

**CITATION:** Horizon Legacy Energy Corporation, et al v. The Corporation of the City of  
Thunder Bay, 2011 ONSC 375  
**COURT FILE NO.:** CV-10-412617  
**DATE:** 20110118

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** HORIZON LEGACY ENERGY CORPORATION, HORIZON WIND INC.,  
HORIZON WIND LIMITED PARTNERSHIP, BIG THUNDER WINDPARK  
INC., and BIG THUNDER WINDPARK LIMITED PARTNERSHP, Plaintiffs

**AND:**

THE CORPORATION OF THE CITY OF THUNDER BAY, Defendant/Moving  
Party

**BEFORE:** WHITAKER, J.

**COUNSEL:** *Darryl Cruz, Kate Findlay*, for the Plaintiffs

*Timothy J. Hill, Patty Robinet*, for the Defendant

**HEARD:** January 13, 2011

**ENDORSEMENT**

**What This Case is About**

[1] This is a dispute about the construction and placement of wind turbines in the City of Thunder Bay.

[2] The defendant City moves to stay this action and requests a direction that the issues in dispute be determined in accordance with an arbitration agreement between the parties.

[3] The plaintiffs (together “Horizon”) oppose the motion. They take the position that the arbitration agreement does not apply to the disputes raised in the action.

[4] For the following reasons, I conclude that the arbitration agreement does not apply to the disputes raised in the action and the motion is dismissed.

**The Facts**

[5] The salient facts are for the most part undisputed.

[6] Horizon seeks to develop a wind turbine farm on lands owned by the City.

[7] In November 2006, the City granted a licence to Horizon permitting it to enter onto lands to explore the viability of their project. This licence has been extended to November 2012.

[8] In November 2007, Horizon and the City entered into an Option Agreement. The Option Agreement included as Schedule "1", the Lease which the City was required to grant Horizon if the option were to be exercised. The Lease does not specifically delineate the lands to be leased.

[9] Section 6 of the Option Agreement provides a mechanism for the parties to arrive at a description of the leased lands. This mechanism contemplates that the parties will attempt to agree on the description of the leased lands, failing which the City can make the final determination, reasonably and with regard to certain specified factors.

[10] On April 20, 2010 Horizon delivered to the City a Notice of Exercise of Option. On May 7, 2010, Horizon forwarded to the City, its proposed lease and unilaterally purported to determine the description of the leased lands.

[11] On June 29, the City held a meeting to consider Horizon's proposed description of the lands. The City determined that it needed more information from Horizon and retained an engineering consulting firm for advice.

[12] At a meeting of the City's Committee of the whole on October 12, 2010, the Committee members resolved to approve the description of the leased lands proposed in the lease prepared by Horizon, subject to approval of City Council at a meeting to be held on October 18, 2010.

[13] At the Council meeting on October 18, 2010, the resolution to approve Horizon's proposed lease did not pass. Council did however pass a separate motion to propose an alternative description of the lands, which varied from the description in the lease prepared by Horizon.

[14] Horizon commenced this action on October 19, 2010. The substance of the action is to obtain specific performance of the Option Agreement.

[15] On October 20, 2010, Horizon received an executed Lease from the City which was the same lease document attached to the Option Agreement as Schedule "1". This Lease contained no description of the lands.

[16] On October 22, 2010, the City gave notice of arbitration to Horizon under section 7.01 of the Lease.

### **Positions of the Parties**

[17] The City takes the position that once Horizon exercised the Option Agreement, the document at Schedule "A" described as "Lease" was indeed a binding lease on the parties, once granted by the City. Further, the City argues that the Lease is valid as it provides for a final and binding mechanism to determine the description of lands. Even if not a lease, it is a contract which includes the arbitration agreement, itself binding even where severed.

[18] The City argues the Entire Agreement provision of the Lease operates to combine three documents (the Licence, the Options Agreement and the Lease) into one with the Licence and the Options Agreement incorporated by reference into the Lease. In this way the arbitration agreement provisions of the Lease apply to any dispute arising from the language of the Licence, Option Agreement and/or Lease, now all within the Lease.

[19] Horizon takes the position that it has not entered into a lease with the City. It is argued that the purported "Lease" does not satisfy the common law requirements of a lease as it contains no description of the lands. Further, Horizon did not execute the document, and in any event the central issue in the action arises from the Option Agreement, to which the arbitration agreement does not apply. Horizon also asserts that the action commenced prior to the City granting its version of the Lease and for that reason, the action is not appropriately stayed.

### **Analysis**

[20] Even if one accepts the City's position that the parties are now bound by a valid lease, this motion must fail.

[21] This matter may be determined simply on the basis of the language used by the parties to describe and define the "Arbitration" and "Entire Agreement" provisions, found in the Lease. These provisions (section 7.02 for the Arbitration and section 7.05 for Entire Agreement) are as follows:

7.02 Arbitration: In the event of any dispute arising respecting this Lease, either Party may by notice in writing require that the dispute be arbitrated. The *Arbitrations Act* and the *Municipal Arbitrations Act* shall apply. Within fifteen (15) days of delivery of the notice requiring arbitration, the Parties shall in good faith approach the Superior Court of Justice to request the appointment of a Justice as arbitrator in accordance with the *Municipal Arbitrations Act*. The arbitration shall be conducted in accordance with the provisions of the legislation cited and the decision of the arbitrator shall be final. The Parties shall share equally the cost of the arbitration, and neither Party shall be entitled to an award of costs from the arbitrator, regardless of the outcome.

7.05 Entire Agreement: This Lease, together with the Option Agreement and the Licence, constitute the entire agreement between the Parties. It is agreed that there is no covenant, promise, agreement, condition precedent or subsequent, warranty or representation or understand, whether oral or written, other than as set forth in this Lease, the Option Agreement and the Licence, and that these documents fully replace and supersede any letter, letter of intent, electronic correspondence or other contractual arrangement between the Parties related to the Lands or the Leased Land that may have been in existence at the time of execution and delivery of each of them.

[22] It is agreed that the arbitration agreement between the parties is defined in its entirety by section 7.02 and that the construction of this provision delimits the scope of the arbitration process. It is further agreed that the arbitration agreement survives even if severed from the Lease.

[23] Section 7.02 of the Lease clearly states that it applies in the event of any dispute arising from the “Lease”. The very narrow question then is what constitutes the “Lease”? This question must be answered having regard to the meaning of this term in the context of the Lease. There is no suggestion that the interpretation of the term “Lease” requires any regard to extrinsic evidence.

[24] The City argues that the Entire Agreement provision in section 7.05 indicates that the Licence and the Options Agreement are incorporated by reference into the “Lease”. In other words, the City suggests that all three documents combine to form the “Lease” - which constitutes the entire agreement between the parties.

[25] With respect, I cannot agree with this assertion. In my view, section 7.05 (or indeed any other portion of the Lease), does not contemplate or suggest that the Option Agreement or the Licence, are incorporated by reference into the Lease. These two latter agreements themselves do not suggest such a result either.

[26] On the contrary, it would appear that the language of section 7.05 expressly refers to and contemplates the continuing existence of the three stand alone documents – the Licence, the Options Agreement and the Lease. The plain language meaning of this provision is that the Licence and the Options Agreement continue to survive the execution of the Lease.

[27] If this was not the intention of the parties and they wished to incorporate the Licence and the Options Agreement into the Lease, that could have easily been expressed in the Entire Agreement provision, elsewhere in the Lease or in the provisions of the Licence and/or Options Agreement.

[28] I accept the submission from the City that as a policy matter, parties should be encouraged to submit their disputes to arbitration whenever possible and that the provisions of the Arbitration Agreement should be interpreted in that light. It is however a critical and valuable feature of the arbitration process that parties themselves can delineate and tailor the scope of what is their own private adjudicative process – and not the Court.

[29] Where the parties have used express language to structure an arbitration agreement, that should be honoured.

[30] I conclude from these provisions that the arbitration agreement does not apply to disputes that arise under the Options Agreement or the Licence. As it is clear that Horizon’s action addresses a breach of section 6 of the Options Agreement, this does not fall within the jurisdiction of the arbitration process.

[31] In the result, it is not necessary for me to determine whether the Lease is in fact a lease, a contract or binding at all.

**Outcome**

[32] The motion is dismissed. On agreement of the parties, Horizon is entitled to its costs fixed at \$15,000.00 inclusive of taxes and disbursements.

[33] Order accordingly.

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Whitaker, J.

**Date:** January 18, 2011