

Court File No. CV-20-82758

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

HARDROCK CONCRETE INC.  
FRANK SCHWENZER

Plaintiffs

and

CITY OF OTTAWA, PUBLIC AUTHORITY HAVING JURISDICTION, RIDEAU TRANSIT GROUP GENERAL PARTNERSHIP, a general partnership consisting of EllisDon RTG Partner Inc., SNC RTG Partner Inc. and ACS RTG Partner Inc., AND OLRT CONSTRUCTORS, an unincorporated joint venture consisting of EllisDon Corporation, SNC-Lavalin Constructors (Pacific) Inc. and Dragados Inc.

Defendants

A N D B E T W E E N:

OLRT CONSTRUCTORS, an unincorporated joint venture consisting of EllisDon Corporation, SNC-Lavalin Constructors (Pacific) Inc. and Dragados Inc.

Plaintiff by Counterclaim

and

HARDROCK CONCRETE INC.

Defendant by Counterclaim

**STATEMENT OF DEFENCE OF THE DEFENDANTS, RIDEAU TRANSIT GROUP GENERAL PARTNERSHIP, A GENERAL PARTNERSHIP CONSISTING OF ELLISDON RTG PARTNER INC., SNC RTG PARTNER INC. AND ACS RTG PARTNER INC., AND STATEMENT OF DEFENCE AND COUNTERCLAIM OF THE DEFENDANT/PLAINTIFF BY COUNTERCLAIM, OLRT CONSTRUCTORS, AN UNINCORPORATED JOINT VENTURE CONSISTING OF ELLISDON CORPORATION, SNC-LAVALIN CONSTRUCTORS (PACIFIC) INC. AND DRAGADOS CANADA, INC. (INCORRECTLY NAMED DRAGADOS INC.)**

1. Unless otherwise admitted herein, the Defendants, Rideau Transit Group General Partnership, a General Partnership consisting of EllisDon RTG Partner Inc., SNC RTG Partner Inc., and ACS RTG Partner Inc. (collectively, "RTG"), and OLRT Constructors, an unincorporated Joint Venture consisting of EllisDon Corporation, SNC-Lavalin Constructors

(Pacific) Inc. and Dragados Canada, Inc. (incorrectly named Dragados Inc.”) (collectively, “OLRTC”), deny each and every allegation contained in the Statement of Claim.

2. OLRTC and RTG deny that the Plaintiffs are owed the total sum of \$12,819,375.00, inclusive of HST, as claimed and hold the Plaintiffs to the strict proof thereof.

### **THE CONTRACT AND THE SUBCONTRACT**

3. OLRTC entered into a contract with RTG in or around February 23, 2013, to act as the general contractor for an infrastructure project in the City of Ottawa known as the Ottawa Light Rail Transit Project (the “Project”), (the “Contract”).

4. In turn, OLRTC entered into Subcontract Agreement No. Segment 2-107, with the Plaintiff, Hardrock Concrete Inc. (“Hardrock”), on or about March 4, 2016, for the supply of shotcrete final lining at the Project as detailed in the subcontract (the “Subcontract Work”), for a subcontract price of \$4,748,364.00, exclusive of HST (the “Subcontract”).

5. OLRTC and RTG state that the Plaintiff, Frank Schwenzer (“Mr. Schwenzer”), has no claim against any of the Defendants in this action since Hardrock is the corporate entity that entered into the Subcontract with OLRTC. In fact, Mr. Schwenzer has no contract with any of the Defendants.

6. Further to the preceding paragraph, OLRTC and RTG state that any claim that Hardrock may have, which is specifically denied, would solely be against OLRTC based on the Subcontract. Hardrock has no contract with any of the other Defendants.

7. OLRTC and RTG ask that this action be dismissed as against RTG and all other Defendants with costs on a substantial indemnity basis.

8. RTG pleads and relies on the Statement of Defence of OLRTC.
9. It was an express or implied term of the Subcontract that:
  - (a) Hardrock would complete all work under the Subcontract diligently, expeditiously and in a thorough and workman-like manner;
  - (b) Hardrock would complete the work under the Subcontract in accordance with the Subcontract Documents listed at Schedule D of the Subcontract;
  - (c) Hardrock's price for the work under the Subcontract included, but was not limited to the supply of all labour, equipment and materials related to Shotcrete Final Lining adherence to be performed by an ACI Certified shotcrete nozzleman;
  - (d) Hardrock would make applications for payment with all required documents, on or before the 25<sup>th</sup> day of each month for approval;
  - (e) Hardrock would complete and rectify all deficiencies within 25 days of the issuance of a deficiency list by OLRTC;
  - (f) if RTG withheld any amounts from OLRTC pursuant to the Contract related to the Subcontract Work, then OLRTC would withhold from the next payment or payments due to Hardrock;
  - (g) OLRTC would withhold 10% of the Subcontract price as Holdback, and would pay out the Holdback in accordance with the terms set out in the Subcontract;
  - (h) Hardrock would perform the Subcontract Work in compliance with all applicable laws, permits, licenses and approvals and in accordance with good industry practice and in a timely and professional manner;

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- (i) if Hardrock failed to comply with the Project Schedule and OLRTC became liable for damages, Hardrock would indemnify OLRTC for any and all such damages;
- (j) if Hardrock failed to properly complete the Subcontract Work in accordance with the Subcontract, then OLRTC would have the option to notify Hardrock in writing of the default and instruct Hardrock to correct the default within three days of receiving such notice; and
- (k) if Hardrock did not correct the default within the three day time period provided for in the Notice of Default, then OLRTC would have the option to terminate the Subcontract.

10. With respect to the allegations at paragraphs 10, 13 and 15 of the Statement of Claim, any and all delays to the Project Schedule, as defined in the Subcontract, were the direct result of Hardrock's inability to have the resources, manpower and financial means to complete the Subcontract Work within the time frame required under the Subcontract.

11. Further to the preceding paragraph, at no material time did Hardrock give notice of any alleged delays by OLRTC or advise that it would be claiming damages for delay against OLRTC.

12. With respect to the allegations at paragraphs 17, 18 and 19 of the Statement of Claim, OLRTC denies that Hardrock is owed \$10,819,375.00 for alleged work performed and states as follows:

- (a) Hardrock has not provided any particulars as to how the alleged amounts are calculated;

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- (b) Hardrock has never delivered invoices in accordance with the terms of the Subcontract to OLRTC for the alleged amounts claimed as owing;
- (c) Hardrock has not performed the value of the work for which it is now claiming it is entitled to be paid;
- (d) OLRTC has paid Hardrock in excess of the actual value of the work performed and as such, Hardrock has no basis for any claim against OLRTC for *quantum meruit*; and
- (e) OLRTC states that the doctrine of unjust enrichment is not applicable as the parties are bound by the Subcontract.

13. With respect to paragraph 22 of the Statement of Claim, OLRTC denies that it has committed a breach of trust as alleged, and states that it has paid Hardrock all amounts due and owing in accordance with the Subcontract.

14. OLRTC states that to date, it has paid Hardrock the total sum of \$5,993,873.12, inclusive of HST, under the Subcontract, which includes direct payments to LIUNA Locals 527 and 183 (the “Unions”), and payments directed to the Canada Revenue Agency (“CRA”) in response to the CRA Requirements to Pay (“RTP”). OLRTC maintains that there are no amounts owing to Hardrock and in fact Hardrock is indebted to OLRTC for the damages suffered as a result of the Breaches of the Subcontract, as defined herein.

15. OLRTC states that the Unions delivered two Claims for Lien in relation to the Project:

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- (a) on or about December 13, 2017, the Unions delivered a Claim for Lien in the amount of \$277,796.94, representing the amounts owing by Hardrock for unpaid wages and remittances (“Lien 1”); and
- (b) on or about March 27, 2018, the Union delivered an additional Claim for Lien in the amount of \$140,577.28, representing the additional amounts owing by Hardrock for unpaid wages and remittances (“Lien 2”).

16. OLRTC states that as a result of Lien 1 and Lien 2, it was directed by Hardrock to make direct payments to the Unions in full satisfaction of Lien 1 and Lien 2.

17. OLRTC states that on or about February 9, 2018, OLRTC received the RTP from the CRA as a result of Hardrock’s failure to make necessary tax remittances to the CRA, in the amounts of \$429,274.05 and \$231,094.24 respectively.

18. Further to the preceding paragraph, OLRTC states that as a result of the RTP, it has made a payment to CRA in the amount of \$496,122.95, inclusive of HST.

19. The direct payments made by OLRTC to the Unions and to CRA reduced any amounts owing to Hardrock under the Subcontract.

20. OLRTC maintains there are no amounts owing to Hardrock but rather, Hardrock is indebted to OLRTC as a result of the Breaches of the Subcontract, the costs associated with completing the Subcontract Work and rectifying deficiencies in the Subcontract Work and warranty obligations, as well as having to make direct payments to the Unions and the CRA.

21. With respect to paragraphs 23, 25, 26, 27 and 28, OLRTC specifically denies the allegations made therein and that the Plaintiffs are entitled to damages for the amounts being claimed, or for any amount whatsoever, and puts the Plaintiffs to the strict proof thereof.

22. Further to the preceding paragraph, OLRTC states even if Hardrock has suffered any of the alleged damages as claimed, which is specifically denied, Hardrock is specifically prohibited from claiming those amounts pursuant to Article 20.03 of the Subcontract, which provides that under no circumstances, shall Hardrock be entitled to punitive, exemplary or aggravated damages, loss of business opportunity or loss of business, or any claims for consequential loss.

### **BREACHES OF THE SUBCONTRACT**

23. OLRTC specifically denies the allegations made in paragraph 29, 30, 31, 32 and 35 of the Statement of Claim and states that it has not breached the Subcontract and that it did not cause the alleged delays and damages described by Hardrock in the Statement of Claim.

24. OLRTC states that Hardrock failed to perform the Subcontract Work in accordance with the terms of the Subcontract, resulting in the supply of substandard materials and services, delays and failure to complete the work under the Subcontract.

25. Further to the preceding paragraph, OLRTC states that Hardrock breached the terms of the Subcontract and particulars of the breaches of the Subcontract by Hardrock include, but are not limited to, the following:

- (a) failing to perform the work in accordance with the Subcontract Documents, as listed in Schedule D of the Subcontract, including but not limited to failing to comply with the specifications and to perform the Subcontract Work in accordance with the specifications;

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- (b) failing to have competent and skilled labourers to perform the Subcontract Work;
- (c) failing to have sufficient labourers on site to perform the Subcontract Work;
- (d) the quality of work supplied by Hardrock was of poor quality resulting in OLRTC having to retain other subcontractors to repair the work;
- (e) failing to supply all services and materials required to complete the scope of work under the Subcontract;
- (f) failing to rectify deficiencies in the Subcontract Work;
- (g) failing to perform the Subcontract Work in accordance with industry standards;
- (h) delivering invoices for amounts greater than what was agreed upon in the Subcontract and for work not performed;
- (i) requesting payment as extras for work that was part of the Subcontract Work and included in the price carried by Hardrock for the Subcontract;
- (j) failing to complete the Subcontract Work in accordance with the time frame provided for in the Subcontract, thereby causing delays to the Project Schedule;
- (k) on or about February 9, 2018, Hardrock abandoned its obligations under the Subcontract;
- (l) failing to remit taxes to the CRA resulting in the CRA serving OLRTC with the RTP; and
- (m) failing to pay wages and remittances to its workers and the Unions resulting in the Unions delivering Lien 1 and Lien 2 to OLRTC,



(the “Breaches of the Subcontract”).

26. In light of the Breaches of the Subcontract, on February 20, 2018, OLRTC served Hardrock with a Notice of Default in accordance with Article 15.04 of the Subcontract (the “Notice of Default”). Pursuant to the Notice of Default and in accordance with the Subcontract, Hardrock was given three days to correct the default from the date of receipt of the Notice of Default and advised that if the default was not corrected, OLRTC would have the option to terminate the Subcontract.

27. Further to the preceding paragraph, OLRTC states that Hardrock failed to respond to or address the Notice of Default and as such on February 26, 2018, OLRTC, in accordance with its rights under Article 15.07 of the Subcontract, terminated the Subcontract (the “Termination”).

28. OLRTC states that the Termination was the direct result of the Breaches of the Subcontract, Hardrock’s inability to complete the Subcontract Work in accordance with the Project Schedule and in accordance with the requirements of the Subcontract Documents.

29. OLRTC states that, after the Termination, it had to mitigate its damages by hiring other subcontractors to complete the Subcontract Work and rectify deficiencies.

30. Further to the preceding paragraph, OLRTC denies that any amount was due and payable under the Subcontract to Hardrock as of the date of the Termination. Rather, OLRTC states that it has suffered damages in the approximate amount of \$10,067,480.85 plus additional amounts for legal fees, overhead and other related damages as provided for at Article 15.08 of the Subcontract, broken down as follows:

<b>Description of Damages</b>	<b>Amount</b>
Excess of rebound (material cost)	\$187,288.77
Damaged equipment	\$108,856.02
Repairs to Deficiencies	\$6,500,000.00
Delay	\$3,271,336.06
<b>SUBTOTAL:</b>	<b>\$10,067,480.85</b>
<b>Plus: Legal Fees, Overhead and other related damages per Article 15.08 of the Subcontract</b>	<b>To be determined</b>

### ***Excess of Rebound (Material Cost)***

31. OLRTC states that it incurred costs as a result of excess rebound caused by Hardrock when it sprayed the shotcrete. This resulted in OLRTC paying in excess of the material cost that was required to perform this work as compared to if Hardrock had performed this work in accordance with industry standard expected percentage of rebound for this type of work. The excess material cost being claimed by OLRTC against Hardrock is \$187,288.77.

### ***Damaged Equipment***

32. OLRTC states that in accordance with the Subcontract it provided Hardrock with equipment for it to use to perform the Subcontract Work at the Project. Hardrock failed to properly care for, clean and protect the equipment thereby resulting in damages to the equipment. As a result, OLRTC was required to repair the damaged equipment and has suffered damages in the amount of \$108,856.02.

### ***Repairs to Deficiencies***

33. OLRTC states that there were major deficiencies in the work performed by Hardrock (the “Deficiencies”). OLRTC states that it provided notice to Hardrock on a number of occasions to repair the Deficiencies in its work but that Hardrock refused, neglected or failed to do so. As a result, OLRTC has suffered damages in estimated amount of \$6,500,000.00 to address the Deficiencies. Particulars of the Deficiencies and damages will be provided in advance of trial.

***Delay Damages***

34. OLRTC states that Hardrock delayed the Project Schedule as follows:

- (a) delay of approximately 60.27 days due to the extra shotcrete sprayed as a consequence of the excess of rebound;
- (b) delay of approximately 30 days due to not having two spraying crews as required to meet the Project Schedule; and
- (c) delay of approximately 20.25 days due to Hardrock cancelling the installation of the shotcrete works, or not working at all.

(the “Delays”).

35. OLRTC advised Hardrock on various occasions that the Delays were directly impacting the Project Schedule. OLRTC has incurred costs of approximately \$3,271,336.06 for overtime paid to the architectural work crews in an effort to overcome the Delays.

36. Further, OLRTC claims against Hardrock for its legal fees, overhead and other related damages as provided for in Article 15.08 of the Subcontract. OLRTC states that the full extent of costs and damages suffered by OLRTC are still not known and full particulars will be provided in advance of trial.

**SET OFF**

37. OLRTC states that there are no amounts owing to Hardrock. If there are any amounts found to be owing to Hardrock, which is specifically denied, OLRTC claims a right in contract, at law and in equity to set off all present and future costs and damages incurred or suffered as a result

of Hardrock's Breaches of the Subcontract as against any amounts which may be found to be owed to Hardrock.

38. OLRTC pleads and relies on Article 19.00 of the Subcontract, the doctrine of equitable set off, section 111 of the *Courts of Justice Act*, RSO 1990, c. C.43, and section 17(3) of the *Construction Act*.

39. With respect to the allegations that OLRTC owed a duty of care to Hardrock and was negligent, OLRTC states that,

- (a) no duty of care was owed to the Plaintiff by OLRTC;
- (b) in the alternative, if a duty of care was owed, OLRTC met all standards of care of a contractor with respect to the Subcontract;
- (c) all Subcontract documents provided to Hardrock were accurate;
- (d) OLRTC did not cause any delays to the Project Schedule and allowed Hardrock to perform the Subcontract Work without any interferences;
- (e) at all material times, OLRTC acted diligently, responsibly and in accordance with the standards of a reasonable contractor co-ordinating the work with respect to a project of this nature; and
- (f) OLRTC denies that it breached any terms of the Subcontract.

40. OLRTC states that Hardrock has not provided in its Statement of Claim any particulars of the breakdown of the amounts being claimed with respect to the Project.

41. OLRTC states that the amounts claimed by Hardrock as owing under the Subcontract are excessive and exaggerated and do not correspond with the actual value of the work performed under the Subcontract, and do not take into account the payments made by OLRTC to Hardrock, the Union and CRA.

42. Further to the preceding paragraph, OLRTC denies that the Plaintiff has suffered damages as alleged and holds the Plaintiff to the strict proof thereof.

43. In the alternative to the preceding paragraph, if the Plaintiff suffered any damages, which is not admitted but expressly denied,

- (a) then such damages were not caused by OLRTC, or any of the Defendants;
- (b) they were caused wholly, or in part, by others;
- (c) they were caused wholly, or in part, by Hardrock's own actions;
- (d) Hardrock did not mitigate its damages; and
- (e) the damages claimed by Hardrock are exaggerated and/or excessive and/or remote and puts Hardrock to the strict proof thereof.

44. OLRTC pleads that further to Article 24.02 of the Subcontract and section 23(1) of the *Arbitration Act* S.O. 1991, c. 17, the Action should be stayed and referred to arbitration.

45. OLRTC and RTG ask that the within action be dismissed, together with costs on a substantial indemnity basis.

### **COUNTERCLAIM**

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46. The Defendant/Plaintiff by Counterclaim, OLRTC, claims against the Plaintiff/Defendant by Counterclaim, Hardrock, the following:

- (a) damages estimated in the amount of \$10,067,480.85, exclusive of HST;
- (b) an amount to be determined at trial for costs, overhead and damages in accordance with Article 15.08 of the Subcontract;
- (c) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended;
- (d) post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended;
- (e) the costs of this proceeding, plus all applicable taxes; and
- (f) such further and other relief that this Honourable Court deems just.

47. OLRTC repeats and relies on the allegations contained in the Statement of Defence in support of the Counterclaim.

48. OLRTC states that as a result of the Breaches of the Subcontract it has incurred and will continue to incur additional costs and damages. Particulars of all additional damages incurred will be provided in advance of trial.

49. OLRTC proposes that the main action and the Counterclaim be tried together and referred to arbitration pursuant to Article 24.02 of the Subcontract and section 23(1) of the *Arbitration Act*, S.O. 1991, c. 17.

Date: March 31, 2020

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**CITY OF OTTAWA AND**  
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MARKHAM CONCRETE, S.M.

-and-

CITY OF OTTAWA, FEDERAL HOME AFFAIRS  
JURISDICTION, et al.

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