, and with respect to the Borrower includes each of HPL, Muskeg Valley, Dawson Bay and the Fort McKay JV.”;
- b. “Convertible Securities” means all subscriptions, options, calls, warrants, commitments, contracts, pre-emptive rights, rights of first refusal, demands, conversion rights or other agreements, arrangements or securities of any character or nature whatsoever under which the Borrower is or may be obliged to issue any Common Shares or securities directly or indirectly convertible into, or exercisable or exchangeable for, Common Shares; and
- c. “Debenture Shares” means the Common Shares that may be issued from time to

time upon any conversion or redemption of the Senior Secured Debenture in accordance with its terms.

102. The words in the definition of affiliate “directly or indirectly, controls or is controlled by or is under common control” are words that refer to the concept of *de facto* control.
103. The words in the definition of affiliate “the power (including *de facto* control) to direct, or cause to be directed, the management and policies of [Birch Mountain]” expand on the definition of *de facto* control.
104. The words in the definition of affiliate “whether through the ownership of voting shares or units or by contract or otherwise” are further words of insurance that the exercise of the conversion right to acquire the Debenture Shares is a not a requirement of direct or indirect control.
105. The word “control” is not defined with a stand alone definition in the Loan Agreement but incorporated instead in the definition of “affiliate”.
106. In order for *de facto* control or factual control to exist, Brookfield, Tricap and 1439442 must have enough influence to control the management and policies of Birch Mountain in place of the shareholders who have the *de jure* control or the legal control.
107. The evidence must show that the decision making power lies with Brookfield, Tricap and 1439442 and not with the Birch Mountain common shareholders who have *de jure* control.
108. The particulars of *de facto* control include the following:
 - a. the Loan Agreement is the principal document that defines the terms and conditions related to the \$31,500,000 loan (subsequently increased to

\$34,500,000) from Tricap to Birch Mountain, for example;

- b. section 6.1 of the Loan Agreement defines the affirmative covenants - general which relate to *defacto* control pursuant to the terms of the contract;
- c. section 6.2 of the Loan Agreement defines the affirmative covenants - financial which related to *defacto* control pursuant to the terms of the contract;
- d. section 6.3 of the Loan Agreement defines the financial covenants and is the *defacto* control related to cash flow and other financial considerations;
 - i. “So long as any Obligations remain outstanding and unless the Lender otherwise consents in writing, the Borrower covenants and agrees with the Lender that it will at all times maintain: (a) Minimum Shareholders’ Equity of not less than \$10,000,000; and (b) A Consolidated Working Capital Ratio of not less than 1.0 to 1.0.”;
- e. section 6.4 of the Loan Agreement defines the negative covenants which are extremely restrictive and exercise *de facto* control of not less than 27 corporate decisions:
 - i. “So long as any Obligations remain outstanding and unless the Lender otherwise consents in writing, the Borrower covenants and agrees with the Lender that it shall not do, allow, permit or suffer to exist, and shall not permit any other Obligor to do, allow, permit or suffer to exist, any of the following in respect of any Obligor:”;
- f. many of the negative restrictions are controlled by reference to the sole discretion of the Tricap, for example:
 - i. “Disposal or Surrender of Assets ... dispose of any of its Property ... in each case without the prior written consent of the Lender, which consent may be withheld in the Lender’s sole and absolute discretion.”;

- g. section 9.18 sets forth the entire agreement clause which means other definitions of “control” and “affiliates” are definitive:
- i. “The Loan Documents constitute the entire agreement between the parties hereto pertaining to the matters therein set forth and supercede and replace any prior understandings or arrangements pertaining to the Credit Facilities, including the Term Sheet.”;
 - h. the reason the Convertible Debentures were not converted is that Brookfield, Tricap, 1439442 and Pattison opted for the court appointed receivership procedure as confirmed in Tricap’s Early Warning Report dated December 10, 2008:
 - i. “4. (a) ... Given the Corporation’s current receivership proceedings, neither Tricap nor 1439442 currently intends to exercise any conversion rights under the Debenture or the Unsecured Debentures.”; and
 - ii. “7. The Unsecured Debentures were acquired to provide Tricap, as a creditor in the Corporation’s current receivership proceedings, with greater flexibility.”
109. If for any reason the definition of “affiliate” set forth in the Loan Agreement is deemed not to be applicable then the plaintiff relies on the application of the following definitions of “complainant”.
110. Pursuant to section 239 of the BCA "complainant" also means:
- (b) (iii) a creditor ... in respect of an application under section 242, if the Court exercises its discretion under subclause (iv)”; and
 - (b) (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part.”
111. If for any reason the definition of “affiliate” set forth in the Loan Agreement is not to be applicable then the plaintiff relies on the application of section 2 of the BCA that defines the relationships between corporations.

112. **The Representations of Brookfield and/or Tricap**

113. The defendants made the following representations, more specifically, the representations set forth in Tricap's Early Warning Report dated September 19, 2008:

- a. "Tricap intends to review, on a continuous basis, various factors related to its investment, including (but not limited to) the price of the Common Shares, subsequent developments affecting the Corporation and its business, the Corporation's sale process, and general market and economic conditions. Based upon these and other factors, Tricap may decide to purchase additional securities of the Corporation or may decide in the future to sell all or part of its investment."

114. **The Conversion Privilege**

115. The defendants knew, or should have known, that the cause and effect of the conversion of common shares would cause dilution and that the common share dilution coupled with the common shares death spiral stock trading would cause the collapse of the common share price based on the following particulars:

- a. in Tricap's Early Warning Report dated December 24, 2007, the conversion terms and conditions of the Convertible Debenture were described as follows:

"The initial principal amount of the Debenture will be convertible, at the election of the holder, in whole or in part, into common shares ... at an exercise price of equal to the lower of (i) \$0.80 per common share and, (ii) the current market price at the time of conversion, subject to certain anti-dilution adjustments; provided, however, that prior to December 31, 2008, the Debenture is convertible only in the event of a change in control of the Corporation or event of default under the Debenture.";

- b. initially, in Tricap's Early Warning Report dated August 07, 2008, the conversion terms and conditions of the Private Placement Debenture were described as follows:

“The initial principal amount of the Debenture will be convertible, at the election of the holder, in whole or in part, into common shares of the Corporation (“Common Shares”), at an exercise price equal to the lower of (i) \$0.80 per common share and, (ii) the current market price at the time of conversion, subject to certain anti-dilution adjustments; provided, however, that prior to December 31, 2008, the Debenture is convertible only in the event of a change of control of the Corporation or event of default under the Debenture.”;

- c. subsequently, in Tricap’s Early Warning Report dated September 19, 2008, the conversion terms and conditions of the Private Placement Debenture were amended and described as follows:

“The principal amount of the Debenture will be convertible at any time throughout the term of the debenture, at the election of the holder, in whole or in part, into common shares of the Corporation (“Common Shares”), at an exercise price equal to the lower of (i) \$0.40 per Common Share (the “Initial Price”) and, (ii) the current market price at the time of conversion, subject to certain anti-dilution adjustments; provided, however, that should the Corporation issue equity securities at a price below \$0.40 per equity security, or securities convertible into equity securities with a strike or exercise price below \$0.40 per equity security, the Initial Price will be reduced to such lower amount per equity security.”

116. **The Common Share Dilution**

117. Brookfield and/or Tricap knew, or should have known, that the effect of the aggregate dilution of the Birch Mountain common shareholders assured Brookfield and/or Tricap that control of the assets would eventually be foreclosed by Brookfield and/or Tricap based on the following particulars:

- a. Tricap’s Early Warning Report dated December 24, 2007, in part, stated:

“Assuming conversion of the entire Debenture at an exercise price of \$0.80, Tricap would have ownership and control over 39,375,000 Common Shares representing approximately 31.4% of the aggregate issued and outstanding Common Shares as of December 21, 2007. The conversion price may be lower

than \$0.80 depending on current market price at the time of conversion. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture.”;

- b. Tricap’s Early Warning Report dated August 07, 2008, in part, stated:

“Assuming conversion of the entire Debenture at an exercise price of approximately \$0.31, the conversion price in effect as at July 23, 2008, Tricap would have ownership and control over 102,960,197 Common Shares representing approximately 55.0% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture.”;

- c. Tricap’s Early Warning Report dated September 19, 2008, in part, stated:

“Assuming conversion of the entire Debenture at an exercise price of \$0.40, Tricap would have ownership and control over 86,250,000 Common Shares representing approximately 50.5% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture. A greater number of Common Shares may be issued to Tricap should the conversion price be less than the Initial Price of \$0.40.”;

- d. the Tricap’s SEC filing dated December 16, 2008 described the dilution as follows:

“As a result of both investments, Tricap may be deemed to be the sole beneficial owner of 3,458,872,727 of Common Shares that would be issuable upon the conversion of the Unsecured Subordinated Convertible Debentures and the Secured Senior Convertible Debentures, which represent 97.6% of the Common Shares outstanding.”; and

- e. Brookfield and/or Tricap knew, or should have known, that the Birch Mountain Unsecured Subordinated Convertible Debentures and the Secured Senior Convertible Debentures may be converted into Birch Mountain common shares at a time when the price of the Birch Mountain common shares were severely

depressed as a result of the short sales and failed to deliver sales and that this possibility posed a serious share dilution risk to Birch Mountain common shareholders.

118. **The Advantages to Brookfield and/or Tricap**

119. Tricap utilized its control of the Birch Mountain debentures to favour the financial and business interests of Brookfield and/or Tricap to the detriment of Birch Mountain common shareholders based on the following particulars:

- a. on or about November 28, 2006, Brookfield and/or Tricap implemented the Unsecured Subordinated Convertible Debentures, not only for the stated purpose of meeting Birch Mountain's short-term funding requirements, but also for the long term purpose of liquidating Birch Mountain common shareholders in an orderly fashion to maximize the benefit to Brookfield and/or Tricap;
- b. on or about December 21, 2007, Brookfield and/or Tricap also implemented the Secured Senior Convertible Debentures Private Placement, not only for the stated purpose of meeting Birch Mountain's short-term funding requirements, but also for the long term purpose of liquidating Birch Mountain common shareholders in an orderly fashion to maximize the benefit to Brookfield and/or Tricap;
- c. on or about December 24, 2007, Brookfield and/or Tricap diverted approximately 50% of the Senior Secured Convertible Debentures to repay the existing senior secured bridge financing loaned by Brookfield lending Fund Inc. to Birch Mountain;
- d. on or about May 06, 2008, Brookfield and/or Tricap communicated to Birch Mountain that there would be "direct adverse consequences" if the Birch Mountain common shareholders did not approve Tricap's ability to convert the

entire amount of the Senior Secured Convertible Debentures to Birch Mountain common shares and thereby avoid the 20% limitation;

- e. on or about July 03, 2008, Birch Mountain announced that Tricap “exercised its right under the loan agreement to direct Computershare Trust Company not to make the scheduled interest payment until further notice from the lender”;
- f. on or about August 01, 2008 the Amending Agreement was executed which assured the demise of the Birch Mountain as a viable commercial enterprise and assured the eventual conveyance to Brookfield and Pattison;
- g. on or about August 27, 2008, Birch Mountain announced the amendments to Senior Secured Convertible Debentures and the avoidance of Birch Mountain common shareholder approval by utilizing the TSX Financial Hardship Exemption;
- h. on or about November 05, 2008, Brookfield and/or Tricap designed the receivership proceedings to insure that the Birch Mountain common shareholders would not share in the maximization of shareholder value versus the maximization of debenture holder value; and
- i. on or about December 10, 2008, Brookfield and/or Tricap, as stated in the Early Warning Report of Tricap December 10, 2008, transferred the Unsecured Subordinated Convertible Debenture to 1439442 for nominal cash consideration and other non-cash consideration “to provide Tricap, as a creditor in the Corporation’s current receivership proceedings, with greater flexibility.”

120. **The Death Spiral Stock Trading**

121. The death spiral stock trading of the Birch Mountain common shares during the period

from May 25, 2006 to November 05, 2008 was critical to Brookfield and/or Tricap gaining effective control of Birch Mountain.

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

<u>Event</u>	<u>Trading Days</u>	<u>TSX Volume</u>	<u>TSX Price</u>
Davenport buy recommendation	Feb 16, 2006	1,546,400	\$8.15
Hammerstone application filed	May 25, 2006	215,100	7.99
TD securities front running	Jun 15, 2006	2,508,800	5.93
CERI valuation at \$1.6 billion	Jun 26, 2006	285,400	5.67
	Nov 14, 2006	2,125,300	4.15
RBC = \$34.5 million	Nov 15, 2006	366,200	4.25
Brookfield = \$15.0 million	Apr 02, 2007	74,200	3.70
	Apr 03, 2007	213,500	3.68
Brookfield = \$31.5 million	Nov 26, 2007	318,100	0.77
Tricap = \$31.5 million	Dec 24, 2007	415,900	0.68
South Haul Road funds	Aug 27, 2008	227,700	0.18
PWC appointed receiver	Nov 10, 2008	350,300	0.01
Tricap/1439442 ownership	Dec 10, 2008	000,000	0.01

123. The death spiral stock trading of the Birch Mountain common shares during the period from period from May 25, 2006 to November 05, 2008 caused the share price of the Birch Mountain common shares on AMEX to collapse from \$7.24 on May 25, 2006 to \$0.01 on November 05, 2008:

<u>Event</u>	<u>Trading Days</u>	<u>AMEX Volume</u>	<u>AMEX Price</u>
Davenport buy recommendation	Feb 16, 2006	3,024,000	\$7.06
Hammerstone application filed	May 25, 2006	356,400	7.24
TD Securities front running	Jun 15, 2006	3,356,500	5.33
CERI valuation at \$1.6 billion	Jun 26, 2006	1,977,400	5.06
	Nov 14, 2007	3,100,600	3.66
RBC = \$34.5 million	Nov 15, 2006	1,060,500	3.69
Brookfield = \$15.0 million	Apr 02, 2007	583,400	3.18
	Apr 03, 2007	1,065,300	3.20
Brookfield = \$31.5 million	Nov 26, 2007	871,400	0.79
Tricap = \$31.5 million	Dec 24, 2007	529,450	0.66
South Haul Road funds	Aug 27, 2008	347,634	0.18
PWC appointed receiver	Nov 10, 2008	58,880	0.01
Tricap/1439442 ownership	Dec 10, 2008	286,294	0.01

124. The death spiral stock trading of the Birch Mountain was exacerbated by the Canadian short sales of Birch Mountain common shares summarized as follows:

<u>Event</u>	<u>Trading Days</u>	<u>Can Short Positions</u>
Davenport buy recommendation	Feb 16, 2006	682,721
Hammerstone application filed	May 25, 2006	2,233,290
TD Securities front running	Jun 15, 2006	2,442,325
CERI valuation at \$1.6 billion	Jun 26, 2006	3,574,762
RBC = \$34.5 million	Nov 15, 2006	3,768,400
Brookfield = \$15.0 million	Apr 02, 2007	1,199,400
Brookfield = \$31.5 million	Nov 26, 2007	94,800

Tricap = \$31.5 million	Dec 24, 2007	105,100
South Haul Road funds	Aug 27, 2008	97,900
PWC appointed receiver	Nov 10, 2008	2,800
Tricap/1439442 ownership	Dec 10, 2008	000,000

125. The so called death spiral stock trading of the Birch Mountain common shares was exacerbated by the United States failing to deliver positions of Birch Mountain common shares summarized as follows:

<u>Event</u>	<u>Trading Days</u>	<u>US FTD Positions</u>
Davenport buy recommendation	Feb 16, 2006	21,632
Hammerstone application filed	May 25, 2006	12,958
TD Securities front running	Jun 15, 2006	7,000
CERI valuation at \$1.6 billion	Jun 26, 2006	7,000
RBC = \$34.5 million	Nov 15, 2006	346,890
Brookfield = \$15.0 million	Apr 02, 2007	31,057
Brookfield = \$31.5 million	Nov 26, 2007	41,853
Tricap = \$31.5 million	Dec 24, 2007	167,840
South Haul Road funds	Aug 27, 2008	64,600
PWC appointed receiver	Nov 10, 2008	118,998
Tricap/1439442 ownership	Dec 10, 2008	40,234

126. **The Control of Birch Mountain**

127. The corporation statutes and the common law have recognized that control of a corporation can be accomplished if the votes carried by a security, if exercised, would elect a majority of the board of directors of the controlled corporation.

128. The oppression remedy statutes have recognized that for the purposes of the application

of the oppression remedy the concept of an affiliated corporation is fundamental. One corporation shall be deemed to be an affiliate of another corporation if more than 50% of the voting securities are held by the controlling corporation and both corporations are controlled by the same person.

129. In this fact situation Brookfield controlled Tricap as a subsidiary corporation of Brookfield by owning more than 50% of the voting shares and Brookfield also controlled Birch Mountain by owning more than 50% of the voting shares as set forth in various Early Warning Reports and filings with the SEC.
130. On May 30, 2008, Tricap in an Early Warning Report stated: “Assuming conversion of the entire Debenture at an exercise price of approximately \$0.31, the conversion price in effect as at July 23, 2008, Tricap would have ownership and control over 102,960,197 Common Shares representing approximately 55.0% of the aggregate issued and outstanding Common Shares as of March 31, 2008. Tricap does not own or control any outstanding Common Shares or other securities of the Corporation, other than the Debenture.”
131. On December 10, 2008, Tricap in an Early Warning Report stated: “1439442 Alberta Ltd. (“1439442”), a wholly-owned subsidiary of Tricap Partners Ltd. (“Tricap”), acquired \$29,280,000 aggregate principal amount of 6.0% convertible unsecured subordinated debentures (the “Unsecured Debentures”) of Birch Mountain Resources Ltd. (the “Corporation”). The Unsecured Debentures were acquired by way of private agreement. ... As reported in the early warning report filed September 19, 2008, Tricap, the sole shareholder of 1439442, owns a convertible debenture of the Corporation in the aggregate principal amount of \$34.5 million, convertible into Common Shares at the lower of \$0.40 per Common Share and current market price at the time of conversion (the “Debenture”). Given the Corporation’s current receivership proceedings, neither Tricap nor 1439442 currently intends to exercise any conversion rights under the Debenture or the Unsecured Debentures. ... 1439442 paid nominal cash consideration and other

non-cash consideration to acquire the Unsecured Debentures. ... The Unsecured Debentures were acquired to provide Tricap, as a creditor in the Corporation's current receivership proceedings, with greater flexibility.”

132. On December 16, 2008, Tricap in a SEC filing stated that it may be deemed to be the sole beneficial owner of 3,458,872,727 Birch Mountain common shares that would be issuable upon the conversion of both the Unsecured Subordinated Convertible Debenture and the Secured Senior Convertible Debenture, which represent 97.6% of the Birch Mountain common shares.
133. The role of RBC as financial advisor is unknown to the plaintiff at this time since these parties utilized private agreements, the terms and conditions of which are not publicly available and the plaintiff must wait for these documents to be disclosed pursuant to this action.
134. The following financial actions must be reviewed and the reason for the said financial advice evaluated by the Court:
 - a. at the time of executing the Loan Agreement, the General Security Agreement and the Convertible Debentures, Tricap knew, or should have known, of the financial hardship of Birch Mountain;
 - b. at the time of executing the Loan Agreement, the General Security Agreement and the Convertible Debentures, Tricap knew, or should have known, that a further default was likely to occur in the near future;
 - c. the Amending Agreement assured that a further default would occur with the following amendments to the Loan Agreement;
 - d. the initial interest rate that was agreed at prime plus 4% was reasonable in the

- circumstances but then changed before the receivership to 20% per annum;
- e. the \$3,000,000 loan amendment fee was particularly onerous and attracted interest at the new interest rate which was calculated and payable monthly;
 - f. the timing between the \$3,000,000 loan advance under the \$15,500,000 Brookfield bridge financing and the \$3,000,000 loan amendment fee and repayment of the \$15,500,000 is unknown at this time;
 - g. the change of control redemption price to 200% of the principal outstanding assured that any redemption was extremely onerous and therefore unlikely in view of known Birch Mountain financial information;
 - h. the lowering of the conversion price of the Birch Mountain common shares from \$0.80 to \$0.40 favoured Tricap and further diluted the Birch Mountain common shareholders;
 - i. Tricap planned its time of taking action on any defaults until the formula for conversion was approved by the Birch Mountain common shareholders;
 - j. Tricap actions were directed to cause a default under the Loan Agreement in order to gain complete control of Birch Mountain;
 - k. the sale process conducted by the PWC, the receiver and manager, was contrived and not reasonable in the circumstances;
 - l. potential purchasers of the asset valued at \$1.6 billion were not properly investigated by PWC and several purchase inquiries were ignored, for example;
 - m. the Chinese Sovereign Wealth Fund potential purchase as presented by Mr. Jim

Currie was not investigated by RBC or PWC;

- n. the Surerus Construction & Development potential purchase as presented by Mr. Ken Shearer was not investigated by RBC or PWC; and
 - o. the potential purchase and the supply agreement with Kiewit Energy Canada Corp. was not investigated by RBC or PWC but preserved for Tricap.
135. The role of Pattison, a director of Brookfield and a security holder of Birch Mountain, is unknown at this time since many of the public filings appear to be incomplete and Mr. Pattison utilized private agreements, the terms and conditions of which are not publicly available.
136. The Pattison Agreement must be reviewed and the reason for the Pattison Agreement evaluated by the Court:
- a. Pattison, a director of Brookfield, assigned the Pattison Agreement to Tricap and in return Pattison received various preferences and options not available to other shareholders, creditors and debenture holders;
 - b. the Pattison Agreement was not disclosed to the Court or other parties as part of the receivership disclosure to protect the various preferences and options granted to Pattison, the principal controlling Great Pacific Capital;
 - c. the Pattison Agreement was executed during the period of time when section 9 of the Receivership Order was applicable and all actions were therefore stayed and suspended except with the written consent of the Receiver or leave of the Court;
 - d. Pattison failed to properly report on the Pattison Agreement and the securities acquired and/or exchanged in compliance with the rules of the applicable

securities statutes and other filing requirements;

- e. Tricap’s and 1439442’s joint Early Warning Report dated December 10, 2008 filed pursuant to National Instrument 62-103 was a misleading filing which effectively covered up the Pattison Agreement;
 - f. the said Early Warning Report effectively covered up the Pattison Agreement with incomplete references, misleading references and “not applicable” references; and
 - g. the terms of the various options are set forth in paragraph 3 of the Pattison Agreement and these terms and conditions were not disclosed to the general public and more specifically the Birch Mountain common shareholders.
137. Great Pacific Capital breached various terms and conditions of the Confidentiality Agreement which disclosed confidential information to Pattison related to a potential transaction within the two year restricted time period set forth in the said agreement.
138. The role of RBC as financial advisor, if any, related to the death spiral stock trading is unknown at this time.
139. The role of TD Securities Inc., if any, related to the death spiral stock trading is unknown at this time.
140. **The Contrived Interest Default**
141. The Birch Mountain Management Information Circular issued for the annual general and special meeting of shareholders held May 30, 2008 stated:
- a. “The Board has determined that it would be in the best interests of the

Corporation for the shareholders to approve the private placement of the Convertible Debenture, with regard to the ability of Tricap to convert the entire principal amount thereof and unanimously recommends that the shareholders vote in favour of the resolution set forth below. ... In addition, there are direct adverse consequences to the extent that shareholder approval is not obtained.”

142. The Birch Mountain’s Material Change Report dated August 27, 2008 stated:

- a. “The Company announced that it has entered into agreements to amend (the “Amending Agreement”) certain terms of a \$31.5 million principal amount convertible senior secured debenture issued to Tricap Partners Ltd. The Company has applied to the TSX for an exemption from the requirement to obtain shareholder approval for the Amending Agreement on the basis of the financial hardship exemption pursuant to section 604(e) of the TSX Company Manual (the “Financial Hardship Exemption”). The TSX has conditionally granted and the Company shall rely upon the Financial Hardship Exemption in connection with the Amending Agreement.

Schedule “A” AMENDMENTS TO SECURED CONVERTIBLE DEBENTURE AND RELEASE OF PROCEEDS: FINANCIAL HARDSHIP EXEMPTION

August 27, 2008 - Birch Mountain Resources Ltd. (“Birch Mountain” or the “Company”) (BMD: TSX) announces that it has entered into agreements to amend certain terms of a \$31.5 million principal amount convertible senior secured debenture, (the “Debenture”), issued to Tricap Partners Ltd. (“Tricap”) on a private placement basis on December 21, 2007 and announced on December 24, 2007, in order to gain the release and use of the cash proceeds from the sale of the South Haul Road that Tricap would have had the right to elect to apply to reduce the indebtedness owing to them under the Loan Agreement (as defined below). In connection with these amendments, Tricap has agreed to waive certain defaults under the Loan Agreement on the terms set forth in the amendment.

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.

Background to Debenture Amendments

On June 23, 2008, Tricap issued a notice of a default with respect to financial covenant non-compliance by the Company under the terms of the December 21, 2007 Loan Agreement, (the “Loan Agreement”). This became an event of default on July 3, 2008 and since July 23, 2008 Tricap has had the ability to convert the

Debenture into common shares of the Company (“Common Shares”) due to the passage of an additional 20 days without the Company having cured the event of default.

The Company signed an agreement effective July 11, 2008 with the East Athabasca Highway Proponents led by Suncor Energy, for the acquisition, construction and operation of the South Haul Road, (“SHR”). The cash proceeds of \$4.8 million (the “SHR Proceeds”) have been paid to and are currently being held by counsel to Tricap, in accordance with the terms of the Loan Agreement. The proceeds will be used by the Company for its continued business operations and in accordance with an approved cash flow forecast.

Summary of Amendments

Pursuant to the terms of an Acknowledgement, Waiver and Amending Agreement between the Company and Tricap effective August 1, 2008 (the “Amending Agreement”) the parties agreed to make certain amendments to the Loan Agreement, the Debenture and the Investor Rights Agreement between the Company and Tricap dated December 21, 2007 subject to TSX approval. Generally stated, the amendments to the Loan Agreement provide that Tricap will waive the Company’s existing defaults and release the SHR Proceeds to the Company, subject to the Company satisfying a number of conditions as set out in the Amending Agreement.

Pursuant to the Amending Agreement the principal amendments include:

- the aggregate principal amount is increased from \$31.5 million to \$34.5 million to accommodate a \$3 million loan amendment fee;
- the applicable interest rate is increased from a variable interest rate of prime plus 9% to an interest rate of 20%;
- the conversion price pursuant to the Debenture is reduced from the lower of \$0.40 (reduced from \$0.80) per Common Share (the “Initial Price) and the current market price at the time of conversion;
- should the Company issue equity securities below \$0.40 per share, or securities convertible into equity securities with a strike or exercise price below \$0.40 per equity security, the Initial Price will be reduced to such lower amount per equity security (the “Ratchet Provision”);
- the restriction on conversion of the Debenture prior to December 31, 2008 will be removed, such that the Debenture will be convertible in whole or in part into Common Shares at any time throughout the term of the Debenture;
- the minimum Change of Control Redemption Price (the “Minimum Redemption Price”) pursuant to the Debenture will be amended from its current rate of 120% to 150%. On January 1, 2009, the Minimum Redemption Price will increase to 200%;
- the reinstatement of the events of default under the Loan Agreement and the

granting of certain board rights in favour of Tricap will occur in the event that a sale agreement or an equity financing of not less than \$10 million is not concluded on or before September 30, 2008 and a closing of the said transaction does not occur on or before October 31, 2008;

- a reduction of the loan amendment fee which would reduce the principal amount of the Debenture from \$34.5 million dollars to \$32.5 million dollars in the event a sale agreement is concluded on or before September 30, 2008 and a closing of the said transaction occurs on or before October 31, 2008.

Conditional TSX Approval, Exemption from Shareholder Approval and Effect of Amendments

In connection with the Amending Agreement, and based on a principal amount of \$34.5 million and an Initial Price of \$0.40, the Company may issue up to 86,250,000 common shares representing a dilution of 102% of the current issued and outstanding shares. A greater number of common shares may be issued to Tricap should the conversion price be less than the Initial Price. For example, based on a price of \$0.20 per share (the closing price on August 25, 2008), assuming full conversion of the Debenture, 172,500,000 common shares would be issuable which would represent 67.16% of the then outstanding common shares. A lesser number of common shares may be issued to Tricap should the principal amount be reduced.

In accordance with the policies of the TSX, shareholder approval is required for the Amending Agreement on the basis of the following: (i) dilution will be in excess of 100% if the amended Debentures are converted, (ii) Tricap would own in excess of 50% of the issued and outstanding securities of the Company if the amended Debentures are converted, which would materially effect control of the Company and (iii) the anti-dilution provisions of the amended Debentures are not in accordance with section 607(g)(i), 604(a)(i) and 607(e) of the TSX Company Manual.

As already disclosed, the Company is presently experiencing serious financial difficulty. As a consequence of such financial hardship and upon the recommendation of the Special Committee of the board of directors of the Company, the Company applied to the TSX for an exemption from the requirement to obtain shareholder approval for the Amending Agreement on the basis of the financial hardship exemption pursuant to section 604(e) of the TSX Company Manual (the "Financial Hardship Exemption"). The TSX has conditionally granted and the Company shall rely upon the Financial Hardship Exemption in connection with the Amending Agreement.

As a consequence of relying upon the Financial Hardship Exemption, the TSX has informed the Company that it will, in the ordinary course, commence a delisting review. It is expected upon completion of further transactions as

described above, the Company will then be in compliance with TSX listing requirements.

The Company also intends to rely on the Financial Hardship Exemption for any further transactions which may require shareholder approval. A further press release will be issued once details of any further transactions have been determined.

Pursuant to Multilateral Instrument 61-101 (“MI 61-101”), the Amending Agreement may be considered to be a “related party transaction”. The Company will rely upon the formal valuation exemption in Section 5.5(g) of MI 61-101 and upon the minority approval exemption in Section 5.7(e) of MI 61-101 on the basis of financial hardship.”

143. Brookfield and/or Tricap knew, or should have known, that the interest default was contrived in order that Brookfield and/or Tricap would gain the Birch Mountain assets through foreclosure by Brookfield and/or Tricap based on the following particulars:
- a. Tricap’s Early Warning Report dated December 24, 2007 described the first interest rate as follows:

“The Debenture will have a maturity date of June 30, 2012 and an interest rate of prime rate plus 4.0%, calculated daily and compounded and payable monthly.”;
 - b. Tricap’s Early Warning Report dated September 19, 2008 described the amended interest rate as follows:

“Pursuant to the Amending Agreement, the Debenture will have a maturity date of June 30, 2012 and an interest rate of 20.0%, calculated daily and compounded and payable monthly.”;
 - c. the Shareholders Rights Plan was suspended at the same time as the interest rate was increased to 20.0% to accommodate the commercial interest of Brookfield and/or Tricap; and
 - d. Brookfield and/or Tricap actions were specifically designed and implemented to

cause an interest default by Birch Mountain to suit the specific purposes of Brookfield and/or Tricap in their efforts to gain complete control of Birch Mountain.

144. **The Contrived Receivership**

145. On November 05, 2008, Tricap initiated through the Alberta Superior Court of Justice the appointment of PWC as the receiver of Birch Mountain, in order to transfer the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap.

146. The Birch Mountain's Material Change Report dated October 31, 2008 and November 05, 2008 stated:

- a. "On October 31, 2008, the Corporation received a demand for repayment of its loans from its principal secured creditor, Tricap, together with a notice of intention to enforce security pursuant to section 244 of the BIA. Birch Mountain was unable to repay its indebtedness to Tricap. On November 5, 2008, PricewaterhouseCoopers Inc. was appointed as Receiver of all of the Corporation's current and future assets, undertakings and properties of every nature and kind (the "Property") by order of the Alberta Court of Queen's Bench (Action #0801- 13706).

Among other powers, the Receiver is authorized to take possession and control of the Property; to receive, preserve, protect and maintain control of the Property; to manage, operate and carry on the business of the Corporation; to receive and collect all monies and accounts now owed or hereafter owing to the Corporation and to exercise all remedies of the Corporation in collecting such monies, including, without limitation, to enforce any security held by the Corporation; and to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business (subject to the approval of the court with respect to certain sales).

No proceedings against or in respect of the Corporation or the Property can be commenced or continued except with the written consent of the Receiver or with leave of the court and any and all proceedings currently under way against or in respect of the Corporation or the Property are stayed and suspended pending further order of the court. With certain exceptions, all rights and remedies (including, without limitation, set-off rights) against the Corporation, the

Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of the court. Anyone having oral or written agreements with the Corporation or other mandates for the supply of goods and/or services to the Corporation are restrained from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required until further order of the Court.

Under the Business Corporations Act (Alberta), as a Receiver has been appointed, the powers of the directors of the Corporation that the Receiver is authorized to exercise may not be exercised by the directors until the Receiver is discharged. Accordingly, all of the directors of the board of the Corporation have resigned and all officers have been released of their duties.

At this time 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."

147. Brookfield, Tricap and PWC have not forwarded any information and documents to the Birch Mountain common shareholders with respect to the sale of the Birch Mountain assets to 1439442, a wholly-owned subsidiary of Tricap.
148. Brookfield, Tricap and PWC have not explained how the same Hammerstone trademarks, same web site address and the same web site photographs have been transferred to 1439442, a wholly-owned subsidiary of Tricap.
149. **REASONABLE SHAREHOLDER EXPECTATIONS**
150. The particulars of the "reasonable shareholder expectations" are as follows:
 - a. that Brookfield and/or Tricap would comply with all applicable laws and created the reasonable shareholder expectation based on compliance with various laws and more specifically:
 - i. would act fairly, honestly and in good faith in the interests of Birch Mountain common shareholders to maximize shareholder value;

- ii. would conduct its business and affairs in compliance with and subject to applicable corporate laws, more specifically, the oppression remedy;
 - iii. would be guided by the “full, true and plain disclosure” contained in the Short Form Prospectuses filed August 26, 2005 and November 28, 2006;
 - iv. would reasonably expect Birch Mountain common shareholders to rely on the “full, true and plain disclosure” set forth in the prospectuses;
 - v. would not implement a receivership proceedings without independent valuations and Birch Mountain common shareholder approval; and
 - vi. would not implement a receivership proceedings unless the proceedings were reasonable in the circumstances;
- b. that Brookfield and/or Tricap would fulfill the representations made to Birch Mountain common shareholders set forth on the joint web pages of Brookfield and/or Tricap and referred to in various Birch Mountain press releases, and therefore created the following reasonable shareholder expectations based on the following particulars:
- i. that Tricap invests in companies where it can capitalize upon Brookfield’s operating experience and long term perspective to drive change and build value;
 - ii. that investment candidates typically have attractive tangible assets with significant operating capacity and a proven operating history but are experiencing short term duress;

- iii. that Tricap targets transactions in which it can invest between \$50 million and \$500 million in either debt and equity capital;
 - iv. that when Tricap makes an equity investment, it seeks to play a meaningful role in the restructuring process and governance of the recapitalized company;
 - v. that Tricap has a three to seven year investment horizon and not a short term investment horizon of six to twelve months; and
 - vi. that the Brookfield and/or Tricap team includes operating, finance and legal professionals with extensive experience in reorganizations under Canadian and U.S. legislation;
- c. Tricap's Early Warning Reports created the reasonable shareholder expectation that short-term and long term funding commitments of Birch Mountain would be met by Brookfield and/or Tricap:
- i. in Tricap's Early Warning Report dated December 24, 2007 that Tricap acquired the Debenture for investment purposes, and to refinance the existing credit facility extended to Birch Mountain by an affiliate of Tricap;
 - ii. again, in Tricap's Early Warning Report dated August 07, 2008 that the Debenture was originally acquired for investment purposes and in connection with refinancing of a prior credit facility that had been extended to Birch Mountain by an affiliate lender of Tricap; and
 - iii. in Tricap's Early Warning Report dated September 19, 2008 that Tricap intends to review, on a continuous basis, various factors related to its

investment, ... and based upon these and other factors, Tricap may decide to purchase additional securities of Birch Mountain or may decide in the future to sell all or part of its investment;

- d. the Birch Mountain Common Share Prospectus filed August 26, 2005 and Unsecured Subordinated Convertible Debenture Prospectus dated November 28, 2006 created the reasonable shareholder expectation of the future recovery of Birch Mountain common share values based on the following material facts:
- i. that updated limestone reserves reported in the 2006 Technical Report are 1.0 billion tonnes (net of mining losses), with 460 Mt of proven limestone reserves and 539 Mt of probable limestone reserves;
 - ii. that initial development capital required prior to 2013 to construct the Hammerstone quarry and aggregate plant, the first activation and the first two calcining kilns, and the first hydrating plant, is estimated in the 2006 Technical Report to be \$270 million;
 - iii. that total development capital spending over the life of the project is estimated to be \$577 million, with a further \$443 million in sustaining capital to be spent over the life of the project;
 - iv. that the discounted cash flow net present value (“NPV”) of the Hammerstone Project in constant 2006 dollars, using a discount rate of 7.5%, is \$1,669 million on a pre-tax basis and \$1,099 million on an after-tax basis;
 - v. that the internal rate of return (“IRR”) pre-tax is 36.2% and after tax is 31.2% while the payback period is estimated to be 5.9 years from first production in January 2006. All operating and capital costs are deducted

from revenues in calculating the annual cash flows used to arrive at the NPV;

- vi. the heading “Eligibility for Investment” creates the reasonable shareholder expectation that Birch Mountain common shares were qualified investments pursuant to numerous statutes and a safe and secure investment; and
- vii. the heading “Risk Factors” creates the reasonable shareholder expectation that future financings were possible since the Unsecured Subordinated Convertible Debenture was to be subordinate to all Senior Indebtedness.

151. **BREACH OF REASONABLE SHAREHOLDER EXPECTATIONS**

152. Brookfield and/or Tricap knew, or should have known, that the Birch Mountain business plan was maturing but required further capital cost investment and that their actions would breach reasonable shareholder expectations based on these developments:

- a. sales growth of MVQ project;
- b. environmental approvals of Hammerstone project;
- c. the maturing of the reagent product business plan;
- d. the construction of the South Haul Road;
- e. the reserve estimated by CERI at approximately \$1.6 billion;
- f. Hammerstone limestone 55 year reserves are estimated at 1 billion tonnes;

- g. internal rate of return is estimated at 31.2% and the payback period is estimated at 5.9 years;
 - h. the total development costs estimated at approximately \$500 million;
 - i. a major pending purchase and supply agreement with Kiewit Energy Canada Corp.; and
 - j. break even third quarter results with a profitable month and expectation of a profitable fourth quarter.
153. Brookfield and/or Tricap knew, or should have known, that their actions breached reasonable shareholder expectations, including the following representations:
- a. that Tricap invests in companies where it can capitalize upon Brookfield's operating experience and long term perspective to drive change and build value was breached since there was no long term perspective to drive change and build value;
 - b. that investment candidates typically have attractive tangible assets with significant operating capacity and a proven operating history but are experiencing short term duress was breached since there was no long term perspective to develop the tangible assets and resolve the short term duress;
 - c. that Tricap targets transactions in which it can invest between \$50 million and \$500 million in either debt and equity capital was breached since Tricap's limited its investment to less than \$50 million when the development costs of approximately \$500 million were required;

- d. that when Tricap makes an equity investment, it seeks to play a meaningful role in the restructuring process and governance of the recapitalized company was breached since Brookfield and/or Tricap only favoured and developed their interests to the exclusion of Birch Mountain interests;
- e. that Tricap has a three to seven year investment horizon and not a short term investment horizon was breached since Tricap invested in the Secured Senior Convertible Debenture on December 31, 2007 and appointed PWC as receiver on November 05, 2008 being a period of approximately eleven months;
- f. that the Brookfield and/or Tricap team includes operating, finance and legal professionals with extensive experience in reorganizations under Canadian and U.S. legislation was breached since the extensive experience of these professionals only favoured Brookfield and/or Tricap interests to the exclusion of Birch Mountain interests;
- g. in Tricap's Early Warning Report dated December 24, 2007 and August 07, 2008 that Tricap acquired the Debenture for investment purposes, and to refinance the existing credit facility extended to the Corporation by an affiliate of Tricap was breached since the Brookfield and/or Tricap business plan was to eliminate the Birch Mountain common shareholders; and
- h. in Tricap's Early Warning Report dated September 19, 2008 that Tricap intends to review, on a continuous basis, various factors related to its investment, ... and based upon these and other factors, Tricap may decide to purchase additional securities of the Corporation or may decide in the future to sell all or part of its investment was breached since the Brookfield and/or Tricap business plan was to eliminate the Birch Mountain common shareholders.

154. Brookfield and/or Tricap knew, or should have known, that their planning prior to the

receivership of Birch Mountain was designed to solely favour Brookfield and/or Tricap, and therefore breached reasonable shareholder expectations based on the following particulars:

- a. the \$3,000,000 loan amendment fee was an extremely onerous fee at a difficult financial time for Birch Mountain;
- b. the increase of the applicable interest rate from a variable interest rate of prime plus 4% to an interest rate of 20% would lead to further defaults;
- c. the amendment of the conversion price to the current market price at the time of conversion would lead to death spiral stock trading and common share dilution;
- d. should Birch Mountain issue equity securities below \$0.40 per share, or securities convertible into equity securities with a strike or exercise price below \$0.40 per equity security, the initial price will be reduced to such lower amount per equity security favoured Brookfield and/or Tricap;
- e. the restriction on conversion of the Secured Senior Convertible Debenture prior to December 31, 2008 was removed, such that the said Debenture could be converted in whole or in part into Birch Mountain common shares at any time throughout the term of the said Debenture favoured Brookfield and/or Tricap;
- f. the minimum change of control redemption price pursuant to the Secured Senior Convertible Debenture was amended from its current rate of 120% to 150% and on January 1, 2009, the minimum redemption price was increased to 200% favoured Brookfield and/or Tricap; and
- g. the reinstatement of the events of default under the loan agreement and the granting of certain board rights in favour of Tricap occurred since there was no

sale agreement or an equity financing of not less than \$10 million favoured Brookfield and/or Tricap.

155. Brookfield and/or Tricap knew, or should have known, that the receivership of Birch Mountain was designed to solely favour Brookfield and/or Tricap and therefore breached reasonable shareholder expectations:
 - a. would implement the receivership proceedings without independent Birch Mountain valuations; and
 - b. would avoid Birch Mountain common shareholder approval by having Birch Mountain rely on the financial hardship exemption for any transactions which may require Birch Mountain common shareholder approval.

156. **“OPPRESSIVE OR UNFAIRLY PREJUDICIAL OR UNFAIRLY DISREGARD”**

157. The conduct of the defendants is oppressive or unfairly prejudicial or unfairly disregards various interests based on the following particulars:
 - a. a young developing public company, Birch Mountain, with assets worth an estimated \$1.6 billion dollars were transferred to a private company, 1439442, wholly owned by Brookfield and Tricap for a cash outlay of less than \$50.0 million dollars;
 - b. the various methods used to accomplish this transfer of ownership have been employed numerous times by Brookfield and/or Tricap with devastating results for the Birch Mountain common shareholders and include the use of convertible debentures, death spiral stock trading and avoidance of shareholder approvals;
 - c. the death spiral stock trading of the Birch Mountain common shares during the

period from May 25, 2006 to November 05, 2008 caused the share price of the Birch Mountain common shares on TSX to collapse from \$7.99 on May 25, 2006 to \$0.01 on November 05, 2008;

- d. after the death spiral stock trading was completed Brookfield and/or Tricap owned, if the various convertible debentures were exercised, approximately 97.6% of the outstanding Birch Mountain common shares leaving the original Birch Mountain common shareholders with approximately 2.4% of the outstanding Birch Mountain common shares;
- e. the various public disclosures were selective and confusing and often filed so late as to be of no assistance to the Birch Mountain common shareholders;
- f. on November 05, 2008, Tricap initiated through the Alberta Superior Court of Justice the appointment of PWC as the receiver of Birch Mountain, in order to transfer the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap;
- g. Birch Mountain common shareholder approvals were completely avoided by suspending the operation of the Shareholders Rights Plan and relying on the financial hardship exemption pursuant to section 604(e) of the TSX Company Manual; and
- h. the end result of the above conduct is that the original Birch Mountain common shareholders who worked so long and hard to develop an asset worth an estimated \$1.6 billion received nothing and the hedge fund that made numerous written representations received everything and the hedge fund will now develop the resource in a private company.

158. **COMPENSATORY DAMAGES**

159. The plaintiff claims compensatory damages for the following reasons:

- a. the defeated reasonable expectations of the members of the Class;
- b. the lost investment of the members of the Class; and
- c. a reasonable profit that should have been earned by members of the Class.

160. **PUNITIVE DAMAGES**

161. The plaintiff claims punitive damages for the following reasons:

- a. the actions of the defendants were “misleading”, “usurious”, “oppressive” and “arrogant”;
- b. the actions of the defendants are evidence of bad faith as opposed to good faith in fulfilling the various agreements between the parties;
- c. the breach by the defendants of various representations and the subsequent removal of the representations from the web site was evidence of bad faith;
- d. the certifications attached to numerous SEC filings made by Brookfield were misleading to obtain a judicial remedy;
- e. the certifications attached to numerous SEC filings made by Pattison were misleading to obtain a judicial remedy;
- f. the actions of the defendants are evidence of unfair dealing as opposed to fair

dealing in fulfilling the various agreements between the parties; and

- g. the actions of the defendants utilized their superior bargaining power and superior financial resources to the benefit of the defendants.

162. **REMEDY SOUGHT**

163. The plaintiff claims damages for oppression, and pleads that the damages should be calculated by taking into account the following:

- a. an order pursuant to BCA section 242 (2) declaring that the defendants acted in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the interests of the Birch Mountain common shareholders as security holders of Birch Mountain;
- b. an order affecting the plaintiff and all the other members of the Class pursuant to BCA section 242 (3) if found to be applicable by the Court;
- c. an order directing the defendants to pay the monies paid by the security holders being a members of the Class for securities pursuant to BCA section 242 (3) (h);
- d. an order compensating the plaintiff and all the other members of the Class pursuant to BCA section 242 (3) (l) for damages incurred;
- e. an order setting aside an appropriate sum for the cost of administering the distribution to the Class of the recovery in this action; and
- f. an order for costs.

164. **GENERAL CLAUSES**

165. The plaintiff pleads and relies on:

- a. the applicable *Business Corporations Acts* of each province;
- b. the applicable *Class Proceedings Acts* of each province;
- c. the applicable *Courts of Justice Acts* of each province;
- d. the applicable *Securities Acts* of each province; and
- e. all applicable United States statutes.

166. The plaintiff proposes that this action be tried at Calgary, Alberta.

167. Dated: September 22, 2010

168. NOTICE TO DEFENDANT(S)

Your only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada

You can respond by filing a statement of defence or a demand for notice in the office of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's (s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

CONSENTED TO this 26th day of May, 2014

Legal Counsel to Brookfield Asset Management Inc., Brookfield Special Situation
Partners Ltd. and Hammerstone Corporation



Howard A. Gorman, Q.C. / Allison Kuntz
Norton Rose Fulbright Canada LLP