

CITATION: Bond v. Brookfield Asset Management Inc., 2011 ONCA 730

DATE: 20111123

DOCKET: C53770

COURT OF APPEAL FOR ONTARIO

Laskin, Rosenberg and Rouleau JJ.A.

BETWEEN

Wanda Bond

Appellant (Plaintiff)

and

Brookfield Asset Management Inc.  
Brookfield Special Situations Partners Ltd.  
1439442 Alberta Ltd.

Respondents (Defendants)

*Proceeding Commenced Under the Class Proceeding Act, 1992*

John W. McDonald and John W. Findlay, for the appellant

Howard A. Gorman, for the respondents

Heard: November 16, 2011

On appeal from the judgment of Justice Paul Perell of the Superior Court of Justice, dated April 26, 2011.

ENDORSEMENT

[1] We agree with the motion judge that on this record Birch Mountain could not be an affiliate of Tricap simply because Tricap had an unexercised conversion right to obtain voting shares. Since Birch Mountain is not a corporation to which the OBCA applies and none of the other defendants are affiliates of Birch Mountain, it follows that even assuming the appellant held shares in Birch Mountain, she is not a complainant under the OBCA. She is not the holder of a security of a “corporation”, meaning an Ontario corporation, since Birch Mountain is an Alberta corporation, nor of any affiliate of Birch Mountain within that part of the definition of complainant in s. 245 relied upon by the appellant.

[2] Accordingly, as held by the motion judge in para. 62 of his reasons, the OBCA does not apply so as to give Ontario jurisdiction.

[3] We also entirely agree with the motion judge’s reasons on *forum non conveniens*. Most of the *Muscutt* factors strongly favour Alberta as the convenient forum. At its core, this proposed class action is about oppression of an Alberta corporation and the shareholders of that Alberta corporation. The applicable law is the Alberta company law, and most of the important contractual provisions specify Alberta law as the applicable law. Importantly, as the motion judge noted, there are outstanding proceedings in Alberta where the Alberta Queen’s Bench supervised the sale of Birch Mountain’s assets and is still supervising its bankruptcy. Many of the allegations in the statement of claim concern dealings related to the asset sale and bankruptcy. The Alberta courts are in a far

better position to deal with those allegations. The appellant asks us to infer, in the absence of direct evidence, that most of the witnesses would be in Ontario. Like the motion judge we are not prepared to draw that inference in the absence of some indication of what their evidence would be or why it would be required. On the materials before us, much of the Ontario evidence appears to consist of documents. It is not at all apparent what Ontario witnesses would be required.

[4] Accordingly, the appeal is dismissed with costs fixed on a partial indemnity basis at \$20,000 inclusive of disbursements and HST.

DL Leach A  
Mr. Parry A  
Paul Leach J.A.