

Ontario Energy Board

EB-2011-0076

EB-2011-0077

EB-2011-0078

Reply Argument of Tribute Resources Inc.

Summary

All parties to this proceeding favor designating the Bayfield and Stanley gas storage pools. The geological evidence and filed evidentiary submissions on pool boundaries is uncontested. Tribute Resources Inc. ("Tribute") replies herein that all the safety and construction issues are manageable and resolvable with continued cooperation among the parties.

One issue in some of the intervener and Board Staff submissions has revolved around the project schedule. Since filing its Argument in Chief, Tribute finds itself back again into an appeal situation at the court of appeal (see attached appeal filing). This appeal will not be heard until mid-2013, which may then be followed by an OEB compensation hearing. Given this recent development, current market conditions and all the practical reasons related to construction requirements and timing, which are addressed below, Tribute submits that it respectfully needs the Board to grant the requested approvals to December 31, 2016.

In the alternative, if the Board does not grant the approvals to inject into and withdraw from the two storage pools, and to construct the pipeline, extended to December 31, 2016, then Tribute hereby requests that the Board should grant approval for designation of the two pools.

For purposes of clarification within these Reply submissions, it should be noted that Market Hub Partner's ("Market Hub") involvement in the continued development is subject to satisfying certain requirements of the Term Sheet between Market Hub and Tribute, including development commencement approval up to December 31, 2016, receipt of a DSA order and the associated Inject, Store, and Withdrawal orders.

Tribute is requesting a decision from the Board by Thursday December 20, 2012 in order that its proposed commercial transaction with Market Hub may proceed to meet another critical commercial milestone in this development.

Tribute proposes to address each of the submissions of the interveners and conclude with its reply to the submission of Board Staff.

Ministry of Natural Resources ("MNR")

The MNR is supportive of the designations, which Tribute appreciates. MNR correctly points out that all well licences in the Province expire within one year unless wells are spudded within that timeframe. Tribute and its affiliated companies understand the need to move as quickly and prudently as possible in developing the projects, however, this particular series of applications will require a slightly different, more practical approach to understanding the timing and order of this unique development.

Tribute believes that unlike other standard well licence applications, which may be capable of being fulfilled within one year because local pipeline connections are readily nearby, this project will require well licence renewals and reapplications for drilling in both pools because the development period will necessarily take a longer period than one year to put it all together, as described in Tribute's evidence and Argument in Chief.

Tribute respectfully invites the MNR and the Board to recognize, as a practical matter, the scale of these projects including two new pools, compressor station and one long pipeline, makes this an atypical incremental storage development in a new underdeveloped area of Ontario.

Respecting the assertions made by Tribute, it is understood that the MNR has not provided an opinion on ownership percentages of the pools, however, MNR has provided its technical opinion on the boundaries of the two storage pools and their estimated capacities which accord with those submitted by Tribute. It is acknowledged by Tribute that it calculated the relative ownership proportions in the pools based on the collective understanding of the pool boundary determinations.

Huron County Federation of Agriculture ("HFCA")

Tribute has reviewed the letter dated October 29, 2012, submitted by Mr. Palmer P.Eng and understands the basis of the concerns expressed therein.

Tribute remains committed to abide by all government regulatory requirements and allowances set by the relevant regulatory agencies in Ontario in respect of *inter alia* setbacks, technical codes, workplace health and safety and any other priorities identified by the agencies. Similar to other energy companies, where appropriate, Tribute will utilize equipment that encompasses automatic shut-down technology to ensure that there are no prolonged releases in the event of an incident.

Tribute shares Mr. Palmer's opinion that these two energy projects must be compatible throughout their development and operations phases to ensure public health and safety at all times. Tribute is committed to continuing to work with the developer of the wind farm and with the local municipality to ensure that the optimal practical development of its facility is undertaken in a compliant manner. Tribute does not believe that it is reasonable or

appropriate that it shoulder the task of commissioning some undefined independent report on wind farm development setbacks from gas, electric, or any other utility or transportation facilities.

The HCFA has touched on the issue of the need for storage and the economic and financial wherewithal of the companies to complete these developments. As noted elsewhere in the record, Tribute submits that the approvals sought to be issued each separately in these applications are all in the public interest as they will allow the applicant to continue with the developments and prepare to connect them into the Ontario natural gas infrastructure within a defined and reasonable development timeframe, particularly in view of the size and scope of the projects. Together, the two proposed pools represent, along with the two Tipperary pools, approximately 10 Bcf of incremental Ontario storage in the provincial inventory of 260 Bcf.

The HFCA is not opposed to these developments. Incremental developments were a key part of the reformed competitive gas storage regime recently introduced by the Board. It is the companies and their investors who are bringing this incremental gas storage to the market at their expense and risk, not the ratepayers. The incremental storage, when complete, will offer additional security of supply in a developing region of the province where there is opportunity to bring this gas facility on stream and connect it securely and directly to the high pressure transmission pipeline infrastructure at Lobo.

Since the projects were envisaged, and notwithstanding that no final road user agreements are executed, Tribute has been meeting with various municipal representatives of each of the upper and lower tier governments. Sometimes the meetings have been with councillors; more frequently they have been with road superintendents or municipal engineers. Tribute has enjoyed a high level of cooperation with each of the municipalities' representatives as they are all willing to eventually enter into some form of agreement with Tribute once they know the project is proceeding.

Interestingly, and to HFCA's point, although there is a common interest from each municipality to facilitate the new pipeline infrastructure, a standard road user agreement model does not exist at this time, unlike the standard Municipal Franchise Agreements for Ontario's gas distribution utilities. Notwithstanding this varied circumstance, from its many meetings, Tribute is confident that it will complete separate, distinct, signed, customized road user agreements once the approvals are granted and well in advance of any pipeline construction. Tribute has committed to each of the six municipalities that there will be a meter-by-meter joint decision as to the exact location of the pipeline in the agreed municipal road allowance, once the approvals and road users agreements are in place.

Tribute has identified and previously acquired options for compressor sites with interested landowners and therefore anticipates selecting a compressor site will be relatively straightforward once the approvals are in place. It was unfortunate, but prudent, to allow these site options to expire as continuing delays in this proceeding proved inevitable, expensive and challenging.

On water testing, Tribute is prepared to undertake and follow the identical water testing regime prior to, during and post-construction that was followed in the Tipperary development, and welcomes the suggestion of the HCFA of a 5 year annual well water testing to establish and confirm the safety and integrity of the water wells within the DSA lands, on notice to the landowners. Tribute will welcome and comply with the Board's Standard Conditions of Approval insofar as the well water testing is concerned.

Similarly on the liability insurance and proposed Board Standard Conditions of Approval, Tribute reiterates that it is committed to undertake an independent insurance study as it did in the Tipperary development, and to carry up to date insurance at all times on the development. This is the only prudent method of proceeding with a series of projects such as these and it is noteworthy that this important insurance coverage would be sought and undertaken with or without a Board condition.

County of Middlesex

Tribute continues to work with the County of Middlesex on this specific road user agreement and expects to reach agreement on it with Mr. Chris Traini, P.Eng, following which it will pass through the County Council process. This series of exchanges has continued for a few years and has since restarted with a fresh blacklined copy of the draft agreement being circulated.

Tribute will comply with the Board's Standard Conditions of Approval and enter into the required easement agreements with all landowners along the proposed route prior to construction.

Municipality of Bluewater ("Bluewater")

Bluewater has identified three issues for the Board's consideration.

The first issue raised relates to the coexistence of a wind farm in the area of a gas storage development. Tribute respectfully submits that there are several turbines adjacent to gas wells and associated developments in other parts of Ontario and near Lake Erie; they have co-existed well for years, without incident. Established setbacks are currently in existence, and if they change, Tribute will work with the wind developer to ensure compliance with the new standards.

However, Tribute is respectfully in no position to spearhead an industry wind-gas co-existence study and does not believe that the Board should ask one gas storage applicant to undertake such a generic study as part of its approval process. If the Board has concerns in this respect, it might consider referring the matter over to the Technical Standards and Safety Authority and the Minister of Energy to determine what, if anything, should be studied, which might result in findings that would be implemented in revised safety standards and building codes.

The second issue relates to Tribute's usage of the lands adjacent to the Bluewater sewage treatment facility ("STF"). Tribute will not reply herein with any further debate about Bluewater's position as to how they acquired their land rights, when or what they are; Bluewater is wrong in its legal opinion for all the reasons Tribute explained earlier in the record, when it stated that the Gas Storage Lease, the Petroleum and Natural Gas Lease and the Unit Operating Agreement "grant unto Tribute exclusive surface and subsurface rights" to what have subsequently become the STF lands, as specifically stated in these documents. Bluewater had an obligation to check the rights that ran with the land prior to it deciding to build the STF facility and Bluewater missed that opportunity. Tribute never received written notice that lands to which it had rights were to be affected by the installation of an STF

Fortunately, there is no harm done. The STF is operating with no interference with the work Tribute has done on the pool development to date, and no interference is anticipated as stated in the evidence.

Understandably, Bluewater now wants to protect this valuable public facility; indeed they would like to expand it. Tribute is supportive of the current facility's operations and remains supportive of its expansion to the north as long as it does not interfere with Tribute's exclusive rights to use the land surface and subsurface for its development, which have legal priority. Tribute has had these discussions with Bluewater and has provided maps of all anticipated infrastructure locations and it was mutually agreed that the proposed expansion location does not interfere with Tribute's proposed facilities.

Bluewater has listed an extensive list of conditions that it seeks to have the Board impose on Tribute, many containing concepts which Tribute would be willing to accommodate without the legal hand of a Board condition of approval. However, it would be inappropriate in Tribute's submission for the Board to ignore Tribute's priority exclusive surface and subsurface rights with subsequent conditions that would supersede and effectively oust Tribute's rights with newly created supervisory compliance rights accorded to Bluewater in this proceeding. The effect of introducing such extraordinary conditions would be an attempt to arguably neuter or remove Tribute's long pre-existing legal rights and allow Bluewater to control certain final decisions related to Tribute's development. Such an imposition of the list of desired conditions rooted in the removal of Tribute's prior subsurface and surface rights could, if implemented,

raise jurisdictional questions as to the extent of the Board's authority to alter historic land rights registered on title.

The third issue relates to Tribute entering into a road user agreement with Bluewater. Over the years, there have been several meetings with former and current Bluewater staff related to the project's pipeline routing in municipal road allowances. Tribute has always expressed a willingness to work with Bluewater to reach a mutually acceptable road users agreement and the company remains committed to doing so prior to pipeline construction.

Tribute is comfortable with the suggested list of issues to be addressed in the road user agreement with Bluewater as listed in condition 6 in Bluewater's submissions.

McKinley Farms Ltd. and 2195002 Ontario Inc. ("McKinley")

McKinley consents to the designation of the Stanley pool and the pipeline being sized to accommodate the volumes into and out of the Stanley pool.

Only two other aspects of these submissions need to be addressed herein.

The first is that the Stanley pool size and boundaries have now been determined *de facto* by the MNR's and Tribute's evidence, as these evidentiary submissions respecting size of and boundaries around the pools, are the only submissions that the Board has before it on this issue, and that evidence remains unchallenged. McKinley did not file any independent evidence on the size and boundaries of the Stanley pool. McKinley does not enjoy ownership of a majority of the Stanley proposed designated storage pool in spite of its repeated assertions.

Second, reference is made to alleged repeated refusals by Tribute to settle on compensation; irrespective of the accuracy of that statement, there is another attempt at settlement scheduled for November 21, 2012.

Ontario Energy Board Staff

Tribute is appreciative of Board Staff's support for the designations of both pools and of the high level of cooperation and patience the Applicant has had from Staff over the many years these applications have been processed and in the face of ongoing court delays.

However, notwithstanding all the combined efforts, uncontrollable delays, ongoing litigation by one landowner and extensive resource allocations over several years to get to this point, Staff is now unsupportive of allowing Tribute to move forward with the development of the project because they have allegedly failed to demonstrate the need for the incremental storage.

Tribute respectfully disagrees with and is surprised by this Staff position to support only designation.

It is not Staff's nor Tribute's fault that the delays in seeking the regulatory approvals and moving forward were repeatedly thwarted by lawsuits and delays due to appeals; it is worth noting that had the applications proceeded earlier, the issue of need might have been more easily demonstrated. However, delays notwithstanding, it is submitted that it is appropriate to prepare these pools for development within a defined timeframe that Tribute submits to the Board is reasonable under all the circumstances – then be ready to build without further delay.

The main reason it is appropriate to allow not only the designations but also the approvals to construct, inject and withdraw, lies in the reality that this is a large scale project that will take more than two years to develop. The Board is familiar with the lengthier timelines associated with a large and or long transmission line builds out over almost 80 km.

A close second reason is that the two principal parties to the proposed transaction, Market Hub Partners and Tribute, are sophisticated knowledgeable energy companies, which will jointly find a willing off-take customer before construction commences, which is entirely commercially normal. Once approvals are in hand, it is much easier to find commercial partners than if approvals are withheld.

The Tipperary gas storage development was a recent and close case in point. The Board will recall that it was virtually impossible for the Huron Tipperary LP project to move forward to obtain financing without Board approvals; once they were issued with conditions, then financing was obtained when an off-take contract was sought and obtained. In this case, the projects can move forward within the proposed schedule if allowed the time required to complete the detailed engineering, the surveying of the rights of way in the road allowances, finding an off-take customer and contract with that customer, close the project financing and move forward with full scale development.

As a storage developer, Tribute directly understands the need of an applicant to meet the statutory objectives for the rational and safe development of the pools and for facilitating the maintenance of a financially viable gas industry for the storage of gas. Tribute submits that its proposals are in sync with those statutory objectives.

With no disrespect to Board Staff's position, Tribute has the experience of successfully developing the Tipperary gas storage pool, which took several years to develop starting in 2004 with construction completed in 2008. At the time that the Tipperary project was first proposed, the economics were challenging, but once approvals were obtained, and closer to the time for contracting, the project was economic and continued. It is now into its fourth year of operations. It is submitted that Tribute's perseverance in pursuit of these applications is illustrative of its commitment to ensure that the pools are developed in a commercially sensible and viable manner.

Board Staff argues that the timeframe Tribute is requesting to roll-out the development is unreasonable. Tribute respectfully disagrees. These larger projects simply take more time than previously was envisaged to develop, and the regulatory framework likely needs some adjustments, such as the one year well licence limitation/requirement, which fortunately may be overcome with renewal requests or fresh applications. The planning horizon is longer and more complex, not less, resulting in more time being required. The Board can take administrative notice that the equivalent scale and cost of wind projects which easily take 3 to 4 years to develop, as the provincial Renewable Energy Approval and Notice to Proceed regimes have established.

In essence, what Tribute submitted and continues to submit in this Reply is that the schedule for such a larger scale storage project in a new area is necessarily going to be more drawn out than connecting a new pool in, for example, the Dawn area. Just because this project will necessarily take more time to develop, should not put it off-side the historical approval time frame. Tribute acknowledges some land owners may sell their lands and some environmental issues may newly arise, but these are manageable in every sense directly by the applicants or enforced through conditions of approval. None of these normal issues should cause Tribute to have to reapply and start the regulatory processes over again.

Tribute is supportive of all of the Board Staff proposed Conditional Approvals with few exceptions as identified below.

- Construction commencement within 12 months is possible but unlikely given the need to finalize the detailed designs, which is only done following receipt of approvals, contract bidding processes for services and materials, negotiating and closing financing and sign up customers for off-take contracts; December 31, 2013 is respectfully not practical or reasonable;
- Market conditions may change accelerating the off-take customer sign-up, which cannot be known until approvals are provided, as customers will not sign-up if approvals are not first issued by the regulator as was the case in the Tipperary development;
- All of the issues raised by Board Staff such as natural gas market conditions, biophysical environment and land use changes could be managed by Tribute reporting to the Board annually or in the event of a material change, as part of the conditions of approval; this would be more administratively efficient than being denied these applications and having to return to the Board with fresh applications and going through the whole process again for fundamentally the identical applications and developments;
- Proposed Condition 1.7 in the Stanley Bayfield Storage Project Standard Conditions of Approval, which calls for commencing injections prior to December 31, 2013 would be impossible to meet under any circumstances because (a) the courts will take at least

until April 2013 to address the latest appeal in the ongoing litigation regarding an interpretation of the storage rights contained in the PNG lease; (b) the Board likely still needs to hear the compensation matter following that appeal resolution in mid-2013; (c) surveying of the pipeline route along the road allowances has yet to be completed; (d) bidding for materials and services would occur after the resolution of the appeal and the compensation hearing; (e) delivery of the pipe and compressor could not happen until 2014 the earliest year when construction could commence and more likely in 2015; (f) injections could not occur until the earliest of spring 2015 and more likely in 2016.

Tribute respectfully submits that the proposed extended timeframe to December 31, 2016 is reasonable under the circumstances. It is preferred as it realistically allows the project to better time its expenditures in accordance with contracting in real market conditions, but it is also sought because of the practicalities of the completion of the appeal, the compensation issues resolution followed by final detailed planning, materials ordering and assembly, then construction and commissioning. Similar to how the Province manages wind project developments over 3 – 4.5 years, this project is sufficiently complex that it cannot be completed within the time advanced by Staff.

Tribute is more than willing to report to the Board annually as to its progress in developing the projects; it would strongly prefer to not have to re-initiate this series of applications at significant expense for essentially the continuation of an ongoing project, which has a clear and proposed commercial operation date.

In the alternative, if the Board does not grant the approvals requested with the timeline for commencement prior to December 31, 2016, then Tribute respectfully requests that the Board grant the approvals necessary for the designation of each of the Bayfield and Stanley pools.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

this 12 day of November, 2012

Jane Lowrie,

President, Tribute Resources Inc.

Giffen & Partners

Barristers, Solicitors and Notaries Public

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Our Reference: 2491-7027
November 7, 2012

Delivered by Overnight Courier

Court of Appeal for Ontario
130 Queen Street West
Toronto, Ontario
M5H 2N5

Dear Sirs:

Re: Tribute Resources Inc. – Appellant
2195002 Ontario Inc. - Respondent

Please be advised that we are the solicitors for the Appellant, Tribute Resources Inc..

We are enclosing herein a Notice of Appeal and the Appellant's Certificate each dated October 30, 2012, together with a copy of each document with service admitted thereon, which we would ask that you file on our behalf. In this regard we enclose herein our firm cheque in the amount of \$259.00 in payment of the same.

We thank you for your assistance herein.

Yours very truly,

GIFFEN & PARTNERS



Per: CHRISTOPHER A. LEWIS
CAL/bp
Enclosures

Court File Number:

COURT OF APPEAL FOR ONTARIO

BETWEEN:

2195002 ONTARIO INC.

Applicant
(Respondent in Appeal)

and

TRIBUTE RESOURCES INC.

Respondent
(Appellant)

NOTICE OF APPEAL

THE APPELLANT, TRIBUTE RESOURCES INC., APPEALS to the Court of Appeal from the judgment of Madame Justice Rady dated October 18, 2012 made at London, Ontario.

THE APPELLANT ASKS that the judgment be set aside and a judgment be granted as follows:

1. That this Appeal be allowed and the judgment of The Honourable Justice Rady dated October 18, 2012 be set aside;
2. That the relief sought by the Respondent in its Application before the Court below be denied;
3. That this Honourable Court order and declare that the Oil and Gas Lease dated October 12, 1977 and registered on November 17, 1977 as Instrument Number 160688, as amended by a Unit Operation Agreement dated November 30, 1984 and registered on February 11, 1985 as

Instrument Number 215978 (collectively the "Oil and Gas Lease") both registered in the Land Registry Office of Huron (No. 22) Goderich grants to the Appellant the right to store gas in or under the lands described therein;

4. That the Appellant be awarded its costs of this Appeal and its costs on the Application before Madame Justice Rady, together with applicable HST thereon;
5. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. The Honourable Madame Justice Rady erred in finding that the Gas Storage Lease Agreement dated September 24, 1998 and registered on December 2, 1998 as Instrument Number R330698 (the "Gas Storage Lease") was intended to replace the storage rights set out in the Oil and Gas Lease.
2. The Honourable Madame Justice Rady erred in finding that it was not necessary to decide the issue of the meaning of the words "*gas sands*" and the other storage rights as contained in the Oil and Gas Lease which was the issue that was squarely placed before her by the parties.
3. The Honourable Madame Justice Rady erred in interpreting the "*whole agreement clause*" in paragraph 21 of the Gas Storage Lease as meaning that all matters pertaining to gas storage were contained in the Gas Storage Lease thus rendering the gas storage provisions in the Oil and Gas Lease void.

4. The Honourable Madame Justice Rady erred in interpreting the "*paramount provision*" in Schedule "B" to the Gas Storage Lease as pertaining to the Oil and Gas Lease and as evidencing the intention of the parties to the Gas Storage Lease that it replace any storage rights that may have been contained in the Oil and Gas Lease.
5. The Honourable Madame Justice Rady failed to properly interpret all of the provisions of the Gas Storage Lease and in particular the three references therein stating that it was "*subject to the Oil and Gas Lease*" and as a consequence find that the provisions in the Oil and Gas Lease, including the storage rights therein contained, were specifically preserved under the Gas Storage Lease.
6. The Honourable Madame Justice Rady misapplied *Sunnyside Nursing Home v. Builders Contract Management Ltd.* [1985] S.J. No. 145 (Sask.Q.B.), a case that was not argued or referred to by counsel at the hearing of the Application, in finding that the Gas Storage Lease replaced the storage rights contained in the Oil and Gas Lease and in effect rendered the storage provisions in the Oil and Gas Lease null and void.
7. The Honourable Madame Justice Rady erred in concluding that because the Gas Storage Lease contained broader storage rights and privileges than those contained in the Oil and Gas Lease, the parties intended the Gas Storage Lease to replace the storage rights set out in the Oil and Gas Lease rather than supplement them.
8. The Honourable Madame Justice Rady erred in failing to consider and accept the evidence of Ms. Lowrie, the President of the Appellant, wherein she stated that the reason the Appellant entered

into the Gas Storage Lease was to supplement the storage rights it already held under the Oil and Gas Lease and to provide it with a modern form of gas storage lease that was familiar to the Ontario Energy Board. This was the only direct evidence of intention on the issue of why the Appellant entered into the Gas Storage Lease.

9. The Honourable Madame Justice Rady erred in concluding that paragraph 12 of the Unit Operation Agreement constituted support for the conclusion that the Gas Storage Lease was intended by the parties to replace the storage rights contained in the Oil and Gas Lease.
10. The Honourable Madame Justice Rady erred in concluding on the evidence that the Appellant had not proceeded before the Ontario Energy Board relying upon its storage rights as contained in the Oil and Gas Lease.
11. The Honourable Madame Justice Rady erred in considering and applying legal issues and case law that had not been raised by the parties, either in their written or oral arguments before her, and by not giving counsel an opportunity to make submissions regarding the same.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Section 6(1)(b) of the *Courts of Justice Act*;
2. Rule 61 of the Rules of Civil Procedure;
3. The Order appealed from is final as regards the right of the Appellant, Tribute Resources Inc.; and

4. Leave to appeal is not required.

Dated: October 30, 2012

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Solicitor for the Respondent, 2195002 Ontario Inc.

Court File No: _____

2195002 ONTARIO INC.

v.

Applicant (Respondent in Appeal)

TRIBUTE RESOURCES INC.

Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

NOTICE OF APPEAL

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Court File Number:

COURT OF APPEAL FOR ONTARIO

BETWEEN:

2195002 ONTARIO INC.

Applicant
(Respondent in Appeal)

and

TRIBUTE RESOURCES INC.

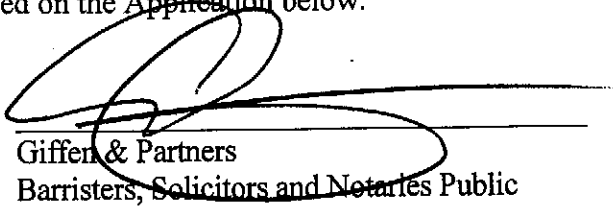
Respondent
(Appellant)

APPELLANT'S CERTIFICATE

The appellant certifies that the following evidence is required for the appeal, in the appellant's opinion:

1. Affidavit evidence of Michele Kremer, Steven A. Colquhoun, Jane Elizabeth Lowrie and John Lester Norman.
2. The Factum of 2195002 Ontario Inc. used on the Application below.
3. Factum of Tribute Resources Inc. used on the Application below.

Dated: October 30, 2012



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Court File No: _____

2195002 ONTARIO INC.

v.

TRIBUTE RESOURCES INC.

Applicant (Respondent in Appeal)

Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

APPELLANT'S CERTIFICATE

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