

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

BOMBARDIER TRANSPORTATION CANADA INC.

Applicant

– and –

METROLINX and JEFFREY RANKIN

Respondents

APPLICATION UNDER rules 14.05(3)(d) and (h) of the *Rules of Civil Procedure*.

NOTICE OF APPLICATION

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant is set out on the following pages.

THIS APPLICATION will come on for a hearing on a date to be determined by the Court, at 10:00 a.m., at 393 University Avenue, Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date:

Issued by _____
Local Registrar

Address of Court Office: b

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TO: Metrolinx
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AND TO: Jeffrey Rankin
c/o Metrolinx
97 Front Street West
Toronto, Ontario
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APPLICATION

1. **THE APPLICANT (“Bombardier”) MAKES APPLICATION FOR** the following relief against the respondents (“**Metrolinx**” and “**Rankin**”, respectively) in respect of the July 12, 2016 notice of default (the “**Notice of Default**”) issued by the Engineer to Bombardier pursuant to GC 10, GC12.1 and GC12.2 of the June 14, 2010 contract (the “**Contract**”) between Bombardier and Metrolinx for Transit City Light Rail Vehicles:

- (a) an order maintaining the status quo between Bombardier and Metrolinx concerning the Contract until such time as the validity of the Notice of Default is finally determined through the mandatory dispute resolution process prescribed by the Contract;
- (b) a declaration that under the terms of the Contract, Metrolinx is not entitled to terminate the Contract until the validity of the Notice of Default is finally determined through the mandatory dispute resolution process prescribed by the Contract;
- (c) an order staying any action by Metrolinx to terminate the Contract until such time as the validity of the notice of default is finally determined through the mandatory dispute resolution process prescribed by the Contract;

- (d) an order that the running of the seven-day cure periods prescribed by GC 10.1 and GC 10.2 are hereby stayed, *nunc pro tunc*, as of July 12, 2016 until:
 - (i) such time as the Dispute Review Board determines whether said cure provisions should continue to be stayed until the Engineer, or if necessary the Dispute Review Board or any Court to whom an appeal has been made, finally determines the Contractor Claims filed by Bombardier pursuant to GC 23 and GC 24 of the Contract, disputing the Notice of Default (the “Dispute”);
 - (ii) the Engineer, or if necessary the Dispute Review Board or any Court to whom an appeal has been made, finally determines the Dispute pursuant to GC 23 and GC 24 of the Contract; or
 - (iii) further order of the court;

- (e) an order that the running of the seven-day cure period prescribed by GC 12.3 is hereby stayed, *nunc pro tunc*, as of July 12, 2016 until:
 - (i) such time as the Dispute Review Board or any Court to whom an appeal has been made, determines whether said cure provisions should continue to be stayed until the Engineer, or if necessary the Dispute Review Board, finally

determines the Dispute pursuant to GC 23 and GC 24 of the Contract);

- (ii) the Engineer, or if necessary the Dispute Review Board or any Court to whom an appeal has been made, finally determines the Dispute pursuant to GC 23 and GC 24 of the Contract; or
 - (iii) further order of the court.
- (f) an order that the running of the seven-day cure period prescribed by GC 12.4.1 is hereby stayed, *nunc pro tunc*, as of July 12, 2016 until:
- (i) such time as the Dispute Review Board or any Court to whom an appeal has been made, determines whether said cure provisions should continue to be stayed until the Engineer, or if necessary the Dispute Review Board, finally determines the Dispute pursuant to GC 23 and GC 24 of the Contract;
 - (ii) the Engineer, or if necessary the Dispute Review Board or any Court to whom an appeal has been made, finally determines the Dispute pursuant to GC 23 and GC 24 of the Contract; or
 - (iii) further order of the court.

- (g) a declaration that under the terms of the Contract, Metrolinx is not entitled to draw on any letters of Credit until the validity of the Notice of Default is finally determined through the mandatory dispute resolution process prescribed by the Contract;

- (h) an order that the Engineer is hereby enjoined from issuing a certificate pursuant to GC12.4 of the Contract until:
 - (i) the conclusion of the dispute resolution process under GC 23 and GC24 of the Contract in respect of the July 12, 2016 Notice of Default issued by the Engineer, including (if required) final determination by the Dispute Review Board of that Dispute;

 - (ii) the Dispute Review Board renders a determination regarding the Engineer's ability to issue a certificate pursuant to GC12.4 of the Contract; or

 - (iii) further order of the court.

- (i) a declaration that the Engineer has demonstrated bias in rendering his opinion (pursuant to GC 10.1) that Bombardier has failed to comply with the provisions of the Contract and in rendering his opinion (pursuant to GC 12) that Bombardier is in material default of the Contract;

- (j) a declaration that the Engineer is not entitled to issue a certificate pursuant to GC12.4 of the Contract until:
 - (i) the conclusion of the dispute resolution process under GC 23 and GC24 of the Contract in respect of the July 12, 2016 Notice of Default issued by the Engineer, including (if required) final determination by the Dispute Review Board of that Dispute;
 - (ii) the Dispute Review Board renders a determination regarding the Engineer's entitlement to issue a certificate pursuant to GC12.4 of the Contract;
 - (iii) further order of the court.
- (k) an order for payment to Bombardier by the respondents of Bombardier's costs of this application;
- (l) Such further and other relief as counsel may advise and as this Honourable Court might permit.

2. THE GROUNDS FOR THE APPLICATION ARE:

JURISDICTION

- (a) Clauses 14.05(3)(d), (g) and (h) of the *Rules of Civil Procedure* and the inherent jurisdiction of the court.
- (b) Sections 95, 96 and 97 of the *Courts of Justice Act* R.S.O. 1990, c. C.43
- (c) Section 6 of the *Arbitration Act*, 1991, S.O., c. 17

THE PARTIES

- (d) Bombardier is a Canadian company with headquarters in St. Bruno, Quebec. It has been manufacturing rail cars since 1974 and is one of the world's leading rail manufacturers built for high-speed travel as well as for trains built for public transit. Bombardier is a subsidiary of the Bombardier Transportation global group (the "Group"). With 61 production and engineering sites and 18 service centres in 28 countries, the Group is a global leader in the rail industry, covering the full spectrum of rail solutions, ranging from complete trains to sub-systems, maintenance services, system integration and signalling. The Group's installed base of rolling stock exceeds 100,000 rail cars and locomotives worldwide. The Group employs 39,400 employees, who work on the multitude of rail transportation

solutions worldwide.

- (e) Metrolinx – formerly the Greater Toronto Transportation Authority – is an Ontario Crown agency that is responsible for the GO Transit system and other prescribed passenger transportation systems in the Greater Toronto Area.
- (f) Rankin is the “Engineer” appointed by Metrolinx as Metrolinx’s authorized representative, to represent and act on behalf of Metrolinx, under the Contract.

THE CONTRACT

- (g) On June 26, 2009, Bombardier entered into an agreement with the Toronto Transit Commission (“TTC”) for the design and supply of 204 low floor light rail vehicles (i.e. streetcars) that were to be operated on existing TTC streetcar routes (the “TTC Legacy Contract”). The TTC Legacy Contract included an option to purchase up to an additional 400 light rail vehicles from Bombardier. A portion of this option was later assigned to Metrolinx so that it could order light rail vehicles (i.e. trains or “LRVs”) from Bombardier, for use on a new network of railway tracks that Metrolinx was responsible for building.
- (h) On June 14, 2010 Metrolinx exercised the option, and entered into the Contract with Bombardier, pursuant to which Bombardier agreed to design, build and supply 182 LRVs for Metrolinx. As part of the Contract, Bombardier is required to deliver

two different types of LRVs: single cab LRVs and dual cab LRVs. These LRVs were intended to be used on new lines - the Sheppard East Line, the Eglinton Crosstown Line, the Scarborough RT Line and the Finch Line - that were to be constructed in Toronto, as part of Toronto's Transit City development program. The Eglinton line requires single cab LRVs and the Finch line requires dual cab LRVs. Although there have been delays in producing the Pilot Vehicles (caused by both Metrolinx and Bombardier), the delays have not impacted Metrolinx's ability to put the LRVs in service in a timely manner. As explained below, Bombardier will deliver the LRVs to Metrolinx long before Metrolinx will be ready to put the LRVs in service.

- (i) As will be explained in greater detail in the supporting affidavits for this application, as a result of this Contract, Bombardier has created a significant number of jobs for employees in Thunder Bay (where Bombardier is the largest, private sector employer) and in Kingston (where Bombardier has expanded its manufacturing facilities and operations in order to service this Contract). If Metrolinx is permitted to improperly terminate the Contract, a significant number of jobs will be lost in Thunder Bay and in Kingston.
- (j) After entering the Contract with Bombardier, Metrolinx made changes to the initial Transit City Plan, and later launched public tendering processes to have the infrastructure (i.e. railway tracks, stations, platforms, wayside equipment, communication and signalling equipment) for the Finch and Eglinton Crosstown lines to be built, and later maintained, by private consortiums. The construction of this infrastructure is also being managed by Metrolinx. Metrolinx is significantly late in

constructing these lines:

- (i) the Eglinton Crosstown Line is currently under construction but will not be ready to serve the public until 2021 at earliest;
- (ii) Metrolinx has not even selected a contractor to build the infrastructure for the Finch line yet. When the Finch line will be ready for service is unclear, although Metrolinx has recently reported that Finch will be in service some time in 2022.
- (k) Metrolinx has asked Bombardier to change the delivery schedule that currently exists under amendment 2 of the Contract. Bombardier has agreed to do so and is therefore required to deliver the first set of single cab LRVs in November 2018, for use on the Eglinton Crosstown Line that will not be ready until at least 2019. The new delivery date for dual cab LRVs to be used on the Finch line has not yet been agreed to, but has to be changed since under the schedule that currently exists under amendment 2 of the Contract, Bombardier would theoretically be required to deliver the first set of dual cab LRVs in March 2017 for use on the Finch line. Metrolinx does not want nor is it capable of accepting delivery in March 2017, because the Finch line will not be ready until 2020 or much later. In fact, the contract for the construction of the Finch Line has not yet been awarded - one month before the March 2017 start of delivery dates under amendment 2 of the Contract.
- (l) Because all of the LRVs are currently scheduled to be delivered well before the infrastructure for the LRVs will be ready, Metrolinx faces some significant cost

expenditures and/or liabilities that it wants to avoid:

(i) Metrolinx now wants fewer LRVs than it needed originally. Under the Contract, Metrolinx is contractually required to pay for 182 LRVs. These LRVs were intended to run on four different lines. However, Metrolinx seems to have indefinitely postponed two LRV lines from its transit plans, leaving only the Eglinton and Finch projects. Given the reduction in transit lines, it is not clear whether Metrolinx still requires all 182 LRVs or when they will be required. Metrolinx's recent conduct suggests that it is trying to avoid having to pay for all 182 LRVs that it is contractually required to purchase from Bombardier.

(ii) If Bombardier delivers the LRVs in accordance with its current Contract schedule, Metrolinx will not be able to put those LRVs into service, perhaps for as long as 3 years. Accordingly, Metrolinx would have to store and maintain the LRVs, which is a costly proposition. Bombardier would not agree to store the LRVs for more than 18 months, as there are significant risks and costs associated with doing so. Metrolinx would logically also have to make provision for or purchase extended warranties for the LRVs, as Bombardier's contract warranties would expire while the LRVs are in storage. Bombardier estimates that the price of storage, maintenance and extended warranty for 15 months could exceed 10 million dollars;

(iii) Rather than store the LRVs, under the terms of the Contract, Metrolinx could issue a change directive to Bombardier and change the current delivery schedule. However doing so would require Bombardier to temporarily suspend work on the LRV project and Metrolinx would have to compensate Bombardier accordingly. Metrolinx is well aware that issuing a change directive to suspend work comes with a cost, given that it issued a similar directive to Bombardier in 2011.

(iv) Metrolinx has used a public-private-partnership ("PPP") business model to

construct and maintain the infrastructure. It will also use the PPP model to maintain the LRVs on the Eglinton Crosstown line. Metrolinx has committed to provide the LRVs purchased from Bombardier to the PPP for the Eglinton Crosstown line by a specified date. Based on the project agreement with the PPP, it appears that if Metrolinx cannot meet that commitment, it will have to compensate the PPP for delay. Given the size of the PPP and the nature of the PPP contract, , one would expect the amount of compensation to be paid in the event of delay to be significant. Under its Contract with Bombardier, even if Bombardier were the cause of Metrolinx's late delivery of revenue service LRVs (which it is not), Bombardier's exposure for late delivery of LRVs is limited to a liquidated damage amount of \$1500 per day, per LRV. Even so, the Contract limits the liquidated damage amount recoverable by Metrolinx to a cap of 5% of the "Currently Determined Contract Price".

- (m) It appears Metrolinx is trying to: (a) get out of its contractual obligation to purchase all 182 LRVs; (b) blame Bombardier for its delays; and (c) shift the cost of those delays to Bombardier. Perhaps not surprisingly, in July 2016, Metrolinx's Engineer served Bombardier with the Notice of Default, essentially alleging that Bombardier had failed to comply with: (a) general scheduling requirements; (b) scheduling requirements relating specifically to the delivery of two pilot vehicles; (c) a technical specification relating to load levelling requirements; and (d) its obligation to supply skilled workers, products, plant and equipment at a plant

located in Sahagun, Mexico.

- (n) Bombardier disputes these allegations of material default, and has challenged the validity of the Notice of Default, through the dispute resolution process prescribed by the Contract. At present, Bombardier has filed its submissions contesting the validity of the Notice of Default and is awaiting a decision from the Engineer who is required to render a decision on this issue. Once the Engineer renders his decision, the dispute resolution process allows either party to challenge Metrolinx's Engineer's decision and to have the matter determined by a three-person Dispute Review Board, as provided for under the Contract. Indeed, on February 3, 2017 Bombardier appointed its member to the Dispute Review Board, and intends to use the dispute resolution process to its fullest. Metrolinx has yet to appoint a member to the Dispute Review Board even though it was contractually required to do so by February 3, 2017.
- (o) Although Metrolinx was fully aware that Bombardier was challenging the Notice of Default in accordance with the dispute resolution process in the Contract, on October 28, 2016 Metrolinx served Bombardier with a Notice of Intention to Terminate the Contract (the "Notice of Intention"). Under the terms of the Contract, the Notice of Intention could only be served and ultimately, the Contract can only be terminated, if the Notice of Default was indeed valid in respect of its allegations that Bombardier was in material default - all of which is to be

determined under the dispute resolution process provided for in the Contract.

- (p) Since the Notice of Intention to Terminate, the parties have had without prejudice discussions, the details of which are not included in this application record. However, Bombardier now strongly believes that Metrolinx will try to terminate the Contract shortly.
- (q) Metrolinx and Bombardier both expressly agreed in the Contract, that they have a responsibility to try to resolve any disputes, including disputes of this nature amicably and expeditiously. They have specifically agreed that any disputes of this nature must be submitted to a mandatory dispute resolution process for resolution. In accordance with its contractual rights and in good faith, Bombardier is currently utilizing this mandatory dispute resolution process to assess the validity of the Notice of Default. If Bombardier's challenge is successful, the Notice of Default will be invalid and struck. Metrolinx should not be permitted to take any steps to terminate the Contract until the issue of the validity of the Notice of Default is finally determined through the mandatory dispute resolution process agreed to by both parties.
- (r) If Metrolinx is permitted to terminate the Contract, and it is later determined that the Notice of Default is indeed invalid, irreparable harm will be suffered by the significant number of people currently being employed by Bombardier to complete the Contract. This includes a significant number of employees who are currently

working in Bombardier's facilities in Thunderbay and in Kingston. The harm to Bombardier will also be significant and irreparable. Amongst other things, a termination will adversely affect Bombardier's ability to obtain further contracts, and could permit Metrolinx to call on a letter of credit posted by Bombardier for a significant sum.

- (s) Bombardier has therefore brought this application to seek a stay of certain of the default provisions under the Contract, until such time as the validity of the Notice of Default has been finally determined through the mandatory dispute resolution process.

- (t) Metrolinx's Engineer, having issued the Notice of Default, has himself formed the opinion that Bombardier is in material default under the Contract. Under the dispute resolution process, the Engineer must now make a determination regarding Bombardier's claim challenging the validity of the Notice of Default. The Engineer's communications to Bombardier in dealing with this issue plainly show that the Engineer did not independently evaluate and render opinions in respect of the allegations raised in the Notice of Default, but instead, simply adopted Metrolinx's positions and carried out Metrolinx's instructions, thereby demonstrating bias or perceived bias in favour of Metrolinx. This is a clear violation of his express, contractual obligation to be impartial. For this reason, Bombardier is concerned that the Engineer has demonstrated an inability to act

impartially. Accordingly, Bombardier is also seeking an order replacing Rankin as Engineer for the purpose of determining the validity of the Notice of Default

- (u) There is no urgency that requires Metrolinx to circumvent the dispute resolution process:
 - (i) Under the terms of the Contract, Bombardier is not required to deliver LRVs for use in service for another two years; and
 - (ii) In two years, Metrolinx still will not have completed the infrastructure for the LRVs, and cannot put them into service due to its own failure to provide the infrastructure in accordance with its own schedules.
- (v) Bombardier has invested a great deal of money and mobilized significant resources to ensure that it will meet its contractual obligation to deliver the LRVs in two years. The purpose of the proceedings before the Dispute Resolution Board is to determine whether Metrolinx must continue to perform the Contract, or whether it can follow through with its intention to terminate. If Metrolinx is permitted to terminate now, Bombardier would lose this procedural right, and would suffer irreparable harm.

The Dispute Resolution Process under the Contract

- (w) GC 23, GC24 and Schedule F of the Contract, prescribe a comprehensive process for making claims and resolving disputes that arise under the Contract. This dispute

resolution process is intended to provide the parties with an efficient and expeditious means for resolving disputes, and also provides that while any such disputes are pending, Bombardier can be required to continue performing its obligations under the Contract. Any claims Bombardier might assert against Metrolinx, called a “Contractor Claim”, involves the following steps:

- (i) Bombardier gives a “Written Notice” to the Engineer which sets out the particulars of the Contractor Claim;
- (ii) Within 60 days thereafter (or such other period as may be agreed on by the Engineer in writing), Bombardier submits a “Written Statement of Claim” describing the facts and circumstances of its claim;
- (iii) Within 60 days thereafter (or such longer period of time as is required by the Engineer), the Engineer issues a determination of the validity of the Contractor Claim;
- (iv) If either party disputes the Engineer’s determination of the Contractor Claim, within 60 days of receiving the Engineer’s determination, the disputing party gives the other party a notice of dispute;
- (v) The parties shall make all reasonable efforts to resolve the Dispute by amicable negotiations. Such negotiations are to be initiated within 10 days

of the notice of dispute being received; and

- (vi) If the Dispute is not resolved within 30 days of the notice of dispute being received, then a three-member “Dispute Review Board” must be struck and the Dispute will be referred to it for resolution. After a hearing, the Dispute Review Board makes a ruling on the Dispute that is binding on the parties, except for specifically provided rights of appeal.

The Default and Termination Provisions of the Contract

- (x) GC12 of the Contract provides a mechanism for Metrolinx to terminate the Contract if Bombardier is in “material default” of its obligations under the Contract. The process involves the following steps:
 - (i) In the event that Bombardier is in material default of the Contract, then the Engineer may serve written notice (a “Default Notice”) to Bombardier, specifying the alleged default;
 - (ii) If the material default continues for seven business days after the default Notice, Metrolinx may serve on Bombardier written notice of its intention to terminate the Contract (a “Notice of Intention to Terminate”);
 - (iii) If (A) the material default continues for seven business days after the Notice

of Intention to Terminate, and (B) the Engineer issues a certificate “that sufficient cause exists to justify such action”, then Metrolinx may terminate the Contract and serve notice of termination on Bombardier; and

(iv) As with all decisions, interpretations, determinations and findings of the Engineer under the Contract, any determination by the Engineer that:

(A) Bombardier is in material default of the Contract; or

(B) sufficient cause exists to justify Metrolinx terminating the Contract,

is subject to the dispute resolution process under GC 23, GC24, and Schedule F of the Contract.

THE ENGINEER’S PURPORTED NOTICE OF DEFAULT, AND THE DISPUTE RESOLUTION PROCESS UNDER THE CONTRACT

(y) Bombardier’s Notice of Intention to Terminate the Contract is unlawful and improper under the Contract for the following reasons:

(i) The Notice of Intention is based on the Notice of Default;

(ii) The validity of the Notice of Default is now subject to the dispute resolution

process provided for in the Contract;

- (iii) If the Dispute cannot be resolved by the parties or by the Engineer's determination under GC23.6, then the Dispute will ultimately be determined by the Dispute Review Board;
- (iv) While the dispute resolution process is still in process with respect to the very question of whether or not Bombardier is in material breach of the Contract, Metrolinx has no right to take any action based on those alleged material breaches. To do so is contrary to the bargain that the parties made, and the clear scheme and wording of the Contract.
- (z) Similarly, it would be unlawful and improper under the Contract for Rankin to take any steps in furtherance of the termination for default provisions of the Contract (GC12) while the validity of the Notice of Default is subject to the dispute resolution process.

3. THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the application:

- the affidavit of Lamia Orfali, sworn February 7, 2017;

- the affidavit of Carolyne Leroux, sworn February 7, 2017;

Date: ■ February 10, 2017

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Lawyers for the Applicant

Court File No.:

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– Applicant –

v.

METROLINX and RANKIN

– Respondents –

**ONTARIO
SUPERIOR COURT OF JUSTICE**

(PROCEEDING COMMENCED AT TORONTO)

NOTICE OF APPLICATION

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Lawyers for the Applicant

Court File No.:

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Applicant

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**AFFIDAVIT OF CAROLYNE LEROUX
(SWORN FEBRUARY 7, 2017)**

TABLE OF CONTENTS

A. OVERVIEW OF APPLICATION.....3

B. BOMBARDIER TRANSPORTATION8

C. THE TTC CONTRACT & TORONTO’S TRANSIT CITY PROGRAM.....9

D. BOMBARDIER CONTRACTS WITH METROLINX FOR TRANSIT CITY’S LIGHT
RAIL VEHICLES..... 11

E. THE EVOLUTION OF THE CONTRACT 13

 i. Metrolinx Suspends Work under the Contract..... 13

 i. The Strike at Bombardier’s Thunder Bay Plant 19

I, CAROLYNE LEROUX of the City of Thunder Bay, in the Province of Ontario, make oath and say:

1. I am General Manager of Bombardier Transportation Canada Inc., as such, I have personal knowledge of the matters set out in this affidavit. Where my knowledge is based on information or belief, I have identified the source of that information or belief and believe it to be true.
2. From April 2009 to October 2015, I held the position of Director, Project Management at Bombardier Transport Canada Inc. ("**Bombardier**"). In that role, I led Bombardier's team in the negotiations with Metrolinx regarding the Contract (defined below) for the light rail vehicle ("**LRV**") project in early 2010. From June 2010 until August 2013, I was the project director for the Metrolinx LRV project. From October 2014 to October 2015, I have been responsible for a number of major projects, including the Metrolinx LRV project in my role as Head of Project Management. I am currently General Manager of Bombardier's plant in Thunder Bay, involved with operations activities of major projects.
3. I have reviewed the affidavit of Lamia Orfali sworn on February 7, 2017, which at times, will be referred to in my affidavit.

A. OVERVIEW OF APPLICATION

4. On June 26, 2009, Bombardier entered into an agreement with the Toronto Transit Commission ("**TTC**") for the design and supply of 204 low floor light rail vehicles (i.e. streetcars) that were to be operated on existing TTC streetcar routes (the "**TTC Legacy Contract**"). The TTC Legacy Contract included an option to purchase up to an additional 400 light rail vehicles from Bombardier. A portion of this option was later assigned to Metrolinx so that it could order light rail vehicles (i.e. trains or "**LRVs**") from Bombardier, for use on a new network of railway tracks that Metrolinx was responsible for building.
5. On June 14, 2010 Metrolinx exercised the option, and entered into a contract with Bombardier, pursuant to which Bombardier agreed to design, build and supply 182 LRVs for Metrolinx (the "**Contract**"). These LRVs were intended to be used on new lines—the Sheppard East Line, the Eglinton Crosstown Line, the Scarborough RT Line and the Finch Line—that were to be constructed in Toronto, as part of Toronto's Transit City development program. Although there have been delays in producing the Pilot Vehicles (caused by both Metrolinx and Bombardier),

the delays have not impacted Metrolinx's ability to put the LRVs in service in a timely manner. As explained below and by Ms. Orfali, Bombardier will deliver the LRVs to Metrolinx long before Metrolinx will be ready to put the LRVs in service.

6. After entering the contract with Bombardier, Metrolinx made changes to the initial Transit City Plan, and later launched public tendering processes to have the infrastructure (i.e. railway tracks, stations, platforms, wayside equipment, communication and signalling equipment) for the Finch and Eglinton Crosstown lines to be built, and later maintained, by private consortiums. The construction of this infrastructure is also being managed by Metrolinx. Metrolinx is significantly late in constructing these lines:
 - a. the Eglinton Crosstown Line is currently under construction but will not be ready to serve the public until 2021 at earliest;
 - b. Metrolinx has not even selected a contractor to build the infrastructure for the Finch line yet. When the Finch line will be ready for service is unclear, although Metrolinx has recently reported that Finch will be in service some time in 2022.
7. As explained below and by Ms. Orfali, Metrolinx has asked Bombardier to change the delivery schedule that currently exists under amendment 2 of the Contract. Bombardier has agreed to do so and is therefore required to deliver the first set of single cab LRVs in November 2018, for use on the Eglinton Crosstown Line that will not be ready until at least 2019. The new delivery date for LRVs to be used on the Finch line has not yet been agreed to, but has to be changed since under the schedule that currently exists under amendment 2 of the Contract, Bombardier would theoretically be required to deliver the first set of dual cab LRVs in March 2017 for use on the Finch line. Metrolinx does not want nor is it capable of accepting delivery in March 2017, because the Finch line will not be ready until 2020 or much later. In fact, the contract for the construction of the Finch Line has not yet been awarded, one month before the start of delivery dates under amendment 2 of the Contract.
8. Because all of the LRVs are currently scheduled to be delivered well before the infrastructure for the LRVs will be ready, Metrolinx faces some significant cost expenditures and/or liabilities that it wants to avoid:

- a. Metrolinx now wants fewer LRVs than it needed originally. Under the Contract, Metrolinx is contractually required to pay for 182 LRVs. These LRVs were intended to run on four different lines. However, Metrolinx seems to have indefinitely postponed two LRV lines from its transit plans, leaving only the Eglinton and Finch projects. Given the reduction in transit lines, it is not clear whether Metrolinx still requires all 182 LRVs or when they will be required. Metrolinx's recent conduct suggests that it is trying to avoid having to pay for all 182 LRVs that it is contractually required to purchase from Bombardier.
- b. As explained in greater detail in Ms. Orfali's affidavit, if Bombardier delivers the LRVs in accordance with its current Contract schedule, Metrolinx will not be able to put those LRVs into service, perhaps for as long as 3 years. Accordingly, Metrolinx would have to store and maintain the LRVs, which is a costly proposition. Bombardier would not agree to store the LRVs for more than 18 months, as there are significant risks and costs associated with doing so. Metrolinx would logically also have to make provision for or purchase extended warranties for the LRVs, as Bombardier's contract warranties would expire while the LRVs are in storage. Bombardier estimates that the price of storage, maintenance and extended warranty for 15 months could exceed 10 million dollars;
- c. Rather than store the LRVs, under the terms of the Contract, Metrolinx could issue a change directive to Bombardier and change the current delivery schedule. However doing so would require Bombardier to temporarily suspend work on the LRV project and Metrolinx would have to compensate Bombardier accordingly. Metrolinx is well aware that issuing a change directive to suspend work comes with a cost, given that it issued a similar directive to Bombardier in 2011.
- d. Metrolinx has used a public-private-partnership business model ("PPP") to construct and maintain the infrastructure. It has also used the PPP model to operate and maintain the LRVs on the Eglinton Crosstown line. Metrolinx has committed to provide the LRVs purchased from Bombardier to the PPP for the Eglinton Crosstown line by a specified date. Based on the project agreement

with the PPP, it appears that if Metrolinx cannot meet that commitment, it will have to compensate the PPP for delay. Given the size of the PPP, one would expect from this type of project that the agreement would provide that if Metrolinx cannot meet that commitment, it will have to compensate the PPP for a delay. It is also important to note that under its Contract with Bombardier, even if Bombardier were the cause of Metrolinx's late delivery of revenue service LRVs (which it is not), Bombardier's exposure for late delivery of LRVs is limited to a liquidated damage amount of \$1500 per day, per LRV, which is in line with industry standards for rolling stock contracts. Even so, the Contract limits the liquidated damage amount recoverable by Metrolinx to a cap of 5% of the "Currently Determined Contract Price".

9. For the reasons I describe in greater detail below and for those set out in Ms. Orfali's affidavit, it appears Metrolinx is trying to: (a) get out of its contractual obligation to purchase all 182 LRVs; (b) blame Bombardier for its delays; and (c) shift the cost of those delays to Bombardier. In July 2016, Metrolinx's Engineer¹ served Bombardier with a Notice of Default, essentially alleging that Bombardier had failed to comply with: (a) general scheduling requirements; (b) scheduling requirements relating specifically to the delivery of two pilot vehicles; (c) a technical specification relating to load levelling requirements; and (d) its obligation to supply skilled workers, products, plant and equipment at a plant located in Sahagun, Mexico (the "**Notice of Default**").
10. Bombardier disputes these allegations of material default, and has challenged the validity of the Notice of Default, through the dispute resolution process prescribed by the Contract. At present, Bombardier has filed its submissions contesting the validity of the Notice of Default and is awaiting a decision from the Engineer who is required to render a decision on this issue. Once the Engineer renders his decision, the dispute resolution process

¹ The role of Metrolinx's Engineer is explained in greater detail in Ms. Orfali's affidavit. However in summary, under GC 1.22 and GC 8.1 of the Contract, Metrolinx has to designate an engineer to act as its "duly authorized representative ... to exercise such power, authority or discretion as is required under the Contract" (the "Engineer"). Among other things, the engineer is authorized to: (a) Act on behalf of Metrolinx, to the extent provided in the Contract Documents (GC 8.1); (b) instruct Bombardier on behalf of Metrolinx (GC 8.1); (c) inspect, approve or reject Bombardier's work on behalf of Metrolinx (GC 8.1); and (d) prepare and issue contract amendments and directives (GC 8.1 and GC 22). However, despite the fact that the Engineer was to act on Metrolinx's behalf, the Contract also provides that in making any "decisions, approvals, acceptances, agreements, certifications, determinations, opinions and other similar acts of the Engineer called for under the Contract" the Engineer is not to "show partiality to either party" (GC 8.5).

allows either party to challenge Metrolinx's Engineer's decision and to have the matter determined by a three-person Dispute Review Board, as provided for under the Contract. Indeed, on February 3, 2017 Bombardier appointed its member to the Dispute Review Board, and intends to use the dispute resolution process to its fullest. Metrolinx has yet to appoint a member to the Dispute Review Board even though it was contractually required to do so by February 3, 2017.

11. Although Metrolinx was fully aware that Bombardier was challenging the Notice of Default in accordance with the dispute resolution process in the Contract, on October 28, 2016 Metrolinx served Bombardier with a Notice of Intention to Terminate the Contract (the "**Notice of Intention**"). Under the terms of the Contract, the Notice of Intention could only be served and ultimately, the Contract can only be terminated, if the Notice of Default was indeed valid in respect of its allegations that Bombardier was in material default - all of which is to be determined under the dispute resolution process provided for in the Contract.
12. Metrolinx and Bombardier both expressly agreed in the Contract, that they have a responsibility to try to resolve any disputes, including disputes of this nature amicably and expeditiously. They have specifically agreed that any disputes of this nature must be submitted to a mandatory dispute resolution process for resolution. In accordance with its contractual rights and in good faith, Bombardier is currently utilizing this mandatory dispute resolution process to assess the validity of the Notices of Default. If Bombardier's challenge is successful, the Notice of Default will be invalid and struck. Metrolinx should not be permitted to take any steps to terminate the Contract until the issue of the validity of the Notice of Default is finally determined through the mandatory dispute resolution process agreed to by both parties.
13. As explained in greater detail in Ms. Orfali's affidavit, if Metrolinx is permitted to terminate the Contract, and it is later determined that the Notice of Default is indeed invalid, the harm to Bombardier will be significant and irreparable. Bombardier has therefore brought this application to seek a stay of certain of the default provisions under the Contract, until such time as the validity of the Notice of Default has been finally determined through the mandatory dispute resolution process.

14. As explained in greater detail in Ms. Orfali's affidavit, Metrolinx's Engineer, having issued the Notice of Default, has himself formed the opinion that Bombardier is in material default under the Contract. Under the dispute resolution process, the Engineer must now make a determination regarding Bombardier's claim challenging the validity of the Notice of Default. As discussed in Ms. Orfali's affidavit, the Engineer's communications to Bombardier in dealing with this issue plainly show that the Engineer did not independently evaluate and render opinions in respect of the allegations raised in the Notice of Default, but instead, simply adopted Metrolinx's positions and carried out Metrolinx's instructions, thereby demonstrating actual or perceived bias in favour of Metrolinx. This is a clear violation of his express, contractual obligation to be impartial. For this reason, Bombardier is concerned that the Engineer has demonstrated an inability to act impartially. Accordingly, Bombardier is also seeking an order replacing Mr. Rankin as Engineer for the purpose of determining the validity of the Notice of Default.
15. There is no urgency that requires Metrolinx to circumvent the dispute resolution process:
 - a. Under the terms of the Contract, Bombardier is not required to deliver LRVs for use in service for another two years; and
 - b. In two years, Metrolinx still will not have completed the infrastructure for the LRVs, and cannot put them into service due to its own failure to provide the infrastructure in accordance with its own schedules.
16. Bombardier has invested a great deal of money and mobilized significant resources to ensure that it will meet its contractual obligation to deliver the LRVs in two years. The purpose of the proceedings before the Dispute Resolution Board is to determine whether Metrolinx must continue to perform the Contract, or whether it can follow through with its intention to terminate. If Metrolinx is permitted to terminate now, Bombardier would lose this procedural right, and would suffer irreparable harm.

B. BOMBARDIER TRANSPORTATION

17. Bombardier is a Canadian company with headquarters in St. Bruno, Quebec. It has been manufacturing rail cars since 1974 and is one of the world's leading rail manufacturers built for

high-speed travel as well as for trains built for public transit. Bombardier is a subsidiary of the Bombardier Transportation global group (the “**Group**”). With 61 production and engineering sites and 18 service centres in 28 countries, the Group is a global leader in the rail industry, covering the full spectrum of rail solutions, ranging from complete trains to sub-systems, maintenance services, system integration and signalling. The Group’s installed base of rolling stock exceeds 100,000 rail cars and locomotives worldwide. The Group employs 39,400 employees, who work on the multitude of rail transportation solutions worldwide, including:

- a. Rail vehicles—automated people movers, monorails, light rail vehicles, advanced rapid transit, metros, commuter/regional trains, intercity/high-speed trains and locomotives;
- b. Propulsion and controls—complete product portfolio for applications ranging from trolley buses to freight locomotives;
- c. Bogies—product portfolio for the entire range of rail vehicles;
- d. Services—fleet maintenance, operations and maintenance (O&M), vehicle refurbishment and modernization, and material management;
- e. Transportation systems—customized “design-build-operate-maintain” transportation system solutions; and
- f. Rail control solutions—advanced signalling solutions for mass transit and mainline systems.

C. THE TTC CONTRACT & TORONTO’S TRANSIT CITY PROGRAM

18. In or around 2007, the City of Toronto began publicizing its plans for “Transit City”—a plan to criss-cross Toronto with a light rail network of vehicles for public transportation (the “**Transit City Plan**”).
19. In or around the same time that Toronto was discussing its plans for Transit City, it also required new streetcars for its existing infrastructure. Accordingly, in January 2009, the TTC issued a Request for Proposal (“**RFP**”) for the design and supply of 204 low floor light rail vehicles (i.e. streetcars) that were to be operated on existing TTC streetcar routes

(i.e. TTC's legacy system). Bombardier intended to manufacture these LRVs in North America with much of the work to be performed at its facilities in Thunder Bay, Ontario.

20. On June 26, 2009, Bombardier was advised it was the successful bidder on this RFP and on June 30, 2009, entered into the "**TTC Legacy Contract**". As discussed below, a portion of the options under the TTC Legacy Contract was later assigned to Metrolinx, so that it could order light rail vehicles from Bombardier, for use on Toronto's Transit City network. Attached hereto as Exhibit "1" is a copy of the TTC Legacy Contract.
21. I have reviewed the TTC press release relating to the TTC Legacy Contract. It is my understanding that the vehicles from Bombardier were intended to replace existing TTC streetcars, which were purchased in the 1970s and 1980s and were nearing the end of their service lives. In addition, the existing streetcars were not accessible, their reliability was steadily declining, and maintenance costs continued to rise. Attached hereto as Exhibit "2" is a copy of the June 30, 2009 TTC press release, published on the TTC website, forming the basis of my understanding.
22. Under the TTC Legacy Contract, the initial order was for 204 light rail vehicles, but also included an option for an additional 400 vehicles, to be used as part of Toronto's Transit City Plan to expand the existing streetcar network.
23. I have reviewed Bombardier's press release related to the TTC Legacy Contract. From my review, I understand that the TTC LRVs were based on Bombardier's Flexity light rail platform, but would be modified to TTC specifications and to accommodate special requirements of Toronto's streetcar network. They were designed to provide improved reliability and operating performance for the TTC along with a wide range of features, including a step-less interior allowing easy access at street level; car capacity for more than 240 passengers; increased heating and air conditioning capacity; improved customer comfort; enhanced accessibility, safety and other interior features; locations for bicycles, wheelchairs and strollers; more efficient passenger boarding and exiting; improved communications features; and a regenerative braking system that would feed power back into the TTC network. Attached hereto as Exhibit "3" is a copy of a June 30, 2009 Bombardier press release, published on the Bombardier website, forming the basis of my understanding.

D. BOMBARDIER CONTRACTS WITH METROLINX FOR TRANSIT CITY'S LIGHT RAIL VEHICLES

24. In or around December 2009, Metrolinx and TTC approached Bombardier, and exploratory discussions began for the assignment of a proposal - they wanted TTC to assign a portion of the option for 400 light rail vehicles under the TTC Legacy Contract to Metrolinx. Metrolinx would then exercise the assigned options to procure light rail vehicles to be used on new infrastructure that was to be built as part of the Transit City network. At the time, Metrolinx represented to Bombardier that it would require 200 vehicles for use on a Sheppard East Line, a Scarborough Rapid Transit Line and an Eglinton Crosstown line, with an option to purchase 100 additional LRVs for use on a Finch Line and for further use on the Eglinton Crosstown Line as well as other unspecified lines.
25. Based on my review of the reports presented to the TTC board regarding the Ontario's *Big Move Regional Transportation Plan* (the "**Big Move Plan**"), I understand that the assignment proposed by TTC and Metrolinx occurred in or around the same time frame as the release of the Big Move Plan. The Big Move Plan is a strategic plan to design and build a transportation network for the Greater Toronto and Hamilton Area, which would include 1,200 km of rapid transit. The plan identified the four new transit lines that were to form Toronto's Transit City (the Sheppard East LRT, Finch West LRT, Eglinton Crosstown LRT and Scarborough RT), as top priority transit projects. In furtherance of this plan, the TTC and Metrolinx developed a governance structure that would provide for Metrolinx to oversee the procurement and development phases for each of the four Toronto City transit lines, and TTC would assume the role of overall program manager, and would later operate and maintain the completed projects. The basis of my understanding is a copy of a January 31, 2012 update to the TTC Board regarding the Eglinton Scarborough Crosstown Project which is attached hereto as Exhibit "4".
26. In early December 2009, when Metrolinx and Bombardier began negotiating, both Metrolinx and Bombardier wanted to leverage the similarities between the design, commissioning, operation and maintenance of the LRVs under development for the TTC, and the contemplated Metrolinx LRVs. The goal was to achieve the lowest possible costs and contract price and deliver value for money equal to or better than a price obtained as a result of a new competitive process, taking into account price and schedule. This is

reflected in the December 2009 Negotiation Basis Document that outlined the parameters for negotiations with Bombardier regarding the exercise of the TTC's options under the TTC Legacy Contract. The intention was that the Metrolinx LRVs would leverage the components and systems used for the TTC LRVs, and that certain design reviews, first article inspections ("FAIs"), and testing could potentially be waived upon the delivery of documentation demonstrating successful completion and approval for the same reviews, inspections or testing for the TTC vehicles. However, the parties also anticipated that certain aspects of the Metrolinx LRVs would require standalone design review and testing documentation. Attached hereto as Exhibit "5" is a copy of the December 2009 Negotiation Basis Document.

27. The costing was based on the mutual understanding that the design of the TTC LRVs and Metrolinx LRVs, in principle would be the same, and that the design review and approval process for the two, would essentially be the same. TTC and Metrolinx were involved in these discussions and fully approved this approach.
28. Accordingly, on or around February 2010, Bombardier submitted to Metrolinx a revised "Proposal to Exercise TTC LFLRV Options". Attached hereto as Exhibit "6" is a copy of the Pricing Assumptions section of the proposal. There was a clear expectation that all existing designs and components, accepted by the TTC for the TTC LRVs would be leveraged so that same reviews under the Contract would not be subject to extensive documentation, qualification and acceptance standards. For example, section 4.2 of the proposal provided the following:

4.2 Design Reviews and Testing

As suggested in Metrolinx/TTC Negotiation Basis Document, Bombardier is planning to conduct design reviews, first article inspections, and qualification testing only on those systems for which an existing design will be modified to suit the Metrolinx specific requirements. For systems where the sub-systems parts are the same but differ in quantity, only the integration of these additional parts will be tested.

For all remaining components/systems of the vehicle which are the same as implemented on other platform vehicles, Bombardier will be resubmitting existing documentation for design reviews first article inspections and testing reports, on the basis that they have been successfully qualified and approved by TTC or other

agencies (on the base low floor LRV contract or on another Flexity platform product).

29. On February 18, 2010, Bombardier signed a letter of intent with TTC and Metrolinx regarding the terms on which TTC would assign a portion of the 400 options provided for in the TTC Contract. Attached hereto as Exhibit "7" is a copy of the letter of intent.
30. The letter of intent also reflects the parties' continued intent to leverage the development of the TTC LRVs, as evidenced by the inclusion of terms such as "value for money", "synergies in design", and "prices are viewed as the ceiling going forward". As stated by Metrolinx, it did not want a custom-designed vehicle, but rather, wanted the LRV to be as "off the shelf" as possible. Similarly, Bombardier's Pricing Assumptions appended to the letter of intent included the assumption that Metrolinx was "planning to conduct design reviews, first article inspections, and qualification testing only on those systems for which an existing design will be modified to suit the Metrolinx-specific requirements".
31. On June 10, 2010, TTC assigned Metrolinx the option to purchase up to 300 of the option LRVs. Attached hereto as Exhibit "8" is a copy of the assignment.
32. On June 14, 2010, Metrolinx exercised the option assigned to it by TTC, and contracted with Bombardier for the supply of 182 Transit City LRVs (the "**Metrolinx LRVs**"), with options to purchase up to an additional 118 vehicles. Attached hereto as Exhibit "9" is a copy of the Contract and the Technical Specifications that make up the Contract Documents (as defined in the Contract).

E. THE EVOLUTION OF THE CONTRACT

i. Metrolinx Suspends Work under the Contract

33. I have reviewed several presentations made to the Metrolinx board available on the internet regarding the changes to the Transit City Plan. From my review, I understand that by 2010 the vision for Toronto's Transit City Plan had changed, due to funding constraints. This led to changes in the scope of Metrolinx's transportation plans for Toronto, and resulted in the "5 in 10 Plan". The "5 in 10" Plan included the completion of five major transit projects in ten years. Among other things:

- a. The plan divided the four LRV projects into two phases: the Sheppard and Eglinton Crosstown projects were to start immediately, and the Scarborough and Finch projects were to be delayed until between 2015 and 2020.
- b. The plan refined the scope of the Phase 1 projects.
- c. With respect to the Eglinton Crosstown line, the portion of the line from Kennedy Station to Weston Road was to proceed immediately. The portion from Weston Road to Pearson International Airport was postponed.
- d. Funding was confirmed for the Finch line, which was to run from Yonge Street to Humber College.

The presentations forming the basis of my understanding regarding the changes to the Transit City Plan are:

- a. A May 19, 2010 presentation to the Metrolinx board, titled “Achieving 5 in 10: A Revised Plan for the Big 5 Transit Projects attached hereto as Exhibit “10”.
 - b. A May 1, 2012 presentation made to the TTC board, titled “LRT Projects in Toronto—Status Report” attached hereto as Exhibit “11”.
34. By letter dated April 18, 2011 (approximately one year after the Contract was signed by the parties) Metrolinx advised Bombardier that changes to the Transit City Plan were being made that would have a direct impact on the Contract. Metrolinx indicated, among other things, that the total quantity of Metrolinx LRVs needed would be less than 182, and that the Metrolinx LRVs would “not [be] required for a few years” due to the cancellation of a transit line. As a result of these changes, Metrolinx sought to change the scope of work Bombardier would perform under the Contract. Metrolinx later issued Change Directive 2 which ordered Bombardier to suspend all work under the Contract, other than design work. Attached hereto as Exhibit “12” is a copy of Change Directive 2.
35. For some period of time thereafter, the issuance of Change Directive 2 created a great deal of uncertainty, as Metrolinx did not seem to know what vehicle configuration it wanted, how many LRVs would be needed (other technologies were considered for some of the

lines), or what the delivery schedule would be. Metrolinx issued several revisions to the Change Directives, the last one in November 2012.

36. The Contract could not be amended overnight, particularly due to the uncertainty of the requested changes. In fact discussions regarding what changes would have to be made took place between April 2011 and March 2013. When a contract of this magnitude is changed in such a significant way, a great deal of time must be invested to determine the impact of those changes, determining the precise scope of the work to be performed, the pricing for the modified scope of work and to determine the scheduling for the new scope of work. Accordingly, from April 2011 to March 2013, Bombardier spent a significant amount of time and resources developing, presenting and reviewing various schedules and scope scenarios, as well as the associated pricing for any such changes. During that time, Metrolinx issued a series of Change Directives under the Contract, pursuant to which Bombardier was directed to undertake work:
- a. suspend all efforts related to the manufacturing of Pilot Vehicles and Production Vehicles (and mitigate projects costs related thereto);
 - b. postpone project milestones;
 - c. wait for new project schedule and vehicle quantities to be determined by Metrolinx;
 - d. undertake engineering and manufacturing analysis for a 7-module vehicle;
 - e. resume activities related to the manufacturing of Pilot Vehicles and Production Vehicles;
 - f. confirm initial order quantity and new delivery dates of first and second Pilot Vehicles, to be postponed to April 2015 and May 2015, respectively; and
 - g. deliver the first 21 production LRVs by March 2017 and the twenty-second production LRV, by February 2018.
37. Between April 2011 and March 2013, the parties engaged in extensive discussions regarding the impact the changes in Change Directive 2 and subsequent change directives

issued by Metrolinx, would have on the schedule. In March 2013, a settlement was reached by the parties with respect to the Change Directives issued by Metrolinx (the “**Settlement**”). Pursuant to the Settlement, the parties agreed to formally amend the Contract to incorporate the changes made under the Change Directives and the compensation to be paid to Bombardier for the costs of those changes, as terms of the Contract. Amongst other things, pursuant to the terms of Settlement, Metrolinx and Bombardier agreed to the following:

- a. An advance payment of \$65 million and compensation of \$3 million to Bombardier;
 - b. Changes to certain payment milestones; and
 - c. That Metrolinx and Bombardier were to work co-operatively to maximize commonality of the Metrolinx LRV with the TTC LRV and its operations and maintenance requirements. This particular term was sought by Bombardier because of Metrolinx’s failure to operate in accordance with the initial intent of the Contract. We viewed Metrolinx’s agreement to this term as an explicit acknowledgement from Metrolinx that it had not done so in the past and its promise to do so in the future. However, as I describe below, Metrolinx did not change its behaviour.
38. However, as explained by Ms. Orfali, the amendment was not adopted immediately following the Settlement. Instead, from March 2013 to August 2014, there was ongoing negotiation by the parties regarding the contract amendment. Ultimately, the terms of the Settlement and corresponding changes to the Contract were formally adopted as a contract amendment (“**Contract Amendment 2**”) on August 27, 2014. A copy of Contract Amendment 2 can be found at Exhibit 3 of Ms Orfali’s affidavit
39. Between September 2011, and January 2012, Metrolinx indicated that it was seriously considering reducing the number of LRVs ordered from 182 to 135, and reordering the delivery of the LRVs for the various lines (at the time, the LRVs for Finch were to be delivered before the LRVs for the Eglinton line). Ultimately, Metrolinx did not change

either in Contract Amendment 2 - it ordered the same number of LRVs and maintained the same delivery sequence contained in the original Pricing Form under the Contract.²

40. Further, although Metrolinx had not changed the LRV delivery sequence in Contract Amendment 2, during the course of its discussions with Bombardier, Metrolinx revealed that its infrastructure would not be ready in time to receive the Metrolinx LRVs as per the agreed to delivery dates. This meant that if the Metrolinx LRVs were to be delivered in accordance with the March 2017 and February 2018 delivery dates, they could not be put into operation right away. Instead, Metrolinx would have to store the Metrolinx LRVs until the infrastructure was available to receive the LRVs.
41. During the negotiations leading up to Contract Amendment 2, the parties had explored whether Bombardier could store and maintain the LRVs for Metrolinx, provide extended warranties for the Metrolinx LRVs, and the terms under which Bombardier would be prepared to do so. They did not reach an agreement on that issue, but expressly agreed in section 2.14 of Contract Amendment 2 that issues related to storage and warranty were excluded from the scope of the Settlement and that further negotiation of these issues would occur. The parties intended that a separate contract amendment would be issued to address storage and warranty issues as well as the delivery schedule. Negotiations relating to the storage and warranty issue are discussed in Ms. Orfali's affidavit.
42. The suspension of the work under the Contract had a significant impact on Bombardier. For example, in anticipation of the work under the Contract, the welders Bombardier hired to work in its Mexico plant had been sent to Bombardier's Vienna facility to receive extensive training on how to perform the specialized welding required for the Metrolinx LRVs. As a result of the suspension of work ordered by Metrolinx, these welders had to be reassigned or laid off.
43. When the work under the Contract was recommenced, Bombardier was required to hire new welders who did not have the benefit of the specialized training previously provided. Essentially, the weeks of welding training provided by Bombardier was lost. To facilitate

²The Pricing Form contains sensitive and confidential commercial information regarding pricing used by Bombardier in respect of this RFP. This information would be of particular value to Bombardier competitors bidding against Bombardier on RFP similar to this LRV project in the future. For this reason, it has not been included as an exhibit to this affidavit

the training of the new welders it was required to hire, Bombardier flew its welding experts from Vienna and other European plants to the Mexico plant for on-site training and support.

44. I have reviewed reports and media coverage relating to the Transit City Plan around the time of the issuance of the Change Directive by Metrolinx. I understand that around this same time, there was a great deal of discussion and uncertainty surrounding the Transit City Plan in the political sphere. For instance, in 2011, Rob Ford was elected Mayor of Toronto. He had a different vision for Toronto's Transit City than his predecessor, how many rail lines should be built, whether LRVs should be used or subways, and where the lines should begin and end, all became subjects of debate. Attached above as Exhibit 4 is a copy of a January 31, 2012 update to the TTC board, titled Eglinton Scarborough Crosstown Project Update.
45. I also understand that the following events took place in February 2012 related to the Transit City Plan:
 - a. On February 8, 2012, Toronto City Council voted to overturn Mayor Ford's modifications to the Transit City Plan, including the proposed changes to the Eglinton line.
 - b. On February 16, 2012, the Metrolinx board received a report and presentation both titled "City Council Position on the Light Rail Transit Priority Plan" that highlighted departures between the plan adopted by Toronto City Council on February 8 and the MOU (the MOU between the province, Mayor and Metrolinx). The primary departure concerned the Sheppard project. Another departure related to a request that TTC staff discuss future feasibility studies with Metrolinx on, among other things, the extension of Eglinton Crosstown line from Jane to Pearson Airport.

Attached hereto as Exhibit "13" are copies of the February 16, 2012 report and presentation received by the Metrolinx board which form the basis of my understanding.

46. I understand from media articles that between February 2012 and July 2013 various changes to the Eglinton line were considered. However, these proposed changes were

abandoned following community feedback, and the original Transit City Plan for the Eglinton line was reconfirmed. Attached as Exhibit "14" are the relevant media articles.

i. The Strike at Bombardier's Thunder Bay Plant

- 47. In Ms. Orfali's affidavit, she discusses events or conduct that caused delivery of the first Pilot Vehicle to be delayed. One event not mentioned in Ms. Orfali's affidavit that contributed to this delay is a strike that occurred in the Thunder Bay plant, that in or around July 14, 2014. This strike constituted a Force Majeure event under GC 1.28.5 of the Contract.
- 48. The strike ended on September 12, 2014. Following the end of the strike, Bombardier assessed that the impact of the strike on the project schedule was nine weeks with up to an additional five weeks of ramp up.
- 49. This meant that the delivery of the Pilot Vehicles would necessarily be delayed by at least nine weeks and that neither Metrolinx nor Bombardier was responsible for this delay.
- 50. I make this Affidavit in support of this Application and for no improper purpose.

SWORN BEFORE ME
 In the City of Thunder Bay
 In the Province of Ontario
 This 7th day of February, 2017

Karen Margaret O'Connor, a
 Commissioner, etc., Province of
 Ontario, for the Constituency office
 of Bill Mauro, M.P.P.
 Expires November 9, 2018.

Karen O'Connor

 A Commissioner of Oaths, etc.

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Carolyn Leroux

 CAROLYNE LEROUX

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BOMBARDIER TRANSPORTATION CANADA INC.

Applicant

– and –

METROLINX and JEFFREY RANKIN

Respondents

**AFFIDAVIT OF LAMIA ORFALI
(SWORN FEBRUARY 7, 2017)**

TABLE OF CONTENTS

A. OVERVIEW OF THE CONTRACT3

 i. Contract Milestones 3

 ii. Metrolinx’s Engineer 4

 iii. Work Schedules & Progress Reports 5

 iv. Pilot Vehicles 8

 v. Default Provisions 9

 vi. Mandatory Dispute Resolution 10

B. THE EVOLUTION OF THE CONTRACT 12

 i. The Settlement and Contract Amendment 2 12

 ii. Storage and Warranty Negotiations 14

 iii. The Parties Work Toward New Delivery Timeline 15

C. THE NOTICE OF DEFAULT 16

D. THE NOTICE OF INTENTION TO TERMINATE 20

E. THE NATURE OF THE ALLEGATIONS IN THE NOTICE OF DEFAULT 21

 iv. The Pilot Vehicle Is Not Late 23

 v. Welding Issues in Mexico and Bombardier’s Action Plan 26

 vi. Bombardier has Correctly Interpreted the Load Levelling Requirements 27

 vii. Delays Caused by Metrolinx 28

 a. Inefficient Management of the Contract 28

 b. Delays in Approval of Design Documents 28

 c. The Quality Notice Process 31

 d. The Test Track 32

 e. Free Issue Integration 34

 f. Metrolinx’s Infrastructure is Necessary to the Contract 37

 g. The Crosslinx Contract 41

F. THE NOTICE OF DEFAULT IS SUBJECT TO MANDATORY DISPUTE RESOLUTION
..... 42

G. HARM TO BOMBARDIER AND TO THE ONTARIO ECONOMY 43

 A. Lost Ontario Jobs 43

 B. Financial and Reputational Harm to Bombardier 45

 C. Provision of Bombardier’s Property and Intellectual Property to Competitors 47

H. LETTER OF CREDIT 48

I. THE ENGINEER HAS NOT ACTED IMPARTIALLY AS REQUIRED BY THE
CONTRACT 49

I, LAMIA ORFALI of the City of St. Bruno, in the Province of Quebec, make oath and say:

1. I am an electrical engineer and have been working at Bombardier Transportation Inc. (“Bombardier”) for 30 years. During my first 15 years at Bombardier, I worked as an engineer. However, since 2003, I held various project management positions. My current position is Project Commercial Manager for the contract between Bombardier and Metrolinx, dated June 14, 2010, pursuant to which Bombardier agreed to design, build and supply 182 light rail vehicles (LRVs) for Metrolinx (the “Contract”). In particular, I have been responsible for leading contractual and commercial discussions with Metrolinx, including negotiating amendments to the Contract. As such, I have personal knowledge of the matters set out in this affidavit. Where my knowledge is based on information or belief, I have identified the source of that information or belief and believe it to be true.
2. I have reviewed the affidavit of Carolyne Leroux sworn on February 7, 2017, and throughout this affidavit, adopt the terms that have been defined in her affidavit.

A. OVERVIEW OF THE CONTRACT

3. The Contract prescribes the general terms and conditions of the contractual relationship between Bombardier and Metrolinx. Other contract documents (such as amendments to the Contract, change directives issued under the Contract, articles of agreement, pricing forms, technical specifications, contract drawings, assignment agreements, recommended capital spare parts lists, recommended maintenance spare parts lists and technical proposals) would set out more precisely some of the subject-specific terms agreed to by the parties over the course of the Contract. As discussed in Ms. Leroux’s affidavit, the LRVs are currently planned for use on the Eglinton Crosstown line and the Finch line. As part of the Contract, Bombardier is required to deliver two different types of LRVs: single cab LRVs for the Eglinton Crosstown line; and dual cab LRVs for the Finch line.
 - i. **Contract Milestones**
4. The parties initially agreed to the following schedule for delivery of the LRVs, although they subsequently changed this schedule several times:
 - a. First Pilot Vehicle before January 14, 2013;

- b. Second Pilot Vehicle before February 14, 2013;
- c. First production LRV before June 14, 2014;
- d. Second to twenty-second (22) production LRVs before June 14, 2014;
- e. Twenty-third (23) to ninety-eighth (98) production LRVs before June 14, 2018;
and
- f. Ninety-ninth (99) to one hundred and eighty second (182) production LRVs at a rate of three LRVs per month commencing in or around February 2018.

Under this schedule there was 16 months between the delivery of the first Pilot Vehicle and the delivery of the first production LRV. As will be discussed below, the first Pilot Vehicle was ready for delivery in October 2016. This means there is a 25-month period between the date on which the first Pilot vehicle was actually delivered and the date when the first production single cab LRV is due to be delivered under Contract Amendment 2.

ii. Metrolinx's Engineer

- 5. Under GC 1.22 and GC 8.1 of the Contract, Metrolinx has to designate an engineer to act as its "duly authorized representative ... to exercise such power, authority or discretion as is required under the Contract" (the "**Engineer**"). Among other things, the Engineer was authorized to:
 - a. Act on behalf of Metrolinx, to the extent provided in the Contract Documents (GC 8.1);
 - b. Instruct Bombardier on behalf of Metrolinx (GC 8.1);
 - c. Inspect, approve or reject Bombardier's work on behalf of Metrolinx (GC 8.1);
and
 - d. Prepare and issue contract amendments and directives (GC 8.1 and GC 22).
- 6. Despite the fact that the Engineer was to act on Metrolinx's behalf, the Contract also provides that in making any "decisions, approvals, acceptances, agreements, certifications,

determinations, opinions and other similar acts of the Engineer called for under the Contract” the Engineer is not to “show partiality to either party” (GC 8.5).

7. As will be explained in greater detail below, GC 23 and GC 24 of the Contract also provide for a comprehensive dispute resolution process in respect of various issues that might arise between Bombardier and Metrolinx over the course of the Contract. As part of that dispute resolution process, GC 23.1.1 provides that for certain claims Bombardier might wish to advance against Metrolinx, Bombardier must at first instance, make any such claim to the Engineer. The Engineer is in turn required to make a determination regarding the validity of Bombardier’s claim(s) (GC 23.6).

iii. Work Schedules & Progress Reports

8. The Contract requires Bombardier to prepare schedules, which set out the timing of certain activities and deliverables, including the Contract Completion Date. The schedule can be updated and amended, but at all times must be submitted to the Engineer for approval (see for example GC 1.17, 15.5 and GC 50, as well as TS 21.6 and 21.8.3).
9. The Contract also requires Bombardier to submit regular progress reports to Metrolinx, and requires the parties to meet regularly to discuss the progress reports. In accordance with GC 54.1, from July 2010 to February 2013 these meetings took place monthly. In or around March 2013 (as part of Contract Amendment 2 settlement), the parties agreed to conduct these meetings on a bi-monthly basis instead. In advance of each such meeting, Bombardier submits an updated progress report to the Engineer (the “Bi-Monthly Progress Report”). Among other things, the progress report provides project status updates relating to staffing, manufacturing, and payment information; discusses scheduling in detail; identifies key activities and achievements, and identifies critical open items for discussion. Importantly, the report advises of any changes to the Contract Work Schedule and provides a full explanation as to why the change in schedule is required. Attached hereto as Exhibit "1" is a copy of the Bi-Monthly Progress Reports submitted to the Engineer between January 2015 and December 2016.
10. On or about September 17, 2010, Bombardier prepared a Contract Work Schedule (which the parties call the “**Detailed Project Schedule**”). The Contract Work Schedules are regularly submitted to the Engineer in compliance with GC50 of the Contract. Attached

hereto as Exhibit "2" is a copy of the Detailed Project Schedule dated September 14, 2010. No formal approval was ever issued confirming the Engineer's acceptance of the Contract Work Schedule.

11. In addition to these requirements, over the course of the Contract, the parties have had regular discussions about the progress of the work under the Contract. These communications have taken several forms.

12. As discussed above, the parties would regularly meet to discuss the Bi-Monthly Progress Reports. In advance of each such meeting, Bombardier would provide the Engineer with a Bi-Monthly Progress Report. While I refer to this generally as one meeting, the meeting actually took place over two days and involved two separate meetings between the parties on different high-level topics:

a. Technical Meetings: The Technical meeting was typically attended by Bombardier's Project Director, Project Manager, Contract Manager (also referred to as Project Commercial Manager), Director of Engineering, the Mechanical and electrical integration engineers and the RAMS (Reliability, Availability, Maintainability and Safety) engineer. Those in attendance for Metrolinx typically included John Watkins or Frank Grasha (the Technical Lead, Metrolinx/LTK) and Boris Chulak (LRV Manager), Andrew Boss (Deputy Project Manager from CH2M Hill), and Paul Przepiorka (Senior Project Officer/Engineer, Metrolinx). Jeff Rankin (the Engineer appointed by Metrolinx from CH2M Hill) would attend on behalf of Metrolinx and as the Engineer under the Contract. A number of additional Metrolinx consultants used to attend in the earlier phase of the project. At the Technical meeting, discussion would focus on the progress of the design, the implementation of the design and any technical issues. Scheduling was not discussed at this meeting. As Contract Manager, I was generally in attendance at these meetings.

b. Commercial Meetings: The same individuals from Metrolinx who attended the Technical meeting would also typically attend the Commercial meeting. For Bombardier, the Project Director, Project Manager, Contract Manager, and Director of Engineering would participate. In these meetings, discussion would

focus on non-technical issues such as scheduling, commercial issues, contract amendments and production issues. At this meeting, Bombardier would make a presentation to the Engineer and Metrolinx representatives about the progress of the project during the reporting period. Changes to the schedule would be submitted to the Engineer, explained and discussed in detail by the parties. In addition, any production issues impacting the schedule would also be discussed by the parties at this meeting. I also have generally attended these meetings.

13. In addition to the regular meetings to discuss the Bi-Monthly Progress Reports, there were a number of regular communications between the parties, some of which occurred almost on a daily basis. These communications included:
 - a. Bi-weekly meetings involving senior management of Bombardier and Metrolinx. These meetings started in or around November 2014.
 - b. Bi-weekly conference calls between the project management teams from both parties. The purpose of this call was to discuss in detail special topics which needed resolution. These discussions started in or around November 2015 and continued until in or around October 2016. The calls were scheduled to occur in the week between the bi-weekly senior management meetings.
 - c. Technical conference calls that were conducted on an as-needed basis. These typically involved the lead technical engineers from the parties. During these discussions, the parties would talk about technical issues and Metrolinx requirements for approval of the technical submittals.
 - d. Approximately one year ago, in addition to this technical discussion, the parties initiated bi-weekly conference calls specific to testing. These discussions would involve the parties' testing group leads.
 - e. Daily peer-to-peer communications between the engineers for both parties through email or over the phone regarding various other topics including scheduling.
14. A review of the Bi-Monthly Progress Reports demonstrates Bombardier's and Metrolinx's typical practice with respect to changes to the Contract Work Schedule. In particular, when

a scheduling change was required, Bombardier would reflect it in its monthly schedule submittals to the Engineer. The change would be discussed by the parties. Like the first Contract Work Schedule, no formal approval was ever issued confirming the Engineer's acceptance of any scheduling changes submitted by Bombardier. However, the Engineer, through his planner, regularly commented on the schedule details and links, but never objected to the vehicles delivery dates incorporated into the Contract Work Schedule. Bombardier always understood and operated on the basis that the schedules submitted to the Engineer, including any amendments to the schedule, were acceptable to and approved by the Engineer, as has the Engineer and Metrolinx.

iv. Pilot Vehicles

15. It is typical in transit projects that test cars—often referred to as the “pilot vehicles”—are produced on a small scale in order to validate the performance and qualify the design of the vehicle. Under the Contract and Technical Specifications, Bombardier was to produce two pilot vehicles (the “**Pilot Vehicles**”) that were to be subjected to an extensive testing program. The testing program is planned to take six months to complete (although the Technical Specifications provide that the length of the testing program can be extended), and requires the Pilot Vehicles to undergo two formal inspections, each referred to as the First Article Inspection (“FAIs”).
16. During the first FAI, the parties inspect the Pilot Vehicle and conduct testing for basic functionality. Any discrepancies in the Pilot Vehicle design or performance are noted and must subsequently be corrected by Bombardier.
17. The second FAI is conducted after the Pilot Vehicle undergoes the qualification test program. Qualification testing involves running the Pilot Vehicle on a test track, and later, requires the Pilot Vehicle to be run on the owner's infrastructure at high speed. After this final phase of testing, Bombardier is required to incorporate any necessary modifications into the Pilot Vehicle. Any discrepancies noted during this inspection shall be corrected and the Pilot Vehicle modified accordingly. This fully modified and conformed Pilot Vehicle, when approved by the Engineer, will be defined as the Baseline Production Vehicle Design Configuration—that is, the final design that is to be used to manufacture the LRVs that ultimately will go into service (sometimes also referred to as production vehicles).

v. Default Provisions

18. The Contract also includes provisions, which stipulate how defaults of contractual obligations by Bombardier are to be dealt with. These provisions are primarily found in GC 10 (Default by the Contractor) and GC 12 (Termination for Default) and are the provisions under which Metrolinx has purported to serve the Notice of Default.
19. These provisions can be briefly summarized as follows:
 - a. Under GC 10, if the Engineer forms the opinion that Bombardier has failed to comply with the provisions of the Contract, delays the work under the Contract or causes expense to Metrolinx, then the Engineer may provide Bombardier with written notice of default and instruct Bombardier to correct any such default within seven business days. For defaults that cannot be corrected within the seven business days, Bombardier is deemed to be in compliance with the Engineer's instructions if it: commences the correction within the specified time; provides Metrolinx with a schedule acceptable to the Engineer for such correction; and completes the correction in accordance with the accepted schedule. Failure to correct the default within the time specified (or subsequently agreed upon) may result in Metrolinx performing the correction and/or recovering certain expenses from Bombardier. However, a default under GC 10 does not give rise to a right to terminate the Contract.
 - b. GC 12 addresses material defaults caused by Bombardier's own acts or omissions. Under GC 12.1, if Bombardier is in material default, the Engineer may provide Bombardier with written notice of the material default. Although GC 12 does give rise to a right of termination for certain material defaults, the Contract cannot be terminated if:
 - i. the default is corrected within seven business days (GC 12.3); or
 - ii. if the default cannot be corrected within seven business days, but Bombardier has commenced the correction within seven business days and provides Metrolinx with a schedule acceptable to the Engineer for such correction (GC 12.4).

20. Provided there is a valid determination that a material default has occurred, even if corrective action is not commenced by Bombardier in accordance with GC 12 or GC 12.4, there are further steps Metrolinx must take before it can terminate the Contract:

- a. it must serve a notice of intention to terminate, but can only do so if the material default has not been cured (GC12.3); and
- b. it must obtain a certificate from the Engineer that sufficient cause exists to justify such action (GC 12.4).

vi. Mandatory Dispute Resolution

21. GC 23, GC 24 and Schedule F of the Contract set out a mandatory dispute resolution process which embodies principles of cooperation and expeditious resolution agreed to by the parties, in that at every stage of any dispute, the parties are required to attempt to negotiate and settle those disputes without resorting to litigation, and with a view to advancing the work to be performed under the Contract.

22. GC 23 sets out the procedure Bombardier must follow if it wants to resolve any disputes that arise with Metrolinx. To invoke the process in GC 23, Bombardier must first file a “Written Notice” with the Engineer within 30 days of knowing that a claim condition exists (GC 23.1). Bombardier can file a Written Notice in respect of a number of issues (called “Contractor Claims”), including:

- a. its intention to make a claim regarding the proper interpretation, application or administration of the Contract or Work to be done thereunder (GC 23.1.1);
- b. its intention to dispute a decision, interpretation, determination or finding of the Engineer (GC 23.1.4); or
- c. any other claim that it intends to advance against Metrolinx (GC 23.1.5).

23. Once the Written Notice is filed, the procedure set out in the balance of GC 23 must be followed:

- a. Within 60 days, or such other period as may be agreed by the Engineer in writing, Bombardier must submit a “Written Statement of Claim” setting a sufficient

description of the facts and circumstances of the occurrences that is the subject of the Contractor Claim, to enable the Engineer to determine whether the Contractor Claim is justified (GC 23.3 and GC 23.4);

- b. Within 60 days of receiving the Written Statement of Claim and all supporting documents, or such longer time required by the Engineer, the Engineer shall issue a determination regarding the validity of the Contractor Claim. If a party does not dispute the Engineer's determination within 60 days in accordance with GC 24, that party will be deemed to have accepted the Engineer's determination (GC 23.6); and
 - c. If Bombardier disagrees with the Engineer's decision, the Engineer has to enter into negotiations with Bombardier to resolve the matters in dispute. If a negotiated settlement cannot be reached, then the dispute may be resolved using the dispute resolution process described in GC 24 (GC 23.10).
24. If Metrolinx wishes to dispute certain issues with Bombardier, it must also file a written notice. However, Metrolinx does not file a written notice with the Engineer (as Bombardier is required to do at first instance), instead it files its written notice for review and determination by the Dispute Review Board constituted under GC 24. As I noted above, GC 24 also sets out the procedure Bombardier is to follow if it wants to challenge a determination made by the Engineer under GC 23.6. A notice filed by either party under GC 24 is called a "Dispute Notice" (GC 24.1.3).
25. The procedure under GC 24 is as follows:
- a. Each party shall make all reasonable efforts to resolve disputes by amicable negotiations and, unless prohibited by applicable laws, each party shall provide to the other party, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations. Such negotiations shall be initiated within 10 days after either party has received the Dispute Notice from the other party (GC 24.3);
 - b. If the parties do not resolve the dispute within 30 days of the Dispute Notice, then the dispute is referred to the Dispute Review Board. The proceedings before the

Dispute Review Board are to commence within 30 days, or as soon as the Dispute Review Board (which is not a standing board but has to be selected by the parties) is available (GC 24.4); and

- c. The Dispute Review Board is required to convene a hearing, and provide a written ruling within two weeks of completion of the hearing (GC24.5; Schedule F IIIB(a) and VIII(d)).

26. Instead of following the agreed upon dispute resolution process, Metrolinx is circumventing the process they agreed to, and in so doing, depriving Bombardier of its right under the Contract—to have the issue of whether a material default has occurred and the Contract terminated, determined by an independent panel.

B. THE EVOLUTION OF THE CONTRACT

i. The Settlement and Contract Amendment 2

27. As indicated in Ms. Leroux's affidavit, in April, 2011 (approximately one year after the Contract was signed by the parties), Metrolinx advised Bombardier that changes to the Transit City Plan were being made that would have a direct impact on the Contract. Metrolinx indicated, among other things, that the total quantity of Metrolinx LRVs needed would be less than 182, and that the Metrolinx LRVs would "not [be] required for a few years" due to the cancellation of a transit line. As a result of these changes, Metrolinx sought to change the scope of the work Bombardier would perform under the Contract. Metrolinx later issued Change Directive 2 which ordered Bombardier to suspend all work under the Contract, other than design work.

28. Between April 2011 and March 2013, the parties engaged in extensive discussions regarding the impact the changes in Change Directive 2 and subsequent change directives issued by Metrolinx, would have on the price and schedule. In March 2013, a settlement was reached by the parties with respect to the Change Directives issued by Metrolinx (the "Settlement"). Pursuant to the Settlement, the parties agreed to formally amend the Contract to incorporate the changes made under the Change Directives and the compensation to be paid to Bombardier for the costs of those changes, as terms of the

Contract. Among other things, pursuant to the terms of Settlement, Metrolinx and Bombardier agreed to the following:

- a. An advance payment of \$65 million and compensation of \$3 million to Bombardier;
- b. Changes to certain payment milestones; and
- c. That Metrolinx and Bombardier were to work co-operatively to maximize commonality of the Metrolinx LRV with the TTC LRV and its operations and maintenance requirements. This particular term was sought by Bombardier because of Metrolinx's failure to operate in accordance with the initial intent of the Contract. We viewed Metrolinx's agreement to this term as an explicit acknowledgement from Metrolinx that it had not done so in the past and its promise to do so in the future. However, as I describe below, Metrolinx did not change its behaviour.

29. However, the amendment was not adopted immediately following the Settlement. Instead, from March 2013 to August 2014, there was ongoing negotiation by the parties regarding the contract amendment. Ultimately, the terms of the Settlement and corresponding changes to the Contract were formally adopted as a contract amendment ("**Contract Amendment 2**") on August 27, 2014. Attached hereto as Exhibit "3" is a copy of Contract Amendment 2.
30. Between September 2011, and January 2012, Metrolinx indicated that it was seriously considering reducing the number of LRVs ordered from 182 to 135, and reordering the delivery of the LRVs for the various lines. Ultimately, Metrolinx ordered the same number of LRVs but changed the delivery sequence contained in the original Pricing Form under the Contract.¹
31. Further, although Metrolinx had already changed the LRV delivery sequence in Contract Amendment 2, during the course of its discussions with Bombardier, Metrolinx revealed

¹ The Pricing Form contains sensitive and confidential commercial information regarding pricing used by Bombardier in respect of this RFP. This information would be of particular value to Bombardier competitors bidding against Bombardier on RFP similar to this LRV project in the future. For this reason, it has not been included as an exhibit to this affidavit.

that its infrastructure would not be ready in time to receive the Metrolinx LRVs as per the agreed to delivery dates. This meant that if the Metrolinx LRVs were to be delivered in accordance with the March 2017 dual cab delivery date, they could not be put into operation right away. Instead, Metrolinx would have to store the Metrolinx LRVs until the infrastructure was available to receive the LRVs.

32. During the negotiations leading up to Contract Amendment 2, the parties had explored whether Bombardier could store and maintain the LRVs for Metrolinx, provide extended warranties for the Metrolinx LRVs, and the terms under which Bombardier would be prepared to do so. They did not reach an agreement on that issue, but expressly agreed in section 2.14 of Contract Amendment 2 that issues related to storage and warranty were excluded from the scope of the Settlement and that further negotiation of these issues would occur. The parties intended that a separate contract amendment would be issued to address storage and warranty issues as well as the delivery schedule.

ii. Storage and Warranty Negotiations

33. As Metrolinx was not able to take delivery of the Metrolinx LRVs following preliminary acceptance in accordance with Contract Amendment 2, Metrolinx asked Bombardier whether it would agree to store, maintain during storage and extend the warranty for the Metrolinx LRVs. Along with storage, warranties were an important issue. The warranties under the Contract for each LRVs runs for a two-year or a five-year period, depending on the items subject to warranty. If the Metrolinx LRVs are delivered in accordance with the schedule agreed to in Contract Amendment 2 but are stored for two years, the warranty for many of the Metrolinx LRV parts will expire before they are put into service.
34. Accordingly, the parties engaged in extensive negotiations on these issues, starting in late 2013 and continuing through 2015. Metrolinx advised Bombardier on August 31, 2015 that they would no longer pursue this contract amendment. In response, Bombardier advised Metrolinx that associated issues from Contract Amendment 2 were to be settled differently (such as the large gap between the Preliminary Acceptance Certificate and Final Acceptance Certificate date). These issues have not been resolved until now. In addition, absent an agreement with Bombardier, Metrolinx will also likely have to negotiate an amendment to its contract with Crosslinx (discussed in greater detail below), or identify an

alternative storage solution. Attached hereto as Exhibit "4" is a copy of Metrolinx's email on August 31, 2015 and Bombardier's email in response dated October 8, 2015.

35. In any case, Bombardier did not agree to take responsibility for storage and extended warranties for more than 18 months, because it was not possible to predict what condition the LRVs would be in after being stored outdoors for 18 months.

iii. The Parties Work Toward New Delivery Timeline

36. Discussions were initiated between the parties in early 2015 in which Metrolinx sought, amongst other things, to reorder the sequence of the dual cab and single cab LRV deliveries and review the Preliminary Acceptance Certificate and the Final Acceptance Certificate dates, in a manner that would take into account that Metrolinx had not yet contracted for the construction of the Finch line.
37. While Bombardier did not formally object to the request, as was the case in March 2013, any such delay would result in Metrolinx having to compensate Bombardier, would require a change directive, and ultimately an amendment to the Contract. Between September 2015 and March 2016, the parties exchanged several without-prejudice proposals on how to deal with this issue (among a number of other commercial issues). However, a resolution was ultimately not achieved. By letter dated March 4, 2016, Bombardier formally asked the Engineer to issue a Change Directive to reflect Metrolinx's request to delay delivery of the LRVs and re-order the delivery sequence. Thus far, the Engineer has not issued a Change Directive as requested, nor has he responded to Bombardier's correspondence requesting same. Attached hereto as Exhibit "5" is a copy of Bombardier's letter dated March 4, 2016.
38. The issue of deferring the first set of dual cab LRV deliveries until after the deliveries of the single cab (Eglinton) LRVs was also discussed as part of the Bi-Monthly Commercial meetings, namely the January and March 2016 meetings where Metrolinx confirmed their requirement that the delivery sequence be re-ordered. It followed that the production efforts should be focused on delivering single cab LRVs for the Eglinton Crosstown line in November 2018, rather than the Finch line dual cab LRVs, due in March 2017. The parties have been working towards this new timeline since that date.

39. In reality, given its delays in constructing the Finch line, Metrolinx expended a great deal of effort trying to secure a change in the sequence of deliveries but unjustifiably, wanted Bombardier to absorb the costs of this change. While the parties are both working towards the delivery of the single cab (Eglinton) LRVs first and the dual cab LRVs afterwards (including Finch), Metrolinx still refuses to formally amend the Contract to reflect this reality and at the same time, is also refusing to close open items related to Contract Amendment 2.

C. THE NOTICE OF DEFAULT

40. By 2016, Metrolinx had received a significant amount of negative press regarding its management of various infrastructure projects, including the Transit City project. In response, Metrolinx publicly blamed Bombardier for the delays, without referencing Metrolinx's significant contributions to those delays (discussed below) or the fact that the infrastructure for the first Metrolinx LRVs will not be ready until 2019 at the earliest. Because Metrolinx is such a significant and important client, Bombardier did its best to publicly support Metrolinx and refrain from criticizing Metrolinx in public and even in communications with Metrolinx. Bombardier instead tried to work as cooperatively as possible, with a view to keeping the project on track. As a result, Bombardier bore the brunt of the bad publicity even though it was largely unjustified.
41. In the spring of 2016, Metrolinx appeared to be in a bind: (i) it no longer wanted all of the LRVs it had ordered; (ii) it did not want to compensate Bombardier for any amendments to the schedule; (iii) it did not want to take responsibility for any delays in getting the Finch and Eglinton lines up and running, publicly or otherwise; and (iv) it likely became concerned about its potential exposure to Crosslinx for damages, if Metrolinx was late in commencing revenue service for the Metrolinx LRVs.
42. Given the foregoing, perhaps it should not have come as a surprise to Bombardier (although it did), when on July 12, 2016 Metrolinx served Bombardier with a Notice of Default. The Notice of Default alleged four grounds of default:
 - a. Failure to properly schedule;
 - b. Failure to meet the April and May 2015 delivery dates for the Pilot Vehicles;

- c. Failure to meet load levelling requirements in accordance with Metrolinx's interpretation of those requirements; and
- d. Failure to supply skilled workers, products, plant and equipment at the Sahagun plant in Mexico.

Attached hereto as Exhibit "6" is a copy of the Notice of Default.

43. Bombardier fully disputes the alleged grounds of default. In particular:
- a. As I indicated above, prior to July 12 2016, updated Contract Work Schedules had been provided to the Engineer and the updated schedule that included changes to the delivery date of the Pilot Vehicles were not rejected by the Engineer;
 - b. The parties had been debating and attempting to resolve the issue with respect to the correct interpretation of the load levelling requirements. However, prior to July 12, 2016, this issue had never been referred to the Engineer for final settlement in accordance GC 8.6. As a result, no binding interpretation of the load leveling requirements had ever been issued. Bombardier also has a strong basis on which it disputes the Engineer's interpretation of the load levelling requirements; and
 - c. Although Bombardier had identified some welding issues in its Mexico plant, it had fully addressed welding issues in a comprehensive action plan, which amongst other things, improved training of welders, enhanced quality assurance procedures and relocated some of the more complex welding jobs to Bautzen, Germany and to La Pocatière, Quebec, where Bombardier could leverage the expertise of more senior and experienced welding engineers and welders. The comprehensive action plan was put in place well before the issuance of the Notice of Default.
44. By letter dated July 21, 2016, Bombardier wrote to the Engineer and addressed each allegation of default raised in the Notice of Default. Attached hereto as Exhibit "7" is a copy of Bombardier's July 21, 2016 letter.

45. By letter dated July 29, 2016, Metrolinx wrote to the Engineer, purporting to respond to Bombardier's July 21, 2016 correspondence. Although Metrolinx itself acknowledges in the letter that "the contractual authority to make the determination as to the acceptability of the Bombardier Response is that of the Engineer", the letter sets out Metrolinx's opinion regarding the acceptability of Bombardier's response. Metrolinx's opinion is later wholly adopted by the Engineer. It is also worth noting that in this very same letter, Metrolinx reminds the Engineer that "Bombardier expects that the Engineer will be assessing and reviewing the Response [i.e. Bombardier's proposed corrective action] in order to determine its acceptability, as does Metrolinx. If you as Engineer require any additional project funding to conduct this evaluation, please advise and Metrolinx will take steps to provide additional budget approval as requested." [emphasis added] Attached hereto as Exhibit "8" is a copy of Metrolinx's July 29, 2016 letter.
46. The Engineer's response to Bombardier's July 21, 2016 letter is found in a letter dated August 9, 2016. Although the letter purports to be from the Engineer, it is written on Metrolinx's letterhead and is clearly not an impartial determination made by the Engineer, but rather is a determination made by Metrolinx that has simply been adopted by the Engineer. Throughout the letter, the Engineer confirms directly that the determinations being expressed are those of Metrolinx. For instance, the Engineer states:
- Metrolinx does not agree with Bombardier's assertion that it already has in place the actions necessary to correct the shortcoming, and that Bombardier has communicated such to Metrolinx over the course of the LRV program.
- Metrolinx hereby reaffirms that Bombardier is in default of its contractual obligations.
- Attached hereto as Exhibit "9" is a copy of the Engineer's August 9, 2016 letter.
47. On August 11, 2016, Bombardier filed two written Notices of Claim with the engineer, pursuant to GC 23 of the Contract, thereby triggering the dispute resolution process under the Contract (the "Notices of Claim"). Together, the two Notices of Claim challenge the validity of each of the allegations of default set out in the Notice of Default. Attached hereto as Exhibit "10" are copies of the two Notices of Claim.

48. By letter dated August 18, 2016, Bombardier once again wrote to the Engineer with a further response to the allegations of default. The letter was written with a view to finding a collaborative solution that would allow the parties to continue to work cooperatively on the project and move past the Notice of Default, which Bombardier maintains is invalid. Attached hereto as Exhibit "11" is a copy of Bombardier's August 18, 2016 letter.
49. By letter dated August 19, 2016, Metrolinx wrote to the Engineer (having been copied on Bombardier's August 18, 2016 letter) and asked the Engineer to advise of the status of his review of the alleged defaults. Attached hereto as Exhibit "12" is a copy of Metrolinx's August 19, 2016 letter.
50. Also on August 19, 2016, Metrolinx wrote to Bombardier to advise that it had begun to seek out possible new LRV suppliers, and to that end, had delivered a notice to the proponents in the Finch West LRT Project, in which Metrolinx asked those proponents for "feedback on the possible addition of revenue vehicles to the scope of supply" as a possible mitigation strategy in the event that the engineer "makes a determination that Bombardier has not cured the defaults set out in the ... Notice of Default..". Attached hereto as Exhibit "13" is a copy of the Request for Proposals Finch West LRT Project dated August 19, 2016 letter.
51. By letter dated August 26, 2016, the Engineer once again wrote to Bombardier. In this letter, the Engineer appears to criticize Bombardier for not having provided Metrolinx with the information requested in Metrolinx's July 29, 2016 letter, and to repeat Metrolinx's criticism that Bombardier had not provided sufficient documentation to demonstrate that Bombardier had "cured the defaults, or the required schedule within which the defaults will be cured", even though this information had indeed been provided. Attached hereto as Exhibit "14" is a copy of the Engineer's August 26, 2016 letter.
52. By letter dated September 2, 2016, the Engineer confirmed the determination that Bombardier was in default. This letter once again demonstrates that the determination of default was not made by the Engineer but was made by Metrolinx and simply adopted by the Engineer:

Upon review of your letter ... dated August 18, 2016, Metrolinx has determined that the defaults identified ... have not been corrected. Nor

has Bombardier responded with sufficient documentation, as requested ... to demonstrate that the defaults are being addressed.

As stated ... Metrolinx hereby reaffirms that Bombardier is in default of its contractual obligations. [emphasis added]

Attached hereto as Exhibit "15" is a copy of the Engineer's September 2, 2016 letter.

53. By this point in time, Metrolinx appears to have recognized that the Engineer had failed to act impartially in making his determination of default. By letter dated September 6, 2016, Metrolinx instructed the Engineer to correct the situation:

Dear Mr. Rankin,

Further to your letter of September 2, 2016, we note that your letter states that "Metrolinx" has made certain determination(s) in respect of Bombardier's default(s) under the Contract. To be clear, Metrolinx in no way participated in or influenced the performance of your duties as Engineer under GC 10, or otherwise in relation to the default(s). Rather, the determination(s) communicated by your letter of September 2nd were arrived at by you in your capacity as Engineer, and not by Metrolinx. We would be grateful if you would confirm the foregoing.

Attached hereto as Exhibit "16" is a copy of Metrolinx's September 6, 2016 letter.

54. By letter dated September 12, 2016, the Engineer did as Metrolinx instructed, and confirmed as such. Attached hereto as Exhibit "17" is a copy of the Engineer's September 12th letter.

D. THE NOTICE OF INTENTION TO TERMINATE

55. Although Metrolinx was fully aware that the validity of the Notice of Default was before the Engineer for determination, on October 28, 2016, Metrolinx served Bombardier with a Notice of Intention. Under the terms of the Contract, the Notice of Intention could only be served and ultimately, the Contract can only be terminated, if the Notice of Default was indeed valid in respect of its allegations that Bombardier was in material default. Attached hereto as Exhibit "18" is a copy of the Notice of Intention.
56. Bombardier responded to the Notice of Intention in a letter dated November 7, 2016, reiterating its defences to the allegations in the Notice of Default, and advised Metrolinx that the Notice of Intention could not be served until the validity of the Notice of Default is

determined under the dispute resolution process under the Contract. In this letter, Bombardier also took issue with the Engineer's lack of impartiality:

In rejecting Bombardier's response, and in other respects generally during the last several months, it has become apparent that Metrolinx has been improperly exerting influence over the Engineer, making it impossible for him to comply with his obligations of impartiality under GC 8.5. In this regard, Bombardier reserves all of its rights.

Attached hereto as Exhibit "19" is a copy of the November 7, 2016 letter.

57. Under GC 23 of the Contract, the Engineer had the authority to extend the deadline by which Bombardier was to file its statement of claim. Bombardier initially sought an extension on September 26, 2016 for the submission of its Written Statement of Claims, but did not receive a response from the Engineer until October 6, 2016. Mark MacGregor is a Bombardier employee. He shares office space with the Engineer in Toronto. I am advised by Mr. McGregor, and believe to be true, that on or around September 29, 2016, he asked the Engineer whether the extension would be granted, to which the Engineer replied "It's in the lawyers' hands" (being Metrolinx's lawyers). On October 6, 2016, the extension was granted, as was a subsequent request to Metrolinx for another extension. On January 13, 2017, Bombardier filed two statements of claim in response to the Notice of Default, copies of which are attached hereto as Exhibit "20" and Exhibit "21".
58. Since the Notice of Intention to Terminate, the parties have had without prejudice discussions, the details of which I will not include here. However, Bombardier now strongly believes that Metrolinx will try to terminate the Contract shortly.

E. THE NATURE OF THE ALLEGATIONS IN THE NOTICE OF DEFAULT

59. The allegations in the Notice of Default all center around delays experienced over the course of the Contract and in particular, the delay in delivery of the Pilot Vehicles. In my experience, changes in schedule over the course of a large and complex project like the Contract are not uncommon and can result from various reasons. In this instance, some of the delays have originated as a result of Bombardier and others are a result of Metrolinx.
60. Regardless, I believe that the concerns Metrolinx has expressed regarding the delays are disingenuous:

- a. Given the delays in its own infrastructure projects, Metrolinx is insisting on a delivery schedule that it cannot and does not want to meet, in light of the warranty and storage issues described above, among other reasons;
- b. As will be explained in greater detail below, Metrolinx knows that the Pilot Vehicles are not late. At all material times, the Engineer was fully apprised of any changes in the Contract Work Schedule, including changes to the delivery dates for the Pilot Vehicles. All such schedule changes were discussed with the Engineer before they were implemented. Bombardier could not unilaterally proceed to work towards these new delivery dates and timelines in the Contract Work Schedule, without the Engineer's approval of those changes, which was given.
- c. The Engineer is purporting to rely on the April and May 2015 delivery dates for the Pilot Vehicles, as set out in Contract Amendment 2, but waited until July 2016 to claim that Bombardier was in default under the Contract.
- d. As noted above, there are 25 months between the date on which the first Pilot Vehicle was delivered and the date on which the first production single cab LRV is needed. The 25-month interval between delivery of the Pilot Vehicle and the first production single cab LRV, is 9 months more than the parties had required under the original Contract Work Schedule. There can be no inference made that a delay in the delivery of the first Pilot Vehicle will result in late delivery of the first production single cab LRVs.
- e. As will also be explained below, Metrolinx knows that some of the mandatory qualification testing that has to be performed on the Pilot Vehicles before Bombardier can commence production of the LRVs, has to be conducted on Metrolinx's infrastructure, which Metrolinx has not yet built.
- f. As will also be explained below, well before the Notice of Default, Bombardier developed and implemented an action plan, which amongst other things, expanded its production capabilities and implemented corrective measures to address the welding issues in its Mexico plant, and to ensure that Bombardier would be

delivering the Metrolinx LRVs in accordance with the revised schedule that Metrolinx has requested.

i. Acceptance of Scheduling Changes by the Engineer

61. As I mentioned above, a review of the Bi-Monthly Progress Reports demonstrates the typical practice of Bombardier and Metrolinx with respect to changes to the Contract Work Schedule. In particular, when a scheduling change was required, Bombardier would reflect it in its monthly schedule submittals to the Engineer. The change would be discussed by the parties. Like the first Contract Work Schedule, no formal approval was ever issued confirming the Engineer's acceptance of any scheduling changes submitted by Bombardier. However, the Engineer, through his planner, regularly commented on the schedule details and links, but never objected to the vehicles delivery dates incorporated into the Contract Work Schedule. Bombardier always understood and operated on the basis that the schedules submitted to the Engineer, including any amendments to the schedule, were acceptable to and approved by the Engineer, as has the Engineer and Metrolinx.
62. Although Bombardier had identified some welding issues in its Mexico plant, it had fully addressed welding issues in a comprehensive action plan, which among other things, improved training of welders, enhanced quality assurance procedures and relocated some of the more complex welding jobs to Bautzen, Germany and to La Pocatière, Quebec where Bombardier could leverage the expertise of more senior and experienced welding engineers and welders.

ii. The Pilot Vehicle Is Not Late

63. As described above, under the terms of the Contract and the Technical Specifications, once the Pilot Vehicle is substantially ready, it must undergo an FAI. FAIs are conducted to demonstrate that the Pilot Vehicle has been constructed in accordance with approved designs, to test certain of its basic functions, and to identify any deficiencies that need to be corrected. The FAI is a crucial step as it permits the start of the qualification of the vehicle and as production of Metrolinx LRVs for delivery to Metrolinx can, subject to certain other requirements being fulfilled, begin shortly thereafter. Both the FAI and the start of qualification tests are Milestones for which Metrolinx is required to pay Bombardier under the Contract.

64. On July 26, 2016, Bombardier issued a preliminary notification to Metrolinx advising that the Pilot Vehicle FAI was scheduled to occur on August 29-31, 2016. Attached hereto as Exhibit "22" is a copy of the email sent by Bombardier to Metrolinx on July 26, 2016.
65. By email dated July 29, 2016, Metrolinx provided a number of comments in response to the Bombardier's FAI Pre-Notification. Ultimately, Metrolinx advised that it was "gravely concerned" about the FAI date and noted that the volume of information required for approval of the FAI will be "insurmountable" for Bombardier. Attached hereto as Exhibit "23" is a copy of Metrolinx's email dated July 29, 2016.
66. Between August 5, 2016 and October 26, 2016, correspondence was exchanged between the parties regarding the Pilot Vehicle FAI. While the Pilot Vehicle FAI was rescheduled by Bombardier to October 31, 2016, Bombardier maintained its position that it was ready to conduct the Pilot Vehicle FAI throughout this correspondence.
67. By letter dated October 28, 2016, Metrolinx advised Bombardier that it would not be meeting with Bombardier to conduct the FAI. Attached hereto as Exhibit "24" is a copy of Metrolinx's October 28, 2016 letter.
68. Bombardier disagrees with Metrolinx's position because, among other reasons, the scope of the FAI insisted on by Metrolinx goes beyond what is required under the Contract and industry standard practice for such activity. As such, on October 29, 2016, Bombardier advised Metrolinx that it was ready for the Pilot Vehicle and would proceed to conduct the FAI on October 31, 2016. Attached hereto as Exhibit "25" is a copy of Bombardier's letter to Metrolinx, dated October 29, 2016.
69. On October 31, 2016, the Engineer sent a letter to Bombardier advising that its attendance in Thunder Bay on that date was not for the Pilot Vehicle FAI. Attached hereto as Exhibit "26" is a copy of Engineer's letter dated October 31, 2016.
70. The Pilot Vehicle FAI was conducted on November 1, 2016. Metrolinx was present at the time the FAI was conducted.
71. On November 8, 2016, Bombardier wrote to Metrolinx advising that the Pilot Vehicle is ready to commence pre-qualification activities and is being shipped to the test track at its

Kingston plant. Attached hereto as Exhibit "27" is a copy of Bombardier's letter dated November 8, 2016.

72. On November 25, 2016 Bombardier subsequently filed a Written Notice of claim with the Engineer, challenging the Engineer's refusal to treat the November 1 inspection as the Pilot Vehicle FAI. And on January 24, 2017 filed a Written Statement of Claim regarding same. Attached hereto as Exhibit "28" is a copy of Bombardier's Written Notice and Statement of Claim, as filed with the Engineer.
73. On one hand, Metrolinx is purporting to complain about the lateness of the delivery of the first Pilot Vehicle. On the other hand, now that Bombardier has delivered the first Pilot Vehicle, Metrolinx is doing all that it can to delay Bombardier from progressing to the qualification of the vehicle and second FAI—the last step in the Pilot Vehicle Program. I also note that one of the main basis for Metrolinx's refusal to conduct the FAI is that it wants Bombardier to demonstrate more functionalities at the first FAI than Bombardier believes is required under the Technical Specifications or pursuant to industry standard. Here too, Metrolinx's complaint seems to be one of form over substance, since the demonstrations it is asking for will be demonstrated as part of the next phase of the Pilot Vehicle program (that is during the qualification stage that follows the first FAI and precedes the second FAI) and well before the Baseline Production Vehicle Design Configuration is finalized. This qualification program is being delayed precisely because of Metrolinx's refusal to conduct the first FAI.
74. I also note the following about this schedule:
 - a. The first Pilot Vehicle was ready for delivery in October 2016. This means there is a 25-month period between the date on which the first Pilot Vehicle was actually delivered and the date when the first production single cab LRV is due to be delivered under Contract Amendment 2 (discussed below).
 - b. Regardless of the alleged delay in the delivery of the Pilot Vehicle, the fact that the delivery date for Pilot Vehicle shifted over the course of the Contract has never impacted the delivery date for the first LRVs Bombardier is required to deliver. The first LRVs Bombardier is required to deliver are the single-cab

Metrolinx LRVs (intended for the Eglinton Line and the very first needed). Despite the changes to the delivery date for the Pilot Vehicle, the delivery date for the single-cab Metrolinx LRV has consistently been November 2018 since Contract Amendment 2 was executed.

- c. Contract Amendment 2 requires the first set of dual-cab LRVs (intended for the Finch line) to be delivered in March 2017. Metrolinx has continuously delayed the delivery dates. The expectation has always been that the parties would settle the terms on which the parties have agreed to this delay, and that a contract amendment would be made to address the re-sequencing of the deliveries and the gap between preliminary and final acceptance of the vehicles.

iii. Welding Issues in Mexico and Bombardier's Action Plan

75. In deciding how to execute the work under the Contract, Bombardier planned to leverage its expertise in building LRVs. This expertise resided primarily at Bombardier's operations in Vienna, where the vehicles for the TTC Contract were designed.
76. Bombardier also planned to build upon the expertise developed in its North American facilities including Thunder Bay and Sahagun, Mexico. The Thunder Bay plant was assigned responsibility for the assembly of the Metrolinx's LRVs. The Sahagun plant was responsible for the manufacturing and welding activities related to the Metrolinx LRVs.
77. The welding processes used on the LRVs are called special processes. Bombardier had to develop specifications for how each type of weld must be done. Following prescribed welding standards, Bombardier also had to qualify these welds to ensure their quality.
78. As I mentioned above, weeks of training were provided by Bombardier's Vienna employees—who are experts in welds of this nature—to teach the skilled workers hired by Bombardier at the Mexico plant to complete the specialized welds required for the Metrolinx LRVs.
79. Bombardier does not rely solely on the expertise of its welders to ensure the quality of its welds. It also has a quality assurance program to ensure that its welds are up to standard. Amongst other things, this program includes a number of inspections that are performed at

the plant level. These inspections can involve visual inspections and ultrasound testing. In the event an issue is discovered in the welding process, the part is sent back for revalidation to ensure that the root cause of the issue is understood.

80. Through its quality assurance program, Bombardier did discover some welding issues at its Mexico plants well before the issuance of the Notice of Default. These issues included a higher rate of repair work required for the welds than anticipated by Bombardier at the outset of the Contract. Bombardier has taken a number of steps to address the welding and other production issues. A significant example of this is the launch of a restructuring and enhancement initiative to implement substantive changes to the Metrolinx LRV production. This initiative was presented by Bombardier's President, Benoit Brossoit, to John Jensen (Metrolinx's Chief Capital Officer) on May 19, 2016.
81. As part of this initiative, the assembly work to be completed at the Thunder Bay plant has been moved to Bombardier's plant in Kingston. In doing so, Bombardier invested significant capital to increase the size of the plant and transfer all of the required equipment, jigs, and tooling for assembly from Thunder Bay. In total, an investment of approximately \$8 million dollars was made by Bombardier in the Kingston plant as a result of this initiative. Of this, approximately \$6 million dollars was spent to add an extension to the building and \$2 million dollars was spent on tooling and training of Bombardier employees. All of these costs have been borne solely by Bombardier.
82. Currently, the implementation of the initiative is on track. All necessary steps are being taken to increase manufacturing capability and to ensure that Bombardier will meet the November 2018 delivery date required by Metrolinx for the Eglinton Crosstown line.

iv. Bombardier has Correctly Interpreted the Load Levelling Requirements

83. Entrances to LRVs can never be perfectly level with the platforms from which passengers will be embarking or to which they will be disembarking. To ensure accessibility for passengers with mobility issues, the Technical Specifications specifically adopt certain standards prescribed by the *Americans with Disabilities Act Accessibility Specifications for Transportation Vehicles* and the *Ontarians with Disabilities Act*. The Technical Specifications also prescribe various leveling requirements as well as the prescription for load induced levelling of the LRVs.

84. Metrolinx and Bombardier disagree on the proper interpretation of the applicable Technical Specifications. In particular, the parties dispute whether the levelling values prescribed by the Technical Specifications already include manufacturing tolerances, or whether manufacturing tolerances should be added. It is Bombardier's view that manufacturing tolerances must be added to the leveling values, and relies on standard industry practice, as well as on the *Americans with Disabilities Act Accessibility Specifications* and the "Light Rail Vehicles & Systems Technical Assistance Manual", published in October 1992, in support of its interpretation.
85. Among other things, the parties are arguing over a 6 mm difference in manufacturing tolerances (after mitigation by Bombardier). Metrolinx's position—that this manufacturing tolerances will impede accessibility—does not make sense, when one considers the dimensions of the LRVs which; have a height of 3800 mm; have a width of 2650 mm; have a length of 31,960 mm reach a weight close to 70 metric tons when fully loaded with passengers, and 49.5 tons when empty.

v. Delays Caused by Metrolinx

86. Bombardier does take responsibility for some of the manufacturing issues which in turn, delayed delivery of the Pilot Vehicle. However some of this delay was caused by Metrolinx's own conduct—specifically, by Metrolinx's inefficient management of the Contract, its inability to satisfy its obligations under the Contract, and its inability to ensure that the infrastructure will be completed on time.

a. Inefficient Management of the Contract

87. The inefficient management of the Contract by Metrolinx has been a contributing factor to the delay experienced to date. Below I have set out the various ways in which Metrolinx has contributed to the delay.

b. Delays in Approval of Design Documents

88. Metrolinx's interpretation of the Technical Specification requirements and its approach to reviewing and approving Final Design Review ("FDR") Contract deliverables, contributed significantly to delays in advancing the project. In 2012, after the previous engineer, Stephen Lam (who was also the engineer for the TTC Legacy Contract) was replaced as the

engineer for the Metrolinx Contract, the progress of the design process became more arduous and significant delays and disruptions to the project were encountered as result. At or around the same time as the engineer was replaced, changes in the Metrolinx technical team occurred and some of the experienced TTC engineers were replaced by new team members, mostly consultants. By way of example:

- a. The Contract Documents provide that Metrolinx must respond to Bombardier submittals or responses within 21 calendar days. Metrolinx's average response time was 108 days (5 times the allowable contract time) among all iterations and deliverables;
- b. The high number of iterations of the design documents that were required before Metrolinx would provide final approval. On average, seven iterations of the design documents were required for the Final Design Review (even though the same documents had been previously submitted, commented, responded to and approved at the previous Conceptual Design Review and Preliminary Design Review phases). This number far exceeds industry standards. The number of iterations arose due to additional comments from Metrolinx after initial submission, Metrolinx's repeated requests for more in-depth responses, high turnover on the Metrolinx team, and due to the high number of Metrolinx reviewers assigned to review the same document (on average 2.5 reviewers per deliverable, with some deliverables having been reviewed by seven reviewers);
- c. Metrolinx also did not comply with the Contract requirement for "Conditional Approval": The Contract specifies the use of "Conditional Approval" status of deliverables as a means of permitting project progress while open issues are being discussed/closed. Metrolinx refused to use this approach, and instead kept deliverables open until closure of 100% of Metrolinx's comments and questions were achieved. This caused considerable delays in the closure of design documents;
- d. Metrolinx's lack of knowledge about rail engineering: A number of Metrolinx's employees and consultants are not versed in train engineering and rail industry practices, which resulted in excessive commenting, questioning and iterations of

deliverables before Metrolinx would grant approvals. As an example, the carbody fatigue and crashworthiness analysis documents (BRA-2000 and 2001) have been subjected, respectively, to 434 and 213 comments each. Due to the significant number of comments, this matter was left open for an excessive period of time. In fact, it was not closed until three years after the initial submission, when Metrolinx finally appointed a subject expert to review the documents. The documents were finally closed with no change to the initially submitted carbody design;

- e. Comments on all deliverables: Metrolinx insisted on commenting on deliverables which were submitted “for information” only, i.e. that were not required as formal deliverables;
- f. Metrolinx also did not follow the intent of the Contract to maximize the re-use of TTC LF LRV documentation (per GC 9.12), and instead treated the Metrolinx project as if it were a brand new development project. Among the many examples illustrating this are:
 - i. The amount of design documentation required under the Contract ended up being significantly more than the same documentation for the same system/environment under the TTC Legacy Contract. For instance, the HVAC design documentation on the TTC LRV project is about 50 pages. On the Metrolinx project it has become a 125-page document, even though there are negligible differences between the two. In fact, systems on the Metrolinx project that were almost identical to the system used for TTC, received the same level of scrutiny from Metrolinx that they would have received had the systems been new;
 - ii. Initial rejection by Metrolinx of design functions or concepts similar to TTC LRV (for same system in same environment). They were eventually accepted, but it took significantly more iterations and supporting rationale to reach design approval than was justified;

iii. Initial rejection by Metrolinx of waivers identical or similar to TTC LRV. They were eventually accepted, but it took significantly more iterations and supporting rationale than the same waivers request on the TTC LRV program (in same environment).

89. In short, Metrolinx's general approach to the contract deliverable reviews resembles the type of review that is applied to a brand new development project. Metrolinx's level of review does not accord with the spirit and express intent of the Contract, that the parties be able to leverage the design work and review already performed under the TTC Contract. This has caused significant disruptions and delays with no or little added value, and has diverted technical resources from other important tasks.
90. It is noteworthy that the entire Final Design Review phase under the TTC Legacy Contract took five months to complete, whereas the same phase under the Metrolinx Contract took over five years to complete.

c. The Quality Notice Process

91. The process Metrolinx has required Bombardier to follow when resolving quality issues, has also played a significant role in the delay in the Contract Work Schedule. In general, when an issue with a part is identified, a meeting is called to review the issue with the Materials Review Board ("MRB") team. A draft disposition, summarizing the cause of the issue and how it was resolved, referred to as a Quality Notice, is prepared by the MRB. The Quality Notice is then provided to Metrolinx's onsite inspector for review. Any changes required by the inspector are incorporated into the Quality Notice. The Quality Notice is then resubmitted to Metrolinx's inspector for a second review. If acceptable, the Quality Notice is then sent to the Engineer for a second set of comments and questions. Bombardier must then respond to these questions. Significantly, during this process, production of the Metrolinx LRVs is halted and cannot proceed. Production can only resume once Bombardier receives approval to proceed from the Engineer.
92. The production is usually significantly delayed by this process, sometimes by up to twenty days. Most of the time, Bombardier's initial disposition is followed without any change to the resolution Bombardier proposed in the first place. Every time this process is initiated, productive time is lost due to the excessive and unnecessary consultation.

93. In contrast, under the TTC Legacy Contract, the process for identifying and resolving quality issues was more fluid—a disposition of the issue was determined at the MRB and preliminarily approved by the MRB and TTC's onsite inspector so as not to delay the work. A Quality Notice would still be prepared and submitted to the TTC engineer for final approval. While the Quality Notice documentation was being prepared, Bombardier's operations teams could initiate the repair/rework process or continue production while awaiting final approval from the TTC engineer. TTC retained a right to reject the disposition until the Quality Notice was approved.
94. In October 2016, Bombardier identified the challenges in this process as part of the Bi-Monthly Commercial meeting and proposed a new process (similar to that used under the TTC Legacy Contract) geared toward mitigating the delay associated with resolving quality issues. Attached hereto as Exhibit "29" is a copy of the October 6, 2016 presentation made at the Bi-Monthly Commercial Review meeting.

d. The Test Track

95. In late 2012, Metrolinx advised Bombardier that Metrolinx's infrastructure for the test track would not be ready in time to conduct the qualification testing. In order to provide a solution, Bombardier undertook a high-level analysis of the cost of upgrading the test track at its Kingston facility. The anticipated cost was about \$8-9 million. Metrolinx did not want to pay that amount, and in 2013 and 2014 considered other potential options, including locations outside of Canada.
96. On November 21, 2014, Bombardier submitted a preliminary indicative proposal to the Engineer, which included costing and timing, for conducting part of the qualification testing at Bombardier's Kingston location. Attached hereto as Exhibit "30" is a copy of that proposal. Following Bombardier's proposal, the parties exchanged the following correspondence:
 - a. Metrolinx letter, dated December 22, 2014 re: Indicative ROM for High Speed Testing in Kingston Ontario: The Engineer advised that Metrolinx had elected to use the Kingston test track for the high speed testing of the Pilot Vehicles. The letter also indicated that Metrolinx wanted a firm quote for the necessary

modifications to the Kingston test track. Attached as Exhibit "31" is a copy of the December 22, 2014 letter.

- b. Metrolinx letter, dated January 19, 2015 re: RFQ and Scope of Work for High Speed Testing in Kingston Ontario: The Engineer asked for a firm price for the modifications to the Kingston test track, with a detailed breakdown. Attached as Exhibit "32" is a copy of the January 19, 2015 letter.
 - c. Metrolinx letter, dated February 5, 2015 re: Change Directive No. 14 – Pilot Testing at the Kingston Test Track: The Engineer proposed \$3.15 million as an appropriate price for the modifications to the Kingston test track. Attached as Exhibit "33" is a copy of the February 5, 2015 letter. Bombardier proceeded with the modifications to the Kingston test track. However, Bombardier has not agreed to the price Metrolinx has proposed for this Change Directive.
 - d. Bombardier letter, dated November 26, 2015 re: Fixed and Firm Price for the Pilot Testing at Bombardier Kingston Test Track: Bombardier proposed (i) an infrastructure price of \$5.012 million (ii) a non-infrastructure price of \$2.189 million (iii) changes to sections GC 35.10 and GC 35.11 of the Contract to reflect that qualification testing was to be conducted in Kingston and not on Metrolinx's infrastructure in Toronto, and (iv) changes to the Technical Specifications to provide for two phases of baseline vehicle configuration (i.e. qualification testing) - one phase in Kingston on the test track and one phase in Toronto on Metrolinx's infrastructure once it was available. Attached as Exhibit "34" is a copy of the November 26, 2015 letter.
97. Notwithstanding Bombardier's efforts to accommodate Metrolinx's inability to provide a test track (as Metrolinx was required to provide under the Contract), Metrolinx would not agree to compensate Bombardier for the full amount of the reasonable costs it would incur to upgrade the test track at the Kingston plant in order to test the Metrolinx LRVs. The Engineer issued a Change Directive ordering Bombardier to upgrade their Kingston track and later refused to compensate Bombardier for the full final price. Nevertheless, Bombardier proceeded with the modification of its facilities so as to accommodate the testing. To date, Metrolinx has failed to agree on the price for the necessary modifications

to the Kingston test track required to conduct the first phase of the qualification testing, and on the changes to the testing plan. Furthermore, Metrolinx has refused to agree to Bombardier's November 26, 2015 proposal regarding: changes to sections GC 35.10 and GC 35.11 of the Contract to reflect that qualification testing was to be conducted in Kingston first and then on Metrolinx's infrastructure in Toronto; and regarding changes to the Technical Specifications to provide for two phases of baseline vehicle configuration (i.e. qualification testing) - one phase in Kingston on the test track and one phase in Toronto on Metrolinx's infrastructure once it was available.

e. Free Issue Integration

98. Under the Contract, Metrolinx was required to provide Bombardier with a number of items, referred to as "Free Issue" items (i.e. communication and signaling equipment, sensors, etc.), that would ultimately be incorporated into the Metrolinx LRV but were not required to be purchased or provided by Bombardier. Bombardier's obligation with respect to the Free Issue items was to include provisions for pre-installation of mechanical, electrical or software interfaces that are required for the Free Issue items. Essentially, Bombardier was required to make sure the Metrolinx LRV had a placeholder for the Free Issue items. Metrolinx's obligation under the Contract was to provide all necessary design and interface information about the Free Issue train to wayside communication parts on time during the design phase. Furthermore, the responsibility for integration of the Free Issue items under the Contract rested on Metrolinx.
99. Two key Free Issue items Metrolinx was supposed to supply for the Metrolinx LRVs were: (i) voice and data radio with antenna and (ii) the automatic train supervision/automatic train protection/automatic train operation parts.
100. It is important to note that the installation of the Free Issue items by Bombardier was not included as part of the Contract and therefore, were to be the subject of a subsequent amendment to the Contract.
101. As early as February 8, 2011, Bombardier wrote to Metrolinx advising that Metrolinx's failure to provide the information regarding the Free Issue items was delaying the design process. Attached hereto as Exhibit "35" is a copy of Bombardier's letter dated February 8, 2011.

102. In response, Metrolinx simply advised Bombardier that Bombardier should continue designing the Metrolinx LRVs as the Free Issue items were not part of the current scope of the Contract. Attached hereto as Exhibit "36" is a copy of Metrolinx's letter dated April 6, 2011. Metrolinx's statement is not accurate--although the Contract does not require Bombardier to supply the Free Issue, it does require Bombardier to make a provision for pre-installation of mechanical, electrical and software interfaces for these Free Issue items in the design of the LRV. This means that Bombardier cannot finalize the design in accordance with the Technical Specification which do not include provision for the Free Issue items.

103. The Free Issue items were also regularly discussed at the Bi-Monthly Progress Review meetings starting in March-April 2013. In particular, the parties discussed the timeline for Metrolinx to supply the required information for Free Issue items and the unavailability of their mechanical, electrical and software interfaces, as consistently raised as an issue. This issue was discussed as part of the Bi-Monthly Progress Review meetings until the November-December 2016 Bi-Monthly Progress Review meeting. In its November-December 2013 Bi-Monthly Progress Review Report, Bombardier noted that the preferred proponent for the Free Issue items may not be identified until 2015 and accordingly, manufacturing constraints would need to be discussed for the purpose of adjusting the schedule. Attached hereto as Exhibit "37" are copies of the Bi-Monthly Progress Review Reports from March-April 2013 to January-February 2014.

104. On November 11, 2015, Metrolinx issued Change Directive 20 to Bombardier. The Change Directive requires Bombardier to support the integration of the Automatic Train Control and Radio into the design on the Metrolinx LRV. Attached hereto as Exhibit "38" is a copy of Change Directive 20.

105. Two revisions to Change Directive 20 were issued by Metrolinx. On May 12, 2016, Change Directive 20, Revision 1 was issued. Attached hereto as Exhibit "39" is a copy of the revision. Change Directive 20, Revision 2 was issued on November 29, 2016. Attached hereto as Exhibit "40" is a copy of the revision. Notably, this latest revision states that the purpose of its issuance is "to finalize the integration of the free issue systems with

the Light Rail Vehicle during the detailed design phase between Bombardier and CTS [Crosslinx].”

107. While Bombardier was prepared to support Metrolinx in an advisory role with respect to the integration identified in Change Directive 20 (and did so on a time and materials basis), the scope of the Change Directive, Revision 2 issued by Metrolinx was unclear. Attached hereto as Exhibit "41" is a letter sent by Bombardier dated December 22, 2016 requesting clarification from Metrolinx about various concerns.
108. On the same date, Bombardier sent a separate letter to Metrolinx responding to Metrolinx's request that Bombardier provide a fixed and firm quotation for changes to the Metrolinx LRV due to the integration of the Free Issue items. Bombardier advised Metrolinx that it had insufficient details to provide Metrolinx with pricing and noted that the Free Issue items are still under development by Crosslinx and Metrolinx. Further, Bombardier identified a number of items that needed to be resolved before Bombardier's engineers could begin work on the detailed design. Attached hereto as Exhibit "42" is a copy of the letter sent by Bombardier on December 22, 2016.
109. To date, Metrolinx has not paid Bombardier for its completed work under Change Directive 20 due to a dispute between the parties about the hourly rates.
110. In addition, Metrolinx wants to add additional functions beyond the specified functionality under the Contract. For example, Metrolinx has advised Bombardier that it wants the Metrolinx LRV to have the ability to operate "unmanned" (without an operator in the LRV) in its yard. There was no intention under the Contract for this functionality and a number of alterations to the design of the Metrolinx LRV will be required to accommodate this function.
111. Ultimately, the responsibility for integration rests with Metrolinx and not Bombardier. Accordingly, Metrolinx is faced with a decision. It must either amend the schedule to allow sufficient time to integrate the Free Issue items into the Metrolinx LRVs or retrofit the Metrolinx LRVs following delivery by Bombardier. In either circumstance, Bombardier is left unable to complete its obligations under the Contract.

f. Metrolinx's Infrastructure is Necessary to the Contract

112. I understand from presentations made to the Metrolinx board (available on the internet) that the schedule for construction of the infrastructure for the Eglinton Crosstown and Finch lines has changed since the beginning of the Transit City Plan. The chart below sets out the ever-changing start dates for construction, as well as the expected "in service" dates for each line, based on presentations Metrolinx staff and senior management have made to Metrolinx's board:

	EGLINTON CROSSTOWN LINE		FINCH LINE	
Date of Report to Metrolinx Board	Construction Start Date	Service Date	Construction Start Date	Service Date
Jul 2009	2010	2016	2010	2014
Nov 2009	2011	2016-2020	2011	2016
May 2010	2011	2020	Late 2015	2019
Apr 2011	2011	2020		
Dec 2016		2021	2017	2021

113. The information contained in the chart above and forming my understanding regarding the changes shown in it are based on the following presentations made to the Metrolinx board. These presentations are attached as exhibits to my affidavit:

- i. **Exhibit "43"**: Leslie Woo, Chief Planning Officer Planning and Policy, "Metrolinx Big 5 Projects", dated July 13, 2009.
- ii. **Exhibit "44"**: Jack Collins, Vice President, Rapid Transit Implementation and John Howe, Vice President, Investment Strategy and Project Evaluation, "Big Five Progress Update", dated November 16, 2009.

- iii. **Exhibit 45"**: Jack Collins, Vice President, Rapid Transit Implementation, "Achieving 5 in 10: A Revised Plan for the Big 5 Transit Projects", dated May 19, 2010.
- iv. **Exhibit "46"**: Jack Collins, Vice President, Rapid Transit Implementation, and "Metrolinx / Toronto Transit Plan", dated April 28, 2011.
- v. **Exhibit "49"** (attached below): John Jensen, Chief Capital Officer, Capital Projects Group "Capital Projects Group Quarterly Report: December 2016", dated December 8, 2016.

114. For both the Eglinton Crosstown and Finch lines, Metrolinx has tendered the contract for the construction of the infrastructure separately from the contract for the production of the LRVs. The bidding process for the Eglinton Crosstown line and then the Finch line are conducted by Infrastructure Ontario and Metrolinx. This procurement structure - separating the infrastructure from the LRVs - is unusual for projects of this nature. Normally, the design and production of the LRVs would not be procured through a stand-alone contract, but instead, would be contracted out to a subcontractor under the general contract. In that way, management of entire project, including the scheduling of deliveries and coordination of the integration that has to take place between the LRVs and the infrastructure, can be performed by the lead contractor effectively and efficiently.

115. I have reviewed parts of the Infrastructure Ontario website regarding the Eglinton Crosstown line. It is my understanding that the Request for Qualifications for the Eglinton Crosstown line was issued on January 22, 2013, the Request for Proposals closed on February 19, 2015, a preferred proponent was selected on June 9, 2015, and the contract was awarded on November 3, 2015. The contract to design, build, finance and maintain the Eglinton Crosstown lines was awarded to a consortium called Crosslinx Transit Solutions General Partnership, which was made up of more than 26 companies (the "**Crosslinx Contract**"). The 4 major developers were ACS Infrastructure Canada Inc., AECON Concessions (a division of AECON Construction Group Inc.), Ellis Don Capital Inc., and SNC-Lavalin Capital Inc. The basis of my understanding in this respect is: copy of the Request for Proposal for the Eglinton Crosstown line attached hereto as Exhibit "47".; and a copy of the redacted Project Agreement attached hereto as Exhibit "48". Both agreements

can be found on the Infrastructure Ontario website. An un-redacted Project Agreement has not been produced by Metrolinx.

116. It is my understanding from my review of a report made to the Metrolinx board available on the internet that the Request for Qualifications for the Finch line was issued on September 8, 2015, and the Request for Proposals was issued on February 20, 2016. However to date, the contract has yet to be awarded. Attached hereto as Exhibit "49" is a copy of a December 8, 2016 report made to the Metrolinx board by John Jensen, Chief Capital Officer, Capital Projects Group, titled "Capital Projects Group Quarterly Report: December 2016" that forms the basis of my understanding.
117. Whether one considers the schedule for delivery set out in Schedule F of Contract Amendment 2, or the revised schedule that Metrolinx has asked Bombardier to work towards, given the delays in constructing the infrastructure for the Finch and Eglinton Crosstown Lines, Metrolinx is not in a position to proceed with acceptance of the Metrolinx LRVs under any of these schedules.

EGLINTON CROSSTOWN LINE (SINGLE CABS)

Contract Amendment 2 Delivery Date	Revised Metrolinx Delivery Date	Revenue Service Date
November 2018	November 2018	2021

FINCH LINE (DUAL CABS)

Contract Amendment 2 Delivery Date	Revised Metrolinx Delivery Date	Revenue Service Date
March 2017	Metrolinx has yet to formally confirm this date to Bombardier. It has only advised that the LRVs will be delivered after the LRVs for the Eglinton Crosstown Line.	2022

118. As I discuss below, the fact that Metrolinx's infrastructure, including the tracks, will not be completed until 2019 at the earliest, could also affect the production of the Metrolinx LRVs - Bombardier simply cannot complete the second phase of the mandatory qualification testing it is required to perform on the Pilot Vehicles until Metrolinx's infrastructure is available. This is because the FAI process, which requires Bombardier to perform qualification testing on the Pilot Vehicles, must be completed before Bombardier can start manufacturing the LRVs. Qualification testing involves running the Pilot Vehicles on a test track, and later, on the actual infrastructure on which the Metrolinx LRVs will be operating. Under the terms of the Contract, Metrolinx was required to provide Bombardier with a test track within their completed infrastructure (i.e. the Finch and Eglinton Crosstown lines) on which to conduct all qualification testing.

119. The following aspects of testing must be performed on Metrolinx's infrastructure:

- a. Electromagnetic compatibility ("EMC") testing to ensure that the traction equipment and other vehicle systems will not interfere with the track switch control equipment, signalling equipment and any other interface in the infrastructure.
- b. Vehicle ride quality and ground borne vibration testing to ensure the ride quality and vibration requirements set out in the Technical Specification under the Contract are met.
- c. Various integration testing to verify the LRV performance on the Metrolinx infrastructure and ensure compatibility between the LRV and Metrolinx's infrastructure. The interfaces between the LRVs and the Metrolinx's infrastructure that require testing include: trackwork and station interfaces, trackswitch interface, overhead catenary power supply system interface, communication interface and carhouse/shops interface. In addition, specific testing is required for the yard interface to ensure compatibility of the LRV with, among other things, the above-floor and under-floor lifting equipment and under-floor wheel turning lathe. It also includes vehicle to yard interface, vehicle clearance, vehicle surface rail environment, and vehicle noise (external and internal).

- d. Automatic train protection and automatic train operation testing—not required unless Metrolinx asks for it (Free Issue items).
- e. Complete system testing to confirm compatibility of all LRV.
- f. Vehicle system performance testing including vehicle dynamic validation, articulation, coupler centering, pantograph, data logger, brake and acceleration (propulsion, electric brake, friction brake thermal capacity, vehicle emergency recover).
- g. Bogie dynamic testing to ensure the requirements set out in the Technical Specification under the Contract are met.
- h. Vehicle communication testing including vehicle to wayside wireless, voice and data radio and Automatic Passenger Counting. This test is to be done regardless of the Free Issue issues.
- i. Monitoring and diagnostic system testing.

120. Qualification testing cannot be completed because of Metrolinx’s failure to build the infrastructure on time.

g. The Crosslinx Contract

121. Under Schedule 36 of the Crosslinx Contract (attached as Exhibit “48”), Metrolinx is required to provide a prescribed number of Revenue Vehicles by a prescribed period of time before the infrastructure is substantially complete (Sch. 36, s. 2.1(a)(i)). The number of revenue vehicles and deadline for Metrolinx’s infrastructure has been redacted from the public version of the Crosslinx Contract. Under Crosslinx Contract if Metrolinx fails to provide the revenue vehicles by the deadline, the failure “shall be subject to and in accordance with Section 40 [of the Crosslinx Contract], be treated as a Delay Event and, subject to and in accordance with Section 41 [of the Crosslinx Contract], be treated as Compensation Event” as long as the delay is not caused by Crosslinx (Sch. 36, s. 2.1(a)(ii)).
122. The operation of sections 40 and 41 of the Crosslinx Contract appears to require Metrolinx to pay Crosslinx’s actual damages caused by a delay:

- a. Section 40(a)(xix) specifically defines a Delay Event to include a failure to delivery Revenue Vehicles under s. 2.1(a)(ii) of Schedule 36;
- b. Section 41.1(a) in turn defines a Compensation Event to include an event as defined referred to in s. 40.1(a)(xix)—i.e. a failure to deliver LRVs on time;
- c. When a Compensation Event occurs under s. 41.1, s. 41.2(b) obligates Metrolinx to pay Crosslinx “such compensation as would place Project Co. [Crosslinx] in no better and no worse position than it would have been in had the relevant Compensation Event not occurred...”;

123. Under section GC 39.1 of the Contract, if Bombardier fails to deliver to Metrolinx LRVs in accordance with the Contract Schedule, Bombardier is required to pay Metrolinx liquidated damages in the amount of \$1500 per day, per Metrolinx LRV, for every day beyond the final acceptance date. The \$1500 per day liquidated damage amount, is in line with the liquidated damages one would normally see in a rolling stock equipment contract.

124. The difference between the \$1500 per day liquidated damages amount and Metrolinx’s potential liability under the Crosslinx contract, is likely of great significance to Metrolinx. However, Metrolinx chose to enter these contracts, fully aware of its potential exposure to Crosslinx and of its limited ability to recoup from Bombardier. More importantly, should Metrolinx be required to pay damages to Crosslinx, that liability will likely arise due to Metrolinx’s own defaults under the Crosslinx Contract, and will have nothing to do with Bombardier’s performance under the Metrolinx Contract.

F. THE NOTICE OF DEFAULT IS SUBJECT TO MANDATORY DISPUTE RESOLUTION

125. As noted, on January 13, 2017, Bombardier filed two Written Statements of Claim with the Engineer, which together contest the validity of all of the allegations of default set out in the Notice of Default. As also mentioned, on January 24, 2017, Bombardier also filed a Written Statement of Claim, challenging the Engineer’s refusal to conduct the FAI on October 31, 2016.

126. The mandatory dispute resolution process under the Contract has therefore been triggered. In compliance with its obligations under GC 23, GC 24 and Schedule F of the Contract, on

February 3, 2017, Bombardier selected Jacques Laparé to act as Bombardier's appointee on the Dispute Review Board. Attached hereto as Exhibit "50" is a copy of the February 3rd letter to Metrolinx advising of Bombardier's selected appointee.

127. To date, Metrolinx has not indicated that it has selected an appointee it wishes to propose to sit as a member on the Dispute Review Board, nor has it confirmed that it has no objection to Bombardier's appointee.

G. HARM TO BOMBARDIER AND TO THE ONTARIO ECONOMY

128. This Contract is worth more than \$770 million and is one of Bombardier's largest Canadian transit contracts.

A. Lost Ontario Jobs

129. Currently, the work under the Contract has created approximately 450 jobs. Of these, more than 70% of the jobs have been created in Canada.
130. It is my understanding from a review of the media coverage on the internet that one of the reasons then Mayor Miller supported the granting of the Contract to Bombardier was that it would create jobs in both the long and short term in Bombardier's Thunder Bay plant. Moreover, by building Bombardier LRVs in Thunder Bay, the Contract ensured at least 25% Canadian content (as defined in the Contract). Attached hereto as Exhibit "51" is a copy of a June 10, 2009 article published in the Toronto Star by T. Kalinowski, titled "High stakes in streetcar game" that forms the basis of my understanding.
131. I understand from the Thunder Bay Community Economic Development Commission's website that Bombardier is Thunder Bay's largest private sector employer, employing about 1,100 people. The Thunder Bay plant contains Bombardier's Centre of Excellence in Aluminum, and was to become the primary production site for LRVs. Currently, about 367 Bombardier employees are currently involved in the production of LRVs under the Contract. Attached hereto as Exhibit "52" is a copy of a list of Thunder Bay's major employers, published on the Thunder Bay Community Economic Development Commission's website.

132. In May 2016, Bombardier moved the production of some of the Metrolinx LRVs to its facility in Kingston, allowing it to add a second manufacturing line in Thunder Bay for the TTC vehicles. Bombardier also moved parts of the Metrolinx LRV production to its La Pocatière, Quebec plant, from its plant in Mexico. The La Pocatière plant is designated as a Center of Expertise for stainless steel car body manufacturing, and in welding processes. Metrolinx knew about and never opposed the transition of the Metrolinx LRV production to Kingston before Metrolinx delivered its Notice of Default on July 12, 2016.
133. As a result, approximately 139 additional Canadian employees are involved in the production of the LRVs under the Contract.
134. If the Contract is terminated before the validity of the Notice of Default is finally determined (and therefore before Metrolinx's right to terminate the Contract for material default is determined) 32 employees on the Engineering team devoted to the work under the Contract will likely be terminated. It is expected almost 230 Canadian jobs created as a result of the Contract will be lost.
135. As a result of the foregoing, Bombardier will incur significant costs. These costs arise not only as a result of the severance to the employees but also the hours that could have been leveraged for use in other Bombardier projects involving LRVs. For example, if the Contract is terminated, then the following aspects of the work that Bombardier was going to perform under the Contract cannot be leveraged for use on other projects: (i) all the designs prepared or in the process of being prepared for systems, production, maintenance, and special tools for the work under Contract; and (ii) any redesign or modification of these designs based on qualification tests on the Metrolinx LRVs that is yet to be completed.
136. LRVs are relatively new to the North American market. As a result of the Contract, Bombardier has been able develop its LRV expertise, which it can then leverage in delivering other existing (but less advanced) LRV projects, as well as future LRV projects.
137. In addition, by possibly having to terminate these employees, Bombardier will lose significant expertise it has developed in LRV production at its Thunder Bay and Kingston locations. Once expert employee resources have been lost, they are difficult to regain for

potential future projects. If the Contract is terminated for Material Default, Bombardier will likely lose key resources that have expertise in the following areas:

- a. Subsystems design such as train control management system, communication, heating ventilation and air conditioning, propulsion and braking, and load leveling systems;;
- b. Production specialized processes such as welding and bonding;
- c. Structure and crashworthiness;
- d. Electromagnetic Interface/ Electromagnetic Compatibility
- e. Wayside System Communication/ Automatic Train Protection/ Automatic Train Control/ Automatic Train Operation;
- f. Qualification testing;
- g. Truck and ride quality;
- h. Tunnel operation and fire load; and
- i. Multi-vehicle operation and maintenance.

138. The loss of skilled labour is likely to also have an economic impact on the Thunder Bay and Kingston areas in terms of lost local business activity.

B. Financial and Reputational Harm to Bombardier

139. If the Contract is terminated before a determination of the outstanding disputes, Bombardier will lose more than 70 million dollars beyond what has already been paid by Metrolinx.

140. Termination of the Contract will also have a negative impact on Bombardier's supply chain. If the Contract is terminated, Bombardier will have to cancel its contracts with suppliers and in essence, shut down its supply chain for this Contract. Suppliers who are currently available and able to provide supplies for this Contract, might not be available or able to do so at a later date. This can arise for many reasons including that the technology

may change and the supplier will no longer have access to the technology it has currently agreed to provide, or the design of the LRVs might have to change due to other changes in the market (including changes to available technology). If Bombardier is ordered by the Engineer to stop working pending a determination by the Dispute Review Board, and the Contract is later found to have been improperly terminated, will encounter enormous difficulties trying to resume its work under the Contract. It might have to negotiate a substantially different contract, with different terms and different risks than it originally bargained for.

141. Bombardier will also incur contractual liabilities with its suppliers if required to terminate those contracts, due to early termination. More importantly, the mass termination of supply contracts will also affect Bombardier's commercial reputation with its suppliers. In this industry, reputation and relationships play a key role in a company's ability to negotiate favourable contract terms. This is because: (a) there is a value in knowing that the party you are contracting with is reliable; and (b) suppliers will negotiate more favourable prices with a client based on the overall book of business the supplier expects to get from that client. Premature cancellation of a contract of this magnitude – especially if cancelled based on an allegation of material default – will seriously impact Bombardier's reputation and goodwill with its suppliers, and will inhibit its ability to obtain discount prices for large projects in the future.
142. Similarly, the termination of the Contract in advance of a resolution of the outstanding disputes will likely impact Bombardier's reputation as the employer of choice for specialized jobs like project management or engineering. This in turn will make Bombardier less competitive in attracting and maintaining key talent.
143. Bombardier has never previously received a notice of default anywhere in North America. This is important because a notice of default or termination of the Contract for material default, will also likely affect Bombardier's ability to bid on future projects. This is because RFPs usually require proponents to disclose whether they have ever been terminated for material default. This disclosure will affect a proponent's ability to qualify as a bidder and will negatively affect how a proponent is scored on an RFP. If the Contract is terminated before a determination regarding the validity of the Notice of Default, it will affect

Bombardier's and its Americas affiliates' ability to qualify as a bidder on other projects, and to ultimately win those bids. Bombardier and its Americas affiliates currently are a proponent on at least 10 projects and anticipate to be submitting bids on at least 30 projects over the course of the next year, and an additional 16 over the course of the next two years.

144. Furthermore, even under the terms of this Contract, in accordance with GC 12.10, if Bombardier is terminated for material default under this Contract, Metrolinx can, at its sole discretion, restrict Bombardier from submitting tenders or proposals on subsequent Metrolinx Requests for Tenders/Proposals for a period of time deemed appropriate by Metrolinx. Given that Metrolinx controls the majority of infrastructure projects in Ontario (which is by far Bombardier's largest Canadian market), the impact in Ontario alone could be significant.

C. Provision of Bombardier's Property and Intellectual Property to Competitors

145. Bombardier has also invested a significant amount of expertise into the design and manufacture of the Metrolinx LRVs. These designs and tools have been developed using Bombardier's considerable expertise and experience, know-how and proprietary technology and processes. This proprietary technology is unique in the transit industry, and is vital to Bombardier's ability to distinguish itself in the marketplace from its competitors.
146. The Contract defines Intellectual Property as any drawings, documents, technical data, methods, processes, tooling and inventions whether conceived or developed and produced during the course of the contract specifically for the purposes of completing the contract (GC 7.3). This Intellectual Property is the property of Bombardier, who has the sole exclusive rights for subsequent use of its Intellectual Property, subject to specific licenses granted to Metrolinx (GC 7.3). Specifically, GC 7.3 states the following:

Any drawings, documents, technical data, methods, processes, tooling, and inventions; whether conceived, or developed and produced during the course of the Contract specifically for the purposes of completing the Contract (collectively the "Intellectual Property"), shall be the property of the Contractor, who shall have sole exclusive rights for subsequent use of same, except for an irrevocable, perpetual, royalty-free, nonexclusive license granted by the Contractor to Metrolinx, to use itself or through its agents, for the specific purposes listed below, all patented, copyrighted and unpatented technology, know-how, trade-secrets and other proprietary rights which are included in the Work and which are necessary for the

specific purposes to maintain and repair, modify and overhaul the Vehicles, and for the preparation of specifications for future production orders of Vehicles employing some or all of the licensed technology...
[emphasis added]

147. The Contract prescribes how and when Metrolinx is entitled to access and use Bombardier's designs, drawings, and other intellectual property. Those restrictions vary depending on whether the Contract is completed (GC 7.3) or terminated for material default (GC 12.6).
148. Metrolinx has already solicited information from Bombardier's direct competitors with respect to replacing Bombardier as the Contractor under the Contract. Bombardier has serious concerns that if Metrolinx is permitted to terminate the Contract for material default before the dispute resolution process has been completed, and provides Bombardier's competitors with its designs, drawings, technical data, intellectual and other property for the purpose of completing the work under the Contract, Bombardier will suffer a loss of competitive advantage and irreparable harm. Intellectual property and other proprietary information cannot be recovered once they have been disclosed. Moreover, this information would be of great value to Bombardier's competitors not just with respect to the Eglinton Crosstown and Finch projects, but with respect to other projects on which they might be bidding against Bombardier in the future.

H. LETTER OF CREDIT

149. In order to guarantee its performance under the Contract, Bombardier has provided Metrolinx with two irrevocable standby letters of credit for a total amount of \$153 million. These letters can be drawn upon if Metrolinx provides the bank with a signed statement that its demand for payment is due to a failure by Bombardier to perform its obligations under the Contract dated June 14, 2010 between Bombardier Transportation Canada Inc. and Metrolinx. Attached hereto as Exhibit "53" is a copy of the letter of credit dated December 13, 2013, a copy of the amendment to the letter of credit, dated January 24, 2014, as well as a copy of the letter of credit dated October 2, 2015.
150. If Metrolinx draws on these letters of credit, Bombardier will immediately have to repay the full amount to the bank within 2-5 business days creating a heavy burden on its cash flow position.

151. In addition, this will harm Bombardier's ability to obtain bonds in the future even if Metrolinx's claim is later withdrawn.

I. THE ENGINEER HAS NOT ACTED IMPARTIALLY AS REQUIRED BY THE CONTRACT

152. Bombardier is concerned that Mr. Rankin has been improperly influenced by Metrolinx in relation to the July 12th Notice of Default and that in dealing with the alleged defaults, he has violated his contractual obligation to remain impartial.

153. The Engineer's correspondence in July and September 2016 (referred to above) strongly indicates that the Engineer, in making determinations regarding alleged defaults, is not acting impartially as he is expressly required to do under the Contract. As a result, Bombardier is concerned that Mr. Rankin is unable to objectively and impartially review Bombardier's Written Statements of Claim, and to independently and fairly assess the validity of the Notice of Default. Given these circumstances, Bombardier seeks to have Mr. Rankin enjoined from rendering any determinations under the dispute resolution process that has been commenced and to have him replaced by a mutually-agreed upon engineer.

154. I make this Affidavit in support of this Application and for no improper purpose.

SWORN BEFORE ME
In the City of St Bruno
In the Province of Quebec
This 7th day of February, 2017

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Suzanne Bérubé
A Commissioner of Oaths, etc.

