

**A Review of the Impact of Canadian Law, Policy and P3 Practice on the Case for
Procuring Capital-Intensive Infrastructure Services via P3s**

by

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Dedication

To Matilda, mum and Aimée...my present, past and future.

Abstract

This dissertation investigates the advantages of procuring capital-intensive infrastructure services via Public-Private Partnerships (P3s or PPPs) – *cost and time savings* and; *innovation and high levels of efficiency* – accounting for these advantages by reference to the underlying legal provisions and principles that facilitate them; and in this process highlights two significant directions in which Canadian P3 law, policy and practice has evolved – the *enactment of P3 legislation and/or the formulation of non-statutory P3-related policy*; as well as the *establishment of legal institutions that promote and/or facilitate P3 procurements*. The dissertation also addresses key arguments raised against P3s, by reference to aspects of Canadian law, policy and P3 practice. The research methodology comprises a detailed review of legal and non-legal sources. The implication of the research findings is that, given the foregoing developments in Canadian P3 law, policy and practice, the key arguments canvassed against P3s are overstated and lacking in merit.

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CHAPTER I

INTRODUCTION

1.0 SCOPE AND OBJECTIVES

Public-Private Partnerships (PPPs or P3s) have completely revolutionized the way capital-intensive infrastructure services are procured by governments the world over. This global trend has been informed by a number of significant advantages that result from opting for this procurement approach rather than for the conventional public procurement approach. However, the evolution of the practice of procuring capital-intensive infrastructure services via P3s has not been without some degree of resistance and opposition. The central proposition of this dissertation is that, taking Canada as a reference point, P3-related law, policy and practice, not only facilitate and accentuate the advantages of PPPs, but also effectively allay the concerns of a legal nature which give rise to such resistance and opposition, and show the said concerns to be overstated and lacking in merit.

In developing this thesis, Chapter Two presents a detailed discussion of the meaning and nature of P3s, in the light of the relevant literature. Chapter Three highlights key aspects of Canadian P3 law and policy, and provides the material that will later be used in Chapter Four to argue the case for the use of PPPs in the procurement of capital-intensive infrastructure services, and respond to the key arguments proffered against their use. Finally, Chapter Five will present the conclusions drawn in the course of the research.

1.1 SUMMARY OF LITERATURE REVIEW

Much of the published research and literature on the subject of P3s directs itself to the meaning, distinctive features and classification of P3s. A significant portion of the literature also presents comparative and statistical studies of the performance of P3 projects relative to projects procured by alternative procurement approaches, especially conventional public procurement. There have also been several efforts to build a case for the use of P3s by sole reference to the results of such comparative and statistical studies and the actual documented performance of the projects examined. All such research has been extensively reviewed in the course of this dissertation, particularly in Chapters Two and Four. There has however been a dearth of literature explaining the aforesaid results and the findings they support in legal terms, and accounting for such results and findings by analytical synthesis of the underlying legal provisions and principles that make them possible, thereby bringing the concept of P3s out of the almost exclusive preserve of economists, financial analysts, public policy experts and even construction engineers, and into the domain of legal scholars.

The research reported in this dissertation is however unique in this regard. It takes the results of notable published studies that have been presented in the literature and explains them in terms of the underlying legal provisions and principles that account for the findings and eventual conclusions such results support. The present research essentially builds a case for the use of P3s and addresses key arguments formulated against their use, only doing so in a manner that involves rigorous legal analysis and sets

a research agenda for legal theorists – by direct reference to legal principles and provisions that have crystallized into tangible economic and financial benefits. This research also fills an important void by demonstrating, in relation to P3s, one way in which interactions in society between law, policy, economics and finance have evolved.

1.2 METHODOLOGY

The methodology for this research and upon which the eventual conclusions were based comprised a detailed review of available primary and secondary sources of P3-related law, and copious references to non-legal sources including P3 literature, publicly available documentation on the performance of P3 and conventionally procured infrastructure projects; and notable comparative and statistical studies of alternative procurement approaches.

CHAPTER II

THE MEANING AND NATURE OF PUBLIC-PRIVATE PARTNERSHIPS

2.0 INTRODUCTION

This chapter examines the various definitions, classification schemes, and resulting types of P3s that have been put forward in the literature. The chapter also takes a brief look at the legal nature as well as the distinctive features of P3s. Finally, based on all of the foregoing, P3s are distinguished from other procurement approaches that involve to some degree the participation of public and/or private sector entities.

2.1 DEFINITIONS

The almost commonplace use of the word *partnership*, imports a measure of obscurity to the concept of P3s. In recent times, owing to the desire of governments and government agencies to be perceived more as “consultative” rather than “directive”, in public-sector discourse, “the use of terms such as [*partnering* and *partnerships*]...has become virtually mandatory...virtually every government initiative is now described as a [*partnership*], a practice that trivialises the term.”¹ Similarly, “since any relationship involving some combination of the private, voluntary and public sectors is prone to be labelled a ‘partnership’”,² it is imperative to define what a PPP is in the context of this research project.

¹ John R Allan, *Public-Private Partnerships: A Review of Literature and Practice* (Regina, Sask: Saskatchewan Institute of Public Policy, 2001) at 6-7.

² Darrin Grimsey & Mervyn K Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (Cheltenham, UK: Edward Elgar, 2004) at 2 [Grimsey & Lewis, *Worldwide Revolution*].

The growing literature on the subject presents a multiplicity of definitions of P3s. For example, Grimsey and Lewis define PPPs as “arrangements whereby private parties participate in, or provide support for, the provision of infrastructure”.³ In their view, a PPP is a “risk-sharing relationship based on a shared aspiration between the public sector and one or more partners from the private and/or voluntary sectors to deliver a publicly agreed outcome and/or public service”,⁴ and a P3 project “results in a contract for a private entity to deliver public infrastructure-based services.”⁵ In the same vein, Eggers and Startup define a PPP as “a contractual agreement formed between a government agency and a private sector entity that allows for greater private sector participation in the delivery of public infrastructure projects.”⁶ Similarly, the Canadian Council for Public-Private Partnerships (CCPPP)⁷ adopts the following definition: “[a] cooperative venture between the public and private sectors”, an essential ingredient of which is the “allocation

³ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2. The same authors elsewhere define “infrastructure investment” to include:

Energy (power generation and supply); Transport (toll roads, light rail systems, bridges and tunnels); Water (sewerage, waste water treatment and water supply); Telecommunications (telephones); Social infrastructure (hospitals, prisons, courts, museums, schools and Government accommodation)...[which in common with] other types of fixed investment (such as property development, [and] office construction...[share the following] characteristics: *Duration* (infrastructure is long-lived, and has a long gestation process); *Illiquid* (the lumpiness and indivisibility of infrastructure projects makes for a limited secondary market); *Capital intensive* (projects are large scale and highly geared); *Valuation* (projects are difficult to value because of taxation and pricing rules and embedded options and guarantees).

See Darrin Grimsey & Mervyn K Lewis, “Evaluating the Risks of Public Private Partnerships for Infrastructure Projects” in Darrin Grimsey & Mervyn K Lewis, eds, *The Economics of Public Private Partnerships* (Cheltenham, UK: Edward Elgar, 2005) 567 at 568 [Grimsey & Lewis, “Evaluating the Risks”] [footnotes omitted] [emphasis added]. The foregoing is the sense in which either of the terms, *infrastructure* or *infrastructure investment* is used throughout this thesis.

⁴ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at xiv.

⁵ *Ibid* at 2.

⁶ William D Eggers & Tom Startup, *Closing the Infrastructure Gap: The Role of Public-Private Partnerships* (New York: Deloitte Research, 2006) at 5.

⁷ Established in 1993, the CCPPP promotes the concept of P3s, “conducts research, publishes findings, facilitates forums for discussion and sponsors an Annual Conference on topics related to PPP's, both domestic and international”. See Canadian Council for Public-Private Partnerships, “About the Council”, online: Canadian Council for Public-Private Partnerships <<http://www.pppcouncil.ca/about-ccppp.html>>.

of resources, risks and rewards.”⁸ Emphasizing this cooperative and risk-sharing element of P3s, a report by the British Columbia Task Force on Private Public Partnerships makes the following observation:

[T]he term “public-private partnerships” has taken on a very broad meaning. The key element, however, is the existence of a ‘partnership’ style approach to the provision of infrastructure as opposed to an [arm’s] length ‘supplier’ relationship...Either each party takes responsibility for an element of the total enterprise and work together, or both parties take joint responsibility for each element...A P3 involves a sharing of risk, responsibility and reward, and is undertaken in those circumstances when there is value for money benefit to the taxpayers.⁹

The foregoing definitions are by no means exhaustive. It has been correctly observed both that “a multiplicity of definitions of P3s is available to the researcher”;¹⁰

⁸ Canadian Council for Public-Private Partnerships, “Definitions”, online: Canadian Council for Public-Private Partnerships <<http://www.pppcouncil.ca/resources/about-ppp/definitions.html>> [Canadian Council for Public-Private Partnerships, “Definitions”].

⁹ British Columbia, Task Force on Public-Private Partnerships, *Building Partnerships: Report of the Task Force on Public-Private Partnerships* (British Columbia: no publisher, 1996) at 8.

¹⁰ Allan, *supra* note 1 at 7. See Jeffrey Delmon & Victoria Rigby Delmon, eds, *International Project Finance and PPPs: A Legal Guide to Key Growth Markets* (The Netherlands: Kluwer Law International, 2010) ch 1 at 3-4

([b]roadly, PPP refers to arrangements between the public and private sectors whereby part of the services or works that fall under the responsibilities of the public sector are provided by the private sector, with clear agreement on shared objectives for delivery of public infrastructure and/or public services...PPP may be defined narrowly to cover complex infrastructure projects which involve substantial private sector investment, and to make a distinction from delegation of public services in the form of ‘concessions’ and ‘affermages’; whereas in other countries the definition has been limited to typical build, operate and transfer projects);

Geza R Banfai et al, “Construction Risk in Public-Private Partnerships in Canada” [2007] *Journal of Canadian College of Construction Lawyers* 63 at 67 (“contractual relationship between the public sector proponent and a private sector team for the delivery by the private sector of construction, goods and services, characterized by an assumption of risks by the private sector, including financial risks, which had traditionally been assumed by the public sector”); Grimsey & Lewis, “Evaluating the Risks”, *supra* note 3 at 568 (“agreements where public sector bodies enter into long-term contractual agreements with private sector entities for the construction or management of public sector infrastructure facilities by the private sector entity, or the provision of services (using infrastructure facilities) by the private sector entity to the community on behalf of a public sector entity”); Apurva Sanghi, *Public Private Partnership Units: Lessons for their Design and Use in Infrastructure* (Washington DC: World Bank & Public-Private Infrastructure Advisory Facility, 2007) at 13 (“[agreements] between a government and a private firm under which the private firm delivers an asset, a service, or both, in return for payments”); Erik-Hans Klijn & Geert R Teisman, “Governing Public-Private Partnerships: Analyzing and Managing the Processes and Institutional

Characteristics of Public-Private Partnerships” in Stephen P Osborne, ed, *Public-Private Partnerships: Theory and Practice in International Perspective* (London: Routledge, 2000) 84 at 85 (“a commitment between public and private actors of some durability, in which partners develop products together and share risks, costs and revenues which are associated with these products”); Stephen H Linder & Pauline Vaillancourt Rosenau, “Mapping the Terrain of the Public-Private Policy Partnership” in Pauline Vaillancourt Rosenau, ed, *Public Private Policy Partnerships* (Cambridge, MA: MIT Press, 2000) 1 at 9

(a means to finance and deliver publicly demanded services, qualitatively different from private and public, and superior to either one alone. For example, they may be structured to get around the deficiencies of extreme privatization that include important conflicts of interest...as well, public sector difficulties with lackadaisical performance and inefficiency due to monopoly status);

Jim Armstrong & Donald G Lenihan, “From Controlling to Collaborating: When Governments Want to Be Partners” (1999) 3 *Institute of Public Administration of Canada New Directions* 1 at 13

([t]raditionally, partnerships between government and the private or third sectors have been much like contracting-out arrangements. Government itemizes the tasks it wants performed and pays the *partner* for performing them. Negotiating these arrangements revolves around defining the terms of the contract. Managing them is about ensuring that the partner complies with the terms [emphasis in original]);

Consulting and Audit Canada, *Impediments to Partnering and the Role of Treasury Board* (Prepared for the Alternative Service Delivery Group, Treasury Board Secretariat) (13 May 1998) at 8 (“an arrangement between two or more entities that enables them to work co-operatively towards shared or compatible objectives and in which there is some degree of shared authority and responsibility, joint investment of resources, shared risk taking and mutual benefit”); Kenneth Kernaghan, “Partnership and Public Administration: Conceptual and Practical Considerations” (1993) 36:1 *Canadian Public Administration* 57 at 61 (“a relationship involving *the sharing of power, work, support and/or information* with others for the achievement of joint goals and/or mutual benefits” [emphasis in original]); Alti Rodal & Nick Mulder, “Partnerships, Devolution and Power-Sharing: Issues and Implications for Management” (1993) 24:3 *Optimum* 27 at 28 (“an arrangement between two or more parties who have agreed to work cooperatively toward shared and/or compatible objectives and in which there is shared authority and responsibility...; joint investment of resources...; shared liability or risk-taking; and ideally, mutual benefits”). For definitions of Private Finance Initiatives (PFIs), the UK equivalent programme introduced in November 1992, see the following: Alan Smithers, “Education” in Anthony Seldon & Dennis Kavanagh, eds, *The Blair Effect, 2001-5* (Cambridge: Cambridge University Press, 2005) 256 at 273 (“PFIs, or...PPPs, involve the public sector purchasing a service, often the provision of property, from the private sector over a long period and paying an annual charge”); G Owen & A Merna, “The Private Finance Initiative” in Grimsey & Lewis, *supra* note 3, 317 at 318

(an alternative method of procuring services for the public sector...The emphasis of the PFI is not acquisition of an asset but procurement of a service...The private sector will provide the funding for the capital projects and operate a facility for the public benefit. They will receive revenue from operating this service and hence make a profit);

Paul A Grout, “The Economics of the Private Finance Initiative” in Grimsey & Lewis, *supra* note 3, 332 at 333

([t]he central feature of PFI projects is that the private sector funds and builds the asset and it is the flow of services from the asset that is sold to the public sector; that is, the obligation on the part of the government is to purchase, directly or indirectly, a flow of services over time rather than the capital asset that provides the services. In effect it is a form of leasing rather than purchase of assets).

and that the several definitions “found in the literature tend to be of limited assistance towards any analytical understanding of these arrangements”.¹¹ Nevertheless, a number of elements are common to most definitions of P3s and serve to identify the essential nature of the concept. We shall examine these elements later in the chapter when we discuss the characteristics of P3s. For now though, we shall take a close look at the legal nature of PPPs, as well as the classes and types of P3s identified in the literature.

2.2 LEGAL NATURE OF P3S

A P3 entails a *vinculum juris* or network of rights, duties, liabilities, and so on, reminiscent of the Hohfeldian analysis of the right-duty complex.¹² Essentially, a P3 contract is an agreement by which a public sector owner transfers certain *rights* to a private sector partner in consideration for that private party undertaking to perform a number of *duties* or *obligations*.¹³ The principal rights transferred by the public sector owner to the private sector partner are the right of *possession* of land and property owned by the public sector entity, and “access to *revenues* during the operational stage of the

¹¹ Banfai et al, *supra* note 10 at 66.

¹² In the early 1900s, Stanford University and later Yale Law School Professor Wesley Newcomb Hohfeld identified and distinguished eight fundamental conceptions that characterize every legal relation, grouping them into a scheme of four pairs of “Jural Correlatives” (right/duty, privilege/no-right, power/liability, and immunity/disability), and four pairs of “Jural Opposites” (right/no-right, privilege/duty, power/disability, and immunity/liability). See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, ed by Walter Wheeler Cook with a new Foreword by Arthur L Corbin (New Haven: Yale University Press, 1946) at 35-66; David Campbell and Philip Thomas, eds with an Introduction by Nigel E Simmonds, *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* (Aldershot, UK, Burlington, US; Dartmouth, Ashgate, 2001) at 11-50; Michael DA Freeman, *Lloyd’s Introduction to Jurisprudence*, 8th ed (London, UK: Sweet & Maxwell, 2008) at 569-574; Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford: Oxford University Press, 2009) at 279-283.

¹³ AM Abdel-Aziz & AD Russell, “A Structure for Government Requirements in Public-Private Partnerships” (2001) 28:6 Canadian Journal of Civil Engineering 891 at 892.

contract”.¹⁴ The duties or obligations undertaken by the private sector partner in consideration for the rights it acquires include *planning, design, construction, improvement, operation, maintenance, environment-related, labour-related, regional, business-related and financing obligations*.¹⁵ The liabilities that frequently arise under the P3 contract are “actual and potential liabilities and risks shared or assumed by parties under the agreement” and include “general liability (*tort, third party and facility damage*), liability for *taxation*, and *risk liabilities*”.¹⁶

2.3 CLASSIFICATION AND TYPES OF PPPS

P3s “span a [wide] spectrum of models.”¹⁷ Much of the literature order the various PPP models into classes, the taxonomy varying according to level of power-sharing, objectives, central activity undertaken, identity of the partners, mechanisms involved, means of cost-recovery, expected outcomes, and degree of risk-transfer to the private partner.

Allan comprehensively synthesizes the various classification schemes adopted in the literature.¹⁸ The first scheme he identifies is that adopted by Kernaghan¹⁹ and Boase²⁰

¹⁴ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 87 [emphasis added]. See also Abdel-Aziz & Russell, *supra* note 13 at 892.

¹⁵ *Ibid.*

¹⁶ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 87-88 [emphasis added].

¹⁷ Canadian Council for Public-Private Partnerships, “Definitions”, *supra* note 8.

¹⁸ Allan, *supra* note 1 at 9-12.

¹⁹ Kernaghan, *supra* note 10 at 61-65.

²⁰ Joan Price Boase, “Beyond Government? The Appeal of Public-Private Partnerships” (2000) 43:1 *Canadian Public Administration* 75 at 78-79.

– classification “on the basis of the amount of power sharing”²¹ or “relative influence on decision-making”.²² In this scheme, P3s are classified as one of the following:

(1) “[C]ollaborative partnerships, in which there is real power sharing, with each partner exercising power in the decision-making process”.²³ These types of partnerships have been said to “both reduce the autonomy of the public-sector partner and genuinely empower the private-sector partner”.²⁴ Collaborative partnerships are usually employed “when there is a mutual goal that neither has the resources to accomplish alone. Ideally they should include a sharing of objectives, liabilities, authority, responsibility (for the delivery of programs and services), accountability, and a joint investment of resources and the promise of mutual benefits”.²⁵

(2) “[O]perational partnerships”, characterized by “sharing work, rather than decision-making power”.²⁶ These partnerships are also known as “community development partnerships”.²⁷ The “[e]mphasis in these types of relationships is on joint contributions for the achievement of mutual goals, and they are typically partnerships with the non-profit sector, such as school boards or community health councils”.²⁸

(3) “[C]ontributory partnerships in which one of the partners provides support, usually in the form of funding, for an activity in which it will have little or no operational

²¹ Allan, *supra* note 1 at 9-10.

²² Boase, *supra* note 20 at 78.

²³ Allan, *supra* note 1 at 10 [emphasis in original].

²⁴ Boase, *supra* note 20 at 79.

²⁵ *Ibid.*

²⁶ Allan, *supra* note 1 at 10 [emphasis in original].

²⁷ Boase, *supra* note 20 at 79 [emphasis in original].

²⁸ *Ibid.*

involvement”.²⁹ One example of this type of partnership is “the Disabled Persons Program sponsored by Secretary of State and Multiculturalism in 1985”.³⁰

(4) “[C]onsultative partnerships in which a public organisation receives advice in respect of a particular policy field or issue”³¹ from “groups or organizations in society”.³² Much unlike collaborative partnerships, even though “influence on policy may result, little real empowerment of societal participants exists in these arrangements”.³³ A good example of a consultative partnership is “the roundtables on the environment organized in the 1980s to help the [Canadian] federal government prepare its Green Plan in its efforts to implement the concept of sustainable development”.³⁴

Allan next identifies the set of classification systems favoured by Rodal and Mulder.³⁵

(1) First, the situation of “partnerships on a continuum ranging from *consultation*...through consultative, advisory partnerships to *operational and collaborative partnerships*, to [*devolution*]...the transfer of functions or responsibilities for the delivery of programs and services from government to another entity”,³⁶

(2) Second, classification by reference to purpose or objective, and thereby identifying “partnerships intended to achieve *service responsiveness* by facilitating client input; those for which the primary objective is *empowerment of clients and stakeholders*; those

²⁹ Allan, *supra* note 1 at 10 [emphasis in original].

³⁰ Boase, *supra* note 20 at 78-79.

³¹ Allan, *supra* note 1 at 10 [emphasis in original].

³² Boase, *supra* note 20 at 78.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Rodal & Mulder, *supra* note 10 at 28-37.

³⁶ Allan, *supra* note 1 at 10 [emphasis added].

directed at *improved effectiveness*; and, finally, partnerships designed to achieve *risk-sharing, cost savings, or the leveraging of scarce public funds*”,³⁷ and

(3) Lastly, classification “by reference to the central activity undertaken – for example, *policy development, program design, program delivery*, etc.; the identity of the partners; and on the basis of the mechanisms involved, e.g., *voluntary* arrangements or *legally binding ones, project-specific or long-term*, etc.”.³⁸

The third classification system identified by Allan is that employed by the Private Finance Initiative (PFI) of the UK:

(1) “[F]inancially free-standing projects, which are those undertaken by the private sector with *cost-recovery by means of user-charges* imposed on the final user”,³⁹

(2) “PFI projects that involve the sale of services to the public sector, with costs being recovered from the relevant public body or bodies by these sales or lease proceeds”,⁴⁰

and

(3) “[J]oint ventures, where the cost of the project is met partly from public funds and partly from private sources, with overall project control resting with the private sector”.⁴¹

A fourth typology examined by Allan is that “predicated upon specific outcomes” and proposed by the Canadian Treasury Board Secretariat.⁴² This system identifies nine distinct classes of outcomes or objectives, including partnerships “to create, replace,

³⁷ *Ibid* [emphasis added].

³⁸ *Ibid* [emphasis added].

³⁹ *Ibid* [emphasis added]. See also Owen & Merna, *supra* note 10 at 319-320; John Hall, “Private Opportunity, Public Benefit?” in Grimsey & Lewis, *supra* note 3, 360 at 362.

⁴⁰ Allan, *supra* note 1 at 10 [emphasis added].

⁴¹ *Ibid* [emphasis added].

⁴² *Ibid*.

*refurbish or maintain public infrastructure... [as well as those] to reduce the overall cost of government procurements/expenditures”.*⁴³

A final system of classification dealt with by Allan is one “that has been used quite extensively for infrastructure projects, [and] is that used by the... [CCPPP, the British Columbia] Taskforce on Public-Private Partnerships”,⁴⁴ and by Grimsey and Lewis.⁴⁵ As with Rodal and Mulder’s first typology,⁴⁶ this system equally situates “partnership variants on a continuum”, according to “the degree of risk transferred from the public sector to the private sector”.⁴⁷ Thus, at the lowest point of the continuum lies the mere *contribution contract* “which involves a private-sector contribution to a public facility, and minimal risk-transfer to the private sector”;⁴⁸ and at the highest point lies the “*buy-build-operate partnership (BBO)* in which the private partner purchases an existing public facility, upgrades it, and owns and operates it in perpetuity, thereby assuming all the risks formerly borne by the public sector.”⁴⁹ The other P3 variants located along the risk continuum are arrived at by “feasible combinations of the functional activities in which the partnership is engaged. Thus public-private partnerships may undertake some combination of the following functions: Design (D); Build (B); Finance (F); Operate (O); Maintain (M); Own (O); Transfer (T); Lease (L); Develop (D); and (Buy) (B)”.⁵⁰

⁴³ Canada Treasury Board Secretariat, “Citizen-Centered Service and the Partnership Option” *Working Document*, (15 April 1998) at 10-11 [emphasis added].

⁴⁴ Allan, *supra* note 1 at 11.

⁴⁵ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 10-12.

⁴⁶ Rodal and Mulder, *supra* note 10 at 28.

⁴⁷ Allan, *supra* note 1 at 11.

⁴⁸ *Ibid* [emphasis added].

⁴⁹ *Ibid* [emphasis added].

⁵⁰ *Ibid*.

Grimsey and Lewis discuss in some detail the following P3 models which are largely based on the foregoing risk-transfer continuum, namely: Build-Operate-Transfer (BOT), Build-Own-Operate (BOO), Leasing, Joint Ventures (JVs), Operations or Management Contracts and Cooperative Arrangements.⁵¹ In addition, they refer to an “[alphabet soup] of acronyms” comprising: BLT (Build-Lease-Transfer), BLTM (Build-Lease-Transfer-Maintain), BTO (Build-Transfer-Operate), BOOR (Build-Own-Operate-Remove), BOOT (Build-Own-Operate-Transfer), LROT (Lease-Renovate-Operate-Transfer), DBFO (Design-Build-Finance-Operate), DCMF (Design, Construct, Manage, Finance) and DBFOM (Design-Build-Finance-Operate-Manage).⁵² The CCPPP, for its part, includes in the spectrum of Canadian P3 models: Design-Build (DB), Operation and Maintenance Contracts (O & M), DBFO, BOO, BOOT, Buy-Build-Operate (BBO), Operation License and Finance Only P3s.⁵³

It remains to be said that the present treatment of P3 types is by no means exhaustive. “P3 arrangements can be” – and indeed are – “many and varied, limited perhaps only by the imaginations of the project participants and their advisors”.⁵⁴

2.4 ESSENTIAL FEATURES OF P3S

The distinction between P3s on the one hand and conventional public procurement approaches – or even privatization – on the other hand, is not always an

⁵¹Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 10-12.

⁵²*Ibid.*

⁵³ Canadian Council for Public-Private Partnerships, “Models of Public-Private Partnerships”, online: Canadian Council for Public-Private Partnerships <<http://www.pppcouncil.ca/resources/about-ppp/models.html>> [Canadian Council for Public-Private Partnerships, “P3 Models”]. A brief description of the commonest of these P3 models will be found in the Appendix at 111-119, below.

⁵⁴ Banfai et al, *supra* note 10 at 72.

obvious one. Furthermore, the concept of PPPs is “evolving in different ways in each country in which the arrangements are being implemented”.⁵⁵ Considerable diversities exist even within Canada – across the jurisdictions that are actively engaged in P3 procurement. For example-

[S]ome jurisdictions do not require more than one project phase for a P3. This is the case for Ontario’s build-finance (BF) hospital projects, which are procured as alternative financing and procurement (AFP) projects—a term for P3s used by the Ontario government. As another example, Quebec’s definition of P3s does not necessarily entail private financing, although private financing has been used in all the projects that have reached financial close and have been managed or co-managed by PPP Québec to date.⁵⁶

This diversity notwithstanding, all P3s have a number of features in common.⁵⁷

Thus, to introduce clarity, to achieve clear-cut distinctions and to provide a rational basis for including within or excluding from the ambit of PPPs, certain procurement approaches, it is necessary to examine the major characteristics and distinguishing features of P3s. This section of the dissertation highlights these distinguishing features. Generally, the essential features of P3s relate to the following:

1. *The Parties*: A P3 inevitably involves at least two parties, one of which must be a public sector entity and the other a private sector entity. Each party must have full legal

⁵⁵ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 12.

⁵⁶ Mario Iacobacci, *Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments* (Ottawa, ON: Conference Board of Canada, 2010) at 2-4 [footnotes omitted].

⁵⁷ See generally B Guy Peters, “With a Little Help from Our Friends: Public-Private Partnerships as Institutions and Instruments” in Jon Pierre, ed, *Partnerships in Urban Governance: European and American Experience* (Houndmills: MacMillan Press, 1998) 11 at 12-13. See also Bing Li & Akintola Akintoye, “An Overview of Public-Private Partnership” in Akintola Akintoye, Matthias Beck & Cliff Hardcastle, eds, *Public-Private Partnerships: Managing Risks and Opportunities* (Oxford: Blackwell Science, 2003) 3 at 5-6.

capacity, the legal power to “[negotiate] and [contract] on its own behalf”,⁵⁸ “without resort to some other authority”.⁵⁹

2. *The Relationship*: A P3 is characterized by an “enduring” relationship.⁶⁰ It must involve a transaction that implies “real continuity of behaviour”,⁶¹ the terms of which “are negotiated at the outset”⁶² and embodied in a detailed long-term P3 contract.

3. *Resourcing*: Consistent with recognized principles of the law of contract which require parties to a validly constituted contract to give valuable consideration, each party to a P3 must of necessity contribute something valuable to the arrangement. “PPPs seek to draw on the best available skills, knowledge and resources, whether they are in the public or the private sector, and deliver value for money in the provision of public infrastructure services. For this to happen, each partner must transfer resources...to the arrangement”.⁶³ The usual forms of consideration – ‘resources’ – contributed to a P3 include “money, property, authority, reputation”,⁶⁴ as well as “expertise, [and] manpower”.⁶⁵

⁵⁸ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13. See also Peters, *supra* note 57 at 12.

⁵⁹ Banfai et al, *supra* note 10. See also Peters, *supra* note 57 at 12.

⁶⁰ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13; Peters, *supra* note 57 at 13.

⁶¹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13. Accord Gavin Kelly, *The New Partnership Agenda* (London: Institute for Public Policy Research, 2000) at 10; Peters, *supra* note 57 at 13.

⁶² Banfai et al, *supra* note 10. See also Peters, *supra* note 57 at 13.

⁶³ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13. See also Peters, *supra* note 57 at 13.

⁶⁴ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13.

⁶⁵ Banfai et al, *supra* note 10.

4. *Sharing*: P3s are characterized by actual “sharing of responsibility and risk...in a collaborative framework...mutual interest and unified commitment”.⁶⁶ This feature serves to distinguish P3s from-

[R]elationships between the public and private sectors in which the public body retains control over policy decisions after getting the advice of private sector entities...[and those] primarily contractual in nature...[involving] essentially command relationships. In these cases, the private sector bodies are not partners in any real sense.⁶⁷

5. *Whole-of-life Cycle Costing*: P3 contracts are characterized by “complete integration – under one party – of up-front design and construction costs with ongoing service delivery, operational, maintenance and refurbishment costs”⁶⁸.

Rather than there being separate design, construction, financing, operations and maintenance arrangements as occurs with traditional public procurement, these functions are combined under one contractor. This integration (‘bundling’) within a long-term partnership framework provides financial motivation for the project company to think beyond the design stage and build in energy-reducing and waste-minimizing features that may cost more initially but result later in lower operating and running costs, and so deliver cost effectiveness over time.⁶⁹

6. *Innovation*: Unlike the case with conventional public procurement where “the public sector owner specifies the exact inputs required for the facility”,⁷⁰ P3s by their very nature focus on “output specifications”.⁷¹ This feature of P3s leaves the private sector

⁶⁶ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13. See also Peters, *supra* note 57 at 13.

⁶⁷ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 13. See also Peters, *supra* note 57 at 13.

⁶⁸ Darrin Grimsey & Mervyn K Lewis, “Introduction” in Grimsey & Lewis, *supra* note 3, xiii at xv.

⁶⁹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 1.

⁷⁰ Iacobacci, *supra* note 56 at 3 (table 1).

⁷¹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 14.

partner free “to put forward the best...[strategy] for meeting the output specifications”⁷² and “provides enhanced opportunities and incentives for bidders to fashion innovative solutions to meet those requirements”.⁷³

7. *Risk Allocation*: P3s “typically involve the formal identification, quantification, and allocation among the partners of the risks associated with the partnership project... [allocating] particular risks to the partner best able to manage that risk”.⁷⁴

Grimsey and Lewis embody all of these elements in the following comprehensive description of P3s:

[A] method of producing and delivering public services that *brings together the public and private sectors in a long-term contractual relationship in which each retains its own identity and set of responsibilities*. Public and private sector *resources are combined* on the basis of a clearly defined *division of tasks and risks*. The purpose of this collaboration is to bring added value to infrastructure through *innovation*, enabling the government to deliver either a qualitatively better end product for the same outlay or the same quality at *a cost saving*. PPPs are predicated on the assumption that there exist in the private sector certain core competencies that can be drawn into infrastructure projects and that incentives can be written into the contractual arrangements to encourage the participants to find other parties who can bring extra value by way of complementary skills and *synergies*. To this end, PPPs are designed to maximize the use of private sector skills where these are needed to supplement the existing skills of the public sector, while ensuring clear accountability and *risk transfer* for both project delivery and operation.⁷⁵

⁷² Iacobacci, *supra* note 56 at 3 (table 1).

⁷³ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 14.

⁷⁴ Allan, *supra* note 1 at 13. See also Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 14.

⁷⁵ *Ibid* at 58 [emphasis added].

From the foregoing, in the context of this research project, a P3 is any enduring contractual relationship between a public sector entity and a private sector entity formed for the purpose of providing infrastructure services; involving the mutual contribution of resources and the “sharing of responsibility and risk”;⁷⁶ and characterized by output specification and resultant innovation, bundling of project phases and relevant costs, and the systematic allocation of project risks. An arrangement that does not meet these criteria is not a P3, even if it involves the participation of both public and private sector entities. Armed with this insight, we may proceed to distinguish P3s from other procurement approaches that involve to some degree the participation of both public and private sector entities.

2.5 P3S AND OTHER PROCUREMENT APPROACHES

One of the oft expressed “misconceptions” about P3s is that they essentially consist of “the privatization of public assets” and the transference to the private sector of the responsibility for providing infrastructure services.⁷⁷ This misconception, largely due to the presence of the term *private* in the designation P3, is at the heart of much of the scepticism towards P3s.⁷⁸ In reality though, P3s differ from privatization in a number of important respects, and this section of the dissertation addresses those differences. In procurement discourse, the terms privatization and *contracting out* are often employed interchangeably;⁷⁹ so it may be useful to also make clear the distinction between the latter and P3s. Lastly, the more obvious distinction between PPPs and conventional public

⁷⁶ *Ibid* at 13.

⁷⁷ See Iacobacci, *supra* note 56 at 4.

⁷⁸ Institute for Public Policy Research, *Building Better Partnerships: The Final Report of the Commission on Public Private Partnerships* (London, UK: Institute for Public Policy Research, 2001) at 23-25.

⁷⁹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 56.

procurement of infrastructure will be addressed. Addressing this distinction is important, as it will later provide the setting for assessing the benefits of employing P3s in the delivery of infrastructure services.

2.5.1 P3s and Privatization

P3s and Privatization have in common the involvement and participation of private sector entities. Privatization refers to the transfer of “government functions and responsibilities in whole or in part *to the private sector*”,⁸⁰ or of “ownership of physical assets from public to *private* hands... [such as by] sale of a public utility via a share float”.⁸¹ Other common examples of privatization include: “deregulating formerly regulated industries, transferring assets by lease or sale of income-producing government assets, [and] contracting out government services”.⁸² The term also refers to “governmentally sponsored efforts to move assets and economic decision-making away from the political arena and *into the hands of individuals or private corporations*”.⁸³ We have already seen thus far that P3s equally involve the participation of private sector entities. In fact, in most P3 models, the private firm “assumes a greater role in the planning, finance, design, construction, operation, and maintenance of [a] public infrastructure project”⁸⁴ than it would under the conventional public procurement approach.

⁸⁰Celeste Pagano, “Proceed with Caution: Avoiding Hazards in Toll Road Privatizations” (2009) 83:1 St John’s L Rev 351 at 361 [emphasis added].

⁸¹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 56 [emphasis added].

⁸² Pagano, *supra* note 80.

⁸³Carol M Rose, “Privatization – The Road to Democracy?” (2006) 50:3 Saint Louis ULJ at 691 [emphasis added].

⁸⁴ Jacques Cook, “Modern Enhancements for PPP Concession Agreements” (2008) 28:4 Construction Law at 24.

While P3s and privatization have in common the involvement and participation of private entities, they differ in two important respects. And these differences relate to the role of the government or the public sector after the consummation of the P3 or privatization, and to the means by which service delivery and related activities are regulated at that stage.

In a P3, the government or public sector partner “retains ultimate responsibility for the delivery of the services”,⁸⁵ to which the partnership relate. Although in most cases, the services are actually provided by the private sector partner, they are provided *to the government or public sector partner*, as a ‘middle-man’, which in turn “acquires and pays for [such] services...on behalf of the community”.⁸⁶ This is well illustrated in the case of a South Australian BOO-type P3 in which the private sector partner provides filtered water to the public sector utility for onward delivery to the taxpayers.⁸⁷ The taxpayers in question deal directly with the public sector partner and clearly recognize the latter and not the private firm that processes the raw water as the service provider.

In a privatization on the other hand, “the private firm that takes over the business” of the government entity “assumes the responsibility for service delivery”.⁸⁸ The government does not serve as middle-man as is the case with a P3. Its subsequent “involvement [with the service] is minimal”,⁸⁹ at best limited to regulation, where, given

⁸⁵ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 55.

⁸⁶ *Ibid.*

⁸⁷ See the Appendix at 111-112, below.

⁸⁸ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 55.

⁸⁹ Allan, *supra* note 1 at 9.

the nature of the industry in question, the newly privatized entity enjoys a natural monopoly.⁹⁰

The second difference between a P3 and privatization is that in the former, regulation of the private sector partner is internal – primarily by contract; whereas with privatization, the privatized firm is externally regulated. A P3 “is a formal business arrangement between the public and private sectors”.⁹¹ As such, the nature of the “business activity, the outcomes required, the prices paid for the services (and thus the scope for profits) along with the general rights and obligations of the various parties are specified in considerable detail” in a P3 contract.⁹² Consequently, regulation of the private entity is principally effected not by statute, a statutory regulatory agency or by unseen market forces of competition, demand or supply, but rather by the express terms of a contract containing provisions prescribing minimum performance and quality standards, “with abatement attached to any failure to maintain service standards on a continuing basis”.⁹³ By contrast, in the case of privatization, the private entity is regulated by competition both from within the capital market when raising finance for its bid for the concern slated for privatization, and after the privatization, from other business concerns that deliver identical services. In addition, typically in industries where the newly privatized entity enjoys a natural monopoly, the state supplements these unseen

⁹⁰ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 55.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

external forces with “some type of regulatory regime” affecting service standards, price or profits.⁹⁴

On account of these two important differences – the limited role of the government or the public sector after the consummation of a privatization as against the unaffected responsibility of the government or public sector entity party to a P3; and the internal regulation by contract present in a P3 versus the external regulation of a privatized entity by unseen economic forces and statutory devices – P3s are not an instance of privatization.

2.5.2 P3s and Contracting Out

P3s and Contracting out also have in common the participation of the private sector to some degree. Nevertheless, the two concepts differ considerably. “[C]ontracting out involves opening up to competition a set of economic activities that were previously excluded from it. [Private sector] [o]rganizations are invited to submit bids for contracts to provide particular services to the [public sector] client”.⁹⁵ As is the case with privatization, in contracting out, a private sector entity “commercially [provides] a service previously provided by the public sector itself”.⁹⁶ Unlike privatization however, in contracting out, “[t]here is little if any transfer of responsibility and control to the private sector, and no substantive involvement [of the latter] in decision making”.⁹⁷

⁹⁴ *Ibid.*

⁹⁵ *Ibid* at 57.

⁹⁶ Allan, *supra* note 1 at 8.

⁹⁷ *Ibid.*

The key distinction between contracting out and P3 procurement lies in the relationship that exists between the public and private sector actors in each approach. “Contracting out is characterized by a *principal-agent* relationship” between the public and private sector actors.⁹⁸ The public sector principal “defines the problem, specifies the solution and selects a private company that can produce results in a cost-efficient way”.⁹⁹ In other words, contracting out “implies that the public principal [alone] is able to specify the service that should be delivered by private enterprises and also to define the desired output”.¹⁰⁰ The private sector agent is reduced to a mere implementer.¹⁰¹ A P3, on the other hand, involves “*joint* decision making and production” between the public and private sector partners.¹⁰² Both the public and private sector entities are partners in a true sense since they “develop products *together* and *share* risks, costs and revenues which are associated with these products”.¹⁰³

2.5.3 P3s and Conventional Public Procurement

Conventional public procurement of infrastructure is a procurement approach whereby public assets “are purchased entirely with taxpayers’ money or debt, and operated predominantly by the public sector”.¹⁰⁴ The relevant “public agency secures the finance directly and pays the contractor as works progress”.¹⁰⁵ In a typical conventional public procurement, “the desired product – a pencil or a computer, by way of example –

⁹⁸ Erik-Hans Klijn & Geert R. Teisman, *supra* note 10 [emphasis added].

⁹⁹ *Ibid* at 86 (table 5.1).

¹⁰⁰ *Ibid* at 85.

¹⁰¹ *Ibid* at 88.

¹⁰² *Ibid* at 85 [emphasis added].

¹⁰³ *Ibid* [emphasis added].

¹⁰⁴ Government of British Columbia, *Capital Asset Management Framework: Overview*, online: Government of British Columbia <http://www.fin.gov.bc.ca/tbs/camf_overview.pdf> at 1 [Government of British Columbia, *Framework Overview*].

¹⁰⁵ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at xi.

is specified, perhaps in exhaustive detail, and from the tenders received, the public agency chooses the lowest-cost bid that meets tender specifications”.¹⁰⁶

Conventional public procurement is everything that a P3 is not. An important distinction between procurement of infrastructure via P3s and that via conventional public procurement relates to the mode of procurement of successive project phases. As highlighted earlier, a P3 project is characterized by integration under one party of a number of project phases.¹⁰⁷ It is thus not uncommon under a P3 arrangement for one contractor to undertake responsibility for the design, construction, operation and maintenance of a project facility. In a conventional project, on the other hand, each successive phase is “procured separately through a succession of separate contracts”¹⁰⁸. The “detailed design work”¹⁰⁹ is completely executed under the oversight of the public sector entity “before tendering of the construction phase”¹¹⁰. And thereafter, the actual construction is “often accomplished through multiple contracts awarded to multiple contractors for separate pieces of work...Once the new facility has been built, facilities maintenance services and other aspects of operations are delivered through contracts that are separate from the design and build contracts”.¹¹¹

Another important distinction between the two procurement approaches is that P3s characteristically involve “Output-based contracts” while conventional public

¹⁰⁶ Finn Poschmann, *Private Means to Public Ends: The Future of Public-Private Partnerships* (Toronto: CD Howe Institute, 2003) at 5.

¹⁰⁷ See text accompanying notes 68-69.

¹⁰⁸ Iacobacci, *supra* note 56 at 3.

¹⁰⁹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 84.

¹¹⁰ Iacobacci, *supra* note 56 at 3.

¹¹¹ *Ibid.*

procurements involve “Input-based contracts”.¹¹² In a P3, the public sector partner merely “specifies the functional requirements for the facilities to be procured” without spelling out the particular methods and materials to be implemented.¹¹³ This leaves the private sector partner with ample room to innovate in meeting those specifications. In a conventional public procurement on the other hand, the public sector partner usually “specifies the exact inputs required for the facility”.¹¹⁴

Closely related to the ‘output-based versus input-based’ distinction between P3 contracts and conventional public procurement contracts is the difference in payment milestones involved in both forms of procurement. In a P3, the private sector partner is paid only upon delivery of the assets or services specified by the public sector partner. For this reason, output-based contracts characteristic of P3s are also called performance-based contracts. In a conventional public procurement project, on the other hand, contractors are paid monthly, according to the percentage of work completed.¹¹⁵

One of the most important differences between P3 procurements and conventional public procurements relates to the level of private financing involved in either approach. In a P3, “a substantial share of the project is financed through project-specific equity and debt”.¹¹⁶ In a conventional public procurement on the other hand, since the contractors are paid monthly, “private financing is limited to a modest amount of working capital”.¹¹⁷

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

A final distinction between P3s and conventional public procurements relates to project stewardship. In a P3, “overall control of project execution” rests with the private sector partner.¹¹⁸ “The completion of milestones is determined by an independent certifier and overseen by the private sector partner”.¹¹⁹ This feature does not in any way detract from public sector ownership of project assets. It only means that the private sector partner, along with its contractors, is allowed “the freedom to manage each phase of the project in a way that best meets the contractual obligations”.¹²⁰ The situation is radically different with conventional public procurements. Here, “[o]verall control of project execution rests with the public sector owner (or a contract management firm acting on [its] behalf...). The public sector owner (or its contract management firm) would typically have engineers on site to supervise and direct the project”.¹²¹

Of the five differences between P3s and conventional public procurements just discussed, the most important relate to payment upon delivery, private financing and private sector project stewardship. This is because, in principle, the other distinguishing features – integration of project phases and output-based contracts could be built into conventional public procurements.¹²² Be that as it may, in practice, this is seldom ever the case.

¹¹⁸ *Ibid* at 4.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

2.6 CONCLUSION

This chapter commenced by highlighting some of the definitions of PPPs propounded in P3 literature and thereafter proceeded to define the concept as any enduring contractual relationship between a public sector entity and a private sector entity formed for the purpose of providing infrastructure services; involving the mutual contribution of resources and the apportioning of responsibility and risk; and characterized by output specification, resultant innovation, bundling of project phases and relevant costs, and the systematic allocation of project risks.

Implicit in this working definition of P3s are the key features of any P3 which were clearly identified elsewhere in the chapter. They are: the presence and interaction of independent public-sector and private-sector parties; an enduring contractual relationship; mutual contribution of resources; sharing of risk and responsibility; complete integration of project phases and attendant costs; output specification and resultant innovation, and risk allocation.

The foregoing features provided a basis for distinguishing P3s from conventional public procurements which lack the elements of integration and output specifications, as well as ‘payment-upon-delivery/performance-based contracts’, private financing and private sector project stewardship. In tandem with the unaffected responsibility of the government and the internal regulation that characterizes a P3, these self-same features also served to distinguish P3s from privatization wherein, post-privatization, the newly

privatized entity takes on the government's obligation to provide infrastructure services and is regulated externally by unseen economic forces and/or statutory devices. Lastly, the distinction between P3s and contracting out was premised on the peculiar nature of the relationship between the parties in either procurement approach. While contracting out involves a principal-agent relationship, a P3 is an arm's-length transaction involving partners.

The chapter further reviewed the classification of P3s. The literature has ordered the various PPP models into classes, according to the following parameters: level of power-sharing, objectives, central activity undertaken, identity of the partners, mechanisms involved, means of cost-recovery, expected outcomes, and degree of risk-transfer to the private partner. Some of the types of PPPs that have been identified on this basis are: collaborative partnerships; operational partnerships; contributory partnerships; consultative partnerships; operational and collaborative partnerships; devolution-driven partnerships; P3s existing to effect service responsiveness; P3s existing for client/stakeholder-empowerment; P3s aimed at improving effectiveness; P3s aimed at achieving risk-sharing, cost savings or leveraging of scarce public funds; P3s that undertake policy development; P3s that undertake program design; P3s that undertake program delivery; project-specific P3s; long-term P3s; free-standing projects where cost-recovery is by means of end user-charges; projects involving sale of services to the public sector; joint ventures; PPPs geared towards creation, replacement, refurbishment or maintenance of public infrastructure; PPPs geared towards reduction of government expenditure; BOTs; BOOs; BOOTs; DBFMs; DBFOs; Build-Lease or Own Operate-type

P3s; BFs; Leasing-type P3s; DBMs; DBOMs; DBFOMs; concessions; O &M/M contracts; SCs; cooperative arrangements; BBOs; operation licenses; finance only-type P3s; and DBs.

As to the legal nature of P3s, the point was made that the legal relations ceated by any P3 give rise to a network of correlative rights, duties, liabilities and so on, that furnish the consideration for the mutual promises and undertakings exchanged between the public and private sector parties while entering into a P3.

CHAPTER III
THE INCIDENCE OF CANADIAN LAW AND POLICY ON THE P3
LANDSCAPE

3.0 INTRODUCTION

This chapter discusses broadly the most significant areas in which the impact of Canadian law and policy has been felt in the practice of procuring capital-intensive infrastructure services via P3s. Research indicates that the thrust of the inroads of Canadian law and policy into P3 practice has generally been seen in two major areas. These areas are, on the one hand, the establishment of PPP units – specialized P3 legal institutions or agencies, and on the other hand, the enactment of P3 legislation and to a lesser degree, formulation of non-statutory policy statements that either promote or facilitate the utilization of P3s in the procurement of infrastructure.

What follows in the remainder of this chapter is a brief discussion of key federal and provincial statutes, policy statements and legal institutions that have emerged in the Canadian P3 landscape. In developing this aspect of the thesis in relation to provincial law and policy, special emphasis is placed on the four leading jurisdictions in the area of P3 procurements, namely; Alberta, British Columbia, Ontario and Québec.¹²³

¹²³ For support for the view that Alberta, British Columbia, Ontario and Québec are the leading jurisdictions in the deployment of P3s in the procurement of infrastructure services, see PPP Canada, Press Release, “PPP Canada Closes P3 Canada Fund – Round 2: Canada’s P3 Market Heats Up; New Markets Emerge” (28 July 2010) online: PPP Canada <http://www.p3canada.ca/_files/file/PR_July28_EN.pdf> [PPP Canada, “PPP Canada Closes Round 2”]; Iacobacci, *supra* note 56 at 13.

3.1 P3 LEGISLATION AND POLICY

The state's role in the promotion of P3 practice has been said to entail “developing an enabling legal framework” and creating enabling public institutions.¹²⁴ As to the former, given the fact that “[p]rivate sector involvement in public infrastructure and services is often either explicitly or implicitly prohibited by the legal framework in a jurisdiction...the first step towards developing an enabling legal framework for P3s is to seek approval for private sector involvement”.¹²⁵ Furthermore, “[l]aws that provide consistency among jurisdictions in a federation assure the private sector that P3 contracts will be honoured and/or provide an effective dispute resolution process. These laws are also important to attract private investors and reduce potential transaction costs”.¹²⁶

There are broadly four categories of P3 legislation in Canada. “Some P3 legislation is limited to *specific projects*, such as the Deh Cho Bridge in the Northwest Territories or Highway 407 in Ontario”.¹²⁷ Ontario's *Highway 407 Act, 1998*,¹²⁸ for example, among other things, provided statutory authority for the transfer of Ontario's Highway 407 lands and appurtenant interests to a private sector party,¹²⁹ who would maintain and keep the highway in repair¹³⁰ and have the power to establish, collect and enforce payment of tolls, administration fees, and interest on unpaid tolls and fees in

¹²⁴ Allison Padova, *Public-Private Partnerships: Why, Where, When, and How* (Library of Parliament Background Paper) (Ottawa, Canada: Library of Parliament, 2010) at 8-12.

¹²⁵ *Ibid* at 8.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* [emphasis added]. See e.g. *Deh Cho Bridge Act*, SNWT 2003, c 10.

¹²⁸ SO 1998, c 28.

¹²⁹ *Ibid*, ss 2, 4-6.

¹³⁰ *Ibid*, s 43.

relation to vehicles driven on the highway.¹³¹ The Act also spells out the only valid grounds for disputing an alleged failure to pay a toll,¹³² as well as an effective two-tier process for resolving toll disputes.¹³³ This dispute resolution process comprises determination by the private sector ‘owner’ of Highway 407 at the first instance,¹³⁴ and a final appeal to a dispute arbitrator appointed by the Lieutenant Governor in Council,¹³⁵ who is empowered to, decide the appeal on the basis of written material, upon a hearing, or by recourse to any available mediation or alternative dispute resolution method he considers appropriate.¹³⁶

Some other P3 legislation “enables private investment in specific sectors, such as transportation and health care in the case of British Columbia”¹³⁷ and transportation in Québec. In this regard, British Columbia’s *Transportation Investment Act*, among other things, specifically provides for the formation of concession-type PPP contracts between the government and private sector parties; under which the private sector partner or “concessionaire undertakes to maintain and operate” a highway(s) or portion(s) of a highway(s), “in relation to which interests, rights or obligations are transferred [to], granted [to] or imposed” upon the concessionaire under a concession agreement.¹³⁸ In addition, under such contracts, the concessionaire undertakes to, at the minimum,

¹³¹ *Ibid*, ss 13-14.

¹³² *Ibid*, s 17(1) (i.e. that “[t]he toll was paid in full”; that “[t]he amount of the toll is incorrect”; that “[t]he vehicle, the numbered plate or the toll device registered to” the disputant “was lost or stolen at the time the toll was incurred”; or that the disputant is not the person contemplated by the Act to be “responsible for the payment of the toll”).

¹³³ *Ibid*, ss 15-19.

¹³⁴ *Ibid*, ss 15-17.

¹³⁵ *Ibid*, ss 17(6), 18-19.

¹³⁶ *Ibid*, s 19(4).

¹³⁷ Padova, *supra* note 124 at 8-9 [emphasis added].

¹³⁸ SBC 2002, c 65, ss 1-2.

“develop, plan, design, construct, expand, extend, upgrade, remove [or] rehabilitate all or part of the [concession] highway”.¹³⁹ Upon the execution of such contracts, the government is discharged from liability for the performance of the specific obligations undertaken by the private sector partner,¹⁴⁰ whereas the latter’s right to payments provided for in any of the concession agreements is guaranteed.¹⁴¹ Similarly, the *Health Sector Partnerships Agreement Act*¹⁴² contemplates P3s between public-sector partners in the health sector on one hand and on the other a private-sector partner, under which the latter undertakes to “provide capital for building, modifying or renovating a health care facility or any part of it, or for equipment to support services delivered in the health care facility or any part of it, and provide one or more non-clinical services at or for that health care facility or any part of it”.¹⁴³ And Québec’s *An Act Respecting Transport Infrastructure Partnerships*,¹⁴⁴ which contains provisions similar to British Columbia’s *Transportation Investment Act*, enables private sector participation via P3s in the delivery of transportation infrastructure services in the province.¹⁴⁵

Then, there is legislation that provides for the *funding of capital-intensive P3 projects*. A notable example of such legislation is the *Canada Strategic Infrastructure Fund Act*¹⁴⁶ together with the *Regulations for the Purposes of the Canada Strategic Infrastructure Fund Act*¹⁴⁷ and the *Order Designating the Minister of Transport as*

¹³⁹ *Ibid*, s 2.

¹⁴⁰ *Ibid*, s 8.

¹⁴¹ *Ibid*, s 8(7).

¹⁴² SBC 2003, c 93.

¹⁴³ *Ibid*, s 2.

¹⁴⁴ RSQ c P-9.001 [*Transport Infrastructure Partnerships Act*].

¹⁴⁵ See *Transport Infrastructure Partnerships Act*, *ibid*, ss 1-3, 5, 7-8, 16.

¹⁴⁶ SC 2002, c 9 [*Infrastructure Fund Act*].

¹⁴⁷ SOR/2003-51 [*Regulations*].

*Minister for Purposes of the Act.*¹⁴⁸ The *Infrastructure Fund Act* principally establishes a fund, “the object of which is to provide for the payment of contributions to eligible recipients for the carrying out of large-scale strategic infrastructure projects that contribute to economic growth or quality of life in Canada and that advance Canada’s objectives with respect to infrastructure”¹⁴⁹ (“the CSI Fund”). For the purposes of the *Infrastructure Fund Act*, “strategic infrastructure” means highway, rail, local transportation, tourism, urban development, sewage treatment, water, advanced telecommunications and high-speed broadband infrastructure situated anywhere in Canada, as well as all other forms of “fixed capital assets that are used or operated for the benefit of the public” in Yukon, the Northwest Territories and Nunavut.¹⁵⁰ Worthy of note is the fact that one of the objectives of the CSI Fund is to “*promote the use of*” P3s,¹⁵¹ and that by the definition of “eligible recipients” contained in the *Infrastructure Fund Act* both public and private sector parties to P3s may receive the contributions contemplated by the Act.¹⁵²

Accordingly, the following P3 projects were executed with the aid of significant contributions of varying amounts out of the CSI Fund, namely:

¹⁴⁸ SI/2006-23, (2006) C Gaz II, 116.

¹⁴⁹ *Infrastructure Fund Act*, *supra* note 146, s 3(1).

¹⁵⁰ *Ibid*, s 2; *Regulations*, *supra* note 147, s 1.

¹⁵¹ *Infrastructure Fund Act*, *supra* note 146, s 3(2) [emphasis added].

¹⁵² See *Infrastructure Fund Act*, *ibid*, s 3(3)(a)-(c) (an “eligible recipient” is any one of the following: (a) a “province or a municipal or regional government established” pursuant to provincial legislation; (b) a “public sector body that is established” pursuant to provincial law, or that is “wholly owned by a province”, or that is wholly owned by a “private sector body that is in partnership with a province” or a municipal or regional government, provided the public sector body possesses “legal capacity”, or comprises organizations which each possess legal personality, and “carries out or, in the opinion of the Minister [of Transport], is capable of carrying out” a “large-scale project for the construction, renewal or material enhancement of strategic infrastructure in Canada”; and (c) a private sector body that possesses “legal capacity”, or comprises organizations which each possess legal personality, and “carries out or, in the opinion of the Minister [of Transport], is capable of carrying out” a “large-scale project for the construction, renewal or material enhancement of strategic infrastructure in Canada”).

(i) Canada Line – A 19.5-kilometre “rapid transit line”¹⁵³ linking “Richmond City Centre, the Vancouver International Airport and downtown Vancouver”.¹⁵⁴ This \$1.1 billion DBFOM project was completed in 2009 with a contribution of \$450 million out of the CSI Fund.¹⁵⁵

(ii) Kicking Horse Canyon Highway Improvement Project (Phase 2) – The “[r]ealignment and construction of 5.8 km of the Trans-Canada Highway to a modern four-lane standard, and replacement of the Park (10 Mile) Bridge in the Kicking Horse Canyon”.¹⁵⁶ By the terms of this DBFOM contract, Trans-Park Highway Group, the private-sector partner, is also to “operate, maintain and rehabilitate the entire 26-km section” of the Trans-Canada Highway that constitutes the Kicking Horse Canyon segment, for twenty-five years.¹⁵⁷ This \$143 million project, completed at the end of 2007, benefitted from a \$62.5 million contribution out of the CSI Fund.¹⁵⁸

(iii) Twinning of Trans-Canada Highway (Route 2) – Completed in November 2007, this \$543.8 million DBFOM project for “the twinning of the Trans-Canada Highway in New Brunswick” entailed the construction of “98 kilometres of highway between Grand Falls and Woodstock, and the selected upgrade of 128 kilometres of existing four-lane

¹⁵³ Infrastructure Canada, “Canada Strategic Infrastructure Fund: Project Descriptions”, online: Infrastructure Canada <<http://www.infc.gc.ca/ip-pi/csis-fcis/description-eng.html>>. See also Canadian Council for Public-Private Partnerships, *Canadian PPP Project Directory: Selected Public-Private Partnerships Across Canada* (Toronto: Canadian Council for Public-Private Partnerships, 2006) at 81 [Canadian Council for Public-Private Partnerships, *P3 Directory*].

¹⁵⁴ *Ibid.*

¹⁵⁵ See Infrastructure Canada, *supra* note 153. See also Canadian Council for Public-Private Partnerships, *P3 Directory*, *supra* note 153 at 81-82.

¹⁵⁶ Infrastructure Canada, *supra* note 153. See also Canadian Council for Public-Private Partnerships, *P3 Directory*, *supra* note 153 at 109-110.

¹⁵⁷ *Ibid* at 109.

¹⁵⁸ See Government of British Columbia, “Kicking Horse Canyon Project: Project Detail – Phase 2 (Completed)”, online: Government of British Columbia <http://www.th.gov.bc.ca/kickinghorse/khc_phase-2.htm>; Infrastructure Canada, *supra* note 153.

highway”.¹⁵⁹ The project was procured with a contribution of \$200 million out of the CSI Fund.¹⁶⁰

(iv) York Region Transit (VIVA Phase 2, Stage 1) – The “construction of dedicated bus rapid transit systems along Yonge Street, from the Finch subway station to the Richmond Hill Centre, and along Highway 7, from the Markham Centre to Yonge Street”.¹⁶¹ This, as with the other two stages of the entire VIVA system, was procured via a DBFOM-type P3.¹⁶² The capital cost of the entire 3-phase project was estimated at \$150 million.¹⁶³ To assist in the execution of VIVA Phase 2, Stage 1 which is slated for completion in 2011, the Government of Canada contributed the sum of \$85 million out of the CSI Fund.¹⁶⁴

(v) Anthony Henday Drive Southeast Leg Ring Road – This DBFO project entailed the construction of “the southeast quadrant of a larger ring road project around the City of Edmonton” and included “4-laning the new road from Highway 216 to the north-south

¹⁵⁹ Communications New Brunswick, News Release, NB 141, “Brun-Way Group to Complete Twinning of Trans-Canada Highway” (7 February 2005) online: Communications New Brunswick <<http://www.gnb.ca/cnb/news/tran/2005e0141tr.htm>>. See also Communications New Brunswick, News Release, NB 1405, “Four-lane Trans-Canada Highway in New Brunswick Open to Traffic” (1 November 2007) online: Communications New Brunswick <<http://www.gnb.ca/cnb/news/tran/2007e1405tr.htm>> [Communications New Brunswick, “Four-lane Highway Open”].

¹⁶⁰ See Infrastructure Canada, *supra* note 153. See also Communications New Brunswick, “Four-lane Highway Open”, *supra* note 159.

¹⁶¹ Infrastructure Canada, *supra* note 153. See also Canadian Council for Public-Private Partnerships, *P3 Directory*, *supra* note 153 at 85-86.

¹⁶² See Canadian Council for Public-Private Partnerships, *P3 Directory*, *ibid* at 85 (the entire VIVA system, when completed in 2023, will-

link Markham, Newmarket, Richmond Hill and Vaughan along four key transportation corridors. Phase 1...[included] design and construction of stations at over 50 stop locations and 6 terminals; roadway improvements...to facilitate the movement of Bus Rapid Transit (BRT) vehicles at congested intersections; a dedicated fleet of 85 BRT vehicles...[and] intelligent transportation systems [ITS].

Phase 1 was completed in 2006. Phase 3, scheduled to be commenced in 2013, could involve “Light Rail Transit (LRT) and subway extensions...and/or BRT... [expansion]”).

¹⁶³ See Canadian Council for Public-Private Partnerships, *P3 Directory*, *ibid*.

¹⁶⁴ See Infrastructure Canada, *supra* note 153.

Highway 2 corridor”.¹⁶⁵ “The total budget for the project was \$493 million...[and] the federal government provided \$75 million in funding through the [CSI] Fund”.¹⁶⁶

Finally, there has been the enactment of legislation that *streamline the process of P3 procurements*, usually by importing transparency, fairness and accountability into the process. One good example of such legislation is Québec’s *An Act Respecting Contracting By Public Bodies*¹⁶⁷ which, among other things, mandates PPP contracts in respect of public infrastructure projects to be governed by the following principles:¹⁶⁸

1. “transparency in contracting processes”;¹⁶⁹
2. “the honest and fair treatment of tenderers”;¹⁷⁰
3. “the opportunity for qualified tenderers to compete in calls for tenders made by public bodies”;¹⁷¹
4. “the use of effective and efficient contracting procedures, including careful, thorough evaluation of procurement requirements that reflects the Government’s sustainable development and environmental policies”;¹⁷²
5. “the implementation of quality assurance systems for the goods, services or construction work required by public bodies”;¹⁷³ and
6. “accountability reporting by the chief executive officers of public bodies to verify the proper use of public funds”.¹⁷⁴

¹⁶⁵ See Infrastructure Canada, *ibid.* See also Canadian Council for Public-Private Partnerships, *P3 Directory*, *supra* note 153 at 91-92.

¹⁶⁶ Iacobacci, *supra* note 56 at 48.

¹⁶⁷ RSQ c C-65.1 [*Public Contracting Act*].

¹⁶⁸ *Ibid.*, s 18.

¹⁶⁹ *Ibid.*, s 2(1).

¹⁷⁰ *Ibid.*, s 2(2).

¹⁷¹ *Ibid.*, s 2(3).

¹⁷² *Ibid.*, s 2(4).

¹⁷³ *Ibid.*, s 2(5).

In more practical terms, the *Public Contracting Act* stipulates that a public sector body contemplating the procurement of public infrastructure via P3 “must make a *public call for tenders*”,¹⁷⁵ by “*publishing* a notice on the electronic tendering system approved by the Government”.¹⁷⁶ In this connection, the *Public Contracting Act* prohibits any amendment of a contract, or splitting or segmentation by a public sector body of its procurement requirements done for the sole aim of “avoiding the obligation to make a public call for tenders”.¹⁷⁷ The stages of a public call for tenders for a P3 contract “must be defined in the tender documents”.¹⁷⁸ And the tender documents must include:

1. “the criteria and conditions against which the public body will evaluate the tenderers and their proposals”;¹⁷⁹
2. provisions that will allow “the public body to ensure compliance at all times with the rules applicable to it, particularly as regards access to documents held by public bodies and the protection of personal information, and to meet accountability reporting requirements”;¹⁸⁰ and
3. “conflict of interest rules”.¹⁸¹

Finally, each public-sector body is obligated to “publish information on the contracts it has entered into which involve an expenditure over \$25,000” in a “manner determined by government regulation”.¹⁸²

¹⁷⁴ *Ibid*, s 2(6).

¹⁷⁵ *Ibid*, s 10(2) [emphasis added].

¹⁷⁶ *Ibid*, s 11 [emphasis added].

¹⁷⁷ *Ibid*, s 12.

¹⁷⁸ *Ibid*, s 19.

¹⁷⁹ *Ibid*, s 20(1).

¹⁸⁰ *Ibid*, s 20(2).

¹⁸¹ *Ibid*, s 20(3).

In concluding this section of the chapter, it should be noted that, in addition to legislative enactments, an allied criterion for successful P3 practice that has been identified in the literature is “a governmental policy to pursue P3 opportunities” incorporating, “among other things, a commitment to consistent processes with clear lines of responsibility within government to identify opportunities, evaluate them and implement them, as well as a procurement process which is transparent and fair, and seen to be so”.¹⁸³ Accordingly, a number of Canadian jurisdictions, notably “the Province of Alberta, the City of Calgary, and the City of Ottawa”, and recently the City of Edmonton, short of enacting P3 legislation, “have published guidelines and frameworks for P3 procurement”.¹⁸⁴ In addition, the government of British Columbia has developed a Capital Asset Management Framework (“the Framework”).¹⁸⁵ The Framework was designed to equip public-sector agencies charged with capital asset procurement and management “to think ‘outside the box’ and apply fresh solutions to infrastructure challenges”, and to help them “find the best solutions and apply the best capital management practices”.¹⁸⁶ Significantly, the Framework, while recognizing conventional

¹⁸² *Ibid.*, s 22.

¹⁸³ Banfai et al, *supra* note 10 at 71.

¹⁸⁴ Padova, *supra* note 124 at 9. See Government of Alberta, Infrastructure and Transportation, *Management Framework: Assessment Process* (Alberta: Government of Alberta, 2006) at 6-23 [Government of Alberta, Infrastructure and Transportation, *Assessment Process*]; Government of Alberta, Infrastructure and Transportation, *Draft Management Framework: Procurement Document Preparation Guide* (Alberta: Government of Alberta, 2006) at 2-30; Government of Alberta, Infrastructure and Transportation, *Management Framework: Procurement Process* (Alberta: Government of Alberta, 2006) at 2-45 [Government of Alberta, Infrastructure and Transportation, *Procurement Process*]; City of Calgary, Finance and Supply, Council Policy No CFO011, *Public-Private Partnerships (P3) Policy* (15 December 2008), paras 1-17; Bruce Thom, “Public-Private Partnerships” (City Manager’s Report to the Corporate Services and Economic Development Committee and Council on 7 June 2002 at Ottawa); City of Edmonton, Finance and Treasury Department, City Policy No C555, *Public Private Partnership (P3)* (26 May 2010), paras 1-2.

¹⁸⁵ See Government of British Columbia, *Framework Overview*, *supra* note 104.

¹⁸⁶ *Ibid.*

public procurement as an option, encourages public-sector agencies to determine, “as a first step in the capital process”, among other things, whether there exists “a way to share the cost and risk of capital acquisition with, for example, *a private sector partner*”.¹⁸⁷ With this formula,¹⁸⁸ the Framework announces the policy of the British Columbia government to consider P3s as a “viable [alternative]” to conventional public procurement in capital asset procurement.¹⁸⁹

3.2 P3 LEGAL INSTITUTIONS OR PPP UNITS

The second role of the state in the promotion of P3 practice – creating enabling public institutions – is fulfilled by the legal establishment of PPP units. Broadly defined, PPP units are organizations designed to “[p]romote or improve PPPs”.¹⁹⁰ In this connection, a PPP unit “may manage the number and quality of PPPs by trying to attract more PPPs, or trying to ensure that the PPPs meet specific quality criteria such as affordability, value for money, and appropriate risk transfer...[and usually has] a lasting mandate to manage multiple PPP transactions, often in multiple sectors”.¹⁹¹ The specific functions of these legal institutions vary across jurisdictions and include providing government departments with information on P3-related activity in foreign jurisdictions, as well as specialized guidance on P3 procurements through the provision of standardized contractual templates, and streamlined “procedures for identifying, evaluating, and

¹⁸⁷ *Ibid* at 2 [emphasis added].

¹⁸⁸ “The Framework is not prescriptive but sets out basic guidelines and principles, as well as minimum standards, which agencies are encouraged to exceed”. See Government of British Columbia, *Framework Overview, ibid.*

¹⁸⁹ *Ibid* at 2.

¹⁹⁰ Sanghi, *supra* note 10 at 20.

¹⁹¹ *Ibid* at 20-21.

procuring PPPs”.¹⁹² There are also PPP units that merely “provide advisory support and funding to line departments and subnational agencies developing PPPs”.¹⁹³

Commenting on the rationale for the emergence of PPP units on the global P3 landscape, Dutz *et al.* observe that P3s pose novel challenges for government agencies,¹⁹⁴ such as:

1. the need for “capacity to design projects with a package of risks and incentives that...[are] attractive to the private sector”;¹⁹⁵
2. the need “to be able to assess the cost to taxpayers”, a task which is more complex in P3s than in conventional public procurements “because of the long-term and often uncertain nature of government commitments” in P3s;¹⁹⁶
3. the need for “contract management skills to oversee these arrangements [i.e. P3 arrangements] over the life of the contract”;¹⁹⁷ and
4. the need for “advocacy and outreach skills to build consensus on the role of PPPs and to develop a broad program across different sectors and levels of government”.¹⁹⁸

“An increasingly common way” to address these needs and challenges has been “to establish PPP units, as *new agencies* or as *special cells within a crosssectoral ministry*”

¹⁹² Mark Dutz et al, “Public-Private Partnership Units” (2006) 311 Viewpoint: Public Policy for the Private Sector 1 at 1-2.

¹⁹³ *Ibid* at 2.

¹⁹⁴ *Ibid* at 1.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

such as finance or planning”.¹⁹⁹ And this has been seen at the federal level as well as in the leading P3 practicing jurisdictions in Canada.

3.2.1 Federal P3 Legal Institutions or PPP Units

3.2.1.1 Public-Private Partnerships Canada Inc. (PPP Canada)

In 2007, as part of efforts to promote infrastructure investment via P3s, the federal government announced the establishment of an office charged with “[i]dentifying opportunities and executing [PPPs] at the federal level” and “[o]verseeing the assessment of [P3] options for projects seeking funding from federal infrastructure initiatives”.²⁰⁰ The budget that year also earmarked funding for the new office to the tune of \$25 million to cover its operations for the next five years.²⁰¹ The office was to be set up and managed through the joint efforts of the Minister of Finance and the Minister of Transport, Infrastructure and Communities.²⁰² The following year, the Canada Development Investment Corporation,²⁰³ a federal Crown corporation overseen by the Minister of Finance, incorporated PPP Canada as a wholly-owned subsidiary.²⁰⁴ Three months after its incorporation, the Governor General in Council declared all of the provisions of Part

¹⁹⁹ *Ibid* [emphasis added].

²⁰⁰ Government of Canada, Department of Finance, *The Budget Plan, 2007* (Canada: Her Majesty the Queen in Right of Canada, 2007) at 169 [Government of Canada, Department of Finance, *Budget 2007*]. This announcement was re-iterated in the 2008 Budget. See Government of Canada, Department of Finance, *The Budget Plan, 2008* (Canada: Her Majesty the Queen in Right of Canada, 2008) at 16, 106, 132.

²⁰¹ Government of Canada, Department of Finance, *Budget 2007*, *supra* note 200 at 169.

²⁰² *Ibid*.

²⁰³ Incorporated in 1982, the Canada Development Investment Corporation is an investment vehicle of the federal government. See Canada Development Investment Corporation, “About CDIC: Overview”, online: Canada Development Investment Corporation <http://www.cdiccei.ca/english/about_overview.asp>.

²⁰⁴ PPP Canada, *Summary of Corporate Plan, 2008-2012*, online: PPP Canada <http://www.p3canada.ca/_files/file/P3C_Corporate_Plan.pdf> at 1.

X of the *Financial Administration Act*,²⁰⁵ excluding section 90, applicable to PPP Canada, effectively rendering PPP Canada a parent Crown corporation.²⁰⁶

In addition to the previously stated objectives,²⁰⁷ PPP Canada was incorporated for the following objects set out in its Articles of Incorporation, namely:

1. To “[a]dvise on the execution of [PPP] projects at the federal level”.²⁰⁸
2. To “[m]anage the Public-Private Partnerships Funds (P3 Canada Fund)²⁰⁹ in accordance with the policies and authorities established by the Treasury Board”.²¹⁰
3. To “[n]egotiate, sign and administer agreements to be funded through the P3 Canada Fund in accordance with the policies and authorities established by the Treasury Board”,²¹¹ and,
4. To provide “expertise and advise on P3 matters”.²¹²

An independent Board of no more than nine Directors (“the Board”) is “responsible for the overall governance of the corporation” and “oversees the operational direction proposed by management”.²¹³ The Minister primarily responsible for the corporation is the Minister of Finance, and through him the Board reports to

²⁰⁵ RSC 1985, c F-11.

²⁰⁶ See *Order Declaring that all Provisions of Part X of the Financial Administration Act, Other Than Section 90, Apply to PPP Canada Inc*, SI/2008-53, (2008) C Gaz II, 1298.

²⁰⁷ See text accompanying note 200.

²⁰⁸ PPP Canada, *Annual Report, 2009-2010: Public-Private Partnerships – Improved Infrastructure Delivery*, online: PPP Canada <http://www.p3canada.ca/_files/file/PPP_Canada_Annual_Report_2009-10_en.pdf> at 13 [PPP Canada, *Annual Report, 2009-10*].

²⁰⁹ Further discussion of this Fund will be found at 45-47, below.

²¹⁰ PPP Canada, *Annual Report, 2009-10*, *supra* note 208 at 13.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid* at 16-17.

Parliament.²¹⁴ PPP Canada became fully “operational” in 2009 with the appointment of seven Board Members including the Chairperson and Chief Executive Officer, the establishment of Board Committees, the recruitment of staff, and the launching of the P3 Canada Fund.²¹⁵

The P3 Canada Fund was established to “contribute up to 25 per cent of the cost of innovative [PPP] projects”²¹⁶ and “to build the market for P3s in Canada by supporting provinces, territories, municipalities and First Nations in undertaking P3 procurements”.²¹⁷ The 2007 Budget allocated the sum of \$1.26 billion to this fund.²¹⁸

Eligible P3 projects are approved for funding out of the P3 Canada Fund through a multilevel process of approvals at the Board, Ministerial, and in some instances, Treasury Board levels. The Board is empowered to initially approve all projects recommended to the relevant Minister(s) for funding out of the P3 Canada Fund.²¹⁹ The Board then submits such projects to the Minister of Finance for final approval, where what is sought in each case is an amount less than \$25 million. If the amount sought is \$25 million or more but less than \$100 million, the Board submits the project to *both* the Minister of Finance and the Minister of Transport, Infrastructure and Communities for final approval. If the amount sought is or exceeds \$100 million however, both Ministers can only grant “approval in principle”.²²⁰ They must thereafter “seek the final approval”

²¹⁴ *Ibid* at 13, 16.

²¹⁵ *Ibid* at 2-8, 13-15, 17-24.

²¹⁶ Government of Canada, Department of Finance, *Budget 2007*, *supra* note 200 at 166.

²¹⁷ PPP Canada, *Annual Report, 2009-10*, *supra* note 208 at 4.

²¹⁸ Government of Canada, Department of Finance, *Budget 2007*, *supra* note 200 at 166.

²¹⁹ PPP Canada, *Annual Report, 2009-10*, *supra* note 208 at 16.

²²⁰ *Ibid* at 17.

of the Governor-in-Council through the Treasury Board.²²¹ After final approval has been obtained in each of these cases, the Chief Executive Officer of PPP Canada will execute “a funding agreement with the recipient(s)” and any other relevant parties.²²²

Already the creation of PPP Canada and the P3 Canada Fund is beginning to yield positive results. At the end of the first round of calls for project submissions in October 2009, PPP Canada had received twenty applications “from [nine] different provincial and territorial governments, as well as Indian and Northern Affairs Canada. Six of the applications were for municipal projects...and represented [eight] different infrastructure sectors”.²²³ At the end of the second round of calls for project submissions in June 2010 however, these figures had increased considerably to seventy-three proposals for projects to be carried out in eleven Provinces and Territories. More than half of these projects, thirty-five in all, were municipal projects.²²⁴ As with the first round of calls, the projects in the second round represented diverse infrastructure sectors.²²⁵ The promising response to the calls for project submissions in both rounds indicates that in harmony with its mandate, PPP Canada is “driving the adoption of P3 procurement at the provincial and municipal levels”.²²⁶ In fact, PPP Canada reports that all but two Canadian Provinces and Territories have “submitted at least one project to the P3 Canada Fund”²²⁷ and that

²²¹ *Ibid.*

²²² *Ibid* at 16-17.

²²³ PPP Canada, Press Release, “P3s Improve Delivery of Public Infrastructure, Yield Better Value for Taxpayers: PPP Canada Launches Second Round of Funding for Public-Private Partnerships (P3s)” (12 May 2010) online: PPP Canada <http://www.p3canada.ca/_files/file/PR_may12_EN.pdf>. See also PPP Canada, *Annual Report, 2009-10*, *supra* note 208 at 8.

²²⁴ PPP Canada, “PPP Canada Closes Round 2”, *supra* note 123.

²²⁵ *Ibid.*

²²⁶ PPP Canada, *Annual Report, 2009-10*, *supra* note 208 at 8.

²²⁷ PPP Canada, “PPP Canada Closes Round 2”, *supra* note 123.

“[i]nterest in P3s from First Nations has also increased significantly”.²²⁸ The marked increase in the number of proposals put forward in the second round relative to the earlier round is “a positive signal that the P3 Canada Fund is able to leverage increasing consideration of [P3s] as an alternative infrastructure delivery model”.²²⁹

Besides its activities in connection with the “[investment] of the P3 Canada fund”, within its first year of operation, PPP Canada provided support for “the development of capacity, knowledge, expertise and business cases²³⁰ for P3 projects in several new markets... [including a] wastewater project in British Columbia [and a] hydroelectric project in Innavik, northern Quebec”.²³¹

3.2.1.2 Infrastructure Canada

Infrastructure Canada “was set up as a separate department under the Transport, Infrastructure and Communities portfolio in August 2002”.²³² It functions as “the main reference for the government on infrastructure, aids the government in meeting infrastructure needs and supports infrastructure initiatives throughout Canada”.²³³ Its functions also extend to “overseeing and co-ordinating the Building Canada plan across

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ A business case analysis is a “method of analysis that applies professional, business-like reasoning and argumentation to a series of well-developed options and criteria, in order to present a clearly reasoned justification for a proposed initiative or expenditure, demonstrating its viability, desirability and affordability”. See Government of British Columbia, *Capital Asset Management Framework: Guidelines*, online: Government of British Columbia <http://www.fin.gov.bc.ca/tbs/camf_guidelines.pdf> at 143 [Government of British Columbia, *Framework Guidelines*] (glossary, under “Business case analysis”).

²³¹ PPP Canada, *Annual Report, 2009-10*, *supra* note 208 at 11 (the project in British Columbia was designed “to address the negative health and environmental impacts of an existing sewage lagoon”; while the project in Innavik was designed “to reduce the small community’s reliance on costly and environmentally hazardous diesel-based power generation”).

²³² Organization for Economic Co-operation and Development, *Dedicated Public-Private Partnership Units: A Survey of Institutional and Governance Structure* (Paris, France: OECD, 2010) at 96.

²³³ *Ibid.*

participating federal departments and agencies”.²³⁴ Infrastructure Canada administers “three funds that directly support the Building Canada plan: Public Private Partnerships Fund (CAD 1.26 billion); the Building Canada Fund (CAD 8.8 billion), and Gateways and Border Crossing Fund (CAD 2.1 billion)”.²³⁵ The “PPP Fund [unlike the other two] specifically targets public-private partnership projects”,²³⁶ hence the consideration of Infrastructure Canada under the subject of ‘PPP units’. Nevertheless, “recipients of the other two funds are *required* when planning infrastructure projects *to give due consideration to whether projects may be delivered as a public-private partnership*”,²³⁷ and to that extent Infrastructure Canada promotes the use of P3s as any PPP unit is designed to do.

3.2.2 Provincial P3 Legal Institutions or PPP Units

3.2.2.1 The Alternative Capital Financing Office of the Alberta Treasury Board (The Alternative Capital Financing Office)

The Alternative Capital Financing Office “was established as a dedicated PPP unit” within Alberta’s Treasury Board.²³⁸ The major functions of this PPP unit include: “providing technical assistance to ministries to assess whether or not approved capital projects meet the necessary requirements; and providing oversight and guidance through planning, procurement and implementation. It may also negotiate a public-private partnership on behalf of a ministry”.²³⁹

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid* [emphasis added].

²³⁸ *Ibid* at 94.

²³⁹ *Ibid.*

A standing committee known as The Advisory Committee on Alternative Capital Financing “provides recommendations to the Treasury Board on alternative financing of projects”.²⁴⁰ In addition, the committee “evaluates capital projects and supporting business cases referred [to it] by [the] Treasury Board and provides feedback to ministries on alternative capital financing proposals”.²⁴¹ The members of the committee are all drawn from the private sector and each “have a working knowledge of government-owned alternative capital financing projects”.²⁴² Collectively, they possess “a strong understanding of financial planning and management, investment banking, contract law, accounting, real estate and large capital projects”,²⁴³ and represent such sectors as the “management, investment banking/finance, law, real estate, accounting, engineering, academic, and/or business sectors”.²⁴⁴

3.2.2.2 Partnerships British Columbia (Partnerships BC)

Partnerships BC is “a company registered under the *Business Corporations Act*²⁴⁵...[and] is wholly-owned by the Province of British Columbia”.²⁴⁶ The company was created in May 2002 and commenced operations on June 30, 2002.²⁴⁷ Its governing

²⁴⁰ *Ibid.*

²⁴¹ Government of Alberta Treasury Board, “Advisory Committee on Alternative Capital Financing (ACACF)”, online: Government of Alberta Treasury Board <<http://www.treasuryboard.alberta.ca/1188.cfm>>.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ SBC 2002, c 57.

²⁴⁶ Partnerships British Columbia, “Overview of Partnerships BC”, online: Partnerships British Columbia <<http://www.partnershipsbcc.ca/pdf/Corporate%20Overview%20FINAL%20feb07.pdf>> [Partnerships British Columbia, “Overview”].

²⁴⁷ See Partnerships British Columbia, *Annual Report, 2002-2003*, online: Partnerships British Columbia <<http://www.partnershipsbcc.ca/pdf/2002%20-%202003%20PBC%20Annual%20Report.pdf>> at 5.

Board comprises ten directors,²⁴⁸ who have “significant experience in developing and managing joint-venture projects and partnerships”.²⁴⁹

The British Columbia government relies on Partnerships BC “for establishing policies and best practices for successful partnership projects in the province”.²⁵⁰ It facilitates P3 development by “encouraging the expansion of PPPs and overseeing the administration of ongoing projects”.²⁵¹ In addition, “Partnerships BC provides member services, which consist of developing PPP policy and practices, assisting with government relations, providing legal and procurement services, and spearheading public communications”.²⁵² Lastly, Partnerships BC serves as the province’s “principal financial and administrative organization for PPPs, providing financial, accounting, human resources, contract management, and corporate governance services”.²⁵³ It must however be noted that Partnerships BC does not, through any of its directors or officers, actually *sign* P3 agreements or enter into such agreements with the private sector, the individual government departments or agencies that are the “direct owners of the projects” and therefore parties to the P3 do.²⁵⁴ In addition, Partnerships BC “is not an approval organization...does not serve as a facilities manager, is not a capital-planning agency and is not a funding agency. B.C. Treasury retains its roles as approver and overseer of capital

²⁴⁸ Partnerships British Columbia, “Overview”, *supra* note 246.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ David W Gaffey, “Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States” (2010) 39:2 Pub Cont LJ 351 at 363.

²⁵² *Ibid* at 363-364.

²⁵³ *Ibid* at 364.

²⁵⁴ Ahmed M Abdel Aziz, “Successful Delivery of Public-Private Partnerships for Infrastructure Development” (2007) 133:12 Journal of Construction Engineering and Management 918 at 922. See also Gaffey, *supra* note 251 at 364; Derek Burleton, *Creating the Winning Conditions for Public-Private Partnerships (P3s) in Canada* (TD Bank Financial Group, 2006) at 18.

projects within the government”.²⁵⁵ The role of Partnerships BC in any given P3 project undertaken in the province is that of “government procurement manager and/or financial advisor for all stages of procurement including financial close [i.e. leading up to the signing of the contract]”.²⁵⁶ This role necessarily involves “the preliminary assessment” whether a P3 is the most viable procurement approach for any given project.²⁵⁷ It also includes “the development of a business plan, the approval stage, and the project implementation phase. At a minimum, Partnerships BC assists client agencies to manage changes in risk profile, and becomes involved in material changes in project scope to ensure that the project’s economics are maintained”.²⁵⁸ In sum, “Partnerships BC facilitates P3 projects by bringing together a mix of private-sector, deal-structuring expertise on the one hand and a high level of public-sector stewardship on the other”.²⁵⁹

3.2.2.3 Infrastructure Ontario

Infrastructure Ontario is a crown corporation²⁶⁰ whose stated objective is “to strategically rebuild vital infrastructure, on time and on budget”,²⁶¹ and to renew such public assets as “hospitals, courthouses”, transportation networks, and water facilities.²⁶² Its strategy entails utilizing AFPs to harness private sector financing.²⁶³ The corporation

²⁵⁵ *Ibid.*

²⁵⁶ Aziz, *supra* note 254. See also Gaffey, *supra* note 251 at 364.

²⁵⁷ Burleton, *supra* note 254.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ Infrastructure Ontario, “Infrastructure Ontario”, online: Infrastructure Ontario <<http://www1.infrastructureontario.ca/en/about/index.asp>>.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

also provides “municipalities, universities and other public bodies with access to affordable loans to build and renew local public infrastructure”.²⁶⁴

For projects valued at \$50 million or more, the functions of Infrastructure Ontario include overseeing the process through which the private-sector consortium is selected, while protecting the public interest.²⁶⁵

Infrastructure Ontario’s mandate is not the privatization of public assets or services, but rather the utilization of “*private-sector expertise...[in] the expansion and revitalization of public assets*”.²⁶⁶ In this regard, the corporation deploys private-sector competencies in the management and renewal of “Ontario’s public infrastructure while shifting the risk associated with cost and schedule overruns away from taxpayers and onto the private sector”.²⁶⁷

Some of Infrastructure Ontario’s methods for ensuring adherence to “expected and planned life-cycle costs”²⁶⁸ include:

- (i) conditioning payments to the private sector contractor upon compliance with stipulated performance standards;²⁶⁹
- (ii) effective use of incentives and penalties;²⁷⁰ and

²⁶⁴ *Ibid.*

²⁶⁵ Infrastructure Ontario, “How Infrastructure Ontario Supports Infrastructure Development”, online: Infrastructure Ontario <<http://www1.infrastructureontario.ca/en/about/develop.asp>>.

²⁶⁶ *Ibid* [emphasis added].

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

(iii) contractual provisions which allow for termination and cancellation in extreme cases of substandard performance.²⁷¹

3.2.2.4 Infrastructure Québec

Infrastructure Québec was created in 2010 pursuant to section 1 of *An Act Respecting Infrastructure Québec*,²⁷² to replace the Agence des partenariats public-privé du Québec (PPP Québec)²⁷³ which had been created five years earlier “to advise the government [of Québec] on the implementation and structure of public-private partnerships”.²⁷⁴ The key functions of PPP Québec had included “the provision of technical assistance to the government on all public-private partnership matters including the evaluation, selection and negotiation of projects, as well as support in contract management”.²⁷⁵ Although, Infrastructure Québec assumed the obligations of the former agency,²⁷⁶ it was not – much unlike its predecessor – designed to promote the exclusive use of P3s.²⁷⁷ Owing to “criticism” of and “resistance” to the use of P3s,²⁷⁸ the mandate of the agency was *re-worded* as follows:

[T]o contribute, through its advice and expertise, *to the planning and carrying out of public infrastructure projects by public bodies in order to obtain quality infrastructures and ensure the optimal management of risks, costs and scheduling, and to take*

²⁷¹ *Ibid.*

²⁷² RSQ c I-8.2, repealing *An Act Respecting the Agence des partenariats public-privé du Québec*, RSQ c A-7.002 [*Infrastructure Québec Act*].

²⁷³ *Ibid.*, s 51.

²⁷⁴ Organization for Economic Co-operation and Development, *supra* note 232 at 96.

²⁷⁵ *Ibid.*

²⁷⁶ *Infrastructure Québec Act*, *supra* note 272, s 51.

²⁷⁷ Compare *An Act Respecting the Agence des partenariats public-privé du Québec*, RSQ c A-7.002, as repealed by *Infrastructure Québec Act*, *supra* note 272 [*PPP Québec Act*], ss 4-5.

²⁷⁸ Kevin Dougherty, “Quebec renames agency; PPPs ‘subject to criticism, resistance’” *The [Montreal] Gazette* (22 October 2009) A10.

*part in the planning of infrastructure maintenance, all of which to ensure the sound management of public funds.*²⁷⁹

In carrying out its aforesaid mandate, Infrastructure Québec, among other things, provides:

1. advise to the government of Québec on any matter concerning public infrastructure projects;²⁸⁰
2. “expert services to public bodies in respect of any public infrastructure project... with regard...to identifying the options available to meet the need with due regard for the functional, durable and harmonious nature of the proposed infrastructure, and to determining the preferred option and the project delivery approach”,²⁸¹ and
3. “public bodies with strategic, financial and other advice with regard to public infrastructure projects”.²⁸²

Unlike PPP Québec, the advisory and expert services of Infrastructure Québec are not limited to P3 projects but extend to all “[p]ossible project delivery approaches”, including “traditional, management contract, [and] turnkey” approaches.²⁸³ Be that as it may, Infrastructure Québec nevertheless qualifies to be designated a PPP unit because section 9 of the *Infrastructure Québec Act* specifically provides that when a P3 approach

²⁷⁹ *Infrastructure Québec Act*, supra note 272, s 4 [emphasis added]. *Contra PPP Québec Act*, supra note 277, s 4 (“[t]he mission of the agency is to contribute, through its advice and expertise, to the renewal of public infrastructures and the enhancement of services delivered to citizens through public-private partnerships.” [emphasis added]).

²⁸⁰ *Infrastructure Québec Act*, supra note 272, s 5(1).

²⁸¹ *Ibid.*, s 5(2).

²⁸² *Ibid.*, s 5(3).

²⁸³ *Ibid.*, s 6 (the Act defines a “turnkey approach” under which “an enterprise or group of enterprises is given responsibility for the drawing up of the plans and specifications and the construction of the public infrastructure” as distinct from a P3 approach where “a public body brings in a private-sector enterprise as a partner, with or without a financial contribution, to participate in designing, building and operating a public infrastructure”).

has been chosen, the public body planning the public infrastructure project in question *must work with Infrastructure Québec* so that the latter may coordinate the selection of the enterprise or group of enterprises that will carry out the project. In fact “[t]he public body may also work with Infrastructure Québec to follow up and manage the contracts arising from a public infrastructure project [which may well be P3 contracts] and to carry out any other project-related operation they have agreed upon”.²⁸⁴ Finally, when its ‘advice’ and/or ‘expert services’²⁸⁵ lead to the adoption and/or successful implementation of a P3 in the procurement of a public infrastructure project, Infrastructure Québec fulfils one or more of the roles of a PPP unit, expounded at the outset of this section of the chapter.²⁸⁶

3.3 CONCLUSION

This chapter has shown that Canadian governments at all levels – federal, provincial, territorial and municipal – have been very active in the area of P3 law and policy. In this connection, Canadian P3 law and policy has evolved in two significant directions. These directions have been on the one hand, the legal establishment of specialist PPP institutions that promote and/or facilitate P3 procurements; and on the other hand the enactment of P3-related legislation and/or the formulation of non-statutory P3-related policy statements. Furthermore, the chapter identified four major categories of P3 legislation that exist in Canada: 1) project-specific P3 legislation; 2) P3 legislation that enables private investment in specific sectors; 3) legislation that provides for the

²⁸⁴ *Ibid.*, s 9.

²⁸⁵ Enumerated in the previous paragraph.

²⁸⁶ See text accompanying notes 190-199.

funding of capital-intensive P3 projects; and 4) legislation that streamline the process of P3 procurements.

CHAPTER IV

**THE IMPACT OF CANADIAN LAW, POLICY AND P3 PRACTICE ON THE
CASE FOR PROCURING CAPITAL-INTENSIVE INFRASTRUCTURE
SERVICES VIA P3S**

4.0 INTRODUCTION

As indicated in Chapter One, significant advantages result from procuring capital-intensive infrastructure services via PPPs rather than by conventional public procurement approaches. Furthermore, these advantages have been facilitated and accentuated by the peculiar direction in which Canadian P3 law, policy and practice has evolved. This chapter identifies these advantages in the light of applicable P3 law, policy and practice.

As equally stated in Chapter One, the evolution of the practice of procuring capital-intensive infrastructure services via P3s has not been without some degree of resistance and opposition. This chapter also addresses those concerns that have been raised against P3s which have a legal context or which may be allayed by reference to Canadian P3 law, policy and practice.

**4.1 THE IMPACT OF CANADIAN LAW, POLICY AND P3
PRACTICE ON THE ARGUMENTS FOR PROCURING CAPITAL-
INTENSIVE INFRASTRUCTURE SERVICES VIA P3S**

The key arguments in favour of procuring capital-intensive infrastructure services via P3s relate to the *cost and time certainty and savings*, and *innovation* that result from

opting for P3s, rather than conventional public procurement, as the preferred vehicle of procurement. What follows presently is a discussion of these advantages in turn, as well as the aspects of Canadian law, policy and P3 practice that facilitate and accentuate these identified advantages.

4.1.1 Cost and Time Certainty and Savings

A number of studies have yielded empirical evidence which strongly suggests that, the world over, significant cost overruns and time delays characteristically attend conventional public procurement of capital-intensive infrastructure projects, but not the procurement of such projects via PPPs.²⁸⁷ This global phenomenon characteristic of

²⁸⁷ See Iacobacci, *supra* note 56 at 11-24; Colin Duffield, *National PPP Forum – Benchmarking Study, Phase II: Report on the Performance of PPP Projects in Australia When Compared With a Representative Sample of Traditionally Procured Infrastructure Projects* (Melbourne: Melbourne Engineering Research Institute, 2008) at 4-6, 15-28, 43-44; Allen Consulting, Colin Duffield & Peter Raisbeck, *Performance of PPPs and Traditional Procurement in Australia* (Melbourne: Infrastructure Partnerships Australia, 2007) at 1-2, 25-33; Partnerships UK, *Report on Operational PFI Projects* (London: Partnerships UK, 2006) at 12-14; UK, National Audit Office, *PFI: Construction Performance: A Report by the Comptroller and Auditor General* (HC 371 Session 2002-2003) (London, UK: National Audit Office, 2003) at 1-9, 11-17; Bent Flyvbjerg, Mette Skamris Holm & Soren Buhl, “Underestimating Costs in Public Works Projects: Error or Lie?” (2002) 68:3 *Journal of the American Planning Association* 279 at 280-291; Mott MacDonald, *Review of Large Public Procurement in the UK* (London: HM Treasury, 2002) at 14-20, 60-64; Philip Gray, *Private Participation in Infrastructure: A Review of the Evidence* (Washington DC: World Bank, 2001) at 1, 14-15; Don H Pickrell, *Urban Rail Transit Projects: Forecast versus Actual Ridership and Cost* (Washington DC: US Department of Transportation, 1990) at 61-65; RM Fraser, “Compensation for Extra Preliminary and General (P & G) Costs Arising from Delays, Variations and Disruptions: The Palmiet Pumped Storage Scheme” (1990) 5:3 *Tunneling and Underground Space Technology* 205; MM Dlakwa & MF Culpin, “Reasons for Overrun in Public Sector Construction Projects in Nigeria” (1990) 8:4 *International Journal of Project Management* 237 at 237-240; Peter WG Morris & George H Hough, *The Anatomy of Major Projects: A Study of the Reality of Project Management* (Chichester: John Wiley & Sons, 1987) at 7-13, 199-205, 220-226; David Arditi, Guzin Tarim Akan & San Gurdamar, “Cost Overruns in Public Projects” (1985) 3:4 *International Journal of Project Management* 218 at 218, 220-223; Henry T Canaday, *Construction Cost Overruns in Electric Utilities: Some Trends and Implications* (Occasional Paper No 3) (Columbus, Ohio: National Regulatory Research Institute, Ohio State University, 1980) at i, 9-36; Peter Hall, *Great Planning Disasters* (London, UK: George Weidenfeld and Nicolson, 1980) at 87-108, 138-151; PD Henderson, “Two British Errors: Their Probable Size and Some Possible Lessons” (1977) 29:2 *Oxford Economic Papers* 159 at 159-185; Leonard Merewitz, “Cost Overruns in Public Works” in William A Niskanen et al, eds, *Benefit Cost and Policy Analysis* (Chicago: Aldine, 1973) 277 at 277-293; Maynard M Hufschmidt & Jacques Gerin, “Systematic Errors in Cost Estimates for Public Investment Projects” in Julius Margolis, ed, *The Analysis of Public Output* (New York: Columbia University Press, 1970) 267 at 271-281, 291-294, 299-315; Robert Summers, “Cost Estimates as Predictors of Actual Costs: A Statistical Study of Military Developments” in Thomas Marschak, Thomas K Glennan, Jr & Robert

conventional public procurements is known either as “appraisal optimism”²⁸⁸ or “optimism bias”²⁸⁹. In addition, such studies indicate that the procurement of such projects via PPPs, rather than via conventional public procurement, yields considerable cost and time savings.²⁹⁰

In the context of such studies, cost overruns refer to the difference between actual construction costs (i.e. “real, accounted construction costs determined at the time of project completion”²⁹¹) and estimated construction costs “budgeted, or forecasted” at the planning stage.²⁹² Time delays on the other hand refer to delays associated with the failure or inability to deliver infrastructure facilities “fit and available for use” by the public, on schedule.²⁹³

One example of the studies just referred to, is that in which Flyvbjerg, Holm & Buhl examined 258 transportation infrastructure projects carried out over a 70-year period across 20 countries and 5 continents, including Europe and North America.²⁹⁴ Of this number, there were 58 rail projects, 33 fixed-link (i.e. tunnels and bridges) projects,

Summers, eds, *Strategy for R & D: Studies in the Microeconomics of Development* (New York: Springer-Verlag, 1967) 140 at 140, 142, 148-149; JM Healey, “Errors in Project Cost Estimates” (1964) 12:1 *Indian Economic Journal* 44 at 44-52.

²⁸⁸ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 72.

²⁸⁹ HM Treasury, *The Green Book – Appraisal and Evaluation in Central Government* (London: TSO, 2003) at 29-30, 85-87; Mott MacDonald, *supra* note 287 at 4

([o]ptimism bias is the tendency for a project’s costs and duration to be underestimated and/or benefits to be overestimated...a measure of the extent to which actual project costs (capital and operating), and duration (time from business case to benefit delivery (project duration) and time from contract award to benefit delivery (works duration) exceed those estimated).

²⁹⁰ See especially Iacobacci, *supra* note 56 at 11-24. See also Peter Fitzgerald, *Review of Partnerships Victoria Provided Infrastructure* (Melbourne: Growth Solutions Group, 2004) at 17.

²⁹¹ Flyvbjerg, Holm & Buhl, *supra* note 287 at 281.

²⁹² *Ibid.*

²⁹³ Iacobacci, *supra* note 56 at 9, 12.

²⁹⁴ Flyvbjerg, Holm & Buhl, *supra* note 287 at 282-283, 286-287, 289, 290.

and 167 road projects.²⁹⁵ With the notable exception of the Channel Tunnel, “the overwhelming majority” of these projects had been “developed using conventional approaches to public procurement”.²⁹⁶ In 90 per cent of these projects, however, actual construction costs exceeded estimated construction costs by an average of 28 per cent.²⁹⁷ They found that for rail projects, the average difference between actual construction costs and estimated construction costs, when expressed as a percentage of estimated costs, was as high as 44.7 per cent.²⁹⁸ For fixed-link projects, the average was 33.8 per cent,²⁹⁹ and for road projects the average was 20.4 per cent.³⁰⁰ “For a randomly selected project, the likelihood of actual costs being larger than estimated costs [was] 86 per cent”.³⁰¹ They also found that this global trend of optimism bias or cost underestimation, has not changed over time, leading them to conclude that “cost underestimation...today is in the same order of magnitude as it was 10, 30 and 70 years” prior to their study.³⁰²

Significantly, Flyvbjerg, Holm & Buhl observed that the occurrence of this phenomenon of “cost underestimation” is not limited to transportation infrastructure projects alone, but occurs in “other types of infrastructure projects as well”.³⁰³ They “reviewed cost data for several hundred other projects including power plants, dams, water distribution, oil and gas extraction, information technology systems, aerospace

²⁹⁵ *Ibid* at 283-285 (figures 1 and 2, and tables 1 and 2).

²⁹⁶ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 72, 91, n 1.

²⁹⁷ Flyvbjerg, Holm & Buhl, *supra* note 287 at 282, 287, 290.

²⁹⁸ *Ibid* at 282-285, 290.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid* at 282.

³⁰² *Ibid* at 285-286.

³⁰³ *Ibid* at 286.

systems, and weapons systems”.³⁰⁴ Notable among these ‘other types of infrastructure projects’ were the “Sydney Opera House, with actual costs approximately 15 times higher than those projected, and the Concorde supersonic airplane, with a cost 12 times higher than predicted”.³⁰⁵ Their analysis of the data led to the conclusion that “other types of projects are at least as, if not more, prone to cost underestimation as are transportation infrastructure projects”.³⁰⁶

In a similar vein, in 2002, the UK Treasury commissioned a study to review the outcome of 50 capital-intensive infrastructure projects carried out in the UK alone over a 20-year period.³⁰⁷ 39 of the projects examined were conventionally procured, while 11 were procured via PFIs/PPPs.³⁰⁸ Broadly, the project categories were:

1. “Standard buildings projects” – Projects under this category included “the construction of buildings not requiring special design considerations i.e. most accommodation projects (offices, living accommodation, general hospitals, prisons and airport terminal buildings)”.³⁰⁹

³⁰⁴ *Ibid.* See Arditi, Akan & Gurdamar, *supra* note 287; Coleman Blake, David Cox & Willard Fraize, *Analysis of Projected vs. Actual Costs for Nuclear and Coal-Fired Power Plants* (Report prepared for the United States Energy Research and Development Administration (McLean, VA: Mitre Corporation, 1976) at 3-31; Canaday, *supra* note 287; Department of Energy Study Group, Peat Marwick Mitchell & Co & Atkins Planning, *North Sea Costs Escalation Study* (Energy Paper No 7) (London: Her Majesty’s Stationery Office, 1976) at 6-7, 44-50; Dlakwa & Culpin, *supra* note 287; Fraser, *supra* note 287; Hall, *supra* note 287; Healey, *supra* note 287; Henderson, *supra* note 287; Hufschmidt & Gerin, *supra* note 287; Merewitz, *supra* note 287; Edward W Merrow, Lorraine McDonnell & R Yilmaz Argüden, *Understanding the Outcomes of Megaprojects: A Quantitative Analysis of Very Large Civilian Projects* (Santa Monica, CA: RAND Corporation, 1988) at v-vi, 30-55, 63-64; Morris & Hough, *supra* note 287.

³⁰⁵ Flyvbjerg, Holm & Buhl, *supra* note 287 at 286.

³⁰⁶ *Ibid.*

³⁰⁷ Mott MacDonald, *supra* note 287 at 4, 6-7.

³⁰⁸ *Ibid* at 45-48.

³⁰⁹ *Ibid* at 7.

2. “Non-standard buildings projects” – Projects under this category included the “construction of buildings requiring special design considerations due to space constraints, complicated site characteristics, specialist innovative buildings or unusual output specifications...(specialist hospitals, innovative prisons, specialist barrack accommodation and other unique buildings or refurbishment projects)”.³¹⁰
3. “Standard civil engineering projects” – Projects under this category included “the construction of facilities, in addition to buildings, not requiring special design considerations i.e. most new roads and some utility projects”.³¹¹
4. “Non-standard civil engineering projects” – Projects under this category included “the construction of facilities, in addition to buildings, requiring special design considerations due to space constraints or unusual output specifications i.e. innovative rail, road, utility projects and upgrade and extension projects”.³¹²
5. “Equipment & development projects” – Projects involving “the provision of equipment and/or development of software and systems (i.e. manufactured equipment, Information and Communication Technology (ICT) development projects) or leading edge projects”.³¹³

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid* at 7-8.

³¹³ *Ibid* at 8.

6. “Outsourcing projects” – Projects involving “the provision of hard and soft facilities management services i.e. ICT services, facilities management or maintenance projects”.³¹⁴

The Mott MacDonald study, as the study presently under consideration, came to be known, observed that in the case of the 39 conventionally procured projects, actual capital expenditure exceeded estimates by an average of 47 per cent. For those same projects, the duration between contract award and benefit delivery (works duration) exceeded the estimated duration by 17 per cent.³¹⁵ By contrast, optimism bias levels were significantly far less for the 11 PFI/PPP projects – 1 per cent for capital expenditure and minus 1 per cent for works duration.³¹⁶

What emerges from a brief consideration of these two studies may be summed up in this way: In the case of conventional public procurement of capital-intensive infrastructure, cost overruns and time delays attributable to optimism bias are the order of the day rather than the exception. The situation differs radically with P3 procurements, as the result of a recent Canadian study serves to establish.

In January 2010, as part of a report in which it assessed the “benefits and drawbacks of using P3s”, the Conference Board of Canada (Conference Board) published the results of its review of 55 P3 projects initiated between June 2004 and November

³¹⁴ *Ibid.*

³¹⁵ *Ibid* at 14.

³¹⁶ *Ibid* at 14-15.

2009.³¹⁷ The P3 projects examined in this study were drawn from “the four Canadian jurisdictions that have been most active in using a P3 procurement model for the delivery of infrastructure facilities and subsequent maintenance services – Alberta, British Columbia, Ontario and Québec”.³¹⁸ 32 of these projects were in the “health and long-term care sector”, 14 in the “transportation sector”, 8 involved other forms of “social infrastructure (such as schools, data centres, a courthouse, a sports centre, and a concert hall), and 1 [was] for a water treatment plant”.³¹⁹ At the time of the Conference Board report, only 19 of the 55 projects had “reached their respective substantial completion date, that is, the date by which the new facility should be built and soon available to be put in service as stipulated” in the P3 agreement.³²⁰

The Conference Board report highlighted value-for-money (VfM) estimates, “which compare the total costs of P3 versus conventional procurement methods, *before the start of each P3 project*”.³²¹ The VfM estimates are “based on high-level comparisons with projects delivered through similar procurement methods as well as detailed cost analysis undertaken by the procurement authority and its advisors”,³²² and provide “a gauge of the cost savings expected at the outset of a project”.³²³

The VfM estimates highlighted in the report showed projected cost savings ranging from “just a few million dollars per project, as in the case of Edmonton’s

³¹⁷ Iacobacci, *supra* note 56 at i-ii, 13, 20.

³¹⁸ *Ibid* at 13-22 (the distribution was as follows: Alberta – 4, British Columbia – 16, Ontario – 30, and Québec – 5).

³¹⁹ *Ibid* at 13-21.

³²⁰ *Ibid* at 13.

³²¹ *Ibid* at 13-21 [emphasis added].

³²² *Ibid* at 13.

³²³ *Ibid*.

Anthony Henday Drive Southeast Leg Ring Road or Vancouver’s Golden Ears Bridge, through to \$751 million in the case of the Autoroute 30 project just south of the Montréal area”.³²⁴ These savings, when “expressed as a proportion of the potential costs for procuring the projects through conventional contracting methods...[identified in the report as the “public sector comparator (PSC)”³²⁵] range from 0.8 per cent through to 61.2 per cent of the PSC for each project”.³²⁶ Thus even at the budgetting stage, opting for a PPP approach held promise of significant cost savings that would have been unavailable had the provinces in question procured these projects conventionally.

Next, the report examined the documented “cost and time performance”³²⁷ of the projects “against their own milestones”,³²⁸ to ascertain “the time and cost certainty with which projects are delivered”³²⁹ and to determine whether the expected savings would crystallize at the end of the P3 project.³³⁰ This examination was necessary because “[w]hether the *actual* savings match the *expected* savings by the end of the P3 project depends on the degree of cost and time certainty of P3 projects”.³³¹

Since not all of the projects had achieved substantial completion at the time of the report, the individual cost performance of some projects was assessed “by identifying whether [such] projects have had contract variations after financial close (i.e., any changes to contract deliverables, such as the specifications of the facility) and by

³²⁴ *Ibid* at 13, 14-21.

³²⁵ *Ibid* at 11.

³²⁶ *Ibid* at 13.

³²⁷ *Ibid* at 12.

³²⁸ *Ibid*.

³²⁹ *Ibid* at 13.

³³⁰ *Ibid* at 12-13, 20-22.

³³¹ *Ibid* at 13 [emphasis added].

determining whether the projects have remained within their approved P3 budgets”.³³² If “the cost impact of the contract variations on the public sector owner’s P3 project budget exceeds the provisions for retained risks in the budget”,³³³ cost certainty would be lost, along with any cost savings predicated thereon. In other words, the project would have cost more than budgeted, and the savings projected in the VfM estimates would be reduced or in some cases lost altogether. Conversely, if the public sector owner’s P3 project budget is not exceeded by the cost impact of the contract variations, the cost savings in the VfM estimates remain unaffected and the project is said to be “on budget”.³³⁴ Furthermore, the report examined “whether there [were] any successful claims by the P3 partner (or by any third parties) and whether the impact of such claims exceeds the public sector’s P3 budget”.³³⁵ All of these inquiries put together would indicate whether the cost savings projected in the VfM estimates, albeit futuristic, would materialize at the end of the project. “With regard to time performance”, on the other hand, the relevant inquiry was “whether the P3 partner has met the substantial completion date target stipulated by the project agreement”.³³⁶ The findings of the Conference Board in this connection are discussed below.

Between June 2004 and November 2009, four P3 projects were initiated in Alberta.³³⁷ Only two of these projects were scheduled, by contract, for substantial completion on dates not later than November 2009, the cut-off date for the Conference

³³² *Ibid* at 20 (subject to contract, the cost of contract variation is borne by the party requesting the change). Financial close is “the date when the partnership agreement with the private sector consortium is signed and takes effect” (*ibid* at 13, n 10).

³³³ *Ibid* at 20.

³³⁴ *Ibid* at 13.

³³⁵ *Ibid* at 20.

³³⁶ *Ibid*.

³³⁷ *Ibid* at 14-15, 20.

Board report. They were the Anthony Henday Drive Southeast Leg Ring Road and the Northeast Stoney Trail Ring Road.³³⁸ These two projects “were completed on schedule”.³³⁹ The other two Alberta P3 projects were scheduled for substantial completion in June 2010 and Autumn 2011 respectively.³⁴⁰ These latter two projects along with one that was completed on schedule (i.e. the Northeast Stoney Trail Ring Road) experienced “contract variations either for *changes requested by the public sector* or in order to address *items for which the public sector retained the risks* under the project agreement”.³⁴¹ Although at various stages of completion, all of the four P3 projects “remain within their public sector P3 budgets”³⁴² – this, notwithstanding the aforesaid contract variations.

During the same period (i.e. between June 2004 and November 2009), sixteen separate P3 projects were initiated in British Columbia.³⁴³ Eleven of these projects were, by contract, scheduled for substantial completion on or before the cut-off date of November 2009.³⁴⁴ In six of these, “the project (or a component thereof) reached substantial completion earlier than the date specified in the project agreement”.³⁴⁵ The remaining five were completed right on schedule.³⁴⁶ Six of the eleven completed projects experienced contract variations.³⁴⁷ However, there was no indication that “the financial

³³⁸ See Iacobacci, *ibid* at 14 (column under “Substantial completion date (project agreement)”).

³³⁹ *Ibid* at 20.

³⁴⁰ See Iacobacci, *ibid* at 14 (column under “Substantial completion date (project agreement)”).

³⁴¹ *Ibid* at 20 [emphasis added] (“[t]he fourth project – the Anthony Henday Drive Southeast Leg Ring Road...had no contract variations or successful claims against the public sector owner”).

³⁴² *Ibid*.

³⁴³ *Ibid* at 14-17, 21.

³⁴⁴ See Iacobacci, *ibid* at 14, 16 (column under “Substantial completion date (project agreement)”).

³⁴⁵ *Ibid* at 21.

³⁴⁶ *Ibid*.

³⁴⁷ *Ibid* at 14-15.

impact of the variations resulted in additional costs in excess of the public sector's approved P3 capital budget".³⁴⁸ In fact, regarding one of those projects with contract variations, the Abbotsford Regional Hospital and Cancer Centre, the report unequivocally noted that "the variations *had no impact on public sector capital costs*".³⁴⁹ Similarly, two of the five projects with substantial completion dates later than the cut-off date for the report, had experienced contract variations at the time of the report.³⁵⁰ Being merely "minor changes" however, they equally had no impact on costs.³⁵¹

During the period under review, thirty AFP projects were initiated in Ontario.³⁵² Only seven of these projects were, by contract, scheduled for substantial completion by the cut-off date of November 2009.³⁵³ Four were delivered on schedule. In fact, two of these projects – the "Sudbury Regional Hospital" and the "St. Joseph's Health Care-London" projects – were delivered thirty-three and eighteen days respectively ahead of schedule.³⁵⁴ However, the three other projects scheduled for substantial completion by the cut-off date of November 2009 were delivered behind schedule, the delay in each case being only approximately two months long.³⁵⁵ Interestingly, the delay in one of the three projects just mentioned, the "Trillium Health Centre (Mississauga only)", was as a result of "*a one-month province-wide labour dispute and a one-month schedule adjustment by the public sector owner allowed for within the contract*".³⁵⁶ Furthermore,

³⁴⁸ *Ibid* at 21.

³⁴⁹ *Ibid* at n 14 [emphasis added].

³⁵⁰ *Ibid* at 16-17.

³⁵¹ *Ibid* at 21.

³⁵² See Iacobacci, *ibid* at 16-21.

³⁵³ See Iacobacci, *ibid* at 16, 18, 20 (column under "Substantial completion date (project agreement)").

³⁵⁴ *Ibid* at 18-19, 22.

³⁵⁵ *Ibid* at 21-22.

³⁵⁶ *Ibid* [emphasis added].

the “financial impact of the delay was shared between the public and private sector parties”.³⁵⁷ In one of the other two projects marked by a two-month delay – the Roy McMurry Youth Centre – “the financial impact of the delays was borne by the respective private sector partner”.³⁵⁸ Both the Trillium Health Centre and the Roy McMurry Youth Centre along with the four projects delivered either on or ahead of schedule “were completed within the approved public sector budgets”.³⁵⁹ In all, at the time of the compilation of the Conference Board’s report, twenty-three of the AFP projects initiated in Ontario between June 2004 and November 2009 had “experienced contract variations”.³⁶⁰ However, where there has been “any cost impact from these variations...[they have] remained within the approved AFP capital budgets”.³⁶¹

Lastly, five P3 projects were initiated in Québec between June 2004 and November 2009.³⁶² All five projects were, by contract, scheduled for substantial completion on dates later than the cut-off date for the Conference Board report, the earliest of these completion dates being September 2010.³⁶³ Consequently, the time performance of these projects was not assessed in the report. Nevertheless, one of these projects, the Autoroute 25 “experienced contract variations and claims against the public sector”.³⁶⁴ The variations all pertained to “risks retained by the public sector”,³⁶⁵ and, as

³⁵⁷ *Ibid* at 22.

³⁵⁸ *Ibid*.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid*.

³⁶² *Ibid* at 16-17, 22.

³⁶³ See Iacobacci, *ibid* at 16 (column under “Substantial completion date (project agreement)”).

³⁶⁴ *Ibid* at 22.

³⁶⁵ *Ibid* (i.e. “soil contamination levels greater than those the private partner had agreed to cover in the project agreement” and “changes requested by the City of Montréal”).

seen in all the cases of contract variation in each of the other three provinces, “the cost impact of these variations remains within the limits of the approved P3 budget”.³⁶⁶

The Conference Board’s findings, just discussed above, lend overwhelming support to the argument that procurement of infrastructure via P3s typically leads to cost and time savings, and that in this procurement approach, cost overruns and time delays are the exception rather than the rule. In all the cases just examined, where infrastructure projects were procured via P3s (AFPs in Ontario), the projects proceeded according to budget, even where there were contract variations and time delays. Such cost certainty in turn guarantees the realization of the cost savings indicated for P3s in the first instance through the futuristic VfM estimates. Furthermore, out of the twenty projects that had reached their substantial completion dates by November 2009,³⁶⁷ and which could thus be assessed for time certainty in the Conference Board report, only three experienced delays. In one, the delay was attributable to a province-wide labour dispute and a schedule adjustment by the public sector owner provided for by the P3 contract; and in each case the delay was merely two months long. On the other hand, as pointed out earlier, eight of the twenty completed projects – six in British Columbia and two in Ontario – were completed ahead of schedule. All of these details argue strongly for the time certainty and savings of P3s as a procurement approach.

The cost and time savings, as well as the low incidence of time and cost overruns inherent in P3 procurements of large infrastructure are attributable to at least three

³⁶⁶ *Ibid.*

³⁶⁷ i.e. 2 in Alberta, 11 in British Columbia, and 7 in Ontario.

reasons: 1) the optimal risk allocation characteristic of P3s; 2) the presence of private project financing; and 3) the combined effect of: (a) the incidence of private ownership and the concomitant profit-maximization motive of private enterprise, (b) the existence of a market for corporate control and the threat of bankruptcy, and (c) competition. These three reasons are discussed in detail below.

4.1.1.1 Optimal Risk Allocation in P3s

As highlighted earlier, one of the distinguishing features of P3s is the systematic identification, evaluation and allocation of particular project risks between the public and private-sector partners, *depending on which is better qualified to assume each allocated risk*.³⁶⁸ An additional factor that influences the allocation of risk is cost-effectiveness. These considerations put together give rise to three broad categories of risks: risks retained by the public sector partner; risks shared by both the public and private sector partners, and risks transferred to the private sector partner.

Risks retained by the public sector partner are those in which “the private partner has no control over the outcome”.³⁶⁹ One example of such risks is that arising from “soil contamination” that remains unknown to the private sector partner until after the P3 project is underway.³⁷⁰

Risks shared by both the public and private sector partners are “those that are best shared between the two parties to the extent that they both have significant influence over

³⁶⁸ See 18, above.

³⁶⁹ Iacobacci, *supra* note 56 at 33.

³⁷⁰ *Ibid.*

the outcomes”.³⁷¹ For example, both the public sector owner and the private sector operator can wield a measure of influence over traffic outcomes arising from a toll road operated under a P3 contract. While public sector policy will invariably determine the concentration of “economic activity” in the area serviced by the road, and by extension, the volume of road use, the private sector operator may limit the volume of traffic through the quality of its “maintenance work” and resulting “lane availability”.³⁷² For these reasons, traffic risk is usually shared.

In determining which risks to transfer to the private sector partner, a key consideration is whether “the risks in question can be managed at a lower cost by the private partner”³⁷³ Where they can be so managed, a portion of the resulting “cost saving is transferred to the public sector owner in a competitive bid environment”.³⁷⁴ And this is one explanation for the cost savings inherent in P3 procurements.

To illustrate how, in practical terms, cost-effective risk transfer translates into real cost savings for the public sector, we will take as an example the Durham Consolidated Courthouse project, procured by Infrastructure Ontario in 2007 as a DBFM project. “[T]he total risk exposure [that would have been] retained by the public sector (i.e., taxpayers) under the conventional procurement approach was estimated at \$157 million in 2007 dollars. The partnership agreement transferred 84 per cent of that risk exposure in

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

value terms (i.e., \$132 million) to the P3 partner”.³⁷⁵ Transferring these risks to the private sector partner “cost the public sector \$74 million”.³⁷⁶ Adjusting the quantum of savings gained from transferring the risk exposure to the P3 partner (i.e., \$132 million), by subtracting the cost of the transfer (i.e., \$74 million) results in a gross cost saving of \$58 million.³⁷⁷ “[T]he *net* savings to the public purse (or the VfM savings) are obtained by subtracting the incremental transaction costs incurred by the public sector as a result of the P3 procurement method”.³⁷⁸ The incremental transaction costs in this project amounted to \$9 million, resulting in net savings of \$49 million.³⁷⁹ This represents a real cost saving for the public sector, as a result of transferring to the private sector partner risks which the latter were “in a better position than the public sector to manage”.³⁸⁰

Realistically, the risks that are “worth transferring” to the private sector partner “are those where the private partner has some control over how to achieve the desired outcomes, which puts it in a better position to manage the outcomes than the public sector

³⁷⁵ *Ibid* at 27 (figures are drawn from VfM studies that compared the total estimated costs of procuring the project via P3 and conventional public procurement respectively).

³⁷⁶ *Ibid* (“[t]his is the gross estimate of the cost to the public sector of the transferred risks (or risk premium), including the incremental cost of private financing, any incremental transaction costs borne by the private consortium, less the value of any other efficiencies resulting from the AFP procurement approach”).

³⁷⁷ *Ibid*.

³⁷⁸ *Ibid* at n 31 [emphasis added].

³⁷⁹ *Ibid*.

³⁸⁰ *Ibid* at 27. The transferred risks included: “Construction price certainty”, “Scheduling, project completion and delays”, “Building design”, “Benchmarking and market testing”, “Leadership in Energy and Environmental Design (LEED) design and construction obligations”, “Facilities maintenance risks”, and “the cost overruns associated with these risks”. See Infrastructure Ontario, *Value for Money Assessment: Durham Consolidated Courthouse*, online: Infrastructure Ontario <<http://www1.infrastructureontario.ca/en/projects/jus/durham/files/DCC%20Value%20for%20Money%20-%20FINAL.pdf>> at 11-12, 14-15.

partner”.³⁸¹ For this reason, some of the risks typically transferred to the private sector partner include risks associated with financing, cost overruns and scheduling.³⁸²

The transfer of the latter two risks – cost overruns and scheduling risks – account for the low incidence of cost and time overruns in P3 projects and their resultant characteristic cost and time certainty. Transferring the risk that the project will not be delivered on time and within budget to the private sector partner ensures effective performance on its part.³⁸³ This is because, upon transfer, the private sector partner bears responsibility for any cost overruns, and suffers the imposition of penalties, in the form of diminution of payments, for any delays.³⁸⁴ It is thus in the private partner’s interests to perform optimally in order to eliminate the possibility of any such overruns or delays. In this connection, it has been opined respecting P3s that “payments [are] better aligned to the delivery of project objectives”, and for this reason, P3s possess “a solid track record of completing construction on time or even ahead of schedule”.³⁸⁵

A conventional public procurement, on the other hand, does not benefit from the risk-transfer incentive just discussed.³⁸⁶ “[T]he public sector owner (or procurement authority)” does not put forth the same rigorous effort expended in a P3 “to [identify] the wide range of possible risks and to [assess] the value of such risks retained by the public sector under a conventional contract and under one or more potential P3-type

³⁸¹ Iacobacci, *supra* note 56 at 33.

³⁸² *Ibid.*

³⁸³ Timothy J Murphy, “The Case for Public-Private Partnerships in Infrastructure” (2008) 51:1 Canadian Public Administration 99 at 101.

³⁸⁴ *Ibid.*

³⁸⁵ Eggers & Startup, *supra* note 6 at 7.

³⁸⁶ Murphy, *supra* note 383 at 102.

contracts”.³⁸⁷ It is for this reason that the Mott MacDonald study attributed the differing levels of optimism bias between conventional public procurements and P3 procurements discussed earlier to “the negotiated transfer of project risks from the public sector to the private sector, where project risks are passed to the party best placed to manage them consistent with achieving value for money and quality”.³⁸⁸

Optimal risk allocation represents one of the key areas where the impact of Canadian P3 law, policy and practice has been keenly felt. And, as seen above, optimal risk allocation in turn has lent support to the arguments in favour of the use of this alternative approach to procurement of capital-intensive infrastructure services. For example, in recognition of the efficiency gains, discussed above, which result from optimal risk allocation in the procurement of infrastructure services, section 1 of the *Transport Infrastructure Partnerships Act* specifically provides that a P3 agreement for the “construction, repair or operation” of transport infrastructure in Québec “*must involve the sharing of risks* between the Government and the private sector”.³⁸⁹ Provisions of this nature enshrine in P3 procurements the salutary practice of identifying, evaluating and cost-effectively apportioning project risks between respective public and private sector partners.

Moreover, a number of Canadian legal institutions – PPP units – discussed in Chapter Three, “have developed formal, quantitative risk assessment processes, which draw on past infrastructure procurement experience and on commercial cost evaluators to

³⁸⁷ Iacobacci, *supra* note 56 at 34.

³⁸⁸ Mott MacDonald, *supra* note 287 at 14-15.

³⁸⁹ *Transport Infrastructure Partnerships Act*, *supra* note 144, s 1 [emphasis added].

prepare risk templates for assessing which risks to transfer to the private partner”.³⁹⁰ Additionally, such “a rigorous risk assessment process” has the potential to enable “both the public and private partners avoid certain risks altogether”.³⁹¹ One example of a Canadian PPP unit that has developed such ‘a rigorous risk assessment process’ is Infrastructure Ontario which “has had construction cost valuation experts develop a detailed set of risk templates identifying up to 80 categories of material risks for large infrastructure projects”.³⁹²

4.1.1.2 The Presence of Private Project Financing in P3s

The capital expenditure in most P3 projects often consists of public financing and private project financing. “The publicly financed portion of P3 infrastructure projects takes the form of government contributions paid to the private partner at key milestones in the delivery of the project”.³⁹³ Examples of this aspect of the financing of Canadian P3 projects were highlighted in Chapter Two, in the course of the discussion of the *Infrastructure Fund Act* and the P3 Canada Fund. “A significant portion of the capital spending on a P3 infrastructure project is [however] privately financed and at risk”.³⁹⁴

Also, as seen above, the risks most likely to escalate costs in a P3 project are typically transferred to the private sector partner(s). This feature of P3s, coupled with “private financing at stake”, provides “all [private sector] bidders” an obvious incentive to rigorously “[consider] upfront all the costs and risks associated with delivering on each

³⁹⁰ Iacobacci, *supra* note 56 at 33.

³⁹¹ *Ibid.*

³⁹² *Ibid* at 34.

³⁹³ *Ibid* at 35-36.

³⁹⁴ *Ibid* at 35 (this portion of the capital spending is “at risk” because “service payments begin only after construction”).

stage of the project”.³⁹⁵ A “private sector consortium” that would, following a successful bid, ultimately “[bear] the risk for the majority of project financing”, would hardly ever “bid on, let alone commit to, a P3 project to deliver a facility at a grossly underestimated budget”.³⁹⁶ On the other hand, it is not “uncommon [in conventional public procurements] for private firms to undertake projects where budgets have been underestimated by the public sector”.³⁹⁷ Clearly, “it is the presence of substantial private financing, and the risk that entails, that forces both parties in a P3 procurement to take full account upfront of all the requirements and risks entailed by the project”.³⁹⁸ The necessity in P3 procurements to ascertain and evaluate, before the start of projects, all costs and risks, makes for a “disciplined procurement process”³⁹⁹ that eliminates the incidence of optimism bias, and in part accounts for the cost certainty of P3 projects.

The establishment of Canadian PPP units at both the federal and provincial levels of government have contributed to this ‘disciplined procurement process’ that is principally brought about by the presence of private project financing in P3s. These legal institutions “advise the public sector owner...as it prepares for a potential P3 procurement, and... ensure [the existence of] a clear, predictable procurement process” in their respective jurisdictions.⁴⁰⁰ This function of Canadian PPP units which in conjunction with private financing ultimately contributes to the cost certainty of P3 procurements of capital-intensive infrastructure services, represents another salutary effect of the thrust of Canadian P3 law, policy and practice.

³⁹⁵ *Ibid* at 36.

³⁹⁶ *Ibid*.

³⁹⁷ *Ibid* (this “was the case with the extension of the Montréal metro to the City of Laval”).

³⁹⁸ *Ibid*.

³⁹⁹ *Ibid*.

⁴⁰⁰ *Ibid* at 36.

4.1.1.3 Profit Maximization Motive, Corporate Control, Bankruptcy, and Competition

This explanation for the cost-savings that result from adopting a P3 approach to infrastructure procurement, is one that is based on “both logic and experience”.⁴⁰¹ The experience-based explanation for cost-savings that occur in P3s but not in conventional public procurements is manifest from the empirical studies discussed at the outset of this chapter.

Logically, private enterprises are motivated to control costs and perform efficiently because of the incidence of private ownership and the resultant motive to maximize profits; because of the existence of a market for corporate control and the threat of bankruptcy; and because of competition. Consider for example, the corporation, the single most important figure in private enterprise. The principal objective of the owners of a publicly traded corporation, the shareholders, is profit maximization through the maximization of the value of their shares.⁴⁰² Corporate law equips shareholders with the means to enforce this objective. They can either exercise their power “to *elect* and *remove* the directors of a corporation to elicit optimal managerial performance or can *divest their shares*”.⁴⁰³ The former in particular is a powerful motivation “for [directors

⁴⁰¹ Murphy, *supra* note 383 at 103.

⁴⁰² Roy Hrab, “Privatization: Experience and Prospects” (Research Paper 22) (February 2004), online: Panel on the Role of Government in Ontario <<http://www.law-lib.utoronto.ca/investing/reports/rp22.pdf>> at 5.

⁴⁰³ *Ibid* [emphasis added]. For the power of shareholders to elect and to remove directors respectively, see e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, ss 106(3), 109(1)-(2). For the power of shareholders to divest their shares, see *Companies Act*, RSA 2000, c C-21, s 74 (“[t]he shares or other interest of any member in a company is personal estate, *transferable* in the manner provided by the articles of the company” [emphasis added]); *Business Corporations Act*, RSO 1990, c B.16, ss 41-42; *Edmonton Country Club Ltd v Case* (1974), [1975] 1 SCR 534 at 549, 44 DLR (3d) 554 (“[t]he right of a shareholder to transfer his shares is undoubtedly one of the incidents of share ownership, assured by *The Companies Act*” [emphasis in original]).

and] managers to operate efficiently in order to preserve their employment”.⁴⁰⁴ In addition, the shareholders can “structure compensation payments to employees based on market outcomes” and this also can serve to induce optimal performance.⁴⁰⁵ Finally, this selfsame objective of maximizing share values, and the positive pressure it exerts on directors and management, necessitates the “active pursuit and retention of qualified staff”.⁴⁰⁶

The existence of a market for corporate control – the potential for private corporations or large shareholdings in such corporations “to be bought and sold”, as well as “the threat of hostile takeover or bankruptcy” – is another powerful incentive for efficient management.⁴⁰⁷ Whether it be stock trading, hostile takeover, or bankruptcy, “[p]rofit levels and the value of the shares” of a corporation are at the heart of “the market for corporate control”.⁴⁰⁸ This is because, “[a] takeover of a company [for example] implies that an individual or organization believes that the company can be managed more efficiently, indicating that present management is performing sub-optimally and should be replaced”.⁴⁰⁹ Therefore, the threat of “hostile takeover provides incentives for managers to operate... [the corporation] as efficiently as possible in order to maximize shareholder return and retain their jobs”.⁴¹⁰ Similarly, the threat of bankruptcy, which is indicative of a diminution of “the market value of a firm’s assets...below the

⁴⁰⁴ Hrab, *supra* note 402.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid* at 5-6.

⁴¹⁰ *Ibid* at 6.

value of its outstanding liabilities”,⁴¹¹ will compel a corporation’s creditors and shareholders “to monitor management decisions”, and motivate managers “to ensure that the... [corporation] produces products that consumers want to purchase”.⁴¹² In addition, any “decrease in share value hinders the ability of the firm to raise capital through additional equity offerings, raising the potential of the ... [corporation] being taken over or failing via bankruptcy... [which in turn threatens] the future employment of management [and directors]”.⁴¹³ All considered, the existence of a market for corporate control – be it via stock trading or takeover – as well as the ever-present threat of bankruptcy is a veritable incentive for efficiency and cost-effectiveness.

Competition equally acts as a powerful motivation for efficiency. This is seen in “the generally held belief that the market discipline provided by competition between [private] firms is conducive to an organization that is customer oriented, efficient, technologically superior and better able and willing to adapt to change”.⁴¹⁴ This “competition effect” brings about efficiency, “as firms seek to lower costs in order to offer a lower price to consumers than competitors and gain market control... [and] may give rise to enhanced product quality and innovations in production methods”.⁴¹⁵ In addition, “the competitive environment of the private sector gives firms incentives to develop and make use of specialized skills, expertise and technological innovation in order to remain in the market”.⁴¹⁶

⁴¹¹ John Vickers & George Yarrow, *Privatization: An Economic Analysis* (Cambridge, Mass: MIT Press, 1988) at 24.

⁴¹² Hrab, *supra* note 402 at 6.

⁴¹³ *Ibid* at 5.

⁴¹⁴ *Ibid* at 8.

⁴¹⁵ *Ibid*.

⁴¹⁶ *Ibid*.

Antagonists of private enterprise might argue that the efficiency gains of competition, just described, may over time diminish when market control is achieved and a private monopoly emerges. However, “private monopoly does not necessarily imply inefficient production”⁴¹⁷ or the lowering of service standards. This is because the freedom of entry into an industry, along with the prospect of gaining “market control through offering lower prices” and higher quality, can actually incentivize “a private monopoly...[to operate] efficiently in order to *deter* entry” by potential competitors.⁴¹⁸ Additionally, in the case of a private monopoly emerging as a result of a P3, as will be shown later in this chapter, the P3 contract will usually spell out a system of penalties or diminution of payments for faltering service standards and/or quality levels. This form of sanctions will effectively check any tendency on the part of the private sector partner or its contractor to lower standards.

As the key players in any given P3, private sector partners bring the discipline instilled by all of the aforementioned interrelated catalysts – the profit maximizing motive, the existence of a market for corporate control and the threat of bankruptcy, and competition – as well as the “efficiency-maximizing behaviour” they engender to P3 procurements, resulting in overall efficiency and cost-effectiveness.⁴¹⁹ In contrast, “efficiency and cost-effectiveness are not hallmarks of public-sector service delivery”.⁴²⁰ This is because public sector agencies are not subject to the market discipline induced by

⁴¹⁷ *Ibid* at 9.

⁴¹⁸ *Ibid* at 8-9 [emphasis added].

⁴¹⁹ Murphy, *supra* note 383 at 103.

⁴²⁰ *Ibid*.

the three catalysts for efficiency and cost-effectiveness discussed above.⁴²¹ Public sector agencies are not typically driven by the motive to maximize profit.⁴²² At all material times, ownership remains vested in the state, and there is consequently “no market for corporate control...[or the threat] of bankruptcy”.⁴²³ And such agencies “rarely face competition”.⁴²⁴ For these reasons, public sector agencies are not incentivized “to perform efficiently and provide quality goods and services”.⁴²⁵ Public sector agencies bring this overriding attitude of complacency that they have grown accustomed to into conventional public procurements.

4.1.2 Innovation

PPPs are intrinsically conducive to innovation. This point was made earlier in Chapter Two when ‘focus on “output specifications”’ was identified as a distinguishing feature of P3s.⁴²⁶ In sharp contrast to the widespread use of “prescriptive contracts”⁴²⁷ in conventional public procurement of infrastructure services whereby “the public sector owner specifies the exact inputs required for the facility”,⁴²⁸ P3s typically employ the instrumentality of “[p]erformance-based contracts”.⁴²⁹ These are detailed contracts in which the public sector owner, party to a P3, stipulates “deliverables in terms of the outputs...desired by end users rather than prescribing specific inputs or materials to be

⁴²¹ Hrab, *supra* note 402 at 6.

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ Murphy, *supra* note 383 at 103. See also Hrab, *supra* note 402 at 9-10 (“many SOEs [state-owned enterprises] are legislated monopolies [precluding entry into the industry] or face no comparable private sector competitor...[In] situations where SOEs compete with private sector firms...the absence of the profit motive in government operations will likely limit the magnitude of efficiency gains that can be realized”).

⁴²⁵ *Ibid* at 6.

⁴²⁶ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 14. See generally 17-18, above.

⁴²⁷ Iacobacci, *supra* note 56 at 32.

⁴²⁸ *Ibid* at 3 (table 1).

⁴²⁹ *Ibid* at 32.

used in delivering the outputs”.⁴³⁰ In addition, such contracts include robust provisions that prescribe minimum service standards and quality levels expected of the private sector service provider, and a pragmatic system of enforcement consisting of a combination of periodic inspections to ascertain compliance levels as well as “penalties (i.e. deductions from their monthly service payments) [for non-compliance] or bonuses [that reward and stimulate further performance and compliance]”.⁴³¹ By reason of their emphasis on output and outcomes rather than inputs and methods,⁴³² as well as the built-in payment mechanisms which utilize the carrot and stick approach to effectively guarantee performance, the private sector partner has both the freedom “to put forward the best...[strategy] for meeting...output specifications”⁴³³ and the motivation to innovate in efficiently and qualitatively meeting those specifications.⁴³⁴

The P3’s intrinsic impetus for innovation just discussed represents one of the major arguments for its use in the procurement of complex, capital-intensive infrastructure services. And one positive contribution of Canadian P3 law, policy and practice in this area has been the entrenchment and legitimization of the unique payment mechanisms that sustain the use of output/performance-based contracts in P3s, and ultimately guarantee a level of innovation in P3 procurements that is virtually nonexistent in conventional public procurements. For example, the *Transportation Investment Act*, in spelling out the mandatory provisions that must be incorporated in P3 agreements that

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² Murphy, *supra* note 383 at 104.

⁴³³ Iacobacci, *supra* note 56 at 3 (table 1).

⁴³⁴ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 14.

regulate concession highways in British Columbia, provides that such agreements must set out such payment arrangements as:

(i) “payment by the government or any other contracting party of an amount or amounts *based on the performance by the concessionaire of any or all of its obligations under the concession agreement*”;⁴³⁵ and

(ii) “payment by the government or any other contracting party of an amount or amounts *based on one or both of use and availability of the concession highway*”.⁴³⁶

As to performance standards, the same Act stipulates that such P3 agreements must require the concessionaire, in the performance of its obligations or exercise of its rights in relation to the concession highway, “*to meet or exceed the standards applicable to a comparable public highway, or, if higher standards are referred to in the concession agreement, meet or exceed those specified standards, including without limiting this, design, construction, safety, maintenance and signage standards*”.⁴³⁷ Also to be mandatorily included in such agreements are provisions that “require that the concessionaire not close the concession highway except for so long as, and to the extent that, closure is necessary to permit maintenance or construction,...is necessary for public safety, or...is required by the minister under the *Transportation Act*”.⁴³⁸ Lastly, as an added layer of security for the meeting of such performance standards, the *Transportation Investment Act* provides that P3 agreements that regulate concession highways must stipulate “requirements for insurance, bonds, including performance

⁴³⁵ *Transportation Investment Act, supra* note 138, s 3(c.1)(i) [emphasis added].

⁴³⁶ *Ibid.*, s 3(c.1)(ii) [emphasis added].

⁴³⁷ *Ibid.*, s 3(f) [emphasis added].

⁴³⁸ *Ibid.*, s 3(g).

bonds and labour and material payment bonds, securities, indemnities and guarantees that the concessionaire must provide in connection with the concession highway”.⁴³⁹

The Act facilitates monitoring and periodic inspection of the level of compliance by the private sector partner with prescribed minimum standards, by compulsorily requiring P3 agreements to “set out any reporting and public information requirements and any record retention requirements that the concessionaire must meet, and specify the records or classes of records, if any, respecting the maintenance or safety of the concession highway that the concessionaire must, on request, make available”.⁴⁴⁰

Recognizing on the one hand, that the use of penalties and drawbacks is pivotal to the enforcement of the performance standards prescribed in P3 output/performance-based contracts, and on the other that the judicial interpretation and treatment of penalties usually raises a particularly thorny legal issue across jurisdictions;⁴⁴¹ the *Transportation Investment Act* expressly provides that-

⁴³⁹ *Ibid*, s 3(m).

⁴⁴⁰ *Ibid*, s 3(k).

⁴⁴¹ See Delmon & Delmon, *supra* note 10, ch 3 at 15 (“[s]ome jurisdictions allow them [penalties] so long as they are reasonable, others require them to be a genuine [pre-estimate] of the damage likely to be suffered, for example, in England. Still others allow the court to modify such penalties in order to achieve reasonableness, in particular where one of the counterparties is a public entity”. A sampling of the legal issues that frequently arise in connection with “penalties”, “sanctions” and “bonuses” include the following:

- (i) “What limitations apply to the government’s ability to pay bonuses to the project company for good performance?
– Do the courts have a right to revise the level of bonuses agreed in a contract?”
- (ii) “Do penalties charged need to have some specific relationship with the level of actual damages to be incurred?”
- (iii) Do the courts have a right to revise the level of penalties or sanctions agreed in a contract?”).

For a detailed discussion of the treatment of penalties across jurisdictions, see Thomas Benes Felsberg et al, “Brazil” in Delmon & Delmon, *supra* note 10, ch 4, 1 at 34-35; F Patricia Núñez, F Sebastián Quijada & Carolina Benito Kelley, “Chile” in Delmon & Delmon, *supra* note 10, ch 5, 1 at 16-17; Matthew McKee &

A provision in a concession agreement that stipulates a drawback or penalty for failure to perform a condition of the concession agreement or to fulfil a covenant or promise in the concession agreement *must not be construed as punitive, but as importing an assessment by mutual consent of the damages caused by the failure.*⁴⁴²

This provision effectively insulates penalty clauses in P3 agreements from judicial interpretative interference and preserves this most veritable of enforcement devices from being whittled down.

In concluding the discussion of the impact of Canadian law, policy and P3 practice on the arguments in favour of the use of P3s in procuring capital-intensive infrastructure services, it is worthy of note that all of the P3 projects assessed in the Conference Board report discussed much earlier in the chapter were “executed under the direction or guidance” of some of the PPP units discussed in Chapter Three.⁴⁴³ The fact that P3 projects undertaken under the auspices of these legal institutions furnished empirical evidence of the cost and time certainty and savings that result from P3s is in itself at least anecdotal evidence of the positive impact of Canadian law, policy and P3

Aldo Settimio Boni de Nobili, “China” in Delmon & Delmon, *supra* note 10, ch 6, 1 at 33-34; Ahmed El Sharkawy & Salma Shams El-Din, “Egypt” in Delmon & Delmon, *supra* note 10, ch 7, 1 at 12; Cyril Shroff & Alice George, “India” in Delmon & Delmon, *supra* note 10, ch 8, 1 at 31-32; Adedolapo Akinrele, Zelda Odidison & Jumoke Onigbogi, “Nigeria” in Delmon & Delmon, *supra* note 10, ch 9, 1 at 26-27; Luminița Popa, Iuliana Craiciu & Marius Bârlădeanu, “Romania” in Delmon & Delmon, *supra* note 10, ch 10, 1 at 31-32; Andrei Baev et al, “Russia” in Delmon & Delmon, *supra* note 10, ch 11, 1 at 42-43; Young Kyun Cho & Seong Soo Kim, “South Korea” in Delmon & Delmon, *supra* note 10, ch 12, 1 at 16; Wilbert Basilius Kapinga, Joy Hadji Alliy & Nasra Hassan, “Tanzania” in Delmon & Delmon, *supra* note 10, ch 13, 1 at 24-25; Tolga Danişman et al, “Turkey” in Delmon & Delmon, *supra* note 10, ch 14, 1 at 42-45; Joseph B Luswata et al, “Uganda” in Delmon & Delmon, *supra* note 10, ch 15, 1 at 22; David Wadham & Mhairi Main Garcia, “United Arab Emirates” in Delmon & Delmon, *supra* note 10, ch 16, 1 at 29-30; Allan T Marks et al, “United States” in Delmon & Delmon, *supra* note 10, ch 17, 1 at 48-49.

⁴⁴² *Transportation Investment Act*, *supra* note 138, s 5 [emphasis added].

⁴⁴³ Iacobacci, *supra* note 56 at i-ii.

practice on the arguments *in favour of* procuring capital-intensive infrastructure services via P3s.

4.2 RESPONDING TO KEY ARGUMENTS AGAINST P3S

Murphy has succinctly articulated the major arguments proffered against the use of P3s as an alternative procurement approach. They may be summarized as follows:

- 1) P3 procurements are costlier than conventional public procurements;
- 2) Over time the private sector will lower its quality of service and design in favour of maximizing profit;
- 3) Transparency and accountability are not hallmarks of P3 procurements;
- 4) P3s pose a threat to workers' interests, and
- 5) P3s erode public sector flexibility.⁴⁴⁴

The crux of the first of the arguments enumerated above is that P3s cost more than conventional public procurements.⁴⁴⁵ The relatively higher costs, it is argued, are attributable to “the higher cost of private borrowing; the need to make a profit and associated other potential operational inefficiencies; and higher procurements costs”.⁴⁴⁶

⁴⁴⁴ Murphy, *supra* note 383 at 104. See also CUPE Research Branch, *A CUPE Backgrounder on Urban Infrastructure* (np: no publisher, 2004) at 17-22; CUPE Research – Alberta Region, *The Case against Public-Private Partnership (P3) Financing for Public Infrastructure: Recent Research* (np: Canadian Union of Public Employees, 2008) at 2-5; Toby Sanger & Corina Crawley, “The Problem with Public-Private Partnerships: Economic Crisis Exposes the High Costs and Risks of P3s”, *The CCPA Monitor* (1 April 2009), online: CCPA <<http://www.policyalternatives.ca/publications/monitor/problem-public-private-partnerships>>.

⁴⁴⁵ Murphy, *supra* note 383 at 104.

⁴⁴⁶ Lewis Auerbach, *Issues Raised by Public Private Partnerships in Ontario's Hospital Sector* (np: no publisher, 2002) at 19, online: Canadian Union of Public Employees <<http://cupe.ca/updir/P3s-in%20Ont%20Hospitals.pdf>>.

As to the higher cost of private borrowing, Iacobacci observes that “[t]he private financing used for P3 projects is more expensive than the public financing (i.e., government bonds) used for conventional procurements”.⁴⁴⁷ And elsewhere that-

[T]he cost of bank debt is usually at least 100 basic points higher than equivalent-term Canadian Treasury bills...When the public sector relies on financing obtained by the P3 partner, it pays for the higher cost of private financing through service payments to the P3 partner”.⁴⁴⁸

The relatively higher procurement costs, on the other hand, result from the “additional due diligence” which arranging private financing and “risk assessment and allocation” entail;⁴⁴⁹ as well as from the bidding process itself.⁴⁵⁰

Clearly, this initial argument does not fall squarely within the ambit of the present research because strictly speaking, this particular concern does not raise any issue of a clear-cut legal nature; neither can it be addressed by direct reference to Canadian law or policy. Be that as it may, it may be said in passing and by way of response that the supposed ‘higher costs’ of P3s are “more than offset” by such tangible gains as access to private capital; cost and time certainty and savings; innovation, and efficiency-related benefits associated with risk-transfer and such contractual devices as performance standards, penalties and bonuses.⁴⁵¹

⁴⁴⁷ Iacobacci, *supra* note 56 at ii.

⁴⁴⁸ *Ibid* at 27.

⁴⁴⁹ *Ibid* at 28.

⁴⁵⁰ Auerbach, *supra* note 446 at 25. See also John Loxley, “The Hidden Expenses of Public-Private Partnerships”, *The Globe and Mail* (27 June 2000) B16.

⁴⁵¹ Murphy, *supra* note 383 at 104.

Any comparison between P3s and conventional public procurements that focuses solely on “the cost of money” is of necessity inaccurate.⁴⁵² An accurate comparative assessment of the two procurement approaches must necessarily consider, as the foremost criterion, “the net benefit, taking into account all factors”.⁴⁵³

The ‘higher cost’ refrain also erroneously leaves out of the equation altogether the issue of risk.⁴⁵⁴ “Lower interest rates for public sector borrowing exist because they are assumed to be risk free, which, of course they are not. Risks exist as long as there are potential problems with cost overruns, scheduling delays, and so on – problems that are common with public sector projects and lead to higher taxes in the future”.⁴⁵⁵ The risk-free illusion of conventional public procurement “is only achieved because of the public sectors’ ability to increase taxes if problems arise with the project. As such, the potentially sizeable costs associated with unforeseen events are effectively underwritten by the taxpayer”.⁴⁵⁶ The added costs held out by P3 critics to be embodied in service payments to the P3 partner may properly be viewed as “an insurance premium to protect against the risk of higher costs”⁴⁵⁷ that would otherwise have resulted from missed deadlines, cost overruns and other inefficiencies earlier demonstrated to be typical of conventional public procurements, where the practice is to “[self-insure] at a zero premium cost but at a potentially high failure cost”.⁴⁵⁸ In a P3, such risk – “and potential costs – can be transferred to the private sector, but only when compensated by an

⁴⁵² *Ibid* at 104-105.

⁴⁵³ *Ibid* at 105.

⁴⁵⁴ *Ibid* at 104.

⁴⁵⁵ Harry Kitchen, *A State of Disrepair: How to Fix the Financing of Municipal Infrastructure in Canada* (Toronto: CD Howe Institute, 2006) at 11.

⁴⁵⁶ Burleton, *supra* note 254 at 13.

⁴⁵⁷ Murphy, *supra* note 383 at 105.

⁴⁵⁸ *Ibid*.

appropriate return”.⁴⁵⁹ The situation is comparable to spending a little extra cash to purchase “an extended warranty on a car or any other insurance premium”.⁴⁶⁰

Add to the foregoing, the fact that on a careful analysis, “it is not at all clear that governments can borrow more cheaply...or at a lower cost than the private sector”.⁴⁶¹

⁴⁵⁹ Burleton, *supra* note 254 at 13.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Jean-Etienne de Bettignies & Thomas W Ross, “The Economics of Public-Private Partnerships” (2004) 30:2 Can Pub Pol’y 135 at 146-147

(a comparison between the borrowing rates charged to governments and to private partners is not necessarily comparing apples with apples, as the private borrower is acquiring a put option with its loan and this must cost it something. To see this, assume that because of its very low probability of bankruptcy, the government can borrow at the risk-free rate of interest, say this is 5 percent over 20 years. If a private borrower had an equally low probability of bankruptcy it would also be able to borrow at 5 percent, but in fact over the course of 20 years there is a not-insignificant chance it will be unable to meet its debt obligations. Thus, a loan contract with this private borrower, say at 7 percent, is actually a combination of a loan plus an option to “put” the remaining portion of the debt back to the original lender. The important observation here is that the government does not get this put option when it pays 5 percent, it must repay the loan in full, no matter what. This is not to say that the cost of borrowing has to be identical when we take the put option into account, it is just to point out that the listed rate exaggerates the difference...[Secondly] with a solid, long-term contract from a government buyer a private borrower can most likely secure a very good rate from private lenders. Here the government’s reliability as a buyer substitutes for its reliability as a borrower, with the result that the rate at which the private party can borrow is very low... [Lastly] when we recognize that governments, particularly subnational (e.g., provincial) ones, can get themselves into serious financial trouble and even possibly face bankruptcy, we know that they will often not be able to borrow at the risk-free rate. Importantly, they may face an upward-sloping supply of capital curve such that the more they borrow the higher the interest they must pay. For example, as a provincial government increases borrowing it runs the risk of having its debt-rating downgraded and having to pay higher rates on all of its borrowing. The implication is a familiar one from monopsony theory – the cost of borrowing for the next project is higher than just the interest rate you pay for that project if it also increases the rate you pay for all your other borrowing. For a government borrowing considerable sums of money regularly, the chance of a downgrade leading to the need to pay even a quarter percentage point more is a very serious matter. Thus, we can have a situation in which even if the interest rate charged to the government borrowing for the next project is lower than that which a private sector partner would have to pay, the [‘full’] marginal cost to the government could be much higher).

Presently, the other arguments proffered against the use of P3s will be addressed, in the light of Canadian law, policy and P3 practice.

4.2.1 Diminished Quality of Design and Service over Time

The second major argument raised against the use of P3s is that the private sector's profit motive will eventually lead to diminished quality of service and/or design.⁴⁶² In this connection, it has been argued that by their very structure, P3s incentivize the private sector to “reduce costs” and “optimize revenues”, and here is the point, “*even if this impacts negatively on levels of service; and...causes the project ultimately to cost more than it would have with public ownership and normal procurement processes [i.e. conventional public procurement]*”.⁴⁶³

Quite to the contrary, rather than lower service or design quality, the profit maximizing motive of the private sector – in tandem with the existence of a market for corporate control, the threat of bankruptcy, and competition within and for the market – is in fact a powerful driver of efficiency, which is often reflected in *higher service and design quality* and *lower costs*. This efficiency-maximizing pull exerted by the private sector's profit motive and other related catalysts was demonstrated earlier in the chapter, in the course of the discussion of the third reason for the well-documented cost and time

⁴⁶² Murphy, *supra* note 383 at 107. See also The Ontario Federation of Labour, “Private-Public-Partnerships (P3s) and the Transformation of Government” *OFL Policy Papers* (November 2005), online: The Ontario Federation of Labour <http://www.ofl.ca/uploads/library/policy_papers/P3s.pdf>; CUPE Research Branch, *supra* note 444 at 19; Canadian Union of Public Employees – Ontario Division, *Re-Building Strong Communities with Public Infrastructure: A Submission to the Ontario Ministry of Public Infrastructure Renewal in Response to the Discussion Paper on Infrastructure Financing and Procurement – “Building a Better Tomorrow: Investing in Ontario’s Infrastructure to Deliver Real, Positive Change”* (Ontario: CUPE SCFP, 2004) at 7.

⁴⁶³ Auerbach, *supra* note 446 at 29 [emphasis added].

savings, and low incidence of time and cost overruns inherent in P3 procurements of large infrastructure services.⁴⁶⁴ At the pain of repetition, the simple point here being made is that the “goals” of profit maximization on the one hand and service/design quality on the other hand “are not mutually exclusive”.⁴⁶⁵ If anything, as previously shown, the former induces the latter.

Furthermore, in addition to the foregoing inherent private sector incentives to efficiency, additional incentives and safeguards can be – and in practice usually have been – created contractually or statutorily. Contractually, such incentives and safeguards are introduced by provisions in the P3 contract that stipulate minimum “service and quality standards”,⁴⁶⁶ bonus clauses, “[p]enalty clauses and, in the extreme case, the right to [unilaterally and without liability] terminate the contract”.⁴⁶⁷ In this regard, as highlighted earlier, the *Transportation Investment Act* mandates the inclusion of provisions that stipulate minimum service and quality standards in P3 agreements concerning concession highways.⁴⁶⁸ Additionally, performance-related penalty and bonus clauses are mandatory provisions in such agreements;⁴⁶⁹ and the validity and enforceability of penalty clauses is guaranteed by statutory provisions that preclude their

⁴⁶⁴ See 78-82, above.

⁴⁶⁵ Burleton, *supra* note 254 at 16.

⁴⁶⁶ Murphy, *supra* note 383 at 107.

⁴⁶⁷ *Ibid* at 107. For example on April 27, 2006, the Ontario government announced its decision not to renew its five-year contract with Management and Training Corporation Canada (MTCC) under which MTCC was to operate the Central North Correctional Centre in Penetanguishene. The reason cited was that “[a]fter five years, there [was] no appreciable benefit from the private operation of the Central North Correctional Centre...[when] compared with the [identically designed] publicly operated Central East Correctional Centre in Kawartha Lakes”. See Ontario, Ministry of Community Safety and Correctional Services, Press Release, “Central North Correctional Centre Transferring to Public Sector Operation: Private Jail Operation Contract Not Renewed” (27 April 2006) online: Irish Penal Reform Trust <<http://www.iprt.ie/contents/496>>. See also Murphy, *supra* note 383 at 108 (the prison was returned “to the public sector *penalty-free*”) [emphasis added].

⁴⁶⁸ See *Transportation Investment Act*, *supra* note 138, s 3(d), (f)-(g).

⁴⁶⁹ *Ibid*, s 3(c.1).

interpretation as “punitive”.⁴⁷⁰ The aforesaid contractual devices, equip the public sector to stipulate and enforce the quality of performance expected from its private-sector partners,⁴⁷¹ and constitute a veritable check to the lowering of service and design quality.⁴⁷² In those circumstances, the profits of the private-sector partner materialize “not through service quality reductions”,⁴⁷³ as contended, but because of onerous contractual provisions that necessitate the introduction of “sound business techniques and practices, ranging from improvements in management efficiency, application of new technologies, cash flow management, personnel development and shared resources”.⁴⁷⁴

Statutorily, these same incentives and safeguards can be introduced by provisions that prescribe optimal levels of service from the private-sector P3 participants,⁴⁷⁵ provisions that legitimize the use of penalty clauses, and provisions that preserve the government’s power to unilaterally terminate the P3 agreement without liability, in the event of the private sector partner’s failure to comply with prescribed standards. British Columbia’s *Transportation Investment Act* once again provides an excellent example of the use of these types of statutory devices. As highlighted above, the Act outlines rules that regulate transportation P3s, and in particular provides that a concession agreement must obligate the private-sector operator of a concession highway “to meet or exceed the standards applicable to a comparable public highway...including...design, construction, safety, maintenance and signage standards”.⁴⁷⁶ The *Transportation Investment Act* also

⁴⁷⁰ *Ibid.*, s 5.

⁴⁷¹ Murphy, *supra* note 383 at 107.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ Burleton, *supra* note 254 at 16.

⁴⁷⁵ Murphy, *supra* note 383 at 107-108.

⁴⁷⁶ See *Transportation Investment Act*, *supra* note 138, s 3(f).

preserves the government's power to engage another private-sector partner in relation to the same concession highway, following termination of the P3 agreement with a private-sector partner that was underperforming.⁴⁷⁷

It remains to be said, that in the final analysis, “there is [also] no consistently compelling evidence of lower-quality design or service as a [direct] result of using the P3 model”.⁴⁷⁸

4.2.2 Less Transparency and Accountability

The present argument against P3s stems from the “secrecy”⁴⁷⁹ – better yet, privacy that surrounds P3s, given their contractual nature. It is argued that for this reason, “[t]here is insufficient transparency, accountability and public consultation”.⁴⁸⁰

Proponents of this argument would like to see disclosure of at least the following:

- Comparisons of the cost and non-cost advantages and disadvantages of relevant alternatives with the use of appropriate comparators
 - The RFP [request for proposals]
 - The terms of the contract, if one is awarded
- And if the project proceeds...

⁴⁷⁷ *Ibid*, s 10.

⁴⁷⁸ Murphy, *supra* note 383 at 108 (in support of this conclusion, Murphy cites, among other things the UK National Audit Office “review of nine PFI prisons” which showed that “PFI prisons tended to be more cost-efficient and better than public prisons in areas relating to decency and purposeful activities for prisoners”, and attributes this success to “a combination of clear contractual service standards and effective monitoring of compliance, including, where appropriate, the use of penalties”). See UK, National Audit Office, *The Operational Performance of PFI Prisons: Report by the Comptroller and Auditor General* (HC 700 Session 2002-2003) (London, UK: National Audit Office, 2003) at 7-16, 21-24, 31, 33. See also Iacobacci, *supra* note 56 at 24-25

(“[o]ne of the benefits of a P3 project that incorporates a service or operating phase is that the P3 partner is required to provide a specified level of service and to [maintain] the facility in a satisfactory condition...[at the pain of] penalties...Anecdotal evidence suggests that there is little basis to the criticism that service standards suffer under a P3 relative to conventional maintenance contracts”).

⁴⁷⁹ Murphy, *supra* note 383 at 108.

⁴⁸⁰ Auerbach, *supra* note 446 at 16.

- An adequate and appropriate monitoring and audit regime
- Assurance of audit and public access to relevant performance and financial information of the private sector partners.⁴⁸¹

The reality is that Canadian P3 law, policy and practice actually fulfil these basic expectations. This is seen in the fact that the specialized P3 agencies established for the major P3 utilizing provinces have adopted tools and practices that incorporate these minimum requirements in their procurement processes. Three such significant tools are “the public-sector comparator [PSC], value-for-money audits and...“best practice” standards for disclosure of information”.⁴⁸² All three have been heralded as “key standards”⁴⁸³ that “allow an adequate sharing of information in a form useful for citizens to hold governments to account on “best value for money” for P3 projects”.⁴⁸⁴

The PSC for one is a straightforward conception and works as follows:

[G]ather a realistic and detailed assessment of all of the costs of the proposed project, including delay and budgetary risks, inflation effects, life-cycle costs, finance charges, operating costs, etc., and, based on a net present value, derive a public-sector cost of the project against which the price of a P3 model of delivering the same project can be compared.⁴⁸⁵

⁴⁸¹ *Ibid* at 16-17. See also Tim Gosling, *Openness Survey Paper* (London: Institute for Public Policy Research, 2004) 4-13, 27-28; Duncan Cartlidge, *Public Private Partnerships in Construction* (London: Taylor & Francis, 2006) at 79-88; Boase, *supra* note 20 at 88-90.

⁴⁸² Murphy, *supra* note 383 at 109 [quotes in original].

⁴⁸³ *Ibid* [emphasis added].

⁴⁸⁴ *Ibid* [quotes in original].

⁴⁸⁵ *Ibid*. For a more detailed exposition of the definition, usefulness and possible formats of a PSC, see generally Cartlidge, *supra* note 522 at 136, 139-140 (“The PSC may be defined as a hypothetical risk-adjusted cost model, assuming that the public sector is the supplier. It is based on the output specification...that is prepared as part of the PFI [/PPP] procurement process... [and] is a benchmark against which value for money is assessed”).

Partnerships BC “has adopted the PSC model and obligates its use through the three-step procurement process outlined in its Capital Asset Management Framework”.⁴⁸⁶ Infrastructure Ontario has equally embraced the use of the PSC model,⁴⁸⁷ and Alberta’s Treasury Board which houses the provinces’s PPP unit, the Alternative Capital Financing Office, similarly relies heavily on the use of the PSC model for the success of its entire P3 procurement process.⁴⁸⁸

With regard to “value-for-money audits”⁴⁸⁹ – the second ‘key standard’ referred to above⁴⁹⁰ – Partnerships BC and Infrastructure Ontario have taken up the salutary approach of subjecting P3 projects executed under their auspices “to publicly available value-for-money assessments at three critical stages: 1) at the point of selecting an appropriate procurement methodology; 2) at the point of assessing P3 bids; and 3) at appropriate junctures during the concessionary contract”.⁴⁹¹ For example, British Columbia’s Sea-to Sky Highway Improvement project was repeatedly subjected to value-for-money assessments first by Partnerships BC and later by the provincial auditor general.⁴⁹² Similarly, consistent with its disclosure practice of publicizing value-for-

⁴⁸⁶ Murphy, *supra* note 383 at 109. See also Government of British Columbia, *Framework Guidelines*, *supra* note 230 at 39-40.

⁴⁸⁷ See Infrastructure Ontario, *Assessing Value for Money* (Toronto: Queen’s Printer, 2007) at 5-14; Infrastructure Ontario, *Value for Money Assessment: Hôpital Montfort Expansion and Redevelopment Project* (Toronto: Queen’s Printer, 2007) at 5, 10-11, online: Infrastructure Ontario <<http://www.infrastructureontario.ca/en/projects/health/montfort/files/Montfort%20Value%20for%20Money%20-%20Final.pdf>>.

⁴⁸⁸ See Government of Alberta, Infrastructure and Transportation, *Assessment Process*, *supra* note 184 at 14-18; Government of Alberta, Infrastructure and Transportation, *Procurement Process*, *supra* note 184 at 5.

⁴⁸⁹ Murphy, *supra* note 383 at 109.

⁴⁹⁰ See text accompanying notes 482-484.

⁴⁹¹ Murphy, *supra* note 383 at 109.

⁴⁹² *Ibid* at 110. See also Partnerships British Columbia, *Project Report: Achieving Value for Money Sea-to-Sky Highway Improvement Project* (Vancouver: Partnerships BC, 2005) at 17-24, online: Partnerships British Columbia <<http://www.partnershipsbc.ca/pdf/SeatoSkyFinal.pdf>>.

money reports for each P3 project within six months of financial close,⁴⁹³ Infrastructure Ontario saw to it that the “Hôpital Montfort P3 project...was reviewed on a value-for-money basis, and the results were posted on [its] web site”.⁴⁹⁴

Lastly, the specialized provincial P3 agencies have embraced the aforementioned “best practice” disclosure standards.⁴⁹⁵ For example, Partnerships BC has articulated a balanced policy of “[disclosing] as much as possible in the public interest without jeopardizing the ability of the government to generate the best value agreement for taxpayers...while protecting commercially sensitive information, so that private companies will continue to participate in [its] market”.⁴⁹⁶ In a similar vein, in a document outlining its AFP disclosure practices,⁴⁹⁷ Infrastructure Ontario announced its commitment to “striking a balance between acting in the public interest, maintaining accountability and ensuring that all processes are fair, transparent and efficient”.⁴⁹⁸ It “will disclose key project documents on its web site,...[for example] RFPs, final project agreements and value for money reports...[but not commercially sensitive information as] determined with reference to the principles under FIPPA [*Freedom of Information and Protection of Privacy Act, 1990*]”.⁴⁹⁹

⁴⁹³ Infrastructure Ontario, “Overview of Infrastructure Ontario’s Disclosure Practices”, online: Infrastructure Ontario <http://www1.infrastructureontario.ca/en/about/governance/disclosure_overview.asp> [Infrastructure Ontario, “Disclosure Practices”].

⁴⁹⁴ Murphy, *supra* note 383 at 110.

⁴⁹⁵ See text accompanying note 482.

⁴⁹⁶ Partnerships British Columbia, *Procurement Related Disclosure for Public Private Partnerships* (Vancouver: Partnerships BC, 2007) at 2, online: British Columbia <http://www.partnershipsbcc.ca/pdf/psc-disclosure_guidance-25-apr-07.pdf>.

⁴⁹⁷ Infrastructure Ontario, “Disclosure Practices” *supra*, note 493.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

A combination of each of the three measures just highlighted – the PSC, value-for-money assessments and best-practice disclosure standards – effectively addresses “most of the transparency and accountability concerns related to the project award phase”.⁵⁰⁰ In practice, “the continued monitoring of the project *during the concessionary period* and the performance of the private-sector partner in meeting existing and evolving service standards”,⁵⁰¹ is achieved through the combined instrumentality of carefully worded contractual clauses and the previously discussed devices for securing compliance – *penalties* and *bonuses*. “In a well-drafted P3 concessionary contract, the private sector is [affixed with responsibility] for recording and disclosing performance failures and actively monitoring performance across all services. Significant penalties attach to the failure to carry out such *monitoring* or *disclosure*”⁵⁰² – the selfsame penalties that, as previously highlighted, effectively ensure compliance with contractually stipulated service and quality levels. An added layer of concession-phase monitoring is introduced by the presence of private project financing in most P3 procurements. The lenders usually

⁵⁰⁰ Murphy, *supra* note 383 at 110.

⁵⁰¹ *Ibid* [emphasis added].

⁵⁰² *Ibid* [emphasis added]. This responsibility has also been statutorily introduced. For example, the *Transportation Investment Act* provides that:

At any time, the minister may, after giving reasonable notice to a concessionaire or the billing organization [employed to invoice and or collect tolls], require that the *accounts* and *other records* of the concessionaire or billing organization, as the case may be, that relate to any of the following be audited by an auditor satisfactory to the minister:

- (a) the charging or collection of tolls;
- (b) the collection, use and disclosure by the concessionaire or billing organization of personal information collected under section 25 (2) (a), (b), (c) or (d);
- (b.1) *the basis on which any amount is or may become payable to the concessionaire under a payment arrangement contemplated by section 3(c.1)* [i.e. performance-related bonuses or penalties];
- (c) any other rights or obligations of the concessionaire under the concession agreement or this Act.

See *Transportation Investment Act*, *supra* note 138, s 9 [emphasis added]. In order to be in a position to furnish such “accounts” and “other records” to the chosen auditor upon demand, the private-sector partner and or its agents or contractors are duty-bound to keep accounts and other records in the first place.

have considerable funding at stake, and as such, each hire a full complement of “commercial, technical, and legal due diligence advisors on each project...[and] continue to monitor the progress of the project *after financial close*”.⁵⁰³

A further transparency/accountability-related concern “that is often raised against P3s”⁵⁰⁴ relates to the problem of “[p]otential bidders lobbying public officials during the bidding process”,⁵⁰⁵ as this is perceived – and rightly so – as capable of impugning “the fairness of the bidding process”.⁵⁰⁶ This, as with each of the other concerns raised, is easily dealt with, in this case, “through anti-lobbying policies that disqualify bidders who attempt to lobby public officials”.⁵⁰⁷ For example, “Infrastructure Ontario’s standard form request for proposals includes a prohibition against lobbying public officials and Infrastructure Ontario to influence the bid process. A breach of this... [prohibition] can lead to disqualification of a bidder’s proposal”.⁵⁰⁸

In a related development, some Canadian P3 legislation address the issue of unsolicited bids. Specifically, section 6 of Québec’s *Regulation respecting government concession contracts*,⁵⁰⁹ which was made pursuant to section 23 of its *Public Contracting Act* expressly provides that “[n]o concession contract may be entered into unless tenders have been called for, except where only one agent [i.e. prospective private-sector party] is

⁵⁰³ Iacobacci, *supra*, note 56 at 37 [emphasis added].

⁵⁰⁴ Murphy, *supra* note 383 at 111.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ RRQ 1981, c A-6, r 6 [*Public Contracting Regulation*].

available in which case the authorization of the Conseil du trésor is required”.⁵¹⁰ The Regulation then proceeds to set out a detailed procedure for the making of calls for, and the receipt and treatment of tenders.⁵¹¹ Earlier, in Chapter Three, the equally detailed provisions of the *Public Contracting Act* that imbue Québec’s P3 tendering and procurement processes with fairness and transparency were highlighted.⁵¹² All of these provisions put together ensure for Québec P3s the required level of disclosure, transparency, fairness and accountability that P3 critics argue for.⁵¹³

In the final analysis, contrary to the contentions of some P3 opponents, existing and available contractual, legal and policy measures guarantee the accountability and transparency of P3 procurements, subject to generally acceptable standards of confidentiality in the case of commercially sensitive information.

4.2.3 Threat to Workers’ Rights

From the most vociferous of critics of P3s, the Canadian Union of Public Employees (CUPE), comes the criticism that P3s are characterized by “high [employee] turnover” and “reduced wages”.⁵¹⁴ These weaknesses, they argue “invariably result in reduced service as a result of reduced staff complements”.⁵¹⁵

⁵¹⁰ *Ibid*, s 6.

⁵¹¹ *Ibid*, ss 7-17.

⁵¹² See 38-39, above. See also *Public Contracting Act*, *supra* note 167, ss 2, 10-12, 18-20, 22.

⁵¹³ Regarding disclosure, for example, the *Public Contracting Act* requires a public body to “publish information on the contracts it has entered into which involve an expenditure over \$25,000”. See *Public Contracting Act*, *ibid*, s 22 [emphasis added].

⁵¹⁴ CUPE Research Branch, *supra* note 444 at 18-20.

⁵¹⁵ Murphy, *supra* note 383 at 111.

The merit of this contention becomes dubious in the face of “the general practice in most jurisdictions [whereby] the private sector is obligated to offer employment to all displaced public-sector employees on the same terms and conditions” as their previous employment.⁵¹⁶ As a specific example, in practice, “Ontario P3 deals include provisions obligating the private sector to hire public-sector employees on the same terms and conditions as outlined by any existing collective agreement or employment contract”.⁵¹⁷ Furthermore, “even in the absence of a successor employer obligation, there is no compelling evidence of large job losses as a [*direct*] result of moving to a P3”.⁵¹⁸ On the other hand and quite significantly, Burleton cites a 2001 United States Department of Labour study “which examined partnerships in 34 cities and countries, [and] found that virtually all affected public employees were either hired by private contractors in order to benefit from their institutional knowledge and experience or transferred to other government positions”.⁵¹⁹ He adds that “[i]n the cases where there have been layoffs, these job cuts have usually occurred through attrition”.⁵²⁰ Hence, while it is common, “[w]hen a private sector partner takes on the responsibility of delivering a public service, [for] concerns...[to] be raised about the potential for the company to lay-off government employees, cut wages and reduce pension entitlements and other benefits”,⁵²¹ for the patent lack of supporting evidence, empirical or otherwise, of such concerns actually crystallizing on a significantly widespread scale⁵²² – even in the CUPE’s foremost

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ Burleton, *supra* note 254 at 16.

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² E.g. actual instances of such job, wage or benefit cuts in such statistically significant amounts as would lend overwhelming support to the contention presently under review; as opposed to unsubstantiated, vague and specious assertions that are not verifiable and accordingly smack of speculation, such as: “[h]igh

articulation of its resistance to P3s⁵²³ – the argument that P3s by their very nature threaten workers’ rights must be relegated to the realm of rhetoric.

4.2.4 Erosion of Public Policy Flexibility

From a legal perspective, the most significant prong of the present argument against P3s is the perceived “threat of trade repercussions as a result of private-sector involvement in previously publicly delivered services”.⁵²⁴ Proponents of this aspect of the argument essentially theorize that the participation of the private sector in “the delivery of public services”,⁵²⁵ coupled with “international trade disciplines concerning foreign investment and services”,⁵²⁶ could potentially open the floodgates to an avalanche of “foreign investor claims” under trade agreements such as the North American Free Trade Agreement (*NAFTA*),⁵²⁷ to which Canada is a party.⁵²⁸ This situation, they contend, would have the effect of “limit[ing] the range of public choices available to government

turnover is *common with P3s*. Because *private sector support services pay lower wages than public sector support services*, private sector employees are *more likely to leave their jobs...Reduced wages are the norm in P3 operations*. Private contractors *usually* pay their workers much less than public employers”. See CUPE Research Branch, *supra* note 444 at 19 [emphasis added].

⁵²³ i.e. CUPE Research Branch, *ibid*.

⁵²⁴ Murphy, *supra* note 383 at 112. The other prong of this argument is that “reduced expenditure choices” and “reduced service and policy choice options” result from the “long-term contractual commitments” involved in P3 arrangements; and these results, in turn, erode public policy flexibility. However, these supposed hindrances to public policy flexibility are easily eliminated “through careful drafting of the P3 contract” to include “a cancellation clause” or other “break options...that would allow the public sector to terminate a P3 contract at specific points and pay predetermined levels of compensation to the private sector”. See generally Murphy, *supra* note 383 at 112, 114.

⁵²⁵ *Ibid* at 115.

⁵²⁶ Steven Shrybman, *Public-Private Partnerships: Assessing the Risks Associated with International Investment, and Services Treaties* (np: no publisher, 2002) at 1 [Shrybman, *Assessing the Risks*].

⁵²⁷ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*].

⁵²⁸ Shrybman, *Assessing the Risks*, *supra* note 526 at 1, 2, 11-22. See also Steven Shrybman, *A Legal Opinion Concerning the Potential Impact of International Trade Disciplines on Proposals to Establish a Public-Private Partnership to Design, Build and Operate a Water Filtration Plant in the Seymour Reservoir Prepared for the Canadian Union of Public Employees* (np: no publisher, 2001) at 22-23.

and *force* private-sector delivery of public goods and services”,⁵²⁹ ultimately thereby “[reducing] the flexibility of the public sector to respond to public demands”.⁵³⁰ Notably, Shrybman conceives of a situation where “a decision by government to terminate...[a] P3 contract, will be characterized as expropriation for the purposes of founding an investor-state claim”, and asserts that, given the “binding international obligations” created under “international trade, investment and services agreements”, P3s open up “*environmental and public-health measures* – from safe drinking-water standards and water pollution controls to the remedial orders of local health officials – *to trade challenges and foreign investor claims*”.⁵³¹ Elsewhere, he has contended that-

[T]he private dispute processes established by international investment treaties have now been invoked to challenge environmental and public health regulation, land-use planning by municipal governments, judgments and jury awards, procurement contracts, and in the broader international context, P3 agreements concerning water and sewer services which have gone sour.⁵³²

Looked at objectively, the foregoing concerns are in reality misgivings about international trade agreements and are misplaced as arguments *against the use of P3s*. They only tangentially involve P3s in so far as P3 opponents contend that “[b]y entering into P3 arrangements, governments and other public agencies expose Public services and indeed public authority to tremendous risk from corporate rights enshrined in international trade agreements”.⁵³³ Be that as it may, on a closer analysis, these concerns are exaggerated. For example, as to the view that the international trade disciplines exerted by trade agreements could be exploited to erode the flexibility of the public sector

⁵²⁹ Murphy, *supra* note 383 at 115 [emphasis added].

⁵³⁰ *Ibid* at 104.

⁵³¹ Shrybman, *Assessing the Risks*, *supra* note 526 at 2 [emphasis added].

⁵³² *Ibid* at 1.

⁵³³ CUPE, “CUPE Talking Trade”, Introduction to Shrybman, *Assessing the Risks*, *ibid*, online: CUPE <cupe.ca/updir/P3s%20&%20Trade%20Agreements%20.doc>.

to respond to public demands, the decision of the *NAFTA* Chapter 11 Tribunal in *Marvin Feldman v Mexico*⁵³⁴ in this regard is instructive. This case had involved, among other things, a claim by the Claimant that the refusal by the Mexican authorities to grant to the Claimant's company excise tax rebates on exported cigarettes amounted to expropriation of the Claimant's investment under article 1110 of the *NAFTA*. In dismissing this head of the claim, the Tribunal held that:

*[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.*⁵³⁵

In addition, article 1114 of *NAFTA* provides that nothing in Chapter 11 “shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter...to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns”. In the same juncture, *NAFTA* entitles the state parties to make unbounded reservations to the application of its provisions.⁵³⁶ Consistent with that right, Canada has reserved the right to take measures with respect to “the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child

⁵³⁴ (2002), 18 ICSID Rev 488 (International Centre for Settlement of Investment Disputes), (Arbitrators: Prof Konstantinos D Kerameus, Mr Jorge Covarrubias Bravo, Prof David A Gantz).

⁵³⁵ *Ibid* at para 103 [emphasis added].

⁵³⁶ *NAFTA*, *supra* note 527, art 1206.

care.”⁵³⁷ Clearly, these provisions of the *NAFTA* preserve public policy flexibility in each of the enumerated sectors.

As to the view that the termination of a P3 contract could be characterized as expropriation ‘for the purposes of founding an investor-state claim’,⁵³⁸ *NAFTA* tribunals have held the exact opposite to be true.⁵³⁹ In *Azinian*, a case in which the claimants had unsuccessfully sought damages as a result of the annulment of their concession contract by a Mexican municipality, the Tribunal stated as follows:

To put it another way, a foreign investor entitled in principle to protection under *NAFTA* may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA*. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many *Mexican* parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. *NAFTA* was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides...The problem is that the Claimants’ fundamental complaint is that they are the victims of a breach of the Concession Contract. *NAFTA* does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, *NAFTA* cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes. *The Claimants simply could not prevail merely by persuading the Arbitral Tribunal that the Ayuntamiento of Naucalpan breached the Concession Contract.*⁵⁴⁰

⁵³⁷ *Ibid*, Annex II.

⁵³⁸ See text accompanying note 531.

⁵³⁹ See *Robert Azinian, Kenneth Davitian, & Ellen Baca v United Mexican States* (1999), 14 ICSID Rev 538 at paras 83-87 (International Centre for Settlement of Investment Disputes), (Arbitrators: Mr Benjamin R Civiletti, Mr Claus von Wobeser, Mr Jan Paulsson) [*Azinian*].

⁵⁴⁰ *Ibid* [emphasis in original].

Curiously enough, notwithstanding its outcome, Shrybman had referred to this case in support of his view that “an act that might represent a breach of contract may also represent a violation of the NAFTA and *found* a complaint under Chapter Eleven [i.e. for Expropriation under Article 1110 of *NAFTA*]”.⁵⁴¹ The more correct view of the case is that expressed by Kirby and Doubilet: “the Tribunal made it quite clear that NAFTA *does not extend* to protect investors from mere claims of breach of contract...Termination of a properly drafted contract which provides for termination cannot be considered expropriation”.⁵⁴²

Finally, as to the contention that trade agreements such as the *NAFTA* would have the effect of forcing private-sector delivery of public goods and services, it is noteworthy that “*NAFTA* does not obligate all services to be delivered in the same way and, therefore, does not obligate governments to deliver...service[s] using a P3 methodology”.⁵⁴³

The result is that, rhetoric aside; there is little merit to the contention that P3s, in conjunction with international trade agreements, erode public policy flexibility.

4.3 CONCLUSION

This chapter has demonstrated that significant, well-documented advantages result from procuring capital-intensive infrastructure services via P3s rather than by

⁵⁴¹ Shrybman, *Assessing the Risks*, *supra* note 526 at 19-20 [emphasis added].

⁵⁴² Peter Kirby & David Doubilet, *The Canadian Council for Public-Private Partnerships Submission to the Walkerton Inquiry Part 2: Comments of Fasken Martineau DuMoulin LLP on the Shrybman Opinion* (np: no publisher, 2001) at 11 [emphasis added].

⁵⁴³ Murphy, *supra* note 383 at 116.

conventional public procurement approaches. Firstly, procurement of such infrastructure services via P3s typically leads to cost and time savings. On the other hand, in this type of procurement approach, cost overruns and time delays that are almost synonymous with conventional public procurement are the exception rather than the rule.

The cost and time savings, as well as the low incidence of time and cost overruns inherent in P3 procurements of large infrastructure are attributable to at least three major reasons: 1) the optimal risk allocation characteristic of P3s; 2) the presence of private project financing; and 3) the combined effect of: (a) the incidence of private ownership and the concomitant profit-maximization motive of private enterprise, (b) the existence of a market for corporate control and the threat of bankruptcy, and (c) competition. It was further demonstrated in the course of the chapter that each of the foregoing factors, that are ultimately responsible for the cost and time certainty and savings of P3s, have been positively impacted by developments in Canadian law, policy and P3 practice.

Secondly, P3s are intrinsically conducive to innovation and high levels of efficiency, owing to their exclusive use of output/performance-based contracts which prescribe minimum service standards and quality levels expected of the private sector service provider, as well as a pragmatic system of enforcement and incentives, consisting of a combination of periodic inspections, penalties and bonuses. As with cost and time savings and certainty; the peculiar direction of the thrust of Canadian P3 law, policy and practice – notably the entrenchment and legitimization of the unique payment

mechanisms that sustain the use of output/performance-based contracts in P3s – has given considerable impetus to the innovation that typically characterizes P3 procurements.

This chapter also addressed the key arguments proffered against the use of P3s, in the light of Canadian law, policy and P3 practice. On a careful analysis, and in the face of the present state of the law and applicable policy and practice, each of these arguments was shown to be lacking in merit.

CHAPTER V

CONCLUSION

As an aid to the reader, this final chapter of the dissertation restates the problem investigated and the methodology adopted in the course of this research. The chapter also summarizes the major findings and resulting conclusions.

The objective of the research was to investigate the impact of Canadian P3-related law, policy and practice on the case for procuring capital-intensive infrastructure services via P3s. To achieve this objective, it was necessary to identify the advantages of procuring such services via P3s, and to thereafter account for such advantages by reference to the underlying legal provisions and principles that facilitate and accentuate the said advantages. It was also necessary to identify the key arguments raised against the use of P3s, and to address these arguments by reference to developments within Canadian law, policy and P3 practice.

As explained in Chapter One, the research methodology comprised a detailed review of available primary and secondary sources of P3-related law, and copious references to non-legal sources including P3 literature, publicly available documentation on the performance of P3 and conventionally procured infrastructure projects; and notable comparative and statistical studies of alternative procurement approaches.

The research reported in this dissertation identified two well-documented advantages that result from procuring capital-intensive infrastructure services via P3s rather than by conventional public procurement approaches. Firstly, procurement of such infrastructure services via P3s typically leads to cost and time savings. On the other hand, in this type of procurement approach, cost overruns and time delays that are almost synonymous with conventional public procurement are the exception rather than the rule. Secondly, P3s are intrinsically conducive to innovation and high levels of efficiency that are virtually unattainable in conventional public procurements.

The research also showed that Canadian governments at all levels – federal, provincial, territorial and municipal – have been very active in the area of P3 law, policy and practice. In this connection, Canadian P3 law and policy has evolved in two significant directions. These directions have been on the one hand, the legal establishment of specialist PPP institutions that promote and/or facilitate P3 procurements; and on the other hand, the enactment of P3-related legislation and/or the formulation of non-statutory P3-related policy statements.

Finally, the present research showed by reference to specific examples, that the foregoing developments in Canadian P3 law, policy and practice, facilitate and accentuate the aforesaid advantages of procuring capital-intensive infrastructure services via P3s, and at the same time, reveal the key arguments canvassed against this procurement approach to be overstated and lacking in merit.

APPENDIX

TYPES OF P3S, CLASSIFIED BY DEGREE OF RISK TRANSFER

1. **Build-Operate-Transfer (BOT)**

In a BOT-type P3, the private sector partner is primarily responsible for “funding (financing), designing, building and operating the project. Control and formal ownership of the project is then transferred back to the public sector”.⁵⁴⁴ For example, “the third Dartford Crossing of the River Thames linking two stretches of the M25 motorway circling London” was operated by the private sector partner for about twenty years and thereafter transferred to the UK government.⁵⁴⁵

2. **Build-Own-Operate (BOO)**

In a BOO-type P3, the private sector partner “finances, builds, owns and operates an infrastructure facility effectively in perpetuity”,⁵⁴⁶ with the public sector partner retaining overall responsibility for delivering the infrastructure service in question. Grimsey and Lewis cite as an example of a BOO-type P3 “water treatment plants serving parts of South Australia”.⁵⁴⁷ The private sector partner assumed responsibility for financing, designing, building and operating the facilities which “process raw water, provided by the public sector entity, into filtered water which is then returned to the public sector utility for delivery to consumers”.⁵⁴⁸ In this way, the public sector partner

⁵⁴⁴ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 10.

⁵⁴⁵ *Ibid* at 11.

⁵⁴⁶ *Ibid*.

⁵⁴⁷ *Ibid*.

⁵⁴⁸ *Ibid*.

retains the responsibility for delivering water to taxpayers, while the ownership and operation of the *plants* remain with the private sector partner.

3. Build-Own-Operate-Transfer (BOOT)

A BOOT-type P3 is a hybrid of the BOO and BOT models as it essentially involves a franchise or concession agreement authorizing the concessionaire – the private sector partner – to “finance, design, build and operate a facility (and to charge user fees)” during the concession period, after which ownership of the facility is transferred to the public sector owner.⁵⁴⁹

4. Design-Build-Finance-Maintain (DBFM)

Similar to the BOOT-type P3, the DBFM P3 is one in which the private sector partner “assumes the obligation to design, construct and finance the work and then to provide maintenance services during the term of the agreement. The relationship involves a design-build contract followed by a maintenance agreement, in addition to the financing agreements”.⁵⁵⁰ The major difference between the DBFM and the BOOT-type P3s is that in the former, the ownership and operation of the facility remains with the public sector partner at all material times, thus obviating the need for an eventual transfer as would have been the case with a BOOT-type P3. The DBFM is one of two P3 models “currently favoured by the Province of Ontario, particularly for new construction and larger projects”.⁵⁵¹

⁵⁴⁹ Canadian Council for Public-Private Partnerships, “P3 Models”, *supra* note 53.

⁵⁵⁰ Banfai et al, *supra* note 10 at 73.

⁵⁵¹ *Ibid.*

5. Design-Build-Finance-Operate (DBFO)

Here, “in addition to constructing and operating the project, the private sector [partner]...fund[s] the project through an equity stake and debt financing”.⁵⁵² Debt financing is typically generated through “bank lending, private placement (i.e., pension funds) or tapping financial markets through an initial public offering (IPO). Cash or ‘in kind’ contributions to the project by the government would lower the required private funding needs”.⁵⁵³ After a set period of time, during which the private sector partner operates the project, the project assets are transferred to the public sector.⁵⁵⁴

6. Build-Lease or Own Operate

In a Build-Lease or Own-Operate-type P3, the private sector partner “takes possession of certain lands through a lease or transfer of title in perpetuity, and assumes the obligation to build and operate a facility”.⁵⁵⁵ The key distinction between this P3 model and the BOT, BOO and BOOT-type P3s is that while in each of the latter, the private sector partner *always* assumes the responsibility for financing the project, in the Build-Lease or Own-Operate P3 model, the private sector partner “*may or may not* also assume the obligation to finance the undertaking”.⁵⁵⁶

7. Build-Finance (BF)

In a BF-type P3, the private sector partner-

⁵⁵² Burleton, *supra* note 254 at 7.

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Banfai et al, *supra* note 10 at 72.

⁵⁵⁶ *Ibid* [emphasis added].

[A]ssumes the obligation to build and finance the project through to completion of construction. The project financing is provided by a private sector lender. On completion, the public sector owner accepts the work and pays a fixed price, predetermined at the front end upon a design fixed at that point.⁵⁵⁷

This form of P3 is the other P3 model commonly employed in the Province of Ontario, “particularly for smaller projects and renovations”.⁵⁵⁸ BF-type P3s differ from BOT, BOO, BOOT and Build-Lease or Own-Operate-type P3s in that, unlike in each of the latter, the role of the private sector partner in a BF-type P3 stops short of operating the facility subject of the P3.

8. Leasing

A Lease-type P3 involves a contract that contemplates “design and building, or operation” of a facility by the private sector partner; “but [does] not embrace project financing”.⁵⁵⁹ An example of Lease-type P3s is a system common in francophone African countries, known as “the ‘*affermage* system’ through which a municipality constructs a facility and contracts with a private firm to operate and maintain it”.⁵⁶⁰

9. Design-Build-Maintain (DBM)

The DBM P3 model is one in which the private sector partner “assumes the obligation to design, construct and maintain a facility under a long-term maintenance

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 11.

⁵⁶⁰ Dennis Rondinelli, “Public-private Partnerships” in Colin Kirkpatrick, Ron Clarke & Charles Polidano, eds, *Handbook on Development Policy and Management* (Cheltenham, UK: Edward Elgar, 2002) 381 at 383 [emphasis in original].

agreement”.⁵⁶¹ The public sector partner however retains ownership and operation of the facility.⁵⁶² In this respect – uninterrupted public *ownership* and *operation* of the facility – the DBM-type P3 is similar to the DBFM model discussed above.

10. Design-Build-Operate-Maintain (DBOM)

The DBOM P3 model is a slight modification of the DBM model. The major difference being that in addition, the private sector partner in the former, through the instrumentality of a “long-term concession agreement, assumes the obligation to operate the facility for the period it is otherwise maintaining it”.⁵⁶³ “At the end of that period”, the private sector partner transfers the operation of the facility to the public sector partner.⁵⁶⁴

11. Design-Build-Finance-Operate-Maintain (DBFOM)

The DBFOM P3 model is closely related to both the DBM and the DBOM models – the key difference being the private sector partner’s additional obligation, in the DBFOM, to *finance* the project. “The private sector [partner] designs, *finances* and constructs a new facility or infrastructure. It subsequently performs hard and/or soft facility management or other operational services under a long-term agreement. The private partner transfers the new facility to the public sector at the end of the term”.⁵⁶⁵

⁵⁶¹ Banfai et al, *supra* note 10 at 72-73.

⁵⁶² *Ibid* at 73.

⁵⁶³ *Ibid*.

⁵⁶⁴ Eggers & Startup, *supra* note 6.

⁵⁶⁵ Canadian Council for Public-Private Partnerships, *P3 Directory*, *supra* note 153 at 139 [emphasis added].

12. Concessions

Concessions arise where a private sector entity is granted “exclusive rights” to construct, “operate and maintain an asset over a long period of time in accordance with performance requirements set forth by the...[public sector entity]. The public sector [entity] retains ownership of the original asset, while the private [sector] operator retains ownership over any improvements made during the concession period”.⁵⁶⁶

13. Joint Ventures

In a Joint Venture-type P3, the public sector partner and the private sector partner “jointly finance, own and operate [the] facility”.⁵⁶⁷ Examples of this type of P3 include the “urban regeneration schemes in the United States in which local government authorities purchase and clear blighted areas for private developers or themselves to invest in new construction, such as a new city hall or a government office”.⁵⁶⁸ Another example is the “Japanese ‘third sector’ approach introduced in the mid-1980s, bringing together the public (the ‘first sector’) and the private sector (the ‘second sector’) to form project-based companies...engaged in urban developments, leisure/resort developments, transport, telecommunications and other regional activities”.⁵⁶⁹

⁵⁶⁶ Eggers & Startup, *supra* note 6.

⁵⁶⁷ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 11.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

14. Operations and Maintenance/Management (O & M/M) Contracts and Service Contracts (SC)

Both in O & M/M and SC-type P3s the involvement of the private sector partner is partial and is limited to the operation of “a publicly-owned asset”⁵⁷⁰ or the provision of “infrastructure-related services for specified periods of time”,⁵⁷¹ or both. While the public sector partner is itself responsible for financing, designing and building the facility, the private sector partner may provide a service or manage the operation.⁵⁷² Examples of O & M/M contracts include “the management of state-owned agro-businesses in Senegal, Cote d’Ivoire and Cameroon, water and electricity in Guinea-Bissau, and mining operations in Latin America”.⁵⁷³ Also, three P3 projects in Canada “involving wastewater treatment facilities” are Operate and Maintain contracts while one is an Operate, Maintain and Manage contract.⁵⁷⁴

15. Cooperative Arrangements

Cooperative arrangements “occur between governments and private entities [and] are more informal than...equity partnerships and concession-type franchise arrangements...In many localities, fiscal incentives or guarantees are given to attract private capital into low-cost housing associations for social housing projects”.⁵⁷⁵ A classic example of arrangements of this nature can be found in Cost Rica where “the

⁵⁷⁰ Canadian Council for Public-Private Partnerships, “P3 Models”, *supra* note 53.

⁵⁷¹ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 11.

⁵⁷² *Ibid.*

⁵⁷³ *Ibid* at 12.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

government creates and maintains national parks, while private organizations develop the eco-tourist programmes and finance some of the tourist promotion campaigns”.⁵⁷⁶

16. Buy-Build-Operate (BBO)

In a BBO project, an existing public asset is transferred to the private sector partner under a contract that stipulates that the asset is “to be upgraded and operated for a specified period of time”.⁵⁷⁷

17. Operation License

In Operation License-type P3s, the private sector partner is granted a fixed-term licence “to operate a public service”.⁵⁷⁸

18. Finance Only

As the name suggests, in a Finance Only-type P3, the involvement of the private sector partner is limited to financing the project. For this reason, the private sector partner in this type of P3 is typically a financial services institution.⁵⁷⁹

19. Design Build (DB)

In DB-type P3s, the private sector partner undertakes to design and build the infrastructure assets required by the public sector.⁵⁸⁰ Upon completion of the construction phase of a DB-type P3, the public sector partner “assumes responsibility for operating

⁵⁷⁶ *Ibid.*

⁵⁷⁷ Canadian Council for Public-Private Partnerships, “P3 Models”, *supra* note 53.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

and maintaining the facility. This method of procurement is also referred to as Build-Transfer (BT)”.⁵⁸¹

Some literature excludes DB projects from the spectrum of P3s “because such projects are publicly financed”.⁵⁸² However, P3s are not “principally about private sector financing of public infrastructure...Financing is only one element. The essence of a PPP is that the public sector does not buy an asset; it is purchasing a stream of services under specified terms and conditions”.⁵⁸³ DB projects, on the other hand, possess a number of “P3 characteristics such as [the integration of] more than one project phase and output-based performance specifications”.⁵⁸⁴ And it is these features, not the presence or absence – in this case, absence – of private sector financing that properly determine whether DB projects should be considered P3s.

⁵⁸¹ Eggers & Startup, *supra* note 6.

⁵⁸² See e.g. Iacobacci, *supra* note 56 at 2.

⁵⁸³ Grimsey & Lewis, *Worldwide Revolution*, *supra* note 2 at 6.

⁵⁸⁴ Iacobacci, *supra* note 56 at 2.

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