SCHEDULE D

Amended Factum of McKinley Farms Limited in Superior Court of Justice File #60819 between McKinley Farms Limited and Tribute Resources Inc., page 30, paragraph 137.

Court File No. 60819

Ontario
SUPERIOR COURT OF JUSTICE

BETWEEN:

MCKINLEY FARMS LIMITED

Applicant

and

TRIBUTE RESOURCES INC.

Respondent

AMENDED FACTUM OF THE APPLICANT
MCKINLEY FARMS LIMITED

Jed M. Chinneck
CHINNECK LAW
Professional Corporation
37 Ridout Street South
London, ON N6C 3W7
Solicitor for the Applicant
LSUC # 21375C
Tel: (519) 679-6777
Fax: (519) 432-4811

TO: Christopher A. Lewis
Giffen & Partners LLP
Barristers & Solicitors
465 Waterloo Street
London, ON N6J 1Y3
Solicitor for the Respondent
Tel: (519) 679-4700
Fax: (519) 432-8003

Index

INDEX

AMENDED FACTUM OF THE APPLICANT, MCKINLEY FARMS LIMITED

PART I - THE NATURE OF THE APPLICATION

1. This is an application brought by McKinley Farms Limited ("**Farms**"), for various declarations relating to certain leases which are registered as caveats against their lands described as Lots 7 and 8, Concession 11, Stanley Township as in PIN 41217-0069 (the "**Lands**").

2. Farms is requesting an order declaring that a certain **Oil and Gas Lease** dated October 12, 1977 and registered on November 17, 1977 as Instrument Number 160688 in the Land Registry Office of Huron (No. 22) Goderich as amended by a **Unit Operation Agreement** dated November 30, 1984 and registered as February 11, 1985 as Instrument Number 215978 in the Land Registry Office of Huron (No. 22) Goderich and assigned by Assignment of Lease dated January 1st, 1998 and registered on July 24th, 1998 as instrument no. 0327413 and further assigned by Assignment of Lease dated February 1st, 1998 and registered on July 24th, 1998 as instrument no. 0327414 (collectively the **"1977 PNG Lease" or "Lease #1"**) is void and vacated from the Lands.

3. [Deleted – Lease #2 has been discharged.]

4. Farms is requesting an order declaring that a certain Gas Storage Lease dated September 24th, 1998 and registered on December 2nd, 1998 as instrument no. 033698 (the **"Gas Storage Lease" or "Lease #3"**) is void and vacated from the Lands.

PART II - THE FACTS

A) Background

5. Farms is a private Ontario corporation which provides care to poultry breeder stock under contract. Farms and its principles have no real knowledge or experience in oil

and gas matters except to the extent that oil and gas companies have approached Farms from time to time in order to acquire lease rights to the Lands.

Reference: Application Record of Farms ("**Farms AR**"), Tab 2, Affidavit of Dale Ratcliffe sworn January 21st, 2009 ("**Racliffe Affidavit #1**") at para. 5 and 6.

Farms AR, Tab 3, Affidavit of Catherine McKinley sworn January 17th, 2009 ("**McKinley Affidavit**") at para 4.

6. Tribute Resources Inc. ("**Tribute**") has acquired, directly or indirectly, three distinct leases from Farms. The three leases registered against the Lands consist of, an Oil and Gas Lease (the "**1977 PNG Lease**" or "**Lease #1**"), a Surface Lease (the "**1984 Lease**" or "**Lease #2**"), and a Gas Storage Lease (the "**Gas Storage Lease**" or "**Lease #3**") (collectively the "**Leases**")

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 3.

7. Because of the limited knowledge possessed by Farms in relation to oil and gas matters, Farms relies on the oil and gas companies that seek to acquire lease rights, or negotiate amendments thereto, to be ethical and fair in their dealings with Farms.

Reference: Farms AR, Tab 3, McKinley Affidavit at para 5.

Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 7.

8. The behavior exhibited by Tribute or its agents in recent months toward Farms, in conjunction with certain things Farms had heard about Tribute, compelled Farms to seek legal counsel for the first time in November, 2008 in relation to certain expired and/or terminated Leases.

Reference: Farms AR, Tab 3, McKinley Affidavit at para 5.

Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 42, 43 and 52.

B) Tribute and its Behaviour (Past and Present)

9. Tribute is a corporation whose common shares are publicly traded and whose operations include gas exploration and production, and the acquisition and development of natural gas storage and renewal energy projects.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 8.

10. Tribute has experience in the acquisition, designation, development and construction of natural gas storage reservoirs in Huron County.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 9.

11. Tribute also has a reputation with the Tipperary Storage Landowner Association of unfair dealings with farmers and pressure tactics in order to achieve compliance with Tribute's demands.
Reference: Farms AR, Tab 5, Affidavit of Frederick Dutot sworn January 20th, 2009 ("**Dutot Affidavit**") at para 7, 8 and 11.

12. Tribute enjoys a massive imbalance of power which derived from its money, knowledge and range of expert geologists and land men whose business it is to understand the geology, the lease agreements and the value of the lease assets from which they generate so much money.
Reference: Farms AR, Tab 5, Dutot Affidavit at para 12.

13. Farmers enjoy no such advantage or opportunity and are not inclined to pay for lawyers when they only stand to make a dollar or two per acre per year.

14. In or about late October, Farms experienced first hand the high pressure and misleading tactics that led to Tribute gaining this reputation.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 41, 42, 43, 44.

15. Subsequent to Tribute missing an application deadline contained in the Gas Storage Lease which resulted in the Gas Storage Lease terminating in accordance with its terms on September 24, 2008, Tribute's agent, Howard Jordan, arranged a meeting with Dale Ratcliffe.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 40 and 41.

16. At the above mentioned meeting, Mr. Jordan proposed that the Gas Storage Lease be amended to grant an additional one year in order to allow Tribute time to file their application to the Ontario Energy Board (the "**OEB**") by way of an amending agreement (the "**Amending Agreement**") that would accomplish that end.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 41.

17. Mr. Ratcliffe was not given time to review the proposed Amending Agreement beforehand, and was not given time to digest the significance of the amendment at the meeting, but was being pressured by Mr. Jordan to sign the Amending Agreement on the spot.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 42.

18. During that meeting, and in response to questions posed by Mr. Ratcliffe, Mr. Jordan advised that Farms did not have to worry about the rates of compensation that would be paid to Farms because the OEB sets "standard rates" and he further advised that an "additional clause" on the Gas Storage Lease allowed for a 10 year period for Tribute to file an application to the OEB, which period had "recently passed".
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 43.

19. Mr. Jordan advised Farms that there was no use wasting money on a lawyer and told Mr. Ratcliffe not to contact a lawyer with respect to the requested amendment.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 43.

20. At no time during this meeting, or at any other time, did Mr. Jordan advise Farms or Mr. Ratcliffe that the Gas Storage Lease had terminated on September 24, 2008.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 43.

21. Mr. Jordan misled Mr. Ratcliffe insofar as the OEB does not "set standard rates" as Mr. Jordan had advised, and by virtue of the fact that he failed to disclose to Mr. Ratcliffe that the Gas Storage Lease had terminated. He in fact gave Mr. Ratcliffe the distinct impression that the Gas Storage Lease remained valid and an insignificant

"additional clause" simply had to be cleaned up and implied that Tribute would proceed with the storage project regardless.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 43, 44, 47 and 48.

22. Mr. Jordan misrepresented the nature and effect of the clause terminating the Gas Storage Lease for Tribute's failure to apply to the OEB in an effort to pressure Mr. Ratcliffe to sign the Amending Agreement.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 48.

23. Mr. Ratcliffe declined to sign the Amending Agreement without first consulting a lawyer.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 45.

24. The above October meeting was not the first time that Farms had felt the pressure tactics from Tribute or its agents.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 50.

25. In April, 2008, Mr. Jordan sent a letter proposing a meeting with Mr. Ratcliffe to discuss the location of a road to access a new proposed well on the Lands.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 50.

26. During this meeting, Mr. Jordan was forceful in obtaining Mr. Ratcliffe's consent to construct a road along the southerly boundary of the Lands. Mr. Jordan would not entertain any options presented by Mr. Ratcliffe with respect to the location of the road and resorted to threatening Mr. Ratcliffe into compliance by advising that if Mr. Ratcliffe did not agree to the location proposed by Tribute along the southerly boundary of the Lands, Tribute would constructed the road down the middle of Lot 7, in a most undesirable location, pursuant to an alleged easement which was owned by Tribute.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 51.

27. It was subsequently discovered, after Farms consulted with a lawyer, that Tribute did not enjoy the benefit of the easement it used to force Farms' compliance with the

access road location. The subject easement had expired in 2004 and was no longer valid.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 51.

28. Tribute continued to exhibit the pressure tactics subsequent to Farms obtaining legal representation and providing notice to Tribute of the termination of the Leases. After receiving said notice, the President of Tribute, Jane Lowrie, called Mr. Ratcliffe to request that he meet with her and Mr. Jordan alone.

Reference: A Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 53 and 54.

29. When that meeting was refused in accordance with the legal advice obtained by Mr. Ratcliffe, Tribute's high pressure tactics ensued with Ms. Lowrie threatening Mr. Ratcliffe by say that "this is going to escalate".

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 54.

30. Tribute's improper behaviour and lack of respect for Farms continued into December, 2008 when, after being advised by Farms' lawyer that all future communication and negotiations be directed to Farms' lawyer, Tribute on two separate occasions wrote directly to Farms.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 54.

C) The Lands and the Stanley Reef

31. Farms owns approximately 200 acres which comprises the Lands that are subject to the Leases in this Application

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 10.

32. The geological structure which is of interest to the parties to the Application is known as the Stanley Reef (the "**Reef**") and is located approximately 1800 feet below the surface of the Lands.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 12.
Farms AR, Tab 4, Affidavit of Steve Colquhoun sworn January 19, 2009 ("**Colquhoun Affidavit**"), at para 3.

33. The Reef's structure of coral and coral debris and geological processes like dolomitzation, gave the Reef porosity and the anhydrite provided a seal which trapped migrating gases in the Reef, thereby creating a reservoir.

Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 5.

34. Initial exploration interest in the Reef was to find and produce the gas that was trapped in the reservoir.

Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 6.

35. Tribute's predecessors and then Tribute produced gas from the Reef for a number of years intermittently.

Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 6.

36. In 1984, Tribute's predecessor entered into a Unit Agreement with owners of the lands thought to overlie the Reef, and by that Unit Agreement, agreed that Farms owned 76.441% of the lands directly overlying the Reef.

Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 7.
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit "B", Unit Operation Agreement.

D) Oil and Gas Lease and Unit Operation Agreement (collectively "1977 PNG Lease" or "Lease #1")

i) General

37. Farms (under a predecessor name), as Lessor, and predecessors of Tribute, as Lessee, entered an Oil and Gas lease on the Lands dated October 12th, 1977 and registered in the Land Registry Office of Huron (No. 22) Goderich on November 17th, 1977 as instrument no. R160688 which Lease was subsequently amended by a Unit Operation Agreement dated November 30th, 1984 and registered in the Land Registry Office in Huron (No. 22) Goderich on February 11th, 1985 as instrument no. 215978 (collectively "**Lease #1**").

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 15.

38. The primary purpose of most oil and gas leases, like the Oil and Gas Lease, is to provide for the search, capture and production of oil or gas or both from the lands.
Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 56.

ii) Habendum in Oil and Gas Lease

39. Most oil and gas leases, like the Oil and Gas Lease, provide in the habendum or granting clause, an initial term of a set number of years (the "**primary term**") followed by language that keeps the lease alive if production in paying quantities continues beyond the primary term. This is to allow the parties to share in the ongoing cash flow arising from the harvest of the oil and gas, if there is any, after the primary term expires.
Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 57.

40. The Oil and Gas Lease's habendum contains a primary term of "10 years, and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted...".
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 16.
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit "B", page 39.

41. It is the practice in Ontario, subject to the specific terms in each lease, that if production in paying quantities ceases at any time after the primary term, the lease terminates. In other words, after expiry of the primary term, production in paying quantities must be continuous or the lease ends.
Reference: Farms AR, Tab 4, Colquhoun Affidavit at para 58.

42. The relevant portion of the Oil and Gas Lease (the "**habendum**") reads as follows:

> "*...the Land Owner* ***(Farms)****, for and in consideration of ($600.00 which shall constitute the first year's rental in advance), and the receipt of which is hereby acknowledged and of the agreement herein on the part of Operator* ***does hereby grant, demise and lease to Operator for the term of ten***

> ***years and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted,*** *all the oil or gas in and under the following lands and also all wells...**(description of Farms' property) and** Land Owner **(Farms) also leases to Operator** the exclusive right to drill for, produce, store, treat, transport and remove by any method all oil and gas found in or under the said lands, **to store in any gas sands** on the premises and withdraw therefrom gas originally produced from other lands, also the right to lay, operate, and repair pipe lines for transporting the products of said lands or other lands, also the right to possession and use of as much land including rights-of-way as may be necessary to conduct all operations hereunder."* (bolding added).

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit B, page 39.

iii) Royalty Clause

43. The Unit Operation Agreement ("**UOA**") amended the Oil and Gas Lease effective January 1, 1985. The relevant part of the UOA is clause 3 (the "**Royalty Clause**") which reads in part as follows:

> *"3) It is understood and agree that **in respect of each calendar year thereafter the Lessee shall pay or tender to the Lessor in lieu of all payments under the said lease:***
>
> *(a) The percentage allocated to the Lease by its lease factor of the following royalties...**which royalties shall be paid or tendered to the Lessor monthly not later than the 20th day of the month following** the month during which production is taken; provided that if the total of such royalties paid or tendered to the Lessor during any calendar year hereafter is less than Two Dollars and Fifty Cents ($2.50) for each and every acre of the said lands which during such lease year shall have been included in the participating section of the unit are, **the Lessee shall, not later than the***

20th day of January next following, pay or tender to the Lessor and the Lessor shall accept in respect of such calendar year an amount sufficient to bring the total amount payable to the Lessor for his acreage in the participating section of the unit area, during such calendar year, up to the said sum of Two Dollars and Fifty Cents ($2.50) per acre;

*(b) The sum of Two Dollars and Fifty Cents ($2.50) for each and every acre of the said lands which during such calendar year has been retained by the Lessee under the said lease and/or this Agreement and which has not been included in the participating section of the unit area during such year, **which sum shall be paid or tendered to the Lessor not later than the twentieth day of January next following:***

***and as long as the payments in this clause provided are made or tendered, operations** for the production of the leased substances from the unit area **shall be deemed to be conducted** by the Lessee on the said lands under the said lease and the said **lease as hereby amended shall remain in full force and effect** as to all of the said lands retained by the Lessee under the said lease and/or this Agreement."* (bolding and underline added).

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit "B", page 31 - 49

iv) January 20, 2002 ("Click Date")

(a) No production in paying quantities pursuant to habendum

45. On January 20, 2002 (the "Click Date") there was no "oil or gas being produced in paying quantities" that would keep Lease #1 from terminating in accordance with the habendum. The production of gas ceased on July 31, 2001 and has not recommenced due to depletion of the reservoir. The Tribute #25 Well started June 5, 2008 and completed October 22, 2008, confirms the Stanley Reef reservoir is, in effect, empty

and holds no real commercial quantities of gas. It encountered volumes of gas that were "tstm" – "too small to measure" and no pressure; in effect a dry hole. There was no continuing operations on that well – the well head sits alone, not connected to pipelines and without a compressor.

Reference: Farms AR, Tab 2 Ratcliffe Affdavit #1, para 17.
Farms AR, Tab 4, Colquhoun Affdiavit, para 8, 9, 12, 15, 18, 19 20.
Farms AR, Tab 4, Colquhoun Affidavit, Exhibit D, page 133.

(b) No storage operations being conducted pursuant to Habendum

46. On January 20, 2002, (the "**Click Date**") there were no "storage operations being conducted" that would keep Lease #1 from terminating in accordance with the habendum. The production records filed by Tribute with the Ministry of Natural Resources ("**MNR**") for 2002 disclose that for the 31 days in January, 2002, Tribute attempted (unsuccessfully) to produce gas from the Reef. In fact, Tribute's own certified records filed with the Ministry of Natural Resources reveal no operations from August 1, 2001 to December 31, 2006 with the exception of the first 7 months of 2002 when Tribute tried unsuccessfully to produce gas.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 17.
Farms AR, Tab 4, Colquhoun Affidavit Exhibit D, page 135
Farms AR, Tab 4, Colquhoun Affidavit, Exhibit D, pages 133-145.

46.1 Production operations which involve the withdrawal of gas from a reservoir are incompatible with storage operations which involve injection into a reservoir. Storage operations cannot be conducted without authorization from the Ontario Energy Board, and the Stanley Reef has still not been designated.

Reference: Farms Book of Authorities - Ontario Energy Board Act, s. 37 (Tab 16).

(c) No deemed operations pursuant to the Royalty Clause

47. On January 20, 2002 (the "**Click Date**") no payment was received pursuant to the Royalty Clause in the UOA such that Lease #1 remained in force. Tribute did not

make the optional payment on January 20, 2002 that would have saved Lease #1 from terminating pursuant to the Royalty Clause.

48. Tribute did not make the payment due on the Click Date until February 1, 2002, some 12 days later, leaving a fatal gap. The cheque was not dated until February 1, 2002.

Reference: Responding Record of Tribute Resources Inc. ("**Tribute RR**"), Tab 1, Affidavit of Jane Lowrie sworn March 24, 2009 ("**Lowrie Affidavit #2**") Exhibit B, page 31 (copy of cheque).

49. Every cheque made by Tribute to Farms for Lease #1 from 2001 – 2008 was dated after the due date of January 20th each year as follows:

		#of days late
2001	January 24	5
2002	February 1	12
2003	March 18	56
2004	January 27	7
2005	February 1	12
2006	February 20	31
2007	January 31	11
2008	January 31	11

Reference: Tribute RR, Tab 1, Lowrie Affidavit #2, Exhibit B, pages 29-42.

(d) Tribute misrepresents that payments made in compliance with Lease #1

50. In Tribute's Application Record that commenced this Application, Tribute's President, Jane Lowrie, swore that Tribute "has each year on or before January 31 paid to McKinley, royalties or payments in lieu of royalties as provided in the oil and gas lease [Lease #1].

Reference: Application Record of Tribute ("**Tribute AR**"), Tab 2, Affidavit of Jane Lowrie sworn December 19, 2008 ("**Lowrie Affidavit #1**"), para. 29 (page 13).

51. Ms. Lowrie's statement is not true. Lease #1 provides for payments on or before January 20th (not January 31st) and no payments were paid on or before January 20th during 2001 – 2008 and a number of payments were made after January 31.

52. After Ms. Lowrie swears that Lease #1 provides for payments by January 31st each year, Ms. Lowrie admits January 20th is the payment date and only admits that payments were sometimes delivered late.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 21 (page 14).
Tribute RR, Tab 1, Lowrie Affidavit #2, para. 10 (page 3).

53. On cross-examination, Ms. Lowrie admits that it would have been impossible to have paid any cheque for Lease #1 for the years 2001 – 2008 on or before January 20th.

Reference: Cross-examination of Jane Lowrie on April 17th, 2009 ("**Lowrie Cross-Examination**"), questions 189-212, pages 59-63.

54. Tribute's President, Ms. Lowrie, admits that the delay payment on January 20th each year pursuant to the Royalty Clause is optional; if Tribute wanted to keep the Lease, it would make the payment; if Tribute did not want to keep the Lease, Tribute would not make the payment.

Reference: Lowrie Cross-Examination, questions 171-172, page 52.

(e) No gas sands

55. There are no "gas sands" in the Reef.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 64 (page 119).

v) Farms unaware of rights under Lease #1 until November, 2008 when it sought legal advice

56. Lease #1 was signed by the grandfather and the UOA was signed by the father (or father-in-law) of the majority of the current owners Farms. After being signed, Lease

#1 and the UOA, were promptly misplaced or misfiled and other than being aware that there was a lease, Farms forgot about them and their terms, and did not see them again until November, 2008, when Farms requested and received from Tribute copies of both which Dale Ratcliffe took to a lawyer for legal advice.

Reference: Respondent Record of McKinley Farms Ltd. ("**Farms RR**"), Tab 2, Affidavit of Dale Ratcliffe sworn May 27th, 2009 ("**Ratcliffe Affidavit #2**"), para 3, 4, 5, 7 and 8.

56.1 Farms was not aware at any relevant time before November, 2008, that delay payments under Lease #1 were to be made by January 20th of the following year, or that a late payment would terminate Lease #1, or that Lease #1 terminated on January 20th, 2002 when there was no actual or deemed production if a timely payment was not made. This was learned for the first time after seeking legal advice in November, 2009.

Reference: Farms RR, Tab 2, Ratcliffe Affidavit #2, para 12.

57. Farms treated the lease payments from Tribute, which were sporadic and small relative to Farm's chicken business, as more of a nuisance, and paid little attention to the letters accompanying the cheques, and did not know if the payments were timely or that it had the right to refuse a late payment. Farms basically relied on Tribute as the oil and gas professional to lead the way. Farms treated each payment received from Tribute like a representation that all was well and proceeding as it should.

Reference: Farms RR, Tab 2, Ratcliffe Affidavit #2, para. 14.

58. After receiving legal advice for the first time in November, 2008, and although not required to do so, Farms instructed its solicitor to give Tribute's solicitor, notice of Farms' position that Lease #1 and Lease #3 terminated in accordance with their respective terms. Letters advising of those instructions were forwarded on December 9th, 2008 and on January 12th, 2009. The first letter indicates Farms' willingness to consider offers from Tribute and the expectation that any offer contain provision for fair value lump sum to reflect the value of acquiring control of the reservoir, and the second demands Tribute refrain from entry onto Farms' lands and warns that any

breach of the prohibition on entry might lead to a charge of trespass. Neither letter refers to a breach of Lease #1.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 19, 20 (page 13).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibits C and D (pages 50-53).

E) Gas Storage Lease ("GSL" or "Lease #3")

59. Farms as Lessor and Tribute as Lessee entered a Gas Storage Lease dated September 24th, 1998 and registered in the Land Registry Office in Huron (No. 22) Goderich on December 2nd, 1998 as instrument no. R330698.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1 at para 28.
Farms AR, Tab 2, Ratcliffe Affidavit #1,Exhibit "G".

i) Automatic Termination Clause ("ATC")

60. The relevant portion of Lease #3 (the "**Automatic Termination Clause**" or "**ATC**" or **OEB Clause**") is contained in Schedule B of Lease #3 and reads as follows:

> *"This Gas Storage Lease Agreement shall terminate on the tenth anniversary date, **if and only if**, the Lessee or some other person has not applied to the Ontario Energy Board to have the said lands or any part thereof designated as a Gas Storage area on or before the tenth anniversary date hereof."* (bolding and underlining added).

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit G, page 64.

ii) September 24, 2008 ("Click Date")

61. The tenth anniversary of Lease #3 was September 24th, 2008 (the "**Click Date**")

Reference: Lowrie Cross-Examination, para. 55, page 19.

iii) ATC is option

62. The ATC grants Tribute the option to prevent Lease #3 from terminating automatically by electing to make an application to the Ontario Energy Board ("**OEB**") on or before the tenth anniversary of Lease #3 (the "**Click Date**"). This clause does not impose an obligation on Tribute.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit G, page 64.

63. The consequence of Tribute electing to apply to the OEB by the Click Date is the continuation of the Gas Storage lease. The consequence of Tribute electing not to apply before the Click Date is the termination of the Gas Storage Lease.

Reference: Affidavit of Catherine McKinley at para 16.

64. Tribute's President, Jane Lowrie, in cross-examination, admits that Tribute could not be forced to make an application to the OEB under the Automatic Termination Clause.

Reference: Lowrie Cross-Examination, para. 45, page 15.

65. Tribute's President, Jane Lowrie, in cross-examination, admits that if no one applied to the OEB on or before September 24th, 2009, the lease would be void and terminated.

Reference: Lowrie Cross-Examination, para. 49-51, page 17 and 18.

iv) Lease #3 terminated when option not exercised

66. Tribute's President, Jane Lowrie, in cross-examination, admits that on April 17th, 2009, some 7 months after the Click Date, an application had still not be made to the OEB.

Reference: Lowrie Cross-Examination, para. 31-32, pages10-11.

67. In accordance with the ATC, the Gas Storage Lease terminated on September 24, 2008 due to Tribute's failure to apply to the OEB.

Reference: Affidavit of Steven Colquhoun at para 42.

68. Tribute's annual payments under Lease #3 were more often than not late.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 53 (page 22).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit E, (page 54).

v) Tribute misrepresents it was not aware of ATC

69. In Tribute's Application Record that commenced this Application, Tribute's President, Jane Lowrie, swore that Tribute was not aware of the Energy Board Provision (the "**Automatic Termination Clause**") until it received the legal opinion from Giffen and Partners on or about October 27, 2008, yet Ms. Lowrie herself signed Lease #3 and the very schedule that contains the Automatic Termination Clause.

Reference: Tribute AR, Tab 2, Lowrie Affidavit #1, para. 19 (page 11).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit G, (page 64).

70. After receiving Farms' Application Record, Ms. Lowrie admits that she was possibly aware of the ATC when the GSL was executed 10 years before but did not remember it.

Reference: Tribute RR, Tab 1, Lowrie Affidavit #2, para. 13 (page 4).

vi) Tribute did not flag Click Date in computer system

71. Tribute's President, Jane Lowrie, admits on cross-examination that the Click Date of September 24th, 2008 is important to Tribute and that the Automatic Termination Clause in Lease #3 should have been flagged in Tribute's computer system, but was not.

Reference: Lowrie Cross-Examination, para. 132-139 (pages 39-41).

vii) Tribute spent more than $1,000,000.00 before seeking confirmation Lease was valid

72. Tribute's President, Jane Lowrie, admits on cross-examination that Tribute spent $1,000,000.00 on the Stanley Reef before seeking confirmation that the Lease was valid.

Reference: Lowrie Cross-Examination, para. 144 (page 42).

viii) Tribute took risk

73. It is the responsibility of oil and gas companies to manage their leases and to ensure there are no legal issues with lease rights, particularly before expensive wells are drilled.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 33 (page 113).

74. Oil and gas is a high cost, high risk game, and not managing lease assets is a risk that some operators take. Tribute signed the GSL and should have know about the OEB Clause or Automatic Termination Clause, and should not have started the Tribute #25 Well or any other expense relating to the Stanley Reef until the legal status of all leases were verified and clear. Tribute risked the expense without the review and should bear the loss.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 36, 37 (page 114).

75. It is not uncommon in the oil and gas business to hear of operators that have lost leases through inadvertence or poor lease management. In those cases, the Operators are often obliged to leave the lands and investment thereon, and to enter negotiations for a new lease before they can return. It happened to Union Gas in the Chatham area. The landowner forced Union Gas off the lands of an operating gas storage reservoir and Union Gas had to negotiate a new lease with a significant lump sum payment of over seven figures to get back on the land.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 34, 35 (pages 9, 10).

ix) Other operators can develop the Reef

76. There is no doubt that if the Stanley Reef and other reefs have viable storage capacity, someone will develop the storage assets and pipeline to move the gas. It may not be Tribute or Tribute alone, but storage operators will find a way to make it happen, and large amounts of money will be spent in the area.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 32 (page 113).

77. Tribute is a very small and recent entry to the family of gas storage operators in Ontario. It has completed only one designation of a storage area (the Tipperary Reef) and was at risk of having insufficient funds to complete the facilities and start up without selling a 75% interest to Union Gas.
Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 28 (page 113).

78. Union Gas and Enbridge are both substantial experienced and capable operators in Ontario that would have a high degree of interest in the Stanley Reef if Lease #1 and Lease #3 are found to be terminated. They have the means to make lease payments to Farms and other landowners and to develop the storage and pipeline potential of the Stanley Reef and area.
Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 29, 30 (page 113).

x) Tribute started Application too late

79. Tribute had ten years in which to decide whether they would apply to the OEB and extend the Gas Storage Lease. Applications to the OEB for designations require considerable work, and time before they can be submitted to the OEB.
Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 38.

80. Tribute started efforts to prepare the OEB application too late.
Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 42 (page 115).

81. Tribute did not get its legal opinion until October 27th, 2008 (a month after the Click Date of September 24, 2008), its environmental consultants' letters did not appear to go out until November 4th, 2008 and the Well used to obtain the "cap rock" sample was not completed until October 22nd, 2008, a month after the Click Date.
Reference: Farms AR, Tab 4, Colquhoun Affidavit, para. 39, 40, 41 (page 10, 11).

xi) Farms not aware of rights under Lease #3 until November, 2008 when it sought legal advice

82. Cathy McKinley signed the GSL on behalf of Farms over 10 years ago, and shortly thereafter retired from active involvement in Farms' business.

Reference: Farms Amended Responding Record ("**ARR**"), Tab 2, Ratcliffe Affidavit #2, para. 7.

83. Shortly after being signed, Farms misfiled or misplaced Lease #3, and other than being aware of the fact that the lease existed, Farms forgot about it and its terms, and did not see it again until November, 2008 when Farms requested and received from Tribute copies of the lease which Mr. Ratcliffe took to a lawyer for legal advice.

Reference: Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 7, 8, 9 (pages 4, 5).

84. Farms was not aware at any relevant time before November, 2008 that Lease #3 contained the ATC that would terminate Lease #3 automatically if Tribute did not apply to the OEB before September 24, 2008, or that Tribute was at risk of losing Lease #3 or that Farms had a right not to accept the payment delivered on August 25, 2008. This was learned for the first time after seeking legal advice in November 2008.

Reference: Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 13 (pages 5-6).

85. Farms treated the lease payments from Tribute which were sporadic and small relative to Farms' chicken business, as more of a nuisance and paid little attention to the letters accompanying the cheques, and did not know if the payments were timely, or that it had a right to refuse a payment. Farms basically relied on Tribute as the oil and gas professional to lead the way. Farms treated each payment by Tribute like a representation that all was well and proceeding as they should.

Reference: Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 14 (pages 6).

xii) Tribute believed Farms not aware of rights under Lease #3

86. Tribute's President, Jane Lowrie, in cross-examination admits that at or before September, 2008, no one told Farms there was a problem with Lease #3, that Farms apparently did not know there was a problem with Lease #3, and that as far as she

knew, Farms believed things were continuing in the ordinary course. She says that Tribute was in the same position.

Reference: Lowrie Cross-Examination, para. 101-107 (pages 30-31).

xiii) Farms had no reason not to accept August 25th, 2008 cheque

87. On August 25th, 2008 when Farms deposited Tribute's cheque dated September 19, 2008, Farms had, in addition to the foregoing, no reason not accept the cheque because Farms had no knowledge that Tribute had not or would not apply to the OEB and expected, without any knowledge or warning from Tribute of a pending failure to apply, that Lease #3 would continue as before.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 65.

F) Dorchester Meeting – late October, 2008

88. In or about late October, 2008, Tribute's land agent, Howard Jordan contacted Farms field manager, Dale Ratcliffe, and requested a meeting, which took place in or about that time at the Tim Hortons in Dorchester, Ontario (the "**Dorchester Meeting**").

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 41 (page 18).
Farms ARR, Tab 1, Ratcliffe Affidavit #2, para 16, 17, 18 (pages 6-7).

i) Tribute pressures Farms to sign back-dated document to save Lease #1

89. At the Dorchester Meeting, which was a month after the GSL terminated in accordance with the Automatic Termination Clause, Mr. Jordan pressured Mr. Ratcliffe (unsuccessfully) to sign a back-dated document that would have the effect of saving the GSL and extending the Automatic Termination Clause for one (1) year (the "**Amending Agreement**").

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 42
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit I, page 69.

ii) Tribute represents Lease #3 is proceeding

90. During the Dorchester Meeting, Mr. Jordan left Mr. Ratcliffe with the impression that the Amending Agreement that he wanted Mr. Ratcliffe to sign was just a formality and that Tribute would be proceeding with the storage project and that Tribute would proceed even if Farms did not sign the back-dated Amending Agreement.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 43, pages 18-19.

iii) Tribute does not advise Farms that Lease #3 terminated on September 24, 2008

91. During the Dorchester Meeting, Mr. Jordan told Mr. Ratcliffe than an "additional clause" on the GSL "allowed for a 10 year period to file an application to the Board which had recently passed". Mr. Jordan never told Mr. Ratcliffe that the GSL was terminated on September 24th, 2008

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 43, pages 18-19.

iv) Tribute tells Farms not to bother calling a lawyer

92. During the Dorchester Meeting, Mr. Jordan told Mr. Ratcliffe that he did not have to worry about rates of compensation for storage because the OEB sets standard rates, and he told Mr. Ratcliffe not to bother calling a lawyer to review the Amending Agreement because, as he put it, "there's no use both of us wasting money on lawyers".

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 43, pages 18-19.

v) Farms becomes suspicious and requests copies of all leases

93. During the Dorchester Meeting, Mr. Ratcliffe became suspicious that Mr. Jordan was misleading him, and told Mr. Jordan that he would not sign the Amending Agreement without first seeking legal advice, and requested copies of all of the leases affecting the property.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 44, 45, page 19.

vi) Third party confirms Dorchester Meeting took place in fall

94. Dale Ratcliffe saw his niece at the Dorchester Meeting who confirmed his attendance in Dorchester in October, 2008.

Reference: Farms ARR, Tab 3, Affidavit of Jennifer Thompson, sworn May 27th, 2009, para. 2 (page 66).
Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 7, page 9.

G) October 30th, 2008 letter

i) Encloses copies of Oil and Gas Lease, UOA and Lease #3

95. After the Dorchester Meeting, Mr. Jordan sent a letter to Mr. Ratcliffe dated October 30th, 2008 requesting that the Amending Agreement be signed, and enclosing copies of the Amending Agreement and copies of lease #1, the UOA and Lease #3, that were previously requested by Mr. Ratcliffe.
Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 45.1, page 19.
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit I, (page 68).

ii) Letter implies Tribute proceeding with plans

96. The October 30th, 2008 letter states, inter alia, that "it was brought to Tribute's attention that an additional clause on a schedule in the gas storage lease allowed for a 10 year period to file an application to the Board, which period has recently passed on September 24, 2008" and requests that the Amending Agreement be signed to allow Tribute to file their (sic) application to the Board. It also indicates that Tribute continues to be actively preparing to file their Application to the OEB.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit I, (page 68).

iii) Letter does not disclose that Lease #3 terminated on September 24th, 2008

97. The October 30th, 2009 letter does not disclose that Lease #3 terminated on September 24th, 2008 when Tribute failed to exercise its option to continue the lease by filing its application to the OEB by that date.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit I, (page 68).

iv) Copies of leases were first Farms has seen for years

98. The copies of the Oil and Gas Lease, the UOA and Lease #3, that accompanied the October 30th, 2008 letter were the first copies of each that Farms had seen since shortly after each was signed years ago.
Reference: Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 8, page 4.

H) November 7, 2008 – Farms seeks legal advice for first time

i) Meeting with lawyer

99. On or about November 7, 2008, Mr. Ratcliffe took the October 30th, 2008 letter and the copies of the Amending Agreement and Lease #1, the UOA and Lease #3 received from Mr. Jordan to Mr. Chinneck to obtain legal advice about its situation with Tribute for the first time.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para 46, page 19.

100. Mr. Chinneck advised that Lease #3 appeared to have been terminated in the ordinary course by virtue of Tribute's failure to apply to the OEB on or before September 24, 2008 and that the OEB did not have standard rates, and that the OEB process is expensive and time-consuming so it is best to attempt to negotiate reasonable terms upfront. This was the first time that Farms had legal advice about any of the agreements with Tribute.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 47.

ii) Ratcliffe upset when he learned Lease #3 appeared to be terminated, far different from what Jordan represented

101. Mr. Ratcliffe was upset when he learned from Mr. Chinneck that the language in Lease #3 actually terminated the Lease if the OEB application was not made on or before September 24th, 2008. The real effect of the Automatic Termination Clause is far different from the misleading representation that Mr. Jordan made to Mr. Ratcliffe at the Dorchester meeting when he tried to pressure Mr. Ratcliffe to sign the Amending Agreement, or in the October 30th, 2008 letter.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 48.

iii) Before getting legal advice, Farms relied on Tribute but afterwards did not and told Tribute to get off lands

102. Before the Dorchester Meeting and before obtaining legal advice for the first time, Farms relied on Tribute as the oil and gas professionals to treat Farms fairly and ethically, and had no reason to believe that Tribute had not complied with the leases; but after being pressured to sign the Amending Agreement and after obtaining legal advice for the first time, Farms did have reason not to rely on Tribute and to tell Tribute to get off its lands.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 7 and 49.

l) December 9, 2008 – Farms gives notice both leases terminated in accordance with terms and invites offers

103. On December 9, 2008, Farms' lawyer, on instructions from Farms, wrote to Tribute's lawyer to:

(a) express Mr. Ratcliffe's disappointment at Mr. Jordan's mischaracterization of the Automatic Termination Clause in Lease #3; and

(b) advise of Farms' position that Lease #1 and Lease #3 are terminated in accordance with their terms, and

(c) return the $400.00 paid on August 25, 2008, and

(d) advise that Mr. Ratcliffe did not understand at the time that the monies were received in August, that Lease #3 terminated in accordance with its terms and was not aware that the payment was for the ensuring year, and

(e) advise that Farms remained willing to consider gas storage lease offers and invite Tribute to initiate negotiations if interested, and

(f) advised of Farms' willingness to consider lease offers from Tribute and others and of Farms' expectation that any offer contain provision for a fair market value lump sum to reflect the value of acquiring control of the reservoir. There is no suggestion that either lease was terminated by breach, but rather in accordance with their terms and there was no demand for a lump sum payment, but rather the expression of an expectation that any offer that Tribute wished to submit contain a provision for a fair market value lump sum to reflect the value of acquiring control of the reservoir.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para: 53.
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit C, pages 50-51.

J) Tribute Pressures Farms

104. Immediately after the December 9th, 2008 letter, pressure from Tribute started just as Mr. Dutot predicted.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 54 (page 22).

i) Lowrie threatens escalation

105. Tribute's President, Jane Lowrie, immediately called Mr. Ratcliffe and requested a meeting with her, and without his lawyer. When Mr. Ratcliffe, on legal advice, refused to meet with her, Ms. Lowrie threatened that this was going to escalate.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 54 (page 22).

106. On December 10th, 2008, Farms' lawyer wrote to Tribute's lawyer to advise of the contact in the immediately preceding paragraph and to request all communications be through his office.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 54 (page 22).
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit N, (page 83).

ii) Tribute ignores requests to deal through Farms' lawyer

107. Despite the December 10th, 2008 letter, Ms. Lowrie contacted Farms directly on at least 2 other occasions.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 54 (page 22).

108. Farms' lawyer wrote to Tribute's lawyer on two separate occasions, January 6, 2009 and January 13, 2009, to request that Mr. Lewis control his client and to repute misleading and inaccurate statements made by Ms. Lowrie.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 54 (page 22).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit J, (pages 72-74).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit M (page 81).

iii) Tribute issues Application just 9 days after letter from Farms

109. On December 18, 2008, just 9 days after Farms' gave notice of its position that the leases were terminated in accordance with their terms, Tribute issued its Notice of Application and effected service over Christmas on Mr. Ratcliffe's front door and

without providing a copy to Ratcliffe's lawyer who was forced to drive to Exeter to pick up his client's copy after Mr. Lewis refused to provide him with a copy.

Reference: Tribute AR, page 2.

iv) Tribute ignores invitations to negotiate

110. On December 24th, 2008, Farms' lawyer sent an email to Tribute's lawyer to advise that he was preparing responses to Mr. Lewis' letter of December 17th and Ms. Lowrie's letter to Mr. Ratcliffe of the same date, and expected to get them to him early in the new year, and to invite negotiation through his office. This email was ignored.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 48.
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit L.

111. On January 6, 2009, Farms' lawyer wrote to Tribute's lawyer responding to his December 17th letter and to :

(a) advise that Farms was prepared to negotiate,

(b) to request information that was required for the negotiation to be effective (which was later by Tribute refused),

(c) to set out some 16 specific items Tribute should address if it wished to submit an offer to Farms for gas storage, and

(d) to set out the reasons why the threatened lawsuit is ill-advised.

Farms and its lawyers were not then aware that Tribute had issued and served the Application.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 55 (page 22).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit K (pages 75-79).

v) Tribute behaviour is aggressive and escalating

112. Tribute's behaviour was aggressive and escalating and put Farms' to considerable effort and expense to try to deal with this issue, including the January 6th, 2009 letter.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 56 (page 23).

vi) Tribute's Application contains material untrue statements

113. Tribute's Application (issued only 9 days after the December 9th, 2008 letter which, inter alia, invited negotiations) contained untrue statements relating to material facts that forced Farms to respond.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 50

vii) Tribute applied pressure in April, 2008

114. There was an earlier situation in which Tribute pressured Farms. In April, 2008, Tribute's agent, Mr. Jordan, wrote to Mr. Ratcliffe requesting a meeting to discuss the location of an access road. Farms wanted Tribute to use the existing roadway along the north limit of Lot 8, but Tribute preferred the south limit of Lot 7, and in the meeting that followed, threatened to use the easement Tribute enjoyed down the middle of Lot 7, a most undesirable location, if Mr. Ratcliffe did not agree to the south location. After meeting with Mr. Chinneck in November, 2008, Farms learned that the easement that Mr. Jordan threatened to use expired in 2004.
Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 50, 51 (page 21).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit H (pages 66-67).

viii) Tribute has poor reputation with other landowners

(a) Pressure 80 year old to sign

117. Tribute has used pressure and bully tactics on other landowners near the Stanley Reef. Fred Dutot, Chairman of the Tipperary Landowners Storage Association ("**TSLA**") states that TSLA was started in 1988 to protect its landowners from unethical

and unscrupulous behaviour of Tribute and its agent, in that area, particularly when they tried to pressure an 80 year old landowner who had great difficulty reading and no ability to understand the documents without any advice.

Reference: Farms AR, Tab 2, Ratcliffe Affidavit #1, para. 59.1 (page 24).
Farms AR, Tab 5, affidavit of Frederick Dutot sworn January 20th, 2009 (the "**Dutot Affidavit**"), paras 7, 8, 9 (page 3).

(b) Tribute is like school yard bully that exploits imbalance of power

116. In his Affidavit, Mr. Dutot, states that TSLA's dealing with Tribute, its principals and agents has been completely unsatisfactory, that Tribute acted like a school yard bully, that Tribute exploited the massive imbalance of power it enjoyed over TSLA with its money, knowledge and expert geologists, landmen and agents whose business it is to know the geology, agreements and value of the assets from which they make so much money, compared to farmers who have no real oil and gas knowledge or experience, and no understanding of the wording in oil and gas leases and storage leases, and who are not inclined to seek out oil and gas lawyers to read the complex and small print in leases especially when they stand to make only a dollar or two per acre.

Reference: Farms AR, Tab 5, Dutot Affidavit, paras 10, 11 and 12.

(c) Tribute has strategy of escalating pressure and expense called "spin the farmer"

117. Mr. Dutot believes that Tribute employs a strategy of escalating pressure and expense or threat of expense against uncooperative farmers, until the farmer gives up and folds which Mr. Dutot calls "spin the farmer" which Tribute tried to do with TSLA and may be trying to do with Farms.

Reference: Farms AR, Tab 5, Dutot Affidavit, paras 13, 20 (pages 189, 190).

(d) Tribute drilled development well without authority

118. Mr. Dutot states that TSLA experienced many instances of pushy and aggressive behaviour by Tribute and its agents, including the drilling of a development well over protests from the landowners that Tribute had no right to do so, which was later used as a storage well.

Reference: Farms AR, Tab 5, Dutot Affidavit, paras 14, 15 (pages 189).

K) Tribute's "outside counsel", Mr. Peter Budd

119. Tribute did not cross-examine Mr. Dutot on the contents of his Affidavit. Instead Ms. Lowrie swears that she "dispatched one of our outside counsel, Mr. Peter Budd" to meet with members of TSLA to inquire as to their views of the "disparaging remarks about Tribute and its employees contained in Mr. Dutot's affidavit", and Ms. Lowrie swears about what two members of TSLA reportedly told Mr. Budd who reported to Ms. Lowrie.

Reference: Tribute RR, Tab 1, Lowrie Affidavit #2, para. 22, page 6.

120. What Tribute does not tell the Court about its "outside" counsel, Mr. Peter Budd is that he:

(a) is an authorized cheque-signer for Tribute, and has been since at least as early as 2005;

(b) was Vice-President-Corporate Development for Tribute;

(c) was a director of Tribute;

(d) has an office at Tribute's office that he uses when he is in London; and

(e) owns options in Tribute.

Reference: Lowrie Cross-Examination, paras. 69-71, 74-76, 78, 80, 81 (pages 22-24).

121. Further, Tribute's "outside" counsel, Mr. Peter Budd:

(a) was paid $50,000.00 by Tribute in 2007;

(b) was convicted of and incarcerated for a serious breach of trust, which conviction and penalty were affirmed by the Ontario Court of Appeal on October 17, 2007;

(c) ceased being a director of Tribute on October 23, 2007, one week after the Court of Appeal confirmed his conviction.

Reference: Farms ARR, Tab 2, Ratcliffe Affidavit #2, para. 29, 30, 31 (pages 9 and 10).
Farms AFF, Tab 2, Ratcliffe Affidavit #2, Exhibits B, D, D (pages 11-26).

L) Tribute #25 Well

i) Certified to be a development well

122. In Tribute's application to the Ministry of Natural Resources for the well licence for the Tribute #25 Well that was drilled between June 5th, 2008 and October 22nd, 2008, Tribute's President, Jane Lowrie, certified that it is a development well.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 15, 16, (page 109).
Farms AR, Tab 4, Colquhoun Affidavit, Exhibit F.

ii) Definition of development well

123. By Ontario Regulation 245/97 and the Official Well Status Definitions of the Ministry of Natural Resources, a "development well" is defined as "a well that is drilled for the purpose of producing from or extending a pool of oil and gas into which another well has already been drilled".

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 17, (page 109).

iii) Proves Reef is empty

124. In the Drilling and Completion Report for the Tribute #25 Well, filed with the Ministry of Natural Resources, Ms. Lowrie certifies that the well encountered volumes of gas that were too small to measure ("tstm") and no pressure; in effect a "dry hole" that confirms that the Stanley Reef reservoir is, in effect, empty and holds no real commercial quantities of gas.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 18, 19, 20, (page 110).
Farms AR, Tab 4, Colquhoun Affidavit, Exhibit F (page 19).52

iv) Not prudent to drill development well

125. No prudent operator would drill a development well in such close proximity to existing wells on a known reef and within the reef margins as Tribute appears to have done with the Tribute #25 Well. It is clear from the low pressures in the two old wells that the reservoir has already been drained. Wells are too expensive, and there are vastly cheaper means of testing for new gas that are reliable.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 21.

v) Cement bond logs are for storage wells

126. In the Drilling and Completion Report filed with the Ministry of Natural Resources, Ms. Lowrie certifies that Tribute ran cement bond logs to surface. Cement bond logs are only required on injection wells (wells used to inject gas into storage reservoirs); not for development wells.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 22.

vi) Tribute advises shareholders of storage potential

127. Tribute's Management Discussion and Analysis for the 9 months ended September 30th, 2008 filed with SEDAR and now a part of the public record, states that Tribute has identified assets in Huron County to be developed for storage "as reaching natural economic depletion" and "suitable candidates for gas storage". No mention is made of indentifying more reserves.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 23; (page 111).
Farms AR, Tab 4, Colquhoun Affidavit, Exhibit H, 4th and 5th paragraph from the top (page 163).

vii) Tribute by-passed OEB approval for storage well

128. Tribute drilled the Tribute #25 well exclusively to test the cap rock and to use the well as a primary injection well once the Stanley Reef was designated. This effectively by-passes the requirement that no storage well may be drilled without the approval of the OEB.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 25.

viii) Tribute did same thing in Tipperary Reef

129. Tribute did the same thing in the Tipperary Reef, over the protests of the landowners there.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 25 (page 111).
Farms AR, Tab 5, Dutot Affidavit, paras 15 and 16 (page 189).

M) Value of undeveloped storage reefs

130. Storage leases can have significant value to operators like Tribute.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 43 (page 115).

i) Chatham C – Tribute paid cash to insiders equal to $2,000,000.00 per BCF

131. In 2008, Tribute paid its own insiders $1,370,000.00 cash to acquire the gas storage rights for the Chatham C Pool, an undeveloped storage pool that is a depleted gas reef like the Stanley Reef which has an estimated storage capacity of 683,000,000 cubic feet or .683 billion cubic feet (BCF) based on a calculation of fair market value calculated by an independent valuator who considered the current market value for similar undeveloped natural gas storage assets in Ontario and New York, and approved by the Toronto Stock Exchange. That is the equivalent of $2,000,000.00 for each BCF.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 45, 46, 47, 48 (page 115-116).

ii) Bayfield – Tribute paid cash to insiders for undeveloped storage reservoir

132. On May 7th, 2008, Tribute announced that it had purchased from insiders of Tribute all of the petroleum and natural gas rights and natural gas storage rights for the Bayfield Pool (which is the reef that lies just to the north of the Stanley Reef) for $1,500,000.00. The Bayfield Reef has been produced for years and, like the Stanley Reef, has been depleted to the point where it is a good candidate for storage operations.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 49.

iii) Tribute's Huron assets projected to general more than $1,100,000.00 / BCF/ year in net income

133. Tribute itself projects that it will generate $8,000.000.00 net income per year once it develops 7 BCF of undeveloped storage assets in Huron County, or $1,142,857.00 per BCF per year.

Reference: Farms ARR, Tab 2, Ratcliffe Affidavit #2, para 33(a), page 10.
Farms ARR, Tab 2, Ratcliffe Affidavit #2, Exhibit, page 33 (1st paragraph).

iv) Stanley Reef is greater than 2 BCF (per Geologist)

134. Stephen Colquhoun, Certified Petroleum Geologist, estimates the storage capacity of the Stanley Reef to be in excess of 2 BCF.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 55 (page 117).

v) Stanley Reef between 1.4 – 1.8 BCF (per Tribute)

135. Tribute's President, Jane Lowrie, admits that the storage capacity of the Stanley Reef is between 1.4 to 1.8 BCF, closer to 1.4 BCF.

Reference: Lowrie Cross-Examination, para 251 (page 71).

vi) Value of Stanley Reef between $3,000,000.00 and $4,000,000.00

136. At $2,000,000.00 per BCF, storage capacity of the Stanley Reef has an estimated fair market value of between $3,000,000.00 and $4,000.000.00

vii) Farms owns 76.441% of Stanley Reef

137. Tribute and Farms, by the UOA signed in 1984, agree that 76.441% of the Stanley Reef lies beneath lands owned by Farms. Accordingly, Farms' share of the estimated fair market value of the Stanley Reef would be 76.441% of $3,000,000.00 to $4,000.000.00 or $2,293,230.00 to $3,057,640.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 7 (page 106-107).
Farms AR, Tab 2, Ratcliffe Affidavit #1, Exhibit B, page 46.

138. With the termination of the GSL, the storage rights, and the value thereof, revert to Farms. Tribute may be able to purchase these rights from Farms at fair market value.

Reference: Farms AR, Tab 4, Colquhoun Affidavit, para 53.

PART III – THE LAW

A) Oil and Gas Leases are not Leases, but rather profits à prendre

139. An oil and gas lease has been characterized, by the Supreme Court of Canada in *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, as a *profit a prendre*. This essentially provides for the right of the lessee to take something from the soil of the lessor.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at page 15.

140. The petroleum and natural gas lease is not a lease, but a *profit a prendre* "which itself is an interest in land and an incorporeal hereditament. As an incorporeal hereditament it can be created only by grant, that is by a document under seal. It does not create the relation of landlord and tenant and the common law rights and liabilities arising out of the relation of landlord and tenant have no application to the agreement."

Reference: *Langlois v. Canadian Superior Oil of California Ltd* (1957), 23 W.W.R. 401 at para 21. (Tab 2).

141. *Incorporeal Hereditament* is a right in land, which includes such things as rent charges, annuities, easements, *profits a prendres*, and so on.

Reference: *The Dictionary of Canadian Law*, 3rd ed. *s.v.* "incorporeal hereditament".

142. *Profit a Prendre* is a right to take something off the land of another person...more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right.

Reference: *The Dictionary of Canadian Law*, 3rd ed. *s.v.* "profit a prendre".

143. "What as a practical matter is sought by such a lessor is the undertaking of the lessee to explore for discovery and in the event of success *to proceed with production to its exhaustion.*" (emphasis added)

Reference: *Re Sykes* (1955), 16 W.W.R. 172 (Sask) as referred to in Ballem at p. 16.

144. "A profit [a prendre] can also be extinguished by exhaustion where all the subject matter has gone from the servient land."

Reference: The Law Commission Consulation Paper No 186, "Easements, Covenants and Profits a Prendre" at p 118 <http://www.lawcom.gov.uk/docs/cp186.pdf>. (Tab 11)

145. "A profit [a prendre] is exhausted where its subject matter has been destroyed or depleted to the point of non-existence. If the exhaustion is permanent, the profit will be extinguished...."

Reference: The Law Commission Consulation Paper No 186, "Easements, Covenants and Profits a Prendre" at p 121. <http://www.lawcom.gov.uk/docs/cp186.pdf>. (Tab 11)

B) Under the habendum of an oil and gas lease, if the lessee fails to perform, the lease terminates automatically unless it is saved by another proviso in the lease.

146. "The *habendum* clause, together with its provisos, is the heart of the lease. It sets forth the conditions under which the lease continues in force". In other words, this clause establishes the birth and the death of the oil and gas lease.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 149.

147. The *habendum* clause sets out the duration of the lessee's interest in the lands by typically providing for a primary term of the lease and providing for the extension of this primary term which is generally contingent on production.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 149.

148. The following quote is from a judgment considering the interpretation of a *habendum* clause:

"It defines the term during which the lessee may enjoy the rights which had been granted to it. The term is '10 years from the date hereof, and so long thereafter as the said substances or any of them are being produced from the said lands.' I interpret this paragraph as granting a primary term of 10 years, which is to be extended *if* production of any of the substances has been obtained during that period, for so long as such production continues beyond the 10-year term."

Reference: *Canada-Cities Service Petroleum Corp. v. Kininmonth,* [1964] S.C.R. 439 at para 16. (Tab 7)

149. The Supreme Court of Canada in Kininmonth analyzed the effect of the *habendum* clause and indicated that absent a provision that would otherwise extend the term of said lease, and if continued past the primary term by production of the leased substances, "the lease would automatically terminate upon the cessation of production."

Reference: *Canada-Cities Service Petroleum Corp. v. Kininmonth,* [1964] S.C.R. 439 at para 19. (Tab 7)

150. Failure to produce, when economical and profitable to do so, results in the termination of the lease.

Reference: *Canadian Superior Oil of California Ltd. Kanstrup*, [1965] S.C.R. 92. at page 8, para 31 (Tab 8).

Freyberg v. Fletcher Challenge Oil & Gas Inc., [2005] 10 W.W.R. 87. at page 18, paras 58-60 (Tab 10).

151. Several factors favour this strict rule of termination. They include, the desire by lessors to produce the well as soon as possible, the exigencies of the marketplace which encourages production whenever it is economical and profitable, and the fact that delayed production increases the possibility that the gas of an inactive well will be "captured" by other wells.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87 at page 17, paras 49-53 (Tab 10).

152. The proper test to be used in determining an economic and profitable market is whether, based on information available at the time, a prudent lessee would have foreseen profitability.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87 (Tab 10).

153. "Because of the wording 'and so long thereafter as the leased substances or any of them are produced,' the lease would automatically come to an end if production ceased, even temporarily, after the expiration of the primary term."

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 158.

154. When a lessee does not perform, in the sense of drilling paying or producing – and any term is dependant on such performance, the lease terminates.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87 at para. 58, 59 (Tab 10).

C) Delay payment clauses are options in favour of lessees which, if not exercised on time, automatically terminate the lease by engaging or "clicking" the automatic termination contained within the phraseology of the lease.

155. The Courts treat delay payment provisions in oil and gas leases as options in favour of the lessee who is not bound to perform or pay unless he chooses, and find the failure to perform or exercise the privilege of paying in advance activates an automatic termination contained within the lease's terminology that becomes effective or "clicks" when the privilege is not exercised. The termination is automatic.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 at paras 12, 15 and 17, Alberta Supreme Court, Appellate Division (Tab 5).
Langlois v. Canadian Superior Oil of California Ltd (1957), 23 W.W.R. 401 at para 29, 30. (Tab 2).
Canadian Superior Oil of California Ltd. Kanstrup, [1965] S.C.R. 92, at para 41 (Tab 8).

156. It is the lessee's option to avoid having the lease terminate during the primary and secondary terms. During the secondary term, the only option available to the lessee if it wishes to maintain the lease is to produce.

Reference: *Wolff v. Consumers Gas Co.* 1995 Carswell Ont. 3632, [1995] O.J. No. 4004, page 5-6 at para. 23 (Tab 14).

157. Failure to make a timely delay payment is lethal. Any gap, no matter now minute, between the expiration of the period and payment is fatal.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at p 356 and 365.

D) Oil and gas leases cannot be saved by fancy interpretation

158. The golden rule of interpretation requires that unambiguous words be given their literal meaning unless to do so would results in an absurdity. Therefore, when parties choose certain words to express their meaning and to define their relationship, there is no excuse for distorting the words out of their ordinary plain meaning.

Reference: *Suncor Inc. v. Norcen International Ltd.* (1988), 89 A.R. 200 at paras. 93, 94 (Tab 12).

159. In Suncor, the Alberta Queens Bench rejected an attempt by the lessee to interpret the royalty provision in an agreement by resort to legislative debates to show the legislature's intent, preferring to give the words their plain and ordinary meaning.

160. The terms of a gas lease are to be given effect according to their plain and ordinary meaning unless to do so would result in an absurdity. The termination of a natural gas lease for failure to produce when it is economical and profitable is not an absurd result.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87 at page 17-18, para 57 (Tab 10).

161. The terms of oil and gas leases are to be interpreted strictly in favour of the lessor.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87 at page 17-19, para 49-55,65. (Tab 10).

162 In Freyberg, the Alberta Court of Appeal considered and rejected, an implied term found by the Court below in an oil and gas lease. The Court below found that there was an implied term in the lease that if the lessee made timely shut-in payments, there was deemed production under the habendum, even if there was an intervening economic market, and the Court of Appeal rejected that interpretation as circumventing existing case law.

163. Oil and gas leases are drafted by the lessee (and not the lessors as is the case with ordinary commercial leases) and should be construed contra preferendum.

E) Oil and gas leases cannot be saved by delay payments if the payment is not made on time.

164. As set out above, a late payment of a delay rental is lethal. Any gap between the due date and the payment date is fatal.

165. In East Crest and in Langlois, the lessee's failed to pay delay rentals on time and the Alberta Supreme court, Appellate Division and the Manitoba Queens Bench both found that because the lessee was not bound to pay the delay rental, it was a privilege or option, that, if not exercised, activated an automatic termination contained in the

phraseology of the lease that became effective or "clicked" to terminate the lease, without breach.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 at paras 12, 15 and 17, Alberta Supreme Court, Appellate Division (Tab 5).

Langlois v. Canadian Superior Oil of California Ltd (1957), 23 W.W.R. 401 at para 29, 30. (Tab 2).

166. In both East Crest and Langlois, the lessees lost their respective leases due to the fatal gap.

167. The relevant portions of the East Crest Judgment read as follows:

> "12. As to the document in question, I am in full agreement with Shepherd, J. in saying:
>
> The lease contains no covenant on the part of the lessee to either drill or pay. He may hold and enjoy the lands for a period of six years by commencing to drill a well at a specified date or in lieu thereof may have the date extended for one year by paying on a specified date the delay rental, and the lessee's refusal or neglect to either drill or pay does not give rise to a cause of action against him. The lessee is not bound to either drill or pay but may do either of these things only if he so chooses. The lease carries within its own phraseology an automatic termination which becomes effective when the lessee fails to commence drilling operations within the time specified and also fails to exercise his privilege of paying delay rental in advance."
>
> "17. The clauses containing the provision concerning "delay rental" merely confer a privilege on the lessee to have the lease continued for a further period of a year beyond the first without any obligation on him to exercise the privilege. There is, in my opinion, no penalty or forfeiture involved."

168. In Kanstrup, the Supreme Court of Canada found that the payment of a $100.00 delay royalty shortly after the primary term expired without production could not save the fatal gap between the end of the primary term and the payment, and found the lease to be terminated because the lessee failed to exercise its option on time.

Reference: *Canadian Superior Oil of California Ltd. Kanstrup*, [1965] S.C.R. 92, at para 31,40 (Tab 8).

168.1 The relevant portion of the Kanstrup judgment reads as follows:

> "I agree with the learned trial judge (1963) 39 DLR (2d) 275, that payment of the $100 royalty after the primary term had expired was not effective to continue the term of the lease thereafter. At the time the primary term came to an end, no oil, gas or any other mineral was being produced from any part of the unit, nor was there any gas which could be considered as being produced as a result of the operation of clause 3(b). **That clause did not impose upon the appellant any obligation to pay a $100 royalty in respect of a non-producing gas well. The appellant had a choice to pay or not to pay and the clause only became operative "if such payment is made"**. If the appellant sought to continue the lease in operation after the primary term, by the combined operation of clause 3(b) and clause 2, then it was essential that it should have paid the royalty before the primary term expired. The appellant was aware that gas would not be produced within the primary term some time before the primary term expired." (bolding added)

Reference: *Canadian Superior Oil of California Ltd. Kanstrup*, [1965] S.C.R. 92, at para 31 (Tab 8).

F) Oil and gas leases cannot be saved because the late payment was merely an oversight, inadvertent or minor, or because it was accepted by the lessee, which in effect, waived the lateness.

169. In East Crest cited above, the Court rejects the argument by the lessee that the payment which was tendered a month late was a mere oversight, inadvertent or minor, and found the lease to be terminated because the lessee failed to exercise its privilege.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 at paras 6, 12, 15, Alberta Supreme Court, Appellate Division (Tab 5).

170. In Langlois, the Manitoba Queens Bench rejected the argument that acceptance of payment by the lessor after a payment was missed was evidence of a new contract, and specifically found that the gas lease, being a profit à prendre, could only be made under seal, and there being no new contract under seal accompanying the payment, found the lease to be terminated.

Reference: *Langlois v. Canadian Superior Oil of California Ltd* (1957), 23 W.W.R. 401 at para 67. (Tab 2).

171. The relevant paragraph of Langlois reads as follows:

"I have considered whether or not the acceptance of the sum in question could be evidence of a new contract. I do not see how it could. A grant of a profit à prendre can only be made under seal and no such grant was made."

172. In Canadian Superior Oil Ltd. and Hambly, the Supreme Court of Canada confirms that an oil and gas lease that has terminated "cannot be revived thereafter except by agreement for consideration between the parties".

Reference: *Canadian Superior Oil Ltd. v. Hambly* [1970], S.C.R. 932 at para. 13 (Tab 9).

173. The relevant portion of the Hambly judgment reads as follows:

> "[The lease which had been terminated] could not be revived thereafter except by agreement for consideration between the parties."

174. In Kanstrup, where a shut-in payment was paid one week after the lease terminated for want of production at the end of the primary term, the Supreme Court of Canada rejects wavier of forfeiture as a means to save the lease. At paragraph 40, Maitland J. for the Court states:

> "In my opinion, no question arises in this case as to election or waiver of forfeiture by the respondent, Kanstrup (the lessor). This lease contained within itself a provision which operated automatically to terminate it upon the expiration of the primary term. Thereafter there were no steps to be taken

by Kanstrup (the lessor) in order to bring it to an end. There was no election for him to make. There was no duty on the part of the appellant (the lessee) to make any royalty payment in respect of the capped well...There was no default on the part of the appellant (the lessee) in not paying that money before the primary term had expired. There was, therefore no forfeiture to relieve against".

Reference: *Canadian Superior Oil of California Ltd. Kanstrup*, [1965] S.C.R. 92, at para 40 (Tab 8).

G) Oil and gas leases cannot be saved by relief against forfeiture where the delay rental payment is late because the termination of a lease for non-payment, defective or late payment is not a forfeiture.

175. In Kanstrup, the Supreme Court of Canada considered and rejected an argument by the lessee that receipt by the lessor of part of a $100.00 royalty payment after the primary term expired and the lease died for want of production in the secondary term constituted an election or waiver of forfeiture by the lessor and found the lease to be terminated.

Reference: *Canadian Superior Oil of California Ltd. Kanstrup*, [1965] S.C.R. 92, at para 31 and 40 (Tab 8).

176. "Forfeit" is defined as follows: to lose by some ***breach of condition***. (emphasis added)

Reference: *The Dictionary of Canadian Law*, 3rd ed. *s.v.* "forfeit".

177. "Forfeiture" and "Penalty" are defined as follows:

Section 98 of the Courts of Justice Act, R.S.O. 1990, c. C.43. speaks of relief from penalties and forfeitures. Each word lends meaning to the other. 'Penalties' is derived from penal and connotes punishment. 'Forfeiture' is giving up of a right or property and when allied with 'penalties' suggests something of the nature of goods being forfeited to

customs officials. Neither penalties nor forfeitures are compensatory and both connote an added element to any money damages as associated with a breach of contract. The failure to pay premiums on a term life insurance policy and the consequent lapse of that policy engage none of the above considerations. The premium is the payment for coverage for the next term. Subject to the grace provision, there is no coverage for that term when a payment is not made and the insurer arranges its commercial affairs accordingly. In these circumstances, the contract terminates on its own terms and not by a breach. There is no forfeiture in the sense of a loss of property.

Reference: *The Dictionary of Canadian Law*, 3rd ed. *s.v.* "forfeiture" and "penalty.

178. "Relief Against Forfeiture" is defined as follows:

> In an appropriate and limited case a court of equity will grant this relief for a breach of a condition or covenant when the main object of the deal was to secure a certain result and provision for forfeiture was added to secure that result.

Reference: *The Dictionary of Canadian Law*, 3rd ed. *s.v.* "relief against forfeiture".

179. Relief from forfeiture is unavailable to a lessee who has inadvertently failed to perform an optional act which would have extended the term of the lease. "There cannot be default in neglecting to do something one is not bound to do. From its nature the document carries within its own phraseology an automatic termination which clicks."

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 at para 15 (Tab 5).

180. Termination of a lease does not constitute forfeiture and those requirements which cause a lease to terminate prematurely are not 'covenants, conditions or stipulations,' but are options or elections on the part of the lessee.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 314.

181. Similar to the OEB Clause in Lease #3 which confers a privilege on Tribute to apply to the OEB and extend the lease, the Alberta Supreme Court, Appellate Division had said the following about delay rental payments: "The clauses containing the provision concerning 'delay rental' merely confer a privilege on the lessee to have the lease continued for a further period without any obligation on him to exercise the privilege. There is, in my opinion, no penalty or forfeiture involved."

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 at para 17 (Tab 5)

182. The typical "unless" clause found in many leases provides that the lease will terminate at a specified date unless prior to this date, the lessee has performed a certain action. Failure to perform this action exactly in accordance with the terms of the lease, will result in automatic termination of the lease, even if the failure was due to inadvertence on the part of the lessee.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 at page 4, para 12 (Tab 5).

Langlois v. Canadian Superior Oil of California Ltd (1957), 23 W.W.R. 401 at page 6, para 29, 30 (Tab 2).

183. Under the "unless" kind of lease, the lessee has merely failed to perform an optional act which would have otherwise extended the lease, and the lessee has forfeited nothing, and has not been subjected to a penalty, but has only neglected to do what it was not bound to do.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432 (Tab 5)

Canadian Superior Oil of California Ltd. v. Kanstrup, [1965] S.C.R. 92 (Tab 8)

184. "There is here no question of any breach by the appellant of any obligation under the lease. The lease provided for a specified primary term and for its continuance thereafter in certain events. The fact that those events did not occur does not constitute any breach on the part of the appellant of any of its obligations under the lease.

Reference: *Canadian Superior Oil of California Ltd. Kanstrup*, [1965] S.C.R. 92 at page 9, para 37 (Tab 8).

185. If there is no breach of a condition, proviso, or stipulation there cannot be a default. Where there is no breach and no default, there can be no forfeiture.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87 at page 17, para 47 (Tab 10).

186. The Supreme Court of Canada, the Alberta Court of Appeal and the Alberta Supreme Court, the Manitoba Court of Queens Bench and the Ontario Courts of Justice reject the remedy of relief from forfeiture where the lessee has a right or privilege but not the duty to perform – by drilling, producing or paying and fails to exercise the right. They reason that because there is no obligation, "there is no forfeiture to relieve against there being no default in neglecting to do that which one is not bound to do", and that if the right or privilege is not exercised, the automatic termination contained within the phraseology of the lease activates or "clicks" to terminate the lease without breach or forfeiture.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432., at para 15, 17 (Tab 5) Alberta Court of Appeal.

Canadian Superior Oil of California Ltd. v. Kanstrup, [1965] S.C.R. 92.at para 37, 40 (Tab 8).

Freyberg v. Fletcher Challenge Oil & Gas Inc., [2005] 10 W.W.R. 87 at para 58-60 (Tab 10) Alberta Court of Appeal.

Krysa v. Opalinsky (1960), 32 W.W.R. 346 at page 6-7, para 7, 9 (Tab 4) Alberta Supreme Court.

Langlois v. Canadian Superior Oil of California Ltd (1957), 23 W.W.R. 401 at page 6-7, para 29,30,31 (Tab 2)

Wolff v. Consumers Gas Co. 1995 Carswell Ont. 3632, [1995] O.M. No. 4004 at para. 21, 24 (Tab 14).

187. Wolff is an Ontario case remarkably similar to the case at bar. The lessors were successful in obtaining a declaration that the leases were terminated, and Consumers

Gas was obliged to re-negotiate new leases for the undeveloped storage reservoir that it planned to develop under the land.

H) Oil and gas leases cannot be saved by lessor's failure to give notice of breach or by giving defective notice of breach

188. The Courts also reject arguments by lessees that failure by lessors to give notice of breach pursuant to notice clauses in oil and gas leases operates to prevent termination of the leases. The rationale is based on the reasoning above: if the termination is the "click" of an automatic termination that engages when the lessee fails to exercise his privilege or option, then there is no duty, and without a duty, there can be no breach and without a breach, there can be no need to give notice of a breach.

Reference: *East Crest Oil Co. v. Stroschein*, [1952] 2 D.L.R. 432., at para. 16 (Tab 5) Alberta Court of Appeal.

Langlois v. Canadian Superior Oil of Califomia Ltd (1957), 23 W.W.R. 401 at page 7, para 34 (Tab 2).

Freyberg v. Fletcher Challenge Oil & Gas Inc., [2005] 10 W.W.R. 87, at page 19, para 66 (Tab 10) Alberta Court of Appeal.

Krysa v. Opalinsky (1960), 32 W.W.R. 346. at page 7, para 8 (Tab 4) Alberta Supreme Court.

Wolff v. Consumers Gas Co. 1995 Carswell Ont. 3632, [1995] O.M. No. 4004, para. 19, 20, 21, 24 (Tab 14).

189. In Freyberg, the Alberta Court of Appeal puts it succinctly:

"The result of termination is that provisions like clause 18 [notice clause] which provide relief from forfeiture, do not become operative as there is no forfeiture to relieve against: there cannot be default in neglecting to do something that one is not obligated to do."

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87, at page 17, para 47 (Tab 10) Alberta Court of Appeal.

I) Oil and gas leases can rarely be saved by estoppel

i) General

190. There are many types of estoppel: estoppel by representation, estoppel by acquiescence, promissory estoppel, estoppel by deed, estoppel by election.

191. The underlying thrust of the doctrine of estoppel is simply that a party may be prevented from establishing the true state of the legal relationship where it would be unjust or inequitable to allow him to do so.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 402.

192. The basis principal of estoppel may be stated as follows:

> "Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 402-403.

ii) Estoppel is difficult to establish in oil and gas cases

193. On many occasions hard-pressed counsel for the lessee, realizing that the facts of the case and language of the lease will fall short of the tests applied by the Courts, have fallen back on equitable defence outside the language of the doctrine itself.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 402, 1st paragraph.

194. In the normal course of events, if will be the lessee, and not the lessor who will be privy to problems with the lease and operations thereunder. This also holds true when it comes to the question of reliance. It is the lessee who will have the benefit of expert advice and knowledge of operations, not the lessor.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 423.

iii) The application of estoppel is severely limited in oil and gas leases.

195. Two basic elements of the doctrine of estoppel severely limit its application. For estoppel to succeed, it must be established, as a minimum that:

(a) the lessor had knowledge of the problem, and

(b) the lessee relied in some fashion on either the lessor's failure to act or whatever assurances he may have given.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 423.

iv) To establish estoppel, the lessee must prove the lessor had knowledge of its rights and knowledge of all relevant factors.

196. "The overlap of election, waiver and estoppel has been the subject of some discussions. Fortunately, I do not need to provide further judicial commentary on this confusion as the issue in this case can be resolved by reference to one factor: the lack

of knowledge of [the lessor]. The requisite of knowledge is a regiment of estoppel, estoppel by election and waiver".

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87, at page 27, para 128, 129 (Tab 10) Alberta Court of Appeal.

197. To be estopped, the lessor must have knowledge of all material facts.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87, at page 28, para 132 (Tab 10) Alberta Court of Appeal.

198. The Courts reject estoppel by election where the lessor does not have knowledge of its right to elect and all relevant factors underlying the election.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87, at page 27, 28, para 127, 130, 132 (Tab 10) Alberta Court of Appeal.

199. In Freyberg, the lessor, Lady Freyberg accepted timely annual payments for some 20 years (19 shut-in payments and 1 royalty payment) before bringing application for a declaration that the lease terminated some 10 years before the application because the lessee did not produce when it could have. The lessee argued that because Lady Freyberg had accepted the payments, she was estopped (by election) from claiming that the lease was terminated 10 years before, and lost. The Alberta Court of Appeal found that in order to be estopped by acceptance of the payments, Lady Freyberg must have made an **unequivocal election with knowledge of not only her right to elect but also of all relevant factors underlying the election**. As she did not, she was not estopped and the lease was terminated. (bolding added)

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87, at page 27, 28, para 127, 132 Alberta Court of Appeal (Tab 10).

200. The Courts reject estoppel by acquiescence where the lessor does not have knowledge of its rights.

Reference: *Canadian Superior Oil Ltd. v. Hambly* [1970], S.C.R. 932 at page 4, para.13 (Tab 9).

201. In Hambly, the lessor received a delay payment of $100.00 in lieu of production after the lease had terminated by operation of the habendum, and the lessee argued that acceptance of the payment amounted to estoppel by acquiescence, and lost. The Court after reviewing the five probanda in Willmot v. Barber, found that there was "no doubt that Hambly did not know that he had the right to treat the lease as terminated", and rejected estoppel.

202. The Courts reject estoppel by representation and promissory estoppel where the lessor's conduct is based on a mistake of law or fact by the lessor because the lessor's conduct cannot be intended to induce any conduct on the part of the lessee.

Reference: *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81 at para 10, 11, 13 (Tab 3).

203. In Weyburn, the facts were particularly favourable to the lessee, but yet estoppel was rejected. Weyburn, the lessor, committed a number of positive acts, pursuant to a lease that (unknown to both parties) had terminated for lack of production at the expiration of the primary term. In addition to receiving payments for years, Weyburn demanded that the lessee drill an offset well (which it did), granting a surface lease for the drilling of the well, and demanded (and received) reimbursement for 7/8ths of the mineral taxes in accordance with the lease that had terminated earlier without either knowing that it had terminated. The lessee argued estoppel and promissory estoppel, and lost because,

> "there was no representation or conduct amounting to representation done by the (lessor) with the intent of inducing the conduct on the part of the (lessee). Here both parties acted under a mistake – whether a mistake of law or a mistake of act is of no consequence – and there is no question of either party having made a representation to the other. Whatever the (lessee) did, and his consequent action is an ingredient of estoppel – he did because of his own mistake and not because of any representation of the (lessor)".

Reference: *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81 at para 10 (Tab 3).

204. In Weyburn, the Supreme Court of Canada found that the lessor, in making its demands, "simply accepted the lessee's mistaken position that the lease had not terminated" and "because the lessor was not aware of the true legal position is not now precluded from exercising its rights".

Reference: *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81 at para 11 (Tab 3).

v) The lessee must prove that it relied on the lessor's representation to the lessee's detriment to save the lease using estoppel

205. The lessee must prove it relied on the lessor's behaviour to its detriment.

Reference: *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, [2005] 10 W.W.R. 87, at para 127 (Tab 10) Alberta Court of Appeal.

206. Detrimental reliance is not available to save a lease where there is no conduct by the lessor **intended to induce** any conduct on the part of the lessee. (bolding added)

Reference: *Canadian Superior Oil Ltd. v. Hambly* [1970], S.C.R. 932 at para. 21 (Tab 9).

207. In Hambly, the lessor accepted a payment after the lease had expired, and the lessee argued estoppel, and lost. The Supreme Court of Canada found that Hambly did not know he had a right to terminate the lease and that the lessee, from its knowledge of the drilling records which Hambly did not possess, were at all times, in a better position to know the facts upon which their right to continue to the lease depended.

208. The Supreme Court of Canada rejects detrimental reliance and estoppel where the lessee is aware of the possible problem, such as the possible invalidity of a lease, because no detriment is proved.

Reference: *Canadian Superior Oil Ltd. v. Hambly* [1970], S.C.R. 932 at para. 20 (Tab 9).

209. The Manitoba Court of Queens Bench likewise rejects estoppel where there has been no detrimental reliance. In that case, the lessor accepted an annual delay payment after an earlier one was missed. The Court found that acceptance of the later cheque did not alter the lessee's position to its prejudice and rejected estoppel.

Reference: *Langlois v. Canadian Superior Oil of California Ltd* (1957), 23 W.W.R. 401 at para 68 (Tab 2)

210. In Weyburn, the Supreme Court of Canada rejects detrimental reliance where both the lessor and lessee were mistaken in their belief that the lease continued, and found that the lessee's conduct resulted not from the lessor's conduct, which it will be remembered included receiving royalties for years and demanding the lessee drill another well, but from the lessee's own mistaken belief that the lease had not come to an end.

Reference: *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81 at para 10, 11, 16 (Tab 3).

vi) With promissory estopell, the lessee must prove that the representation was made while a valid contract was in effect between the parties, not afterwards

211. In Hambly, Maitland, J. of the Supreme Court of Canada reasons that the principal of promissory estoppel presumes the existence of a legal relationship between the parties when the representation is made

Reference: *Canadian Superior Oil Ltd. v. Hambly* [1970], S.C.R. 932 at para. 14,15 (Tab 9).

212. In Hambly, the lessor accepted a delay payment after the lease terminated for want of production after the primary term, and the lessee argued that Hambly's acceptance of the payment estopped him from denying the lease continued in full force, and lost. The representation (accepting the payment) occurred after the contract ended.

213. It appears that promissory estoppel will be largely irrelevant to oil and gas lease cases. Usually the purpose of the plea of estoppel is to revive a terminated lease. The normal acts of promissory estoppel that would be relied upon must occur after the termination of the lease, which, in accordance with Maitland, J.'s reasoning (in Hambly) precludes the application of promissory estoppel.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 412.

214. Furthermore, a lessor is under no duty to notify a lessee that an oil and gas lease has expired.

Reference: *Republic Resources Ltd. v. Ballem,* [1982] 1 W.W.R. 692 at para 17 (Alta. Q.B.) (Tab 2).

J) What is Production in paying quantities?

215. An oil and gas lease that provides for an extension of the primary term for such longer period as oil or gas is found thereon in paying quantities will remain effective if it is possible to pump it in quantities that are more than sufficient to pay operating costs.

Reference: *Stevenson v. Wesgate*, [1942] 1 D.L.R. 369.

216. "Paying quantities" is defined in two contexts: firstly in relation to the *habendum*, and secondly for purposes of the covenants in the lease. For purposes of the *habendum*, paying quantities means production in sufficient quantities to yield a return in excess of operating costs even though drilling and equipment costs may never be repaid.

Reference: John Bishop Ballem, *The Oil and Gas Lease in Canada*, 4th ed. (Toronto: University of Toronto Press, 2008) at 155-156.

K) A person seeking equity must come with clean hands

217. Under the "clean hands" doctrine, equity will refuse relief to any party who, in the matter of his claim, is himself tainted with fraud, misrepresentation, illegality or

impropriety by reason of which his opponent has suffered a detriment of a kind rendering it unjust that the order sought should be made.

Reference: *Miller v. F. Mendel Holdings Ltd.*, [1984] 2 W.W.R. 683 at para 45 (Tab 15).

L) Ontario Energy Board Act ("OEBA") prohibits injection of gas without designation of the geological formation and without authorization

218. S.37 of the OEBA reads as follows:

"No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor."

Reference: Ontario Energy Board Act, s. 37 (Tab 16)

PART IV – ARGUMENT

A) Is the 1977 PNG Lease or Lease #1 valid and subsisting?

i) Can Lease #1 continue in perpetuity once the reef is empty?

219. Farms, respectfully submits that the 1977 PNG Lease has been extinguished because its subject matter (the gas) has been depleted to the point of non-existence and is exhausted.

220. An oil and gas lease is a *profit a prendre* which exists for the sole purpose of exploration, discovery, and production to exhaustion.

221. This intention can be ascertained by the wording and for so long thereafter as oil and gas is produced in paying quantities of the *habendum* in the Oil and Gas Lease (and

other such oil and gas leases) which led the courts to classify oil and gas leases as *profits a prendre*.

222. Tribute has permanently ceased all production (due to depletion) from the Stanley Reef. There is no longer any gas in the Reef capable of being produced in paying quantities, and despite numerous years' efforts to produce gas in paying quantities, Tribute has failed to produce any gas from the Reef since 2001. The pressure in the Reef has been exceptionally low since July 31, 2001 and the Tribute #25 Well confirms that all gas that can be taken in paying quantities has been taken.

223. Farms submits that the very reason for entering into Lease #1 (the taking of gas) has now essentially ceased to exist and accordingly, Lease #1 (the *profit a prendre*) is at an end and extinguished.

224. The subject matter (the gas) of this *profit a prendre* has been permanently destroyed, consumed or depleted to the point of non-existence. The *profit a prendre* (Lease #1) is therefore extinguished in accordance with the law.

ii) Has the 1977 PNG Lease terminated in accordance with its terms?

225. Farms submits that the 1977 PNG Lease has terminated in accordance with its terms.

226. The Habendum in the Oil and Gas Lease, which sets forth the duration of Tribute's interest in the Lands, provides for a term of "10 years, and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted...in gas sands".

227. Therefore, after the expiration of the primary 10 year term (which was in 1987), the 1977 PNG Lease will automatically terminate when there is a failure to produce oil and gas in paying quantities and also a failure to conduct storage operations...in gas sands.

228. Producing gas in paying quantities and conducting storage operations are not obligations or duties which Tribute must perform, but rather options or privileges which Tribute may do if it can and chooses to. As a result, failure to do either, or both, is not a default or breach but simply failure to do something that Tribute is not bound to do.

229. There was a failure to produce gas at all, let alone in paying quantities, which commenced on August 1, 2001 and continues to this day due to the depletion of the Stanley Reef. Despite efforts to produce, there was and is no gas to produce.

230. There has never been storage operations being conducted on the Lands. The Ontario Energy Board Act prohibits injection of gas into a reservoir without the reservoir being designated by the OEB and without authorization to inject. Tribute has not yet applied for designated and has no authorization in inject. Further, the Tribute #25 Well was not drilled until June-October, 2008 and Tribute represented to the Ministry of Natural Resources that it was a development well, not a storage well and there has been no operations since it was completed in October, 2008. The well head sits alone and there are no compressor or pipelines attached. Further, all operations in 2001-2006, although sporadic were production operations not storage operations. Production, which involves withdrawal of gas from a reservoir, and storage, which involves injecting gas into a reservoir are mutually exclusive activities, and do not occur at the same time. Finally, the 1977 PNG Lease provides for storage in gas sands, and there are no gas sands on the Lands, so, even if there were storage operations being conducted (and there were none), such operations could not have qualified because the operations would have been in a dolomitized reef, and not gas sands.

231. Therefore, in accordance with the terms of the Habendum of the 1977 PNG Lease and the law, the lease terminated automatically on August 1st, 2001, there being then no production at all, let alone in paying quantities and no storage operations being conducted.

232. In the alternative, and in the event the Court should determine that Lease #1 did not extinguish by reason of exhaustion of the gas or terminate automatically in

accordance with the Habendum, it is submitted that the 1977 PNG Lease was terminated in accordance with notice of termination delivered by Farms to Tribute pursuant to the notice provision on page 2 of the Oil and Gas Lease.

233. The notice of termination given in accordance with the notice provision on page 2 of the Oil and Gas Lease was not a notice of default or breach, but simply a notice of termination pursuant to the said clause in order to terminate the lease due to Tribute's failure to exercise its options to produce gas in paying quantities and conduct storage operations at any time after the 10 year term, or either of them.

234. The 1977 PNG Lease is terminated in accordance with its terms.

iii) Is Lease #1 saved by delay payments made pursuant to the Unit Operation Agreement?

235. It is submitted that payments made pursuant to the Unit Operation Agreement cannot save Lease #1 because the 1977 PNG Lease had already terminated in accordance with its terms.

236. In addition to the foregoing, and in the alternative, it is submitted that payments made pursuant to the Unit Operating Agreement cannot save Lease #1 because payments were consistently submitted after the deadline in the Unit Operating Agreement.

237. The Royalty Clause of the Unit Operating Agreement provides that delay payments are to be made "not later than the 20th day of January next following and as long as the payments in this clause provided are made or tendered, operations for the production of leased substances...shall be deemed to be conducted...and the lease shall remain in full force and effect".

238. Therefore, payment must be made or tendered not later than the 20th of January next following in order to keep Lease #1 in full force and effect. Conversely, if payment is

not made or tendered by the 20th day of January next following, then there Lease #1 cannot be saved.

239. The 2002 cheque issued by Tribute was dated and issued on February 1st, 2002, 12 days after January 20th, 2002, and consequently Tribute did not and could not tender a payment on or before January 20th, 2002, leaving a fatal gap between the due date and the payment date which could not save Lease #1 from its termination in 2001.

240. Every cheque that Tribute issued in 2001-2008 was issued and dated after January 20th, and the 2009 cheque was returned with the explanation that Lease #1 terminated years before when Tribute failed to make delay payments on or before January 20th years before.

241. Failure to make a delay payment on time is not a default or breach by Tribute, but simply a failure to do something that Tribute is not bound to do. Tribute has no obligation or duty to pay a delay rental on time, and may do so at its option if it chooses to do so.

242. Lease #1 is not saved by any delay payment pursuant to the Unit Operating Agreement.

iv) Is Lease #1 saved by fancy interpretation?

243. It is submitted that Lease #1 cannot be saved by fancy interpretation.

244. The law is clear: the terms of gas leases are to be given their plain and ordinary meaning unless to do so would result in an absurdity, and are to be interpreted strictly in favour of the lessor.

245. It is submitted that the plain and ordinary meaning of the Habendum in the Oil and Gas Lease and Royalty Clause in the Unit Operating Agreement are clear and

unambiguous and can be understood and construed by their own phraseology and without reference to outside clauses.

246. The plain and ordinary meaning of the words in the Royalty Clause of the Unit Operating Agreement is that payment must be paid or tendered not later than January 20th next following in order to deem operations to be conducted that would save Lease #1. There is no basis for resorting to other clauses to interpret the clear language of the Royalty Clause, and it ought not be done if it results in a construction that does not favour Farms.

247. It is absurd to argue, as Tribute does, that a late payment pursuant to the Royalty Clause in the Unit Operating Agreement is merely a "reasonable temporary cessation on the part of Tribute" which does not result in automatic termination of Lease #1 or provide Farms with the option to terminate the Lease.

248. It is submitted that Tribute's argument is flawed, complex, does not give "plain and ordinary" meaning to the words in the Royalty Clause, and offends the rule of strict construction in favour of the lessor.

249. It is submitted that Tribute's fundamental premise is flawed, and as a result, its whole argument fails. Tribute incorrectly asserts that the notice provision on page 2 of the Oil and Gas Lease "stipulates that the Oil and Gas Lease expires if production or drilling operations cease, except if cessation is due to...reasonable temporary cessation on the part of the Operation (Tribute)", but that clause is merely a notice provision that provides a mechanism for Farms to terminate the Lease with notice if production in paying quantities or drilling operations cease and which provides Tribute with a shield to block termination under that clause if there is a cessation from lack or weakness of market or reasonable temporary cessation on the part of the Operator (Tribute). This clause has nothing to do with the Royalty Agreement. In fact termination of Lease #1 is governed by the Habendum and the Royalty Agreement. Failure to perform by producing in paying quantities, or conducting storage operations or paying a delay

payment under those clauses (not the notice clause) terminates Lease #1 automatically.

250. Lease #1 is not saved by fancy construction. It is terminated automatically in 2001 when Tribute was not producing in paying quantities and was not conducting storage activities, and was not saved when Tribute failed to make an optional payment on January 20th, 2002, leaving a fatal gap before the payment was made. It is clear from the Royalty Clause that the optional payment must be made on or before January 20th to save Lease #1 and no payment was made on time. That clause contains no language to allow a tardy payment and to impute such language would offend the rule that gas leases be construed strictly in favour of the lessor.

v) Is Lease #1 saved because the late payment was merely an oversight, inadvertent or minor, or because payment was accepted by Farms, which had the effect of waiving the lateness?

251. It is submitted that Lease #1 is not so saved.

252. As set out above, Lease #1 terminated automatically when Tribute failed to be producing in paying quantities, failed to be conducting storage operations and failed to exercise its option or privilege of saving Lease #1 by paying an optional delay payment on January 20th, 2002. The automatic termination contained within the phraseology of the Lease "clicked" to end Lease #1 without default or breach.

253. Lease #1 is a profit à prendre and once terminated cannot be renewed or revived without a contract under seal. Lease #1 has not been so renewed under seal and so cannot be revived by acceptance of late payments.

254. There is a fatal gap of 12 days between January 20th, 2002 when the delay payment was due and February 1st, 2002 when the cheque was dated. Lease #1 terminated automatically on January 20th, 2002 when the optional payment was not made, and the Courts reject all arguments that the late payment was merely late, minor or an

oversight or that acceptance of a late cheque constitutes a waiver of the automatic termination.

vi) Is Lease #1 saved by relief from forfeiture?

255. It is submitted that Lease #1 is not so saved.

256. As stated above, when Tribute failed to exercise its options or privileges of continuing Lease #1 by performing – by producing in paying quantities, by conducting storage operations and by making a timely payment on January 20th, 2002, the automatic termination contained within the phraseology of the Lease engaged or "clicked" to automatically terminate the Lease without breach or default.

257. Because Tribute had the right or privilege of performing, and not the duty, there was no breach or default because there cannot be default for neglecting to do that which one is not bound to do.

258. Because there was no breach or default, there can be no forfeiture to relieve against.

259. The Courts hold that there is no forfeiture to relieve against, there being no default in neglecting to do what one is not bound to do.

260. Put another way, without a duty or obligation, there can be no default or breach for failing to perform, and with no default or breach, there can be no forfeiture to relieve against. Tribute has simply failed to do something it was not bound to do, and not being in default, has forfeited nothing.

261. It follows that s.98 of the Courts of Justice Act, the provisions of the Commercial Tenancies Act, and related cases which grant relief from forfeiture, have no application to Lease #1.

262. The Courts reject the application of the equitable remedy of relief from forfeiture to oil and gas leases where the lessee has an option.

vii) Is Lease #1 saved because Farms failed to give notice of breach or gave defective notice of breach?

263. It is submitted that Lease #1 is not so saved.

264. In accordance with the logic outlined above, where the termination is automatic under the terms of the Lease, Farms is not required to give notice of termination.

265. Essentially, because there is no duty and accordingly no breach, there is no duty to give notice of default, and clauses requiring notice of default be given are not invoked because there is no default to give notice of.

266. Farms did give Tribute written notice of default but the notice was unnecessary because the termination was automatic and contained within the phraseology of the Lease and once triggered by Tribute's failure to exercise its operations, required nothing further from Farms to terminate Lease #1.

267. In the alternative, if the Court does not accept that Tribute's failure to exercise its options automatically terminated Lease #1 without default, it is submitted that Farms did deliver notice pursuant to Lease #1 that had the effect of terminating it in accordance with its terms.

viii) Is Lease #1 saved by estoppel?

268. Farms submits that Lease #1 cannot be so saved.

269. To succeed with an estoppel argument, Tribute must establish two (2) elements, but cannot prove either of them.

270. [Deleted intentionally]

271. First, Tribute must prove either:

(a) that Farms made an unequivocal election between accepting each payment and continuing Lease #1, and refusing each payment and ending Lease #1 with knowledge of both the right to elect and with knowledge of all of the facts underlying the election, or

(b) that Farms knew that it had the right to terminate Lease #1 (which is inconsistent with Tribute's alleged belief it continued), and that Farms was aware of Tribute's mistaken belief that the Lease continued.

272. Second, Tribute must prove that it relied on Farms' conduct to Tribute's detriment.

273. Farms was ignorant both of its rights and the rights of Tribute under Lease #1, and relied on Tribute as the oil and gas expert to lead the way. Farms treated payments by Tribute as representations that all was in order.

274. Lease #1 and the Unit Operating Agreement were signed by Farms over a quarter of a century ago and promptly misfiled or misplaced and not seen again until November 2008 when Farms requested copies from Tribute.

275. Other than being aware of the fact that Lease #1 existed, Farms forgot about it and its terms.

276. Farms and its principals were not aware at any relevant times before November, 2008 that delay payments under Lease #1 were to be made by January 20th each year, or that a late payment would terminate Lease #1, or that Lease #1 terminated on January 20th, 2002 when a timely payment was not made at a time when there was no production and no storage operations, or that Farms had a right to refuse a late payment.

277. Annual payments were small and sporadic and Farms and its principals paid little attention to the letters accompanying the cheques. Farms relied on Tribute, as the oil and gas professional to lead the way.

278. As between the two parties, Tribute with its expertise, professionals and computer systems was in a vastly better position to know that Lease #1 was terminated by its failure to perform.

279. Farms had no knowledge sufficient to make an unequivocal election to elect to terminate the Lease or continue it by accepting late payments until after November, 2008 when it first obtained legal advice and notified Tribute that both leases terminated in accordance with their terms.

280. Farms had no knowledge of its own rights, and no knowledge that Tribute was acting in ignorance of its rights.

281. It could be said that Farms was mistaken as to its rights and the rights of Tribute, and merely accepted Tribute's mistaken belief that the Lease was valid each time Farms accepted a cheque.

282. It might also be said, if Tribute's assertion that it was not aware that Lease #1 had terminated is believed, that both parties were mistaken as to their rights under Lease #1.

283. Where Farms is ignorant or mistaken about its rights, or where both Farms and Tribute are mistaken about their respective rights under Lease #1, it cannot be said that Tribute relied on Farms to its detriment.

284. Where Tribute is a publicly traded oil and gas company with access to professional geologists and landmen and sophisticated computer systems and Farms is a chicken

farmer with no oil and gas expertise that relies on Tribute, it is disingenuous to suggest that Tribute relied on Farms.

ix) Is Lease #1 saved because Farms does not have clean hands?

285. The issue of Farms' clean hands does not arise when the termination of the Lease is the "click" of automatic termination contained within the phraseology of the Lease which engaged when Tribute failed to exercise its option to maintain the Lease by timely payment, and there is no forfeiture.

286. Notwithstanding the foregoing, Farms respectfully submits that it does have clean hands.

287. Specifically, Farms is not "attempting to repudiate Lease #1" as alleged because Lease #1 terminated automatically in accordance with the automatic termination contained within its phraseology when Tribute failed to exercise its option to continue the Lease by making a timely delay payment due on January 20th, 2002, and the automatic termination "clicked" to end the Lease without breach or default.

288. Specifically, Farms is not "attempting to repudiate Lease #3" as alleged because Lease #3 terminated automatically in accordance with the automatic termination contained within its phraseology when Tribute failed to exercise its option to continue the Lease by making an application to the Ontario Energy Board on or before September 24th, 2008, and the automatic termination "clicked" to end Lease #3 without breach or default.

289. Specifically, Farms is not "trying to extort a fair market value lump sum payment to reflect the value of acquiring control of the reservoir" as alleged. Farms did through its lawyer, invite Tribute to make an offer to Farms to lease the Lands, and did indicated that such offer, if made, should include a lump sum amount for the rights Tribute seeks to acquire, and referred Mr. Lewis to his client, Tribute, who had recently

completed several such transactions at fair market value, to determine what a reasonable amount to offer would be.

290. Specifically, Farms does not have a hidden agenda as alleged. Farms' position and agenda are consistent and were delivered in writing to Tribute once Farms obtained legal advice after October, 2008: Both Lease #1 and Lease #3 terminated automatically when Tribute failed to exercise its options to keep them alive, and if Tribute would like to submit an offer for a gas storage lease, here are the 16 matters it should address, including a lump sum payment to reflect the value of acquiring control of the Reef that would be consistent with the fair market lump sums Tribute paid to its own insiders recently to acquire at least 2 similar undeveloped storage assets.

x) Is Lease #1 saved because Tribute will lose a significant investment and be forced to abandon additional expenditures and because Farms' "damages" are minor by comparison?

291. Farms submits that it is not.

292. The issue of the magnitude of Tribute's investment compared to Farms' "damages" does not arise when the termination of the Lease is the click of automatic termination contained within the phraseology of the Lease which engaged when Tribute failed to exercise its option to maintain the Lease by timely payment; and there is no forfeiture.

293. The oil and gas business is a risky one and oil and gas companies risk and lose millions of dollars regularly with no recourse when, for example, a well is drilled and there is no gas or the reservoir is plugged with salt or brine. The expenditure and loss of large sums of money is not unusual in the oil and gas business and $1.6 million is not considered to be a significant amount in the industry.

294. Tribute compounded its own risk by spending in excess of $1,000,000.00 before it sought to verify that it had good title to the leases and by paying lease payments late, by not entering the Automatic Termination Clause in its computer system and by

starting work for its OEB application so late that the application could not be submitted on time when it had 10 years to make the application.

295. It is submitted that the issue of the magnitude of Tribute's expenditures and loss is a red-herring designed to gain the Court's sympathy but which should be ignored.

296. On the other hand, given that both leases automatically terminated in accordance with the automatic terminations contained within their phraseology which engaged when Tribute failed to exercise its option to maintain them, Farms will suffer a loss equal to the fair market value of the undeveloped storage volume, calculated at $2,000,000.00 per BCF if the Court finds the Leases to be continuing.

297. By the Unit Operating Agreement, Tribute agreed that Farms owns 76.441% of the reservoir, which is the relevant number in calculating the value of the undeveloped storage reservoir under Farms' lands, not 40% of the proposed DSA.

298. Given that the storage capacity of the reef is estimated by Ms. Lowrie to be between 1.4 and 1.8 BCF and by Mr. Colquhoun to be in excess of 2 BCF, the estimated value of Farms' loss would be at least between $2,000,000.00 and $3,000.000.00.
(1.4 BCF x $2,000,000.00 x 0.76441 = $2,140,348.00)
(2.0 BCF x $2,000,000.00 x 0.76441 = $3,057,640.00)

299. Tribute has no one but itself to blame for failing to exercise its options to keep the Leases alive.

B) Is the Gas Storage Lease or Lease #3 valid and subsisting?

i) Has Lease #3 terminated in accordance with its terms?

300. Farms submits that Lease #3 terminated automatically in accordance with the automatic termination contained within the phraseology of the Automatic Termination

Clause ("**ATC**") in Schedule "B" which engaged or "clicked" when Tribute failed to exercise its privilege or option to continue the Lease by applying to the OEB on or before September 24th, 2008.

301. Similar in consequence to Tribute's failure to pay the delay rental by January 20th, 2002 under the Royalty Clause of Lease #1, Tribute simply failed to do something that it was not bound to do.

302. The ATC in Schedule "B" of Lease #3 granted Tribute the option or privilege, if it so chose, to extend the Lease that would otherwise terminate automatically on its 10th anniversary.

303. By the ATC in Schedule "B", which was expressed to be paramount to any other clause in Lease #3, Tribute was granted, if it chose to do so, 10 years to apply to the OEB to have the Lands designated as a gas storage area.

304. Tribute did not make such an application, and its failure to make the application on or before September 24th, 2008 in accordance with the option granted to Tribute, engaged or "clicked" the automatic termination contained within the Lease, to end it without breach or default.

ii) Is Lease #3 saved by relief from forfeiture or penalty?

305. Farms submits that it cannot be so saved.

306. It cannot be said that there is any penalty or forfeiture in Tribute failing to do something that it was not obligated or bound to do.

307. Failure to make application to the OEB by September 24th, 2008 is not default, but merely failure to perform an optional act which the Courts have never considered a breach.

308. The law in Canada is clear that when a lessee fails to do something that it was not bound to do, even if the failure is inadvertent, there is no breach and no default, and consequently there can be no forfeiture.

309. Where, as here, there has been no forfeiture, it follows that relief from forfeiture cannot and must not be granted. The contract has been terminated in accordance with the automatic termination contained within its own phraseology that clicks when the lessee failed to apply to the OEB (which it was not bound to do), and without default or forfeiture.

310. It follows that s.98 of the Courts of Justice Act, the provisions of the Commercial Tenancies Act, and related cases which grant relief from forfeiture have no application to save Lease #3.

311. There cannot be default in neglecting to do something Tribute is not bound to do and therefore, no penalty or forfeiture to relieve against.

312. The ATC provided for the continuance of Lease #3 if a definite act (application to OEB) was completed prior to the tenth anniversary of said Lease #3. The fact that no application was made does not constitute any breach on the part of Tribute of any of its obligations under Lease #3.

313. The President of Tribute, Jane Lowrie, signed both the Lease #3, and the Schedule thereto (the ATC) and Tribute cannot now be said to not have known of the provision.

314. It has been said that "The parties to a contract, in a sense, make a law for themselves; so long as they do not infringe some legal prohibition, they can make what rules they like in respect of the subject matter of their agreement, and the law will give effect to their decisions".

315. Farms only asks that the decisions made by Tribute and its principle in signing Lease #3 and the ATC be given effect and enforced strictly. Lease #3 has terminated.

316. It is clear from the facts that Tribute failed to act expeditiously in preparing for its application to the OEB. The Supreme Court of Canada commented on the behaviour of a lessee who failed to act expeditiously in the face of a provision terminating a lease if drilling hadn't been commenced. Speaking for the Court in *Kininmonth*, Justice Martland said: "In my view, the lessee deferred the performance of its drilling obligation to the last months of the 10 year term at its own risk. If it failed to be in production before that term expired, then...the lease automatically terminated.."

317. A similar argument can be drawn here, where Tribute delayed the commencement of the necessary preparation for an OEB application at its own risk. As a consequence of its own actions or inactions, and its failure to make an application to the OEB, Lease #3 terminated on September 24, 2008.

iii) Is Lease #3 saved by fancy interpretation?

318. Farms submits that Lease #3 cannot be saved by fancy interpretation.

319. The law is clear: the terms of gas leases are to be given their plan and ordinary meaning unless to do so would result in an absurdity, and are to be interpreted strictly in favour of the lessor.

320. The plan and ordinary meaning of the Automatic Termination Clause is clear and unambiguous and can be understood and construed by its own phraseology and without reference to outside sources or statues.

321. The plain and ordinary meaning of the words in the ATC is that Lease #3 shall terminate on the 10th anniversary date if the lessee has not applied to the Ontario Energy Board to have the lands designated as a gas storage area on or before the 10th anniversary date thereof.

322. It is absurd to argue, as Tribute does, that provisions of the Ontario Energy Board Act couple with the ATC to obligate Tribute to commence an application to the OEB before a specific date with the result that failure to do so results in a breach of Lease #3. That is simply not what the plain and ordinary meaning of the words in the ATC say.

323. It is submitted that Tribute's argument is flawed, complex, unnecessary, does not give the plain and ordinary meaning to the words in the ATC, and offends the rule of strict construction in favour of the lessor.

324. The ATC is, by its terms, an option which the lessee can exercise if it wishes; there is no obligation for Tribute to apply to the Ontario Energy Board, and accordingly, there can be no breach or default.

iv) Is Lease #3 saved by estoppel?

325. Farms submits that Lease #3 cannot be saved by estoppel.

326. While it is true that Farms accepted a cheque in August, 2008, which Tribute alleges extends the term of Lease #3 for one year, the term of Lease #3 cannot be extend by such a payment.

327. Firstly, Farms deposited the cheque prior to the termination of Lease #3. When Tribute failed to extend Lease #3 by making application to the OEB prior to September 24th, 2008, Farms returned the payment after consulting with legal counsel after Tribute pressured Farms (unsuccessfully) to sign an amending agreement that would save Lease #3.

328. Second, Farms was, at the relevant time, unaware or ignorant of its rights, and the rights of Tribute under Lease #3. Farms had years ago misfiled or misplaced its copy of Lease #3. The person that negotiated lease #3 for Farms retired a year or two after it was signed and, although Farms was aware that Lease #3 existed, it was unaware of its terms, and in particular was no longer aware of the ATC or that failure to apply to

the OEB by the 10th anniversary would automatically terminate Lease #3. Mr. Ratcliffe was upset when he learned from his lawyer for the first time in November, 2008, that the ATC terminated the Lease, something far different than what Mr. Jordan represented to him in the Dorchester Meeting and the October 30th, 2008 letter which enclosed the Leases for Mr. Ratcliffe to see for the first time. Also, the cheques were small and sporadic and Farms relied on Tribute, the oil and gas expert to "lead the way". Farms treated each payment as a representation by Tribute that things were proceeding as they should.

329. As between the two parties, Tribute, the publicly traded oil and gas corporation, with its professionals, experience and computer systems, was in a vastly better position to know that Lease #3 would be terminated by Tribute's failure to extend it by exercising its option to apply to the OEB.

330. As a result, Farms had no knowledge sufficient to make an unequivocal election to elect to refuse the August, 2008 cheque or to continue lease #3 by accepting the cheque until November, 2008 when it first obtained legal advice and returned the cheque and advised Tribute both leases terminated in accordance with their terms.

331. As a result, Farms had no knowledge of its own rights under Lease #3, and no knowledge that Tribute was acting in ignorance of its rights under Lease #3.

332. It could be said that Farms was mistaken as to its rights, and was also mistaken as to the rights of Tribute under Lease #3, and merely accepted Tribute's mistaken belief that Lease #3 was valid when Farms accepted the August, 2008 cheque.

333. It might also be said, if Tribute's assertion that it was not aware that Lease #3 had terminated despite its anomalously early (by a month) payment in August, 2008 is believed, that both parties were mistaken as to their rights under Lease #3.

334. Where Farms is ignorant or mistaken about its rights, or where both Farms and Tribute are both mistaken about the rights under Lease #3, it cannot be said that Tribute relied on Farms to its detriment.

335. Where Tribute is a publically traded oil and gas company with access to professional geologists, landmen and computer systems that track leases and payments, and Farms is a chicken farmer with no oil and gas expertise that relies on Tribute, its is disingenuous for Tribute to suggest that it relied on Farms to its detriment.

336. It is submitted that Tribute proceeded on the basis of its own beliefs (and mistakes) without reliance on Farms.

337. It is submitted that Tribute cannot establish estoppel by election or estoppel by acquiescence because it cannot prove knowledge on the part of Farms sufficient to make an unequivocal election to continue the Lease, or knowledge of its own rights that were inconsistent with Tribute's rights, and knowledge that Tribute was proceeding on its mistaken belief, and it cannot prove detrimental reliance on Farms.

338. Farms gave notice that Lease #3 had terminated in a letter to Tribute's solicitor, but in accordance with case law, and as argued above, no such notice is required when a lease terminated automatically in accordance with its terms as Lease #3 has here by virtue of Tribute's failure to exercise its option to continue the Lease by making application to the EOB prior to September 24th, 2008.

v) Is Lease #3 saved because Farms does not have clean hands?

339. It is submitted that the issue of "clean hands" does not arise in cases where there is no forfeiture, such as in this case where Lease #3 terminated, not be default or breach, but by automatic termination that "clicked" when Tribute failed to exercise an option that would continue the Leases.

340. Notwithstanding the foregoing, Farms submits that it does have clean hands, and that Lease #3 is not saved.

341. Specifically, Farms, as argued above, denies that it is repudiating the Leases, trying to extort monies, or has a hidden agenda.

342. There can be no repudiation, extortion or hidden agenda where the Leases terminated automatically as here, in accordance with their terms because of Tribute's own failure to exercise its option to continue the Leases the "clicks" the automatic terminations contained within their phraseology and there can be no hidden agenda when Farms, in writing, invites Tribute to submit an offer and suggests that the offer if submitted, ought to contain a lump sum in an amount to be determined by Tribute, to reflect the value of acquiring control of the reservoir.

343. To the contrary, Farms has openly and continuously invited Tribute to submit an offer to re-lease the lands on reasonable terms, which include a fair market value lump sum in an amount proposed by Tribute not inconsistent with what Tribute has recently paid its own insiders for similar undeveloped storage assets.

vi) Is Lease #3 saved because Tribute will lose a significant investment and be forced to abandon additional expenditures and because Farms' "damages" are minor by comparison?

344. It is submitted that Lease #3 is not so saved.

345. The issue of the magnitude of Tribute's investment compared to Farms' "damages" is only relevant in cases involving forfeiture. Accordingly, in cases such as this where there is no forfeiture, the issue has no application because there is no default or breach.

346. Farms submits that the arguments made above on this issue as it applies to Lease #1, also apply to Lease #3 and adopts such arguments here.

347. It is submitted that the issue is a "red herring" designed to gain the Court's sympathy, but which has no application to lease #3.

348. Tribute has no one but itself to blame for failing to exercise its option to keep Lease #3 alive.

C) Is Tribute disentitled to relief because it does not have clean hands?

i) Tribute does not have "clean hands"

349. Farms submits that Tribute does not have clean hands and that its conduct disentitles it to equitable relief.

ii) Tribute applies pressure

350. Tribute first applied pressure to Farms in April, 2008 when it forced agreement to locate the new access road, not on the existing north access road as Farms requested, but on the south limit, and threatened to put the road down the middle of Lot 7, a most undesirable location, relying on an easement that Tribute represented to be in force (which Farms later discovered on obtaining legal advice in November, 2008, had expired in 2004).

351. Tribute next applied pressure to Farms at the Dorchester Meeting in the fall of 2008, when Mr. Jordan was forceful in attempting to get Mr. Ratcliffe to sign a back-dated amending agreement that would save Lease #1 by extending the ATC by one year, and advised Mr. Ratcliffe there was "no need for both of use wasting money on lawyers" and gave Mr. Ratcliffe the impression that Tribute could and would continue with the project even if he did not sign, and failed to tell Mr. Ratcliffe that Lease #3 terminated over a month before.

352. The misrepresentations in the Dorchester Meeting were continued in the October 30th, 2008 letter which glossed over the fact that Lease #3 terminated and which enclosed copies of the Oil and Gas Lease, Unit Operating Agreement and Lease #3, that Farms previously requested and which implied Tribute was continuing the project.

353. After December 9th, 2008 when Farms' lawyer gave Tribute notice in writing of Farms' position that both Leases had terminated in accordance with their terms, the pressure from Tribute escalated dramatically, just as Mr. Dutot, Chairman of the Tipperary Landowners Association ("**TSLA**") who had had unsatisfactory dealings with Tribute for over 10 years, predicted it would. TSLA was formed to protect an 80 year old who had difficulty reading and who could not understand oil and gas leases from Tribute's efforts to have him sign leases without advice.

354. In December, 2008, Tribute's President, Jane Lowrie, threatened Mr. Ratcliffe that "things were going to escalate" and ignoring requests not to deal with Farms directly, contacted Farms directly on a number of occasions.

355. On December 18, 2008, Tribute applied further pressure by issuing its Notice of Application, just 9 days after receiving notice from Farms of its position that the Leases were terminated in accordance with their terms, and Tribute ignored all invitations by Farms to submit a reasonable offer to lease the Lands.

356. Tribute's Application contains untrue statements about material facts, such as "Tribute has each year on or before January 31st paid to Farms, royalties or payments in lieu of royalties as provided by [Lease #1]" and "Tribute was not aware of the [ATC] until it received the legal opinion from its lawyers on or about October 27th, 2008", which forced Farms to respond. Once Farms pushed back, Tribute admitted that payments under Lease #1 were due January 20th and none of the payments in 2001-2008 could have been paid on time, and that it signed the Schedule with the ATC clause and might have been aware of it.

iii) Tribute Representations

357. Mr. Jordan misrepresented the status of the easement over the middle of Lot 7 (which had expired 4 years before) to Mr. Ratcliffe when he pressured agreement to locate the road along the south limit.

358. Mr. Jordan misrepresented that Lease #3 continued (and did not disclose that it had terminated) when he (unsuccessfully) pressured Mr. Ratcliffe to sign the back-dated Amending Agreement to save Lease #3 at the Dorchester Meeting in the fall of 2008 and told him not to bother getting a lawyer.

359. Mr. Jordan's failure to disclose that Lease #3 had terminated is echoed in the October 30th, 2008 letter which indicates Tribute is continuing and does not disclose that Lease #3 terminated on September 24th, 2008.

360. Ms. Lowrie's affidavit in support of Tribute's Application contained material misrepresentations which glossed over material facts as set out above, which forced Farms to respond.

360. In her second Affidavit, Ms. Lowrie swears that "she dispatched outside counsel, Mr. Peter Budd" to enquire about disparaging remarks by Mr. Dutot, but fails to advise until cross-examined that Mr. Budd has been and continues to be a signing officer for Tribute, is a past director and officer, has an office that he uses in Tribute's offices when he comes to London and owns options in Tribute. Although Ms. Lowrie refused to answer questions about Mr. Budd's compensation and criminal record, the public record discloses that he was paid $50,000.00 by Tribute in 2007 and was convicted of a serious breach of trust and incarcerated. The Court of Appeal refused to set aside the conviction or penalty and the Supreme Court of Canada refused to hear his appeal.

361. Ms. Lowrie certified to the Ministry of Natural Resources that the Tribute #25 Well is a development well, yet advised Tribute's investors and the Toronto Stock Exchange that the well is to verify the quality of the cap rock and Tribute runs cement bond logs,

both of which are required for storage wells but not development wells. This behaviour effectively by-passes requirements that no storage wells be drilled without OEB approval, something that Tribute has already done in the Tipperary Reef to the north.

362. Ms. Lowrie swears in her first Affidavit that Tribute sent Farms a cheque on or about September 19th, 2008 but that cheque was processed on August 25th, 2008, almost one month **before** it was alleged to be sent. Given Tribute's extensive history of late payments on all of the Lease #1 payments and most of the Lease #3 payments, such an early payment is indeed anomalous.

363. In its Management Discussion and Analysis for the year ended December 31st, 2008, Tribute admits involvement in the subject Application and Cross-Application but states that it became involved subsequent to the year end. This is not an accurate representation, given that Farms notified Tribute on December 9th, 2008 that the Leases were terminated and Tribute issued its Notice of Application on December 18th, 2008, both before the December 31 year end.

iv) Tribute has only itself to blame

364. Tribute failed to continue both leases by failing to exercise its options to continue them by performance - in the case of Lease #1 by paying delay payments on or before January 20th and in the case of lease #3 by applying to the OEB before September 24th, 2008. It alone had the power to save both Leases, but did not.

365. Tribute failed to enter the ATC in Schedule "B" of Lease #3 in its computer system that tracks leases and payments and failed to verify that it had good title to Lease #3 until October 27th, 2008, over one month after Lease #3 terminated, and after it had spent over $1,000,000.00 on the project.

366. Tribute knew that it had 10 years to apply to the OEB and that the application takes considerable effort and time (having completed one other such application in Tipperary), yet started all work too late, at its risk.

v) Tribute's hidden agenda

367. It is submitted that Tribute has a hidden agenda.

368. Tribute knows that undeveloped storage assets such as the Stanley Reef are worth at least $2,000,000.00 per BCF having recently purchased similar undeveloped storage assets from insiders of Tribute in the Chatham C Pool, and having recently entered options to acquire undeveloped storage assets for $2,000,000.00 per BCF from insiders. Tribute also believes and projects that storage assets in Huron County, once developed, will generate in excess of $1,100,000.00 per BCF per annum.

369. It is submitted that Tribute also knows that Farms had no knowledge or appreciation of the value of undeveloped storage assets, and wanted to keep it that way.

370. It is submitted that while Tribute appears to have no difficulty paying insiders fair market value for undeveloped storage assets, it does not want to pay Farms fair market value for the Stanley Reef which Tribute once controlled but lost through its own failure to exercise its options to maintain the Leases.

371. It is submitted that this is the reason why Tribute has ignored Farms' invitations to submit a fair offer to lease the Lands, and why Tribute has subjected Farms to continuous and escalating pressure which includes hastily drawn lawsuits and misrepresentations.

372. It is submitted that Tribute's Application , issued just 9 days after Farms gave notice the Leases had terminated, and containing material misrepresentations, was intended to apply such pressure to Farms that it would capitulate and give Tribute control of the Reef without paying fair value for it. Few farmers, with no real understanding or knowledge of the oil and gas business, oil and gas agreements and the value of the underlying reservoir, would continue to fight in the face of such an attack.

373. It is submitted that as expensive as lawsuits are, Tribute believes the costs of a lawsuit to be much cheaper than writing a cheque to Farms for the fair value of the reservoir, thinking it better to "spin the farmer until he goes home", just as Tribute did to the TSLA Chairman, Fred Dutot.

PART V - RELIEF SOUGHT

240. The Applicant seeks:

(a) An Order declaring the 1977 PNG Lease or Lease #1 is void and vacated from the Lands;

(b) [Deleted intentionally]

(c) An Order declaring the Gas Storage Lease or Lease #3 is void and vacated from the Lands;

(d) Costs;

(e) Such further and other relief as counsel may advise and this Honourable Court permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 9th, 2009

Jed M. Chinneck
LSUC #21375c
CHINNECK LAW
Professional Corporation
37 Ridout Street South
London, ON N6C 3W7
Tel: (519) 679-6777
Fax: (519) 432-4811
Solicitor for the Applicant

MCKINLEY FARMS LIMITED
Applicant

- and -

TRIBUTE RESOURCES INC.
Respondent

Court File No. 60819

ONTARIO SUPERIOR COURT JUSTICE
Proceedings commenced at London

AMENDED FACTUM
OF THE APPLICANT MCKINLEY FARMS LIMITED

Jed M. Chinneck
Chinneck Law Professional Corporation
37 Ridout Street South
London, Ontario N6C 3W7
Tel: (519) 679-6777
Fax: (519) 432-4811
Email: jed@chinneck.ca
LSUC #21375C
Solicitors for the Applicant