

# PUBLIC-PRIVATE PRACTICES

*The infusion of private money into capital-intensive public services has been uneven across Canada, but the trend is growing. Five commercial real estate practitioners discuss the impact of public-private partnerships on their practices.*

**By Sheldon Gordon**

**Brock Johnston**  
Clark Wilson, Vancouver

*“I wasn’t retained because I held myself out as a real estate lawyer. The ‘hook’ was my broad range of commercial, real estate and construction law experience.”*



**C**anadian governments at all levels are struggling with the realities of crumbling infrastructure, growing populations and limited public funds. But a growing emphasis on public-private partnerships — to build and operate anything from roads to hospitals — has lawyers rushing to take advantage of new opportunities in an old business: construction of core public services.

A public private partnership, or P3, is a legally binding contract between government and industry for the provision of assets and the delivery of services that allocates responsibilities and business risks among the partners. Government remains actively involved throughout the project’s life cycle. But the private sector is responsible for the commercial functions such as project design, construction, finance and operations.

P3s come in different shapes and sizes, with varying degrees of public and private sector involvement — and varying levels of public and private sector risk. The goal is to combine the best attributes of the public and private sectors for mutual benefit.

Almost all big law firms advertise their practitioners' expertise in public-private partnership projects. Commercial real estate lawyers are especially keen. With knowledge and experience in property development, they can craft complex multi-party agreements, intended to survive a long time — on average 30 years.

Leading the way in P3 projects is British Columbia. But similar undertakings are moving slowly forward in Quebec and have renewed vigour in Ontario, known there as "alternative financing and procurement" (AFP).

All three provinces have created agencies devoted to conceiving and facilitating these types of initiatives. Even the federal government is getting into the game. The last federal budget provided for a "Building Canada Fund" to be allocated to provinces and territories for P3 infrastructure projects.

### A model of choice?

Brock Johnston of Clark Wilson in Vancouver has worked on several public-private partnerships. He was involved in the Britannia Mine Water Treatment Plant, a facility developed to treat acid rock draining from the decommissioned Britannia copper mine into Howe Sound.

He acted under instructions from Partnerships BC, an arms-length commercial agency that the province established

## Neal Leard

Stewart McKelvey, St. John, New Brunswick

*"Not only do you take the asset and manage it over this period of time, but you also make sure that members of the public who use it get a specific level of service."*

in 2002 to promote and help implement P3s. Britannia was one of the agency's first projects.

Johnson also worked with the agency as an advisor to three Yukon government projects — a bridge in Dawson City and two telecom projects.

Then a partnership to build a new aircraft maintenance and aerospace training facility landed him at Kelowna International Airport. Involved were three levels of government, the British Columbia Institute of Technology (BCIT), Kelowna Flightcraft, the Airport and Westjet.

"I wasn't retained because I held myself out as a real estate lawyer," says Johnston. "The 'hook' was my broad range of commercial, real estate and construction law experience." Still,

# Projets plein de promesses

*Les juristes spécialisés en droit immobilier lorgnent du côté des PPP.*

**L**es infrastructures prennent de l'âge, la population est en pleine croissance et les fonds publics sont à sec. Dans ces circonstances, les partenariats public-privé constituent une solution alléchante pour les instances gouvernementales. Et les juristes spécialisés en droit immobilier comptent bien en profiter.

Un PPP répartit la responsabilité et les risques d'affaires d'un projet entre le gouvernement et l'industrie privée. Le gouvernement s'engage à être présent à toutes les étapes du projet, mais c'est le secteur privé qui est généralement responsable des fonctions commerciales telles que la conception et la construction du projet, les finances et les opérations. L'objectif ultime est de combiner les meilleurs attributs de ces deux secteurs.

### Les perspectives et les bémols

En matière de PPP, la Colombie-Britannique mène le bal, suivie du Québec et de l'Ontario. Les trois provinces ont créé des agences qui ont pour mandat de concevoir et faciliter la mise sur pied de PPP.

Ces derniers sont aussi présents en Alberta, mais dans une moindre mesure puisqu'ils ne soulèvent pas le même enthousiasme. Selon Jeffrey Selby, du cabinet Parlee McLaws à Calgary, puisque l'Alberta est un bastion de l'entreprise

privée, « la contribution du gouvernement ne semble pas aussi nécessaire ».

Des PPP ont vu le jour ailleurs au Canada. Ce fut le cas du Pont de la Confédération reliant l'Île-du-Prince-Édouard au Nouveau-Brunswick.

Au Québec, le concept de PPP est lent à s'imposer. Malgré la création en 2005 de l'Agence des partenariats public-privé du Québec, aucun projet n'a encore atteint le stade de l'implantation. En coulisses, on chuchote que les discordes politiques et les coûts à la hausse risquent fort de mettre en péril la concrétisation des quelques projets qui sont déjà sur la table.

### Des habiletés recherchées

Pendant ce temps, les juristes québécois ne restent toutefois pas les bras croisés. « J'insiste pour que les jeunes avocats de Montréal aient la chance de travailler avec leurs collègues de Toronto afin qu'ils puissent bénéficier de leur expérience », explique Rita de Santis, avocate chez Davies Ward Phillips & Vineberg à Montréal.

Et ils ont tout intérêt à bien se préparer puisque les avocats en droit immobilier joueront un rôle de premier plan en matière de PPP, croit Brenda Hebert, avocate chez Stikeman Elliott à Toronto.

La majorité des grands cabinets d'avocats font la promotion de leur expertise en matière de projets de PPP. Les avocats

en droit immobilier trouvent ce marché très intéressant et ont tout ce qu'il faut pour tirer leur épingle du jeu. Leur connaissance et leur expérience en mise en valeur immobilière leur permettent de concevoir des ententes multipartites complexes qui dureront une trentaine d'années en moyenne.

Selon Me Hebert, le juriste en droit immobilier est non seulement en mesure de conseiller les parties au sujet des titres, mais en plus, il peut se pencher sur les questions de droit de l'environnement, de droit d'usage des municipalités, de construction et de financement. »

« Puisqu'ils sont en charge de rédiger les ententes, les avocats deviennent les gardiens de toutes les informations requises par les ingénieurs, les consultants en environnement et les comptables », renchérit Neal Leard du cabinet Stewart McKelvey à Saint John, au Nouveau-Brunswick. « Toutes ces informations doivent s'insérer dans un ensemble d'accords qui reflètent véritablement les désirs du client, tout en conservant une perspective globale ».

Les PPP constituent certes un terrain de jeu invitant pour les avocats spécialisés en droit immobilier. À eux maintenant de mettre en relief les habiletés dont ils disposent et d'offrir leurs services au moment opportun. ■ — Yamina El Jamaï

## Rita de Santis

Davies Ward Phillips & Vineberg, Montreal

*“People are not going to believe in [P3s] until they see something that’s completed.”*

he concedes that in most P3 projects, real estate issues are focal — who owns it and what are the constraints?

B.C.’s infrastructure needs are huge, and Johnston is hopeful P3s will continue to be the model of choice. He says that post-project audits conducted by Partnerships BC have found that they have “generated value over and above what would have been accomplished had conventional procurement been undertaken.”

But in spite of a promising future for public-private partnerships, lawyers will have to adapt to a tighter market for legal services, says Johnston.

“There’s been a great deal of work, and perhaps some wheel-spinning, in the drafting of agreements. I’m fairly confident that documentation will become increasingly standardized.”

That’s because legal concepts, such as addressing risk allocations for geo-technical problems or environmental contamination — integral to P3 projects — will be better defined and more consistent. “There will be a lot less negotiation around those concepts,” Johnston explains. “The legal work will probably be reduced because of that.”

### Plenty of promise

Even so, lawyers will likely play a key part in the success of such massive projects.

Neal Leard of Stewart McKelvey in Saint John, NB believes the outlook for P3s in Canada is generally encouraging. The impact on a commercial real estate lawyer’s practice is “ultimately going to be fueled by the models that are chosen — because real estate can play a big part of it”, he explains.

“Having a real estate background equips you for this, because geo-technical and environmental issues can filter into it, and these are the things you deal with day-to-day in a real estate practice.”

Leard first became involved with P3s working on the province’s TransCanada Highway project.

The project, which included the construction, operation, maintenance and rehabilitation of 275 km of highway between Fredericton and the Quebec border, was unique because the province did its own land assembly and there was no lease-back arrangement.

“I was part of a team from our firm involved in preparation of the RFQ and RFP, drafting of the project agreements and working with the engineers involved fleshing out technical specs to make sure that the construction and performance requirements were met.”

In drafting agreements, lawyers became a repository for the information requirements of engineers, environmental consultants and accountants, says Leard. “You have to take all this information and, keeping your eye on the big picture, make it all fit together into a model and a set of agreements that really reflects where it is your client is trying to go.”

For Leard — currently involved in another partnership to replace and operate ferry services to Grand Manan Island in



the Bay of Fundy — P3 projects are unique, owing to the size of the ventures. The stakes are far more varied than in a typical construction project, which is site-specific and contained — and where the issues can be isolated more readily.

“In the highway project, you’re dealing with such a large and varying physical areal that the number and variety of issues requiring special attention tends to be much greater than on smaller projects,” he explains.

True, much like commercial real estate transactions, long-term operation agreements are concluded on the basis of lease-type arrangements.

But “the main differences are the more stringent maintenance obligations and there is always some level of client service layered in as well,” says Leard. “Not only do you take the asset and manage it over this period of time, but you also make sure that members of the public who use it get a specific level of service.”

The ideal commercial real-estate lawyer for a P3 should be a generalist, says Brenda Hebert of Stikeman Elliott in Toronto, who has worked on P3 projects across Canada, including New Brunswick’s Fredericton-Moncton toll highway, and the financing of two major sports stadiums — B.C. Place (now General



## Discover the Chicago Title Solution

**Chicago Title Insurance Company Canada** is more than just a trusted title insurance provider. Lawyers and notaries across Canada choose Chicago Title to gain unmatched efficiencies in their process and take advantage of many of our value-added tools. Align your practice with a title insurance partner that offers comprehensive protection for your clients and workflow improvements for you.

1-888-868-4853  
[www.chicagotitle.ca](http://www.chicagotitle.ca)

Chicago Title Insurance Company Canada has been providing security for residential and commercial real estate transactions for over 150 years and has been proudly protecting Canadians for the last 35 of those years. Chicago Title is a subsidiary of Fidelity National Financial, one of the world's largest title insurance companies and an industry leader in all measures of financial strength. In fact, based on its worldwide operations, Fidelity National Financial generates the largest claims reserves in the industry. As part of the Fidelity family of underwriters, every insurance policy written by Chicago Title in Canada is backed by those financial resources.



Motors Place) in Vancouver and the Corel Centre in Ottawa.

She also acted for an Ontario hospital that contracted with a private energy company to build and operate a co-generation plant on hospital-owned land.

The job involves more than giving title opinions. "From a real estate perspective, you're looking at title to land, municipal land-use issues, environmental issues, construction and financing," says Hebert. "We're really involved in making the deal work," more so than for a business decision involving a commercial office tower, for example.

She adds that lawyers often play a leadership role in driving the deal "simply because all the documents are emanating from them."

Not to mention that there is a major difference between private-sector real estate transactions and P3 projects in terms of expectations of timing and production.

"Usually these transactions are quite fast and very practical," says Hebert. "In a P3 project there isn't much room for lawyers to dance around being lawyers. There may be delays, and yes, government is bureaucratic, but our clients expect us to work well and efficiently with all parties to the transaction. They don't want us sitting back and saying, 'It's not my fault. The other side hasn't got back to me.'"

Hebert believes that P3s are again in vogue in Ontario, albeit known as AFPs. "I wonder if it means more of our young real-estate lawyers will have a broader range of commercial real-estate experience and corporate commercial experience," she says. "They're going to have to understand more about the other aspects of the transaction and have more construction-contract experience than they've had for some years."

### Challenges abound

Working on P3s, however, comes with its share of disappointments. There is no guarantee the lawyer will see the file to completion.

Hebert, for one, acted for the runner-up bidder in the 407 Express Toll Route project in Toronto. She also acted for Atomic Energy of Canada Ltd. when it designed a project for an underground facility in Whiteshell, MB for environmental protection of nuclear waste products. "We worked on it for quite a while, but it just petered out."

Jeffrey Selby of Parlee McLaws in Calgary knows the feeling. One of the more frustrating P3 projects he worked on was the Southwest Calgary Ring Road project, involving the Tsuu T'ina Nation — which owns the land earmarked for the road. Other partners included the City of Calgary, the federal and provincial governments and the private sector.

"The developers, governments and the aboriginal group ran on such different timetables," he recalls. "It really didn't go very far."

Selby is having better luck acting for a large retailer that acquired a site in the Deerfoot Meadows Shopping Centre built in southeast Calgary. Because the centre was developed near the Queen Elizabeth II Highway, Alberta's major north-south artery, the province was involved in road improvements.

The major challenge in public-private partnerships, says Selby, is giving the client — be it the developer or the end-user — comfort with respect to timetable and costs.

"There has to be a level of certainty as to what's going on," he explains. "Government must be prepared to convert its commitments from letter of intent to signed documentation.

*Continued on page 51*

reduced hours target.”

McCarthy Tétrault’s director of associates keeps tabs on the work habits of the firm’s younger lawyers, including those with flex-time arrangements. She monitors their hours in case “they’re working too hard,” says Chown.

That and her firm’s women’s network are a major draw among prospective hires. “Women will often identify this as a reason they chose to come to us.”

Law firms that don’t have policies for flex-time and maternity leave are sending the wrong signal, says Chown. Firms that do are advised to promote their policies by displaying them prominently on the firm’s website and offer further details on an intranet.

Designing a policy for flex-time work needn’t be difficult. Gavin Hume of Fasken Martineau DuMoulin LLP chairs the Law Society of British Columbia’s Task Force on Women in the Legal Profession. Hume says the task force released a model policy for flex-time work last year to “help law firms think about ways to look at flexible work arrangements.”

The policy addresses possible structures of such arrangements, how to maintain contact with office assistants and how lawyers can be reached during business hours to deal with emergencies.

According to Hume, lawyers are leaving firms for lifestyle reasons. “They’re going to law-related jobs or moving to in-house positions where there is more control over one’s time.” To stem that flow, “law firms need to think about possible accommodations.” What can firms do? “Change clients’ attitudes,” says Hume, since client demands drive much of the

push to work so many hours.

Easier said than done. Alison Bauer at Torys says that sometimes her flexible schedule “works fluidly and other times it can be quite stressful. I’ve had vacations where I’m rushing the kids off the beach because I’ve got to get on a conference call. It’s very stressful.”

So far, Bauer has managed to hold firm. Clients have told her that working on a part-time basis hasn’t affected her level of service.

“Chances were if I was home with my child, they could reach me and I was more accessible than another partner who was out at a meeting with another client. When you get repeat work from them, that’s a compliment right there, they trust you and they know that you’re there for them.”

Bauer admits it hasn’t always been easy handling a transaction-based law practice while working reduced hours. While she normally works a four-day week and can control the number of files she works on, “when you’re on the deal, you’re on the deal,” and that can sometimes translate into 60-hour work weeks. “Hopefully, whether it’s the end of the month, the quarter, the year, it levels out,” she says.

In the end, having the opportunity to work and to spend more time with her family has helped Bauer develop a strong sense of loyalty to her firm. “They’ve looked at our relationship as a long-term one,” she says. By accommodating her needs now, she says, they hope to still be working with her in some capacity 20 years down the road. ■

Ann Macaulay is a Toronto writer and editor.

## PUBLIC-PRIVATE PRACTICES *Continued from page 46*

There’s a significant lag and a significant expense to the developer. The legal bills can be frightening, and can take the average developer out of the picture.”

For commercial real estate lawyers, he adds, P3 projects are “labour-intensive, but they provide exposure to the kind of client base that they would like to have — *i.e.*, you’re not looking at little guys.”

Selby sees some, but not huge, potential for public-private partnerships in Alberta. “The Aboriginal people want to develop their property, and that’s one area where we’re going to see more P3s. Perhaps we’ll see more of it in places like Fort McMurray, where the provincial government wants to promote certain types of development.”

But because Alberta is such a bastion of private enterprise and so flush with private capital, “government doesn’t necessarily have to be drawn in,” he adds.

Quebec, where public funds are harder to come by, might someday prove to be more fertile ground. But for now, when real estate lawyers in the Montreal office of Davies Ward Phillips & Vineberg want exposure to a P3 infrastructure project, Rita de Santis refers them to the firm’s Toronto office.

“I have insisted that younger lawyers in Montreal work with colleagues in Toronto so that we can learn from the Toronto experience,” she says.

That’s because in Quebec, the concept of *partenariats public-privé* (PPPs) has been slow to catch fire. The Agence des partenariats public-privé du Québec (PPP Québec) was created in 2005 “to contribute to the renewal of public infrastructures and the enhancement of services delivered to citizens through public-private partnerships.” But barely any projects have yet moved into the earth-turning stage.

The two most advanced projects are initiatives to extend Highway 25 across Rivière-des-Prairies and the hoped-for

completion of the eastern end of Highway 30 in Candiac and the western end in Vaudreuil-Dorion.

As the magazine went to press, three qualified bidders had until March 31st to present proposals for the former, and three consortia had until May for the latter.

An RFQ to build and operate a music hall for the Montreal Symphony Orchestra as a PPP was launched in December, and an RFP was expected to follow in June.

There are also plans for a McGill University Health Centre and a Centre hospitalier de l’Université de Montréal (CHUM) — two super-hospitals that would replace much of the existing infrastructure of the two health networks. But political wrangling and concerns over rising costs have some people doubting whether the projects will ever be completed.

“It’s hard for lawyers to get involved at this stage,” says de Santis. “It’s extremely expensive to put together the consortia, and unless they know they’ve got a good chance of getting the project, they’re not going to come for that kind of advice.”

Making matters worse, “a very strong lobby by the unions” against PPPs has slowed their momentum in Quebec, she says. PPPs for highways were originally the idea of the Parti Québécois government, but when the Liberals took over, the landscape changed.

As it is, de Santis adds, “we have not been able to explain to the population what a PPP is. People are not going to believe in them until they see something that’s completed. We have nothing to show them right now.”

If the Liberals retain office in a spring provincial election, she says, “they’re going to have to move quickly and realize one or two [projects] to show the people that this can be positive for them.” ■

Sheldon Gordon is a Toronto writer specializing in business and legal affairs.