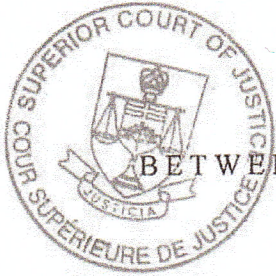


CN-19-00623774-0000
Court File No.



**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

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff.
The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.


If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF

YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date July 15, 2019 Issued by 
Local Registrar

Address of court office: 370 University Avenue
Toronto, ON M5G 1R8

TO: Robert N. Bentley
16 Rodney Avenue
Grimsby, ON L3M 2K5

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10TH FLOOR
TORONTO, ONTARIO
M5G 1E6

COUR SUPERIEURE
DE JUSTICE
393 AVE. UNIVERSITY
10E ÉTAGE
TORONTO, ONTARIO
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AND TO: Joseph Panetta
52 Vintners Lane
Grimsby, ON L3M 5N7

AND TO: James Detenbeck
13089 Niagara Parkway
Niagara Falls, ON L2E 6S6

CLAIM

1. The plaintiffs, the Corporation of the Town of Grimsby, 1938427 Ontario Incorporated, and Grimsby Energy Incorporated, claim against the defendants:
 - (a) damages for negligence, breach of duty of care, and breach of fiduciary duty in the amount of \$18 million;
 - (b) pre-judgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 as amended;
 - (c) costs on a substantial indemnity basis; and
 - (d) such further and other relief as this Honourable Court may deem just.

2. The plaintiff Grimsby Hydro Incorporated claims against the defendant James Detenbeck:
 - (a) damages for negligence, breach of duty of care, and breach of fiduciary duty in the amount of \$7 million;
 - (b) pre-judgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 as amended;
 - (c) costs on a substantial indemnity basis; and
 - (d) such further and other relief as this Honourable Court may deem just.

3. The plaintiff Niagara Power Incorporated claims against the defendants:

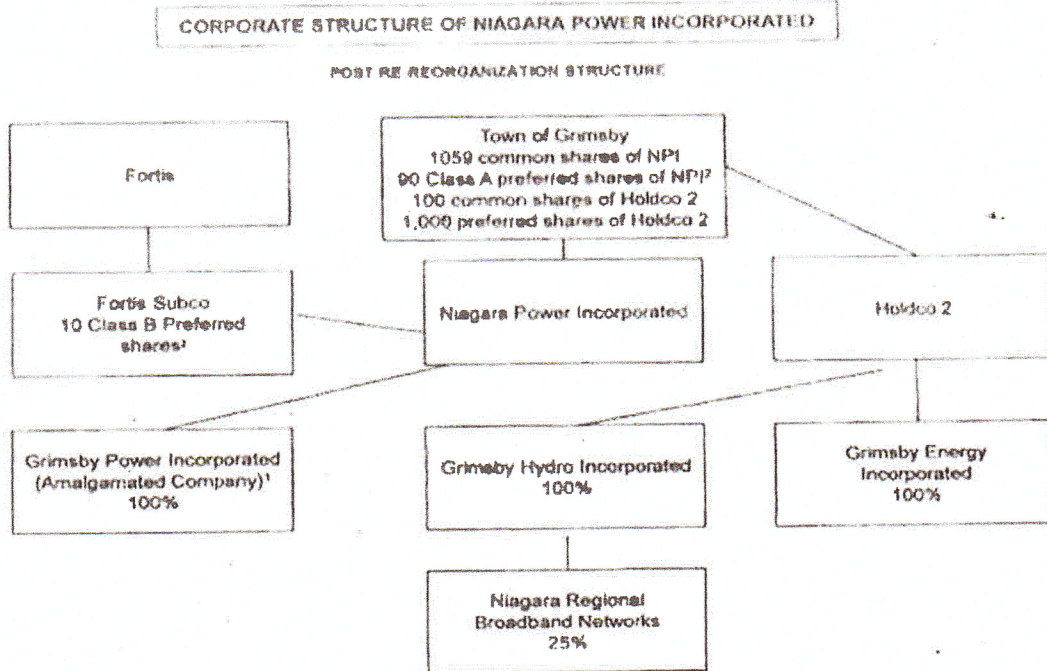
- (a) damages for negligence, breach of duty of care, and breach of fiduciary duty in the amount of \$3 million;
- (b) pre-judgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. 43 as amended;
- (c) costs on a substantial indemnity basis; and
- (d) such further and other relief as this Honourable Court may deem just.

The Parties

4. The plaintiffs Niagara Power Incorporated (NPI), Grimsby Energy Incorporated (GEI), Grimsby Hydro Incorporated (GHI), and 1938427 Ontario Incorporated (“Holdco No. 2”) are all corporations duly incorporated under the *Ontario Business Corporations Act RSO 1990, c B.16* (“OBCA”). The Corporation of the Town of Grimsby is a municipal corporation governed by the *Ontario Municipal Act, 2001, SO 2001, c 25*.

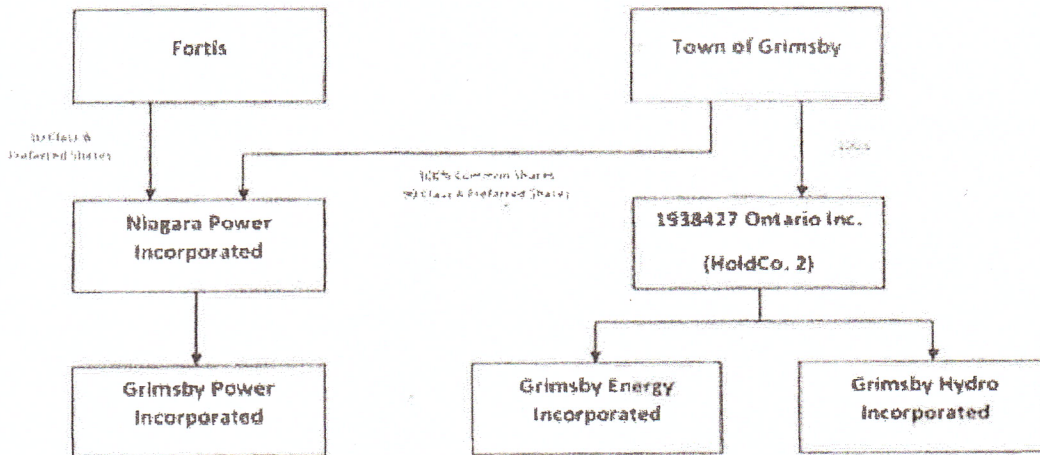
5. The claims of the plaintiffs arise from a failed waste-to-energy project more fully described below, that was initially considered in 2008 when certain studies were commissioned. The relationships among the plaintiffs that existed at that time are depicted in the following chart:

6. In 2015 a re-organization was deemed necessary. A minority shareholder in NPI, Fortis Inc., did not want to be involved in the waste-to-energy project in any capacity and Fortis Inc. had an equity interest in NPI which then held all of the shares of GEI which was to be the corporation that would carry out the project. Effective January 1, 2016, following the re-organization, the relationships among the plaintiffs looked like this:



7. Following the 2016 sale of GHI's interest in Niagara Regional Broadband, and to this day, the relationships among the plaintiffs have been as follows:

Corporate Organizational Flowchart



8. The plaintiff Town of Grimsby is the sole shareholder of 1938427 Ontario Inc. which is the sole shareholder of GEI and GHI. The Town of Grimsby is the primary shareholder of NPI.

9. The defendants are all Ontario residents. Robert Bentley resides in Grimsby and was at all material times the mayor of the Town of Grimsby. Joseph Panetta resides in Grimsby and at all material times was a director of NPI and GEI. James Detenbeck resides in Niagara Falls and at all material times was a director of NPI, GEI, and GHI.

Summary

10. The defendant Robert Bentley served as mayor of the Town of Grimsby from 2003 to December 3, 2018, when his term officially ended following his decision to not run in the election of October 22, 2018.

11. After the results of the October 22, 2018 election, information about the project that had been suppressed by the defendants began to come to light, including, most importantly, the information that the project was not producing any profit, let alone enough profit to justify the investment in the project, the capital cost of which had become more than 300% greater than originally budgeted.

12. In January of 2019, the agricultural waste-to-energy project, which had become known as the Bio-Digester project, was referred to by local media as a "bio-disaster".

13. The Bio-Digester project became a financial disaster as a result of the defendants' complete failure to ensure effective corporate governance and to ensure that corporate decisions were made in the best interests of the plaintiff companies. The plaintiff companies' best interests were made subservient to the interests of the defendants James Detenbeck and Joseph Panetta who, with the

support of the defendant Robert Bentley, appointed themselves as contractors and project managers and received hundreds of thousands of dollars for services provided in those capacities while they continued to serve as directors of the plaintiff companies, ostensibly responsible for the work done by themselves as contractors and project managers. In short, the defendants preferred their own financial interests to the best interests of the plaintiff companies, of which they were at all material times directors and officers, and to which they owed fiduciary duties.

Chronology of the Failed Project

14. The original concept of the Bio-Digester project when it was conceived in or about 2008 was that it would leverage an underutilized local asset—food and agricultural waste—to create methane at a very low cost, and the methane would power a turbine that would produce electricity, which could then be sold onto the electrical grid for a profit, under a Feed-in-Tariff contract that afforded favourable pricing for the electrical energy produced. This was a green energy project that held the promise of being a generator of income for the Town of Grimsby, income that could be used to off-set municipal tax expense for local rate payers. The original capital cost was expected to be \$4 million. 3.5

15. Financing, so the plan went, was to be made possible by investing income received in NPI from the operations of the regulated electricity distribution business conducted by Grimsby Power Incorporated.

16. The corporate entity that was to execute the project and own and operate the Bio-digester was GEI. The defendants James Detenbeck and Robert Bentley became directors of GEI in 2007 and were joined on that board by the defendant Joseph Panetta in 2009.

17. The defendant James Detenbeck was a director of GHI from 2007 until the end of 2018.

18. All three defendants became directors of NPI in 2009 and continued in that capacity to the end of 2018. When Holdco No. 2 was formed on January 1, 2016, all three defendants were appointed to the board of directors of that corporation which was the sole shareholder of GEI and GHI, and they continued in that capacity until their successors were appointed at the end of 2018. As a result of their various directorships held, in the period 2015 through 2017, when the vast majority of the Bio-Digester project costs were incurred, the three defendants were in control of the plaintiff companies.

19. The biodigester project was projected to cost \$3.5 million and take 14 months to become operational once construction began. Further, the biodigester was projected to generate 300k/year in profits.

20. In September 2010, GEI entered into a contract for the design and planning of a bio-digester for a total contract cost of 55,000 Euros.

21. By 2011 the defendants had caused GEI to become indebted to GHI for \$500,000 and to NPI for \$3,154,789.

22. As directors of NPI and GHI, they approved the transfer of these funds to GEI without obtaining any security from GEI or in the project itself and without any proper documentation of the transfers which were booked as loans, save for one promissory note for \$500,000. Some of the money transferred to GEI with their approval was used by GEI, again with their approval, to make payments to themselves the full particulars of which are known to the defendants but which the Plaintiffs believe to be in the approximate sum of \$1,000,000, most of which was paid to Panetta

and Detenbeck. Other directors, who are not named as defendants to these claims, were not invited by the defendants to independently assess the payments made to the defendants and the value for money received by the plaintiff companies in exchange for the services provided by the defendants James Detenbeck and Joseph Panetta. Messrs. Panetta and Detenbeck were allowed, with the approval of the defendant Robert Bentley, to oversee and make payments to themselves as the project proceeded. Likewise, they were allowed to vote on and approve the transfer of money from NPI and GHI to GEI, despite their roles as the project leads on the project which would spend the money transferred.

23. Project construction was delayed due to a lengthy planning period and when it started in the summer of 2015, Fortis Inc., a shareholder in NPI, insisted on a restructuring that would ensure that their investment in NPI did not include an investment in the biodigester project. The result of that restructuring is reflected in the diagrams at paragraphs 3, 4 and 5 hereof.

24. In a media interview in November of 2015, James Detenbeck reported that to that date a total of \$2,100,000 had been spent on the biodigester project that was to cost \$3,500,000. The financial statements for 2015 for GEI show that the amount spent to that point was much higher.

25. The plaintiff Holdco No. 2 was created as a result of the Fortis-related restructuring undertaken in mid-2015 which took effect on January 1, 2016. Again, the defendants Detenbeck and Panetta, who continued to be paid by Holdco No. 2's subsidiary GEI, were appointed to the board with the approval of Robert Bentley.

26. Also in mid-2015, the Town of Grimsby was called upon to provide a guarantee of the construction loan GEI was seeking to obtain approval for from the TD Bank. Following a presentation to Council of the Town of Grimsby on May 26, 2015 the guarantee of the loan was

given. In the presentation, no mention was made of the fact that persons who were GEI directors continued to be paid for project services which the same board members were charged with responsibility to oversee, nor of any plans for managing the obvious conflict of interest those undisclosed payments entailed.

27. As construction of the Bio-Digester progressed, it became apparent to the defendants that because of the improper payments and breach of the duties alleged herein, the funds available from the bank loan and the income from NPI's interest in GPI were not going to be sufficient to cover the capital cost of the project.

28. So, in 2016, the defendant Detenbeck, then the sole director of GHI, caused GHI to sell its 25% interest in Niagara Regional Broadband Network. That sale yielded a significant capital gain. When the sale process was completed GHI, which had already loaned \$500,000 to GEI, was authorized by its sole director, James Detenbeck to loan an additional \$6,500,000 to GEI, which continued to pay James Detenbeck for management services, and of which James Detenbeck continued to be a director. The plaintiffs have not been able to locate any documentation showing the terms of the loan of \$6,500,000.

29. In 2017, the biodigester project continued to consume cash. It did not go live until August of 2017, which was two years into the FIT contract term. There were delays caused by the mismanagement of the project by the defendants and these delays eroded the value of the FIT contract. By the end of 2017 the total amount owed by GEI to NPI, GHI and TD/Town of Grimsby as guarantor, was \$13,817, 939. At some point in 2017 James Detenbeck quit and ceased attending board meetings for any of the boards of the plaintiff companies. However, he did not properly

resign as a director and therefore continued to be liable as a director until his successor was appointed at the end of 2018.

30. In May of 2018, with the municipal election pending and 'the horses already out of the barn', at a board meeting of GEI attended by the defendants Panetta and Bentley, the board passed a policy addressing board members taking on contracts related to the Bio-Digester project.

31. In early 2019, as the new board of GEI took over, it became apparent that the email records of GEI prior to the date of the election, were not on the server used by GEI and had become unavailable.

Duties of the Defendants Breached and Damages Caused

32. By virtue of the Ontario Business Corporations Act, as directors of NPI, GEI and Holdco No. 2, each of the defendants-and as a director of GHI, the defendant James Detenbeck-owed these duties, amongst other duties, to the plaintiffs: (a) a duty to act honestly and in good faith with a view to the best interests of the corporation; (b) a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; (c) a duty to the plaintiffs not to exercise the authority they had as directors and officers in a way that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the plaintiffs; and, (d) a duty to comply with the OBCA.

33. Section 132 of the OBCA requires that a director or officer of a corporation who (a) is a party to a material contract or transaction or proposed material contract or transaction with the corporation; or (b) is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the

corporation, shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest.

The Claim of NPI

34. NPI contends that the defendants were in breach of these duties to NPI. The defendants directed funds from NPI to GEI, and/or permitted GEI to use funds provided by NPI to GEI, without disclosing to NPI their intention as directors of GEI to permit the defendants Panetta and Detenbeck, to be paid with those funds for management of the project while continuing to serve as directors on the board to which they would be accountable for the performance of the project. NPI could not have anticipated that the funds would be used in a manner that did not permit an independent consideration of the best interests of the borrower to be the basis for corporate decision making by the borrower.

35. The actions of the defendants were in breach of their fiduciary duty to NPI to avoid conflicts of interest. The act of approving the loans by NPI to GEI without taking any security or interest for NPI, especially when the two defendants who were going to run the project did not have the skills, experience and track record of running such a project, was negligent and in breach of the duty to exercise the standard of care that a reasonably prudent person would exercise. Failure, as directors of NPI, to call for the immediate repayment of the loans made by GEI when GEI had cash and was able to repay those loans was also in breach of the duties owed to NPI by the defendants. Further, the approval of the loans was done in a manner that was in breach of the OBCA requirements with respect to the disclosure of conflicts of interest and the approval was oppressive and unfairly prejudicial to the interests of NPI. Further, the Defendant Panetta, in a bid to secure approval from a leasing company to lease an item required by GEI for the project, held

himself out to the leasing company as authorized to sign on behalf of NPI when he had not been authorized to do so, and caused NPI to incur an obligation with a value greater than \$50,000 for no value to NPI.

36. Prior to January of 2019, NPI was not aware of the hundreds of thousands of dollars paid by GEI to the defendants, that there was no other independent project management obtained by GEI, and that the total costs of the borrower GEI's project went so far over budget that the company had become incapable of ever paying back NPI's loans.

The Claim of GHI

37. GHI claims that the defendant James Detenbeck, in advancing \$7 million to GEI, was in breach of the same said duties in the same said manner as were the defendants in relation to the funds transferred to GEI by NPI. The failure to obtain proper security for the funds advanced was negligent and in breach of his duty of care owed to GHI. Sending the money to GEI without taking due consideration of the likelihood that it would ever be paid back was also in breach of that duty. Making those funds of GHI available to GEI for use to pay for his services, without taking any steps to allow GHI to make the decision in a way that dealt with the obvious conflict of interest was in breach of his fiduciary duty to GHI.

The Claim of Holdco No. 2

38. Holdco No. 2 owned all of the shares of GEI and GHI. The defendants were at all material times directors of Holdco No. 2. They failed in that capacity to appoint persons to the boards of each of those subsidiaries who could properly supervise the defendants Detenbeck and Panetta. Their failure to do so allowed the defendants to, in a reckless manner, strip funds from GHI and

transfer those funds to GEI for use in the Bio-Digester project. They so failed, when they knew that the Bio-Digester project was being undertaken by directors of those subsidiaries of Holdco No. 2, who would then have responsibility to supervise themselves. It was negligent for the defendants to take no steps as directors of Holdco No. 2 to ensure that the conflict of interest inherent in the manner in which the project was proceeding was managed in a way that allowed the best interests of the subsidiaries to be considered in the decision making of the boards of directors of those subsidiaries. As directors of Holdco No. 2, the defendants through their negligence and their breach of their fiduciary duty caused the project to fail and caused Holdco No. 2 to lose its entire investment in its subsidiaries.

The Claim of GEI

39. GEI contends that the defendants were in breach of their duties of care and their fiduciary duties to GEI. Further GEI pleads that their actions were oppressive and unfairly prejudicial to the best interests of GEI.

40. The defendants as directors of GEI allowed funds received from NPI to be used to pay the defendants Panetta and Detenbeck without ensuring that there was independent consideration of the value received for the services provided by those defendants. The actions of the defendants were in breach of their fiduciary duty to GEI to avoid conflicts of interest. The act of approving the two defendants to run the Bio-Digester project when they did not have the skills, experience and track record to do so and when they wanted to continue as board members, was negligent and in breach of the duty to exercise the standard of care that a reasonably prudent person would exercise in comparable circumstances. Continuing to pile on debt when it was apparent that the total costs of the project were going to exceed an amount that the reasonably anticipated profit

from the project could ever re-pay, was negligent and unfairly prejudicial to the interests of GEI. Further, hiring as a general contractor, a company called Avican Ltd., that was incorporated only days prior to their engagement by GEI and that had never taken on a project like the biodigester project, and doing so without calling for other bids from qualified suppliers was negligent and in breach of the duty of care owed to GEI.

41. The biodigester project was GEI's only project. The failure of the defendants to comply with their duties to GEI and the fact that they used their authority in a way that was oppressive and unfairly prejudicial to GEI caused GEI to become insolvent and the investment of its shareholders to be lost.

The Claim of the Town of Grimsby

42. The Town of Grimsby was at all material times the sole beneficial shareholder of Holdco, No. 2, GHI, and GEI. The Town of Grimsby was at all material times the principal shareholder of NPI.

43. As a shareholder the Town of Grimsby was entitled to expect of the defendants that they: exercise reasonable prudence when acting in their capacity as directors of each of the plaintiff companies; would avoid conflicts of interest and when those arose they would ensure they would be addressed in a way that complied with the OBCA and allowed the best interests of each plaintiff company to be the basis upon which key decisions were made; and that the defendants not act in a way that was oppressive or unfairly prejudicial to the interests of the Town of Grimsby.

44. The actions of the defendants as directors of GEI were in breach of the obligations of the defendants to the Town of Grimsby described in the paragraph immediately above. The defendants

made imprudent decisions, including: appointing to key project management roles persons who were not qualified to execute those roles; allowing those same persons to continue to serve as directors, and to be accountable to themselves; having directors serve as paid managers when there was no system or process in place to ensure they were accountable for their performance and their use of the funds; and receiving and spending funds advanced by affiliates of GEI when there was no reasonable prospect of paying those funds back. The defendants took substantially all cash and marketable securities available to the plaintiff companies, and those obtained after a guarantee of a loan to GEI was provided by the Town, and used that cash and those marketable securities to finance the project costs-no matter how much by which the project costs exceeded budget. Under the management of the defendants, those costs went 300% over budget.

Damages

45. The defendants' conduct as aforesaid caused the plaintiffs' losses by virtue of the improper conduct inflating project costs, their failure to follow proper corporate governance including (but not limited to) avoiding conflicts of interest, and their self-dealing.

46. GEI, the Town of Grimsby and Holdco No. 2 all suffered the full extent of the losses which total \$18,000,000, the full particulars of which will be provided to the defendants prior to trial.

47. NPI is left with a \$3,000,000 loan receivable and no prospect of recovery. GHI lost its only asset when it was sold at the direction of the defendant James Detenbeck, and the cash obtained from that transaction was transferred to GEI and used on the project. The \$7,000,000 in net proceeds of the sale of the 25% interest in NRBN, are gone.

48. The plaintiffs propose that the trial of this action take place at Toronto.

July 15, 2019

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Plaintiffs

-and-

ROBERT BENTLEY et al.
Defendants

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STATEMENT OF CLAIM

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