

PW 17-2019

Appendix C

CV-18 006087540000

Court File No.

ONTARIO

**SUPERIOR COURT OF JUSTICE**

BETWEEN:

POMERLEAU INC.

Plaintiff

and

THE REGIONAL MUNICIPALITY OF NIAGARA

Defendant



**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: November 13, 2018

Issued by   
Local Registrar

Address of court office:  
393 University Avenue, 10<sup>th</sup> Floor  
Toronto, Ontario  
M5G 1E6

TO: THE REGIONAL MUNICIPALITY OF NIAGARA  
1815 Sir Isaac Brock Way  
P.O. Box 1042  
Thorold, Ontario  
L2V 4T7

The Clerk's Office  
2201 St. David's Road  
P.O. Box 1042  
Thorold, Ontario  
L2V 4T7

## CLAIM

1. The plaintiff claims the following:
  - (a) payment of the sum of \$10,000,000.00, including HST;
  - (b) pre-judgment and post-judgment interest at the rate prescribed by the contract between the parties, as described below;
  - (c) in the alternative, pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C. 48 or as this Honourable Court may otherwise direct;
  - (d) costs on a substantial indemnity basis;
  - (e) an order that for the purposes above and for all other purposes that all proper directions be given, enquiries made and accounts taken; and
  - (f) such further and other relief as this Honourable Court deems just.

### *The Parties*

1. The plaintiff, Pomerleau Inc. ("Pomerleau"), is a corporation created and subsisting pursuant to the laws of Quebec which carries on business as a general contractor in Ontario and elsewhere.
2. The defendant, Regional Municipality of Niagara ("Niagara Region") is a municipality in Ontario and was, at all material times, the registered legal and beneficial owner of the lands subject to the construction project at issue in this proceeding.

### *The Construction Contract*

3. On or about February 7, 2014, Pomerleau entered into a contract with the Niagara Region whereby Pomerleau agreed to act as the general contractor in respect of the replacement of the Burgoyne Bridge which carries Regional Road 81 (St. Paul Street West) over 12 Mile Creek and Highway 406 in St. Catharines, Ontario (the "Project").
4. The contract was entered into following the acceptance of a tender by Pomerleau in which it had bid the Project at \$69,909,966.60, plus HST based on designs and specifications

prepared by Delcan Corporation, subsequently acquired by Parsons Corporation ("Parsons" or the "Contract Administrator").

5. The contract contained the following material terms:

- (a) the total agreed upon contract price was \$69,909,966.60, plus HST;
- (b) the contract would be subject to the OPS General Conditions of Contract MUNI 100 included in the Ontario Provincial Standards for Roads and Public Works;
- (c) the Contract Administrator was to be Parsons whose responsibilities included, among other things, determining the amounts owing to Pomerleau and issuing payment certificates, investigating allegations of a Change in the Work made by Pomerleau and issuing appropriate instructions, preparing Change Directives and Change Orders for the approval of Niagara Region;
- (d) Pomerleau would be entitled to receive progress payments for the proportionate share of the work completed subject to various holdbacks as detailed in the contract;
- (e) in the event that Pomerleau was delayed in the performance of the Work by an act or omission of the Niagara Region or the Contract Administrator then Pomerleau would be reimbursed by the Niagara Region for its reasonable costs incurred as a result of the delay; and
- (f) subject to certain exceptions, in the event that the quantity of Work to be done or Material to be supplied or both by Pomerleau under a unity price tender item were to exceed or be less than the tender quantity, Pomerleau would proceed to do the Work or supply the Material or both required to complete the tender item and payment shall be made for the actual amount of Work done or Material supplied or both.

6. Further to subsequently approved change orders and variations in tender quantities required to complete the Project, the total agreed upon contract price was increased to \$74,617,249.00, plus HST.

#### *The Project and Changes to Scope of Work*

7. Commencing shortly after the execution of the contract and continuing until the fall of 2017, Pomerleau supplied services and materials to the Project as had been agreed upon and as were requested by Niagara Region.

8. The services and materials provided by Pomerleau resulted in an improvement to the Property owned by Niagara Region.

9. During the Project, there were a number of important changes to the scope of the work which Pomerleau was required to perform, including the following:

- (a) steps needed to be taken, as instructed by Niagara Region, to address unforeseen soil subsidence near the Renown wastewater Pumping Station (EC0014 and 24) which occurred as a result of vibration-producing construction activities despite the fact that Pomerleau at all times restricted these activities to within the vibration limits specified in the contract;
- (b) steps needed to be taken, as instructed by Niagara Region, to address unexpected movement on the south slope between Pier 2 and the south abutment which occurred as a result of vibration-producing construction activities despite Pomerleau keeping vibration within the limits prescribed by the contract (EC0035,37, 40, 41, 64 and 127);
- (c) additional caisson work needed to be performed as a result of additional requirements imposed during the performance of the work by Niagara Region in respect of cleaning, reinforcing and concreting despite such requirements not having been included in the contract documents (EC0043);
- (d) for an existing pier bent, identified as number 17, it was discovered that the soil capacity could not support the existing bridge during construction if the protection system was constructed as shown on the original drawings and, as a result, a support structure based on a soldier pile design had to be designed, procured and installed and the construction of the north abutment was significantly delayed (EC0052);
- (e) steps had to be taken to address load distribution issues in respect of the east and west girders which arose as a result of unexpected reactions of the steel structure observed during construction, including the installation of shims to fill gaps in certain load bearing locations (EC0105, 146 and 154);
- (f) the Niagara Region requested changes in the design of caisson reinforcing steel, including the addition of a telescopic cage within each caisson resulting in the need for additional rebar and changes in the work required to perform the installation (EC0032);
- (g) despite not being included in the contract documents, Niagara Region requested during construction that no horizontal formwork loads be applied to girder top flanges, resulting in the need for the design of a special custom-made bracing system that would link the formwork from one deck

overhang to the other deck overhang and additional rebar work (EC0094 and EC0190);

- (h) as of result of errors in the design, significant additional work was required on the approaches of the bridge to connect the new bridge with the existing adjacent roads and private properties, which was carried out as per revised drawings issued by the Contract Administrator (EC0175);
- (i) additional reinforcing steel work had to be performed in the arch anchor blocks due to congestion resulting from the reinforcing and embedded items shown on the contract drawings (EC0190 and 193);
- (j) repairs has to be made to an unforeseen sewer line, not shown on the City of St. Catharines utility locates, which was damaged during construction and resulted in a claim for related damages to the property located at 34-36 St. Paul Street W. (EC0192 and claim from property owner);
- (k) debris protection had to be installed under the existing bridge due to the poor condition of the existing sidewalk and in order for the sidewalk to remain in service during construction of the new east bridge as required by Niagara Region (EC0020);
- (l) despite being the responsibility of the Contract Administrator, inspection service were provided for the caissons of the north retaining (EC0082);
- (m) landscaping work required to restore the site was performed, including planting trees and plants in addition to hydroseeding large areas (EC0196); and
- (n) there were various other changes to the contract of lesser value as submitted to Niagara Region (EC0044, 71, 89 and 159).

10. The foregoing changes were the result of breaches and the negligence of Niagara Region and/or the Contract Administrator as agent for Niagara Region and have resulted in additional expenses to Pomerleau not contemplated in the contract documents for which Niagara Region is responsible.

11. Pomerleau submitted requests for change orders and change directives with respect to the above items; however, Niagara Region took the unilateral position that it would not review or settle the various changes, especially those of significant monetary value, until all change requests had been submitted by Pomerleau.

12. Niagara Region had informed Parsons early on in the Project that since it had acted as the designer in addition to being the Contract Administrator that Niagara Region would look to it to recoup any losses resulting from errors and omissions in design work.

*Delay*

13. Additionally, the project to was subject to numerous delays attributable to the Niagara Region or the Contract Administrator in respect of which Pomerleau has already provided the Niagara Region with a detailed delay analysis; however, the Niagara Region has failed and/or refused to respond.

14. Delays in the project attributable to the Niagara Region or the Contract Administrator resulted in the following:

- (a) mobilization of additional caisson construction equipment;
- (b) extended general conditions; and
- (c) additional work performed in winter conditions, including the following:
  - (i) tarping and heating concrete,
  - (ii) snow removal,
  - (iii) loss of productivity in respect of caisson works,
  - (iv) loss of productivity on east girder erection,
  - (v) girder delivery during load restriction period,
  - (vi) loss of productivity on substructure formwork and concrete work; and
  - (vii) loss of productivity on arch ties and hangers works.

15. Pomerleau has demanded payment from Niagara Region, but Niagara Region has refused or neglected to pay. Niagara Region has also failed to provide any response whatsoever to respond to the claims in respect of the work performed and delay despite having already received full particulars of such claims.

16. This amounts to a breach of the contract between Niagara Region and Pomerleau.

17. As a result of Niagara Region's breaches, Pomerleau has sustained a loss and damage.



*Unjust Enrichment and Quantum Meruit*

18. Niagara Region has been unjustly enriched: It has received the benefit of the services and materials supplied by Pomerleau, Pomerleau has suffered a corresponding detriment, and there is no juristic reason for the foregoing.

19. Pomerleau therefore claims from Niagara restitution, on a *quantum meruit* basis, as the reasonable value of services and materials supplied to the Project.

20. Pomerleau pleads and relies upon the terms of the contract between the parties and upon the equitable doctrines of *quantum meruit* and unjust enrichment.

November 13, 2018

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Plaintiff

and

THE REGIONAL MUNICIPALITY OF NIAGARA  
Defendant

Court File No.

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PROCEEDING COMMENCED AT TORONTO

**STATEMENT OF CLAIM**

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