

A Discussion on the Delivery of Infrastructure through Public-Private Partnerships: the Importance of Policy Architecture¹

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The World Bank's PPP Knowledge Lab defines a Public-Private Partnership ("P3")³ as "[a] long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance".⁴ The core features of P3 procurement are the transfer of risk to the private sector, and private financial participation.

In a 2013 report, the McKinsey Global Institute estimated that to "keep pace" with projected global GDP growth, an estimated \$57 trillion in infrastructure invested

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³ Different jurisdictions employ different names for public-private partnerships. For example, Infrastructure Ontario (discussed below) refers to this type of procurement as "alternative financing and procurement", and the United Kingdom refers to it as "private finance initiative". For the purpose of this paper, we will use the term "public-private partnership", or "P3", for short.

⁴ World Bank Group, "PPP Knowledge Lab – PPP Reference Guide", World Bank Group, online: <<https://pppknowledgelab.org/ppp-cycle/what-ppp>>.

PPP Canada Inc. uses a similar definition for P3s: "a long-term performance-based approach to procuring public infrastructure where the private sector assumes a major share of the risks in terms of financing and construction and ensuring effective performance of the infrastructure, from design and planning, to long-term maintenance". See <http://www.p3canada.ca/en/about-p3s/frequently-asked-questions/>.

between 2013-2030 is needed.⁵ This figure is approximately 60% more than the \$36 trillion spent globally on infrastructure from 1995-2013.⁶ McKinsey suggests that by taking practical steps to boost productivity, the global infrastructure sector could lower spending by 40%, resulting in an annual savings of \$1 trillion.⁷

This global infrastructure gap is causing governments to turn to alternative infrastructure investment strategies, including P3s, as a way to boost productivity. In so doing, governments can leverage risk transfer to the private sector with a view to addressing infrastructure deficits caused by booming economies and population growth.

This paper examines the delivery of infrastructure through P3s in Canada and in the Caribbean. Much can be learned from the Canadian experience, as Canada has become a trailblazer in P3 procurement over the last decade. This paper will therefore also highlight features of the Canadian P3 procurement process from which countries in earlier stages of P3 development can learn and benefit as they develop, implement and refine policies and legislative frameworks. Specifically, it will highlight the need for countries to establish and formalize P3 agencies and guiding policies or frameworks—policy architecture—that serve to guide, protect and streamline the procurement process.

⁵ Richard Dobbs et al, "Infrastructure productivity: How to save \$1 trillion a year" (2013), McKinsey & Company, online: <<http://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/infrastructure-productivity>>.

⁶ Dobbs, *supra* note 5.

⁷ Dobbs, *ibid*.

1. INTRODUCTION TO P3S

What are some advantages of and concerns with P3s? How does the P3 procurement process work? What P3 models are used? The answers to these questions are similar across jurisdictions, and we briefly address them below.

(a) Advantages

P3s can be advantageous for a number of reasons, most of which stem from the transfer of risk from the public sector to the private sector, and the financial contribution of the private sector to public infrastructure.

Accelerated Construction. In a P3 model, no payments are made until the project is substantially completed (what this means depends on the project and the underlying agreements). Construction can therefore commence sooner than in a traditional procurement model, where cash flow is typically required up front.⁸

On-Time and On-Budget Delivery. The private sector is incentivized to complete projects on time and within budget, because it will contractually absorb the risks associated with or be penalized for delayed completion dates and inflated costs.⁹ In addition, a P3 contract is relatively inflexible. This inflexibility reduces the likelihood of incorporating expensive changes to the project.¹⁰ This level of accountability does not

⁸ Timothy J. Murphy, "The Case for Public-Private Partnerships in Infrastructure" (2008) 51:1, *Canadian Public Administration* 99 at 101.

⁹ Murphy, *ibid.*

¹⁰ Anthony E. Boardman et al, "The Theory and Evidence Concerning Public-Private Partnerships in Canada" (2016) 9:12, *The School of Public Policy SPP Research Papers* at p. 11.

exist in traditional public procurement. As one author points out, traditional or public-sector procurements are subject to an "optimism bias", which is a tendency to be overly positive when budgeting for project outcomes, as opposed to considering the most likely results.¹¹ This often results in projects being delayed or requiring additional, unexpected capital investment.

The Canadian Centre for Economic Analysis (CANCEA) investigated the economic impact of 200 P3s in Canada. It also looked at the economic value of delays, and determined that for projects of a given size, the impact on the Canadian economy increases as the length of the delay increases.¹² According to CANCEA, on average, the delay avoided by using P3s in Canada is one year. A one-year delay for a \$100 billion portfolio could reduce the total project value by 10%. In other words, completing a portfolio of that size one year earlier could result in additional 10% of project value.¹³ These figures demonstrate the importance of on-time delivery of infrastructure.

Risk allocation/transfer. From a risk perspective, benefits of P3s arise from transferring design and construction risks from the public to the private sector.¹⁴ Depending on the P3 model used, the risk of operating and managing public assets can also be transferred to the private sector. Risks are managed optimally and most cost-

¹¹ Boardman, *ibid*; L. Bryce Jatto, "A Legal Perspective on the Case for Procuring Capital-Intensive Infrastructure Services Via P3s in Canada" (2012), *Asper Rev Int'l Bus & Trade L* 5 at 9.

¹² Canadian Centre for Economic Analysis, "The Economic Impact of Canadian P3 Projects: Why building infrastructure 'on time' matters" (2016), pp. 30-31, online: <http://www.cancea.ca/sites/economic-analysis.ca/files/reports/CANCEA%20Report%20-%20The%20Economic%20impact%20of%20Canadian%20P3%20projects_1.pdf>.

¹³ Canadian Centre for Economic Analysis, *ibid*.

¹⁴ Murphy, *supra* note 8 at 102.

effectively when they are allocated to the party best able to manage them:¹⁵ optimal risk allocation does not happen where the public sector allocates *all* project risks to the private sector. For example, allocating all project risks to the private sector would likely increase the overall cost of the project, particularly because the private sector requires compensation to take on additional risk.¹⁶ The transfer of risk is therefore only a "benefit" or advantage of P3 procurement if P3s mitigate or manage risks better than traditional procurement models. In Canada, the risks that are typically transferred to the private sector consortium are construction and availability risk; demand risk is rarely allocated.¹⁷

Innovation. P3 procurement provides opportunities for innovation. Private sector consortia have an incentive to innovate at every stage of a P3 project: through design, financing, construction methodology, and later in the operation and maintenance of the

¹⁵ Dan Ferguson et al, "To P3 or not to P3" (Paper delivered at the Association of Corporate Counsel Conference, 25 October 2010), online: <http://www.weirfoulds.com/files/6882_ACC%20Conference_To%20P3%20or%20not%20to%20P3_BNM-DPF.pdf#pagemode=none>.

¹⁶ Ferguson, *ibid.*

¹⁷ Matti Siemiatycki, "Is there a Distinctive Canadian PPP Model? Reflections on Twenty Years of Practice" (Paper delivered at the Public-Private Partnership Conference Series CBS-Sauder-Monash, 12 June 2013) at p. 22, online: <http://www.sauder.ubc.ca/Faculty/Research_Centres/Phelps_Centre_for_the_Study_of_Government_and_Business/Events/UBC_P3_Conference/~/_media/Files/Faculty%20Research/Phelps%20Centre/2013%20P3%20Conference/Papers/s6%20%20Siemiatycki%20Is%20There%20a%20Distinctive.ashx>.

Construction risk relates to issues that may be encountered during the construction phase of a project, including cost overruns, delays, and worksite accidents. Availability risk relates to the risk that the asset will provide insufficient services due to management issues, or a failure to meet asset availability or quality standards. Demand risk relates to insufficient user volumes, and the risk of a discrepancy between initial expectations, and the amount of service actually required or consumed by users. See Auditor General of British Columbia, "Understanding Public Private Partnerships", online: <<https://www.bcauditor.com/sites/default/files/publications/2011/report2/files/oagbc-understanding-p3-public-private-partnerships.pdf>>.

project. The incentive to innovate stems from the need to manage risks allocated to the private sector,¹⁸ and to deliver a high-quality project on-time and within budget. Innovation can be specifically encouraged by introducing performance-based outcome specifications for which availability payments are made.¹⁹

Sustained maintenance. Maintenance can be better sustained with a P3 if the private sector is tasked with maintenance during its concession term, and the maintenance obligations are set out in the project agreement ("**PA**") between the public and private entities. As discussed above, the private sector is incentivized and held accountable during the life of the project agreement to maintain the project to a certain standard.²⁰

Cost Savings and better Value for Money. Proponents of P3 procurement argue that each of the proposed advantages discussed above result in P3s having the potential to save governments money but also provide more value for money. Value for money ("**VfM**") is a measure of the extent to which cost savings are achieved when delivering a public infrastructure project through a P3, relative to a traditional government-led procurement approach.²¹ VfM is driven by enhanced, upfront planning; incentive-based bundled contracts that encourage on-time and on-budget delivery;

¹⁸ X.-X. Yuan and J. Zhang, "Understanding the Effect of Public-Private Partnerships on Innovation in Canadian Infrastructure Projects" (2016) Ryerson Institute for Infrastructure Innovation, at p. 41, online: <<http://www.ryerson.ca/content/dam/riii/ryerson-construction-innovation-2016.pdf>>.

¹⁹ Yuan, *ibid.*

²⁰ Public-Private Infrastructure Advisory Facility, "Caribbean Infrastructure PPP Roadmap" (2014) at 8. [**Roadmap**]

²¹ Roadmap, *ibid.*

innovative designs that improve the user/consumer experience and save costs; and the allocation of risks to the private partner best able to manage those risks.²²

(b) Concerns and drawbacks

Opponents of P3s have identified a number of concerns with or drawbacks of this type of procurement. Some say that P3 procurement is akin to privatization. Proponents of P3s think this concern is misguided. In a P3, the public sector retains control over certain aspects of a project, and can play a substantial role in the delivery, implementation, and sometimes financing of the project, while also retaining ownership of the asset.²³

Opponents also suggest that the incremental cost of private financing in P3 procurement is a drawback. However, though there is a higher cost associated with private borrowing, the risks and potential costs of a P3 are underwritten by the private consortium versus the taxpayer.²⁴ Essentially, a government employing a P3 is paying a "risk premium" to transfer risk to the private sector, as opposed to "self-insuring at a zero premium cost but at a potentially high failure cost".²⁵

²² Roadmap, *supra* note 20.

²³ The Canadian Council for Public-Private Partnerships, "Public-Private Partnerships – A Guide for Municipalities" (2011), The Canadian Council for Public-Private Partnerships at p. 9, online: <<http://www.p3canada.ca/~media/english/resources-library/files/p3%20guide%20for%20municipalities.pdf>>.

²⁴ Murphy, *supra* note 8 at 104.

²⁵ Murphy, *ibid* at 105.

Another issue identified by P3 opponents is that the general cost of P3 procurement is higher. There are a limited number of private sector consortia that are in a position to bid on major and complex P3 projects, which means that consortia can factor higher profits into their bids. Ultimately, it is the taxpayer who is covering the cost of these higher bids.²⁶ However, if the project has good VfM, and there is certainty related to the delivery of the project based on the contractual agreements between the public and private sectors, these higher, upfront costs can be offset.

P3 procurement has been accused of resulting in lower-quality design and service of public infrastructure because the private sector is incentivized to reduce costs to optimize revenue. Supporters of P3 procurement rebut this by arguing that in a competitive P3 market, quality of service can (or should) be determinative of financial success, particularly in the long-term.²⁷ In addition, with the public sector having substantial influence over and bargaining power with respect to concessionary P3 contracts, well-crafted quality service provisions that are overseen by the public sector, together with penalty clauses, can serve to effectively define, control and discipline the quality of service.²⁸

Finally, some say that P3s result in less transparency and less accountability, and that P3 procurement creates incentives for bribery and corruption. When an investor has an opportunity to win a bid for a long-term, government-backed contract,

²⁶ Boardman, *supra* note 10 at p. 13.

²⁷ Murphy, *supra* note 8 at 107.

²⁸ Murphy, *supra* note 8 at 107.

corruption can infect the collaboration. Transparency and accountability—actual and perceived—will vary from country to country. Concerns can and should be addressed in P3 policies and frameworks. In Canada, for example, most P3 policies have provisions requiring the procurement process to be open, fair and transparent.²⁹ And, as a general rule, most VfM reports are made available to the public by Canadian procurement agencies.³⁰ Furthermore, most Canadian P3 policies provide for the involvement of a fairness advisor who opines on and monitors the transparency of the process.³¹ Infrastructure Ontario ("IO"), the provincial agency responsible for promoting P3s in Ontario, has developed five principles that govern its operations, one of which is that "accountability must be maintained". In addition, IO states that its approach to transparency is "to make available a significant amount of information... while balancing the need for transparency and commercial confidentiality".³²

The efficacy of P3s is likely to be a disputed topic for years to come. However, if a VfM analysis drives decisions to procure or not to procure, and P3s continue to deliver

²⁹ See, for example, the City of Ottawa's P3 policy, which was adopted in 2013: "The procurement process for all P3 projects shall be undertaken using an open, fair and transparent process, in accordance with the City's Purchasing By-law." See City of Ottawa, "Public-Private Partnerships Policy" (2013), online: <http://p3-2016.com/pdf/ottawa_p3_policy_04102013.pdf>.

³⁰ Murphy, *supra* note 8 at 109-110.

³¹ Mario Iacobacci, "Dispelling the Myths: A Pan-Canadian Assessment of Public-Private Partnerships for Infrastructure Investments" (2010) Conference Board of Canada at p. 35.

³² Infrastructure Ontario, "AFP Approach to Transparency", online: <<http://www.infrastructureontario.ca/AFP-Approach-to-Transparency/>>. IO notes that all disclosure is subject to Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31. Similarly, Partnerships BC, which supports the delivery of infrastructure in British Columbia, has a number of guiding values, including a commitment to transparent management of its business, and a commitment to making transparent, ethical and conflict of interest-free decisions. See Partnerships British Columbia, "About Us", online: <<http://www.partnershipsbc.ca/about/>>.

better VfM than traditional procurement, then the arguments for this model should always weigh in the favour of P3s.

(c) The P3 Procurement Process

The implementation of a P3 project typically takes place in three broad phases: (i) planning (pre-procurement); (ii) procurement; and (iii) contract management/operations.³³ An in-depth analysis of the process is beyond the scope of this paper; however, we provide a brief overview of each step below.

(i) Planning

In the planning phase, the public sector/government agency must first identify priority investment projects, and determine whether such projects may be suitable for P3 procurement. Considerations at this stage include the economic and commercial viability of the project, risk identification and allocation, and a VfM assessment, which will include a consideration of the total project costs.³⁴ The output of this phase is an initial concept or business case for pursuing a P3. The amount of time an agency will spend in this stage often relates to the level of experience that agency has with P3 procurement, and how clear its P3 policies and frameworks are.

³³ CCPPP, *supra* note 23 at p. 24. We appreciate that the process may vary slightly from one jurisdiction to another, but we are providing an outline of a typical procurement process for discussion purposes.

³⁴ CCPPP, *ibid* at pp. 25-27. See also PPP Knowledge Lab, "Appraising Potential PPP Projects", World Bank Group, online <<https://pppknowledgelab.org/guide/sections/49-appraising-potential-ppp-projects>>.

(ii) *Procurement*

In general, once an agency has approved a project to proceed as a P3, the procurement process involves project development, requests for qualifications ("**RFQ**"), requests for proposals ("**RFP**"), finalizing the project agreement, and financial close.

Project development includes, among other things, establishing project rules, developing a project plan and an evaluation process, and assembling human resources.³⁵ Depending on the jurisdiction, a fairness advisor may be appointed to oversee this process to ensure that it has been carried out in compliance with policies, principles and best practices of the agency and/or jurisdiction.

In Canada, the RFQ phase seeks expressions of interest from as many qualified bidders as possible, but will generally only shortlist/invite complete bids from three bidders. This balances the need for competition with the fact that developing a complete bid is costly and time-consuming.³⁶ Selection at this phase is typically based on the bidders' financial capacities, financing capabilities, and their experience, resources and track record.³⁷ The RFP phase involves the release of the RFP document and an evaluation of responses before selecting the preferred bidder.

Once a preferred bidder has been selected, the government agency will contract with the private party. In complex P3s, discussed in more detail below, the government

³⁵ CCPPP, *supra* note 23 at p. 29.

³⁶ Boardman, *supra* note 10 at p. 17.

³⁷ CCPPP, *supra* note 23 at p. 29. This includes the bidder's knowledge of the legal, business and regulatory landscape in the given jurisdiction.

agency will contract with a consortium or a special purpose vehicle ("**SPV**"), which is a legal entity formed for the purpose of the project, through a PA. (A PA may also be called a "Concession Agreement" or a "Ground Lease".)³⁸ In these P3s, the SPV will provide a range of services and some, if not all, of the private capital required for the ultimate project under the PA.³⁹ In addition to contracting with the government agency, the SPV will also enter into contracts with its major subcontractors, and may enter into contracts with the lender providing project financing.⁴⁰ All of the contract negotiation takes place at this stage of the procurement process.

Generally, PAs set out what the powers, responsibilities, and duties of the private sector are in the delivery and operation of the project asset. PAs also deal with insurance issues, indemnification, termination, dispute resolution provisions, penalties for delays, and more.⁴¹ Furthermore, PAs will include the term of the agreement, which can be as long as 25-35 years. If ownership of the asset is transferred to the private sector during the term, the PA will have to include provisions for repair and maintenance responsibilities.⁴²

³⁸ Ferguson, *supra* note 15 at p. 3.

³⁹ Boardman, *supra* note 10 at p. 17.

⁴⁰ Ferguson, *supra* note 15 at p. 3.

⁴¹ Ferguson, *ibid.*

⁴² Ferguson, *ibid.*

"Commercial close" takes place when PAs are executed by the government and the private sector, and "financial close" occurs when the funds from the project financing are received by the private sector.⁴³

(iii) Contract Management/Operations

Once commercial and financial close have been reached, the private sector begins developing the project. This post-procurement phase usually has three stages: development/construction, operations, and contract expiry/termination.⁴⁴ At the development/construction stage, "substantial completion" of a project usually means that construction is complete and ready for use in accordance with contractual requirements. Constant monitoring and communication is required as this phase proceeds through each of its stages.

Having a specialized government agency as well as a formal policy or framework that guides this three-step process can streamline procurement and result in efficiencies throughout the implementation of a P3. A project run by an experienced agency operating under a policy that steers, among other things, the initial VfM assessment, the selection of qualified bidders, and contract negotiations with the selected bidder is bound to be more transparent and accountable, and will encounter fewer delays and political or fiscal risks that might jeopardize the project's implementation.

⁴³ CCPPP, *supra* note 23 at p. 30.

⁴⁴ CCPPP, *ibid* at p. 31.

(d) P3 Models

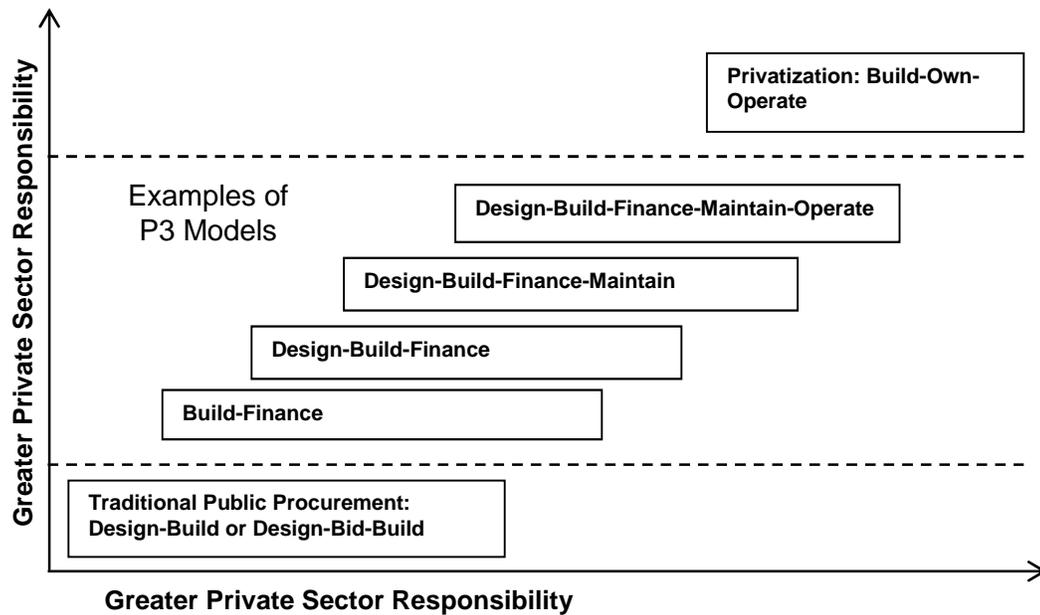
A central characteristic of a P3 contract is that it bundles multiple project phases or tasks together. Typical phases or tasks include:⁴⁵

- **Design:** the development of the project from initial concept to construction-ready design specifications
- **Build:** the construction of a new asset and, if necessary, the installation of equipment. If the P3 involves improving an existing asset, this task is more rehabilitative
- **Finance:** the financing of all or part of the capital expenditure required for building or rehabilitating an asset
- **Maintain:** the maintenance of the asset to a specified standard over the term of the contract
- **Operate:** the operation of the asset and/or service, which could include (i) technical operation of the asset and the provision of service to either the end user (i.e., a water distribution system) or the government (i.e., a bulk water plant), or (ii) providing support services where the government retains the

⁴⁵ World Bank, "Public-Private Partnerships Reference Guide" (2014), online: <<http://api.ning.com/files/lumatxx-0jz3owSB05xZDkmWIE7GTVYA3cXwt4K4s3Uy0NtPPRgPWYO1ILrWaTUqybQeTXleuSYUxbPFWlysyNI5rL6b2Ms/PPReferenceGuidev02Web.pdf>>.

responsibility for delivering a public service (i.e., a hospital that includes janitorial service)

Options for the delivery of infrastructure range from purely public to purely private; delivery of infrastructure by way of P3s falls in between. The figure below lists examples of delivery on a spectrum.⁴⁶



A design-build ("DB") or design-bid-build ("DBB") project has been the most common method of traditional procurement by the public sector, where the public sector is responsible for the design of the asset. Typically, the design is done in-house or is contracted out to a private firm. Once construction is completed, and following a

⁴⁶ Adapted from Siemiatycki, *supra* note 17 at p. 5.

commissioning phase, the asset is given back to the public sector for operation and maintenance.⁴⁷

P3 models bundle tasks set out above. Common bundles include:

- Build-Finance ("**BF**"). The private sector builds and finances the asset, but the public owns, operates and maintains it.
- Design-Build-Finance ("**DBF**"). The public owner contracts with the private sector to design, build and finance the asset; however, maintenance, operation and ownership remains with the public sector.
- Design-Build-Finance-Maintain ("**DBFM**"). During the term of the PA, a private sector consortium, through an SPV, designs, builds, finances and maintains the asset. The asset in a DBFM is publicly owned, and the public sector takes over maintenance when the PA comes to an end.
- Design-Build-Finance-Maintain-Operate ("**DBFMO**"). In a DBFMO, the public sector enters into a PA with an SPV formed by a private sector consortium. The consortium designs, builds and finances the asset, and maintains and operates it during the term of the PA. At the end of the PA, which usually has a term of 25 to 35 years, the public sector owner takes over the asset and its maintenance and operations.

⁴⁷ CCPPP, *supra* note 23 at p. 20.

Another central characteristic of P3s is the payment mechanism involved. The private sector can be paid by collecting fees from service users (i.e., toll roads where drivers pay for use), collecting fees from the government (i.e., shadow tolls where drivers do not pay, but a government pays the operator a fee based on use or some other variable), or based on performance (i.e., "availability" payments⁴⁸). The latter is the most common in Canada for recent P3 projects.

2. THE CANADIAN P3 EXPERIENCE

The development of public infrastructure using the P3 model of procurement has expanded significantly since the 1990s. Canada is now a global leader in P3 infrastructure development, and its P3 programs serve as models for other countries, including the United Kingdom, which is known as the pioneer of P3 procurement.

The history of Canadian P3s is often recounted as being split into two "waves". The first wave covers projects undertaken in the 1990s to early 2000s, which were motivated by the need to (i) supplement (or reduce) public funding for infrastructure, (ii) transfer demand or revenue risk⁴⁹ to the private sector, and (iii) transfer financing of delivery of the public asset to the private sector so that government spending on

⁴⁸ Availability payments are made by the public sector based on the private consortium reaching a particular project milestones or level of performance. Iacobacci, *supra* note 31 at p. 7.

⁴⁹ Transferring "revenue" or "demand" or "use" risk to a private sector consortium means that the private sector consortium is responsible for all of the risk associated with any variations in revenues arising from the use of the project. Many first wave projects failed to do this successfully because features of the use of the project were largely under the public sector's influence. See Iacobacci, *supra* note 31 at p. 7.

infrastructure was "off-book".⁵⁰ The second wave covers projects from the mid-2000s to date, when Canada responded to criticisms raised with respect to projects in the first wave.⁵¹

First wave P3 projects have been criticized for a number of reasons: (i) P3s were politically-motivated and used to privatize public infrastructure, (ii) private financing costs were greater than costs associated with traditional public financing, (iii) insufficient and inadequate assessments were carried out for the purpose of evaluating whether P3 was the best procurement model, (iv) P3 procurement lacked transparency, (v) governments lacked expertise to promote P3 procurement and to manage complex concessions, (vi) the implementation of user fees for public infrastructure was unfair; and (vii) P3s resulted in a loss of public control over important infrastructure.⁵²

The primary response to these criticisms by Canadian governments since the mid-2000s has been the establishment of special-purpose agencies, which have developed sophisticated policies and methods by which to manage P3 procurement. These agencies are discussed below. In contrast to first wave P3 projects, second wave P3 projects typically see private consortia compensated by way of availability payments.⁵³

⁵⁰ Siemiatycki, *supra* note 17 at p. 9.

⁵¹ Siemiatycki, *ibid.*

⁵² Siemiatycki, *supra* note 17 at p. 9; Canadian Centre for Economic Analysis, *supra* note 12 at p. 10.

⁵³ Iacobacci, *supra* note 31 at p. 7.

P3 policies and frameworks vary depending on the jurisdiction in which they are developed. Apart from being consistent with the provincial and federal legislative regime(s) governing procurement, P3 policies and frameworks will generally outline the jurisdiction's guiding principles for procurement, how to determine whether P3 procurement is the optimal approach, guidelines for budgeting, information on how both sides of the project will be humanly resourced, etc. As an example, the Province of Alberta has a comprehensive framework and guideline in place, which is instructive.⁵⁴

The use of P3s in Canada is on the rise, particularly in the last decade. As of the beginning of April 2017, over 250 P3 projects had commenced or been completed across Canada, with approximately 60% of all P3 projects reaching financial close in the last ten years.⁵⁵ The majority of P3s are overwhelmingly found in Ontario;⁵⁶ British Columbia, Alberta and Québec are the other provinces leading the way.

From a sector-specific perspective, approximately 40% of P3 projects in Canada are health care-related,⁵⁷ and nearly 25% are transportation-related. As set out in the chart overleaf, the total capital investment into these projects exceeds \$120 trillion.⁵⁸

⁵⁴ Alberta Government, "Alberta's public-private partnership framework and guideline" (2011), online: <<https://open.alberta.ca/dataset/acddcfca-ec45-4451-949f-b8657f637c71/resource/1f15929e-8d5f-4b29-82ec-28931cd67621/download/5418269-2011-3-Alberta-P3-Framework-and-Guideline.pdf>>.

⁵⁵ Steven Hobbs, "An Overview of Public-Private Partnerships in Canada" (Presentation delivered at the Economic Developers Council of Ontario Spring Symposium, 19 May 2016).

⁵⁶ Hobbs, *ibid.*

⁵⁷ For some perspective on this, in the Province of Ontario, health care spending – over \$51 billion – accounted for some 40% of the Province's 2016-2017 budget. See Kelly Grant, "Ontario needs to make more health cuts to meet spending targets: report", *The Globe and Mail* (10 January 2017), online: <<http://www.theglobeandmail.com/news/national/ontario-needs-to-make-more-health-cuts-to-meet-its-targets-budget-watchdog/article33562725/>>.

P3 Market Snapshot – as of 17 April 2017		
Sector	Number	Value (\$ millions)*
Water & Wastewater	18	1,787
Transportation	66	53,014
Recreation & Culture	16	1,293
Justice	22	5,424
Information Technology	4	773
Health	93	26,584
Government Services	4	1,008
Energy	10	26,091
Education	15	3,060
Accommodations	7	2,546
Total	255	121,580
* includes only costs of projects where costs have been finalized and released		

(a) Enabling legal framework

Some Canadian jurisdictions have enacted legislation to govern specific P3 projects or sectors. For example, Ontario enacted the *Highway 407 Act, 1998*, SO 1998, c 28 in relation to the P3 between the 407 ETR Concession Company Inc. and the Province of Ontario to govern the creation, collection and enforcement of tolls on the 407 highway upon its completion.

Federally, the *Financial Administration Act*, RSC 1985, c F-11 requires government approval for any aspects of a transaction that involves a risk such as a government indemnity or guarantee made in favour of the private consortium or any

⁵⁸ The Canadian Council for Public-Private Partnerships, "Canadian PPP Project Database" online: <<http://www.projects.pppcouncil.ca/ccppp/src/public/search-project>>. [**PPP Database**] The chart lists the number of projects and associated capital expenditure by sector in Canada as of 17 April 2017. The chart was created using information obtained from the PPP Database.

other party to the project (i.e., a subcontractor).⁵⁹ Some provincial legislation has similar provisions. For example, s. 1 of the *Guarantees Indemnities Regulation*, BC Reg 258/87⁶⁰ provides that an indemnity may only be given by or on behalf of the government with prior written approval from the Ministry of Finance.

Generally, however, P3-enabling legislation is the exception and not the rule in Canada, except to the extent that it is necessary to establish P3 agencies. As a result of this, there typically are no legislative requirements regarding mandatory contract terms for PAs, value thresholds for using the P3 model of procurement, or evaluation criteria to be considered in the RFQ or RFP phases.⁶¹ Instead, various agencies have policies, procedures and best practices in place which govern P3 procurement in specific jurisdictions. For example, as mentioned above, the Province of Alberta has published a Public-Private Partnership Framework and Guideline.⁶²

(b) Regulation of P3s

There is no single regulatory body that governs P3s in Canada. Instead, the federal and provincial governments share the responsibility of infrastructure investment.

⁵⁹ *Financial Administration Act*, RSC 1985, c F-11; W. Thomas Barlow, "Canada" in Bruno Werneck and Mário Saadi, eds, *The Public-Private Partnership Law Review* (London, UK: Law Business Research Ltd, 2015) at p. 48.

⁶⁰ Made under the *Financial Administration Act*, RSBC 1996, c 138.

⁶¹ Barlow, *supra* note 59 at p. 48.

⁶² Alberta Government, *supra* note 54.

Though P3 projects are procured at all levels of government, including at the municipal level, P3s have historically been implemented primarily at the provincial level.⁶³

(i) **Federal**

In 2007, the federal budget created the \$1.25 billion P3 Fund, which was coordinated with a P3 Office. The P3 Fund and P3 Office eventually evolved into PPP Canada Inc. ("**PPP Canada**"), which is a federal Crown Corporation that reports to Parliament through the Minister of Infrastructure and Communities.⁶⁴

PPP Canada's primary function is to promote P3s,⁶⁵ and its mandate is to improve the delivery of public infrastructure by achieving better value, timeliness and accountability to taxpayers, through P3s.⁶⁶ PPP Canada acts as a leading source of expertise on P3 matters. According to PPP Canada, it provides advice in assessing and executing P3 procurement projects at the federal level, as well as leveraging greater value for money from Government of Canada investments in provincial, territorial, municipal and First Nations infrastructure through the P3 Canada Fund.⁶⁷ In 2013, the federal budget allocated an additional \$1.25 billion to the P3 Canada Fund, and established a "P3 Screen" for infrastructure projects that have a capital value of over \$100 million.

⁶³ Boardman, *supra* note 10 at p. 6.

⁶⁴ PPP Canada, "About Us", online: <<http://www.p3canada.ca/en/about-us/>>.

⁶⁵ Boardman, *supra* note 10 at p. 6.

⁶⁶ PPP Canada, *supra* note 64.

⁶⁷ PPP Canada, *ibid.*

Applications are accepted on an annual basis. The amount of funding that any one project can get may not exceed 25% of the project's direct construction costs. The level, form and conditions of funding support are decided on a project-by-project basis.⁶⁸

Infrastructure Canada ("**IC**") is the "lead federal department responsible for infrastructure policy development and program delivery".⁶⁹ It works with PPP Canada to contribute to P3s at the provincial and municipal levels.

(ii) Provincial

A number of provinces have specialized government departments or agencies relating to P3s. The mandates of these departments or agencies include overseeing provincial P3 procurement.

Partnerships BC is British Columbia's agency tasked with identifying, promoting, and supporting P3 opportunities. Partnerships BC was established in 2002 and is owned by the Province and governed by a Board of Directors, reporting to its sole shareholder, the Minister of Finance.⁷⁰

⁶⁸ PPP Canada, "Frequently Asked Questions", online: <<http://www.p3canada.ca/en/about-p3s/frequently-asked-questions/>>.

⁶⁹ Infrastructure Canada, "Our Partners", online: <<http://www.infrastructure.gc.ca/about-apropos/partners-partenaires-eng.html>>.

⁷⁰ Partnerships British Columbia, online: <<http://www.partnershipsbc.ca/>>.

In 2012, the Government of Saskatchewan created SaskBuilds, which works with ministries to determine whether particular projects can be pursued as P3s.⁷¹

Infrastructure Ontario (defined previously as "IO") is a Crown corporation owned by the Province of Ontario. It was created in 2005 to assist the Province in delivering its long-term infrastructure plan, and it delivers and manages projects in Ontario. As a result of the number of projects overseen by IO since its establishment, it is arguably the most experienced agency in the country and is well-equipped to deal with the most complex of infrastructure projects. IO predominantly delivers infrastructure through alternative financing and procurement ("**AFP**"), which is another term for PPPs or P3s.

Infrastructure Québec (also known as Société québécoise des infrastructures) is the government department in Québec that is responsible for infrastructure. Part of its role is to provide expertise and advise the government on P3s.⁷²

Some provinces and territories do not yet have specialized agencies responsible for promoting P3s. However, these provinces or territories typically have a ministry or a government department responsible for infrastructure, and P3s fall under that ministry's or department's mandate. In many cases, policies and guidelines have been developed in these provinces to govern and guide P3s in the province. For example, Alberta, though lacking a specialized agency, has developed an in-depth P3 framework and

⁷¹ SaskBuilds, "Frequently Asked Questions", online: <<http://www.saskbuilds.ca/alternative-financing/FAQs.html>>.

⁷² Société Québécoise des infrastructures, online: <www.sqi.gouv.qc.ca/Pages/accueil.aspx>.

guideline referred to earlier in this paper, and has a dedicated P3 office within the Alberta Treasury Board.⁷³

(iii) Municipal

Though municipalities have used and continue to use P3s, they do not typically have specialized agencies through which they promote P3s. Generally, when municipalities use P3s, they are advised by the relevant provincial agency.⁷⁴

(c) Procurement models in Canada

From a Canadian perspective, P3s are used as a procurement strategy rather than a mechanism for reform that is set to fundamentally overhaul the provision of public services.⁷⁵ In Canada, as with other jurisdictions, the primary rationale for delivering infrastructure through P3s is achieving VfM.⁷⁶ Canadian governments attempt this by using a variety of procurement models, some of which are described on pages 15-16, above. However, the majority of Canadian projects are complex and long-term, and are therefore structured as DBFM or DBFMO models.⁷⁷

P3s that are structured as DBFMs or DBFMOs and therefore incorporate service and/or operations have a number of benefits. One of the strengths of this model is that it offers "whole-of-life" cost certainty, which means that the costs are known upfront and

⁷³ Alberta Government, *supra* note 54.

⁷⁴ Barlow, *supra* note 59 at p. 9.

⁷⁵ Siemiatycki, *supra* note 17 at p. 17.

⁷⁶ Siemiatycki, *ibid* at p. 12.

⁷⁷ PPP Database, *supra* note 58.

are consistent over the entire life cycle of the asset. This can be particularly important following a change in government.

The private consortium in a P3 arrangement is contractually required to provide a certain standard of service and to maintain an asset to specific conditions. By bundling service or operation with the P3 project in a DBFM or DBFMO, penalties for non-compliance as set out in the PA once the construction phase has completed will still be imposed on the private sector if standards of service fall below what is required by the PA.⁷⁸ Another suggested benefit of incorporating service or operations in the P3 project is that the private sector partner involved operates at arm's length from the government department that is overseeing, evaluating and monitoring the service or operation of the asset. The government is in a better position to identify lapses in or decreases in the quality of service, and can impose penalties pursuant to the PA as necessary.⁷⁹

DBFMs and DBFMOs are not without their weaknesses. The PAs required in these models can be extremely complex and require protracted negotiation.

Who is financing P3s in Canada? Canadian pension funds and life insurance companies are the main investors in the form of private placements, which have become the primary financing solution for Canada's P3 market.⁸⁰ In general, projects resort to bank credit during the construction phase of a project, and then refinance on

⁷⁸ Iacobacci, *supra* note 31 at p. 24.

⁷⁹ Iacobacci, *ibid* at p. 25.

⁸⁰ Benjamin Gross and Gérard Mounier, "Overview of the Canadian Public-Private Partnerships market" (7 December 2016), online: <<http://www.lavery.ca/en/publications/our-publications/2986-overview-of-the-canadian-public-private-partnerships-market.html>>.

the bond market once the project has reached completion.⁸¹ According to InfraAmericas, 71% of the 177 projects that were financed by the end of 2015 were financed with bank debt, another 21% were financed solely in the capital markets, and 8% were financed with hybrid forms of bank debt and long-term bond financing.⁸² For the most part, the participation of capital markets has focused on DBFM/DBFMO structures, which are longer-term P3 models.⁸³

(d) Determinants of P3 Success in Canada

Canada has become a global leader in the use of public-private partnerships for infrastructure investment and development. The Canadian approach to procurement delivers better value for money than approaches taken in other jurisdictions. Better value for money is achieved through a variety of efficiencies.⁸⁴

Supportive Political Environment. The political environment in Canada has been extremely supportive of spending money on and investing money in infrastructure development through P3s at the federal, provincial and municipal levels. This support is owed, in large part, to the public acceptance of the need for the delivery of infrastructure

⁸¹ Gross, *ibid*; Daniel A. Ford, "The Role of Capital Markets in P3 Financing" (June 2013), online: <<http://www.torys.com/insights/publications/2013/06/the-role-of-capital-markets-in-p3-financing>>.

⁸² Gross, *supra* note 80.

⁸³ Ford, *supra* note 81.

⁸⁴ New Zealand Council for Infrastructure Development, "Best Practice Project Procurement: Findings from an NZCID Delegation to Canada" (2016), at p. 7 online: <http://www.pppcouncil.ca/web/pdf/NZCID_report_032016.pdf>.

services, but also the recognition of the benefits of P3 procurement.⁸⁵ Governments and government P3 agencies continue to show support for P3s. Manitoba's 2017 Budget, for example, has allocated over \$1.7 billion to infrastructure investments in 2017-2018, and includes a commitment to "remove barriers to private investments in public infrastructure through [P3s]".

Canada remains committed to building and strengthening infrastructure. On 18 April 2017, Canada's Infrastructure and Communities Minister, Amarjeet Sohi, commented on Canada's 12-year, \$186 billion plan to invest in Canada. As part of this plan, the Canadian government tabled legislation to establish the Canada Infrastructure Bank, which would "use federal support to attract private sector and institutional investment to new revenue-generating infrastructure projects that are in the public interest".⁸⁶

Sophisticated Procurement Agencies. Canada has established and uses sophisticated procurement agencies to oversee P3 procurement projects from start to finish. These agencies are publicly-owned, but are independent bodies which are governed by a Board. (In certain other countries, such as New Zealand, almost all

⁸⁵ New Zealand Council for Infrastructure Development, *ibid* at p. 3. A recent survey by the Canadian Council for Public-Private Partnerships found that the majority of Canadians say investments in infrastructure projects are a priority, and that two thirds of Canadians support or somewhat support the use of P3s to further investment in Canadian infrastructure. See Canadian Council for Public-Private Partnerships, "Investing in economic infrastructure seen as a high and urgent priority for Canadians" (February 2016), online: <http://www.pppcouncil.ca/web/pdf/nanos_infrastructure_survey_02192016.pdf>.

⁸⁶ Amarjeet Sohi, "The Canada Infrastructure Bank – Enabling Transformational Infrastructure" (18 April 2017), online: <http://www.pppcouncil.ca/web/News_Media/2017/The_Canada_Infrastructure_Bank_Enabling_Transformational_Infrastructure.aspx>.

project procurement is managed "in-house", and public agencies oversee project delivery within their individual portfolios.⁸⁷⁾ Specialized procurement agencies at the federal and provincial levels have a breadth of experience due to governments' continued commitment to funding P3s, and the ensuing delivery of more P3 projects. Specialized and consolidated P3 agencies strengthen connections between the public and private sectors, which results in the movement of more consistent, reliable information in both directions.

Furthermore, experienced P3 agencies are better equipped to negotiate with sophisticated concessionaires.⁸⁸ Their standardized policies and processes (including risk assessment procedures, VfM evaluations, and contract negotiation, which are governed by P3 policies and frameworks) have increased the speed and lowered transaction costs associated with P3s.⁸⁹ As a result, the procurement process in Canada is highly streamlined and productive, and that productivity lends itself to investment.

Stable P3 Market. The Canadian P3 market has been stable, particularly in the last 10 years. For example, in 2015, thirteen P3s entered into the procurement phase by way of the issuance of RFQs; in 2016, this number held fairly steady as 12; and in

⁸⁷ New Zealand Council for Infrastructure Development, *supra* note 84 at p. 6.

⁸⁸ Siemiatycki, *supra* note 17 at p. 13.

⁸⁹ Siemiatycki, *ibid.*

2017, 10 RFQs have already been issued.⁹⁰ Stability in the market results in competitive contract prices, high quality bids from suppliers within and outside Canada's borders, and efficiency on both the supply and demand side of the market.⁹¹

Efficient Procurement. Canada's procurement process is one of the most efficient across global markets. The median procurement time for P3 projects in Canada has been estimated to be between 16-18 months. Bid costs for the winning bidder in Canada are much lower than in other jurisdictions. For example, bid costs in Canada are estimated to be 0.5-1.5% of capital value, whereas in Australia this figure is 1-2% and in the UK, 5-6%.⁹²

3. P3S IN THE CARIBBEAN

Traditional procurement in the Caribbean has led to poor VfM due to underinvestment, high construction costs, poor quality work product and poor maintenance.⁹³ As a result, Caribbean countries are increasingly looking to P3 procurement to develop, maintain and improve infrastructure that supports economic growth and delivers basic social services.

⁹⁰ PPP Database, *supra* note 58. Ten RFQs were issued from 1 January 2017 to 15 April 2017. Operations for 18 projects commenced in 2015, operations for 10 projects commenced in 2016, and operations for 2 projects commenced between 1 January 2017 and 15 April 2017.

⁹¹ New Zealand Council for Infrastructure Development, *supra* note 84 at p. 8.

⁹² New Zealand Council for Infrastructure Development, *ibid* at p. 3

⁹³ Caribbean Development Bank, "Public Private Partnerships in the Caribbean: Building on Early Lessons" (May 2014) at p. viii, online: <<http://www.caribank.org/uploads/2014/05/Booklet-Public-Private-Partnerships-in-the-Caribbean-Building-on-Early-Lessons.pdf>>.

The P3 experience across the Caribbean ranges tremendously. Some countries have successfully implemented P3 projects, with or without formal P3 agencies and policy architecture in place. Other countries have experienced difficulties with implementation due to high and/or unexpected fiscal costs, questionable VfM, and significant delays, which have stunted or halted progress.

Limited P3 policies and institutional policies/frameworks contribute to the slow growth of P3 procurement in the Caribbean. Trinidad and Tobago and Jamaica are two of the countries with the most robust P3 programs in the Caribbean; however, even these countries lack detailed P3 guidelines, dedicated project funding, and staff with P3 experience.⁹⁴

Drawing on previous experiences in Caribbean jurisdictions and beyond will help inform the future of infrastructure in the Caribbean, with a view to improving the delivery of social services while at the same time supporting economic growth.

(a) The justification for P3s in the Caribbean

Infrastructure in many Caribbean countries is either lacking or needs improvement. Electricity, for example, though nearly universal for most Caribbean countries, is expensive compared to countries in other parts of the world. In addition, many Caribbean countries face long wait times for setting up new electrical connections. For example, the average residential tariff in countries in the Organisation

⁹⁴ Roadmap, *supra* note 20 at p. 3.

for Economic Cooperation and Development (OECD) is estimated to be US\$0.26 per kWh.⁹⁵ In comparison, this tariff rises to approximately US\$0.39 per kWh in The Bahamas, and US\$0.45 in Anguilla.⁹⁶ Average wait times for new electricity connections in the Caribbean are long, and vary across the jurisdictions. In Barbados, consumers wait an average of 65 days for electricity, and in Jamaica, this number rises to an average of 96 days.⁹⁷

Infrastructure in other sectors is also lacking or requires rehabilitation. There is room for improvement in the provision of water, transportation (including airports, seaports and roadways), telecommunications, and social infrastructure in the Caribbean.⁹⁸ Not surprisingly, substantial investments are required to close infrastructure gaps.

The Caribbean Development Bank ("**CDB**") estimates that a total capital expenditure of US\$21 billion is required to improve the amount and quality of infrastructure services—electricity, transportation, and water and sanitation—in certain Caribbean countries⁹⁹ by 2025. Of these sectors, the electricity sector needs the

⁹⁵ Caribbean Development Bank, *supra* note 93 at p. 1.

⁹⁶ Caribbean Development Bank, *ibid* at p. 6.

⁹⁷ Caribbean Development Bank, *ibid* at p. 7. Governments are increasingly looking to renewable energy to improve the delivery of electricity in the region. See, for example, the wind farm in Jamaica, which has received US\$63 million in funding from the World Bank and other donors: The World Bank, "Turning point for energy security in the Caribbean", (4 May 2016) online: <<http://www.worldbank.org/en/news/feature/2016/05/04/turning-point-for-energy-security-caribbean>>.

⁹⁸ Caribbean Development Bank, *supra* note 93 at p. 11.

⁹⁹ CDB's facts and figures are based on its borrowing member countries ("**BMCs**"): Anguilla, Antigua and Barbuda, Barbados, Belize, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, Turks and Caicos Islands.

greatest investment at US\$11.9 billion, followed by water and sanitation at US\$5.5 billion.¹⁰⁰

The public sector is responsible for approximately 89% of these investment needs.¹⁰¹ However, average government spending does not meet the public infrastructure needs and results in a stunning funding gap: the CDB estimates that the funding gap in the Caribbean between 2015 and 2025 will be US\$10 billion.¹⁰² To address this problem, governments are turning to the P3 model as a potential solution.

The World Bank has identified three stages of P3 program development. In the first stage, a government defines its policy/framework for P3s, tests the legal and regulatory viability of the program, and demonstrates political commitment to P3 procurement. The government refines the principles and foundations that underlie its policy or framework with a view to building the P3 market by learning lessons from earlier deals in other sectors or jurisdictions. In the second stage, the government introduces legislative reform and publishes policy and practice guidelines, which, ideally, are consistent with one another. At this stage, best practices would also have the government establish a dedicated P3 unit, design a financial platform, implement a training program for civil service, and form specialized institutions to promote and implement P3 projects.¹⁰³ By the time the third stage is reached, a fully-defined P3

¹⁰⁰ Caribbean Development Bank, *supra* note 93 at p. 14.

¹⁰¹ Caribbean Development Bank, *ibid* at p. 13.

¹⁰² Caribbean Development Bank, *ibid* at p. 16.

¹⁰³ The World Bank Caribbean Knowledge Series, "Public Private Partnerships in the Caribbean: Bridging the Financing Gap" (June 2013), online:

program has been established. Once a government has reached this stage, legal impediments have been removed, P3 models continue to be refined, risk matrices have evolved, and there is a political consensus on the use of P3s.

Caribbean countries tend to fall within either Stage One or Stage Two, but generally continue to make strides to improve the provision of infrastructure by P3 delivery.

(b) Progress and Trends in the Caribbean

(i) *Appreciation for regional co-operation*

Overall, countries in the region are demonstrating a commitment to refining P3 policies and frameworks with a view to achieving identified goals, including: (i) better VfM in infrastructure development; (ii) innovation and new technology; (iii) infrastructure that can maintain its function in the face of extreme weather conditions; (iv) increased private financing, and, ultimately (v) successful P3 projects.¹⁰⁴

Many Caribbean countries, particularly the smaller islands, have similar infrastructure needs. Though P3 procurement has been recognized as a solution to these needs, a lack of government capacity and processes has been identified as a

<https://openknowledge.worldbank.org/bitstream/handle/10986/16618/785870WP05.0Pu00Box377349B00PUBLIC0.pdf?sequence=1&isAllowed=y>.

¹⁰⁴ Some Caribbean countries are resiling from P3s due to public and political skepticism. For example, the Dominican Republic, which has more P3 experience than many other Caribbean countries, seems to be moving away from the P3 model of procurement due to challenges with early P3s and the resulting skepticism of the public and the government: Roadmap, *supra* note 20 at p. 14.

potential roadblock for P3 projects being developed, implemented and maintained.¹⁰⁵ A co-ordinated effort among Caribbean countries to support P3s and to jointly develop governments' P3 policies and programs may result in the attraction of international investors whose financial support is needed to stimulate successful P3 procurement.

In 2013, the Caribbean Development Bank, the World Bank Group ("**WBG**"), the Inter-American Development Bank ("**IDB**") and the Multilateral Investment Fund ("**MIF**") organized a Caribbean PPP Forum in Barbados to determine how Caribbean governments could capitalize on P3 procurement to deliver improved infrastructure.¹⁰⁶ This Forum was followed-up in March 2014 with the generation of the "Caribbean Infrastructure PPP Roadmap" ("**Roadmap**") by the World Bank Group, with inputs from various Caribbean governments, private investors and support from the Public-Private Infrastructure Advisory Facility.

The Roadmap identified a "pipeline" of 33 projects in a variety of sectors that are actively being developed in certain Caribbean countries, and that represent an investment of between US\$2-3 billion.¹⁰⁷ It examined the rationale for P3s in the Caribbean, emerging opportunities, and offered suggestions on how to learn from previous experiences with a view to improving infrastructure. One of the suggestions

¹⁰⁵ Roadmap, *supra* note 20.

¹⁰⁶ Roadmap, *ibid* at p. 32.

¹⁰⁷ The Roadmap covered the following countries: Antigua and Barbuda, Dominica, the Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. The authors of the Roadmap note that these countries were chosen because an initial review provided evidence that these countries have an interest in P3s: see Roadmap, *supra* note 20 at p. 1.

was to take a regional approach to support P3s: achieve economies of scale collectively; create a regional P3 market to attract quality investors; and enable regional projects.¹⁰⁸

In response to the findings and recommendations in the Roadmap, in March 2015, a US\$1.2 million Regional PPP Support Facility ("**Facility**") was established by the CDB and certain of its development partners, WBG, IDB, MIF, and the Public Private Infrastructure Advisory Facility ("**PPIAF**").¹⁰⁹ The Facility, which is based at the CDB's headquarters in Barbados, was established in order to strengthen partnerships between Caribbean governments¹¹⁰ and the private sector. Goals of the Facility are to (i) strengthen the enabling environment by creating P3 toolkits or model policies; (ii) provide hands-on support for technical requests and to assist with screening and/or developing new projects; and (iii) develop a business plan for the Facility, which includes staffing a team with expertise that can assist in the development and implementation of policies and, ultimately, P3 projects.

In May 2016, the CDB launched a PPP Helpdesk, which is part of the Facility.¹¹¹ The Helpdesk is meant to assist governments in managing P3 programs, particularly in

¹⁰⁸ Roadmap, *supra* note 20 at p. 28.

¹⁰⁹ The CDB is the primary implementing agency of the Facility. Its partners provide additional funding and technical support. See Caribbean Development Bank, "Public-Private Partnership Helpdesk launches" (25 August 2016), online: <<http://www.caribank.org/news/public-private-partnership-helpdesk-launched>>.

¹¹⁰ The CDB specifically launched the program to assist its BMCs with the development and implementation of P3s: *supra* note 99.

¹¹¹ Caribbean Development Bank, "Public-Private Partnership Helpdesk launched" (25 August 2016), online: <<http://www.caribank.org/news/public-private-partnership-helpdesk-launched>>.

their early stages. Other initiatives that are part of the Facility include three P3 "boot camps", the goal of which is to equip governments so that they are in a position to capitalize on the P3 Pipeline identified in the Roadmap,¹¹² and the launch of a Caribbean web-based P3 Toolkit. The boot camps were held in September 2015 and February 2016. The Toolkit was launched in October 2016.

Evidently, the region is recognizing a need to focus on regional aspects of P3s in planning and developing P3 policies, and in eventually executing on them. However, not all Caribbean countries are demonstrating a continued commitment to P3s. For example, in the Dominican Republic, a country that has P3 experience, challenges experienced in certain sectors has resulted in public and political skepticism about P3 procurement.¹¹³

(ii) *A focus on policy development*

Caribbean governments are recognizing a need to implement formal policies, frameworks and procedures to properly govern the procurement of projects using P3s. The need for this policy architecture is manifest. Without it, there is a lack of defined processes for dealing with procurement at all stages, including planning, development, operations, and maintenance.

¹¹² Caribbean Development Bank, "Third Public-Private Partnership (PPP) Bootcamp to be held in Kingston, Jamaica" (19 January 2016), online: <<http://www.caribank.org/news/third-public-private-partnership-ppp-bootcamp-to-be-held-in-kingston-jamaica>>.

¹¹³ Roadmap, *supra* note 20 at pp. 1 and 14.

Although the Government of Jamaica had already had experience with successful P3s (see the Sangster International Airport commentary, below), it took additional steps to expand its P3 program in 2012 when it passed a P3 policy. Jamaica's P3 policy provides a comprehensive process for identifying, developing, evaluating, implementing and managing P3s.¹¹⁴ Under this policy, a P3 unit was created in the Development Bank of Jamaica to manage procurement in connection with the Ministry of Finance.¹¹⁵ The Government of Jamaica has tendered several projects under the P3 policy, including the expansion of the Kingston Container Terminal, the PA for which was signed by the Port Authority of Jamaica and Kingston Freeport Terminal Ltd (KFTL) in 2015. Financial closure for this project occurred in 2016, at which point KFTL assumed operations of the project.¹¹⁶

Trinidad's infrastructure has developed around its oil and gas industries.¹¹⁷ In 2012, a national P3 policy was approved. The policy provides a general framework for developing and implementing P3s, and also sets out a commitment to transparency insofar as the selection of P3 contractors are concerned.¹¹⁸ This commitment to transparency is consistent with the government's laws and regulations related to

¹¹⁴ World Bank PPP Knowledge Lab, "Jamaica", online:
<<https://pppknowledgelab.org/countries/jamaica>>.

¹¹⁵ *Ibid.*

¹¹⁶ Jamaica Observer, "Kingston Container Terminal successfully divested" (1 July 2016), online:
<<http://www.jamaicaobserver.com/news/Kingston-Container-Terminal-successfully-divested>>.

¹¹⁷ World Bank PPP Knowledge Lab, "Trinidad and Tobago", online:
<<https://pppknowledgelab.org/countries/trinidad-and-tobago>>.

¹¹⁸ *Ibid.*

procurement. Trinidad's P3 unit lies within the Ministry of Finance and the Economy.¹¹⁹

A number of P3 projects are in the works in Trinidad, including projects related to social infrastructure such as primary schools and housing projects.¹²⁰

Jamaica and Trinidad were ahead of the curve with respect to P3 policies; when the Roadmap was published, none of the Organisation of Eastern Caribbean States (OECS) countries had P3 policies in place. This is no longer the case.

Other Caribbean countries seem to be committed to promoting P3 procurement by implementing policies that guide P3 projects. For example, the Government of Grenada passed a P3 policy in July 2014.¹²¹ Similarly, in March 2015, the Government of St Lucia approved a P3 policy framework.¹²² St Lucia received assistance from the World Bank in the development of its policy, and consultations were held with both the private and public sectors throughout its formulation. Notwithstanding this progress, many Caribbean countries still lack P3 policies and agencies. Dominica, St Kitts and Nevis, St Vincent and the Grenadines, and Antigua and Barbuda are among the Caribbean countries lacking formal P3 policies and agencies. This is not to say that these countries have no interest in P3 procurement or have not forayed into this model of procurement. However, the literature suggests that P3 projects are more successful

¹¹⁹ World Bank PPP Knowledge Lab, *supra* note 117.

¹²⁰ World Bank PPP Knowledge Lab, *ibid*.

¹²¹ World Bank PPP Knowledge Lab, "Grenada", online:
<<https://pppknowledgelab.org/countries/grenada>>.

¹²² Government of St Lucia, "Government approves Public-Private Partnership (PPP) policy framework" (21 May 2015), online:
<<http://www.govt.lc/news/government-approves-public-private-partnership-ppp-policy-framework>>.

when the government agency promoting and developing has the appropriate "architecture" in place to properly plan for and monitor these projects.

(iii) Recognition of non-core infrastructure needs

P3s in the Caribbean have traditionally focused on "core" infrastructure sectors such as electricity, water, and transportation, and growth in those sectors continues.

However, some countries in the Caribbean are recognizing the need to develop social infrastructure such as schools, penitentiaries, hospitals, and housing projects.¹²³

(c) P3 Projects in the Caribbean

Though P3s are relatively new to the Caribbean, a number of P3 projects have been undertaken across the region, with varying levels of success.

Sangster International Airport in Montego Bay, Jamaica is but one success story, and its evolution from a dilapidated, overcrowded airport and a potential P3 project to a successfully-implemented P3 resulting in an improved hub for travel, is informative.

In April 2003, the Government of Jamaica ("**GOJ**") set a precedent for P3s—specifically airport P3s—in the Caribbean. Vancouver Airport Services Consortium took over operations of Sangster International Airport in Montego Bay ("**Sangster**") under a 30-year concession agreement. An investment of US\$180 million was required.¹²⁴

¹²³ Roadmap, *supra* note 20 at p. 23; World Bank PPP Knowledge Lab, "Trinidad and Tobago", online: <<https://pppknowledgelab.org/countries/trinidad-and-tobago>>.

¹²⁴ Caribbean Development Bank, *supra* note 93 at p. 72.

Since then, the airport's capacity has doubled, 43 new retail spaces were created, and the revenues from valuable retail space partially offset the cost of expansion. The implementation of this P3 was not without its hurdles, though.

In the early 1990s, the GOJ recognized the fact that Sangster was becoming crowded, and that its assets were aging. Under public ownership, operations were draining the GOJ's fiscal resources at a time when Jamaica's national debt was rising. Airports are critical assets when one of a country's leading industries is tourism. The GOJ decided that privatization was the best way to meet the airport's needs.

The first approach taken by the GOJ to implement this P3 failed. The GOJ, through a special Airport Task Force and a Project Unit at Airports Authority of Jamaica ("**AAJ**"), proposed a structure for the implementation and privatization of the project. The Airport Task Force sought to select its strategic partner for the project's implementation on a negotiated basis, rather than through a competitive tendering process. This proved unsuccessful; after several approaches, the privatization stalled.

In 1996, a memorandum of understanding with a potential partner, United Infrastructure Company/Airport Group International ("**UIC/AGI**"), was signed. UIC/AGI would evaluate the likelihood of the project being implemented and provide the GOJ with a proposal. The proposal was ultimately rejected by the GOJ, and the GOJ

realized that a new approach was required to get the privatization process off the ground.¹²⁵

The second approach began in 1998 with Cabinet approving the establishment of an "Enterprise Team" under the direction of the National Investment Bank of Jamaica ("**NIBJ**") to spearhead the approach. The Team included representatives from the Office of the Prime Minister, the Office of the Attorney General, the Ministry of Finance and Planning, the Civil Aviation Authority, the Ministry of Transport & Works, and the AAJ/Sangster.¹²⁶ With NIBJ directing the privatization process, the GOJ was better positioned to follow an orderly, transparent and competitive process.

The NIBJ and the Enterprise Team made specific changes to the privatization/financing strategy, which were meant to make the offer more attractive to commercial airport operators: (i) the entire airport operation and revenues were included in the concession arrangements; (ii) the GOJ's Golden Share in the terminal operating company was eliminated; and (iii) the Concessionaire would be permitted to establish an airport operating company "wholly under its control with no limitations on its shares, other than restrictions prohibiting control by an airline shareholder, and a requirement that an established airport operator control no less than 10 per cent of the shares".¹²⁷ The privatization involved a three-stage bidding process that consisted of pre-

¹²⁵ International Civil Aviation Organization, "Public Private Partnership (PPP) – Case study" (October 2015), online:
<http://www.icao.int/sustainability/PPP%20Case%20Studies/PPP_Airport_Jamaica.pdf>.

¹²⁶ International Civil Aviation Organization, *ibid.*

¹²⁷ International Civil Aviation Organization, *ibid.*

qualification, a first round of proposal submissions, and a final round of proposal submissions. In addition, the NIBJ, constituent members of the Enterprise Team, financial advisors and other consultants each had specific roles to play in the process. The privatization was finally complete in April 2003, approximately five years later than the originally-scheduled completion date.

Early efforts to privatize Sangster failed due to a lack of a marketable business plan to attract investors; a lack of a competitive bidding process to select the private partner; a lack of an agency to co-ordinate the process and the roles of the various groups involved; and the fact that the GOJ insisted on a Golden Share.¹²⁸ Later efforts to privatize with the help of the NIBJ were not problem-free, either, which resulted in the delay of the project's completion by five years. First, Jamaica did not have a regulatory framework for privatized airports at the time the privatization of Sangster commenced, and the GOJ decided it would develop one during the course of the privatization process – passing the relevant laws took approximately three years. Second, one of Sangster's biggest customers, Air Jamaica, was continuously late in meeting obligations for aeronautical charges, which was highly concerning for investors.¹²⁹

What lessons can be learned from the ultimately successful privatization of Sangster? The existence of a specialized agency helps guide the process, from attracting investors, to the procurement process, to the implementation of operations. Once NIBJ and the Enterprise Team were in place, the privatization progressed at a

¹²⁸ International Civil Aviation Organization, *supra* note 125.

¹²⁹ International Civil Aviation Organization, *ibid.*

meaningful rate. Similarly, standardized procurement processes and guiding policies or frameworks can streamline the implementation of a P3. Though the second approach to privatizing Sangster carved out specific roles for the NIBJ and other advisors and consultants, a structured policy can do more: it can, among other things, set out procedures for proper risk assessment prior to the commencement of the procurement process, help guide contract negotiations, and set out how a project will be staffed.

In September 2012, Jamaica's Cabinet approved a P3 policy. At the same time, the Development Bank of Jamaica ("**DBJ**") was created. The DBJ manages procurement once financial requirements are passed by the Ministry of Finance. The goal of Jamaica's P3 policy is to standardize the implementation of P3s, attract private investors, increase productivity and limit fiscal exposure.¹³⁰ To that end, Jamaican P3s are now guided by four, over-riding principles: (i) optimize risk transfer; (ii) achieve value for money for the public; (iii) commit to being fiscally responsible; and (iv) maintain integrity and transparency.¹³¹

The GOJ is currently seeking a private consortium to operate, finance, and develop the Norman Manley International Airport ("**NMIA**") in Kingston, Jamaica under a long-term concession agreement, and the DBJ is leading the process of implementing a P3 for the privatization of the airport. A tender for bids in 2015 was unsuccessful, primarily because none of the entities—an assortment of international and domestic

¹³⁰ Development Bank of Jamaica Limited, "Overview", online: <<http://dbankjm.com/services/ppp-and-privatisation-division/public-private-partnerships-ppp/>>.

¹³¹ Development Bank of Jamaica Limited, *ibid*.

investors—who pre-qualified submitted bids. Earlier this month, the bid window for NMIA was extended to 1 May 2017.¹³² Once a bidder is selected, it is expected that the combination of a dedicated P3 agency/unit—the DBJ—and additional "architecture" in the form of an official P3 policy will render the privatization of NMIA even more successful than Sangster.

4. CONCLUSION

The popularity of P3s as a cost-effective and efficient way for governments to build and improve infrastructure continues to grow. Over the last three decades, Canada has emerged as a world-class leader in P3 infrastructure development, and it owes its success, in large part, to its sophisticated P3-promoting agencies and the policies they use to guide development. Caribbean countries, whose economies often depend on the delivery of infrastructure to support tourism and other major industries, have learned and can continue to learn from Canada's experiences. These countries are gaining attention from private investors, beginning to create agencies to promote and support P3 procurement, and slowly developing policies and frameworks on which to base successful P3 projects. As is evident from both the Canadian and Caribbean experiences discussed in this paper, the importance of having policy architecture—proper P3 policies and agencies to implement them—is essential in order for P3s to play their proper role in infrastructure development.

¹³² Jamaica Observer, "NMIA privatisation bid extended again" (12 April 2017), online: <<http://www.jamaicaobserver.com/news/NMIA-privatisation-bid-extended-again>>.



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