

**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 DEFENCE**

1. The Defendants, Robert N. Bentley ("**Bentley**"), James Detenbeck ("**Detenbeck**") and Joseph Panetta ("**Panetta**") admit the allegations in paragraphs 4, 7, 8, 10 and 16 of the Statement of Claim.
2. The Defendants deny that the Plaintiffs are entitled to the relief claimed in paragraphs 1, 2 and 3 of the Statement of Claim and further deny the remaining allegations in the Statement of Claim except as expressly admitted herein.

**Overview**

3. The claims asserted by the Plaintiffs have no basis in fact and law and are not advanced in good faith.
4. The Corporation of the Town of Grimsby (the "Town") is the direct or indirect parent of the corporate Plaintiffs and controls each of them. The Town had the right to, and did, appoint persons of its choosing to be directors of the corporate Plaintiffs and to remove them. The Town had the right to, and received, full access to any and all information it wished to have regarding the affairs of the corporate Plaintiffs.
5. The Biodigester Project (defined below) was initiated by the Town for its own purposes and objectives, with instructions to Grimsby Energy Incorporated ("GEI") to implement same. All of the Plaintiffs were fully aware of, and supported, the assignment of Detenbeck and Panetta to management functions, with appropriate compensation, to carry out the Biodigester Project.
6. The Plaintiffs were fully informed of, and participated in, all major decisions in respect of the Biodigester Project. Town councillors or other independent directors were appointed to the boards of the corporate Plaintiffs and had full access to all relevant information. All financing arrangements were put in place with the full knowledge of, and often at the request of, the Town.
7. The Defendants retained qualified advisors and contractors to implement the Biodigester Project. Due to unavoidable delays and other events beyond the Defendants' control, but well known to the Plaintiffs, the cost of the Biodigester Project increased over the many

years it was in development. The Town was aware of these delays and cost increases, but chose at every critical juncture to continue with the Biodigester Project and invest further funds. No funds were conscripted to the Biodigester Project without the full knowledge and support of the Town and the other Plaintiffs.

8. The Biodigester Project did achieve commercial operation, but with a more extended pay-back period than originally hoped. This was not the fault of the Defendants, who executed their requisite duties as directors, and in the case of Detenbeck and Panetta, as managers, in accordance with their obligations.
9. The Town, however, for political or other reasons only known to it, wishes to disassociate itself from, and contend it had no role in, a project that it now wishes to disavow. In order to do so, the Plaintiffs have commenced this action against selected directors only, making allegations of conflicts of interest and breaches of fiduciary duty, amongst other allegations, which they know to be false. The action should be dismissed with costs on a full indemnity basis.

### **The Defendants**

10. Bentley is a resident of Grimsby, Ontario. For 24 years, he served his community with dedication and integrity as a councillor and, ultimately, as mayor for fifteen years.
11. As mayor, Bentley was appointed, and served at various times, as a director of the corporate Plaintiffs. At no time did he receive any additional compensation, and he had no objective or motive for so doing other than to benefit the Town and its residents.

12. Detenbeck resides in Niagara Falls, Ontario. He is a business man with project experience, who was asked by the Town to serve as a director of the corporate Plaintiffs at various times from 2002 until 2016. Detenbeck did not “quit” as alleged by the Plaintiffs. In 2016, he determined not to stand for re-appointment to the boards of the Plaintiff companies and his involvement in these matters ceased at that time.
13. Panetta resides in Grimsby, Ontario. He was a successful local business man who was asked by the Town to serve as a director of Grimsby Power Incorporated upon its establishment, and as a director of the other corporate Plaintiffs from time to time.

#### **Background and History**

14. In 2004, the Town directed its subsidiary, Niagara Power Incorporated (“NPI”), to assess opportunities for establishing “green” energy projects that would be beneficial to the Town’s long-term economic, political and environmental plans. NPI tasked its subsidiary, GEI, with investigating appropriate renewable energy sources, such as wind, solar or biogas, having regard to the Town’s objectives, geography, climate and local resources.
15. The feasibility of alternative renewable energy options was considered. In 2006, GEI recommended biogas as the most suitable solution for the Town. It was anticipated that the biogas plant would make efficient use of local farm waste and produce renewable energy in the form of methane gas that could be commoditized and sold to the power grid at a profit to the Town (the “**Biodigester Project**”). The Biodigester Project was consistent with the Town’s objectives of being a leader in promoting a green economy and providing benefits to local farmers.

16. The Town approved the Biodigester Project. With the full knowledge and consent of the Town, GEI applied for a Feed-In-Tariff ("FIT") incentive under Ontario's new *Green Energy and Green Economy Act*, which would offer guaranteed pricing for the Town's renewable energy production.
17. The boards of directors of the Plaintiff corporations were comprised of members of the municipal council of the Town and volunteer members of the community nominated by the Town. None of the volunteer directors were expected to perform significant management or executive functions unless appointed to such positions and compensated therefor. Detenbeck and Panetta, who were nominated at least in part because of their business experience, were so appointed for the purpose of executing the Biodigester Project.
18. The amount of compensation paid to the Defendants was reasonable and appropriate and at all times known to NPI and the Town. The Town could not have expected that the volunteer directors of GEI would devote such extensive time to the executive management of the Biodigester Project without reasonable compensation therefor.
19. The allegation that the Defendants made hundreds of thousands of dollars of secret or unapproved profits over the course of the Biodigester Project is entirely false. The compensation was neither secret nor excessive. Compensation for GEI directors was set at \$50 per hour (or \$3,500 per month) in 2009 and was never increased, even as the Town increased payments to councillors and directors of other subsidiaries.
20. The independent and councillor directors approved such appointments and compensation, none of the appointees voted on the appointment resolutions, and all of the Plaintiffs were aware of the appointments.

21. The Biodigester Project was not GEI's only energy project. At the direction of the Town, GEI had developed and executed the construction and commissioning of a co-generation facility for the Town. The Town was aware of, and confident in, the ability of the Defendants to undertake such a project and raised no objection to their being assigned to assist in the execution of the Biodigester Project.
22. Although the build schedule for the Biodigester Project was on track to be completed in 2009, it became clear that the FIT program would not be established by September 2009. Accordingly, further steps in respect of the Biodigester Project had to be put on hold pending FIT approval. GEI was only able to apply to the FIT program in November 2009, and the actual FIT contract was not awarded until April 2010.
23. GEI initiated a process to solicit engineering services and a project development plan. It selected Novatech GmbH ("Novatech"), a German company with extensive experience in the biogas industry, to design and build the Biodigester Project. GEI presented its plans to proceed with Novatech to Town council in 2010, and the Town approved the project development plan. Other qualified consultants, advisers and contractors were retained from time to time as required.
24. At each stage, the Town and NPI, and the indirect and direct shareholders of GEI, authorized GEI to proceed with the construction, commissioning, staffing, financing and operation of the Biodigester Project. Such decisions were fully informed.
25. Despite having submitted its Renewable Energy Approval ("REA") application with the Ministry of Environment in February 2013, the Ministry of Environment delayed issuing

REA to GEI for nearly two years. This was a major setback in the project timeline not within the Defendants' control.

26. At all times, other Town councillors were on the boards of some or all of the Plaintiff corporations and were fully aware and apprised of, and involved in, all significant decisions taken by those boards and of which the Plaintiffs now complain. Through these councillors, Bentley, periodic presentations to Town council and the directors of the other Plaintiff corporations, and regular communication with the Town's senior administrative and financial professional staff, the Plaintiffs were fully aware of all material facts, including, without limitation:
- (a) who were the directors of the Plaintiff corporations and which directors were performing management functions and being compensated therefore;
  - (b) the business plans, cost estimates and costs incurred from time to time; and
  - (c) the financing arrangements for the Biodigester Project, including the use of proceeds of the sale of Grimsby Hydro Incorporated's ("GHI") interest in Niagara Regional Broadband Network Limited.
27. The allegations in the Statement of Claim that the Plaintiffs were unaware of and did not either concur or acquiesce in the matters and decisions now complained of are untrue and intended to convey the dishonest impression to the public that certain of those persons who held, or now wish to hold, political office in the Town of Grimsby were not privy to events that they prefer to disassociate themselves from.

28. The allegations of negligence and breach of fiduciary duty are equally unfounded. The Defendants at all times acted prudently and in the best interests of the Plaintiffs.
29. The Biodigester Project eventually achieved commercial operation, but, as a result of the aforementioned and other unavoidable delays and events beyond the control of the Defendants, faced a longer pay-back period than the Town had hoped for. This was not the consequence of any negligence or breach of duty by the Defendants.
30. Had the Biodigester Project been retained by the Town, the Town would have been able to recoup its investment and earn a return. The Defendants also presented the Town with a refinancing option and at least one opportunity to lease the Biodigester Project to an experienced operator on a basis which would have been financially sustainable, and ultimately beneficial, for the Town.
31. For political or other reasons unknown to the Defendants, the Town determined instead to disown and sell the Biodigester Project. It did so on a basis that left it in a worse financial position than it would have been in had it retained ownership.
32. The Town and its new directing minds who assumed office following the 2018 election have determined to try to rewrite history by asserting that the Town was not responsible for the business decisions it made knowingly and with full information at its disposal. In order to do so, the Town commenced this action which it knows to be based on allegations that are false and without merit.



**The Claim of NPI**

33. NPI contends that the Defendants were in breach of their fiduciary duties to NPI when they permitted GEI to use NPI funds.
34. All of the Plaintiffs, including NPI, and the Town councillors appointed to the various boards of directors of the Plaintiffs, were at all times aware of, and in fact insisted upon, the financing arrangements whereby funds from NPI and GHI were to be used to fund the Biodigester Project. They were aware, or ought reasonably to have been aware, that some of those funds would be used, *inter alia*, to meet the operating expenses of GEI, including paying compensation to management as approved by the board of directors.
35. The loans by NPI to GEI were made with the full concurrence and authority of NPI and the Town, including the chief administrative and financial officers of the Town, and were put in place in accordance with their instructions and requirements.
36. It is not a conflict of interest for management of GEI, who were being compensated for their work, to continue to implement the business plans approved by the GEI board of directors, NPI and the Town. In the alternative, if there was such conflict, which is denied, it was known and apparent to the Plaintiffs who acquiesced in same. Furthermore, GEI did retain expert engineers and contractors and there was no requirement for further independent oversight. It was at all times open to any of the Plaintiffs to request further independent oversight, but they elected not to do so.

**The Claim of GHI**

37. GHI claims Detenbeck breached his duty of care to GHI and his fiduciary duty by causing GHI to loan funds to GEI.
38. The loan of funds from GHI to GEI was requested and approved by the Town and NPI. The transaction was carried out on terms requested and approved by the Town and NPI. There was no conflict of interest in Detenbeck carrying out those directions at a time when he was being compensated as manager, with a corresponding duty to GEI to carry out these arrangements.
39. Any failure to take security for the funds advanced is in any event of no consequence in light of the fact that the assets have been sold, and all funds after payment of prior obligations, or obligations which would have ranked in priority to the Plaintiffs, are available to the Plaintiffs.

**The Claim of Holdco No. 2**

40. 1938427 Ontario Incorporated (aka "**Holdco No. 2**") claims that all of the Defendants were negligent and in breach of their fiduciary duties by failing to appoint appropriate persons to the boards of its subsidiaries.
41. The decision regarding who would be appointed as directors of GEI and GHI at all times resided with Holdco No. 2 or the Town. The Town caused other councillors and independent directors to be appointed and had every opportunity to oversee and supervise the affairs of GHI, including the work of Detenbeck and Panetta.

42. The allegation that it was negligent or a breach of fiduciary duty for the Defendants to permit themselves to carry out the instructions and directives of GHI and its shareholder because some of them were receiving compensation (which was approved by the board and its shareholder) simply has no basis in fact or law.

**The Claim of GEI**

43. GEI claims breach of duty of care and breach of fiduciary duty. GEI also alleges oppression in paragraph 39 of the Statement of Claim, but no relief under section 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*") is sought.
44. The allegation that the Defendants were in breach of their duties to GEI is without foundation, fact or law. At all times, the Defendants followed the directions of the board of directors of GEI (which included Town councillors) with the support of the Town and in good faith and to the best of their abilities. At no time were they in breach of any duties.
45. Furthermore, as a matter of law, GEI has no status to bring a claim for oppression with respect to the manner in which the affairs of GEI were conducted.

**The Claim of the Town of Grimsby**

46. The Town claims negligence and breach of fiduciary duty. The Town also alleges oppression in paragraph 43 of the Statement of Claim, but claims no relief under section 248 of the *OBCA*.
47. At all times, the Defendants complied with their obligations at law and pursuant to the *OBCA*. There were no conflicts of interest and no breaches of duty of care or fiduciary duty by the Defendants in carrying out the instructions of the boards of directors and

shareholders of the Plaintiff corporations, whether or not they were compensated for their work.

48. Furthermore, the Town, its councillors and its professional staff were at all times aware of the financing required, the financing arrangements that were put in place and the use of funds for the Biodigester Project, and the Town concurred and acquiesced therein.
49. It was at all times open to the Town to make a decision to cancel the Biodigester Project. It determined not to do so and, instead, authorized the further use of funds of which it was a beneficial owner.

#### Damages

50. The Defendants deny the Plaintiffs have sustained any damages. The Biodigester Project has been sold by GEI, and the proceeds thereof used to repay or reduce any indebtedness of GEI to the Plaintiffs or any losses incurred.
51. The Defendants specifically deny that the amount of funds invested in the Biodigester Project represents damages suffered by the Plaintiffs. The Defendants put the Plaintiffs to the strict proof of any damages.
52. Alternatively, the Plaintiffs have failed to mitigate their damages. In particular, the Plaintiffs:
  - (a) decided to dispose of the Biodigester Project prematurely. Had they retained ownership, in the fullness of time they would have reduced or eliminated any financial loss;

- (b) failed to pursue or consummate other transactions to reduce or eliminate any losses, including refinancing options and the opportunity to enter into a long term lease which provided a reasonable prospect of making the Plaintiffs whole; and
- (c) sold the Biodigester Project for an improvident price.

**Causation and Contributory Negligence**

53. As set out above, the other directors of the Plaintiffs, and the councillors and professional staff of the Town, fully participated and acquiesced in all of the matters and alleged indecisions now complained of, and often directed them. To the extent there was any negligence in any of the respects complained of, then the Plaintiffs are solely or equally at fault. As such, no damages were caused by the Defendants. Alternatively, the Plaintiffs were contributorily negligent.

**Limitations Act**

54. As set out above, the allegation that the matters now complained of were unknown to the Plaintiffs until after the municipal elections in October 2018 is untrue. All of the matters complained of were well known, or ought reasonably to have been known, to the Plaintiffs at the time they occurred. All claims asserted by the Plaintiffs against the Defendants are barred by the passage of time and the doctrine of laches. The Defendants plead and rely upon the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

**Municipal Act**

55. The Defendants state that they at all times acted in good faith and, by reason of section 448 of the *Municipal Act, 2001*, S.O. 2001, c. 25, are not liable to the Plaintiffs.

**Ontario Business Corporations Act**

56. The Defendants state that they at all times acted in good faith are entitled to be indemnified by each of the Plaintiff corporations of which they were directors at the time of any of the alleged misconduct pursuant to section 136 of the *OBCA*.
57. The Defendants therefore ask that this action be dismissed with costs on a full indemnity basis.

October 31, 2019

**GOODMANS LLP**  
Barristers & Solicitors  
Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

**Alan Mark** LSO#: 21772U  
**Larissa Fulop** LSO#: 72873G

Tel: 416.979.2211  
Fax: 416.979.1234

Lawyers for the Defendants