

DATE: 2008/02/06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Harrowand S.L. v. DeWind Turbines Ltd. formerly known as EU Energy PLC and DeWind Inc. also known as EU Energy Inc.

BEFORE: MASTER GRAHAM

HEARD: October 23, 2008

COUNSEL: W. Ross MacDougall for the defendants (moving party)

J. Gardner Hodder for the plaintiff

REASONS FOR DECISION

(Defendants' motion to stay the action)

[1] The action in which this motion is brought arises out of a business venture relating to the marketing of wind turbines in Canada. The plaintiff Harrowand S.L. ("Harrowand") is a company incorporated in Andorra. The defendant DeWind Turbines Ltd. ("DeWind UK") is a company incorporated in the United Kingdom. The defendants DeWind, Inc. and EU Energy Inc. ("DeWind Nevada") are companies incorporated in Nevada.

[2] The substance of Harrowand's claim is as follows:

- On February 20, 2006, it and the defendants entered into a letter of intent to enter into a sales management agreement giving it the exclusive right to market wind turbines produced by the defendants to Canadian customers. The letter of intent constituted a binding contract between the parties.

- In reliance on the letter of intent, Harrowand's representatives began targeting Canadian customers for sales of the defendants' wind turbines and were successful in identifying "highly motivated Canadian customers" whom they presented to the defendants.

- Harrowand alleges that the defendants failed to follow through with the customers that it had located for them. In addition, on June 7, 2007, the defendants terminated their business relationship with Harrowand.

- Harrowand claims damages arising out of the defendants' breach of the letter of intent.

[3] The defendants are foreign corporations and Harrowand, in serving them outside Ontario, relies on the following subsections of rule 17.02 of Ontario's Rules of Civil Procedure:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, . . .

(f) in respect of a contract where,

(i) the contract was made in Ontario, . . .

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario; . . .

(h) in respect of damage sustained in Ontario arising from tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed; . . .

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

(p) against a person ordinarily resident or carrying on business in Ontario; . . .

[4] The defendants now move for an order setting aside service of the statement of claim outside Ontario and staying the action. The grounds for the motion are that the claims made in the proceeding do not fall within the provisions of rule 17.02, the subject matter of the action does not have any real or substantial connection to Ontario and Ontario is not the convenient or appropriate forum for the determination of the dispute. The defendants submit that the matter should properly be tried in either California or England.

Evidence relied on by the defendants

[5] The defendants rely on the affidavit of Andrew Lockhart, sworn March 11, 2008. Lockhart is the executive vice president, marketing, of DeWind Nevada, and deposes as follows:

1. DeWind Nevada's head office is located in Irvine, California. DeWind Turbines' main office is located in Milton Keynes, United Kingdom. Neither company has offices or employees anywhere in Canada.

2. Corporate searches for Ontario and federal corporations reveal no record of any company or business using the name "Harrowand".

3. The letter of intent dated February 20, 2006 that is the basis for Harrowand's claims was sent from DeWind Nevada's office in Texas to Harrowand's office in Andorra. The parties to the letter of intent are the EU companies (now the DeWind companies) and Harrowand. No Ontario entity is a party.

4. Michael Porter, who is listed in the letter of intent as the chairman and CEO of the EU/DeWind companies, resides in Spain. Lockhart, who signed the letter of intent on behalf of DeWind Nevada, resides in Texas.
5. The letter of intent refers to EU Energy Canada Inc.. Lockhart has been advised by counsel that EU Canada was incorporated on October 24, 2005 and then voluntarily dissolved on September 27, 2006.
6. Although not disclosed in the statement of claim, Harrowand and EU Energy (now DeWind UK) entered into a letter agreement dated March 30, 2006, shortly after the letter of intent was signed. The letter agreement was sent from EU Energy's address in the UK to Harrowand's address in Andorra. It is signed by Steve Bircher, who resides in the UK and who is described as the Chief Operating Officer of EU Energy, and Michael Spencer on behalf of Harrowand.
7. The letter agreement refers to the incorporation of EU Energy Canada Inc. by Harrowand and states that Harrowand agrees that it shall cause the full dissolution of the "Canadian Entity" no later than April 15, 2006.
8. The letter agreement also stipulates an amount payable by EU Energy to Michael Spencer of Harrowand and Harrowand acknowledges that this payment "constitutes full payment for Harrowand's provision of services to EU Energy". The letter agreement further provides that Harrowand releases EU Energy from claims based on the provision of services arising prior to the effective date of the letter agreement.
9. The letter agreement provides that "the laws of England will govern this Letter Agreement without reference to conflicts of law principles".
10. Michael McIntosh, described in paragraph 16 of the statement of claim as in house counsel for the defendants, resides in Colorado and California.
11. On June 21, 2007, Michael Spencer of Harrowand sent a letter to Benton Wilcoxon, the chairman and CEO of Composite Technology Corporation, objecting to the unilateral termination by DeWind of the contractual relationship between the parties. Composite Technology Corporation is the parent company of all of the defendants. This letter was sent from Andorra and addressed to Wilcoxon in California.
12. Payments from DeWind Nevada to Harrowand between January 2006 and February 2007 were made by wire transfer from DeWind's Nevada bank accounts in California and Texas to Harrowand's account in Andorra.
13. The defendants' defence would be based on non-performance by Harrowand. The key witnesses for the defence would be Lockhart (resident in Texas), Steve Bircher (resident in the UK) and Michael Porter (resident in Spain).

[6] In the balance of his affidavit, Lockhart summarizes the defendants' position that Ontario is not the proper forum for the hearing of the action as follows:

- The contract between the plaintiff and defendants was made in either England or Andorra. Payments were made to an Andorran account.
- The alleged damages were suffered by an Andorran entity.
- The plaintiff is a foreign entity and the defendants have no connection to Ontario.
- Most of the key witnesses reside outside Ontario.

[7] Lockhart further deposes, although these statements are not evidence, that the balance of convenience does not favour Ontario and there is no real and substantial connection between Ontario and the action. He further states that the defendants would not object on *forum non conveniens* grounds to the jurisdiction of the courts of the United Kingdom or California.

[8] The defendants also rely on the following evidence from the affidavits and cross-examinations of Stephen CameronSmith and Michael Spencer, both of whom swore affidavits on behalf of the plaintiff:

1. The sole shareholders, officers and directors of Harrowand are Michael Spencer and his wife. Spencer has filed income tax returns as an Ontario resident for approximately the past three years. He is the lessee under an apartment lease in Toronto but in October, 2007, the apartment was taken over by a friend who now pays all the bills. Spencer has a work and residency permit and personal bank accounts in Andorra. He has an apartment in Mexico and a house in Spain, where his wife resides.
2. Money paid by the defendants to the plaintiff was shared equally between Spencer and CameronSmith and went from the plaintiff's bank account in Andorra to other Andorran accounts. No Canadian tax was paid on the money.
3. The letter of intent was drafted by EU Energy PLC representatives in England.
4. The letter agreement was presented to Spencer and signed by him in Germany.
5. Michael Porter (CEO of the EU/DeWind companies) considered EU Energy Canada Inc. to be unnecessary. As indicated in Lockhart's affidavit, the letter agreement set a deadline of April 20, 2006 for this company to be dissolved.
6. EU Canada was actually dissolved in September, 2006. It was owned 100% by Spencer and Cameron-Smith and none of the defendants had any ownership interest in it.
7. The defendants' witnesses reside outside of Ontario.
8. The plaintiff's witnesses would likely include CameronSmith, who resides in Ontario, and Spencer, who "divides his time among many places". CameronSmith's affidavit lists 19 companies as potential customers of which 17 are in Ontario. Of the 17 potential Ontario

customers, one, Anemos Energy, was dealt with exclusively by the defendants and another was acquired by a Texas company.

9. Of a list of 103 companies that the plaintiff contacted, and which CameronSmith indicates could support the plaintiff's claim that it carried out its obligations under the letter of intent, approximately half are located outside Ontario.

10. The plaintiff has presented no evidence that witnesses called as potential customers procured by the plaintiff for the defendants would be unwilling or unable to testify outside of Ontario.

[9] In addition the defendants submit that the effect of the letter agreement will require the testimony of English solicitors.

Evidence relied on by the plaintiff

[10] As indicated above, the plaintiff has delivered affidavits of Stephen CameronSmith and Michael Spencer.

[11] CameronSmith, whose affidavit contains most of the evidence on which the plaintiff relies, describes himself as "a representative of the plaintiff corporation". His evidence is as follows:

1. Harrowand was incorporated in Andorra in 1995. The company continued a partnership arrangement between CameronSmith and Spencer. Harrowand has no business other than the contractual relationship described in the statement of claim.

2. CameronSmith resides in Toronto. Spencer is a Canadian resident but spends much of his time in Andorra, Mexico and Spain. Spencer resided in Toronto during most of the material events connected with the action, including the negotiation of the letter of intent.

3. During a meeting in Spain in 2005 [stated by Spencer in his affidavit to have been a telephone conversation], Michael Porter of EU Energy plc, now DeWind UK, told Spencer of his plans to move the business of EU Energy to North America and asked Spencer if he would handle business development and distribution into Canada on an exclusive basis. Spencer agreed.

4. Porter also informed Spencer that he had identified Lockhart as an appropriate candidate to develop the DeWind turbine business in the United States. Porter and Lockhart met with CameronSmith and Spencer "several times", including on January 17, 2005 in New York (without Lockhart) and on October 13 and November 1, 2005 at the Royal Canadian Yacht Club in Toronto, to discuss the new business venture. CameronSmith and Spencer learned that the first substantial business lead in North America concerned a company in New Brunswick and Porter and Lockhart said that they wanted to pursue that opportunity.

5. The discussions among Porter, Lockhart, Spencer and CameronSmith led to the drafting of the February 20, 2006 letter of intent that is the subject of the action. The most important meetings leading to the drafting and execution of the letter of intent were those at the Royal Canadian Yacht Club in Toronto. There were further discussions by telephone involving CameronSmith

and Spencer in Toronto, Porter in England and Lockhart in Texas. The final form of the letter of intent was drafted by EU Energy plc representatives in England.

6. CameronSmith has no reason to dispute Lockhart's assertion that he signed the letter of intent on behalf of "the defendant EU Nevada" (i.e. the defendant DeWind Inc.) in Texas. Both Spencer and CameronSmith received the letter of intent by email sent by Lockhart, presumably from Texas. According to Spencer, Harrowand's office in Andorra received nothing.

7. CameronSmith refers to the letter agreement of March 30, 2006, (referred to in the summary of the Lockhart affidavit at paragraph [5] 6.-9. above). CameronSmith deposes that the reference in the letter agreement to a payment of 12,400 pounds as full and final payment for Harrowand's services to EU is in respect of Harrowand's services to EU Energy "arising prior to the Effective Date of the Letter Agreement".

8. CameronSmith acknowledges that the letter agreement was signed by Porter's solicitor Steve Bircher on behalf of EU Energy. The letter agreement addressed an issue concerning the incorporation in Ontario of EU Energy Canada Inc. by CameronSmith and Spencer and specified a one-time payment to Harrowand for services rendered up to the date of the agreement for consulting and provided compensation for the costs of incorporating the Canadian corporation EU Energy Canada Inc.. Porter had stated the view that the Canadian corporation had become unnecessary and he no longer wanted it to be involved in the development of the business opportunity. Porter told Spencer that he had changed his mind about how he wanted to develop the business in North America and specifically, had decided that he preferred to deal with Lockhart and for Lockhart to deal with Spencer and CameronSmith in Canada. He was also concerned about the requirement that an Ontario corporation must have a director resident in Ontario.

9. CameronSmith states that the action is concerned exclusively with the letter of intent. He highlights term 3) of the letter of intent as follows: "HSL [i.e. Harrowand] will be given the exclusive right to market the Products and solicit orders for the Products to customers located in Canada or to customers located outside Canada but with an office in Canada from where a deal originates". The only "Products" specifically identified are DeWind D8.2 Wind Turbine Generators.

10. CameronSmith states that the performance of the letter of intent took place almost entirely in Ontario. CameronSmith's home office at 45 Oriole Gardens, Toronto became the Canadian office for EU Energy. EU Energy issued a brochure to market DeWind products, showing CameronSmith's Toronto office as the Canadian address for EU Energy Canada Inc. CameronSmith answered his telephone "EU Energy".

11. In its financial statement for the year ending March 31, 2006, EU Energy plc showed 100% ownership of EU Energy Canada.

12. At the Canwea Wind conference, which concerns itself exclusively with the Canadian wind turbine market, held in Quebec City in October 2007, DeWind Inc. had a substantial presence engaged in marketing its turbines to potential Canadian customers. CameronSmith has been

informed by Canwea's conference co-ordinator that DeWind's parent company reserved two booths for the conference scheduled for October, 2008 in Vancouver.

13. The defendants deny Harrowand's allegation in paragraphs 13 and 14 of the statement of claim that Harrowand was successful in identifying highly motivated Canadian customers and that Harrowand's damages resulted from the defendants' failure to follow through with these customers, failure to provide them with technical information and inability to honour commitments for the product as advertised. To prove its allegations, Harrowand will be obliged to compel the attendance at trial of the customers referred to in paragraphs 13 and 14 of the statement of claim, 17 of which are in Ontario, one of which is in Manitoba and one of which is in Colorado. One of the customers, Anemos Energy Corporation of Hamilton, Ontario signed a six year contract with EU Energy plc, as reflected in a press release dated March 29, 2006.

14. In response to the statement in the Lockhart affidavit that the defendants would not object to the action proceeding in the United Kingdom or California, CameronSmith states that trial in those jurisdictions would give the defendants an unfair juridical advantage in that it would be logistically difficult for dozens of Ontario turbine customers to be compelled to testify in other jurisdictions. [Although the location of witnesses is a factor to be considered in resolving the *forum non conveniens* issue, it would not amount to creating a juridical advantage or disadvantage.]

15. No event connected with the performance of the subject contract, being the letter of intent, took place in either the United Kingdom or California. Performance of the contract took place primarily in Ontario and Canada, with the exception of an occasional trip to Germany. During the course of the contract, Lockhart was primarily in Texas and Porter was variously in England, Germany, Spain and the U.S..

16. CameronSmith comments that the Lockhart affidavit describes no difficulty in compelling the attendance of the witnesses Lockhart (from Texas), Bircher (from England) and Porter (from Spain) to testify in Ontario.

[12] Michael Spencer, whose affidavit essentially confirms the contents of the CameronSmith affidavit, describes himself as being "of the city of Marbella, in the Country of Spain" and "a founding principal of the plaintiff corporation".

Applicable statutory provision and rule

[13] The court's jurisdiction to stay an action is found in s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as follows:

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[14] The defendants also move under rule 17.06 of the Rules of Civil Procedure:

17.06 (1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

(a) for an order setting aside the service and any order that authorized the service; or

(b) for an order staying the proceeding.

(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

(a) service outside Ontario is not authorized by these rules;

(b) an order granting leave to serve outside Ontario should be set aside; or

(c) Ontario is not a convenient forum for the hearing of the proceeding.

(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.

Case law

[15] The applicable case law is as follows:

1. Where service has been effected *ex juris*, and where the defendant challenges the plaintiff's choice of forum, the burden of establishing the jurisdiction of the court is on the plaintiff. (*Frymer v. Brettschneider* 1994 CanLII 1685 (ON C.A.), (1994), 19 O.R. (3d) 60 (C.A.))

2. Where the defendant challenges the jurisdiction of the Ontario court, the court must determine whether the action has a real and substantial connection to Ontario. If there is no real and substantial connection to Ontario, the action must be stayed. The factors to be considered in determining whether there is a real and substantial connection to Ontario are as follows:

(a) The connection between the plaintiff's claim and Ontario;

(b) The connection between the forum and the defendant;

(c) Unfairness to the defendant in the Ontario Court assuming jurisdiction;

(d) Unfairness to the plaintiff in the Ontario Court not assuming jurisdiction;

(e) The involvement of other parties to the suit;

(f) The Ontario Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

(g) Whether the case is interprovincial or international in nature;

(h) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

(*Muscutt v. Courcelles* 2002 CanLII 44957 (ON C.A.), (2002), 60 O.R. (3d) 20 (C.A.) at pp. 45-53)

No single one of these factors is determinative and all relevant factors should be considered and weighed together. (*M. J. Jones Inc. v. Kingsway General Insurance Co.*, [2004] O.J. No. 1087 (C.A.)) "The real and substantial connection test requires only *a* real and substantial connection, not *the most* real and substantial connection." (*Muscutt, supra*)

3. Where more than one forum is capable of assuming jurisdiction, the most appropriate forum is determined by applying the *forum non conveniens* doctrine, which allows a court to decline to exercise its jurisdiction on the ground that there is another forum more appropriate to entertain the action. The following factors are to be considered:

(a) The location of the majority of the parties;

(b) The location of key witnesses and evidence;

© Contractual provisions that specify applicable law or accord jurisdiction;

(d) The avoidance of a multiplicity of proceedings;

(e) The applicable law and its weight in comparison to the factual questions to be decided;

(f) Geographical factors suggesting the natural forum;

(g) Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

(*Muscutt, supra*, at pp. 34-35)

4. "The overriding consideration which must guide the Court in exercising its discretion by refusing to grant [an application to stay an action on the ground of *forum non conveniens*] . . . must be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice." (*Anchem Products Inc. v. British Columbia Workers' Compensation Board*) 1993 CanLII 124 (S.C.C.), (1993), 102 D.L.R. (4th) 96 (S.C.C.)

5. The existence of a more appropriate forum must be **clearly** established to displace the forum selected by the plaintiff. (*Anchem, supra*)

6. The "real and substantial connection" test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where there is a more convenient or appropriate forum elsewhere. (*Tolofson v. Jensen*, 1994 CanLII 44 (S.C.C.), [1994] 3 S.C.R. 1022 at 1049)

Issues

[16] The first issue on the motion is whether the action has a real and substantial connection to Ontario. If the action has no real and substantial connection, it should be stayed. If the action does have a real and substantial connection to Ontario, the second issue is whether, based on the application of the *forum non conveniens* doctrine, there is another forum for the action more appropriate than Ontario.

Analysis

[17] The issue of whether this action has a real and substantial connection to Ontario requires a consideration of the factors enumerated in *Muscutt v. Courcelles*, *supra*, as follows:

(a) The connection between the plaintiff's claim and Ontario

Pursuant to the letter of intent, the plaintiff Harrowand was to market and solicit orders for the defendants' "Products", which specifically include DeWind D8.2 Wind Turbine Generators, "to customers located in Canada or to customers located outside Canada but with an office in Canada from where a deal originates". On Harrowand's evidence, 17 of 19 potential customers are in Ontario. On the evidence relied upon by the defendants, approximately half of the 103 companies that the plaintiff contacted and which could support the plaintiff's claim are located outside Ontario, which means that approximately half of these companies are in Ontario. The plaintiff claims that notwithstanding its efforts to locate Canadian customers for the defendants' products, the defendants terminated their business relationship, in breach of the letter of intent. The plaintiff's claim therefore arises from a contract under which the parties contemplated that the plaintiff would perform its obligations primarily in Canada.

(b) The connection between the forum and the defendants

None of the defendants are resident in Ontario or elsewhere in Canada. However, the agreement between the plaintiff and defendants that is the subject of the lawsuit was that the plaintiff would represent the defendants in respect of the marketing and eventual sale of the defendants' products in Canada. The last words of the letter of intent, the final version of which was drafted by EU Energy plc representatives, are: "We look forward to working with you on making the Canadian market a successful venture for both companies." The connection between the forum and the defendants is therefore that the defendants agreed in the letter of intent to have the plaintiff market their products in Canada, including Ontario.

© Unfairness to the defendants in the Ontario Court assuming jurisdiction

Notwithstanding its lack of a physical presence in Ontario, EU Energy PLC, the predecessor company to the defendant DeWind Turbines Ltd., owns 100% of a New Brunswick company called EU Energy Canada Ltd.. Although none of the defendants are in Ontario, they did agree, through the letter of intent, to participate in a business venture that involved the plaintiffs marketing their products in Canada, including Ontario. Accordingly, the defendants were essentially carrying on business in Canada through the New Brunswick company and through Harrowand's marketing of their products in Canada pursuant to the letter of intent. It is not unfair to require the defendants to litigate an action in a jurisdiction in which they have chosen to carry on business.

(d) Unfairness to the plaintiff in the Ontario Court not assuming jurisdiction

The plaintiff is a party to an agreement whereby it was to market the defendants' products in Canada, including Ontario. The plaintiff has provided evidence that most of its witnesses with respect to its efforts to market the defendants' products in accordance with the letter of intent are in Ontario. Even on the defendants' evidence, half of the plaintiff's witnesses on this issue are in Ontario. It would be unfair to the plaintiff to prevent it from litigating the dispute that has arisen in relation to the letter of intent other than in the jurisdiction in which it was performing its obligations and in which the majority of its witnesses are located.

(e) The involvement of other parties to the suit

This action involves exclusively foreign defendants, and there are therefore no "other parties" with a connection to Ontario that might influence the court's decision as to whether to assume jurisdiction over the whole action.

(f) The Ontario Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

The issue is whether the jurisdiction that the plaintiff is asking the Court to exercise in this case would be recognized by this Court in the event that a foreign court exercised jurisdiction over an Ontario resident in a similar case. The defendants did not argue that the Ontario Court would not recognize the judgment of a foreign court that exercised jurisdiction over an Ontario resident in a similar case, so this factor is not applicable.

(g) Whether the case is interprovincial or international in nature

This case involves activity in Ontario and to a lesser extent across Canada and in other countries. However, given that the plaintiff, an Andorra company, is suing corporations from the United Kingdom and the U.S., the case is essentially international in nature.

(h) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

There is no evidence that either the State of California or the United Kingdom would or would not assume jurisdiction in a similar case.

[18] The Ontario courts will assume jurisdiction over a case with a real and substantial connection to Ontario. Further, to reiterate the words of Sharpe J.A. in *Muscutt, supra*, it is sufficient for the connection between the claim and Ontario to be *a* real and substantial connection; it is not necessary for the connection to be *the most* real and substantial connection.

[19] The principal connection that this action has to Ontario is that, as contemplated by the parties in their letter of intent, the plaintiff was performing its obligations to market the defendants' products in Ontario. Further, by engaging the plaintiff to market its products in Ontario, the defendants were carrying on business in Ontario. A claim that arises from the performance of the plaintiff's contractual obligations in Ontario, as contemplated by the parties to the contract, and also arises from the defendants carrying on business in Ontario, does have a real and substantial connection to Ontario.

[20] As I have concluded that this action does have a real and substantial connection to Ontario, it is necessary to consider whether the action should be stayed on the basis of the *forum non conveniens* doctrine.

Forum non conveniens

[21] The defendants submit that even if the subject matter of the action has a real and substantial connection to Ontario, it should be stayed on the basis that Ontario is *forum non conveniens*.

[22] The factors to be considered in determining whether a jurisdiction other than Ontario is a more appropriate forum are as follows (from *Muscutt*, reviewed at paragraph [15] *supra*):

(a) The location of the majority of the parties

The plaintiff Harrowand is incorporated in Andorra, the defendant DeWind Turbines Ltd. is incorporated in the United Kingdom and the defendants DeWind Inc. and EU Energy Inc. are incorporated in Nevada, U.S.A. Accordingly, none of the parties, including the plaintiff, are actually resident in Ontario. The location of the parties does not favour Ontario but also does not particularly favour any other single jurisdiction as the forum for the litigation in question because the parties are all in different locations.

(b) The location of key witnesses and evidence

The bulk of the plaintiff's witnesses, including Stephen CameronSmith and the prospective purchasers of the defendants' products, are in Ontario. The plaintiff's evidence is that 17 of 19 prospective purchasers are in Ontario and that representatives of all of these prospective purchasers will be called to testify with respect to their interest in purchasing the defendants' products. Using the evidence relied upon by the defendants, representatives of about half of 103 companies contacted by the plaintiff are in Ontario. There is no evidence that there is any larger percentage of these companies in any other jurisdiction. In any event, CameronSmith's evidence is that the plaintiff is not relying on evidence from these 103 companies because although the plaintiff had discussions with them, "they weren't far enough along for our claim; they weren't in our claim amount".

In addition to CameronSmith and the 17 prospective customers, Michael Spencer would be a witness for the plaintiff. Although Spencer describes himself as residing in Spain, he is obviously prepared to come to Ontario for purposes of the litigation.

The defendants' evidence is that their witnesses will be Andrew Lockhart, resident in Texas, Steve Bircher, resident in England and Michael Porter, resident in Spain.

There appear to be 18 witnesses in Ontario, two witnesses in Spain (which no one proposes as a possible alternative forum), one witness in England and one witness in Texas. This factor therefore favours Ontario.

© Contractual provisions that specify applicable law or accord jurisdiction

The letter of intent contains no choice of forum clause or any term specifying the applicable law to be applied in the event of a dispute relating to its performance. Although the letter agreement referred to by the defendants does provide that it shall be governed by the laws of England, it is the letter of intent and not the letter agreement that is the subject of the statement of claim. This factor does not favour any particular jurisdiction.

(d) The avoidance of a multiplicity of proceedings

There is no evidence of any other proceedings commenced or contemplated, so the avoidance of a multiplicity of proceedings is not a factor.

(e) The applicable law and its weight in comparison to the factual questions to be decided

The law to be applied to the letter of intent would either be the law of England, where it was drafted, or the law of Ontario where it was to be performed. However, there is no evidence that the law of England is any different from the law of Ontario on the issue, so this factor is neutral.

(f) Geographical factors suggesting the natural forum

This part of the test is largely a duplication of other factors already taken into account. (*Visram v. Chandarana*, [2008] O.J. No. 1407 (Div. Ct.) at ¶51) At the risk of repeating evidence that has already been considered elsewhere, the various geographical factors are as follows:

1. The corporate plaintiff is from Andorra, and the principal of that corporation (Spencer) describes himself as residing in Spain.
2. The corporate defendants are from England and the State of Nevada. The principal of the English corporation (Porter) resides in Spain and the principal of the Nevada corporations (Lockhart) resides in Texas.
3. The subject of the action is a letter of intent drafted in England setting out obligations to be performed by the plaintiff in Canada.

4. In addition to the corporate principals, there are witnesses in England (Bircher and possibly an English solicitor to testify as to English law) and Ontario (CameronSmith and as many as 17 potential customers procured by the plaintiff for the defendants).

A re-visiting of the location of the parties and witnesses indicates that there is no one factor that points to any particular one of the locations with which the action has a connection as the natural forum for the action. The geographical factors as a whole are therefore neutral.

(g) Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court

There is no evidence of any juridical advantage to the plaintiff in proceeding in Ontario instead of California or the United Kingdom. The plaintiff submitted that the presence of the majority of witnesses in Ontario created a juridical advantage to the plaintiff in proceeding in Ontario, but the location of witnesses does not give rise to a juridical advantage. This factor is neutral.

[23] My review of the factors to be considered in determining whether there is another forum more appropriate for this action than Ontario can be summarized as follows:

(a) The location of the parties does not favour Ontario as the appropriate forum but also does not favour any other particular location.

(b) The location of key witnesses favours Ontario as the appropriate forum.

© There are no contractual provisions that would favour a forum other than Ontario.

(d) There are no other related proceedings such that proceeding in another forum would avoid a multiplicity of proceedings.

(e) There is no evidence that the applicable law would be other than Ontario law.

(f) Geographical factors do not favour a forum other than Ontario.

(g) There is no juridical advantage to the plaintiffs in proceeding in Ontario.

[24] The fact that the location of the parties favours neither Ontario nor any other jurisdiction is not uncommon in an international commercial case where parties from different parts of the world come together to do business. The location of witnesses does favour Ontario as the appropriate forum because the majority of anticipated witnesses are in Ontario. The *Muscutt* factors © through (g) do not favour a forum other than Ontario. In order for the court to decline jurisdiction over a case on the basis of *forum non conveniens*, the existence of a more appropriate forum must be **clearly** established (*Anchem, supra*). Based on my analysis of the factors in *Muscutt*, there is no other possible forum that is clearly more appropriate than Ontario.

[25] The defendants had also argued that service of the statement of claim should be set aside on the basis that the plaintiff's claims did not fall within the provisions of rule 17.02. As I have

concluded above, the defendants were "carrying on business in Ontario" through the plaintiff's efforts to market their products pursuant to the letter of intent that is the subject of the action. Service of the statement of claim outside Ontario is therefore permitted pursuant to rule 17.02(p).

Decision

[26] For the reasons set out above, the defendants' motion is dismissed. Although I did hear some submissions with respect to costs following argument, counsel for the defendant requested an opportunity to make submissions on costs in the event that the motion was dismissed. If the parties cannot agree to an order as to costs, they may speak to the issue of costs by bringing the motion back on before me on my Regular Motions list on a mutually convenient date.

Master Graham

DATE: February 6, 2009