

IN THE MATTER OF THE OTTAWA LIGHT RAIL TRANSIT PUBLIC INQUIRY

The Honourable Justice William Hourigan, Commissioner

OPENING STATEMENT OF THE RTG PARTIES

June 6, 2022

Paliare Roland Rosenberg Rothstein LLP

155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Linda R. Rothstein (LSO #21838K)

Tel.: 416.646.4327

email: linda.rothstein@paliareroland.com

Gordon Capern (LSO #32169H)

Tel.: 416.646.4311

email: gordon.capern@paliareroland.com

Jean-Claude Killey (LSO #55563P)

Tel.: 416.646.7473

email: jean-claude.killey@paliareroland.com

Michael Fenrick (LSO #57675N)

Tel.: 416.646.7481

email: michael.fenrick@paliareroland.com

Mannu Chowdhury (LSO #74497R)

Tel.: 416.646.6302

email: mannu.chowdhury@paliareroland.com

Kartiga Thavaraj (LSO #75291D)

Tel.: 416.646.6317

email: kartiga.thavaraj@paliareroland.com

Jesse Wright (LSO #80382Q)

Tel.: 416.646.6314

email: jesse.wright@paliareroland.com

**Lawyers for Rideau Transit Group General Partnership,
Rideau Transit Maintenance General
Partnership, SNC-Lavalin Constructors (Pacific) Inc.,
SNC-Lavalin Inc., Dragados Canada, Inc., and EllisDon
Corporation**

TO: OTTAWA LIGHT RAIL TRANSIT COMMISSION

Kate McGrann, Co-Lead Counsel
Kate.McGrann@OLRTPublicInquiry.ca

Christine Mainville, Co-Lead Counsel
Christine.Mainville@OLRTPublicInquiry.ca

John Adair, Co-Lead Counsel
jadair@agblp.com

TABLE OF CONTENTS

PART I. OVERVIEW	1
PART II. THE RTG PARTIES WELCOME THIS PUBLIC INQUIRY.....	5
PART III. ANTICIPATED KEY EVIDENCE	6
1. The Confederation Line is safe	7
2. The RTG Parties are experts in designing, constructing and maintaining transit systems	9
3. Mass transit projects are complex and challenges and delays are common	11
4. Despite issues arising during the project, the RTG Parties found ways to rectify issues and move the project forward	14
5. Public-private partnership projects require true partners	16
(a) The City took inflexible and unreasonable positions regarding the RTG Parties	16
(b) The City did not adequately prepare OC Transpo	18
(c) The City’s decision to buy out private debt undermined the P3 structure.....	19
(d) Alstom was not fully prepared.....	20
PART IV. CONCLUSION	20
APPENDIX “A”: ANTICIPATED CHRONOLOGY OF EVENTS	22

PART I. OVERVIEW

1. The RTG Parties¹ are industry leaders in light rail transit design, construction, and maintenance. They are professionals from different disciplines in the infrastructure sector who are committed to their work. They knew that the Confederation Line would be an important addition to the Ottawa community, connecting people to their friends, families, jobs, and other activities (the “**OLRT Project**”). The RTG Parties devoted significant resources to design, construct, and maintain the Confederation Line. They have always been and continue to be focused on a safe transit system for Ottawa residents.

2. The construction and operation of the Confederation Line did not unfold as planned. The RTG Parties accept their part in the frustrations that the users of the Confederation Line have experienced. It is important to the RTG Parties that riders get the full picture of how the system was developed and operates, and that public and private stakeholders engage in a constructive dialogue to regain the trust of riders, and of those residents who are not riding the system currently.

3. Although delays are common in large transit developments, the RTG Parties recognize that delays are nevertheless frustrating for a public that is awaiting its new transit system and the benefits that come with it. In this case, a sinkhole caused at least nine months of delay to completion and required the RTG Parties to re-sequence construction and the testing of the

¹ The RTG Parties are, or are affiliates of, EllisDon Corporation, SNC-Lavalin Group, ACS Infrastructure Canada Inc and Dragados Canada, Inc, all leaders in infrastructure. They comprise Rideau Transit Group General Partnership, ACS RTG Partner Inc., SNC RTG Partner Inc., EllisDon RTG Partner Inc., OLRT Constructors, an unincorporated joint venture consisting of Dragados Canada, Inc., EllisDon Corporation and SNC-Lavalin Constructors (Pacific) Inc., and Rideau Transit Maintenance General Partnership, ACS RT Maintenance Partner Inc., ProTrans RT Maintenance Partner Inc., and EllisDon RT Maintenance Partner Inc.

vehicles (the “**sinkhole**”).² While the parties disagree on the cause of the sinkhole, its effects on the OLRT Project were significant and resulted in major delays to the project, as well as substantial increased costs to the RTG Parties.³

4. The City of Ottawa’s (the “**City**”) misguided decision to launch the Confederation Line at nearly full-service levels and without a soft launch (which is the best practice in this area) on a date the City chose compounded the public’s frustration with the system. As is typical of complex projects, the Confederation Line experienced challenges once service commenced. The RTG Parties accept that the system did not operate as expected and accept their share of responsibility for some of the challenges it faced.

5. The City exacerbated these challenges by failing to sensitize riders to the possibility and normality of service interruptions. Instead, the City promoted the system to Ottawa commuters as a “turn key” system, when an experienced transit operator knows that any new transit system of this complexity experiences “growing pains.” It is natural that highly complex systems like this OLRT project go through a bedding-in period. The RTG Parties are contractually prohibited from speaking publicly about the system without the City’s permission. They were therefore unable to educate the public, and the City appeared unwilling to do so.

6. The City also failed to anticipate and mitigate this natural bedding-in period by simultaneously reducing and then cancelling service on alternative bus routes, leading to even greater commuter disruptions and public frustration. The City did not properly manage the

2 There were other disruptions to the OLRT Project as well, for which contractual liability is contested.

3 The RTG Parties’ evidence will be that a faulty municipal watermain line caused the sinkhole.

crowding that occurred when service was disrupted. It is notable that even mature transit systems, such as the Toronto Transit Commission, maintain adequate alternative bus capacity that does not impact other transit routes for circumstances that arise from time-to-time as part of normal operations. The City does not.

7. At present, the RTG Parties' relationship with the City is in a challenging state, and it needs to be reset for the residents of Ottawa. Regrettably, the lack of real partnership on the part of the City began as early as the sinkhole and has continued throughout the Confederation Line's operational term. The City intentionally takes inflexible and unreasonable positions when interpreting contractual provisions, which are inconsistent with the way that similar contracts are interpreted by other, more experienced public authorities. The City lacks an appreciation for how unforeseeable circumstances or simply normal operating conditions may affect the project. The RTG Parties continue to be willing to work with the City to improve this relationship for the benefit of Ottawa's residents.

8. The City and the RTG Parties were also let down by the key subcontractor, Alstom Transport Canada ("**Alstom**"), which was the City's preferred supplier during procurement. Alstom was late in delivering the vehicles. It was slow to staff-up fully to meet its maintenance obligations. Many of the initial challenges were vehicle related. While the root cause of the first derailment continues to be assessed, issues with an Alstom vehicle contributed to the first derailment and the second derailment was caused by Alstom's maintenance shortcomings. Given Alstom's vast resources, market power, and the global scale of its operations and expertise, the RTG Parties expected more from Alstom.

9. While the Confederation Line has had its challenges, the system has performed well over time. The Confederation Line currently has a service reliability of 99.8%, which increased over the last six months from 99.2%.

10. The RTG Parties' lodestar has always been rider safety. When derailments and service disruptions occurred, the RTG Parties acted decisively to ensure that the system was safe and reliable. They are also addressing and hope to reset of the relationships with the City and Alstom to better serve the people of Ottawa. The RTG Parties take seriously their responsibility to Ottawa's residents—including ensuring that the community has a safe and reliable light rail transit system for years to come—and hopes to regain riders' confidence in what is truly a world-class light rail line.

11. This opening statement is divided into two parts:

- (a) In the first part, the RTG Parties outline their engagement with this public inquiry; and,
- (b) In the second part, the RTG Parties submit that the weight of oral and documentary evidence will show that:
 - (i) The Confederation Line is safe;
 - (ii) The RTG Parties are experts in designing, constructing and maintaining transit systems;
 - (iii) Mass transit projects are complex, and delays are common;

- (iv) Despite challenges arising during the project, the RTG Parties found ways to rectify issues and move the project forward; and,
- (v) Public-private partnership projects require true partners willing to work together for the good of the project.

12. Appendix “A” of the opening statement sets out a brief chronology of events that the RTG Parties anticipate will be established by the evidence.

PART II. THE RTG PARTIES WELCOME THIS PUBLIC INQUIRY

13. Public inquiries are integral to Canada’s democracy. As Commissioner Justice Bellamy explained in a recent public inquiry in Ontario, “...‘[t]here is a crack in everything, that’s how the light gets in.’ And I think that’s what the public inquiry does, it shines a light through the crack that has been discovered....”⁴

14. The RTG Parties welcome the Ottawa Light Rail Transit Commission’s (the “**Commission**”) inquiry into the Confederation Line. The Ottawa public has so far been limited in its ability to be informed about many of the issues that have arisen over the life of the project, since under the RTG Parties’ contract with the City, the City controls what information can be made public. The public will now have a chance to hear directly from many of the industry-leading experts who helped design, build, and maintain the Confederation Line. The RTG Parties expect that these experts will paint a fair and unbiased picture of where things could have been done

⁴ The Honourable Madam Justice Denise E. Bellamy, *The Collingwood Inquiry*, Transcript Date November 27, 2019 [unavailable online].

better, by who, and also why the residents of Ottawa should be proud of the Confederation Line as one of the most advanced and technologically sophisticated transit lines in North America.

15. The RTG Parties have sought to assist the Commission. As of today, the RTG Parties have produced 424,107 documents in response to the Commission’s summonses. They arranged for the Commission to interview 21 individuals including current and former employees of the RTG Parties. Nine of these witnesses will testify before the Commissioner during the public hearings.

PART III. ANTICIPATED KEY EVIDENCE

16. Public inquiries serve a “social function.”⁵ They can dispel community wide “scepticism” and educate the public on what occurred.⁶ In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, Justice Cory of the Supreme Court explained as follows:

[A] commission . . . has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.

The investigative, educational and informative aspects of inquiries clearly benefit society as a whole...⁷

17. As part of this broader “social function” of educating the community on the procurement process, design, construction, and maintenance of the Confederation Line, the Commission should

⁵ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [\[1995\] 2 SCR 97](#) at para 64.

⁶ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [\[1995\] 2 SCR 97](#) at paras 62 and 65.

⁷ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [\[1995\] 2 SCR 97](#) at paras 64-65.

remain alert to the following key pieces of evidence that are anticipated to be led at the public hearings.

1. The Confederation Line is safe

18. The Confederation Line is safe. This has been the case from the start, and remains true, notwithstanding that there have been disruptions to service.

19. The RTG Parties take derailments very seriously. Unfortunately many mass transit projects experience derailments at some point in their operation.⁸ For example, since 2019, the commuter rail systems in New York City, Washington DC, and Toronto all experienced at least one derailment.⁹ The RTG Parties have taken steps to avoid any further derailments on the Confederation Line.

20. When a derailment occurs, the most important thing is to respond immediately, focus on safety and mitigate the issues that caused the derailment. That is precisely what the RTG Parties did. While the root cause of the first derailment continues to be assessed, issues with the light rail vehicles (“LRV”) contributed to the first derailment. Poor workmanship (e.g., bolts were not torqued adequately) by Alstom caused the second derailment. Since the derailments, the RTG Parties have undertaken a variety of remedial measures to address the derailment issues including the following:

⁸ The Project Agreement specifically contemplates the occurrence of derailments: see Schedule 20 of the Project Agreement.

⁹ See, for example, media coverage regarding transit derailment in Toronto: Toronto Star, “Rush hour subway derailment caused by tiny piece of protruding rail, early TTC investigation finds”, published on January 27, 2020; [available online](#).

- (a) implementing a bearing inspection check every 7,500 kilometers across the fleet to identify bearing looseness before it becomes a safety concern. This is an aggressive inspection interval;
- (b) strengthening an already robust quality assurance process for retrofit activities;
- (c) enhancing winter operations; and,
- (d) pro-actively removing trains from service (train swap) through fleet support monitoring, train tracer speed sensors, and faults.

21. Because a component of the LRVs contributed to the first derailment, the Commission should remain alert to the procurement of the Alstom vehicle. As part of the bidding process, the RTG Parties indicated to the City that their preferred vehicle was a CAF vehicle. However, during the procurement process, the City left no doubt that it wanted the Alstom vehicle that the Confederation Line's Citadis Spirit is based on. Therefore, the RTG Parties opted for the Alstom vehicle (and Alstom generally as a subcontractor) because the City, in essence, required them to do so for the RTG Parties to have a chance to be successful in the procurement.

22. As the first derailment and other service disruptions suggest (e.g., service had to be halted due to commuters holding the door open), the Alstom vehicle has had significant challenges in Ottawa. To be viable in a setting like Ottawa and to meet the requirements of the Project Agreement (the "**Project Agreement**"), the Citadis required many modifications such that it became essentially a different vehicle from the proven technology that Alstom marketed and the City sought.

2. The RTG Parties are experts in designing, constructing and maintaining transit systems

23. The RTG Parties brought in industry-leading experts from across the globe to make the Confederation Line one of the safest, most innovative, and technologically advanced light rail systems in the world, deserving of a nation's capital. The corporate consortium partners involved in the construction and maintenance of the Confederation Line has an established track record in infrastructure and transit development. Some such experiences include the following:

- (a) ACS Infrastructure Canada Inc., together with its sister company ACS Infrastructure Development, Inc. (collectively "ACS infrastructure"), is a wholly owned subsidiary of the ACS Group, one of the largest infrastructure construction companies and developers in the world with more than 190,400 employees spread across over 50 countries. The ACS Group has developed more than 150 infrastructure projects. Currently, it has 46 projects in its portfolio, with the largest investment in North America (67%) and in transportation infrastructure (48% in transit systems). In North America, ACS Infrastructure has experience delivering seventeen public-private partnership ("P3") projects worth over \$28 billion in assets under management. North American infrastructure and transit development experience includes the Automated People Mover at the Los Angeles International Airport, the Eglinton Crosstown LRT and the Finch West LRT projects in Toronto, as well as the New Champlain Bridge Corridor Project in Montreal and the Gordie Howe International Bridge Crossing between Windsor and Detroit;
- (b) Dragados Canada, Inc. is a wholly owned subsidiary of Dragados, S.A., which is the construction arm of the ACS Group. Dragados, S.A. has more than 72 years of

international experience in the construction, rehabilitation, and maintenance of roads, bridges, tunnels, highways, and rail project around the world. The firm began its Canadian operations in 1997 with the construction of the Fredericton-Moncton Highway in New Brunswick, Canada. Since then, Dragados has continued to deliver major infrastructure projects in the transit and transportation sectors, including complex high-speed rail, commuter rail and station projects worldwide, including rail bridges, pedestrian bridges, grade separations, and track diversions. Its local experience in major infrastructure developments cover the transit and transportation sectors, and includes projects such as Metrolinx's Eglinton Crosstown LRT, Eglinton Crosstown Tunnels, and the Finch West LRT in Toronto, REM Montreal LRT, New Champlain Bridge Corridor Project, and the Gordie Howe International Bridge Crossing;

- (c) EllisDon was established in London, Ontario, in 1951 and is a Canadian employee-owned construction and building services company. EllisDon Civil Ltd., formed in 2000, is a wholly owned subsidiary of EllisDon that has completed over 200 civil projects and has an extensive portfolio consisting of some of the most complex, innovative, and prominent transit infrastructure projects in Canada. EllisDon's history in transit construction is evident by numerous signature projects including the vivaNext Program in York Region, Edmonton Valley Line LRT, Eglinton Crosstown LRT in the Greater Toronto Area, and the GO Rail Expansion - Highway 401/409 Tunnel. EllisDon has also successfully built transit facilities and systems for GO Transit, Toronto Transit Commission, and VIA Rail in Calgary, Edmonton, Ottawa, Toronto and York Region; and,

- (d) SNC-Lavalin is a fully integrated professional services and project management company with offices around the world. Headquartered in Montreal, Canada, since 1911, SNC-Lavalin has a long history of delivering major infrastructure projects located across the Canadian landscape. SNC-Lavalin's projects have ranged from light rail transit, like the REM Project (Montreal), the Calgary West LRT, and the Eglinton Crosstown LRT; tunnels and highways such as the Highway 407 Phase 1 East Extension, the Brun-Way Highway, and Southeast Stoney Trail; to bridge projects like the Samuel de Champlain Bridge and the William R Bennett Floating Bridge. SNC-Lavalin also has broad expertise working on P3 and concession projects, having participated in over two-dozen such projects, of which ten are transportation P3s in Canada.

24. The individual professionals who designed and built the Confederation Line, and who now maintain the system, brought decades of experience and top qualifications in their fields. As a group, their expertise was significant and tailored to this project.

3. Mass transit projects are complex and challenges and delays are common

25. Large transit projects are complex. They involve large multi-party undertakings that have many moving and interconnected parts. Delays are common given the number of stakeholders and the wide range of factors that are beyond the control of any of the parties. The RTG Parties anticipate that the evidence will show that there were three problems which had a significant impact on the timeline of the project.

26. First, at the outset of the project and during the procurement phase, there were concerns about the City's affordability cap. It was lower than for a typical project of this size and

complexity. From the perspective of the RTG Parties, the City appeared to approach the procurement and contract management process with an unrealistic appreciation of the size, scope, and complexity of the project. For example, the City insisted on its choice of vehicle and system design without regard to advice from the RTG Parties. While the RTG Parties devoted all necessary resources to make the Confederation Line a reality, the City's affordability cap and its conduct created challenges which had downstream effects.

27. Second, the unforeseen sinkhole caused significant challenges and delays of at least nine months. Following the immediate aftermath of the sinkhole and the remedial work to stabilize the tunnel and the surrounding area, OLRT-C was forced to re-sequence the remaining excavation and alter the construction plans for the OLRT Project's largest underground rail station. The sinkhole affected the timing of the installation of the trackwork, forced OLRT-C to rebid key scopes of work to subcontractors to address delay, and delayed the installation of the train control systems in the underground segments.

28. The sinkhole also affected the ability to test and commission the system. The RTG Parties could not test the system starting at one end and moving to the other because the sinkhole had effectively cut the system in two. Instead, they had to test and commission the vehicles at the respective ends and meet towards the middle (Rideau Station, where the sinkhole had occurred).

29. Ultimately, the sinkhole had a significant cascading impact on the project and the schedule. Although the RTG Parties took reasonable steps to mitigate the delays that resulted from the sinkhole and incurred significant costs in so doing, it was inevitable that this significant and unforeseen event would cause delay. The City's response to the sinkhole—its insistence that the schedule could not be adjusted—was unrealistic. The City refused to discuss the situation openly

with the RTG Parties.¹⁰ It remained inflexible in its approach and refused to acknowledge how the sinkhole was affecting the broader project, including by refusing to grant the RTG Parties schedule relief.

30. Third, given that commuter light rail projects are complex, there is almost always a “soft opening” or a “bedding-in” period. During this period, the system operates at less than full capacity to allow for “real-world” issues to reveal themselves and for the operator and maintainer to hone their ability to work together to resolve those issues, in a setting that minimizes the impact of these issues on riders. Having a “bedding-in” period is all the more important when the rail system is a new one for the operator (which was the case here), and when the operator and maintainer are new to working together (which was also the case here). Ultimately it is well understood in the industry that a “bedding-in” period will occur naturally regardless of what the contract says: parties have to behave reasonably and cooperate with each other in these circumstances.

31. In this case, the City refused to agree to a soft launch, despite being urged to do so by the RTG Parties. Instead, the City cut off bus services shortly after opening (with no excess capacity to cover normal “growing pains”) and opened the Confederation Line at nearly full service.¹¹ As a result, relatively minor issues such as a train door being forced open had an outsized impact on Ottawa’s riders. It is inconceivable that the City and its experts did not realize that a system this new and complicated would have “bugs” in its early days – something the RTG Parties made clear to the City.

¹⁰ The City knows that the sinkhole caused a substantial delay to the Project. It has commenced a proceeding in the Ontario Superior Court against the Project’s insurers seeking \$131 million for damages that the City says it incurred because of the delay caused by the sinkhole.

¹¹ Prior to opening, the City agreed to reduce the vehicles required for RSA from 15 LRVs to 13.

32. These early disruptions had a significant effect on how the public viewed the Confederation Line. Ongoing media coverage and service issues diminished the public's faith in the system and its reliability. While this partly stemmed from the lack of a soft opening, it also arose because of the City's management of communications with the public. The City should have informed Ottawa residents that their system would take some time to settle in, but instead bowed to political pressures to act "tough". Ottawa commuters are sophisticated and would have understood that a complex transit cannot run perfectly from day one. Yet the City made no such attempts. These communications challenges were compounded because, under the Project Agreement, the RTG Parties were not permitted to communicate with the public except with the consent of the City.

4. Despite issues arising during the project, the RTG Parties found ways to rectify issues and move the project forward

33. The RTG Parties acknowledge that the OLRT Project has not always proceeded as planned. When it has not, the RTG Parties have always done their best to deal with and rectify the issues without delay.

34. There is no dispute that the RTG Parties missed Revenue Service Availability ("RSA") dates and the project experienced delays.¹² Alstom was delayed in supplying and retrofitting the LRVs. The RTG Parties worked with Alstom to try to limit its delays with the LRVs, including seeking and monitoring Alstom's revised schedules.

35. When the sinkhole occurred—which significantly affected the RTG Parties' ability to meet the RSA dates—the RTG Parties invested more money and resources into the construction of the

¹² As part of missing RSA dates, the RTG Parties paid to the City liquidated damages (as required under the Project Agreement) and financed the delay.

project even though the City refused to grant any schedule or cost relief. There was ultimately a partial cost reimbursement to RTG through insurance for some of the cost impacts of the sinkhole, but this was only partial and was received well after RSA. It therefore did not fully relieve pressure on the schedule or change the fact that OLRT-C / RTG funded the prolongation while the City was, at minimum, made whole as lender past the originally scheduled RSA dates.

36. Service disruptions during the early days of the Confederation Line and the derailments are other examples of challenges with this project. The RTG Parties recognize that the system started with disruptions, and riders were not informed of the possibility that this may occur. The result was that many riders were left with limited transit options on several occasions. The RTG Parties deeply regret the difficulties that this caused Ottawa residents. However, since those days of early challenges, the RTG Parties adjusted and the overall reliability of the system has improved. Among other things, the RTG Parties implemented the following measures to enhance the reliability of the Confederation Line:

- (a) an oversight inspection program for the subcontractor (Alstom);
- (b) quality assurance improvements to preventative maintenance activities;
- (c) engineering solutions to outstanding vehicle issues (software & hardware improvements); and,
- (d) mitigations for repeat reliability issues.

37. The Project Agreement contemplates issues occurring from time to time. Should issues arise in the future, the Project Agreement provides a payment mechanism whereby financial penalties may be imposed if there is a service level breach under certain contractual thresholds.

5. Public-private partnership projects require true partners

38. The success of a P3 project depends on the parties being true partners. The third “P” is important and it is there by design. Projects such as the Confederation Line will be successful only if all the parties act as partners in a manner that is best for the overall success of the project and its commuters.

39. In the case of the Confederation Line, there were significant challenges with the City and Alstom as partners as further described below.

(a) The City took inflexible and unreasonable positions regarding the RTG Parties

40. The City has intentionally managed the relationship with the RTG Parties in an adversarial manner. The City uses contractual mechanisms to improperly withhold payment, and slow the pace of dispute resolution. For example, the City has taken the position that a deduction of \$500,000 applies for a broken mirror in a washroom. This is only one example of several unreasonable positions that the City has taken. At best, the City is not being a helpful and proactive partner. At worst, it is using contractual terms to serve punitive functions for political purposes.

41. The City’s inflexibility was especially problematic when the City micromanaged the RTG Parties in times of stress on the project. The City’s micromanagement was unproductive in part because the City lacks expertise and experience with LRTs. Rather than micromanaging, the City’s goal should have been to collaborate with the RTG Parties to triage of priority issues, from the utmost priority (i.e. the safety of commuters on a complex, fast-moving, transit system) to lower, but also important, priority issues.

42. The City's inflexible and unreasonable interpretation of contractual provisions means that the RTG Parties are at times not paid even though they are not at fault.¹³ By way of example:

- (a) The Project Agreement is clear that the City is not entitled to "carry-forward" deductions during the maintenance term from one month to the next. Yet, the City has adopted this approach, contrary to the standard interpretation of such clauses in P3 agreements, resulting in the system being starved of funds;
- (b) The City withheld monies for delay damages and mobility matters (which were actually delay damages) notwithstanding that the Project Agreement expressly stated that liquidated damages are the sole mechanism for addressing delay damages;
- (c) As stated at paragraph 3 above, a faulty watermain infrastructure in the soil may have caused the sinkhole. Under the Project Agreement, this risk was allocated to the City. When the sinkhole occurred, the City refused to grant the RTG Parties schedule relief, even though the sinkhole may have been caused by a risk allocated to the City; and,
- (d) The City appeared to adopt the approach that Brian Guest would later recommend in his October 16, 2021 email to former Mayor Bob Chiarelli, where, rather than create a "partnership" with the goal of giving the

¹³ The City's decision to limit the role of Infrastructure Ontario during procurement and contract implementation was misplaced, especially given the City's relative lack of experience in complex light rail transit projects.

residents of Ottawa a world-class light rail transit line, the P3 arrangement between the City and the RTG Parties was “designed” to cause the RTG Parties to “lose their shirt”.

43. At present, the RTG Parties’ relationship with the City is in need of a “reset”. The City has gone to court to try to effectively sidestep the Project Agreement to confirm its right to terminate the RTG Parties for default. This is misguided: the RTG Parties dispute that they are in default and in any event the Project Agreement requires such disputes to go through the proper dispute resolution process.

44. More to the point, termination of the Project Agreement is not the right outcome for the Ottawa community. The Confederation Line is a good system that operates well now and will only get better. Termination will be extraordinarily expensive and disruptive for Ottawa taxpayers. The City has not informed the people of Ottawa of what it is presently seeking to do. It is possible that the City does not even fully appreciate the operational chaos that may follow if a termination is triggered. Terminating the RTG Parties does not solve any issues that may remain with Alstom’s vehicles or Alstom’s maintenance shortcomings (and may even exacerbate such issues). The RTG Parties remain committed to their responsibilities and to the Confederation Line writ large.

(b) The City did not adequately prepare OC Transpo

45. The City did not adequately prepare OC Transpo, the operator of the vehicles. OC Transpo were focused on the wrong priorities. They had no prior rail expertise and focused on less significant issues to penalize the RTG Parties. For example, OC Transpo classified a cigarette butt found on station floor as a “safety critical” issue, which requires the highest level of response by

the maintainer, Rideau Transit Maintenance General Partnership (“**RTM**”), in the fastest amount of time, instead of focusing on true safety and reliability issues.

46. There should have been a longer period during which the RTG Parties, the City, and OC Transpo worked together to master the system. This is important because (a) the system was new and highly customized, and (b) OC Transpo’s staff did not have significant rail experience or expertise. OC Transpo has improved as they have developed their experience and expertise, but the need for them to have a period of time in which to do so was foreseeable.

(c) The City’s decision to buy out private debt undermined the P3 structure

47. The City’s decision to buy out private debt was very unusual (if not unheard of) in a P3 context. Third party lenders play an important role in a P3 process. They provide a measure of independent oversight to both the City and the consortium partners. At different points in the process, third party lenders may apply commercial pressure on a constructor to perform, or on an owner to be more reasonable in its contract management.

48. The City’s decision in late 2017 to buy out private debt undermined this important aspect of P3 projects—the independent oversight that lenders normally provide. The City’s decision to buy out private debt in this unexpected and unilateral way also meant that the City obtained access to information through financing documents that was not meant to be shared with the City and obtained further commercial leverage.

(d) Alstom was not fully prepared

49. On the OLRT Project, Alstom was selected to act as the sub-contractor to both supply and maintain the vehicles. This choice was, in large part, due to the City's stringent vehicle requirements as set out in the project specifications in the Project Agreement. It was obvious to the RTG Parties that the City wanted Alstom as the subcontractor.

50. Alstom is one of the largest vehicle manufacturers and maintainers in the world. As a result, the RTG Parties expected that they could rely on Alstom to fulfil its dual roles of supplier and maintainer of the vehicles with professionalism and expertise. Alstom marketed themselves this way. Unfortunately, despite its size and reputation, Alstom did not deploy sufficient people, or those with the specific skills and expertise required, to work on the OLRT Project. Ultimately, Alstom was unable to deliver its vehicles when they were needed, and it was slow to bring its maintenance operations (which it performs under subcontract to RTM) up to the capacity required to keep disruptions to a minimum.

51. Alstom should have been able to devote more and better resources to the Confederation Line. The RTG Parties of course understand that they have contracted with Alstom. However, the City, its Mayor, and the RTG Parties have had to continuously push Alstom; and the RTG Parties have on a number of occasions stepped in to fill in the gaps in their performance.

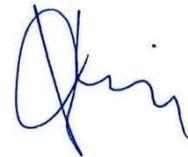
PART IV. CONCLUSION

52. P3 projects, infrastructure construction, and maintenance are complex. Relationships matter more than the words in a contract to the ultimate success of an infrastructure project. As such, a certain amount of flexibility is required, in addition to consistent cooperation and coordination among all parties.

53. Similar to any major infrastructure project, the project teams needed to adapt, evolve the schedule and work together to select the best approach with respect to certain events that happened in Ottawa (for example, the sinkhole). The City's rigidity and its expectation that such events were the RTG Parties' "problem" was misguided and ultimately, counter productive. All stakeholders have a role to play in overcoming unforeseen circumstances, especially the project owner, who could have used the opportunity to be a leader in the partnership toward a better project outcome.

54. The RTG Parties are experts in transit construction and maintenance. They have devoted and continue to devote significant resources and technical professionals to design, develop and maintain the Confederation Line. When phases of the project were delayed and/or unforeseeable events arose, the RTG Parties implemented effective and pragmatic solutions. The result is that Ottawa has a highly sophisticated transit system that is safe and reliable and will be regarded world class.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Paliare Roland Rosenberg Rothstein LLP

APPENDIX “A”: ANTICIPATED CHRONOLOGY OF EVENTS

Below is an outline of the key events that the RTG Parties anticipate will be adduced at the public hearings:

- (a) In May 2011, the City of Ottawa (the “**City**”) approved the Ottawa Light Rail Transit project (the “**OLRT Project**”);
- (b) In July 2011, the City released a Request for Qualifications for the OLRT Project, following which there was a lengthy RFP process for qualified proponents, including numerous meetings between the City and proponents;
- (c) On December 5, 2012, the City awarded RTG a contract to design, build, finance, and maintain the transit line for 30 years at a fixed-price;
- (d) On December 19, 2012, the City approved the plan for the Confederation Line, comprising a 12.5 km light-rail transit line to run from Tunney’s Pasture Station to Blair Station. The line was to consist of 13 stations;
- (e) On February 12, 2013, RTG entered into the Project Agreement with the City (the “**Project Agreement**”). On the same day, RTG entered into a construction contract with OLRT Constructors (“**OLRT-C**”) for the performance of RTG’s construction obligations under the Project Agreement, including the construction of the Confederation Line. RTG also entered into a maintenance contract with Rideau Transit Maintenance General Partnership (“**RTM**”) for the performance of RTG’s maintenance obligations under the Project Agreement;

- (f) On April 19, 2013, preparatory site work began on the Belfast Maintenance, Storage and Administration Facility (“MSF”) which needed to be built before construction could begin on the line itself. Among other things, the rolling stock (i.e. the light rail vehicles) would eventually come to be assembled at the MSF, as part of the project’s “made in Canada” requirement;
- (g) On April 23, 2013, construction on the downtown tunnel began. The downtown tunnel is the centre portion of the Confederation Line and runs from the east portal near Laurier Avenue, under Queen Street and to the west portal near Bronson Avenue;
- (h) On June 8, 2016, a massive sinkhole opened up on Rideau Steet near Sussex Street (the “**sinkhole**”). The sinkhole swallowed three road lanes and a parked vehicle, forced the evacuation of the Rideau Centre and nearby businesses, and caused several streets to close. The sinkhole disrupted power, water and sanitary services through the downtown core of Ottawa. The watermain under Rideau Steet broke, sending thousands of gallons of water and hundreds of tons of liquefied soil into the underground tunnel causing critical damage and burying the road header being used for excavation. Fortunately, no one was injured. One plausible cause of the sinkhole is a faulty municipal watermain. Under the Project Agreement, this risk was allocated to the City;

- (i) In June and July, 2016, OLRT-C took immediate steps to mitigate the effects of the sinkhole. Priorities included stabilizing the soil and the tunnel, pumping out the water in the tunnel, restoring infrastructure, and repairing Rideau Street. There was a huge effort made by all stakeholders to make Rideau Street safe for the public;
- (j) As of August 2, 2016, Rideau Street was stable and OLRT-C resumed tunneling beneath Rideau Street between the Rideau Station Cavern and east of Sussex Drive upon implementing a major change to the tunnel construction program;
- (k) In October and December 2016, there was nightly and eventually complete closure of Rideau Street to facilitate a ground improvement program. In December 2016, Rideau Street re-opened;
- (l) On December 6, 2016, OLRT-C conducted its first test run of a light-rail vehicle (“**LRVs**” or “**vehicles**”) between Blair and Cyrville Stations;
- (m) In February 2017, OLRT-C completed tunnel excavation. In total, the sinkhole resulted in a nine-month delay in the OLRT Project’s completion as recognized by all parties, including the City;
- (n) Alstom was delayed in its delivery of the vehicles. Between April and June 2017, OLRT-C requested updates from Alstom regarding its proposed delivery schedule for the LRVs. Alstom’s proposed schedule did not meet the contractual date for Revenue Service Availability (“**RSA**”) (i.e.,

substantial completion of the construction), which at this point was May 24, 2018 (this was extended from the original date due to the sinkhole, an event which did not affect Alstom's vehicle building or assembly processes in any way). Ten LRVs were needed by September 11, 2017 for testing. However, based on the Alstom's proposed schedule, only five LRVs would have been ready by September 11, 2017;

- (o) Between July and August 2017, Alstom submitted an "optimized version" of its schedule, which contemplated delivery of the vehicles on May 31, 2018, (i.e., seven days after the anticipated RSA date). Since about seven months of testing had to be conducted with the vehicles after they were delivered before RSA could be achieved, this schedule meant the anticipated RSA date would not be achieved;
- (p) Between late-2017 and early-2018, the City acquired the debt of the OLRT Project, thus becoming the lender to RTG in addition to being the owner of the project under the Project Agreement;
- (q) On February 5, 2018, OLRT-C notified the City it would not achieve RSA on May 24, 2018. OLRT-C projected a revised RSA date of November 2, 2018, subject to any delay events;
- (r) On October 22, 2018, Mayor Watson was re-elected;
- (s) On January 3, 2019, OLRT-C notified the City that RSA would be achieved on or before March 31, 2019;

- (t) On April 26, 2019, OLRT-C provided notice of substantial completion to the City;
- (u) In May 2019, the City informed the Independent Certifier that in the City's opinion, OLRT-C had not met the conditions for substantial completion. The Independent Certifier agreed. OLRT-C requested City to fix a revised required RSA date due to delay events. The City rejected OLRT-C's request;
- (v) On July 11, 2019, OLRT-C informed the City that it would achieve RSA on August 16, 2019, which the City accepted;
- (w) On July 27, 2019, OLRT-C achieved substantial completion, including completing construction and preliminary testing;
- (x) On July 29, 2019, RTG began the trial running of the LRT system, which involved simulating full service, and then evaluating the system's performance after each simulated day of service;
- (y) On August 1, 2019, the City advised RTG that it would levy liquidated damages for failing to achieve RSA on three occasions (May 24, 2018, November 2, 2018 and March 31, 2019) under the Project Agreement;
- (z) On August 23, 2019, trial running of the LRVs was completed;
- (aa) On August 30, 2019, OLRT-C achieved the "handover date", after which it handed over the vehicles to OC Transpo;

- (bb) On September 10, 2019, the City announced that it would withhold \$59 million from RTG's final construction payment, reducing it from \$202 million to \$143 million. This included the City holding back \$34 million due to mobility matters, land issues, and for delay damages—in spite of the fact that the Project Agreement stated that liquidated damages are the sole recourse to the City for any delay;
- (cc) Between May 2018 and August 2019 there were significant liquidated damages paid by OLRT-C to RTG under the construction contract. Then, RTG, as borrower under the credit agreement, paid a portion of these liquidated damages to the lenders (i.e., the City) as interest costs or as part of the debt service repayment. The total liquidated damages paid was approximately \$57.8 million; approximately \$10.5 million of that was for interest or debt service. This amount benefitted or at a minimum kept the lenders whole;
- (dd) On September 14, 2019, the Confederation Line was opened to the public after a ceremony inside Tunney's Pasture Station;
- (ee) On October 8, 2019, a service disruption occurred when a passenger tried to force the doors open on a vehicle;
- (ff) In late-2019 and early-2020, there were other disruptions, including issues arising from the onboard computer needing to be reset. Trains were delayed and at times had technical issues, requiring replacement bus service. A review of RTG's maintenance operations was launched by the City's then-

transportation General Manager John Manconi. In response to the review, the RTG Parties made changes, including to inspections;

- (gg) Between August 2020 and August 2021, the Confederation Line performed well. Service was reliable and there were very few disruptions;
- (hh) On August 8, 2021, an out-of-service LRV carrying no passengers derailed after leaving Tunney's Pasture Station. Two wheels on an axle on the train derailed and one of the wheels was no longer attached to the axle. No one was injured and there was no significant property damage;
- (ii) The RTG Parties (in coordination with Alstom) implemented mitigation efforts to return service to the system. Service on the Confederation Line resumed on August 14, 2021;
- (jj) On September 19, 2021, an LRV derailed as it was departing Tremblay Station. There were passengers on the vehicle. Fortunately, there were again no injuries or significant property damage, except to the train infrastructure;
- (kk) Following the derailments, the RTG Parties took a series of actions to mitigate future risks of derailment including: oversight and monitoring of all activities, including 24/7 oversight, intended to stay in place for a defined period of time; keeping the City apprised of any incidents as they happened; ensuring Alstom was more fully staffed; return to service plan quality assurance; taking a pro-active approach to driver reporting (vibrations, general ride quality, abnormal noises) by means of a 10 point inspection;

following a progressive approach when returning vehicles to service following major maintenance/retrofits; and revising engineering hours testing (meaning the hours permitted by the City to test trains or conduct maintenance), and off peak revenue service launch with technicians on board;

- (ll) On November 12, 2021, service resumed on the Confederation Line. Since LRV services have resumed, service disruptions have been limited and the Confederation Line's reliability score has risen from 99.2% in December 2021 to currently 99.8%;
- (mm) On November 17, 2021, Ontario Transportation Minister Caroline Mulroney announced that a public inquiry would be launched to investigate issues associated with the Confederation line; and,
- (nn) On December 16, 2021, the Lieutenant Governor approved and ordered the public inquiry to commence its review of the Ottawa LRT system.

OPENING STATEMENT OF THE RTG PARTIES

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1

Linda R. Rothstein (LSO #21838K)
Tel.: 416.646.4327
email: linda.rothstein@paliareroland.com

Gordon Capern (LSO #32169H)
Tel.: 416.646.4311
email: gordon.capern@paliareroland.com

Jean-Claude Killey (LSO #55563P)
Tel.: 416.646.7473
email: jean-claude.killey@paliareroland.com

Michael Fenrick (LSO #57675N)
Tel.: 416.646.7481
email: michael.fenrick@paliareroland.com

Mannu Chowdhury (LSO #74497R)
Tel.: 416.646.6302
email: mannu.chowdhury@paliareroland.com

Kartiga Thavaraj (LSO #75291D)
Tel.: 416.646.6317
email: kartiga.thavaraj@paliareroland.com

Jesse Wright (LSO #80382Q)
Tel.: 416.646.6314
email: jesse.wright@paliareroland.com

Lawyers for Rideau Transit Group General Partnership, Rideau Transit Maintenance General Partnership, SNC-Lavalin Constructors (Pacific) Inc., SNC-Lavalin Inc., Dragados Canada, Inc., and EllisDon Corporation