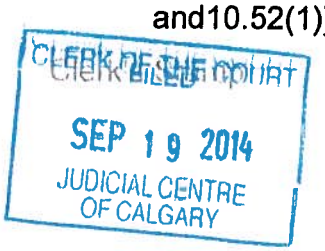
Form 27

[Rule 6.3 and10.52(1)]



COURT FILE NUMBER	1401-05797
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	LANNY K. MCDONALD
DEFENDANTS	BROOKFIELD ASSET MANAGEMENT INC., BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD., and HAMMERSTONE CORPORATION
DOCUMENT	**BRIEF OF THE DEFENDANTS/MOVING PARTIES**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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BRIEF OF THE DEFENDANTS / MOVING PARTIES

PART I - OVERVIEW

1. This action (the **Action**) is a putative class action on behalf of certain shareholders of Birch Mountain Resources Limited (**Birch Mountain** or the **Company**). The proposed representative Plaintiff, Lanny K. McDonald (**McDonald**), has not sued Birch Mountain. Instead, he sues to challenge a final order of the Honourable Mr. Justice S.J. LoVecchio (**Justice LoVecchio**) of the Alberta Court of Queen's Bench (the **Alberta Court**) transferring Birch Mountain's assets in a Court

supervised receivership proceeding (the **Receivership Proceeding**). One Defendant entered into various loan agreements with Birch Mountain, while two of the Defendants are the court-approved transferees of that property.

2. The Defendants file this Brief in support of their application for Summary Judgment dismissing this Action on the grounds that it is entirely without merit, constitutes a collateral attack on Decisions and Orders of the Alberta Court, is *res judicata*, and is also a frivolous, irrelevant, improper action that constitutes an abuse of process.

PART II - THE FACTS

A. THE PARTIES

i. The Proposed Class

3. The proposed class is a worldwide class comprised of all primary and secondary market purchasers of common shares of Birch Mountain who held shares between April 1, 2005, and November 5, 2008.[1]

ii. The Proposed Representative Plaintiff - Lanny McDonald

4. McDonald is a shareholder and a small unsecured creditor of Birch Mountain. McDonald was a director of Birch Mountain from the time it was incorporated in 1995 until 2009. As a director of Birch Mountain, McDonald was directly involved in approving and recommending the loan agreements, amendments, debentures, and disclosure which are in issue in this proceeding. As a director of Birch Mountain, McDonald also consented to the immediate enforcement of Tricap's (defined below) security.[2]

5. Although perfectly capable of doing so[3], McDonald chose not to swear an affidavit in response to this motion, thus avoiding cross-examination. Instead, the responding affidavit was sworn by a stranger to Birch Mountain and the facts in this Action, being David Johnson (**Johnson**), a computer research consultant engaged by Plaintiff's counsel in 2010 to conduct computer related research in respect of a related Ontario action and, later, this Action.[4] Johnson:

   a. is not, and never has been, a Birch Mountain shareholder or creditor;

   b. has never attended a Birch Mountain Shareholder meeting;

   c. has no legal, accounting, or financial analysis training;

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[1] Amended Statement of Claim (**Claim**) at para 4(q).
[2] Claim at para 4(a); Transcript from the Questioning of David Johnson held August, 19, 2014 (**Johnson Ques**) at p 10, lines 15-25 and p 11, lines 11-18.
[3] Johnson Ques at p 9, lines 8-17.
[4] Johnson Ques at p 6 line 25 to p 7 line 4.

d. has spoken with McDonald on only two occassions, and did not rely on any information provided by McDonald in swearing his affidavit;

e. has never spoken with PricewaterhouseCoopers (**PWC**), who was the court-appointed Receiver (the **Receiver**) in the Receivership Proceeding;

f. swore his affidavit based entirely on his interpretation of the documents attached as Exhibits to his affidavit, and to the Affidavit of the Defendants' affiant Rick Eng sworn June 20, 2014, so, for example, where Johnson describes certain agreements or circumstances as contrived or misconstrued, it is merely speculation on his part; and

g. will only be compensated for his work in respect of this Action if the Plaintiff is successful.[5]

iii. Birch Mountain Resources Limited

6. Birch Mountain was incorporated in December 1995 under the Alberta *Business Corporations Act*, RSA 2000, c B-9 (**ABCA**) and was headquartered in Calgary, Alberta from that time to the date of the Receivership Proceeding. As of 2003, Birch Mountain focused its business on the development of a limestone quarry in the Athabasca region of Northern Alberta.[6]

iv. The Defendants

7. Brookfield Special Situations Partners Ltd., which at all material times was called Tricap Partners Ltd. (**Tricap**), is an Ontario corporation.[7] Tricap's business includes providing debt and equity capital to companies through private equity funds. As described in more detail below, Tricap lent money to Birch Mountain in 2007 pursuant to a loan agreement.

8. Hammerstone Corporation (**Hammerstone**) is an Alberta corporation, and at all material times was a subsidiary of Tricap. In the context of the Receivership Proceeding, the Alberta Court authorized and directed the transfer of Birch Mountain's assets to Tricap and Hammerstone, who at the time was named 1439422 Alberta Ltd. (**143 Alberta**).[8]

9. Brookfield Asset Management Inc. (**Brookfield AM**) is an Ontario corporation. It is the parent company to Tricap.[9]

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[5] Johnson Ques at p 3, lines 14-22, p 5, lines 4-11, p 6, lines 10-12, p 7, lines 5-15, p 8, lines 10-27 and p 9, lines 4-7.
[6] Eng Affidavit at paras 16- 17.
[7] Eng Affidavit at para 2.
[8] Eng Affidavit at para 14 and Exhibit 'B'.
[9] Eng Affidavit at para 7.

10. It is the undisputed and unchallenged evidence of the Defendants that none of them were ever shareholders, or short sellers, of Birch Mountain.[10] Despite years since these unfounded allegations were first made, the Plaintiff, his advisors and investigators have no evidence of any shareholdings or short selling by any of the Defendants.[11]

B. BIRCH MOUNTAIN RESOURCES AND FINANCIAL REPORTING

11. Between 1995 and 2008, Birch Mountain had minimal revenues and incurred operating losses every year. Birch Mountain's main source of funding was from the issuance of equity and debt.[12]

12. As a public company whose shares were listed on the TSX between 2004 and 2008, Birch Mountain issued and filed numerous public disclosures (as described in the Amended Statement of Claim), including MD&A, financial statements and press releases confirming its financial predicament and disappointing operating and financial results.[13]

13. Birch Mountain's public disclosure included cautionary language regarding the inherent risks and uncertainties of the forward-looking statements contained therein.[14]

C. BROOKFIELD BRIDGE FACILITY

14. On March 30, 2007, Birch Mountain negotiated a $15.5 million senior secured one-year term credit facility with Brookfield Bridge Lending Fund Inc. (**Brookfield BL**) (the **Brookfield Bridge Facility**). The Brookfield Bridge Facility was the result of efforts made by Birch Mountain's agent, Acumen Capital, to secure financing for the Company.[15]

15. Leading up to and during the time of the Brookfield Bridge Facility (and Tricap loans described below), Birch Mountain retained and relied on advisors, including: (a) John Houghton of the law firm Lawson Lundell LLP; (b) Patrick McCarthy, insolvency counsel at the law firm of Borden Ladner Gervais LLP; (c) David Mann, insolvency counsel at the law firm of Dentons LLP; and (d) RBC Dominion Securities Inc. (**RBCDS**).[16]

16. During the negotiations, Birch Mountain advised that it needed financing to bridge towards an expected significant ramp up in sales from its operations (5,925,000 tonnes of budgeted sales for April through December 2007). Ultimately, however, the Company achieved less than 15% of this target, with sales of only

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[10] Eng Affidavit at para 10.
[11] Johnson Ques at p 86, lines 16-27 and p 87, lines 1-15.
[12] Eng Affidavit at para 18 and Exhibit 'D'.
[13] Eng Affidavit at para 19.
[14] Eng Affidavit at para 20 and Exhibit 'D'.
[15] Eng Affidavit at paras 21- 22.
[16] Johnson Ques at p 12, lines 14-27, p 13, lines 1-27 and p 14, lines 1-15.

approximately 750,000 tonnes, while at the same time ramping up costs and incurring losses.[17]

17. Birch Mountain committed several Events of Default under the Brookfield Bridge Facility between May and August 2007. Birch Mountain requested that Brookfield BL waive these Events in Default, and Brookfield BL agreed.[18]

18. Birch Mountain also requested that Brookfield BL allow Birch Mountain to draw down an additional $4 million under the Brookfield Bridge Facility, notwithstanding its defaults. Again, Brookfield BL agreed.[19]

19. Birch Mountain announced the additional draw down in a press release and Material Change Report, both of which were dated September 18, 2007, and posted on Sedar. Further, Birch Mountain explained to its shareholders in its Third Quarter 2007 Financial Report dated September 30, 2007, that it was in violation of certain financial covenants under the Brookfield Bridge Facility and that Brookfield BL had waived the violations. This report was also posted on Sedar.[20]

20. Ultimately, Birch Mountain advised Brookfield BL that Birch Mountain was falling short on its business plan and would not be able to repay the Brookfield Bridge Facility. Following a series of discussions and negotiations, Brookfield BL's affiliate, Tricap, agreed to provide a new $31,500,000.00 loan to repay the Brookfield Bridge Facility and provide Birch Mountain with additional capital, all as described in detail below.[21]

D. BIRCH MOUNTAIN SPECIAL COMMITTEE AND INCREASED DEFICIT

21. On September 20, 2007, Birch Mountain announced that it had established an independent special committee of the Board of Directors, and that the special committee would explore strategic alternatives for the Company, including a sale, with the assistance of RBCDS as financial advisor.[22]

22. Birch Mountain's press release specifically stated that: "[t]here can be no assurances that any of these activities will result in consummation of an agreement or transaction", and included the typical cautionary language regarding forward-looking statements.[23]

23. The announcement came just months before Birch Mountain disclosed a significant loss in its Annual Financial Report dated December 31, 2007:

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[17] Eng Affidavit at para 22.
[18] Eng Affidavit at paras 23-24 and Exhibits 'E', 'F' and 'G'.
[19] Eng Affidavit at para 25.
[20] Eng Affidavit at paras 25-26 and Exhibits 'H', 'I', and 'J'.
[21] Eng Affidavit at para 27.
[22] Eng Affidavit at para 28 and Exhibit 'K'.
[23] *Ibid.*

> The company has incurred a net loss of $24.5 million for the year end of December 31, 2007, and has an accumulated deficit of $42 million.[24]

24. Six months later, Birch Mountain disclosed a further loss of $4.69 million, bringing its accumulated deficit to $52.85 million. It also announced that its production was down from 546,000 tons of aggregate to 378,000 tons of aggregate.[25]

E. THE TRICAP DECEMBER 2007 DEBENTURE

25. In the context of their inability to repay the Brookfield Bridge Facility, the increased deficit, and announced strategic alternatives process, Birch Mountain proposed that it be provided with additional credit facilities in order to fund various corporate obligations going forward. Tricap agreed to do so, subject to the loan being premised on covenants that Birch Mountain would perform to an agreed standard.[26]

26. On December 21, 2007, Tricap subscribed for a $31,500,000.00 convertible secured senior debenture (the **Tricap December 2007 Debenture**). Birch Mountain announced the debenture in a press release dated December 24, 2007.[27]

27. The subscription was further documented by a loan agreement, also dated December 21, 2007 (the **Tricap Loan Agreement**), which among other things, included an "entire agreement" clause.[28] Birch Mountain entered into the Tricap Loan Agreement with the authority and at the direction of its Board of Directors, including the Plaintiff, all of whom were aware of the entire agreement clause.[29]

28. The Tricap December 2007 Debenture and the Tricap Loan Agreement were posted on Sedar on January 9, 2008, and were, therefore, available to Birch Mountain shareholders.[30]

29. As security for the indebtedness, Birch Mountain granted to Tricap security in all of the Company's present and after-acquired property by way of a General Security Agreement.[31]

30. Birch Mountain drew down the full sum of $31,500,000.00 under the Tricap December 2007 Debenture.[32]

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[24] Johnson Ques at p 38, lines 17-27 and p 39, lines 1-13; Johnson Affidavit at Exhibit '14'.
[25] Johnson Ques at p 39, lines 11-27 and p 40, lines 1-26; Eng Affidavit at para 20 and Exhibit 'D'.
[26] Eng Affidavit at para 30.
[27] Eng Affidavit at para 31 and Exhibit 'L' and 'M'.
[28] Eng Affidavit at para 32 and Exhibit 'N'.
[29] Johnson Ques at p 21, lines 13-27 and p 22, lines 1-3.
[30] Eng Affidavit at para 33.
[31] Eng Affidavit at para 34.
[32] Eng Affidavit at para 35.

31. The Birch Mountain Board of Directors, including the Plaintiff, approved of Birch Mountain entering into the Tricap December 2007 Debenture.[33] Furthermore, the Birch Mountain Board of Directors unanimously recommended the debenture to Birch Mountain shareholders in a Notice of Meeting and Management Information Circular dated April 25, 2008 (the **April 2008 Notice**):

> The board has determined it is in the best interest 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 recommend that the shareholders vote in favour of the resolution set forth below.[34]

32. On May 30, 2008, 94% of the Birch Mountain shareholders who were in attendance at the meeting voted in favour of the Tricap December 2007 Debenture.[35]

33. Neither the Tricap December 2007 Debenture nor the April 2008 Notice contained any representations by Tricap for consideration or reliance at the shareholder meeting or vote. Further, prior to voting on the debenture, Birch Mountain shareholders were told that Tricap's obligations towards the Company were set out in the debenture and the loan agreement, and that Tricap had a right, but not an obligation, to convert its debt into equity.[36]

F. ALBERTA RECEIVERSHIP

34. In June and July 2008, Birch Mountain defaulted under the Tricap December 2007 Debenture. Birch Mountain announced its default in press releases dated July 3 and 31, 2008.[37]

35. Birch Mountain requested an accommodation from Tricap in respect of its default and a "waiver and extension holiday" as a means of avoiding or delaying receivership.[38] Tricap granted this request in the form of an Acknowledgement, Waiver and Amending Agreement (the **Waiver Agreement**) dated August 1, 2008, which also increased the principal amount of indebtedness under the Tricap December 2007 Debenture.[39]

36. Birch Mountain negotiated the Waiver Agreement with input from its financial and legal advisors.[40] Birch Mountain also relied on its counsel, Lawson Lundell LLP, to

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[33] Johnson Ques at p 15, lines 1-14.
[34] Johnson Ques at p 15, lines 15-27 and p 16, lines 1-23; Eng Affidavit at para 36 and Exhibit 'O'.
[35] Johnson Ques at p 17, lines 10-13; Eng Affidavit at para 37 and Exhibit 'P'.
[36] Johnson Ques at p 17, lines 22-27, p 18, lines 1-23 and p 19, lines 14-22
[37] Eng Affidavit at para 38 and Exhibits 'Q' and 'R'.
[38] Johnson Ques at p 48, lines 3-26.
[39] Eng Affidavit at paras 40-41 and Exhibit 'S'.
[40] Johnson Ques at p 47, lines 19-27, p 48, lines 1-2, and p 53, lines 9-16.

write to the TSX for an exemption from the requirement for shareholder approval of the Waiver Agreement.[41] The exemption was granted.[42]

37. The recital to the Waiver Agreement and Birch Mountain's press release of August 27, 2008, stated, among other things, that the Company was experiencing serious financial difficulty. Birch Mountain's public disclosure further stated:

> The amendments to the Debenture will accommodate the continuous pursuit of an immediate sale of the Company or its assets or additional equity financing to unlock the maximum value for its shareholders as previously announced on July 23, 2008.[43]

38. At or about the same time as the parties were negotiating the Waiver Agreement, Birch Mountain announced that it had been delisted from the American Stock Exchange because in the opinion of the exchange:

> The company sustained losses that are so substantial in relation to overall operation for its existing financial condition or its financial condition has become so impaired that it appeared questionable as to whether the company would be able to continue its operation or meet its obligations as they mature.[44]

39. Birch Mountain did not appeal that decision.[45]

40. On October 31, 2008, after Birch Mountain failed to arrange for required additional equity funding or complete a sale agreement, Tricap delivered to Birch Mountain a demand for repayment and a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. Birch Mountain subsequently executed a waiver of the minimum notice period.[46]

41. On November 3, 2008, Birch Mountain announced, in its disclosure that it "was unable to repay its indebtedness to Tricap". It advised further that:

> It is expected that Tricap will begin enforcement proceedings this week. Whether or not a receiver will be appointed and whether or not such a receiver would continue the business operations of the Corporation is not known. Members of the board and management have worked very hard, but without success, to attempt to preserve value for shareholders in light

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[41] Affidavit of David Johnson sworn July 14, 2014 (**Johnson Affidavit**) at Exhibit '34'; Johnson Ques at p 46, lines 14-27 and p 47, lines 1-4.
[42] Eng Affidavit at para 42 and Exhibit 'T'.
[43] *Ibid.*
[44] Johnson Affidavit at Exhibit '33'; Johnson Ques at p 45, lines 16-27 and p 46, lines 1-10.
[45] Johnson Ques at p 46, lines 11-13.
[46] Eng Affidavit at para 43 and Exhibit 'U'.

> of the Corporation's continuing financial difficulties. Members of management intend to be available to assist the receiver in maximizing value for all stakeholders to the extent possible in the circumstances.
>
> 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. Upon appointment of a receiver, the powers of the board of directors will be suspended and ongoing decisions related to the Corporation will be undertaken by the receiver.[47]

42. On November 4, 2008, Tricap commenced the Receivership Proceeding against Birch Mountain in the Alberta Court, and brought an application to appoint the Receiver. Birch Mountain consented to the appointment and did not defend.[48]

43. On November 5, 2008, Justice LoVecchio ordered the appointment of the Receiver (the **Receivership Order**).[49] Having consented to the early enforcement of the Tricap security, Birch Mountain did not attend nor oppose the application.

G. UNSECURED CONVERTIBLE DEBENTURES

44. On November 27, 2008, after the issuance of the Receivership Order, Tricap entered into an Assignment and Option Agreement (the **Assignment and Option Agreement**) with 143 Alberta, and Great Pacific Capital Corp. (**GPCC**), a company owned and controlled by James Pattison, who was a Board Member of Brookfield AM.[50]

45. Pursuant to the Assignment and Option Agreement, Tricap acquired $29,280,000.00 aggregate principal amount of 6.0% convertible unsecured subordinated debentures of Birch Mountain (the **Subordinate Debentures**) from GPCC. This debt was in priority to the Birch Mountain equity.[51]

46. GPCC obtained the Subordinated Debentures in or about 2006, making it the largest contributor of capital to Birch Mountain. In the fall of 2008, Birch Mountain invited Mr. Pattison on a site tour with a view to securing more financing.[52] Mr. Pattison attended the tour, which was hosted by Hugh Abercrombie, who was a director of Birch Mountain at the time and a member of the Birch Mountain Disclosure Committee.[53] Mr. Pattison did not make any further investment in Birch

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[47] Eng Affidavit at para 44 and Exhibit 'V'; Johnson Ques at p 71, lines 11-27, p 72 - 73, and p 74, lines 1-11.
[48] Eng Affidavit at para 45 and Exhibit 'A'; Johnson Ques at p 66, lines 7-9.
[49] Eng Affidavit at para 45 and Exhibit 'A'.
[50] Eng Affidavit at para 46 and Exhibit 'W'.
[51] Eng Affidavit at paras 47-51.
[52] Johnson Ques at p 31, lines 5-27, p 32, lines 1-2.
[53] Johnson Ques at p 32, lines 5-27, p 33, lines 1-7.

Mountain, and subsequently assigned his Subordinate Debentures to Tricap pursuant to the Assignment and Option Agreement.[54]

47. On December 10, 2008, Tricap filed an Early Warning Report announcing that it had acquired the Subordinate Debentures.

48. The Assignment and Option Agreement related to Birch Mountain indebtedness, not shareholding or equity interests.

49. In return for the assignment of debt, GPCC obtained an option to acquire a participating interest in Hammerstone for between $10 - $15 million.[55] The option was never exercised, meaning that GPCC lost its entire $29 million investment in Birch Mountain.[56]

50. The Subordinated Debentures were subordinated to the Tricap December 2007 Debenture, but in priority to any Birch Mountain shareholder or equity claims.[57]

51. The Subordinate Debentures were referenced in the Tricap Offer attached to the filed Receiver Report as being held by Tricap but were not included in the Tricap Offer and were not reduced or affected by Justice LoVecchio's Order approving the sale of Birch Mountain's assets to Tricap and Hammerstone. The claims under the Subordinated Debentures remain outstanding as against Birch Mountain.[58]

H. ALBERTA COURT APPROVES SALE OF BIRCH MOUNTAIN'S ASSETS

52. Following up on, and leveraging the nearly year long RBCDS sales process, the Receiver attempted to find buyers for Birch Mountain's assets. By February 2008, RBCDS had contacted 98 parties; only 8 had executed a confidentiality agreement; and none had provided an expression of interest. RBCDS had commenced a second sale process in July 2008, contacting 48 parties; only 2 executed a confidentiality agreement; but again, there had been no expressions of interest.

53. On January 5, 2009, the Receiver filed a report together with a Notice of Motion for an Order approving an offer made by Tricap to purchase all of Birch Mountain's assets in exchange for a reduction in Birch Mountain's debt under the Tricap December 2007 Debenture (the **Tricap Offer**).[59] The Receiver's report described a year-long intensive sale process which had begun on or about January 1, 2008, when Birch Mountain had retained RBCDS. The Receiver concluded that RBCDS had conducted a thorough sales process.[60]

54. The Receiver's motion was heard on January 8, 2009, with Justice LoVecchio granting an Order vesting all of Birch Mountain's assets free and clear, subject to

[54] Johnson Ques at p 33, lines 12-14.
[55] Eng Affidavit at para 50; Johnson Ques at p 34, lines 22-24.
[56] Eng Affidavit at para 50; Johnson Ques at p 35, lines 3-6.
[57] Eng Affidavit at para 51.
[58] Eng Affidavit at para 52 and Exhibit 'C'.
[59] Eng Affidavit at para 53 and Exhibit 'C'.
[60] Eng Affidavit at para 54.

the interest of one other party (i.e. Canadian Western Bank), to Tricap or its designated nominee, at the time 143 Alberta, now Hammerstone. The Order was not appealed by Birch Mountain or any other party.[61]

I. ONTARIO PROCEEDINGS

55. A parallel action was originally commenced in the Ontario Superior Court of Justice with a different proposed representative Plaintiff (the **Ontario Action**). The Defendants applied to have the Ontario Action stayed on the grounds of jurisdiction, and were successful in that regard before both the Ontario Superior Court of Justice and the Ontario Court of Appeal (collectively, the **Ontario Courts**).

56. While the decisions in Ontario stemmed from jurisdiction arguments, the Ontario Courts made findings in respect of the former Plaintiff shareholder's lack of standing as a complainant under the comparable oppression provisions of the Ontario *Business Corporations Act* (**OBCA**).

57. In a decision dated April 26, 2011, Justice Perell held:

> [60] In this case, it is conceded that none of the Defendants held any voting shares of Birch Mountain. Only Tricap had a conversion right to obtain such shares under its Debenture; however, the right was never exercised and thus the deemed control provision of the Act have never been triggered and none of the Defendants became an affiliate of Birch Mountain.
>
> [61] As an operative fact, Tricap's Debenture was not "held other than by way of security only." Ms. Bond would have it, however, that because the Debenture could potentially become a voting security because of the conversion right, it cannot be held by way of security only. This reading of s. 1 (5) reads out the exception and makes it impossible to have a convertible debenture be other than a voting security. In my opinion, this is not a correct interpretation of s. 1 (5).
>
> [62] In my opinion, it is not the case that Birch Mountain is an Ontario corporation and the Defendants are not affiliates of Birch Mountain...[62]

58. These findings were upheld by the Ontario Court of Appeal in Court File No. C53770, in a decision dated November 16, 2011:

> We agree with the motion judge that on this record Birch Mountain could not be an affiliate of Tricap simply because

[61] Eng Affidavit at para 55 and Exhibit 'B'.
[62] Eng Affidavit at paras 56-58 and Exhibit 'Y' at paras 60-62.

Tricap had an unexercised conversion right to obtain voting shares.[63]

59. Leave to appeal to the Supreme Court of Canada was denied.[64]

PART III - SUBMISSIONS ON THE LAW

60. The Defendants submit that this Action should be summarily dismissed 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. This Action should also be struck because it is frivolous, irrelevant, improper and constitutes an abuse of process.

A. THE TEST FOR SUMMARY JUDGMENT

61. Pursuant to Rule 7.3(1)(b), a party may apply to the Court for Summary Judgment on the grounds that there is no merit to a claim.[65]

62. The test for Summary Judgment was recently considered by the Supreme Court of Canada in *Combined Air Mechanical Services Inc. v Flesch* (aka *Hryniak v Mauldin*), where the Court concluded that a broader and more modern approach was warranted. This approach was adopted by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd.*, and summarized as follows:

> Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial:
>
> > 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.[66]

63. While the applicant bears the burden of showing that there is no genuine issue for trial, the respondent must either refute or counter the applicant's evidence, or risk

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[63] Eng Affidavit at para 59 and Exhibit 'Z' at para 1.
[64] Eng Affidavit at para 60.
[65] Rule 7.3(1)(b), *Alberta Rules of Court*, Alta Reg 124/2010 as amended, Defendants' Authorities, **Tab 1**.
[66] *Windsor v Canadian Pacific Railway Ltd.*, 2014 ABCA 108 at para 13, citing *Combined Air Mechanical Services Inc. v Flesch* (aka *Hryniak v Mauldin*), 2014 SCC 7 at paras 1-5 and 49, Defendants' Authorities, **Tab 2**.

summary dismissal. Each side must "put its best foot forward." It is not enough to make vague references to what may be adduced in the future.[67]

B. STRIKING FRIVOLOUS AND ABUSIVE PROCEEDINGS

64. Pursuant to Rule 3.68(2)(c) and (d), the Court may strike a claim that is frivolous, irrelevant or improper, or an abuse of process.[68]

65. There is no universal test for striking a claim under Rule 3.68,[69] but the Alberta Courts have suggested that proceedings which are "manifestly groundless or without foundation" will be considered an abuse,[70] and that a frivolous pleading is one that is hopelessly factually, and, among other things, brought by a respondent who persistently takes unsuccessful appeals from judicial decisions.[71]

C. COLLATERAL ATTACK ON THE RECEIVERSHIP PROCEEDINGS

66. It is well settled that a challenge to the appointment of a receiver by a court must be made before that court or to the appellate court with jurisdiction over that court. The challenge may not be made collaterally in subsequent proceedings.[72] Further, judicial acts, such as the appointment of a receiver, are not actionable.[73]

67. On its face, the Amended Statement of Claim is a collateral attack on the Receivership Proceedings and the Orders of the Alberta Court, all of which were granted by Justice LoVecchio, and none of which were appealed.

68. McDonald alleges that the Orders were "contrived" and that the sales process was not reasonable in the circumstances. On this motion, Johnson also asserts that Tricap withheld certain information from the Court and that, that information should be brought to this Court's attention now so that it can reconsider the decisions it made in 2008. Johnson makes this assertion based solely on his review of the documents that were before the Court in 2008, and which are before the Court on this motion.[74]

69. The information that Johnson alleges should also have been put before the Court in 2008, includes:

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[67] *Desoto Resources Limited v Encana Corporation*, 2009 ABQB 337 at para 20, Defendants' Authorities, **Tab 3**.
[68] Rule 3.68(2)(c) and (d), *Alberta Rules of Court*, Alta Reg 124/2010 as amended, Defendants' Authorities, **Tab 1**.
[69] *Reece v Edmonton (City)*, 2011 ABCA 238 at paras 16 and 17, Defendants' Authorities, **Tab 4** (without Dissenting Decision).
[70] *L.(P.) v Alberta*, 2011 ABQB 215 at para 21, Defendants' Authorities, **Tab 5**.
[71] *Mcmeekin v Alberta (Attorney General)*, 2012 ABQB 144 at paras 179 and 202, Defendants' Authorities, **Tab 6**.
[72] *Nash v CIBC Trust Co.*, [1996] OJ No 3940 (Gen Div) at paras 31-38 (**Nash**), aff'd [1997] OJ No 1001 (CA), leave to appeal denied, [1997] SCCA No 257 (QL), Defendants' Authorities, **Tab 7**; *Ernst & Young Inc. v Central Guaranty Trust Co.*, 2006 ABCA 337 at paras 47-51, leave to appeal dismissed, [2007] SCCA No 9 (QL), Defendants' Authorities, **Tab 8**; *J.C. Construction (Edm.) Ltd. v CIBC*, [1985] AJ No 935 (Q.B.) at paras 40-46 (QL), Defendants' Authorities, **Tab 9**; *Abacus Cities v Bank of Montreal*, [1987] AJ No 833 (CA) at p 4, 5 and 7, leave to appeal denied, [1988] SCCA No 24 (QL), Defendants' Authorities, **Tab 10**.
[73] *Nash* at para 39, Defendants' Authorities, **Tab 7**.
[74] Jonhson Affidavit at para 75; Jonhson Ques at p 8, lines 25-27; p 82, lines 1-12, p 83, lines 20-24, p 84, lines 1-8.

a. a 2006 AMEC Report which appraised Birch Mountain at $1.6 billion dollars, but that Birch Mountain itself did not rely on when raising capital for the company[75];

b. an Assignment and Option Agreement entered into *after* the Receivership Proceeding was commenced, which did not form the basis of any of the rights exercised by Tricap in the Receivership Proceeding, or otherwise[76]; and

c. a confidentiality agreement that GPCC entered into with Birch Mountain prior to Birch Mountain inviting GPCC to take a tour of its site in hopes of GPCC agreeing to invest more money in Birch Mountain.[77]

70. This information was not, and is not relevant to the Receivership Proceeding. The matters surrounding Birch Mountain's receivership and the sale to Hammerstone and Tricap were fully addressed and finally determined before Justice LoVecchio in the context of the Receivership Proceeding. Birch Mountain did not file evidence, oppose, or appeal, despite being represented by the numerous advisors described above. Accordingly, the Orders of Justice LoVecchio are final and the time for challenging them has passed.

71. The "$1.6 billion" AMEC Report which is oft referenced in the Amended Statement of Claim is demonstrably meaningless. It is a valuation based upon assumptions that never occurred. The Birch Mountain Board of Directors (including the Plaintiff) clearly placed little credibility in the report as they subsequently issued shares or rights at a mere fraction of the purported value after the AMEC Report was in hand. The AMEC Report was also available for use by the Company and its advisors for all purposes in conjunction with their efforts to obtain financing alternatives and their sales processes and otherwise throughout the events leading up to the Receivership Proceeding.

72. Further, the appointment of the Receiver and the sale of Birch Mountain's assets pursuant to the Order of Justice LoVecchio, were judicial acts and are, therefore, not actionable.

D. RES JUDICATA / ESTOPPEL

73. This Action is *res judicata* and barred by cause of action estoppel because the facts upon which this Action is based were known to the Plaintiff at the time of the

[75] Johnson Affidavit at para 75(a) and Exhibit '3'; Jonhson Ques at p 24, lines 6-27 and p 25, lines 1-19.
[76] Eng Affidavit at para 46 and Exhibit 'W'; Johnson Affidavit at para 75(g) and Exhibit '61'; Jonhson Ques at p 33, lines 15-23.
[77] Johnson Affidavit at para 74(e) and Exhibit '24'; Jonhson Ques at p 31, lines 8-27, p 32, lines 1-21, p 56, lines 7-27 and p 57, lines 1-4.

Receivership Proceeding, and could have been put before the Court with reasonable due diligence.[78]

74. Specifically, the terms of the agreements with Tricap were well known to the Plaintiff who approved them in his capacity as a member of the Birch Mountain Board of Directors. They were also well known to the proposed class because they were available on Sedar, and the proposed class voted overwhelmingly in favour of the Tricap December 2007 Debenture upon the advice and recommendation of the Birch Mountain Board of Directors. As well, the AMEC report was also known to the Birch Mountain Board of Directors, as was the confidentiality agreement with GCPP, as both were obtained at their direction.

75. Finally, this Action is *res judicata* because the Ontario Courts have determined that the Plaintiff and the proposed class do not have standing to bring this Action under the nearly identical oppression provisions of the OBCA. The Plaintiff's continued pursuit of this claim in the face of the Receivership Orders and the Orders of the Ontario Court amounts to a frivolous abuse of process.

E. NO STANDING UNDER THE ABCA FOR AN OPPRESSION CLAIM

76. Jurisdiction to grant an oppression remedy is statutory, and that jurisdiction is not conferred unless the plaintiff qualifies as a "complainant", and unless the defendant is a "corporation" or "affiliate" of that "corporation" as defined under the ABCA.

77. Neither the Plaintiff nor the proposed class qualify as a "complainant" for the purposes of the oppression provisions under the ABCA because they are not shareholders (or former shareholders), or former directors of any of the Defendants, and the Defendants are not and never were "affiliates" of Birch Mountain.

78. Section 239 of the ABCA defines "complainant" as follows:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates....[79]

79. The ABCA defines affiliate as "an affiliated body corporate within the meaning of subsection 2(1)", which states, in part, that:

> (a) one "body corporate" is affiliated with another body corporate if one of them is the subsidiary of the other or both

[78] *574095 Alberta Ltd. v Hamilton Brothers Exploration Co.*, 2002 ABQB 238 (CanLII) at paras 50-54, Defendants' Authorities, **Tab 11**.
[79] Excerpts from the Alberta *Business Corporations Act*, Defendants' Authorities, **Tab 12**.

> are subsidiaries of the same body corporate or each of them is controlled by the same person, and
>
> (b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.[80]

80. There is no suggestion that any of the Defendants were subsidiaries of Birch Mountain. As such, the only issue is whether Birch Mountain and the Defendants were under common control. Common control is defined in s. 2(2) of the ABCA as follows:

> 2(2) For the purposes of this Act, a body corporate is controlled by a person if
>
> (a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and
>
> (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body.[81]

81. In this case, none of the Defendants held any securities of Birch Mountain. Tricap (and only Tricap) had a conversion right under the Tricap December 2007 Debenture; however, the right was never exercised. There is no basis to the suggestion in the Amended Statement of Claim that Tricap and Hammerstone became affiliates of Birch Mountain because of the existence of the conversion right.

82. Furthermore, as described above, these issues have already been considered by the Ontario Courts under the parallel oppression provisions in the OBCA, and resolved in favour of the Defendants.

83. There is also no merit to the Plaintiff's claim that the Defendants are affiliates of Birch Mountain because of the definition of affiliate in the Tricap Loan Agreement. The parties sought to define affiliate solely as it is used in the provisions of the Tricap Loan Agreement, which do not purport to alter the applicability of the oppression remedy. Further, as described above, the oppression remedy is statute based. It cannot be altered by a private agreement.

84. Further, there is also no merit to the Plaintiff's claim that references to the Tricap December 2007 Debenture as an "investment" in Tricap's disclosure, or statements made about what Tricap's ownership in Birch Mountain would be *if* it exercised the debenture somehow resulted in Tricap becoming an affiliate of Birch Mountain. Such disclosure reflects solely that Tricap provided the information required under applicable securities laws. The fact remains that Tricap did not

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[80] *Ibid.*
[81] *Ibid.*

exercise any conversion rights under the debentures, and as such did not have "control" over Birch Mountain.

85. Finally, even if there were some basis on which the Plaintiff and proposed class could be granted status as a complainant under the ABCA, there is simply no basis in fact for their allegations of oppression against the Defendants because: (a) the Defendants acted in accordance with the express terms of the relevant agreements, and pursuant to the Orders of this Court; and (b) the entire series of impugned events was done at the direction of the Birch Mountain Board of Directors, of which the Plaintiff was a member, and on the advice of their many advisors, legal and otherwise.

F. NO NEGLIGENT MISREPRESENTATIONS

86. The Plaintiff seeks damages against Tricap and Brookfield AM for alleged negligent misrepresentations regarding the extent of their commitment to Birch Mountain.

87. Specifically, the Plaintiff points to statements made by the companies in respect of their general business models on websites and in press releases. For example, "Brookfield's restructuring operation invests in and provides strategic assistance to companies experiencing financial or operational difficulty" and "Tricap targets transactions in which it can invest between $50 million and $500 million in either debt or equity capital."[82]

88. In order to be successful in its claim for negligent misrepresentation, the Plaintiff must satisfy the five part test laid out by the Supreme Court of Canada in *Queen v Cognos Inc.*,[83] which it cannot do.

i. No Duty of Care Based on a Special Relationship

89. A duty of care will be established where it is shown that: (i) the parties are in a relationship of proximity, or a "special relationship"; and (ii) there are no considerations which ought to negative or limit the scope of the duty.[84]

90. A relationship of proximity is judged against an objective standard and may be established where a defendant ought reasonably foresee that the plaintiff will rely on its representations, and the plaintiff's reliance is reasonable.[85] Whether reliance is reasonable will be considered in the circumstances, but indicia include whether the alleged representation was made in the course of the defendant's business and was given deliberately and in response to a specific query.[86]

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[82] Claim at paras 89-90.
[83] *A. Valin Petroleums Ltd v Imperial Oil Ltd.*, 2007 ABQB 134 at paras 55-57, Defendants' Authorities, **Tab 13**.
[84] *Hercules Managements Ltd v Ernst & Young*, 1997 CarswellMan 198 at paras 22-30, [1997] 2 SCR 165, Defendants' Authorities, **Tab 14**.
[85] *Ibid.*
[86] *Ibid.*

91. The Plaintiff pleads that the various agreements between Tricap and Birch Mountain, and their relationship as borrower and lender, created a special relationship between Tricap and Birch Mountain shareholders.[87] There is no merit to this claim because there are no special circumstances which would give rise to anything more than a contractual relationship between Tricap and Birch Mountain. Courts have repeatedly held that absent special circumstances, a lender owes no duty to a borrower.[88]

92. The agreements were between Tricap and Birch Mountain only. As such, the only relationship was between Tricap and Birch Mountain, and Tricap's only obligation was to Birch Mountain. In any event, Tricap met its obligations to Birch Mountain in full, and at all times acted in accordance with its rights under the agreements. The parties entered into agreements which created a debtor and creditor, not fiduciary, relationship. There is no special relationship between a creditor and debtor.

93. If there was some basis on which to find a special relationship between Tricap and Birch Mountain shareholders, any shareholders' reliance on any alleged misrepresentations was not reasonable for two reasons.

94. First, the alleged misrepresentations were not directed at Birch Mountain shareholders, or made in response to a query by them. Rather, the alleged misrepresentations were general statements that Brookfield AM and Tricap made about the nature of their business either online or in their press releases.

95. Second, the Tricap Loan Agreement contains an entire agreement clause, which precludes the parties from relying on any representations or agreements between the parties except as specifically set forth in the Loan Documents. Loan Documents are defined as:

> all agreements and other documents (including this Agreement, the Senior Secured Convertible Debenture....and any and all Security Documents, undertakings and covenants and agreements) evidencing, securing or guaranteeing any of the Obligations...in connection with this Agreement or any other Loan Document.[89]

96. None of the alleged misrepresentations were referenced or incorporated into any of the agreements, but there was an entire agreement clause when Birch Mountain signed the Tricap Loan Agreement.[90] As such, there is no reasonable basis on

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[87] Claim at paras 86-87.

[88] *Avco Financial Services Realty Ltd. v Bhabha*, 1994 CarswellOnt 1087 at para 51, [1994] OJ No 941, Defendants' Authorities, **Tab 15**; *CareVest Capital Inc. v Chychrun*, 2008 BCSC 201, [2008] BCJ No 288 at para 17, Defendants' Authorities, **Tab 16**; *Condominium Corp. No. 0321365 v 970365 Alberta Ltd.*, [2010] A.J. No. 1022 at para 27, Defendants' Authorities, **Tab 17**; *0895625 BC Ltd. v Ascent Developments Corp.*, 2014 BCSC 1722, [2014] BCJ No 2292 at para 46, Defendants' Authorities, **Tab 18**.

[89] Eng Affidavit at para 32 and Exhibit 'N'.

[90] Johnson Ques at p 18, line 27, p 19, lines 1-13, p 80, lines 23-27, p 81, lines 1-3 and p 21, lines 24-26.

which the Plaintiff can claim he or the proposed class was entitled to rely on any alleged misrepresentations.[91]

ii. No Untrue, Misleading or Negligent Misrepresentations

97. There were no untrue, misleading, or negligent misrepresentations. The alleged misrepresentations were general statements made by Brookfield AM and Tricap to the public at large in respect of how they seek to conduct business, generally. The statements were true, but they did not create obligations in addition to or in replacement of the negotiated, written agreements, nor could they reasonably be seen to constitute a representation guaranteeing a certain course of action by either Brookfield AM or Tricap with respect to Birch Mountain, or otherwise.

iii. No Detrimental Reliance

98. The Amended Statement of Claim pleads detrimental reliance by Birch Mountain on the alleged misrepresentations.[92] Birch Mountain is not a party to this proceeding. Accordingly, we will assume the Plaintiff meant to allege detrimental reliance by Birch Mountain shareholders.

99. There is no evidence that the Plaintiff or the proposed class relied on the alleged misrepresentations in any way. Birch Mountain clearly did not rely upon, nor intend such agreements or reliance, as disclosed in the negotiated terms of the agreements and as disclosed in their public disclosure, including press releases and reports to shareholders. Regardless, for the reasons stated above, any reliance on the alleged misrepresentations was not reasonable.

iv. No Damages

100. The alleged misrepresentations did not cause the Plaintiff or the proposed class any damages. The fact is, Birch Mountain was a struggling Company that never turned a profit. Its operations were funded largely by debt, and by the time of the Receivership Proceeding its deficit was over $50 million.

101. Any loss to the shareholders of Birch Mountain was not caused by Tricap who, to the contrary, forgave Birch Mountain of its defaults under the Tricap Loan Agreement so that Birch Mountain could try and salvage its business. Rather, it was caused by the failure of Birch Mountain's Board of Directors, of which the Plaintiff was a member, to either before or after the Tricap Loan Agreement, meet its business and operational projections.

102. The failure of the Board, the special committee and the advisors to conclude a sale or arrangement bringing value to the shareholders demonstrates no value to or damages suffered by equity.

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[91] *Envirodrive Inc v 836442 Alberta Ltd.*, 2005 ABQB 446 at para 69, Defendants' Authorities, **Tab 19**.
[92] Claim at para 94.

G. NO BREACH OF GOOD FAITH

103. The Defendants did not owe a duty of good faith to the Plaintiff or the proposed class, nor did they act contrary to the "good faith doctrine in the performance of agreements" as alleged by the Plaintiff, or at all.

104. A duty to act in good faith is only recognised in fiduciary and contractual relationships. There is no stand alone duty of good faith that is independent from the express terms of a contract, and one can rarely be implied.[93]

105. The Defendants had no contractual, let alone a fiduciary, relationship with the Plaintiff or the proposed class. As such, the Defendants could not, and did not, owe a duty of good faith to them. Regardless, the agreements entered into by two arms length commercial parties assisted by legal and financial advisors did not incorporate a duty of good faith and one cannot be implied in the circumstances given the entire agreement clause described above.[94]

106. Finally, at all times the Defendants acted within the express terms of the relevant agreements so any aspersions regarding their conduct are frivolous, irrelevant and improper.

H. NO CONVERSION, DILUTION OR DEATH SPIRAL TRADING

107. The Plaintiff pleads that the Defendants knew that "the cause and effect of the conversion of common shares" would cause dilution and that the dilution coupled with the "common shares death spiral stock trading" would cause the collapse of the common share price.

108. Tricap never converted its debt to equity under the Tricap December 2007 Debenture. As such, there could be no "cause and effect of the conversion" as alleged, or at all. The fact that Tricap had a conversion right alone could not cause the collapse of Birch Mountain's share price. It is significant to note, however, that the unexercised conversion rights granted by Birch Mountain and its directors, including the Plaintiff, represent an enterprise value at a mere fraction of the estimated $1.6 billion value now purported by the Plaintiff.

109. There was also no death spiral stock trading because in order for there to be death spiral stock trading, the Defendants would have had to have actually owned and traded Birch Mountain shares. They did not, and the Plaintiff has admitted as much, agreeing that after four years of investigation:

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[93] *Bhasin v Hrynew*, 2013 ABCA 98 at para 27, leave to appeal to the SCC granted, [2013] SCCA No 242, Defendants' Authorities, **Tab 20**.

[94] *Ibid* at para 27; *Benfield Corprate Risk Canada Limited v Beaufort International Insurance Inc.*, 2013 ABCA 200, [2013] AJ No 610 at paras 113-114, Defendants' Authorities, **Tab 21**.

a. they have no evidence that any Brookfield entity was involved in any death spiral trading of Birch Mountain;[95]

b. they have no evidence that any of the Defendants or their affiliates ever bought or sold shares in Birch Mountain;[96]

c. they have no evidence that any of the Defendants or their affiliates shorted shares in Birch Mountain;[97] and

d. they have no evidence to contradict Mr. Eng's sworn testimony that the Defendants or their affiliates did not trade in Birch Mountain shares.[98]

110. There is no evidence whatsoever to support the Plaintiff's claim of dilution and death spiral trading because it does not exist. As such, these allegations are without merit. The Plaintiff's persistence with these allegations in light of their own admissions is frivolous and abusive.

I. NO CONTRIVED RECEIVERSHIP

111. The Plaintiff alleges that the terms of the agreements between Tricap and Birch Mountain were unnecessarily onerous such that Tricap contrived to force Birch Mountain into receivership and gain control of Birch Mountain's assets. There is no merit to this claim.

112. Birch Mountain negotiated and entered into the agreements upon the advice of legal and other counsel, and at the direction of its Board of Directors, of which the Plaintiff was one. Further, the Birch Mountain Board of Directors unanimously recommended that its shareholders vote in favour of the Tricap December 2007 Debenture, which they did. As such, Birch Mountain and its shareholders decided that the terms of the agreements with Tricap were fair, reasonable, and in the best interest of the Company.

113. Further, Birch Mountain acknowledged its defaults under the agreements and disclosed them to its shareholders in its discloser. It also disclosed a possible receivership, and advised its shareholders that in the event of same, it appeared very unlikely that there would be any recovery by the shareholders.

114. At no time during the relevant period did Birch Mountain even suggest that its defaults were Tricap's fault. Rather, it requested waivers, and more funds to continue its operations. Tricap granted Birch Mountain an indulgence, which deferred the inevitable receivership. Tricap subsequently chose to exercise its security when it became clear that Birch Mountain was not able to perform to the standard agreed upon when the financing was first extended.

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[95] Johnson Ques at p 86, lines 1-15.
[96] Johnson Ques at p 86, lines 16-22.
[97] Johnson Ques at p 86, lines 23-25.
[98] Johnson Ques at p 86, line 26 to p 87, line 4.

115. The allegations that the Defendants contrived the receivership by forcing onerous terms upon Birch Mountain are entirely without merit, frivolous and abusive.

116. To the contrary, the Company's advisors undertook a year long, exhaustive sales effort that did not generate any offer for value that would have provided recovery to subordinated creditors or shareholders.

J. SHAREHOLDER EXPECTATIONS

117. The Plaintiff alleges that the Defendants failed to meet the reasonable expectations of Birch Mountain shareholders. However, the Plaintiff and the proposed class were not shareholders of the Defendants. As such, the Plaintiff had no reasonable expectation to place reliance, and the Defendants had no obligation to meet their expectations.

118. If there was some basis on which Birch Mountain shareholders had a right to maintain any expectations of the Defendants, the only expectation that the shareholders could have had was that Tricap would comply with its obligations under the terms of the various agreements, which it did.

K. FRIVOLOUS, IRRELEVANT AND IMPROPER ALLEGATIONS

119. In addition to all of the meritless allegations described above, the Plaintiff makes a number of other irrelevant and improper allegations in the Amended Statement of Claim, including that the Defendants and their advisors withheld pertinent information from the Court in the Receivership Proceeding, and conspired with Mr. Pattison and his companies to force Birch Mountain into receivership and gain control of Birch Mountain's assets.

120. The Defendants did not withhold any information, relevant or otherwise, from the Court in the Receivership Proceeding. Rather, the Defendants filed the relevant agreements and information with the Court, and advanced an argument based solely on their contractual rights. At the direction of its Board of Directors, and upon the advice of counsel, Birch Mountain did not object or file any evidence in opposition to Tricap's application.

121. The evidence filed by Tricap in support of the Receivership was considered by Justice LoVecchio and deemed by him to support an Order appointing the Receiver. There is no basis for the Plaintiff's admittedly entirely inexperienced affiant to second guess the decisions of Justice LoVecchio, or Tricap and Birch Mountain for that matter.

122. The Plaintiff's allegation that perhaps Justice LoVecchio's decision would have been different had the agreements between GPCC and Birch Mountain, and Tricap and GPCC, been before the Court is without merit because those agreements were entirely irrelevant to the Receivership Proceeding.

123. First, the agreement between GPCC and Birch Mountain was a confidentiality agreement that Birch Mountain asked GPCC to sign with a view to having GPCC, Birch Mountain's largest investor, invest more money in Birch Mountain. This agreement has nothing to do with the agreements between Tricap and Birch Mountain, or Birch Mountain's default thereunder.

124. Second, there is no evidence that GPCC breached its confidentiality agreement by somehow sharing confidential information about Birch Mountain with Tricap, who, in any event, would already have had complete information about Birch Mountain by virtue of the due diligence it conducted prior to entering into the various agreements.

125. Third, the Assignment and Option Agreement between GPCC and Tricap did not exist when the Receivership Proceeding was commenced, nor did it form the basis of any rights exercised by Tricap in the Receivership Proceeding, or otherwise. Rather, it was in respect of Subordinated Debentures whose conversion rights were never exercised. Accordingly, as is the case with the Tricap December 2007 Debenture, it did not result in any control over Birch Mountain, by GPCC or Tricap. Further, while the Assignment and Option Agreement could not have been disclosed to the Alberta Court when the Receivership Proceeding was commenced because it did not exist at that time, its effect was subsequently described in the Tricap Offer which was disclosed to the Alberta Court.

126. Fourth, the Plaintiff's repeated allegations in respect of the option granted to GPCC under the Assignment and Option Agreement as being somehow unfair because it was not offered to other shareholders of Birch Mountain are irrelevant. Tricap was entitled to purchase the Subordinated Debentures on whatever terms the parties agreed to.

127. Tricap had no obligation to offer to buy the shares of any Birch Mountain shareholder in exchange for an option to acquire a participating interest in Hammerstone, and there is no basis on which to assert that it did.

128. Finally, even if it was somehow unfair that GPCC was offered an over $10 million option to acquire a participating interest in Hammerstone, the option was never exercised and GPCC ultimately lost its entire $29 million investment in Birch Mountain, meaning that it did not gain any advantage over any other Birch Mountain shareholder.

L. NO DAMAGES

129. The Plaintiff and other Birch Mountain shareholders did not suffer any loss as a result of the Defendants' actions. As described above, Birch Mountain operated at a loss from incorporation to the time of the Receivership. Its disappointing operating and financial losses were repeatedly disclosed to its shareholders, as were its eventual defaults under its agreements with Tricap.

130. Birch Mountain's actions were directed and authorized by the Board of Directors of Birch Mountain, as were the expectations of its shareholders.

131. Tricap was the only Defendant with an obligation to Birch Mountain, and that obligation was dictated by the express terms of the agreements between them. Tricap met its obligations to Birch Mountain under the agreements, and exercised its rights to enforcement within the context of a Court supervised proceeding. As such, there is no basis on which the Plaintiff or proposed class can allege that Tricap, or the other Defendants, caused them any loss.

132. Birch Mountain's extensive failed sales process confirms no damages have been suffered by shareholders

133. Birch Mountain and its Directors, including the Plaintiff acknowledged that there was no value to the equity and therefore no damages to be incurred by shareholders in its November 3, 3008, press release when they acknowledged:

> Members of the board and management have worked very hard, but without success, to attempt to preserve value for shareholders in light of the Corporation's continuing financial difficulties.[99]

M. CLASS PROCEEDING CRITERIA ARE NOT SATISFIED

134. Pursuant to s. 5(1) of the *Class Proceedings Act,* in order for a proceeding to be certified as a class action, the Court must be satisfied that the action meets five specified criteria, one of which is that the action must disclose a reasonable cause of action.

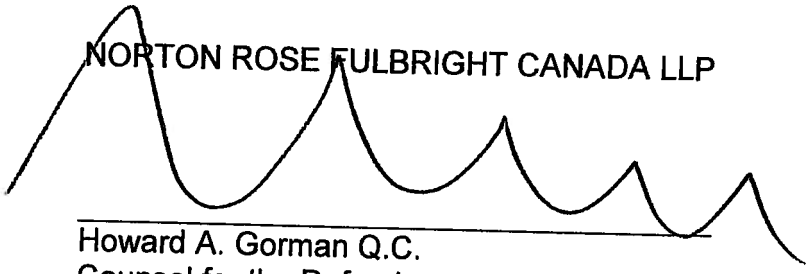
135. For the reasons described above, the Defendants submit that this Action does not disclose a reasonable cause of action, or any cause of action. As such, it could not be certified as a class action even if it were allowed to advance to the stage of certification. Accordingly, it should be summarily dismissed prior to the parties and the Courts exhausting further time and resources in respect of same.

[99] Eng Affidavit at para 44 and Exhibit 'V'.

N. CONCLUSION

136. The issues which the Plaintiff seeks to have this Court resolve were determined by the Alberta Court in the Receivership Proceeding and before the Ontario Courts, and are otherwise meritless, frivolous and an abuse of process. As such, it is the Defendants' submission that this Action should be summarily dismissed with costs payable to the Defendants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF SEPTEMBER, 2014.



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