

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

NIAGARA POWER INCORPORATED, GRIMSBY ENERGY
INCORPORATED, GRIMSBY HYDRO INCORPORATED, 1938427
ONTARIO INCORPORATED, and THE CORPORATION OF THE TOWN OF
GRIMSBY

Plaintiffs

and

ROBERT N. BENTLEY, JAMES DETENBECK, and JOSEPH PANETTA

Defendants

REPLY

1. The Plaintiffs admit that the Defendants make the admissions made in paragraph 1 of the Statement of Defence, and that the Defendants in paragraph 2 of the Statement of Defence deny the relief claimed by the Plaintiffs. Further, the Plaintiffs admit the allegations in the first sentence in paragraph 10 of the Statement of Defence of the Defendants, the first sentence in paragraph 12 thereof, and the first sentence in paragraph 13 thereof.
2. The Plaintiffs: deny the allegations in paragraphs 10, 12, and 13 which are not admitted above; deny the allegations in paragraphs 3-9; deny the allegations in paragraph 11; and deny the allegations in paragraphs 14-57.
3. The Plaintiffs repeat and rely upon the allegations made in the Statement of Claim.
4. Contrary to the allegations in the Statement of Defence, the Plaintiffs state that the Defendants were negligent and in breach of their duty of care when, as directors of the

Plaintiff Grimsby Energy Inc. ("GEI"), they appointed Messrs. Detenbeck and Panetta into the roles they performed in the design, cost forecasting, engineering, construction management, testing, operation and maintenance of a complex one-of-a-kind gas plant. None of the Defendants had any, or any adequate experience, in such matters. In appointing Detenbeck and Panetta to those roles the Defendants were negligent in that they did not canvass other alternatives to the hiring of those Defendants or advertise for or seek out individuals or contractors who did have such qualifications and could be presumed to be more likely to do a more competent job in such roles than the Defendants Detenbeck or Panetta, as individuals with no such experience, could do. The Defendants concluded without investigation that others would be more expensive and used that to justify the appointments. The Defendants Detenbeck and Panetta put their own interests in conflict with their fiduciary duty to the Plaintiff GEI. As a result of the negligence of the Defendants in appointing Detenbeck and Panetta to those roles, under the direction and control of the Defendants the biodigester project went more than 300% over budget and the Plaintiffs lost millions of dollars. It was a breach of their fiduciary duty for Detenbeck and Panetta to continue as directors after they were appointed to these roles.

5. Contrary to the allegations in paragraph 11 of the Statement of Defence, the Defendant Robert N. Bentley was not appointed to those boards of directors of the Plaintiffs to which he was appointed, 'as Mayor' or in any ex officio capacity. He was appointed as Robert N. Bentley. Upon his appointment he took on the duties and responsibilities of a director under the *Ontario Business Corporations Act RSO 1990, c B.16* and at common law.
6. Contrary to the allegations in the Statement of Defence that the Defendants hired all required professionals to assist in the completion of the project, the Defendants were negligent and in breach of their duty of care when, as Directors of GEI, they had knowledge of the written recommendations of the biodigester supplier, Novatech GmbH of Wolpertshausen, Germany, that a Canadian engineering and construction firm be engaged, and refused to follow that recommendation, making the decision to refuse to do

so without bringing the question of whether or not to do so to the board of directors of GEI or to the Town.

7. Contrary to the allegations in the Statement of Defence that professionals who were required to be hired were hired, the Defendants left the management of the construction of the biodigester project to the Defendants Detenbeck and Panetta who had no relevant experience in such matters. The Defendants were negligent and in breach of their duty of care when, as Directors of GEI, they decided to continue to employ the Defendants Detenbeck and Panetta, when they knew or ought to have known that construction of the biodigester plant was being completed in a manner that was materially non-compliant with the requirements of the Renewable Energy Approval issued by the Ministry of the Environment and Climate Change.
8. Contrary to the allegations in the Statement of Defence, the Defendants did not hire professionals to complete work required to be done by professionals. For example, the Defendants were negligent and in breach of their duty of care when, as Directors of GEI, they failed to ensure that a site plan was completed by engineering professionals before construction commenced, or at all, and their failure to do so led directly to ponding, flooding, equipment damage, and drainage issues that added costs that could otherwise have been avoided, contributing to the damages suffered by the Plaintiffs.
9. The Plaintiffs state that the bald claim in the Statement of Defence, that all of the actions of the Defendants were authorized by the Plaintiff the Corporation of the Town of Grimsby ("the Town") on the basis of full disclosure by them to the Town, is simply not true. When the Defendants did provide information to the Town the information provided was made difficult to access, was incomplete, was either deliberately misleading or made on their behalf by others to whom the Defendants did not provide a full, accurate and complete picture. The Plaintiffs state that the Defendants throughout the project actively sought to put the best possible spin on the state of the biodigester project and did not forthrightly disclose all relevant information to the Plaintiffs, to their fellow directors or to the auditors of GEI. As late as July of 2018, at a time when the project was failing, GEI, with the knowledge of the Defendants, was called upon to provide information to

the Town at a council meeting. No report in writing was provided in advance of the meeting. When councillors queried the lack of a written report, they were told GEI was a private company and that all Council had asked for was an update, not a report. The verbal report the Defendants caused to be made to the Town's council by an individual who relied on the Defendants for his information about the subject, was fundamentally positive. Council was promised 'dividends'; 'dividends' they were told, 'were coming'. Following the presentation to the Town's Council, there were no dividends paid by GEI to the Town, contrary to the implication of the statements made to Council. In fact, GEI continued to consume cash and was in no position to make a dividend payment. It was not until the Defendants were removed from the boards of the Plaintiff companies and new directors were appointed that the Town and the Plaintiff companies were able to conclude that the project investment would never be recovered, that the problems at the site required substantial additional investment such that the project was uneconomic and required a substantial write down. Indeed, the Defendants, in the Statement of Defence, continue to contend that the project investment would have been recovered. This is simply not true; it would never have been recovered.

10. Contrary to the allegations in the Statement of Defence, the Defendants were negligent and in breach of their duty of care when they failed to conduct annual general meetings of the Plaintiff companies in compliance with the law. Further they were grossly negligent when, after the Defendant Detenbeck, who was the only director of the Plaintiff Grimsby Hydro Incorporated, quit or chose not to stand for re-election, the Defendants did not ensure that Mr. Detenbeck's resignation or non-election was properly documented and a replacement elected as the sole director of Grimsby Hydro Incorporated. The Defendants were further negligent, and in breach of their duty of care as Directors of 1938427 Ontario Incorporated, when they continued to cause money to be paid out of that Plaintiff's subsidiary, Grimsby Hydro Incorporated ("GHI") to GEI without electing a replacement for Mr. Detenbeck; the Defendants Panetta and Bentley simply caused money to be taken out of GHI and given to GEI without any authorization from GHI to do so, and the failure of the Defendant Detenbeck to ensure his resignation was properly documented contributed to the unauthorized removal of funds from GHI.

11. Contrary to the allegations in the Statement of Defence that all actions taken by the Defendants were properly authorized, the Defendants caused NPI to enter into commitments without the authorization of NPI or the Town. The Defendants, as Directors of GEI, arranged to lease equipment GEI could not afford to buy at the time. In order to conclude those lease arrangements, they caused the Plaintiff Niagara Power Incorporated ("NPI") to co-sign the leases along with GEI, creating a liability for NPI in excess of \$800,000 without proper authorization to do so and without any consideration for NPI in exchange for taking on the lease commitments. They were negligent when as directors of NPI they allowed this to happen.
12. Contrary to the allegations in the Statement of Defence that all actions taken by the Defendants were properly authorized by the Town and involved necessary professional support, the Defendants, in order to fund cost overruns on the biodigester project caused GHI to sell its 25% interest in Niagara Regional Broadband Network for \$9,000,000, the Defendants took no steps to cause there to be consideration at any open meeting of council of the wisdom of doing so, the best means for doing so, the price at which it should be sold, and how any funds raised should be used.
13. The biodigester project was the only project in GEI. GHI had no employees and all of the cash GHI received from the sale of its asset, an equity interest in Niagara Regional Broadband Network, was funneled into the biodigester project by the Defendants. The shares of GEI and GHI were owned by the Plaintiff, 1938427 Ontario Incorporated.
14. Contrary to the allegations in the Statement of Defence, to the effect that the Town did not suffer any damages or made its damages worse by its own actions, the Plaintiffs state that after the commencement of these proceedings the Town managed to sell the shares of 1938427 Ontario Incorporated (which the Defendants had negligently failed to ever issue), effectively transferring ownership of the biodigester project for consideration that somewhat mitigated the Plaintiffs' damages arising from the actions of the Defendants. The mergers and acquisition unit of an accounting firm, as represented by a P.Eng. who was also a CPA, provided financial advisory services and conducted a competitive bid

process for the sale of the biodigester. The Offer to Lease the biodigester project that the Defendants have referred to in the Statement of Defence was made in a non-binding manner and was subject to a right to acquire the biodigester at a price that was less than half of the price that the Town was able to secure. The offer ultimately accepted by the Plaintiffs was the best offer.

15. The market response to the opportunity to purchase the project indicated that the project was not worth the amount the Defendants had caused to be invested in it. In fact, it was worth millions of dollars less than had been invested in it. Full particulars of the Plaintiffs' damages will be provided to the Defendants in advance of trial.

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Plaintiff

-and-

ROBERT BENTLEY et al.
Defendants

Court File No. CV-19-00623774-0000

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PROCEEDING COMMENCED AT
TORONTO

REPLY

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