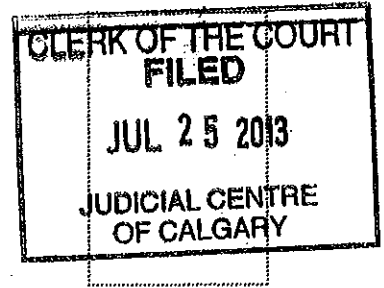


ACTION NUMBER 1201 09763  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
PLAINTIFF WANDA BOND  
DEFENDANT BROOKFIELD ASSET MANAGEMENT INC., BROOKFIELD CAPITAL PARTNERS LTD., and HAMMERSTONE CORPORATION



*Brought under the Class Proceedings Act*

DOCUMENT ~~FRESH FIRST~~ AMENDED STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT MERCHANT LAW GROUP LLP  
400 - 2710 17th Avenue S.E.  
(Merchant Law Building)  
Calgary, Alberta T2A 0P6

E.F. Anthony Merchant, Q.C.  
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AMENDED this 25 day of July 2013 Pursuant to Rule 13.62 dated the 25 day of July 2013

CLERK OF THE COURT

### 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 ON:

#### THE PARTIES

1. The Plaintiff Wanda Bond resides in the City of Ellenton, in the State of Florida.
2. The Defendant Brookfield Asset Management Inc. is an Ontario-based corporation with its registered head office at Brookfield Place, Suite 300 - 181 Bay Street in Toronto, Ontario.

3. The Defendant Brookfield Capital Partners Ltd. (formerly known as Brookfield Private Equity and Finance Ltd., Brookfield Special Situations Partners Ltd., BSS II Limited, and Tricap Partners Ltd.) is an Ontario-based corporation with its registered head office at Brookfield Place, Suite 300 - 181 Bay Street in Toronto, Ontario.

4. The Defendant Hammerstone Corporation (formerly known as 1439442 Alberta Ltd.) is a named Alberta corporation with its registered office at 2681 Hochwald Court SW in Calgary, Alberta.

5. Service outside of Alberta and in Canada of this Statement of Claim on Brookfield Asset Management Inc. and Brookfield Capital Partners Ltd. is authorized pursuant to Rule 11.25 of the Alberta Rules of Court on the following grounds:

- a. The claim relates to a contract made, performed, or breached in Alberta;
- b. The claim is governed by the law of Alberta;
- c. These defendants, although outside Alberta, are, by virtue of their ownership and control relationship, necessary and proper parties to the action brought against Hammerstone Corporation (which is resident in Alberta); and,
- d. The claim relates to a breach of an equitable duty in Alberta.

6 ^ ^  
**DEFINITIONS**

6. In this claim:

- a. "1439442" means Hammerstone Corporation;
- b. "AMEX" means the American Stock Exchange;
- c. "BCA" means the *Business Corporations Act*, R.S.A. 2000, c. B-9;
- d. "Birch Mountain" means Birch Mountain Resources Ltd., an Alberta corporation;
- e. "Brookfield" means Brookfield Asset Management Inc.;
- f. "CERI" means Canadian Energy Research Institute;

- g. "Convertible Secured Senior Debentures" means the \$31,500,000 aggregate principal amount convertible secured senior debentures issued December 31, 2007 and due June 30, 2012 of Birch Mountain;
- h. "Convertible Unsecured Subordinated Debentures" means the \$30,000,000 aggregate principal amount 6% convertible unsecured subordinated debentures issued December 6, 2006 and due December 31, 2011 of Birch Mountain;
- i. "CPA" means the *Class Proceedings Act*, S.A. 2003, c. C-16.5;
- j. "Hammerstone Project" means the project to develop the limestone reserves;
- k. "MVQ" means the Birch Mountain Muskeg Valley Quarry;
- l. "PriceWaterhouseCoopers" means PriceWaterhouseCoopers LLP;
- m. "RBC" means RBC Dominion Securities Inc.;
- n. "Shareholder Rights Plan" means the Shareholders Rights Plan Agreement dated March 28, 2005 that guaranteed that Birch Mountain common shareholders will be treated equally and fairly;
- o. "SEC" refers to the United States Securities and Exchange Commission;
- p. "Tricap" means Brookfield Capital Partners Ltd.; and,
- q. "TSX" means the Toronto Stock Exchange.

## OVERVIEW

7. This claim involves an uncommon 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.

8. Various methods were used by Brookfield or Tricap to effect and accomplish the transfer of ownership of Birch Mountain to 1439442 including, but not limited to, the use of convertible debentures, death spiral stock trading, and avoidance of shareholder approvals resulting in devastating losses to Birch Mountain common shareholders.

9. Ultimately, the death spiral stock trading of the Birch Mountain common shares during the period from May 25, 2006 to November 5, 2008 caused the share price of the Birch Mountain common shares on the TSX to collapse from \$7.99 on May 25, 2006 to \$0.01 on November 5, 2008.

10. 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 conversion of two debentures to common shares.

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.

## **CORPORATE HISTORY**

12. 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 2, 2003 Birch Mountain completed a number of private placements to develop the deposit.

13. On October 3, 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.

14. On April 1, 2005, Birch Mountain executed the Shareholder Rights Plan to ensure that in the event of a bid for control of Birch Mountain through an acquisition of outstanding common shares, that the Birch Mountain common shareholders would be treated equally and fairly.

15. 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.

16. On September 2, 2005, Birch Mountain completed a financing with RBC as the lead underwriter and an 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. This financing was completed pursuant to the Short Form Prospectus dated August 26, 2005.

17. On February 6, 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 which had, and continues to have, many applications collectively valued at over CDN \$1.6 billion and which Brookfield currently uses in their marketing representations.

18. By November 2006, technical reports indicate that there are more than 1 billion tonnes of limestone in reserve (460 Mt of which were proven, and 539 Mt of which were attainable), that the quarry would have a 55-year life span, and that the total development costs over the life of the project would amount to approximately \$577 million. The estimated present value of the project in its entirety (using 2006 dollars) is approximately \$1.67 billion on a pre-tax basis and \$1.1 billion on an after-tax basis.

19. By November 28, 2006 Birch Mountain had identified multiple potential uses for its products, including aggregate products which would be in high demand for constructing and operating oil sands infrastructure.

20. On December 6, 2006, Birch Mountain completed a financing with RBC as the lead underwriter and an 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 a Convertible Unsecured Subordinated Debenture due December 31, 2011. This financing was completed pursuant to the Short Form Prospectus dated November 28, 2006.

21. On April 2, 2007, Birch Mountain announced it had 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.

22. On September 20, 2007, RBC Capital Markets was appointed financial advisor to assist Birch Mountain with numerous strategic and financial issues.

23. On December 24, 2007, Birch Mountain announced the issuance of a \$31,500,000 Convertible Senior Secured Debenture with Tricap which is described as follows:

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.

24. On December 27, 2007, Tricap announced an investment in Birch Mountain which was described as follows:

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.

25. On or about December 2007, Tricap represented to shareholders, through *inter alia* the websites of Tricap and Brookfield, that it is a capital funder with a medium-term investment horizon, interested in participating in the governance and operations of Birch Mountain.

26. On December 31, 2007, Birch Mountain completed a \$31,500,000 Convertible Senior Secured Debenture with Tricap to refinance the existing facility with Brookfield that includes numerous changes prescribed and imposed by Brookfield or Tricap.

27. On July 7, 2008, Birch Mountain announced that, pursuant to the directions of Tricap, it had not made the scheduled June 30, 2008 interest payment on the Convertible Unsecured Subordinate Debenture.

28. 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.

29. On August 7, 2008, Tricap's Early Warning Report announced:  
Assuming conversion of the entire Debenture at an exercise price of approximately \$0.31, the conversion price in effect as of 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.

30. On August 8, 2008, Brookfield's Press Release announced:  
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

31. On November 5, 2008, Tricap initiates proceedings through the Alberta Superior Court of Justice to appoint PriceWaterhouseCoopers as receiver of Birch Mountain, to effect the transfer of the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap.

32. On December 10, 2008, 1439442 announces that it had acquired \$29,280,000 of the 6.0% Convertible Unsecured Subordinated Debentures for nominal cash consideration and other non-cash consideration.

33. On December 16, 2008, Tricap, in a SEC filing, states 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 Unsecured Subordinated Debenture and the Convertible Secured Senior Debenture, which now represented 97.6% of the Birch Mountain common shares.

34. On December 17, 2008, Tricap's offer to purchase all of the assets of Birch Mountain is accepted by PriceWaterhouseCoopers as the receiver of Birch Mountain.

### **COMMON SHARE PROSPECTUS DATED AUGUST 26, 2005**

35. 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.

36. The Common Share Prospectus contained full, true and plain disclosure of the capital cost of the Hammerstone Project, its regulatory status, and the use that the company intended to make of the funds raised.

### **CONVERTIBLE SECURED SENIOR DEBENTURES PRIVATE PLACEMENT DATED DECEMBER 21, 2007**

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



## BIRCH MOUNTAIN BUSINESS PLAN MATURING

38. As at November 28, 2006, the net present value of the Hammerstone Project assets was nearly \$ 2 billion dollars.

39. Birch Mountain had access to senior management personnel with significant experience and expertise in the industry. As such, Birch Mountain had all of the supports in place which it needed to succeed. On January 8<sup>th</sup>, 2008, Birch Mountain announced that John A. Clarke, CIA, MBA, FCA, a senior executive with more than 25 years of experience in the Alberta oil sands industry, had been appointed as Vice President and Chief Financial Officer.

40. On April 2, 2008, Birch Mountain reported that sales were improving, totalling \$7.7 million in 2007 (versus \$1.54 million for the same period in 2006), and that at least one long-term aggregate supply contract had been secured.

41. On April 14, 2008, Birch Mountain announced that it had orders for over \$1 million in limestone aggregate products to be delivered at the start of the second quarter construction season.

42. On May 5<sup>th</sup>, 2008, Birch Mountain announced that Alberta Environment had declared the Hammerstone Project's Environmental Impact Assessment to be 'complete' and that the application would move forward to the approvals phase for determination.

43. On July 10<sup>th</sup>, 2008, Birch Mountain announced that it had entered into an agreement to provide reagent limestone for an innovative full-scale trial treating air emissions from a coke-fired power plant.

44. On July 11<sup>th</sup> 2008, Birch Mountain announced that it had signed an agreement with East Athabasca Highway Proponents for the acquisition, construction and operation of the South Haul

Road for \$4.8 million dollars (plus Birch Mountain would sell aggregates from inventory for the construction of the road).

45. On July 23<sup>rd</sup>, 2008, Birch Mountain opined that its common shares were significantly undervalued, and announced its intention to sell the company in part to "unlock shareholder value" and as a means of responding to the notice of default from Tricap.

46. On August 15<sup>th</sup>, 2008, Birch Mountain announced its second quarter results which again demonstrated a 16% increase in sales over the prior year.

## THE OPPRESSION REMEDY

47. The defendants acted in a manner that was oppressive, unfairly prejudicial to or unfairly disregarded the interests of the Birch Mountain common shareholders.

48. Brookfield or Tricap held a controlling interest of beneficial shares.

49. Brookfield or Tricap utilized this controlling interest to exercise control and direction over Birch Mountain, including control and direction over operations.

## THE REPRESENTATIONS OF BROOKFIELD OR TRICAP

50. The defendants made the following representations, more specifically, the representations set forth on the joint web pages of Brookfield or Tricap published by Brookfield or Tricap:

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.

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

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.

## THE CONVERSION PRIVILEGE

52. The defendants knew, or should have known, based on the particularized conversion rights and continuously declining conversion price described in, *inter alia*, Tricap's Early Warning Reports dated December 24<sup>th</sup>, 2007, August 7<sup>th</sup>, 2008, and September 19<sup>th</sup>, 2008, that 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.

## THE COMMON SHARE DILUTION

53. Brookfield or Tricap knew, or should have known, based on *inter alia* Tricap's Early Warning Reports dated December 24, 2007, August 7, 2008, September 19, 2008, and December 16, 2008, that the effect of the aggregate dilution of the Birch Mountain common shareholders assured Brookfield and Tricap that control of the assets would eventually be foreclosed by Brookfield and/or Tricap.

54. Brookfield and Tricap knew, or should have known, that the Birch Mountain Convertible Unsecured Subordinated Debenture and the Convertible Secured Senior 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.

## THE ADVANTAGE TO BROOKFIELD AND/OR TRICAP

55. 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 Convertible Unsecured Subordinated 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 Convertible Secured Senior 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 Tricap diverted approximately 50% of the Convertible Senior Secured Debentures to repay the existing senior secured bridge financing loaned by Brookfield lending Fund Inc. to Birch Mountain;
- d. on or about May 6, 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 Convertible Senior Secured Debentures to Birch Mountain common shares and thereby avoid the 20% limitation;

- e. on or about July 3, 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 27, 2008, Birch Mountain announced the amendments to Convertible Senior Secured Debentures and the avoidance of Birch Mountain common shareholder approval by utilizing the TSX Financial Hardship Exemption;
- g. on or about November 5, 2008, Brookfield and 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
- h. on or about December 10, 2008, Brookfield and Tricap, as stated in the Early Warning Report of Tricap December 10, 2008, transferred the Convertible Unsecured Subordinated 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.”

## **THE DEATH SPIRAL STOCK TRADING**

56. The death spiral stock trading of the Birch Mountain common shares during the period from May 25, 2006 to November 5, 2008, caused by the deliberate actions of Brookfield or Tricap, was critical to Brookfield and Tricap gaining effective control of Birch Mountain.

57. The death spiral stock trading of the Birch Mountain common shares during the period from May 25, 2006 to November 5, 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 5, 2008.

58. The death spiral stock trading of the Birch Mountain common shares during the period from period from May 25, 2006 to November 5, 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 5, 2008.

59. The death spiral stock trading of the Birch Mountain was exacerbated by the Canadian short sales of Birch Mountain common shares.

## THE CONTROL OF BIRCH MOUNTAIN

60. The <sup>BCA</sup> <sup>Y</sup> <sup>A</sup> <sup>A</sup> and the common law recognize 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 ("**Deemed Voting Shares**").

61. 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 is held by the controlling corporation and both corporations are controlled by the same person.

62. In this <sup>BCA</sup> <sup>Y</sup> <sup>A</sup> <sup>A</sup> case Brookfield controlled Tricap as a subsidiary corporation of Brookfield by controlling more than 50% of the voting shares and Brookfield also controlled Birch Mountain by controlling more than 50% of the voting shares as set forth in *inter alia*, the August 7, 2008, September 19, 2008 and December 10, 2008 Early Warning Reports and filings with the SEC. Tricap and Brookfield, through Tricap, gained sufficient Deemed Voting Shares in Birch Mountain to effectively have sole control over the company's operations.

63. 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.

64. The role of Mr. James Pattison, a director of Brookfield and a security holder of Birch Mountain, is unknown at this time except as noted below since he did not disclose his beneficial ownership in Canada and his US disclosure was 1.5 years late and is misleading and Mr. Pattison utilized private agreements, the terms and conditions of which are not publicly available.

65. The role of RBC as financial advisor, if any, related to the death spiral stock trading is unknown at this time.

66. The role of TD Securities Inc., if any, related to the death spiral stock trading is unknown at this time.

## THE CONTRIVED DEFAULT

67. Brookfield and/or Tricap knew, or should have known, that the loan default was contrived to ensure that Brookfield and/or Tricap would gain the Birch Mountain assets through foreclosure by Brookfield and/or Tricap based on the following particulars:

- a. The initial interest rate was set at a mere rate of prime + 4.0%, calculated daily and compounded and payable monthly;
- b. At the time of signing the SSCD in December 2007, Birch Mountain was effectively in default of the financial covenants in the agreement *but for* receipt of the funds from the SSCD itself. As such, Tricap knew or ought to have known that Birch Mountain was in a perilous circumstance and that a further default was likely in the near future;
- c. On or around April, 2008, Birch Mountain predictably fell afoul of two financial covenants in the SSCD requiring a certain minimum shareholders' equity, and a minimum consolidated working capital ratio;
- d. Tricap did not take action on this default until *after* the shareholders approved a relaxation on the limit to the number of shares which Tricap could convert in the event of a default;

- e. On or around June 30, 2008, Tricap exercised its control and directed that the June 30, 2008 interest payment on the same Convertible Unsecured Subordinate Debenture not be made, effectively causing the interest default;
- f. Tricap subsequently sought to unilaterally and without shareholder approval amend the terms to include interest at 20%, calculated daily and compounded and payable monthly.
- g. On or around October 31, 2008, Tricap demanded repayment of its loans and issued a notice of intention to enforce security pursuant to section 244 of the BIA. Birch Mountain was unable to repay its indebtedness to Tricap.
- h. On or around December 10, 2008, 1439442 (a subsidiary of Tricap) acquired the Convertible Unsecured Subordinated Debentures for nominal cash consideration and other non-cash consideration;

68. Brookfield and Tricap's actions were specifically designed and implemented to cause an loan agreement default to suit the specific purposes of Brookfield and Tricap in their efforts to gain complete control of Birch Mountain.

69. James Pattison, a Brookfield director, is the only known Unsecured Debenture holder to receive the scheduled interest payment on the debenture and further compensated by Tricap through a private agreement with future beneficial ownership interest in the Hammerstone acquisition approximately 45 days prior to its actual liquidation.

## THE CONTRIVED RECEIVERSHIP

70. On November 5, 2008, Tricap initiated through the Alberta Superior Court of Justice the appointment of PriceWaterhouseCoopers as the receiver of Birch Mountain, in order to transfer the assets of Birch Mountain to 1439442, a private wholly-owned subsidiary of Tricap.

"A" "A"



71. In Material Change Reports made October 31, 2008 and November 5, 2008, Birch Mountain disclosed that:

- a. PriceWaterhouseCoopers had been appointed as a receiver;
- b. all directors and officers had resigned in light of the receivership proceedings;
- c. it was unlikely that shareholders would recover anything in the event of a liquidation or sale of the Corporation or its assets.

72. Brookfield, Tricap and PriceWaterhouseCoopers 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.

73. Brookfield, Tricap and PriceWaterhouseCoopers 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.

74. On January 28, 2009, 1439442 Alberta Ltd. changed its name to Hammerstone Corporation and continues to operate the Hammerstone Project under that name today.

## **REASONABLE SHAREHOLDER EXPECTATIONS**

75. The particulars of the 'reasonable shareholder expectations' are as follows:

- a. that Brookfield and 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 proceeding without independent valuations and Birch Mountain common shareholder approval; and
  - vi. would not implement a receivership proceeding unless the proceedings were reasonable in the circumstances;
- b. that Brookfield and Tricap would fulfill the representations made to Birch Mountain common shareholders set forth on the joint web pages of Brookfield and 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 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 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; facility that had been extended to Birch Mountain by an affiliate lender of Tricap; and
  - 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 Convertible Unsecured Subordinated 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 Convertible Unsecured Subordinated Debenture was to be subordinate to all Senior Indebtedness.

## **BREACH OF REASONABLE SHAREHOLDER EXPECTATIONS**

76. Brookfield and 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; and
- h. the total development costs estimated at approximately \$500 million;
- i. a major pending contract with Kewitt;
- j. break-even third quarter results with a profitable month and expectation of a profitable Q4 pending major contracts maturing.

77. Brookfield and 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 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 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 Convertible Secured Senior Debenture on December 31, 2007 and appointed PriceWaterhouseCoopers as receiver on November 5, 2008 being a period of approximately eleven months;

- f. that the Brookfield and 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 Tricap interests to the exclusion of Birch Mountain interests;
- g. in Tricap's Early Warning Report dated December 24, 2007 and August 7, 2008 that Tricap acquired the Debenture for investment purposes, and to refinance the existing credit facility extended to the Corporation by an affiliate of was breached since the Brookfield and 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 Tricap business plan was to eliminate the Birch Mountain common shareholders.

78. Brookfield and Tricap knew, or should have known, that their planning prior to the receivership of Birch Mountain was designed to solely favour Brookfield and 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 Tricap;

- e. the restriction on conversion of the Convertible Secured Senior 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 Tricap;
- f. the minimum change of control redemption price pursuant to the Convertible Secured Senior 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 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 Tricap.

79. Brookfield and Tricap knew, or should have known, that the receivership of Birch Mountain was designed to solely favour Brookfield and 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.

**CONDUCT WHICH IS OPPRESSIVE OR IS UNFAIRLY PREJUDICIAL  
OR UNFAIRLY DISREGARDED THE PLAINTIFFS' RELEVANT  
INTERESTS**

80. The conduct of the defendants was unfair conduct and resulted in prejudicial consequences 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 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 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 PriceWaterhouseCoopers 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 to develop an asset worth an estimated \$1.6 billion received nothing to show for their effort, whereas the defendants hedge fund that



made numerous written representations will now benefit by developing the resource as a private company.

## REMEDY SOUGHT

81. The Plaintiff therefore seeks:

- a. Compensatory damages;
- b. Punitive damages; <sup>"A A"</sup>
- c. Pre- and post-judgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000,  
c. J-1;
- d. A Financial Accounting, including an accounting of any inter-company transactions involving the Defendant Corporations;
- e. Such further and other relief as this Honourable Court may deem fit;
- f. Costs.

### NOTICE TO THE DEFENDANT(S)

You 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 clerk 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) 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