

EB-2009-0338/0339/0340 F19

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OEB BOARD SECRETARY	
File No:	SubFile: EB-2009-0338
Panel	gk, ps.
Licensing	Zona/C. 00/04
Other	M. Helt.
Other	Neil Mc. Walker
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File No:	SubFile: 15 pages
OEB BOARD SECRETARY	

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OCT 08 2009

ONTARIO ENERGY BOARD
OFFICE OF THE BOARD SECRETARY

October 7, 2009

Matter #: 08-938

By Fax - 1-416-440-7656

Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Sirs:

Re: Huron Bayfield Gas Storage Project - Stanley 4-7-XI Pool

We act for McKinley Farms Ltd., owner of 76.441% of the Stanley Reef by virtue of an executed Unit Operation Agreement.

Our client noticed a press release dated September 22nd, 2009 by which Tribute Resources Inc. announced a filing of a natural gas storage application with the OEB (copy enclosed).

Our client wanted you to be aware of the Judgment of the Honourable Mr. Justice Little dated June 29th, 2009 (copy enclosed) wherein he declared both the Oil and Gas Lease and the Gas Storage Lease on the McKinley lands over the Stanley Reef vacated. This decision is currently under appeal by Tribute Resources Inc. but has not been overturned. In addition, our client wished you to be aware of the fact that it has entered into both a Petroleum Natural Gas Lease and a Storage Lease in favour of 2195002 Ontario Inc., a corporation whose director and officer is Cathy McKinley, MBA. These leases are in effect top-leases which drop into first position in light of the Judgment of Mr. Justice Little.

Our client wonders if Tribute's application is premature given they currently have no interest in 76.441% of the Stanley Reef.

Would you kindly advise of status of the application as we note there is no reference to it on your website.

Please reply to the selected office

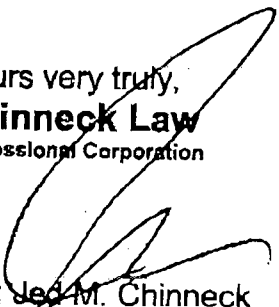
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Please contact the writer if you require any further information.

Yours very truly,
Chinneck Law
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Per: Jed M. Chinneck
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**NEWS RELEASE**

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TRIBUTE RESOURCES INC. ANNOUNCES FILING OF NATURAL GAS STORAGE APPLICATION WITH THE ONTARIO ENERGY BOARD

LONDON, Ontario, September 22, 2009 – Tribute Resources Inc. (TSX-V: TRB) ("Tribute"), a developer of natural gas storage assets and renewable energy projects in Ontario, announced today that it has filed an application with the Ontario Energy Board (the "OEB") to designate the Bayfield and Stanley pools in Huron County, Ontario as natural gas storage reservoirs. It is the intent of Tribute to develop the first two of the Huron County pools (the "Bayfield Pools") with estimated working storage capacity of 6 billion cubic feet ("BCF"), for possible gas injection in April 2012.

Tribute has formed the Huron Bayfield Limited Partnership ("Bayfield LP") and Bayfield Resources Inc. ("Bayfield GP") as investment vehicles for the future development of the Bayfield Pools and potential additional natural gas storage reservoirs in Huron County. Tribute currently owns a 100% interest in both entities. Tribute plans to transfer the natural gas storage and petroleum and natural gas rights for the Bayfield Pools to the Bayfield LP in exchange for units in the Bayfield LP. The funds required to develop the pools will then be raised through a sale of partnership units in the Bayfield LP to third parties. Tribute has sufficient working capital on hand to fund the designation and initial engineering of the Bayfield Pools. However, the construction of storage pools is very capital intensive and additional funding will be required for construction of wells, pipeline, and compression facilities.

All further development of the Bayfield Pools will be completed by the Bayfield LP and Tribute will jointly apply to the OEB with the Bayfield LP for designation of the Bayfield Pools, the right to inject and withdraw natural gas from the reservoirs, and permission to drill injection and observation wells into the pools.

To facilitate the marketing of natural gas from the potential natural gas storage reservoirs requires the construction of a 70 kilometer pipeline that would connect the pools to the Dawn Trafalgar system at Lobo near London, Ontario. An application is being filed in the name of Bayfield Pipeline Corp., a wholly owned subsidiary of Tribute, for a leave to construct the required 16" pipeline. A third party environmental consulting firm has completed an environmental assessment of the pipeline route and has made recommendations on a preferred route for the project.

Tribute remains committed to its core strategy of building and holding natural gas storage in Ontario. This storage development is the second project developed by Tribute in Huron County. Tribute, in partnership with Union Gas, completed its first storage development, the Tipperary pool, in 2008. Tribute holds additional potential natural gas storage assets

in Huron, Lambton and Kent Counties in Ontario and is actively exploring for additional potential natural gas pools suitable for natural gas storage.

About Tribute Resources Inc.:

Tribute is a Canadian energy company with a primary focus on adding value to shareholders by exploring for, developing and maintaining a long-term interest in market-based priced underground natural gas storage assets and renewable energy projects in the Province of Ontario. Tribute's objective is to build a company capable of delivering and sustaining long-term per share growth by developing energy projects that will generate stable long term cash flow when fully developed. Tribute's business plan is to build upon its current asset base to identify, permit, develop, and construct projects that meet its threshold return criteria. Tribute creates value by identifying project opportunities, providing the expertise to develop the projects and maintaining an interest in the completed assets to build long-term stable utility quality cash flow from a strong and diversified energy related asset base.

Tribute believes that it is well positioned to take advantage of opportunities in the ongoing restructuring of the energy markets in Ontario and North America. Tribute's three business units – Underground Natural Gas Storage, Oil and Gas Exploration, and Renewable Energy Development – are strategically aligned with the evolving energy market.

Neither the TSX Venture Exchange nor its Regulation Services Provider (as that term is defined in the policies of the TSX Venture Exchanges) accepts responsibility for the adequacy or accuracy of this news release.

For further information on this press release please contact Jane Lowric, President of Tribute at (519) 657-7624 or visit our website at www.tributeresources.com.

COURT FILE NO.: 60590

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TRIBUTE RESOURCES INC.

Applicant

- and -

McKINLEY FARMS LTD.

Respondent

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)
) Christopher A. Lewis and Linda
) Smits for the Applicant
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) Jed M. Chinneck, for the Respondent
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COURT FILE NO.: 60819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

McKINLEY FARMS LTD

Applicant

- and -

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) Jed M. Chinneck, for the Applicant
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TRIBUTE RESOURCES INC.) Christopher A. Lewis and Linda
) Smits, for the Respondent
)
)
 Respondent) HEARD: June 17, 18, 2009
)

LITTLE J.

The Applications

[1] Each party applies to the court pursuant to Rule 14.05 seeking a declaration as to the validity of two separate contracts entered into between the parties or their predecessors.

[2] Tribute Resources Inc. ("Tribute"), through its predecessor, executed an Oil and Gas Lease with the predecessor of McKinley Farms Inc. ("McKinley") on October 12, 1977. That document was amended by a Unit Operation Agreement dated October 30, 1984. McKinley as lessor, through those documents, leased certain oil and gas rights to Tribute. The Unit Operation Agreement is effectively an amendment to the Oil and Gas Lease. Tribute wishes to have the Oil and Gas Lease as amended by the Unit Operation Agreement declared valid and subsisting while McKinley seeks to have them declared void and vacated.

[3] Further, the parties entered into a Gas Storage Lease Agreement dated September 24, 1998. Again, Tribute wishes to have this document declared valid and subsisting and McKinley wishes to have it declared void and vacated.

[4] All of the documents relate to lands owned and farmed by McKinley being Lots 7 & 8 in the 11th Concession of the Township of Stanley, in the County of Huron and Province of Ontario.

[5] It was elected that the applications be heard together as identical issues apply.

Opening Motion

[6] McKinley initially moved at the opening of the application hearing to obtain leave to file supplementary documents contesting certain facts, or at least bringing them into issue. Affidavits were being advanced by McKinley indicating the degree of knowledge, or lack thereof, that they had with regard to the contents of the documents which issue was relevant to estoppel.

[7] After entertaining submissions, and without the benefit of a reporter, I indicated to counsel that I was only prepared to proceed with the applications pursuant to Rule 14.05(3) which permits proceedings to be brought by way of application where the relief claimed is:

- 14.05(3)(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument...;
- (e) a declaration of an interest in or charge on land, including the nature and extent of the interest or charge...; and
- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

[8] It was evident to me that by admitting the affidavit sworn and served on short notice it presented possible difficulties with regard to material facts being in dispute. I decided to proceed to entertain the applications, at the request of both

counsel, and to avoid dealing with any matter where the likelihood of ruling on facts in dispute might arise.

The Oil and Gas Lease

[9] Exhibit #1 is the Oil and Gas Lease in question. It states that the lease is to be effective November 22, 1977. In it, the owner leases to the operator: "for the term of 10 years and so long thereafter as oil and gas are produced in paying quantities, or storage operations are being conducted ...".

[10] What it actually does is grant, demise and lease to the operator (Tribute's predecessor), all of the oil and gas in and under the designated lands in question, which lands were farmed by McKinley's predecessor.

[11] During submissions by counsel, it became evident that while the lease would have automatically terminated in November of 1987, gas continued to be produced in paying quantities from that date until some time in 2001 when it ceased completely because the pool was emptied.

[12] Oil and gas leases do not appear to be governed by the same rules as regular land leases. Such a document is not really a lease, but the grant of a *profit à prendre* which is itself an interest in land and an incorporeal hereditament.¹

[13] Such document 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 in question. For example, there is no such thing as a right of distress, given to a landlord by the common law, in the case of an oil and gas lease.

¹ *Langlois v. Canadian Superior Oil of California Ltd.* (1957), 23 W.W.R. 401 at 415

[14] The Oil and Gas Lease here, being Exhibit #1, automatically expires at the end of ten years which time period is extended so long as oil and gas are being produced in paying quantities. That is the effect of the wording of the document. Thus, in 2001 when production in paying quantities actually ceased and the "well ran dry", the oil and gas lease ended. Automatic termination took place.²

[15] Since the lease terminated automatically, there was no "default" from which relief from forfeiture could be provided. There was no forfeiture to relieve against. As stated in *East Crest*, supra, there cannot be default in neglecting to do something that one is not obligated to do. This argument is supported by a line of cases outlined in *Freyberg v. Fletcher Challenge Oil & Gas Inc.* (2005), 252 D.L.R. (4th) 365 at para. 58 (Alta. C.A.)

Unit Operating Agreement

Does the Unit Operating Agreement (Exhibit #2) have the effect of amending the Oil and Gas Lease to extend its term beyond 2001?

[16] The purpose of the Unit Operating Agreement, as stated therein, is to protect the oil and gas pool known as the Stanley Pool, (which is partially located under McKinley land) from unnecessary and wasteful drilling and depletion, and to protect the correlative rights therein. The Unit Operating Agreement states that its further purpose is to amend the lease to incorporate further lands with the intention of having all owners of the lands under which the Stanley Pool exists, treated fairly.

[17] Paragraph 3 of the Unit Operating Agreement deals with payments to be made by Tribute to McKinley "in lieu of all payments under the said lease".

² *East Crest Oil Co. v. Straszheim* (1952), 4 W.W.R. 553

Section 3(b) provides that one of the payments required to be made or tendered is that of a \$2.50 rental payment for every acre of the lands retained by the lessee which have not been included in the participating section of the unit area. . . .

[18] That same paragraph goes on to state as follows:

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.

[19] This was referred to by counsel for Tribute as the "Deemed Production Clause". It was submitted that this clause, in fact, extended the term of the Oil and Gas Lease so long as the \$2.50 per acre payment was made and that the said Oil and Gas Lease did not terminate once actual production in paying quantities ceased. The Lease was for a term of ten years and so long thereafter as oil and gas are produced in paying quantities. After 2001 no oil and gas was produced in paying quantities as the pool was empty. Counsel for Tribute feels that this clause deems production to continue if proper timely payments are made, and extends the term of the lease beyond the automatic ten year expiration and when production in paying quantities ceases. I disagree.

[20] That may have been the Lessee's desire, but it does not have that effect.

[21] First of all, the clause is incorporated in an amendment to the "payments" under the original lease and not in a paragraph dealing with the term "of the lease". It is camouflaged under a section one would expect dealt solely with compensation. Secondly, the clause only deals with deemed production and not

deemed production "in paying quantities". Both of these documents were drafted by Tribute or its predecessor and the *contra preferendum* rule must apply as a result. It may well be that it was the Lessee's intention to endeavour to extend the lease so long as these payments were made, but the failure to incorporate the necessary wording "in paying quantities" is fatal.

[22] There is no reason to expect that a party signing such an amending agreement would anticipate finding, buried in a sub-clause dealing with payment, the potential change of the duration and term of the lease. There is a difference between deemed production, and deemed production in paying quantities, as the latter is effectively impossible when the pool is empty. Exact wording would have to be used in order to make that deemed production clause effective.

[23] I am aware that the terms of gas contracts are to be given effect according to their plain and ordinary meaning unless to do so would result in an absurdity.³ I am further aware that there are a number of factors which favour strict interpretation of such leases, those factors being outlined in *Freyberg, supra*, at paras. 50-54.

[24] I conclude that the drafter of a document intending to extend a lease entered into for the purpose of producing gas in paying quantities cannot bury in a clause in an amending agreement, a term which alters the purpose of the lease completely, unless the wording is specific and precise. There was no longer profit to be made from extracting gas from the empty hole and that was the nature of the original agreement between the parties.

³ *Suncor Inc. v. Norcen International Ltd.* (1988), 89 A.R. 200 (Alta. Q.B.) at 224-226

[25] As indicated, if any ambiguity exists in interpreting the documents, it must be interpreted in favour of McKinley as both documents were drawn by Tribute.

[26] As a result, it is my view that upon cessation of production of gas in paying quantities, which the parties agree occurred in 2001, the lease automatically terminated.

[27] As indicated, relief against forfeiture is not a remedy available to Tribute. No default existed. McKinley did nothing that relief can be obtained against. Automatic termination took place and any subsequent actions by either party, irrespective of their intentions or knowledge as to the terms of the lease, can do nothing to revive the original contract or create a new one.

[28] Thus, I find that the original Oil and Gas Lease as amended by the Unit Operating Agreement terminated in 2001, and both documents should be vacated from title to the property.

The Gas Storage Lease Agreement

[29] This document, which was marked Exhibit #3 on the application, was a further document prepared by Tribute and was executed by both parties on or about September 24, 1998. This document purports to lease to Tribute certain of McKinley's land save and except the surface rights thereto and subject to the Oil and Gas Lease. This lease is also for a period of ten years.

[30] Schedule B to the said Gas Storage Lease Agreement provide that all provisions of the schedule shall be additional and shall be paramount with any of

the terms contained in the original agreement. One term of Schedule B states 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.

[31] No such application was made. The tenth anniversary date of this lease agreement has expired. As a result, it automatically terminated. That clause was paramount to any renewal clauses such as para. 3 of the Storage Gas Lease Agreement itself.

[32] Irrespective of whether or not either party knew about the term in the lease, and irrespective of what actions were taken subsequent to the lease, it again is my view that the automatic termination of the lease due to Tribute's failure to apply to the Ontario Energy Board means that no default can exist from which relief against forfeiture can be claimed. The fact that the application did not occur does not constitute any breach of any obligation on the part of McKinley. Tribute failed to make the application within the ten year time limit for whatever reason. As a result, the lease came to an end. No contractual or equitable remedy is available to revive the same.

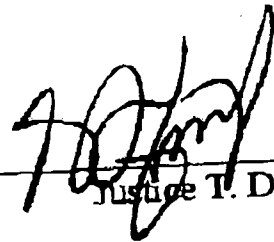
The Commercial Tenancies Act

[33] The *Commercial Tenancies Act* R.S.O. 1990 c.L-7 is not applicable in this case. What the Act does is provide the court with the jurisdiction to grant relief from forfeiture under a lease. No relief from forfeiture can be granted, either under

the Act or otherwise as a result of termination of the lease. Tribute can find no solace in paras. 19 or 20 of that Act.

Costs

[34] No submissions were made as to costs. In my view, this matter should be treated as one single application rather than two separate ones. Costs should be paid by Tribute to McKinley and if they cannot be settled, I will entertain written submissions by McKinley within 30 days of receipt of this judgment and by Tribute within 15 days thereafter.



Justice T. D. Little

DATE: June 29, 2009

COURT FILE NO: 60590

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TRIBUTE RESOURCES INC.

Applicant

- and -

MCKINLEY FARMS LTD.

Respondent

COURT FILE NO.: 60819

MCKINLEY FARMS LTD.

Applicant

- and -

TRIBUTE RESOURCES INC.

Respondent

REASONS FOR JUDGMENT

LITTLE, J.

Released: June 29, 2009