STATE OF VERMONT
ORANGE COUNTY, SS.

JOHN T. NAROWSKI	)	Orange Superior Court
	)	Docket No. 27-2-05 Oecv
v.	)	
	)	
DEPARTMENT OF FORESTS, PARKS, AND RECREATION	)	

DECISION AND ORDER

PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION

In this suit, Plaintiff seeks a declaration that he is not in violation of his lease of land in Newbury, and an injunction to prevent Defendant from interfering with his rights under the lease. Plaintiff leased forested land for ten years for the purpose of collecting and transporting sap for sugar-making.

The original owner/lessor of the premises died, leaving her ownership interest to the State of Vermont. The State claims that it has terminated the lease because the Plaintiff breached it, and that Plaintiff has no further right to maintain his pipeline system and sugaring operation on the property. Plaintiff alleges that there has been no breach of the lease and therefore no valid termination, and that he is entitled to continue to use the land under the terms of the lease.

On July 13, 2005, Plaintiff filed a motion for a preliminary injunction to restrain interference during the forthcoming sugaring season. Defendant filed an Opposition on August 22nd. An evidentiary hearing was held on December 9, 2005. Plaintiff John Narowski (hereinafter "Narowski") was present and represented by Attorney Paul S. Gillies. Commissioner Jonathan Wood of the Department of Forests, Parks, and Recreation of the State of Vermont (hereinafter "Department") was present, and the Department was represented by Assistant Attorney General Clifford Peterson.

Whether Plaintiff is entitled to a preliminary injunction turns on whether the evidence shows that he is likely to succeed at final hearing on his claim that he did not materially breach the lease, and whether he is entitled to an injunctive form of remedy at this preliminary stage.

Based on the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law, and grants the Plaintiff's request for a Preliminary Injunction.

Findings of Fact

Narowski holds a full-time job as an engineer for the State of Vermont. In 1987, he began to "dabble" in sugaring part-time, and in 1991, he proceeded to do so seriously. He tapped 500 trees on his own land, and also tapped 300 trees on land of his neighbors pursuant to an informal agreement with them. He was looking to expand, and in 2000 he learned of the availability of a sugarbush in Newbury owned by Enrita Carlson. The suggestion came from David Paganelli, the Orange County forester, an employee of the Department.

In September of 2000, after negotiating with Enrita Carlson's attorney, Narowski entered into a written lease with Carlson, entitled Sugarbush Lease Agreement, for a period of 10 years effective October 1, 2000, renewable for an additional 5 years at a price to be negotiated. The purpose of the lease is for tapping for sap and transporting it with tubing. The acreage was estimated at approximately 134 acres, but is now thought to be about 110 acres. Several paragraphs in Section II specify "Approved Tapping and Management Practices," and set limits on tapping practices to protect the landowner's retained interest in the trees. Other sections address Payment, Insurance and Indemnity, Renter's Liabilities, Landowner's Responsibilities, Renter's Responsibilities, Landowner's Right of Entry, and "Contract Contingencies." After the lease was executed, Narowski and Mr. Paganelli met and walked over a part of the property. During that conversation, Mr. Paganelli said that he did not believe that there were many veneer trees on the land. Tapping of specified veneer trees is prohibited under the lease.

Narowski borrowed $55,000 on a commercial bank loan, as well as an additional $35,000 from his children's college funds, and he executed a formal Promissory Note to his children with specific repayment terms. He hired an experienced, reputable, and responsible sap collection system contractor, Glenn Goodrich, to install tubing on approximately 43 acres, and he built a new sugarhouse. Goodrich installed tubing sufficient for 3600 taps. This consists of running tubing throughout the portion of the woods chosen, and installing "drops," or loops of tubing around the appropriately sized trees to which spouts will later be connected when taps are drilled.

Narowski informed Goodrich of the lease terms, and Goodrich took care to observe them: "No trees less than ten inches in diameter at breast height (DBH) shall be tapped. Only one taphole shall be made in trees ten to eighteen inches DBH. Two tapholes shall be made in trees greater than eighteen inches DBH. No more than two tapholes shall be made in any tree." In some cases, a drop might be installed in a tree a bit under 10" with the expectation of future growth, since the tubing system was intended to be used over several years. Mr. Goodrich and his coworkers have a great deal of experience in sizing up trees, and he used his experience to determine diameter size without using a precision measurement device.

In preparation for drilling taps in 2001, Narowski created for himself homemade calipers, a measuring device that he carried around his neck to measure whether a tree was 10" or 18" in diameter or not. He went to each tree where a drop was installed, measured it with his calipers, and drilled a tap if the tree was 10" in diameter, or two taps if it was 18" in diameter. He placed

3600 taps. In later years he replaced his homemade calipers with a different device he made for the same purpose, constructed from tubing. Starting in 2001, he ceased sugaring on his own land, and used only the Carlson land and the 300 trees on his neighbor's land. He markets his syrup by selling it for table use directly to stores and retail customers, as opposed to selling it in bulk to a packer.

In 2001, and during the preceding 2-3 years, there was a drought that affected the health of the trees, particularly in one section of 5 acres where the soils are shallow. In 2001, Enrita Carlson died. In her will, she left her ownership interest in the property to the State of Vermont, subject to the lease.

Late in 2001, Narowski ruptured a disc and was required to refrain from physical activity. During the 2002 sugaring season, Narowski tapped the same area as in 2001, in generally the same way and to the same extent, but he had the work done for him by others, as his injury prevented him from doing the physical work himself.

The Department began to consider what to do with the land for the future. A proposal was to transfer it to the Town of Newbury for a town forest. A committee was formed for the purpose of developing a plan for the property. Mr. Paganelli, as County Forester, was actively involved. Narowski was on the committee, as were Town officials of Newbury. In July of 2002, Mr. Paganelli prepared a first draft of a management plan. His recommendations included restricting tapping to those areas already tapped (43 out of the 110 total acres), and not tapping at all for a year or two in the drought-stressed area.

Section VI of the lease requires the landowner to "furnish the area described above," and provides that the landowner may use the premises "to the extent such use does not interfere with renter's use of same." This language suggests that the owner may not cut down trees that would otherwise be eligible for tapping under the lease. Section III specifies that pipeline was planned as the method of transporting sap. The installation of pipeline throughout the woods would hamper many uses, including harvesting wood products from veneer trees (excluded from tapping) or other trees on the land. Finally, Section VIII limits the landowner's right of entry on the premises to (a) entry "for the purpose of inspecting the premises and improvements thereon" and requires 24 hours advance notice, and (b) the right to show the property to prospective purchases or tenants. Thus, Narowski's use virtually precludes other uses by the owner, whose right of entry is specifically limited.

Despite these lease terms, recommendations in the first draft management plan included timber sales in 2003 on the part not yet tapped. At this time it began to be clear that there were competing objectives for both short and long term use of the land and its trees. Mr. Paganelli's proposed objectives included timber sales, even in the short term, whereas Narowski had invested a great deal in the use of the land for his sugaring business, and had shifted the primary focus of his sugaring operation away from his own land to the Carlson land. Since tapping trees depreciates the value of the logs that can eventually be harvested from the trees, there is an

inherent tension, if not potential conflict, between sugaring and timber sales. Among Mr. Paganelli's duties as Orange County Forester is management of municipal forests, including managing sales of timber from municipal forests.

Mr. Paganelli inspected the property, and was concerned about the health of the trees in the area in which the drought had the biggest impact. Mr. Paganelli asked Narowski to withhold from tapping in the drought-stricken area in 2003, without initially specifying the boundaries. Narowski agreed. In January of 2003, Narowski, Mr. Paganelli, and a third person went together on the land and flagged the area in which the drought had weakened the trees. The area was larger than Narowski had expected. Mr. Paganelli did not want Narowski to tap there. A few days later, there was a Selectboard meeting at which Narowski and Mr. Paganelli talked. Mr. Paganelli's comments to Narowski suggested to Narowski that he was being treated as standing in the way of the Department's plans for the property, and that his interests and rights as tenant were being marginalized. Narowski viewed Mr. Paganelli's request for a complete prohibition against tapping in the flagged area with suspicion because of his belief that his interest was being disregarded. He believed the State was attempting to assert ownership rights inconsistent with the lease. He was concerned that the flagged area was unduly large, and that some selective tapping could be done in it consistent with lease terms and with due regard for the effects of drought.

Two days later, a second draft of a forest management plan was issued by Mr. Paganelli. It stated that many veneer quality trees had been tapped. It called for cessation of all tapping in the drought-stressed area, and for timber sales throughout the property starting in 2003-2004 (despite Narowski's lease of the entire 110 acres for sugaring until at least 2010). It stated: "If the sugaring lease is discontinued for any reason, the sale area should include portions of the area presently tapped."

Narowski wrote a letter to the committee on February 1, 2003 in which he called attention to his lease and recommended that healthy development of a sugarbush be included in the management plan "for at least the term of the existing lease." He also objected to a complete prohibition of any tapping in the flagged area on the grounds that there were some healthy trees in that area, and he questioned whether conservative tapping in the area would have a noticeable effect on the trees, pointing out the considerable capital investment he had made and the potential compromise of a prohibition on his "ability to meet the terms of my commercial loan."

Meanwhile, Narowski tapped for the 2003 season. On February 18, 2003, Commissioner Jonathan Wood of the Department wrote to Narowski with a "warning" that tapping in the flagged area would be viewed by the Department as a violation of the lease, but when Narowski received the letter, he had already placed his taps for the 2003 season, including some tapping in the flagged area, although less than previously. Mr. Paganelli visited the land and saw that trees in the flagged area had been tapped. In June of 2003, Mr. Paganelli returned and counted 220 trees in the flagged area that had been tapped. He found that close to 50% of the tapped trees had more than 20% of dieback in the crowns, and that close to 20% of the trees had more than

of crown damage. Crown dieback of 5% indicates stress, and crown dieback of 75% indicates a very serious degree of stress. Mr. Paganelli concluded that Narowski was in violation of the lease.

On January 21, 2004, Narowski received from the Department a Notice of Breach, in which the Department stated that he had breached the lease in three ways: failure to follow conservative tapping practices, tapping undersized trees, and tapping veneer quality logs.

During the 2004 season, Narowski tapped the same 43 acre area that he had tapped during the previous three years, but he avoided tapping in the flagged area. The evidence shows that there was tapping in that area, but it was reduced compared to prior years. By January of 2005, Narowski had paid off the bank loan of $55,000, but he still owed his children. Payments on the loan to his children cost $7,000-8,000 per year.

On February 2, 2005, Narowski received from the Department a Notice of Termination of the lease, based on its claim that Narowski had not cured the breaches identified in its Notice of Breach of January 21, 2004. Further access to the property, except for the removal of tubing to be done under Department supervision, would be deemed a trespass by the Department. The Notice of Termination provided that Narowski had until February 1, 2006, to remove all of his equipment, including tubing, from the property, and that if he failed to do so it would be deemed abandoned and he would be charged the expenses for removal incurred by the Department.

His view was that he had not violated the lease, and he filed this suit to enjoin the Department from interfering with his use of the land. He has made all rental payments due under the lease in a timely manner.

He tapped in the 2005 season, again with reduced tapping in the flagged area. He had reduced the overall number of taps from 3,600 in 2001 to 2,700. In March of 2005, Mr. Paganelli again inspected the land, and sampled an area of 4-5 acres. He claims he found 30 undersized trees that had been tapped. He returned in November of 2005 and systematically sampled an area of 4.2 acres. Based on his measurements, applying his standards, he determined that 10.5% of the trees tapped in the 4.2 acre area were undersized. He concludes that by extrapolation, there must be hundreds of undersized trees on the 43 acres that have been tapped. He acknowledges that he does not want trees that have potential timber value to the Town of Newbury to be stressed or wounded by tapping. At no time in 2003 or 2005 did Mr. Paganelli give Narowski notice in advance of his visits to the land.

Narowski's total production in 2005, from both the Carlson land and his neighbors trees, was 715 gallons. 91% of the syrup he sold came from the Carlson trees. If he were to lose the ability to tap the Carlson trees in 2006, a substantial portion of his customers, who are stores and retail purchasers, would look elsewhere for syrup, and he would not be able to resume the following year with the same customer base. The product that he sells is based on flavor. Purchasing replacement sap on the market in order to maintain sales would not provide his

customers with the same product. It is likely that his customers would buy elsewhere, and he would not be able to have the same customer base return to him after a year out of the business.

Section IX (4) of the lease provides:

> Any disagreements between the landowner and the renter shall be referred to a board of three disinterested persons, one of whom shall be appointed by the landowner, one by the renter, and a third by the two thus appointed. The decision of these shall be considered binding by the parties to this lease. Any costs for such arbitration shall be shared equally between the two parties to this lease.

On June 8, 2005, this Court, Judge Amy Marie Davenport presiding, ruled that the arbitration clause was unenforceable as providing for binding arbitration as the exclusive procedure for resolving disagreements, as the terms of the lease do not comply with 12 V.S.A. §5652. Thus, the suit progressed, and the motion for a preliminary injunction was scheduled for hearing in order to obtain a preliminary decision prior to the 2006 sugaring season.

Narowski has not made a profit from his sugaring operation so far, but intends to generate a profit long-term from his substantial capital investment. He hopes to break even or begin to see profit during the 2006 season. He also wants to continue sugaring because he loves it.

If a preliminary injunction is not issued, under the Notice of Termination, Narowski will be obliged to remove all the pipeline he has installed for the collection of sap on the Carlson property. If, at the time of final hearing, it is determined that the Department's termination was wrongful and Narowski is entitled to enforce the lease, he will have to reinstall all the tubing in order to resume tapping on the property. There has been a cost increase since the original installation in 2001 from $7 per tap to $8.50 to $9.50 per tap. The cost to reinstall the system at this time would therefore be in the range of $23,000 to $25,650 for 2,700 taps, largely duplicating the original expense of $25,200 which was for 3,600 taps.

Narowski has not hired a forester to identify veneer trees. Section II (F) of the lease provides: "Trees containing veneer quality logs in the 1st eight feet of the bole will be identified, with the aid of a forester, and shall not be tapped." The Department introduced testimony that there are veneer trees on the land, and that some have been tapped, but the most specific evidence is that when Bruce Barnum inspected the property for the Department in November of 2005, long after the notice of termination, he found 1-2 veneer quality trees that had been tapped.

Since early 2004 when the Department formally claimed that Narowski was in breach of the lease, Narowski has learned a great deal more about professional practices for measuring DBH and identifying stressed trees as well as current thinking in management practices for sugarbush. He acknowledges the effect of the drought in the area with shallow soils, and has minimized tapping in that area since the struggle between himself and the Department erupted during the 2003 season.

There has been evolution over the past several years over what constitutes "conservative tapping practices" for sugarbush. While the overall goal is to promote the long-term health and vigor of the sugar maples, the techniques for implementation have been changing since the 1980's when it was discovered that practices up to that time were not sufficient to maintain vigorous tree health. The Department seeks to apply a very specific set of standards, and alleges that the lease reference to "conservative tapping practices" embodies this set of standards. Narowski claims that the meaning of the standard is defined by the specifications set forth in the lease itself (e.g., tree size, number of taps, size of taps), and that his practices are within the "approved tapping and management practices" described in the lease.

One clear change in tapping has been the development of the so-called "health spout." The traditional spout was 7/16" in diameter and was drilled 3" into the tree, creating a sizeable zone of dead wood surrounding the tap, which affects the value of logs for timber sales. The specifications in the lease specifically permit the use of a spout of that size. The new health spout is smaller (19/64") and protrudes into the tree to a much less extent (11/4"), and thus has a much less detrimental effect on the health of the trees tapped and the value of the trees as saw logs. While the lease permitted use of the old spout, all the taps Narowski has used are the newer, less harmful health spouts. With the use of the new spouts, some owners tap trees as small as 7 or 8 inches in diameter.

There are several disputes between the parties in applying the standards set forth in the lease under "approved tapping and management practices." They disagree about the tolerance level to be applied to the 10" and 18" standard: the Department says those are mandatory minimum diameters that should be strictly applied, whereas the testimony of Glenn Goodrich (who has been hired by the Department to work on another project) is that such standards are subject to a reasonable degree of tolerance related to working in the woods, as opposed to high precision work. The parties also disagree about the standards for measuring DBT (diameter at breast height) which is referenced in the lease as a standard, but not defined: the Department says that professionals interpret that as 4 ½ feet above ground level, measured on the uphill side. Narowski's evidence is that most people would use their own breast height as the standard. This became a disputed matter because of the Department's position that there was no tolerance for a tree tapped that was less than a full 10" (or 18" for two taps) in diameter.

They disagree about how to measure the diameter of a forked tree: some of the tapped trees that the Department claims were less than 10" in diameter were one of two forks of a forked tree; Narowski claims that both forks in such trees were legitimately treated as a single trunk because there was no air space between. They disagree about whether a dying tree should be tapped: the Department says no tree in poor condition should be tapped, whereas Narowski's evidence was that if a tree is clearly dying (as opposed to under stress but salvageable), tapping that tree is not inconsistent with conservative tapping practices.

Overall, Narowski's tapping on the 43 acres he has tapped so far, out of the total acreage of 110 he has leased, has been in substantial compliance with the lease terms. He used health

spouts that resulted in less impact on the trees than would have occurred if he had used the traditional spouts permitted under the lease. Leaving out the disputed forked trees, and accepting the Department's standards for measuring DBH, eight undersized trees on 43 acres were tapped: they measured 9.7", 9.7", 9.1", 9.5", 9.4", 17.5", 17.5", and 17.3"

A 5 acre area was identified in 2003 in which the trees were under stress due to drought and shallow soils. Narowski did tap in this area in 2003 when he believed that the Department's motive in trying to exclude him was improper and he therefore suspected the validity of the Department's allegations, but he later acknowledged that conservative tapping practices call for restraint in this area, and he has tapped selectively in this area since. In response to the concerns that have been raised, he has reduced the overall number of taps from 3600 in 2001 to 2700 in 2005.

Although the trees in the 5 acre area of concern are still in poor health, the original causes were natural ones (drought in an area of shallow soils), and it has not been shown that Narowski's tapping in that area is the cause of the current weakened condition of the trees. No evidence established that without tapping, the trees would now be in good health. He did tap two veneer trees. The effect of tapping a veneer tree is to destroy its value as a veneer tree, and a veneer tree has a higher value than a saw log.

Commissioner Wood, who has considerable experience himself in cruising forests to evaluate timber and forest health, particularly sugar maples, believes that the Carlson forest would be healthier if it were thinned. Thinning the forest is not consistent with Narowski's right to install tubing throughout the property.

The lease provides for damages as a remedy for violations, without the lease necessarily being terminated due to the existence of a damage claim. The lease also specifies procedural requirements that provide an opportunity to cure breaches before termination can occur, but it does not define standards for termination.

Conclusions of Law

The Court must evaluate the following four factors in considering Narowski's request for a preliminary injunction: (1) likelihood of success on the merits, (2) public policy, (3) effect on others, and (4) whether Narowski will suffer irreparable harm if a preliminary injunction is not issued. *In re J.O.*, 160 Vt. 250, 255 n.2 (1993). The dispute is focused on the first and fourth factors.

Likelihood of success on the merits

Narowski must show that he is likely to succeed on his claim that he is entitled to continue use of the property under the lease, despite the Department's notice purporting to terminate it. As a preliminary matter, there is no dispute about the original validity of the lease; the question is

whether the State has properly terminated it. This raises an interesting question of burden of proof: does Narowski have to show that he is likely to succeed in proving that the termination was wrongful, or does the Department have to prove that its termination of the lease was valid? Given the nature of the request (for preliminary injunctive relief) and the fact that the Department followed the procedural requirements set forth in the lease and clearly identified its grounds, the Court will hold Narowski to the burden of proving that he is likely to succeed on his claim that the Department's purported termination was wrongful.

The Department specified three grounds for termination: (1) failure to tap conservatively, (2) tapping of undersized trees, and (3) tapping veneer trees. Since the lease terms do not define any of these as grounds for termination of the lease, even though they may (if proved) be grounds for breach, common law must be applied. Both parties acknowledge that the Department may terminate the lease if there has been a material breach. Plaintiff's Proposed Findings and Conclusions, filed December 19, 2005, page 8; Defendant's Post-Hearing Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction, filed December 19, 2005, page 10.

The factors to consider in determining whether a breach is material or not are set forth in the Restatement of Contracts as follows:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts, §241.

The Court will address the Department's stated grounds for termination individually, and also consider whether taken together the conduct constitutes a material breach.

Tapping veneer trees. The facts show that only 1-2 tapped veneer trees have been specifically identified. The Department's evidence of the inspection in 2005 suggests that other veneer trees exist on the land, and may have been tapped. While tapping of veneer trees as specified in the lease is prohibited, the evidence does not establish that the tapped trees were in the prohibited class, nor how many prohibited trees were tapped. The Department's evidence does not support the conclusion that there has been a material breach on this ground.

The Department's interest as owner may be protected in several ways without the significant forfeiture to the tenant that would be the result of termination. First, damages can be determined and compensation paid, and the lease very explicitly provides for damage claims while the lease remains in effect. Furthermore, Section VIII of the lease, permitting the owner to inspect the property with notice, is also available as an accountability measure, enabling the owner to make inspections as a deterrent and for the purpose of ensuring compliance as well as monitoring for damage claims. In addition, the arbitration procedure can be invoked to require Narowski to undertake the marking of veneer trees that is required of him under the lease.[1] The facts show that he has not yet complied with this term, and that he was not entitled to rely on the off-hand generalized comment by Mr. Paganelli that there were not a lot of veneer trees on the Carlson property as a substitute for this obligation. Although he has not yet complied with the term, the fact that the extent of the violation of this term is that only a few veneer trees, if any when the lease specification is applied, have been affected over 5 years, and compensation can be paid in money damages, means that this breach is not material, and therefore not sufficient to support termination.

Tapping undersized trees. The second ground for termination relied on by the Department is that Narowski tapped undersized trees. The no-tolerance standard that the Department seeks to apply is unduly strict, and not supported the contract language. Not only was the contract entered into by an owner (Enrita Carlson) and part-time sugar producer (Narowski), neither of whom were professional foresters, but the contract does not specify that no tolerance in the measurement will be allowed. Furthermore, sugaring professionals support a reasonable tolerance in the application of measurements under circumstances of tapping in the woods. Out of 3600 or 2700 taps on 43 acres, only eight trees have been shown to be undersized, and the greatest deviation was less than 1". While it appears that there has been some tapping of undersized trees, most of the variations were within reasonable tolerance levels, and even those beyond reasonable tolerance levels do not demonstrate a degree of disregard for lease standards sufficient to constitute a material breach.

This is not a situation in which the lease was signed, and the tenant then entered the land and engaged in exploitation by routinely tapping undersized trees, leaving the owner with less than had been bargained for under the lease. In crafting the terms of the lease, the parties attempted to balance the tenant's 10-15 year goal of sap collection with the owner's long-term interest in maintaining value in forested lands, and they specified both standards and procedures for this purpose, providing for inspection, damage claims, a neutral dispute resolution process,

---

[1]While the Court has ruled that the terms of the lease establishing arbitration as binding in determining a remedy are not enforceable, that ruling does not vitiate the parties' agreement to use arbitration as a procedure for ongoing accountability under the lease and as a prerequisite to court action. The parties' agreement to arbitrate is consistent with the type of pretrial dispute resolution procedure called for under V.R.C.P. 16.3, and the Court will require non-binding arbitration as agreed upon in Section IX (4) of the lease as a prerequisite to a final hearing on the merits of any issue in dispute.

and an opportunity to cure breaches before termination could occur. These terms provide the owner and tenant with mechanisms to use on an ongoing basis to balance their legitimate, respective, and somewhat competing interests.

While the evidence shows that Narowski has overstepped a bit, he is primarily in compliance with reasonable tolerance levels, and his missteps do not rise to a level that materially upsets the balance. The Department has been understandably vigilant in jealously guarding its interests, but may have been quick to cry foul. For example, it imputes to Narowski all the effects of drought, even though the Department has not shown a causal link between Narowski's tapping and the extent of crown dieback in the drought-stricken area, which was affected by the drought over several years. Narowski has been responsible in responding to concerns about drought and reducing tapping. Assurance of compliance can be maximized for the future by inspection and non-binding arbitration. Compensation for past deviations can be made through payment of damages. Section IX (1) specifically provides for damage claims to be brought forth and resolved, and does not suggest that the fact that there is a damage claim constitutes a material breach. On the contrary, the terms suggest continuation of the lease even though damage claims may be valid.

Failure to tap conservatively. The third claim relied on by the Department for termination of the lease is failure to observe the provision that trees would be tapped "conservatively." "Conservative" is not defined by the lease except as to spout size and tree size, and as already stated, Narowski has been more than conservative in his use of spouts, and only somewhat out of compliance with respect to tree size even when measurement standards are strictly applied. Furthermore, the standards for conservative tapping have changed over the years, and not all professionals are in agreement as to the application of the concept on the Carlson land. The situation is further complicated by the effect of natural drought in an area of 4-5 acres where the soils are shallow. The Department claims that Narowski's "aggressive" tapping in this area is not conservative, given drought conditions; Narowski claims that he is not responsible for the effects of drought and that he has withdrawn tapping in the affected area except to a selective degree consistent with conservative practices.

Taking all these circumstances into account, they show that at most, trees in 5 acres out of 110, or 5 out of the 43 acres tapped so far, show significant signs of stress, but in an area affected by the natural causes of drought and shallow soils. In the meantime, Narowski stopped most tapping in the affected area; he measures the trees more carefully than he did the first two years; he has reduced the number of taps by 25%; and he has improved his ability to recognize stress and address its effects.

While the evidence supports the conclusion that there is a problematic area of 5 acres in which the trees have been affected by drought conditions, and while it further supports the conclusion that the Department is going to be monitoring the long-term health and vigor of the forest vigorously and would like to minimize the sugaring operation so that thinning can occur that would promote the success of future timber sales, the evidence does not support the

conclusion that Narowski has tapped the trees in disregard of their future health and vigor or his obligations under the lease. Narowski has substantially complied with the specific terms of the lease that define "approved tapping practices," and he has demonstrated an intent and willingness to bring any variant conduct into compliance. The Department is seeking to exact an unreasonable high standard of compliance in order to further its goals. Narowski's conduct, however, viewed overall, does not show that the Department had a valid basis to claim a material breach on the basis that Narowski had failed to tap conservatively, and Narowski would suffer a clear economic forfeiture from a premature termination of the lease.

Aggregate conduct. Even though none of the individual grounds supports a conclusion that Narowski materially breached the lease, it is important for the Court to also consider whether the overall effect of Narowski's conduct in each of the three areas does, in the aggregate, support the Department's claim of material breach. The evidence shows that Narowski failed to have veneer trees marked, tapped two veneer trees, has tapped 8 undersized trees as well as some others about which persons could reasonably disagree and tapped in the 5 acre drought area after having been asked to observe a voluntary prohibition.

On the other side of the scales are the fact that he employed a responsible contractor to install his tubing in the first place, developed measuring devices in order to attempt reasonable compliance with lease terms, has used only health spouts rather than the more destructive ones allowed under the lease, has reduced the number of taps from 3600 to 2700 as a result of the concerns raised, has tapped only a portion of the leased premises, has withheld most tapping for the last two years in the drought-stricken area, and has been willing to learn and modify his practices as a result of what he has learned once his practices were challenged by the Department.

All in all, the Court concludes that Narowski's conduct does not support a conclusion that he has materially breached the contract, and accordingly it does not justify the Department's attempt to terminate the lease. The Department's interest in the long-term health and vigor of the trees, and their value as veneer and saw logs, has been impaired, if at all, only slightly compared to what it would be if there had been absolutely no misstep at all by Narowski in any of these areas. The Department, despite being a subdivision of the State and representing the people of the State of Vermont, stands in the same shoes Enrita Carlson would occupy if she were still alive, and the same shoes that would be occupied by anyone else to whom she might have chosen to leave the property in her will. While the Department employs professional personnel and resources related to forestry management, and represents the interests of the people of Vermont, it has no greater right or grounds for claiming a material breach or invoking termination of the lease than Enrita Carlson herself or any individual person who succeeded to her ownership interest in the property. Applying the principles of the Restatement, there has not been a material breach of the lease. The owner's interest, defined by lease terms, has not been materially compromised, and the lease terms make adequate provision for compensation for incidents of noncompliance, as well as mechanisms for ensuring future compliance.

Thus, Narowski has met his burden to show that as of this date, he is likely to succeed on

the merits of his claim that he is entitled to enforce the lease, and that the Department's attempt to terminate the lease was without proper basis.

Public Policy; Effect on Others

It is a matter of public policy that leases and contracts should be enforced according to their terms in order to promote the orderly flow of commerce in our society. To the extent that others are affected, such as the citizens of the State of Vermont, their interests have been defined under the terms of the lease Enrita Carlson entered into, and their interests may not be enlarged beyond those bounds.

Irreparable Harm

The Department's position from the beginning has been that Narowski is not entitled to a preliminary injunction because he cannot show irreparable harm. The argument is that even if the Department is ultimately shown to have breached the lease, causing Narowski harm, it is all financial harm for which compensation can be paid in the form of money damages; therefore, he cannot show irreparable harm and is not entitled to preliminary injunctive relief.

Narowski relies on *Campbell Inns, Inc. v. Banholzer*, 148 Vt. 1 (1987) for the principle that prospective loss of a business constitutes irreparable harm. The evidence shows that Narowski has invested $90,000 in a business in which he did not expect to make a profit for the first few years because of the expense of the initial capital investment, but in which he expects to begin making a profit during the last 5-10 years of the overall 10-15 lease term; that he has developed a customer base of stores and individuals that is dependent on him being able to produce syrup from the Carlson property (90% of his total sap) as opposed to purchasing from a bulk supplier; that if he is prevented from sugaring in 2006 he is likely to lose this customer base, which will go elsewhere and not return even if he is later able to resume sugaring on the Carlson land; that if he is required to take down all his tubing, in order to resume sugaring he would need to reinstall it at higher cost which would impact the viability of his business; and that for these reasons, the loss of access to the Carlson land represents irreparable harm to the continuation of his sugaring business. Under *Campbell Inns, Inc. v. Banholzer*, Narowski has shown irreparable harm to the vitality of his business if he is prevented from using the Carlson land.

The Department argues that he already has a full-time job with full compensation, and that the threat to a supplementary part-time job cannot constitute irreparable harm. However, the history and tradition of sugaring in Vermont is as a part-time seasonal occupation, supplementary to other ways of making a living, usually farming in the past but not exclusively so in current times. It devalues sugaring to conclude that it is an enterprise with no value, either to the individuals who do it or to the Vermont economy and way of life as a whole, unless a person is engaged in it as a full-time, year-round means of support. Surely all Vermonters would suffer irreparable harm if all the people who sugar part-time were prevented from doing so in 2006, and

if all of us would suffer that irreparable harm, the same is true of each individual engaged in it.

Part of the loss would be to a part-time business, as Narowski has demonstrated economically, but Narowski's evidence also shows that he loves sugaring. Irreparable harm would befall Vermont–its identity and way of life–if part-time sugaring were reduced to an economic activity measured only in dollars and cents. How many Vermont sugar-makers would agree that they could be adequately compensated for the loss of a season, even if it were a year of financial loss, by being sent a check a year or two later? How many Vermonters would agree that it didn't matter that the local sugarhouse was dark and cold this year, instead of ablaze with light and steam and talk, because if it turned out that the reason was wrongful, the loss could be taken care of with a money payment? Narowski's evidence shows irreparable harm as measured in both economic and non-economic terms if there is wrongful interference with his part-time sugaring business.

The Department argues that Narowski has only a "license" for gathering sap that amounts to nothing more than a commercial contract under which he is guaranteed a supply of sap for his business. It further argues that Narowski cannot show irreparable harm on the grounds that damages are an adequate remedy for the loss of such a supply.

It is arguable that under common law, injunctive relief is only available to those with a possessory interest, which a licensee, by definition, does not have.[2] The Restatement (First) of Property defines a "license" as "an interest in land *in the possession of another*" (with certain other characteristics). *Restatement (First) of Property,* § 512. (Emphasis added.) "As a general matter, equity has traditionally concerned itself with the protection of property and the enforcement or protection of *property* rights." 42 Am. Jur. 2d § 49. (Emphasis added.) Injunctive relief was available in Vermont to a *tenant* whose quiet enjoyment of leased premises was being substantially interfered with by the landlord. *Rosenberg v. Taft*, 94 Vt. 458 (1920) (emphasis added).

Preliminary relief has traditionally been available to tenants who hold a possessory interest. The basis is that threatened continuous trespasses against a possessor of real estate would impair the possessor's interest on an ongoing basis. "A *tenant* may enjoin threatened continuous or repeated trespasses on the part of the landlord, and a preliminary mandatory injunction has often been granted a lessee to compel the lessor to restore a *tenant* to possession of the premises, upon allegations of wrongful deprivation by the lessor." 49 Am. Jur. 2d § 554 (emphasis added). The corollary is that if a claimant is merely a licensee, and not a tenant, equitable relief is not available.

---

[2]The issue is *preliminary* injunctive relief, since both parties seek declaratory relief at final hearing, which is equivalent to an injunction against the losing party. "The declaration may be either affirmative or negative in form and effect." 12 V.S.A. §§4711 (Declaratory Judgments Act).

The terms of the agreement of the parties provide the basis for determining the nature of Narowski's interest. Enrita Carlson and Narowski entered into a "Sugarbush Lease Agreement," which was called a lease, structured as a lease, and uses language and terms used for leases of real estate. The owner is obligated to "furnish" the entire premises to the tenant, including all means of access. The owner's right of entry is limited to two circumstances: inspection upon 24 hours notice, and to show the property to prospective purchasers or tenants. It is true that the owner reserved the right to use the property to the extent that such use does not interfere with the tenant's collection and transport of sap, but such right is severely circumscribed where the property is sugarbush and the tenant has the right to tap all the sugar maples and lace the entire property, which is forested, with a pipeline collection system. The owner's limited right of entry is similar to that of landlords in residential leases, and is so limited that it makes other uses meaningless.

The tenant's right of full access to the premises and the limitations on the owner's right of entry define the tenant's interest as a possessory one, subject to the terms set forth in the lease to preserve the trees for the future benefit of the owner. The parties' agreement is a lease in both form and substance. The Department's argument that Narowski's interest is a license only, not subject to preliminary equity protection, is unpersuasive.

Narowski was the "last peaceable possessor" of the Carlson premises at the time the Department declared the lease terminated, and the last peaceable possessor is commonly entitled to seek injunctive relief to protect the status quo while competing interests in real property are addressed through the judicial process. Dan B. Dobbs, Handbook on the Law of Remedies 352, 365 (1975).

Given the nature of the dispute between the parties, i.e. whether the lease has or has not been lawfully terminated and therefore whether or not Narowski is entitled to enforce his rights as tenant under the lease, and given the extraordinary cost to Narowski of having to take down his pipeline system and reinstall it later after potentially only one sugaring season if he prevails, preliminary injunctive relief is available to maintain the status quo while the dispute is resolved peaceably through judicial process under the Declaratory Judgments Act.

Summary

For the reasons stated above, Narowski has shown under all factors that he is entitled to a preliminary injunction enjoining the Department from interfering with his rights under the lease of the Carlson property until a final hearing can be held. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Pending a final hearing and decision on the merits in this case, the Department is enjoined from interfering with Narowski's interests under the lease of the former Carlson property, and its Notice of Termination shall be of no force or effect pending final judgment in

this matter,

2. Prior to a final hearing on the merits, the parties are required to engage in the process described in Section IX (4) of the lease with respect to all issues in lieu of the dispute resolution process that would otherwise be required under V.R.C.P. 16.3, and

3. By March 20, 2006, the parties shall submit a stipulated pretrial scheduling order.

Dated at Chelsea this 25th day of January, 2006.

FILED
JAN 2 5 2006
ORANGE SUPERIOR COURT

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Judge