



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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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Attention: Howard Gorman Q.C. and Allison Kuntz
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NOTICE TO RESPONDENTS: LANNY K. MCDONALD

This application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Justice.

To do so, you must be in Court when the application is heard as shown below:

Date: Wednesday, June 25, 2014, for Scheduling

Time: 2 p.m.

Where: Calgary Courts Centre, 601 - 5 Street SW, Calgary, Alberta, T2P 5P7

Before Whom: The Honourable Madame Justice Streckf

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. A Case Management Order directing the timing and scheduling of the within Application;
2. An Order for Summary Judgment dismissing the Plaintiff's claim in its entirety on the basis that it is without merit, is *res judicata*, and constitutes a collateral attack on Decisions and Orders of the Alberta Court of Queen's Bench ("**Alberta Court**");
3. In the alternative, an Order striking the Plaintiff's claim on the grounds that it is frivolous, irrelevant, improper, and constitutes an abuse of process;
4. An Order awarding costs to the Defendants on a solicitor-client basis; and
5. Such further and other relief as counsel may advise and this Honourable Court may permit.

Grounds for making this application:

6. This is a putative class action on behalf of persons who owned common shares of Birch Mountain Resources Limited ("**Birch Mountain**" or the "**Company**") from April 1, 2005 to November 5, 2008;
7. A related proceeding was first commenced in the Ontario Superior Court of Justice, but was stayed pursuant to an Order of that Court, which was upheld on appeal (collectively, the "**Ontario Courts**"). The Ontario action was then transferred and re-filed in Alberta pursuant to an Order of the Alberta Court, with a new proposed representative plaintiff;
8. The Plaintiff bases his claim on the oppression provisions of the *Alberta Business Corporations Act* ("**ABCA**"), an alleged doctrine of good faith in the performance of contracts, and the tort of negligent misrepresentations;
9. The Plaintiff has not sued Birch Mountain. Instead, the Plaintiff has sued two court-appointed transferees of Birch Mountain's property, Hammerstone Corporation ("**Hammerstone**") and Brookfield Capital Partners Inc. ("**Tricap**"), and Brookfield Asset Management Inc., the parent company of Tricap;
10. Between 1995 and 2008, Birch Mountain had minimal revenues and incurred operating losses every year. Its main source of funding was through the issuance of equity and debt. Birch Mountain issued multiple public disclosures in that regard;
11. In December 2007, Tricap issued a \$31,500,00.00 credit facility to Birch Mountain in exchange for a Secured Convertible Debenture (the "**Tricap December 2007 Debenture**"), among other things. Birch Mountain used the money to repay an existing debt of approximately \$15 million and to fund its ongoing operations;

12. The terms of the Tricap December 2007 Debenture were approved by Birch Mountain's Board of Directors and its shareholders;
13. In June and July 2008, Birch Mountain defaulted under the Tricap December 2007 Debenture. Tricap agreed to waive the defaults and to increase Birch Mountain's indebtedness in order to accommodate the Company's pursuit of an immediate sale;
14. The sales efforts failed and, ultimately, Birch Mountain was unable to meet its obligations under the Tricap December 2007 Debenture;
15. Birch Mountain consented to a Receivership Order on November 5, 2008. Birch Mountain is still in receivership;
16. Birch Mountain's assets were transferred to Tricap and Hammerstone pursuant to an Alberta Court mandated and supervised receivership process (the "**Receivership Proceeding**");
17. The Plaintiff does not have standing as a "complainant" for the purposes of the oppression provisions under the ABCA because:
 - a. The Plaintiff and the putative class members were not shareholders of the Defendants;
 - b. The Defendants are not and never were "affiliates" of Birch Mountain;
 - c. The Defendants were never shareholders, nor short sellers, of Birch Mountain; and
 - d. The Ontario Courts have confirmed that the Plaintiff is not a proper "complainant" for the purposes of the comparable oppression provisions of the *Ontario Business Corporations Act*;
18. The Birch Mountain shareholders had no right to maintain any expectation of the Defendants' conduct and, in any event, the Defendants' conduct was reasonable;
19. The Defendants do not owe a duty of care to the Birch Mountain shareholders;
20. The Defendants did not make any representations, negligent or otherwise, to the Birch Mountain shareholders;
21. There is no duty of good faith in the performance of contracts as alleged in the Amended Statement of Claim and, in any event, the Defendants acted in good faith and pursuant to the express terms of the agreements in issue, and the Decisions and Orders of the Alberta Court;
22. The Defendants did not misfile information with the Alberta Court, or otherwise, and the Receivership Proceeding was not contrived;

23. The Defendants did not cause or participate in any "death spiral" trading of Birch Mountain shares, or any trading of Birch Mountain shares;
24. The Amended Statement of Claim does not disclose a reasonable cause of action;
25. There is no merit to the Amended Statement of Claim, or part of it;
26. The matters surrounding the sale of Birch Mountain to Hammerstone and Tricap were fully addressed and finally determined by the Alberta Court in the Receivership Proceeding. As such, the matters raised by the Plaintiff are without merit, *res judicata*, irrelevant, improper, an abuse of process, and constitute a collateral attack on Decisions and Orders of the Alberta Court; and
27. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

28. The pleadings and proceedings in this action;
29. The Affidavit of Rick Eng sworn June 19, 2014; and
30. Such further evidence and materials that counsel may advise and this Honourable Court may permit.

Applicable rules:

31. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 1.4(2), 3.68(2)(c) and (d) and 7.2 and 7.3(1)(b).

Applicable Acts and regulations:

32. *Business Corporations Act*, RSA 2000, c B. 9, Sections 2(1) and (2) and 239(b); and
33. *Class Proceedings Act*, SA 2003, c. C-16.5, Sections 35(7) and 41.

Any irregularity complained of or objection relied on:

34. Nil.

How the application is proposed to be heard or considered:

35. Orally.

AFFIDAVIT EVIDENCE IS REQUIRED IF YOU WISH TO OBJECT.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.