Public-Private Partnerships: Business and Legal Issues
Background Paper

Mary Ellen Bench, City Solicitor, City of Mississauga
Anna Kinastowski, City Solicitor, City of Toronto
Lou Milrad, Associate Counsel, Miller Thomson LLP

September 11-14, 2011
IMLA 2011 - 76th Annual Conference - Chicago

Background paper prepared by:
Gregory Cohen, Student-At-Law, Miller Thomson LLP

Contents

Introduction	2
Glossary	3
Overview	3
The Case For and Against P3	4
Project Scope – Risk and Reward	7
Risk and Liability	8
P3 and the Global Economy	10
Canadian Experience	13
Public Opinion	16
Case Law	16
Conclusion	22

Introduction

This paper focuses on public-private partnerships ("P3s") in general, and also highlights their use by municipalities. Overall, public-private partnerships have proven successful on a global scale.

To better understand the framework within which municipalities have dealt with strategic partnerships, it is necessary to look at how senior levels of government have done the same.

A general overview of P3s will be given, which touches upon their relevant criticisms and strengths. In examining the scope of P3s and the projects that have been undertaken, public and private sector control and allocation of risk are necessarily discussed.

The paper will touch upon the complexities faced within the global economy and ways in which various nations have risen to the challenge. P3s are then situated within the Canadian context, together with related case law and observations of public opinion.

And lastly, some general conclusions will be drawn, reflecting on where P3s have progressed over the years and where it might be headed in the future. As a general overview on the topic, this paper attempts to supplement what we already knew, will contribute to what might now be known, and will help to clarify what still needs to be figured out.

Glossary of Key P3 Terminology

Design-Build (DB): The private sector designs and builds infrastructure to meet public sector performance specifications, often for a fixed price, so the risk of cost overruns is transferred to the private sector. (Many do not consider DB's to be within the spectrum of P3s).

Finance Only (FO): A private entity, usually a financial services company, funds a project directly or uses various mechanisms such as a long-term lease or bond issue.

Operation & Maintenance Contract (O & M): A private operator, under contract, operates a publicly-owned asset for a specified term. Ownership of the asset remains with the public entity.

Build-Finance (BF): The private sector constructs an asset and finances the capital cost only during the construction period.

Design-Build-Finance-Maintain (DBFM): The private sector designs, builds and finances an asset and provides hard facility management (hard fm) or maintenance services under a long-term agreement.

Design-Build-Finance-Maintain-Operate (DBFMO): The private sector designs, builds and finances an asset, provides hard and/or soft facility management services as well as operations under a long-term agreement.

Build-Own-Operate (BOO): The private sector finances, builds, owns and operates a facility or service in perpetuity. The public constraints are stated in the original agreement and through on-going regulatory authority.

Concession: A private sector concessionaire undertakes investments and operates the facility for a fixed period of time after which the ownership reverts back to the public sector.

RFEI: Request for Expressions of Interest

RFQ: Request for Qualifications

RFP: Request for Proposals

---

[1] "Models of Public-Private Partnerships", online: Canadian Council for Public-Private Partnerships <http://www.pppcouncil.ca>.

Overview

Overall, declining revenue streams in the public sector have resulted in less resources for municipal budgets. Municipalities are increasingly embracing the P3 concept to overcome this revenue shortfall in effective ways. Such projects have included bridges, schools, hospitals, highways, water treatment, multi-unit housing, and technology.

At their core, P3s involve a partnership to provide public services or infrastructure. These partnerships unite the public and private sectors working toward a common goal. In doing so, the skills and/or capital of private entities are engaged, and there is a resulting allocation or transfer of risk.

Public-private partnerships can take on many forms, utilizing several well-established models defined in the glossary above. It is important to keep in mind that the advantages or disadvantages of P3s often relate to the delivery method implemented to undertake the initiative.

Most P3s encompass the financing, design, construction, operation, and maintenance of public infrastructure and services. Specifically, P3 has been defined as

> a cooperative venture between the public and private sectors, built on the expertise of each partner, that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards.[1]

The British Private Finance Initiative conceptualizes P3 more broadly to include

> private sector involvement in state-owned enterprises; public sector contracts to purchase long-term services taking advantage of private sector skills with private finance at risk; concessions and franchises where private parties provide a service and may maintain, enhance, or construct necessary infrastructure; selling government services into wider markets and other arrangements where private sector expertise and finance engage the commercial potential of government assets.[2]

This can entail integrating a private actor under contract to provide what might normally have been a public service; or can involve more complex ownership and profit sharing structures. It does not, however, encompass privatization, which ultimately results in the exclusion of public sector participation.

The ingenuity involved in the creation and subsequent evolution of these structures, demonstrates both the versatility and potential of P3s. In addition, P3s are intended to achieve better 'value for money' for taxpayers.

Effective partnerships usually include the following elements:

- Investment in the development of needed infrastructure
- Distribution of risk – allocated where it is most effectively absorbed
- Clearly defined responsibilities and timelines
- Sharing the benefits of the partnership

Ultimately, the interchange between public resources and initiatives and private finance and innovation, makes for productive relationships that are mutually advantageous for all stakeholders.

The Case For and Against P3s

P3s enable governments to deliver public infrastructure, community facilities, and related services and programs, which would otherwise be impossible using conventional methods. For example, cost effective facilities can be made available, which would otherwise lack funding from taxation.

By sharing investment, risk, responsibility, and reward, (as the continuum below depicts) significant benefits are delivered to societies the world over. In addition to value for money and economies of scale, development of new infrastructure can be fast tracked, and skills and knowledge can be transferred to other jurisdictions.

P3s can be implemented to construct or operate public buildings, such as hospitals, clinics, schools, or community centers; roads and bridges; communications and electrical infrastructure,

---

[1] Definitions, online: Canadian Council for Public-Private Partnerships <http://www.pppcouncil.ca>.

[2] "2010 International Survey of Public-Private Partnerships", online: Public Works Financing <http://www.pwfinance.net/pwf_major_projects.pdf>.

such as generation and distribution hardware; water and waste water treatment facilities; or multi-unit housing.

Canada's success with P3S now span dozens of sectors at all levels of government. This includes projects such as the Confederation Bridge in Ottawa, the 407 electronic toll highway in Toronto, and many more.

The CCPPP website lists Canadian projects in its database (www.pppcouncil.ca) with extensive links provided to investigate P3 in the United States, Australia, the United Kingdom, and beyond.[3]

P3 funds will need to be employed efficiently considering growing public needs. For example, transportation priorities in provinces and territories exceed $100B over the next decade. The current municipal backlog is more than $120B. Transit systems account for approximately one-fifth of that amount and must be kept in a state of good repair.[4]

Deferring maintenance or under-investment lead to both higher long-term costs from deterioration and repairs, and an increasing infrastructure deficit. For example, the municipal infrastructure gap has grown from 2.7% of national GDP to over 5% over the last two decades.

In Canadian municipalities particularly, concern has been expressed that the service life of public infrastructure is declining, and the related deficit is estimated at $123 billion.[5] Costs will escalate as infrastructure deteriorates, the longer that roads and buildings remain in a state of disrepair.

As a result, P3 solutions have been tailored to deal with the increasing infrastructure gap to ensure that problem areas are refurbished or replaced. While not all projects are suitable for the P3 model, municipal proponents have been charged with finding sensible and appropriate solutions to address challenges faced; and in so doing facilitate technology and skills transfer between partners over the long term.

For example, the completed Durham Region Courthouse in Oshawa, Ontario has won infrastructure awards. In 2006, Access Justice Durham was selected to design, build, finance, and maintain the Durham Region Courthouse, ultimately completed ahead of schedule and on budget 2009.

Access Justice Durham subcontracted the design and construction of the courthouse to PCL Constructors and the operations and maintenance to Johnson Controls. The courthouse is now considered to be the most technologically advanced of its kind in Ontario with capacity for future expansion and adaptability.

Another successful municipal P3 is the Brampton Civic Hospital in Ontario, which involved the design, build, finance, and maintenance of the project. Construction began in 2004 and was completed in 2007 adding over 400 hospital beds available for public healthcare.

---

[3] "Canadian PPP Project Database", online: Canadian Council for Public-Private Partnerships <http://www.pppcouncil.ca>.

[4] "Danger Ahead: The Coming Collapse of Canada's Municipal Infrastructure" (November 2007); "Looking to the Future: A Plan for Investing in Canada's Transportation System" (December 2005); "Age of Public Infrastructure: A Provincial Perspective" (February 2008).

[5] Federation of Canadian Municipalities, "Danger Ahead: The Coming Collapse of Canada's Municipal Infrastructure," (2007).

Ultimately, partnerships create an efficient method for allocating risks and responsibilities to the party most able to manage them. This allows governments to reduce political hazards for themselves and for private partners, attend to social obligations, maintain accountability and cost-cutting, protect the environment, and ensure that critical services are provided.

Public agencies ultimately gain greater control and accuracy in their spending commitments over the lifetime of an asset. This added transparency enables more accurate planning and reduces the likelihood of cuts in other areas.

As such, financial and development risks can be mitigated. For example, if maintenance contracts are in place, unexpected charges will be absorbed by the private party engaged to undertake the work involved.

And, where privatization is avoided, the government will not have to sell key resources, for example by implementing concession-type arrangements. With concessionaires, public services are provided at a requisite standard for the duration of an arrangement, while the underlying property interest remains in public hands.

From the private perspective, partners capitalize on their competitive advantages, such as an ability to manage projects and finances efficiently, employing best in class technology and practice standards. Procurement of P3 contracts can also be highly lucrative.

Successful project management requires resources to be allocated appropriately. This goes hand in hand with a clear project scope and schedule. When completion dates have been organized into phased components with the flexibility to integrate necessary changes and unforeseen events, outcomes can be managed.

This will be done most effectively when reporting and control systems are prepared and proactive. And, at the same time, a sense of community involvement is introduced into public-private projects.

Nonetheless, there are those who lament a loss of public control, when private companies are involved with private financing, construction, design, or delivery of public services. In addition, concern from the general population has been raised over a perception that P3s represent a privatization of public service.

For example, critics have argued that it costs more for the private sector to borrow capital, which means that P3s increase costs and add unnecessary complexity and effort. Some maintain that poorer or smaller communities will be excluded from such initiatives.

Organized labour groups often conceptualize such partnership arrangements as a source of job loss, diminished quality standards, and insufficient oversight. For example, if P3s require less labour, critics maintain that this leads to public sector job cuts.

In hospitals, public sector unions have argued that this might result in higher costs and user fees, and reduced capacity and staffing; contrary to the long-term good of the public sector. And, when P3s were proposed at the William Osler Health Center protest marches were staged.

Proponents of P3s argue that these criticisms are overstated or without foundation, and fail to acknowledge extensive research in this field. For example, with respect to capital costs, it is true that it might cost more for private borrowers to gain access to funds when compared with public bonds. However, the long term efficiency of the private sector has shown that operating costs are well below those of the public sector.

'Value for Money' analysis if often part of project planning and has generally shown that P3s are a better method to guide infrastructure development.

Moreover, where one party contracts to design and build, cost and scheduling savings can be achieved. And, when parties are expected to operate a service they have built, there is an added incentive to build properly from the start, with extra operating and maintenance cost reductions as a result.

Another discrepancy relates to smaller versus big projects and communities. In fact, small projects and communities have proven successful. In short, when specific skills and knowledge of a private partner can be integrated into a project where this was unavailable to a public partner a P3 is most effective.

With respect to labour concerns, proponents of P3s maintain that in most cases, a project deals with new infrastructure and will not lead to labour redundancies. And, where union positions have been affected, the norm is to transition affected staff into new positions with all former benefits, keeping union membership in place.

For the most part, a lack of familiarity and understanding can precipitate suspicion and unease. This highlights the need for strong leadership from public and private leaders, who can best explain the benefits of P3 while clearing up any misunderstandings.

Project Scope – Risk and Reward

Looking at the diagram below, it is obvious that multiple partnership structures exist. However, what is unique to each one is the level of public and private involvement, and the resulting distribution of risk.

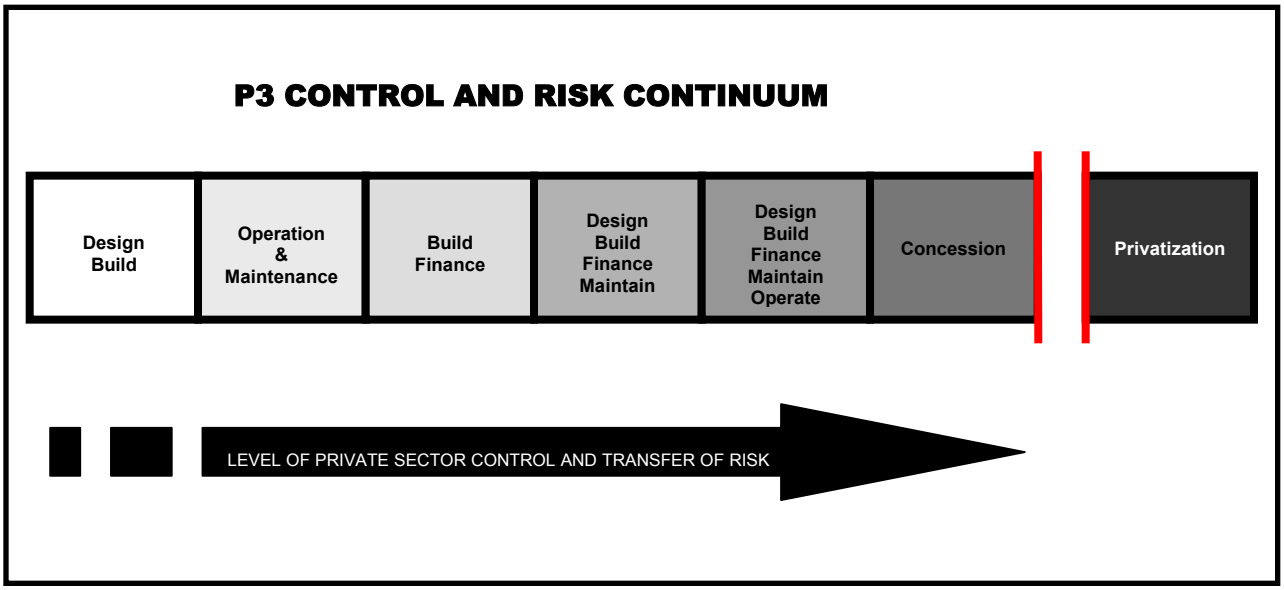
At one end of the spectrum a *design-build* requires a private party to both design and build a structure for an agreed upon price. The public sector party would then no longer be at risk if a project goes over budget, having shifted this burden by negotiating a fixed project price.

On the other end of the spectrum is a *concession*, where private sector participants hold most or all of a project's assets for a predetermined period of time. With this comes all of the applicable obligations and rewards, in exchange for providing a service to the public sector.

Privatization on the other hand falls outside of the limits of P3s, and is therefore separated in the diagram below. It is worth noting though, that in the United States, the term P3 is often used synonymously with privatization, whereas in Canada privatization is not included in the concept of P3s.

Nonetheless, while a public function may be transferred into private hands, despite varying levels of control, regulatory governance remains in the public domain.

The diagram below illustrates the degrees of private and public sector control in varying partnership formulations and the corresponding levels of risk. The transfer of risk is a key component motivating governments to embrace this design.



Despite the differences between P3 models, many projects reflect similar elements. Relationships require a commitment by both partners based on trust and a common understanding of community needs. This ensures that each party's goals are well aligned and help to avoid conflict.

In addition, problem solving will be constructive and knowledge transfers between parties will more easily flow. Because agreements will often encompass long-term goals, documentation must be formally completed to reduce conflicts, but can underpin informal working relationships.

Risk and Liability

Within the P3 project cycle parties face and can mitigate various types of risks. This starts with proper management of the procurement process, founded upon strong quality control policies and standards specifically focused on P3.

Managing outcomes requires skilled team personnel who can negotiate and oversee project expectations. This will include controlling transaction costs and will certify that objectives are supported.

Communications channels must also be established initially so that the entire process is transparent and information flow remains uninhibited. The same protocol will be essential to effectively monitor operations, and can guarantee long-term oversight.

On the other hand, if decision makers are arbitrarily changed and project knowledge either cannot flow or is lost, internal coordination and skill levels will be disrupted, adding unnecessary costs and downside risk to the project.

Private partners can face development, construction, operations, and maintenance risks. These include: (i) Market or financing risks; (ii) Infrastructure design risk; (iii) Construct cost overruns; (iv) Project completion within deadlines; (v) Meeting performance or delivery standards in the short and long term; and (vi) Managing service delivery and lifecycle costs.

Parties to P3s conduct due diligence. In doing so, a risk assessment is critical. Unlike the traditional government model, private sector participants assume the risks associated with completion on time and financing production costs.

Private parties would not usually have a property interest but rather a contractual right to operate on site, and are ultimately paid on completion. The public sector therefore retains some environmental risks.

Private parties are also subject to environmental liabilities, during the time they are in control of a property. Offences and remediation pose risks where non-compliance with statutes might occur. Due diligence is required in this regard.

In some instances, the provincial government will provide a funding commitment to an organization, such as a hospital, but no funding covenant to the private sector party. A release must then be given for public entities to be free from any obligations or liabilities to the project company.

There does remain a risk that the government can appropriate the monies required for a project pursuant to the *Financial Administration Act* (s.11.3). And, it is always open to the government to pass new legislation that can frustrate existing contract obligations without monetary consequences.

If a project company cannot pay for materials, suppliers may attempt to register a construction lien to collect. There is usually a provision preventing this from occurring so that creditor's rights to sell land and apply sale proceeds to arrears cannot be invoked.

The lien period expires soon after substantial performance of the work under contract, the test for which is found in the *Construction Lien Act*. The *Limitations Act* provides a timeframe of two years based on the discoverability principle, and not more than fifteen years after a contested event took place (environmental claims excepted).

The project company is prone to bankruptcy and thus subject to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* (Canada). In ascertaining bankruptcy remoteness[6], the doctrine of substantive consolidation would therefore apply. Whether this will be granted in any case, unless causing material prejudice to a creditor, depends on the following considerations:

- The degree of difficulty in segregating and ascertaining individual assets and liabilities (liquidity).
- Comingling of assets and business functions
- Unity of interests and ownership between corporate entities
- Degree of integration and interdependence of the financing arrangements of affiliated corporate entities
- Transfer of assets without formal observance of corporate formalities
- Whether substantive consolidation is fair and reasonable under the circumstances

A special purpose entity can be insolvency remote from its sponsors, and provisions to this effect are commonly found in applicable financial documents.

---

[6] A bankruptcy remote company does not engage in any other unrelated activities that might lead to insolvency and default under a PPP agreement.

These might include prohibitions from engaging in business or activity unnecessary to the transaction; debt limitations; and requirements for an independent director or partner; and separateness covenants restricting mergers or reorganizations.

Additional considerations may include insurance issues, financial modeling, taxation, payment, and aboriginal rights.

P3s and the Global Economy

Since 1989, there have been 114 P3s design-build projects in Canada and the United States in the transportation sector.[7] Almost half of these have also included private financing, operation, or maintenance commitments. On a global scale, 600 such projects have been undertaken over the past two decades worth over $300 billion.[8]

In a fiercely competitive global economic environment, governments have to find new ways to deliver services and construct and maintain infrastructure. As a key element to attract foreign investment, business infrastructure must be adequately maintained and requires a public commitment of both policy and funds.[9]

This necessarily involves project financing, that P3s have been able to provide. The significant benefit of course is the freeing up of public funds for essential social and economic programs.

There are mixed opinions among private sector members in terms of the availability of well-priced credit to finance the procurement of projects. Some believe there is a sufficient credit supply, and others express a greater degree of concern about the supply and price of accessible capital.

Nonetheless, the global financial crisis has destabilized financing transactions across all asset classes and sectors. Financial institutions are broadly decreasing leverage by shrinking assets and raising more capital, with an overall reduced pool of lending.

And, while it appears that the market has recovered considerably over the last two years, there are still widespread concerns pertaining to the retraction of global credit availability and general levels of economic growth. This has prompted governments to take direct and indirect measures (ie. capital injections and liquidity support) to counter recessionary challenges.

Such challenges have tested the flexibility of P3s to adapt delivery models. Changing market realities mean that project financing structures will likely change in both the short and long term.

Uncertainties have emerged in terms of committed financing and fixed interest rates; together with threats to competition if fewer lenders and sponsors participate. Refinancing risk, increasing debt and security costs, and other issues raise project costs.

---

[7] Of $67.7 billion in projects - $24.7 billion are design-build, $33.5 billion involve financing, operation, and/or maintenance, and $9.5 billion involve lease and improvements.

[8] "2010 International Survey of Public-Private Partnerships", online: Public Works Financing <http://www.pwfinance.net/pwf_major_projects.pdf>.

[9] Dr. M. Saeed Mirza, "The Urgency of Addressing Canada's Infrastructure" (November 22, 2004); "Mind the Gap: Finding the Money to Upgrade Canada's Aging Public Infrastructure", online: TD Bank Financial Group <http://www.pppcouncil.ca>; "Open For Business? Canada's Foreign Direct Investment Challenge", online: The Conference Board of Canada <www.conferenceboard.ca>; "Civil Infrastructure Systems Technology Roadmap 2003-2013" (June 2003), online: Federation of Canadian Municipalities <http://www.pppcouncil.ca>.

It is important that measures are put in place to ensure long-term strength and competitiveness of the P3 market. As institutions have pulled back from international lending or face more stringent regulatory constraints, the Canadian market has seen a shrinking pool of bank lending, and tightening conditions, making fnancing more difficult for everyone.

1985-2010 ROAD, RAIL, WATER, BUILDING P3s WORLDWIDE[10]										
	ROAD		RAIL		WATER		BUILDING		TOTAL	
	# OF PROJS.	COST US$M	# OF PROJS.	COST US$M	# OF PROJS.	COST US$M	# OF PROJS.	COST US$M	# OF PROJS.	COST US$M
USA	43	23,096	20	13,310	141	13,678	158	9,418	362	59,502
CANADA	22	13,151	2	2,175	17	1,263	63	14,685	104	31,274
LATIN AMERICA	153	68,413	26	10,354	85	11,655	10	975	274	91,397
EUROPE	200	176,673	57	47,350	171	23,263	239	70,358	667	317,643
AFRICA/ MID-EAST	13	5,691	4	4,668	55	29,290	4	957	76	40,606
ASIA/ AUSTRALIA	192	63,504	49	63,180	121	37,677	22	7,255	384	171,616
WORLDWIDE	623	350,528	158	141,037	590	116,825	496	103,648	1,867	712,038

On the bright side, Canada has remained attractive as a source of P3 with an internationally recognized reputation and track record. New projects continue to emerge adding certainty and predictability to a difficult atmosphere.

In addition, projects in Canada have allocated risk effectively, used honoraria for bid costs, recognized a politically supportive climate, and can rely on an independent judiciary where dispute resolution needs may arise.

Honoraria have recently been offered to unsuccessful bidders to supplement the significant costs involved in the bidding process. Defining project parameters, incurring design and consulting fees, creating models and plans, and exposing IP are some of the ways in which expenses reach 0.5% of total project costs.

This can mean $500,000 of costs on a $100 million project just to submit a bid, an obstacle that smaller companies cannot overcome. Honoraria enable more firms to participate in the process and should lead to better proposals and add value to projects.

The Canadian Government has earmarked significant amounts of funds for infrastructure related initiatives. This includes the Building Canada Fund ($8.8B); the Public-Private Partnerships Fund ($1.26B); the Asia-Pacific Gateway and Corridor Initiative ($1B); and the

[10] "2010 International Survey of Public-Private Partnerships", online: Public Works Financing <http://www.pwfinance.net/pwf_major_projects.pdf>.

Border Crossings Fund ($2.1B). PPP Canada Inc. is the Crown Corporation administering partnership funding.[11]

Other countries have also undertaken measures to buttress disruptions in credit markets. For example, the UK government announced a lending initiative to safeguard over 100 projects valued at $23B. It will therefore lend alongside the private sector, as a last resort, through a new Treasury Infrastructure Finance Unit (TIFU).

While all other options must be exhausted before TIFU will grant a loan, if private sector funds prove insufficient, this facility will guarantee that projects reach financial close and jobs remain secure. In some cases projects will need to be restructured, the scope changed, or other forms of debt added before TIFU will step in.

One of TIFU's first loans was for $6.8B to help complete a wastewater project in Manchester.

The French government created a $41B stimulus plan focused on infrastructure projects, such as P3s. This 'Government Guarantee Program' includes a $15B fund to provide partial guarantees for P3s, and to support other state backed entities to provide project loans.

The government also made a regulatory change to facilitate P3s, lifting a requirement for private partners to source all project financing, now reduced to 50%.

The European Investment Bank (EIB) is a significant lender to P3s across Europe, having lent over $50B to such projects alongside commercial banks, with increased disbursements to counter the credit crunch.

EIB also provides loan guarantees, which are meant to help transportation projects deal with early revenue risk. For example, the Marao Tunnel project in Portugal and the A5 Motorway in Germany utilized this facility.

In addition, in 2008, the European P3 Expertise Center was launched to provide best practice frameworks and other know-how to public sector parties.

In the United States, the Transportation Infrastructure Finance and Innovation Act Credit Program has been providing billions of dollars in credit assistance to major US transportation investments for over a decade. This usually takes the form of secured loans, but can also involve loan guarantees and standby lines of credit in projects for highways, transit, passenger rail, freight facilities, and port projects.

The American Recovery and Reinvestment Act introduced a grant program also for transportation infrastructure, referred to as TIGER grants. These monies have been used in part to alleviate growing credit costs.

[11] <www.infc.gc.ca/ip-pi/bcip-picc/bcip-picc-eng.html>.

The table below gives some indication of private sector leaders in the transportation industry from around the world.

Global P3 Transportation Companies[12]			
	Company	Country	Concessions
1	ACS/Iridium	Spain	60
2	Global Via-FCC-Caja Madrid	Spain	45
3	Abertis	Spain	40
4	Ferrovial/Cintra	Spain	38
5	Macquarie Group	Australia	36
6	Vinci/Cofiroute	France	35
7	OHL	Spain	29
8	NWS Holdings	China	28
9	Acciona/Necso	Spain	23
10	Sacyr	Spain	22
11	Hochtief	Germany	22
12	Cheung Kong Inrastructure	China	21
13	EGIS Projects	France	20
14	Bouygues	France	18
15	John Laing	UK	18
16	Andrade Gutierrez	Brazil	16
17	Road King	China	16
18	BRISA	Portugal	14
19	Alstom	France	14
20	Groupo ICA	Mexico	14
21	Bilfinger Berger	Germany	14
22	Camargo Correa	Brazil	12
23	Impregilo	Italy	10
24	Eiffage	France	10
25	Reliance	India	10
26	Strabag	Austria	9
27	SNC Lavalin	Canada	9
28	Balfour Beatty	UK	9
29	Transurban	Australia	9
30	Siemens	Germany	8
Includes road, bridge, tunnel, rail, port, and airport concessions over $50m capital value 1985-2010.			

Canadian Experience

Historically, P3s in Canada have been ongoing for over two decades. Airports, waste water plants, bridges, highways, buildings, schools, and facilities have been part of this ongoing trend, with build-finance and design-build-finance-operate representing the most common project models.

Canada recently established a new crown corporation devoted solely to public-private partnerships called PPP Canada. Its mandate is to improve public infrastructure delivery utilizing P3, thereby achieving better value, timeliness, and accountability.

Of the initial eighteen projects involved with the first round of the $1.3B P3 Canada Fund, six of these were municipal projects ranging in size from $45 to $500 million. And applicants were able to approach PPP Canada during the procurement planning process to obtain information and access support and expertise.

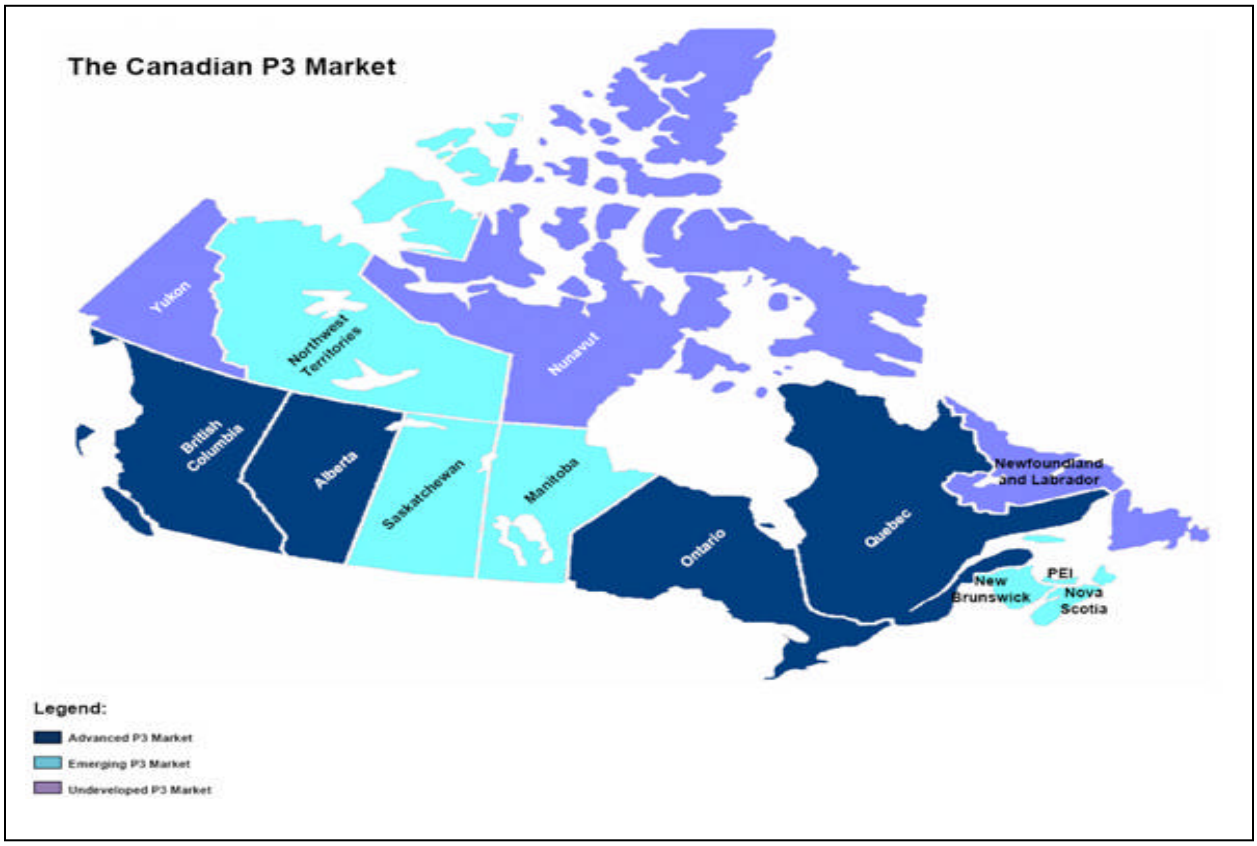
Among the provinces, territories, and municipalities that have driven P3 procurement in Canada, there is a mix of advanced, emerging and undeveloped P3 markets shown in the map below.[13]

[12] *Supra*, note 10.

Advanced P3 markets are usually larger provinces with significant capital infrastructure budgets, and institutionalized P3 procurement capacity. For example, BC, Alberta, Ontario, and Quebec.

Emerging P3 markets usually have an established or developing policy framework for partnerships and support general P3 advice. However, this will often lack dedicated institutional capacity to support P3 procurements, with little experience in executing P3 arrangements. These markets include: Saskatchewan, Manitoba, New Brunswick, Nova Scotia, PEI, and the NWT.

Undeveloped P3 markets are those with a limited understanding of the P3 approach, or have weak institutional and financial capacity inhibiting project development.



Canadian municipalities represent a significant market for P3s, with construction capital expenditures in 2008 estimated at $15 billion. The capacity and knowledge to implement P3s in Canadian municipalities is still developing.

A few major cities and some smaller ones, have experience in alternative forms of infrastructure procurement, including P3s. These include Moncton and Saint John, as well as Toronto, Montreal, Vancouver, Calgary, Edmonton and Ottawa.

To date, municipal P3 activity has been concentrated in the following key sectors: transportation (roads and bridges), public transit, water and wastewater treatment, and civic buildings (administration, courthouses, etc).

---

[13] "What Does The Canadian P3 Market Look Like?", online: PPP Canada <http://www.p3canada.ca>.

Of the thirty-six (36) municipal projects listed in the Canadian PPP Project Database, with completion dates ranging over two decades from 1992-2012, the following distribution was noted:[14]

Municipal Public-Private Partnerships in Canada (1992-2012)

Provinces	
Ontario	18
British Columbia	7
Manitoba	5
Alberta	3
New Brunswick	2
Quebec	1

Project Sector	
Environmental	15
Recreation & Culture	11
Transportation	7
Energy	1
Justice / Corrections	1
Hospitals & Healthcare	1

Partnership Model	
Service Contract	1
Design-Build	2
Operation-Maintenance	4
Build-Own-Operate	2
Design-Build-Finance	5
Design-Build-Operate	3
Design-Build-Own-Operate	1
Design-Build-Finance-Operate	6
Design-Build-Finance-Maintain	6
Design-Build-Finance-Maintain-Operate	6

The Government of Canada is also advancing a new framework to promote economic and social development for Aboriginals based on partnerships between communities and the private sector.

The Minister of Indian and Northern Affairs (INAC) has indicated that infrastructure financing will be structured to facilitate P3s and other alternative financing arrangements. This will help to address a deficit in infrastructure quality and availability in Aboriginal communities that public capital investment budgets alone are insufficient to meet.

Aboriginal communities present some unique challenges and opportunities in terms of developing P3s, stemming from circumstances which include remote locations, comparatively small scale projects and limitations posed by the Indian Act.

Nonetheless, aboriginals have already identified a number of sectors where P3 arrangements can succeed, including green energy generation and transmission, water and wastewater facilities, tourism and cultural facilities, and recreation services.

Some of the projects identified by Aboriginals serve the local community, while others also serve adjacent non-Aboriginal communities and create economic development opportunities.

[14] *Supra*, note 3.

Public Opinion

When projects are introduced to a community it is crucial to manage expectations. Expectations start out high, and can be addressed in a number of ways. For example, utilizing effective communications strategies and carefully defining the project scope will help to control project processes.

As such, scheduling and reporting will clearly demonstrate to communities the limitations and benefits of a project and create realistic expectations. Managing these informational facets of the project is an essential part of the overall success, and plays a key role in managing risk.

Surveys have been conducted to assess the public sentiments in relation to P3. In particular, people are called upon to determine whether they support governments joining forces with private sector entities.

In other words, do people think that the private sector should be building infrastructure and providing services that governments traditionally have? And, if so, which of these areas are best suited for public-private partnerships?

Based on survey results, public attitudes appear to have remained consistent over the last 5-10 years. Most people feel that governments at all levels are not keeping pace with demand for new or improved public facilities. And, more than two-thirds of respondents believe that P3s can address this growing discrepancy.[15]

Support for P3s are strongest in Quebec and the Atlantic provinces but with similar levels of support in Ontario and BC. The sectors most favoured by the surveyed sample were roads, recreation, and non-health hospital services.

Case Law

Political Risk and Liability and Public Opinion. The City of Kingston negotiated with Kingston 2000 to develop a multi-purpose sports arena, arts center and convention center in 1998. The failed negotiations led to litigation in Ontario Superior Court spanning almost a decade.

Kingston City Council signed a letter of intent to negotiate a public-private partnership with Kingston 2000 for the multi-purpose facility.

However, the parties were unable to agree on various matters, and Kingston 2000 felt that public groups and the City itself were deliberately undermining and refusing to cooperate with contractual obligations and the finalization of the project. They alleged contract breach.

Kingston claimed that motivations for cancelling the project included political gain and re-election by the Mayor and members of City Council, and not the lack of feasibility that the City was seeking to rely upon.

The City argued that the Letters of Intent were not contracts. However, Forestell J. noted that the clear wording of the Letters created contractual obligations, including an explicit obligation of good faith.

---

[15] "Trends in Canadian Support for Public-Private Partnerships (November 2007), online: The Canadian Council for Public-Private Partnerships <http://www.pppcouncil.ca>.

Furthermore, even though the Letters represented an agreement to negotiate, the court held that claims in tort can arise from parties involved. For example, in *Premium Properties Ltd. v. Colonia Life Holdings Ltd.* allegations of negligent misrepresentation were considered in similar circumstances.[16]

Kingston 2000 Developments Ltd. v. Kingston (City), 34 MPLR (4th) 150.

Expropriation In Favour Of P3. In this 2008 Quebec case, the municipality of Brebeuf wanted to expropriate land for a tourist and recreational project to be carried out as a P3. Section 1104 of the Municipal Code of Quebec previously prohibited such expropriation, but was subsequently amended to allow for it.

The Municipality applied to the Minister for authorization to expropriate the land after giving notice to the landowner of an intention to do so. Permission was granted. The Quebec court dismissed a motion contesting the expropriation, which the Court of Appeal upheld. The Supreme Court of Canada dismissed a further appeal.

Apotres de l'Amour Infini v. Brebeuf (Municipality), [2008] C.S.C.R. no 233.

Disclosure and Privacy of Agreement Documents. This was an appeal from a recommendation to disclose a P3 document under the *Freedom of Information and Protection of Privacy Act*.

The agreement in question was a P3 between the Province of Nova Scotia (Department of Transportation and Public Works) and private partners ("Atlantic") to build a toll highway.

This design-build contract from 1996 was considered to be the first "large infrastructure project in Canada with private financing but without government guarantees or recourse to government revenue."[17]

Atlantic sought to prevent disclosure based on protection of confidentiality and trade secrets. They were concerned that this might compromise its negotiations with the Province of New Brunswick to build a highway there.

However, after interpreting the *Act*, Atlantic had not satisfied their burden to show they had a proprietary interest in the information which was not supplied in confidence. There was also insufficient proof of the harm they would suffer if the documents were disclosed.

At the heart of the debate was whether a contract negotiated by a government authority could be kept from the public if it were to cause harm to the other contracting party. The answer seems to be that in general, companies cannot expect to keep information private particularly when public funds are involved.

Ultimately, the legislation provides broad access to government records, and any doubts would be resolved in favour of disclosure. As a result, subject to disclosure provisions the appeal was dismissed.

Atlantic Highways Corp. (Re), [1997] N.S.J. No. 238 (SC).

---

[16] [2004] O.J. No. 1785 at para. 35 (Sup. Ct.).

[17] *Atlantic Highways Corp. (Re)*, [1997] N.S.J. No. 238 (SC). at para. 4.

Public Opinion, Public Disclosure, and Non-Competitive Bidding. This case involved an application by 'Friends of Lansdowne' deemed to be a public interest litigant to quash bylaws that approved a Lansdowne Park redevelopment plan.

No competitive bidding process was undertaken for the project. However, in 2010 Ottawa City Council approved a redevelopment proposal by Ontario Sports and Entertainment Group ("OSEG") for a P3. Considerable public interest was attracted by the ensuing dispute.

The court acknowledged that

> …there is perhaps no function of municipal government more important than planning and development. Decisions made by cities regulating use of land, construction of buildings and the location and design of parkland are fundamental decisions that alter the structure of urban life for generations[18]

OSEG's proposal was accepted without a competitive process to bid on the project. Municipal governments are democratically elected legislative bodies free to operate within their jurisdictional sphere, provided they are not overruled by another level of government.[19]

Nonetheless, there was significant public debate surrounding this case. Friends of Lansdowne sought to overturn the city council's decision approving the plan claiming it was illegal. Section 273(1) of the *Municipal Act* allows a Superior Court to quash municipal bylaws in whole or in part if illegal.

The court can provide a statutory remedy but must not engage in policy debates about the future of the park or judicial review. In fact, their narrow mandate is focused entirely on the legality of the bylaws and not even their reasonableness, precluded by s.272 of the same legislation.

Sole source contracting is not illegal where a party, such as OSEG qualifies for an exception in the procurement bylaw. Their exclusive ability to deliver a CFL franchise is a legitimate criteria to avoid a competitive process that would be a waste of time.

Nonetheless, Friends of Lansdowne sought production of documents to assess for themselves the details of the negotiations and proposal process. They alleged that the city was incurring substantial debt and alienating public land to the detriment of the city and its taxpayers.

The court did order some production but on a somewhat narrow relevance basis. For example, emails between the former mayor, the city manager, and OSEG were not considered relevant or necessary for production. Final project documents and city council reviews leading to a final recommendation were considered sufficient for production, unless there was a reasonable explanation not to.

Friends of Lansdowne v. Ottawa (City), 2011 ONSC 1015.

P3 Funding Arrangments, Risk Mitigation, and Guarantees. Victoria Sports/Entertainment Associates ("VSEA") sought funding from TD to construct a hockey arena. The deal collapsed after the government did not provide a funding guarantee, and VSEA claims that TD misrepresented the necessity of this.

---

[18] *Friends of Landsdowne v. Ottawa (City)*, 2011 ONSC 1015 at para. 5.

[19] This case will be reviewed by the Ontario Municipal Board and approval is required by the National Capital Commission.

The court however found that no misrepresentations were made and TD's position was substantiated by a draft loan document.

VSEA was a private partnership intending to relocate a hockey team from San Francisco to Victoria after construction of a new arena with loans from the bank. The BC Government however reused to provide a deficiency guarantee – which would have injected funds into the partnership if liquidity levels were too low.

When the parties could not agree on alternate forms of security the deal fell through. VSEA then claimed that the bank misrepresented the necessity of a deficiency guarantee and caused them to waste money in the process.

However, the bank never gave false assurances, viewing a guarantee at all times as essential. Alternate forms of security could have satisfied the banks expectations, but VSEA's proposals were considered inadequate.

A minimum BC government contribution of $10 million dollars of subordinated debt (rather than a cash loan) was contemplated in this $85 million project. The 'deficiency guarantee' would have lowered the risk of default on VSEA's debt load, to "cover all evils including (indirectly) construction risk" and cost overruns.[20]

The Victoria media reported that the bank was requiring the province to provide a guarantee for the project, creating considerable controversy. The Premier at the time, Glen Clark, denied that a provincial loan was forthcoming but did acknowledge that changes had been made to the *Municipal Act* to allow the municipality to enter a long-term lease with a private developer.

All of the negative press and public outcry was very damaging to VSEA's hopes of city council support. VSEA's lobbying of government allies for financial guarantees was ultimately unsuccessful.

Without government support the private parties were forced to find acceptable alternatives. For example, VSEA contemplated taking on another partner with a minimum balance sheet of $25 million.

The design-build contract could not move forward without some form of debt guarantee, and time was running out to find acceptable options. The City of Victoria and VSEA discussed a $2.75 million sinking fund to cover cash flow shortages but was eventually rejected by TD as an "unacceptable form of security".[21]

A third party guarantee of a more significant size would have been acceptable to the bank but was never completed. In essence the banks were looking for support from "someone with deep pockets and substance to backstop a deal of this size."[22]

And, while open to reasonable alternatives to secure their loans, VSEA was unable to satisfy this requirement. The deal therefore fell through on that basis. The court found that TD has been clear in its requirements at all times and no misrepresentations had been proven.

---

[20] *Victoria Sports/Entertainment Associates v. Toronto-Dominion Bank*, 2006 BCSC 1441 at para 54.

[21] *Ibid.* at para. 86.

[22] *Ibid.* at paras. 87 and 96.

A guarantee for the loan was essential and its absence ultimately caused the partnership to fail; highlighting the importance of financing arrangements for P3 and each parties close attention to acceptable levels of risk.

Victoria Sports/Entertainment Associates v. Toronto-Dominion Bank, 2006 BCSC 1441.

Public Opinion and Breach of Contract. This case involved a P3 to develop Granville Island in Vancouver. Agreements were made during the lengthy planning and negotiation process which the government claimed were not binding. The court found otherwise.

While a formal lease was never entered into, all terms were identified in the agreements, sufficient to found a contractual breach.

Administration of the 41.8 acres of public lands had been transferred from the federal government to Central Mortgage and Housing Corporation ("CMHC") in the 1970s. In 1997 the plaintiffs ("Sacks") entered into an agreement to develop of portion of the lands for commercial purposes together with public and private partners.

While City staff approved the project, city council rejected an amendment to land use provisions that effectively disallowed the project to proceed. This prompted a breach of contract suit and attempts to recover damages of $668,617.

The plan was to build an entertainment center, in a joint initiative with Famous Players who would construct cinemas and CMHC who would construct a parking facility. Various stakeholders, such as the Granville Island Trust, the Emily Carr Institute of Art, and the City Planning Department, and Urban Design Panel were involved in negotiations surrounding the project and created insurmountable disputes.

For example, public outcry over the project was steadily increasing, bolstered by unfavourable media accounts. Concerns over impacts to parking and traffic were voiced at several public meetings, and opponents of the project discovered that the project exceeded square footage allowances. It was this issue which eventually scuttled the entire deal.

Attempts to alter land these use provisions failed and with it the projects hopes. City Hall had become involved and passed an unusual motion requiring that any further project proposals be referred to City Council for advice prior to any final decisions. This added to the mounting controversy.

None of the conflict altered the fact that a Heads of Lease Agreement had already been entered into by the plaintiffs and defendants. Nonetheless, the private parties were forced to jump through a steadily increasing number of hoops to have the project fully approved.

Public consultation was sought, open houses were arranged, special meetings of Council were held, and the controversy and lobbying on both sides continued. In the end, Council rejected amendments to the agreements effectively preventing a development permit application.

At the meeting Council stated that the most significant implication was that this was the first time a development project's approval had been turned over to the City. However, since CMHC had already signed an agreement with Sacks and partners, this was not altogether true.

To be valid an agreement for a lease must show:

1. The parties
2. A description of the premises to be demised

3. The commencement date
4. Duration of the term
5. The rent if any
6. All the material terms of the contract not being matters incident to the relation of landlord and tenant[23]

Having completed a binding agreement CMHC had therefore sealed its own fate. While the project did not go forward, a breach of contract was found and damages were therefore owing.

Sacks v. Canada Mortgage and Housing Corp., 2001 BCSC 394.

Public Opinion and Pressure. The Minister of Health sought to amalgamate two health care providers, one of which was the appellant Glacier View Lodge ("Glacier"), pursuant to s.16.1 of the *Health Authorities Act*, Glacier sought a declaration that the legislation was unconstitutional.

In the interim a new Minister of Health was appointed, who faced significant political pressure from constituents not to proceed with the amalgamation. She ultimately decided against the amalgamation, and acknowledged that if it were to take place in the future, Glacier was to be given sufficient notice.

Glacier wanted to continue with the matter, which was declared moot, because the legislation remained in tact. However, the appeal was dismissed in the absence of a live issue between the parties to be addressed.

Glacier View Lodge Society v. British Columbia (Minister of Health), 2000 BCCA 242.

Public Disclosure of Documents. A group of unions sought judicial review of a provincial government decision to privatize several health care facilities. They were hoping to quash approvals and funding commitments pertaining to the privatization of hospital facilities at the William Osler Health Center.

The provincial Minister of Health and Long-Term Care supported a private sector consortium formed to design, build, finance, lease/own, maintain, and operate new facilities.

The appellant consortium (Healthcare Infrastructure Company of Canada or "HICC") asserted confidentiality over aspects of the record in the judicial review proceedings. Despite claiming that the documents were proprietary and confidential in nature, and that public disclosure would harm its interests, a master ordered them disclosed.

After considering the relevance and confidentiality of the documents, namely, un-redacted copies of the plans and leases for the P3 scheme, the master determined that they were part of the public record. In short, there is a heavy onus on anyone seeking to deny public access to court documents or proceedings.

To do so, they would need to demonstrate that confidentiality is required to protect a value of "super-ordinate importance."[24] The Supreme Court of Canada established a two-step test to determine if public access should be denied.

> (a) First, it must be established that such an order is necessary to prevent a serious risk to an important interest.

---

[23] *Canada Square Corp. Ltd. v. Versafood Services Ltd.* (1981), 130 D.L.R. (3d) 205 (Ont. C.A.).

[24] *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 at 185-187.

> (b) Second, the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[25]

Ultimately, the threat posed to a commercial interest for example, must be real, substantial, and serious, and well grounded in evidence. HICC was unable to satisfy this burden of proof and the .

Ontario Council of Hospital Unions v. Ontario (Minister of Health), [2007] O.J. No. 411.

Conclusion

After several decades of experience with the P3 framework, a diverse array of projects have been completed and important lessons learned. Overall, public-private partnerships have made a significant impact in both the public and private spheres.

Again, these unique and flexible arrangements facilitate cooperative ventures between the public and private sectors, addressing public needs with attendant allocations of resources, risks, and rewards.

Projects have been successful in such areas as water treatment, technology, multi-unit housing, infrastructure, hospitals, airports, and schools. In essence, the interaction between development goals of public entities and private sector financing, expertise, and assumption of risk have created cost effective ways to provide basic public services.

As with any commercial arrangement, P3s have faced numerous challenges, but have nonetheless, proven advantageous in both the short and the long term. Most notably, societies are able to capitalize on the modernization of infrastructure and services, private enterprises grow and gain experience, and governments realize enhanced value for public funds and reduced exposure to risk.

Evidently, the merits of P3s have become even more significant due to the intricacies of the global economy. Governments are compelled to find unique ways to fulfill their obligations in light of concerns about the supply and price of accessible credit. P3s provide one effective and flexible solution.

While Canada has weathered recent financial storms, the broader global economic crisis has destabilized financial markets and transactional practices on an international scale. As such, where project financing is undertaken by private partners, public funds are freed up for essential social and economic programs.

As such, where declining revenue streams in the public sector result in less resources for municipal budgets, municipalities are increasingly embracing the P3 concept to overcome such shortfalls. P3s provide an effective method to bring together the best of the public and private spheres, providing societies with much needed infrastructure and services.

---

[25] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.