

Key indirect tax issues impacting P3 infrastructure

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INTRODUCTION

...we are making the largest investment in infrastructure in modern history - \$33 billion over seven years. This is new money to build roads and transit lanes, rehabilitate bridges and water systems, and to upgrade our international gateways, ports and airports.

If we are going to make the most of this investment, we need to rethink the traditional government approach to infrastructure renewal. We must look beyond just thinking outside the box, and look to reinventing the box.

*Honourable Jim Flaherty, Minister of Finance
2007 Annual National Conference on Public-Private Partnerships*

Recently there has been a movement by governments to look for alternatives to the traditional model of procuring public infrastructure in order to fulfill its mandate of providing services to the public. Driven by the growing needs of the general public for services and the need to balance revenue and expenses, governments are not only endorsing the use of public private partnerships (“P3”), they are embracing P3s as an innovative means to ensuring the government delivers its mandate in a cost effective manner.

While there is a strong business case to select a P3 structure over a traditional method for procuring infrastructure, both the public and private sectors must endeavor to ensure that the obligations and responsibilities of each party are clearly articulated and that the payment mechanisms are based on performance with the satisfactory delivery of the required services. An efficient, well-thought out P3 model will ensure that the project will be completed to the public sector’s design needs and expectations, and that the infrastructure will be available for the public’s use at a specified time. Considering the indirect tax issues at the planning stages of a P3 arrangement will reduce the risk of unexpected indirect tax issues that may affect the cost effectiveness or the efficiency of the project. While indirect taxes are not the primary drivers in structuring a P3 agreement, carefully structured tax planning can affect the price model and could make pricing more competitive which contributes to an overall strong P3 model. Furthermore, the private sector may benefit in the competitive process when bidding on a P3 if it is fully aware of all the potential costs associated with indirect taxes and of any potential opportunities to reduce the indirect tax cost. Therefore, consideration of the impact of indirect taxes to the P3 project is essential at the planning stages to ensure that the P3 agreement is

structured to address significant indirect tax issues. The purpose of this paper is to highlight some essential issues with respect to indirect taxes² and the current P3 environment.

Traditional Funding Methods

Prior to reviewing the impact of indirect taxes to a P3 structure, it is helpful to review the traditional manner used by a province³ for funding infrastructure.

Traditional funding methods for capital infrastructure include the following:

- Direct Capital Funding – includes transfers, grants and contributions for the acquisition of capital assets by the province’s agencies. The cost of these acquisitions is not included in the operating budgets of the organizations and is capitalized on the province’s financial statement with the cost amortized over the life of the asset.
- Prepaid Capital Advances (PCA) – eligible agencies (schools, universities, health care etc) draw upon funds provided by the province to an established project limit. The province has an ongoing claim on the assets to ensure public use. PCA are recorded on the Province’s Consolidated Revenue Fund as non-financial assets and amortized over the useful life of the assets. Funds are financed through direct government debt.
- Fiscal Agency Loan Program – The province borrows directly in the financial markets at its lower interest rates and re-lends to agencies. Responsibility for debt service payments rests with the borrowing agency.

Description of a P3 Structure

The concept of a P3 has been around for some time in practice and in particular, the EU has utilized P3 agreements to help alleviate the cost of capital infrastructure projects.

Fundamental to the concept of a P3 is the transfer of risk to the person (public or private) who can best manage the risk related to designing, constructing, financing, maintaining and/or operating the capital asset.

² This paper will only address the federal Goods and Services Tax (“GST”) and the retail sales taxes in the provinces of British Columbia (BC) and Ontario (ON). All legislative references will be made to the *Excise Tax Act* (“ETA”), *Ontario Retail Sales Tax Act* (“ORSTA”) and the *BC Social Service Tax Act* (“SSTA”).

³ *Financing of Capital Assets in the Public Sector*, Iraj Afshari, *Corporate & Project Finance*, BC Provincial Treasury, January 2007

There are different types of P3 arrangements with varying degrees of risk transfer and private sector involvement but there are common characteristics including an agreement between the public and private sector for the construction of a capital infrastructure and provision of services relating to the operation and / or maintenance of that infrastructure for a set period of time. Payments in respect of P3s are often made on a periodic basis (annual, quarterly or monthly) and may be based on outputs (costs incurred with respect to the construction, maintenance and operation of the infrastructure) or availability of the infrastructure to the general public. Some P3s may also be structured to allocate a share of revenues between the public and private sector that are earned from user fees generated from the operation of the infrastructure, for example toll road/bridges.

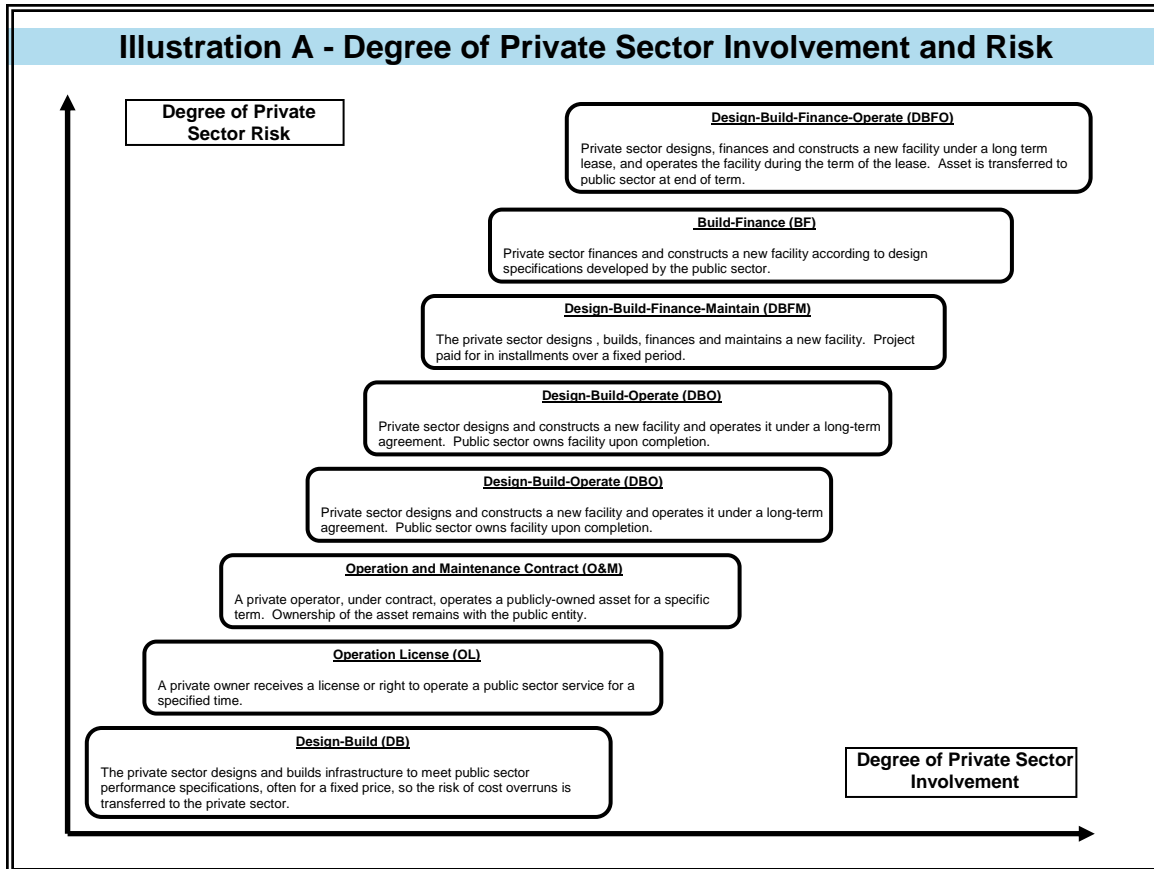
For the purposes of this paper, the term “public sector” will include the various public entities that enter into a P3 agreement and can include the federal or provincial government and their respective agents, and the MUSH sector (municipal, university, school and hospital). The term “private sector” will include the various private entities and can include corporations, partnerships, special purpose vehicles or SPV (an organizational structure consisting of various corporation, partnerships and/or trusts). These terms will be used for general discussion purposes and where applicable certain entities will be specifically mentioned.

P3 Agreements and Risk Transfer

In order to understand the indirect tax implications of a P3 structure, it is important to understand the different types of P3 structures and how the particular structure relates to risk transfer. As mentioned above, the essence of all P3s is the transfer of risk from the public sector to the private sector. Illustration A below demonstrates that as private sector involvement in a P3 increases the level of risk transferred to the private sector also increases.

The degree of how much risk both parties (public and private sector) wish to transfer and accept will tend to dictate the type of P3 structure that is selected. Illustration A demonstrates that the private sector assumes the highest level of risk where its involvement in the overall project is significant due to the assumption of the increased obligations and responsibilities. In addition to the added level of risk and involvement in certain types of P3 structures is the potential opportunity for the private sector to realize additional or success fees for certain goals and targets

relating to the quality and availability of the infrastructure. The private sector is willing to take on the risks because of the opportunity to gain a well defined, long-term secure contract with a relatively stable cash flow with the ability to increase its return on investment if it demonstrates that it can construct the infrastructure in a more cost effective and efficient manner than the public sector and is able meet certain targets.



Public Sector Benefits

In addition to the benefits available to the private sector in a P3 structure, there are also certain benefits of a P3 structure for the public sector:⁴

- ✓ **Improve service delivery** - by allowing both sectors to do what they do best. Government's core business is to set policy and serve the public. It is better positioned to do that when the private sector takes responsibility for non-core functions such as operating and maintaining buildings.
- ✓ **Improve cost-effectiveness** - By taking advantage of private sector innovation, experience and flexibility, P3s can often deliver services more cost-effectively than traditional approaches. The resulting savings can then be used to fund other needed services.
- ✓ **Increase investment in public infrastructure** - Investments in capital infrastructure, such as hospitals, schools, highways and other provincial assets, has traditionally been funded by governments and, in many cases, have added to levels of overall debt. P3s can reduce government's capital costs, helping to bridge the gap between the need for infrastructure and the government's financial capacity.
- ✓ **Reduce public sector risk** – transferring specific risks to the private sector that may be better or have more resources to handle the particular risk.
- ✓ **Deliver capital projects faster** - making use of the private sector's increased flexibility and access to resources.
- ✓ **Improve budget certainty** –transferring risk to the private sector can reduce the potential for government cost overruns from unforeseen circumstances during project development or service delivery. Services are provided at a predictable cost, as set out in contract agreements.

⁴ *An Introduction to Public Private Partnerships*, Updated June 2003, Partnerships British Columbia

- ✓ **Make better use of assets** - Private sector participants are motivated to use facilities fully, and to make the most of commercial opportunities to maximize returns on their investments. This can result in higher levels of service, greater accessibility, and reduced occupancy costs for the public sector.

A P3 structure also encourages a “life cycle” approach to planning and budgeting through the use of long-term contracts. The private sector that agrees to build, operate and maintain a building for 50 years will have to ensure that the asset remains in good condition in order to reduce the maintenance costs. Whereas in the hands of the public sector there is a risk that maintenance costs may be deferred due to budget pressures which will affect the value of the asset over time.

EU Experience⁵

The EU, in particular the UK, has been a leader in implementing P3 structures as a way to bridge the gap between the cost of the infrastructure needed and the resources available. P3s have been implemented to ensure that the infrastructure is delivered as efficiently and cost-effectively as possible.

The P3 experience in the EU covers a vast range of different structures from concession-based transport and utilities projects to toll road/bridges, schools and hospitals. While there is no official definition a P3, the Commission’s 2004 Green Paper on Public-Private Partnerships defines a P3 as “*forms of cooperation between the public and private sectors for the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service*”.

The UK’s Private Finance Initiative (“PFI”) expanded the P3 concept to a broader range of public infrastructure and combined it with the introduction of services being paid for by the public sector rather than the end-users.

Since the UK has had more experience with P3 structures and the P3s in the UK have been in place longer, it is prudent to review how this P3 experience interacts with the application of UK VAT.

⁵ *Delivering the PPP Promise – A review of PPP issues and activity, PricewaterhouseCoopers LLP*

EU – UK Vat Issues

Since the UK VAT legislation has to comply with the underpinning EU VAT Directives there are no P3-specific relief provisions in the UK VAT legislation. Therefore, in the UK, similar to Canada, it is important to understand the context of a P3 arrangement and relationship in order to understand the numerous tax issues.

Generally, public sector bodies are not eligible to recover VAT under most circumstances, specifically VAT on costs incurred on carrying out statutory non-business functions. Therefore, prima facie for P3 arrangements the application of the normal UK and EU VAT provisions would appear to apply to the costs associated with a P3. Consequently, an additional VAT cost would ultimately be incurred by the public if a P3 structure was used to create infrastructure.

In the early 1990's the then UK Government understood the potential increased cost associated with P3s and through the Treasury's ability to establish tertiary legislation in the form of Directions and HM Revenue & Customs' ability to apply operational policies, specific rules for P3s were created. These rules included treating a P3 as a single supply, wherever possible, of an ongoing service relating to the operation and maintenance of an infrastructure, and to allow HM Revenue & Customs to make special VAT refunds to certain public sector bodies. These rules also helped to align the VAT position with the UK corporate tax and stamp tax position that a P3 agreement, even one which under UK land law includes a supply of real property, is treated as a service.

As such, VAT is charged on the service, but the public sector body is usually eligible to claim a special refund of the VAT incurred on the costs associated with the P3, using the specific administrative rules for the public sector. These administrative VAT rules are unique to the UK and are not found elsewhere in the EU.

Canadian Experience¹

One of the first P3 agreements in Canada was the Shouldice Hospital founded in 1945. There was relatively little activity in this area until the 1990's with the establishment of P3s such as Teranet, Vancouver International Airport, Confederation Bridge, NAV Canada among others. In

the late 1990's there was a significant increase in P3 agreements for capital infrastructure projects in Canada. Some recent significant projects are included in the following table.

407 ETR Toll Road (Ontario) Abbotsford Regional Hospital & Cancer Centre (BC) Anthony Henday Drive Southeast Leg Ring Road (Alberta) Sierra Yoyo Desan Road (BC) Britannia Mine Water Treatment Plant (BC) Canada Line (BC) William R. Bennett Bridge (BC) Sea-to Sky Highway (BC) North Bay Regional Health Centre (Ontario) Sudbury Regional Hospital (Ontario) Golden Ears Bridge (BC) BC Gateway Program ⁶ (BC) (in progress)

Proponent Organizations

The Canadian Council for Public-Private Partnerships (“CCPPP”) was established in 1993 as a member-sponsored non-profit organization with representatives from both the public and private sectors and supports the furthering the use of P3s in Canada. The CCPPP provides this support by publishing documents of their research and findings in connection with issues relating to P3s and facilitating forums for discussion, including an annual conference.

The CCPPP published a directory in 2006⁷ that outlines various trends emerging in the Canadian market. Highlights of these trends include, the increased the use of outside auditors to review the fairness of the P3 process to ensure transparency and accountability, increased use of lease-back arrangements to the private sector to ensure that the public sector continues to own the infrastructure and an increase in P3 agreements of long term maintenance requirements to ensure the infrastructure is maintained for a long period of time.

⁶ The BC Gateway Program includes the construction of a new Port Mann Bridge

⁷ *Canadian PPP Project Directory – Selected Public-Private Partnerships Across Canada*

Government Proponents of P3s⁸

The provinces of Ontario and BC publicly recognize and encourage the need for alternative financing and procurement models and in particular a P3 model where there is a clear public benefit.

Ontario

Our challenge is to make sure we have a modern and efficient public infrastructure to deliver quality public services, stimulate economic growth, create jobs and improve the quality of life we enjoy in Ontario. To help meet the government's commitment to deliver better health care, higher-quality education and a clean and safe environment, I am pleased to release this Infrastructure Planning, Financing and Procurement Framework for Ontario's Public Sector. This framework is a critical step forward to help rebuild Ontario's public infrastructure and improve the delivery of key public services.

The Honourable David Caplan

Minister of Public Infrastructure Renewal

BUILDING A BETTER TOMORROW AN INFRASTRUCTURE PLANNING, FINANCING AND PROCUREMENT FRAMEWORK FOR ONTARIO'S PUBLIC SECTOR

The Ontario Infrastructure Projects Corporation (“OIPC”) or “Infrastructure Ontario” was established in 2006 as a crown corporation dedicated to the renewal of the province of Ontario’s public infrastructure (hospitals, courthouses, roads, bridges, water systems etc). Infrastructure Ontario provides project delivery services (including project assessment services) and provides loans and related services to the public sector when determining how best to build the required infrastructure.

⁸ The province of Alberta is also a proponent to P3 arrangements.

British Columbia

... We are not threatened by private sector investment: in fact, we want to encourage private-sector investment because we believe that with private-sector investment come jobs. With jobs come prosperity and stability. With that prosperity we have the resources to provide the public services that are essential in creating quality of life that is second to none.

...Public-private partnerships generate economic activity up front, and they provide longterm infrastructure for the generation to come. They create the environment that says to people in British Columbia: “We want to invest because we have the public framework that’s necessary for us to deliver our goods.”

*Honourable Premier Gordon Campbell
2002 Vancouver P3 Conference*

The province of BC established Partnerships BC (“PBC”) in 2002 to be a “centre of expertise” for evaluating, structuring and implementing P3 structures. PBC is responsible for bringing together the public and private sector to develop and implement P3 projects. For capital projects where the Province contributes \$20 million or more, the P3 model must be considered as an alternative to the traditional procurement method, unless there is a business case otherwise.

PBC has recently expanded its services to assist other provinces including assisting or sharing information with similar organizations with respect to its expertise to those regions in establishing P3 relationships.

Federal Government

At the 2007 CCPPP Conference, Minister of Finance Jim Flaherty announced that the federal government would establish a federal P3 fund of approximately \$1.25 billion and create a P3 office in conjunction with the Ministries of Finance and Transportation. The federal government expects as part of its Building Canada plan to invest over \$33 billion in infrastructure projects as it understands the need to procure these projects in a cost effective manner.

Canadian Indirect Tax Issues for P3 Agreements

This following section discusses some of the essential indirect tax issues to consider when considering and entering into a P3 agreement.

Impact of Reciprocal Taxation Agreement to a P3

In accordance with the Canadian Constitution⁹, each level of federal and provincial governments cannot impose its respective tax on the other. Therefore, the federal government does not pay PST and the provincial governments of BC and Ontario do not pay GST. Furthermore, every 5 years the federal government enters into Reciprocal Taxation Agreements (“RTA”)¹⁰ with certain provinces whereby each party explicitly agrees to pay specific taxes and fees imposed by one another and establishes the schedules to identify the particular entities that will or will not pay tax.

The entities that do not pay tax are generally referred to as being “immune”. However, the general public tends to view these entities as exempt from tax or that the supplies made to the entity are treated as “zero-rated” supplies (GST levied at 0% rather than 5%). Regardless of how the message is communicated when considering a P3 structure, it is beneficial to understand the potential opportunities to structure the agreement so that an “immune” entity may be the person receiving a supply that would otherwise be taxable. This would potentially reduce the cost of a tax that may not otherwise be recovered, for example by claiming input tax credits or rebates, by any other person. On the surface it appears that since the public sector may be immune from the payment of the indirect taxes (GST or PST) that there are no other issues relating to indirect taxes. However, it is important to note that while the public sector may not be required to pay indirect tax, it may still be required to address indirect tax matters on its supplies or sales to the private sector. In particular, provinces are required to collect and remit GST¹¹ on the consideration charged for all taxable supplies made in a P3 agreement.

Nature of Supply

Before applying a particular indirect tax, it is important to review a P3 agreement in detail to fully appreciate the indirect tax implications. The first step is to identify the different supplies that will be made in a P3 agreement and the particular entity that will be making the supply so that each participant is aware of its obligations with respect to the collection of tax. The second

⁹ *The Constitution Act 1867*

¹⁰ The Federal Government agrees to pay PST on purchases made by entities listed on Schedule I of the *Federal-Provincial Fiscal Arrangements Act* or by third parties. The Provinces agree to pay GST on purchases made by provincial entities other than those listed on Schedule A to the RTA. Schedule A includes all Ministries and any Listed Entities (or entities listed on Schedule A).

¹¹ Subsection 122(1) of the ETA

step is to review each participant's independent supplies and to consider the nature of the P3 agreement in its entirety to determine whether or not there is a single supply or a multiple supply being made and apply GST accordingly (i.e. is it a taxable or exempt supply or a combination thereof). The single and multiple supply analysis, discussed further below, is important for determining the timing of when tax is collectible and payable.

Most P3 agreements involve the construction of real property; therefore, it is important to be able to identify the PST status on the various supplies (i.e. is there a supply of real property that is not subject to PST or a supply of taxable or exempt tangible personal property) for each phase of a P3 agreement. Therefore, it is important for the private sector to ensure that it is aware of whether or not it is a vendor and must collect PST or is a user and is required to pay PST (discussed further below).

Indirect Tax Planning and Compliance Issues

GST Impact on Traditional Procurement

In a traditional procurement scenario the government take the role of funding or lending amounts to their agencies and GST is often not a key consideration since these types of payments are typically not subject to GST¹². A significant GST issue can occur when a public sector is required to pay GST on the acquisition of the infrastructure due to the fact it is not a listed entity under the RTA¹³ and the infrastructure will not be used primarily in its commercial activities. Subject to the public sector's ability to recover GST under the public service body rebate provisions¹⁴, a significant amount of un-recoverable GST can occur in connection with a P3 project.

General GST and PST Strategies for Planning P3 Agreements

It is difficult to establish a "one size fits all" indirect tax strategy as a template for all P3 agreements. However, it is vital for each party within the P3 structure to perform its own

¹² These payments may be paid with respect to an exempt financial service of lending money or could be considered grants and/or subsidies and not consideration for a supply.

¹³ It is beyond the scope of this particular paper to discuss the merits of whether or not a provincial entity must be a listed entity under Schedule A to the RTA for it to be immune from the payment of GST.

¹⁴ Section 259 of the ETA.

indirect tax analysis in order to ensure that each person meets responsibilities and obligations with respect to the collection and remittance of taxes.

It is during the request for proposal and selection phase that both the public and private parties establish the obligations and responsibilities relating to the particular P3 structure selected. At this time that it is also important for both parties to understand the indirect tax implications of each person's obligations and responsibilities. While each P3 agreement is different, there are some standard supplies typically made by each party that should be considered when undertaking an indirect tax analysis.

Real Property - Supply of Lease or Licence

In most P3 agreements, the public sector is responsible for the provision of the real property (often undeveloped land) for purposes of constructing the infrastructure. This is due to the fact that the public sector may already have access to existing lands or it will have the ability to expropriate or acquire the land necessary for the project. Typically, the public sector will acquire ownership of the infrastructure at the time it is constructed or installed and it will provide access to the infrastructure back to the private sector under a lease/lease-back or licence. In certain P3 agreements, the public sector may provide a non-exclusive licence to the private sector that provides a limited licence for purpose of the obligations and responsibilities set out within the P3 agreement. The granting of the non-exclusive licence by the public sector to the private sector does not mean that the latter is the person that is supplying the right of the infrastructure to the general public. Typically it is the public sector person that makes the supply of the infrastructure to the general public.

It is possible that the lease or licence of the land may be provided to the private sector for a stated consideration (which may or may not be a nominal amount) depending on the circumstances, one could take the view that the private sector is providing the capital infrastructure as consideration for the lease or licence of the real property. As an example of this is that it is the province that gives the right of public land and infrastructure to the general public in law and only where the common law is not in effect, such as specific privatization legislation, is the private sector party that grants any rights to the general public.

Lease or Licence of Real Property

The application of GST to the supply of a lease or licence of bare land by a public service body for the purpose of constructing the infrastructure may be found in section 25 of Part VI to Schedule V of the ETA (“Section 25”). The supply of real property is exempt in accordance with Section 25 where the supplier (or in this case the public sector) is a “public service body” (i.e. NPO, school authority, university, college, hospital). A “public service body”, as defined, includes a municipality but not a provincial or federal government. However, Section 25 specifically excludes supplies made by municipalities. Section 25 also does not apply to (i) a lease where continuous possession or use of the real property under the lease is provided for less than one month; or (ii) a licence where the supply is made in the course of a business carried on by the body; or (iii) where the public service body has an election in effect under section 211 of the ETA (“Section 211”) with respect to the real property that is used in the P3 project.

Since the private sector is acquiring the lease or licence for purposes of performing the activities relating to the P3 agreement, it should be eligible to recover any GST paid on the lease or licence of the real property as an input tax credit. Therefore, there should be no negative impact in structuring the P3 agreement so that the supply of the lease or licence is subject to GST.

For example, if the supplier is a public service body and the supply is a lease, or the public service body is not in the business of supplying licences of real property, then it may elect in accordance with Section 211 to be excluded from the exempting provision in Section 25. By electing under Section 211, the public service body is no longer subject to the “primary test” for claiming input tax credits for capital real property and may be eligible to claim input tax credits based on the percentage use of the real property in commercial activities.

Supply of Improvements to Real Property

Most P3 agreements involve the construction of infrastructure that will ultimately be for the general public’s benefit or use. As part of a P3 agreement, the private sector may be required to design, build and finance the construction of the infrastructure in order to use the infrastructure to fulfil its obligations set out the operation and maintenance services section of the P3 agreement. For GST and PST purposes, this type of agreement is generally considered a construction service.

Generally, GST is applicable on construction services provided by the private sector, subject to whether the public sector is immune from paying GST, since there are no exemptions or zero-rating provisions that would apply. Since the private sector is engaged in taxable (or commercial activities) it should be eligible to recover any GST paid on the cost of constructing the infrastructure as an input tax credit. Therefore, GST paid with respect to the construction of the infrastructure should not result in a cost to the P3 project.

For most P3 agreements, the cost of the PST paid on purchases of property and materials relating to the construction of the infrastructure will be incurred by the private sector and the PST will be treated as a cost of construction in the financial models. This will affect the pricing structure of the P3 and typically the PST will be recovered indirectly from the public sector. PST compliance may become an issue if there are any provisions within the P3 agreement for the transfer of any tangible personal property that is not real property at the completion of the infrastructure.

Supply of Operation and Maintenance Services

The Operation and Maintenance services are generally performed by the private sector and include various services that require the private sector to operate the infrastructure on behalf of the public sector and to maintain the infrastructure to a specific standard. For some P3s, such as the DBFO (design, build, finance, operate) of a hospital, the standards for operation and maintenance are more regulated compared to a road or bridge that may have a different standard and timeline.

Similar to above, GST would most likely be applicable on the provision of operation and maintenance services since there are no specific exempting or zero-rating provisions that will apply to these particular services. The private sector would be eligible to claim input tax credits for any GST paid on expenses relating to the provision of these services.

Typically, PST does not apply to most services relating to real property in BC and Ontario; however, it is important to fully understand the terms and nature of the operating and maintenance services in order to identify any services that may be subject to PST, such as the repair and maintenance of tangible personal property.

Supplies made by Government to Public Sector Bodies

Certain P3 agreements are structured whereby a government entity (the province or federal government) is the person that enters into the P3 agreement with the private sector and the infrastructure will be used by a public sector body such as a school or hospital. In some cases, the public sector body may also be a party to the P3 agreement or may enter into a separate agreement with the government to provide the land necessary for the private sector to construct the infrastructure. Under these structures the government entity may be the person responsible to make all the payments under the P3 agreement.

P3 arrangements can be complicated, so it is extremely important for each participant of the P3 agreement to identify the particular supplies that it will make and its obligations and responsibilities for the collection of GST on the particular supplies. What complicates a P3 agreement is that there may be several supplies made among the participants with no actual consideration paid at the time of the supply. Or there may be a barter system in place whereby the payments are based on a net payable basis and the value of consideration appears to be reduced in the process.

In a P3 involving a barter transaction, the barter may involve the exchange of real property or intangible rights for the provision of property or service, subsection 153(3) of the ETA is not applicable and there are no provisions within the ETA to support a netting of the GST payable for these particular supplies. Therefore, each person would be required to charge and remit GST on the value of consideration that is paid in money or where the consideration is something other than money, such as property or a service, then on the fair market value of that particular property or service. This means that if the P3 agreement is structured so that consideration is paid for the lease or licence of real property or for any other concessions or rights provided by the public sector to the private sector and the private sector agrees to perform its obligations or transfer title to any property in exchange for the supply, the public sector may, depending on the circumstances, be required to levy GST on the value of consideration of the service or the property.

While the private sector may be eligible to recover this GST as an input tax credit, there is still a risk that the public sector may face interest charges for failure to collect and remit the

appropriate amount of GST on its supplies if tax is not charged correctly from the outset. It is also important at the planning stages to incorporate provisions to assist each party in meeting their respective GST collection and remittance obligations, and to ensure each party complies with the documentation requirements as set out in subsection 169(4) of the ETA. Further, it may be possible to structure the timing of invoices and payments between the parties to help mitigate any potential significant cash flow issues due to the delay between the collection of GST by one supplier and the recovery of the recipient by means of an input tax credit or rebate.

Supplies to the Public of the P3 Infrastructure

The supply of the infrastructure to the general public may take on many different forms, from a direct user based supply of a toll road/bridge, to the supply of educational services or medical services by a school or health authority.

Each supply has its own distinct GST treatment and this is the area where GST may become a cost to the public sector if it is either making an exempt supply of the infrastructure (such as the right to access a road or bridge where a toll is charged) or the infrastructure is property that is used in the course of providing exempt education or medical services to the general public.

Again, it is important to understand which entity (either a government or a public sector body) is making the supply of the infrastructure or is using the infrastructure in exempt activities as it may be possible to structure the P3 agreement to achieve the best tax result. For example, the agreement may be structured so that a provincial government entity acquires the infrastructure so that GST is not levied due to its immunity.

However, as mentioned above, as a government is not included in the definition of public service body for purposes of exempting the supply of real property under Section 25, any real property supplies by the government body way of sale, lease or licence to a public service body will be subject to GST on any consideration payable¹⁵. If the public service body is using the infrastructure primarily in its exempt activities, it will not be eligible to claim input tax credits and may be limited to recovering the GST paid under the public service body rebate rules.

¹⁵ If there is no consideration payable, then there is no GST; however, this is subject to section 155 of the ETA.

Additional GST Issues for Private Sector

Single vs. Multiple Supplies

As stated above, the supply of construction services, operating and maintenance services by the private sector are subject to GST. Most P3 agreements only provide limited mention of the GST and that only to state that payments are exclusive of GST or that the public sector is immune from paying GST and it is assumed that each party will know how and when to levy the GST. One of the fundamental concepts of GST is determining whether the supply is a single supply of property (tangible, intangible or real) or a service (construction, operation or maintenance) and whether an agreement that is made for a single consideration (or an established series of payments of consideration) is a single supply of a particular property or service, or whether each supply is separate and distinct from each other (multiple supplies). While it may appear that it is irrelevant to apply this analysis to an agreement where both parties agree that GST is applicable and they agree to pay the GST, it is important to make this determination for purposes of determining when the GST should be remitted.

The concept of a single or multiple supply is a question of fact and law. Subject to sections 138 and 139, the ETA does not provide guidance for determining whether the provision of property or services under a single agreement is considered a single supply, or if the provision of property or services are so distinct and separate from each other that each one has its own GST application. Therefore, it is necessary to review each P3 agreement in isolation to make this determination and to rely on existing jurisprudence to provide guidance.

There are a number of cases that provide guidance on the classification of supplies as single or multiple supplies. The following Canadian cases are often referred to when applying this analysis are, *O.A. Brown Ltd.* (“O.A. Brown Case”) and *Her Majesty the Queen, Tax Court of Canada (1994-435(GST)I)* and *Canada Trustco Mortgage Company and Her Majesty the Queen, Tax Court of Canada (2003-3554(GST)G)* (“Canada Trustco Case”).

These particular cases help to establish criteria or tests to consider within common law that should be applied in order to determine whether a supply, with a number of component elements,

is a single supply or is considered separate and distinct multiple supplies. The main point applied in each case can be summarized as:

“whether, in substance and reality, the alleged separate supply is an integral part, integrant or component of the overall supply”

In applying this test, the courts stated a number of factors that should be considered as being indicative, but not necessarily conclusive, of the presence of a single supply. These factors can be summarized as follows:

1. the degree to which the services alleged to constitute a single supply are interconnected;
2. the extent of their interdependence and intertwining;
3. whether each is an integral part or component of a composite whole; and
4. whether the services are rendered under a single contract, or for a single undivided consideration.

A key factor identified by the courts is whether a particular element can realistically be omitted from the overall supply without undermining the value of the remaining elements. One must also look at the essence of each component of the supply and determine whether each component is an integral part of the overall supply. The courts determined that there must be an inextricable interdependency between the elements so that they are integral parts of a composite whole that cannot, as a matter of commercial reality, be sensibly separated into separate supplies.

The courts also stated that the fact that a separate charge is made for one constituent part of a compound supply does not alter the GST treatment of that element. The GST treatment of the element is determined by the nature of the supply as a whole.

Canada Revenue Agency (“CRA”) Administrative Policy

The CRA has published its policy in the GST/HST Policy Statement P-077R2 *“Single and Multiple Supplies”*, dated April 26, 2004.

In accordance with this policy position, the CRA has adopted the following principles to determine whether a transaction consisting of several elements is to be regarded as a single supply or multiple supplies:

1. Every supply should be regarded as distinct and independent.
2. A supply that is a single supply from an economic point¹⁶ of view should not be artificially split.
3. There is a single supply where one or more elements constitute the supply and any remaining elements serve only to enhance the supply.

The policy paper suggests a series of questions to assist in determining whether a service is considered a single supply or multiple supplies including:

- Is the property/service provided by two or more suppliers?
- Is there more than one recipient?
- What did the supplier provide for the consideration received?
- Is the recipient made aware of the elements (in detail) that are part of the package?
- In the context of the particular transaction, does the recipient have the option to acquire the elements separately or to substitute elements?

These questions are suggestions to assist with characterizing the services when determining whether there is a single supply or multiple supplies. All the facts of a particular situation must be considered, including the nature of the service being provided, the normal business operations of the supplier, and the recipient's expectations of the service prior to making a determination.

¹⁶ The policy paper does not define or discuss the meaning of "economic point of view".

Applying the Single vs Multiple Supply Analysis to a P3 Agreement

For this example the supplier will be referred to as the private sector and the recipient will be referred to as the public sector to the agreement. It is important to note that a single supply position weakens if there are multiple parties to the agreement, such as a tri-party agreement with a government entity, a public sector body and a private sector.

From the outset, the purpose of entering into a P3 agreement is to transfer the risk and obligation of constructing, operating and maintaining an infrastructure to the private sector. By its very design the construction of the infrastructure is so intrinsically intertwined with the provision of the ongoing operation and maintenance related to the infrastructure that there is no benefit for either party to have one single component service performed without the other services being supplied in their entirety.

Therefore, there is an argument to be made that the construction of the infrastructure is one of the component supplies being made in order for the private sector to fulfill its obligations under the terms of a typical P3 agreement. For example, if the private sector does not complete the entire term of the agreement it will not recognize the financial benefit from entering into a P3 agreement in the first place, subject to any termination clauses (the intent of which are to reimburse the private sector for specific costs incurred prior to termination) in a P3 agreement.

Support for the position that the P3 project could be a single supply can be demonstrated by contract terms similar to the below sample of an agreement:

- The performance of the “Works” or “Project”;
- The delivery of the “Project Services”; and
- All other obligations of the private sector under the agreement.

The “Works” or “Project” typically is defined to include the objective of the particular type of P3 whether it is a DB or full DBFO/DBFM and can include all the services performed to design, build and construct the capital infrastructure. The “Project Services” also are defined within the intent of the P3 agreement and can include the services necessary for the operation and maintenance of the capital infrastructure.

All other obligations typically refer to the fact that the private sector must ensure that it fulfils all the terms of the P3 agreement including meeting certain completion date conditions, maintaining a certain standard of maintenance of the infrastructure (very important in a P3 for a hospital or school) and ensuring that the private sector has sufficient financial arrangements in place to fulfil the conditions of the P3 agreement.

It may appear that the intention of both parties is that the P3 agreement is to be performed in its entirety by the private sector and while it has the ability to hire subcontractors to perform certain component services necessary to fulfill its obligations, ultimately the private sector is responsible under the terms of the P3 agreement.

Notwithstanding the above, there is a risk the CRA or the courts may view the various services performed under the terms of a P3 agreement as separate and distinct component services, each with a specific GST application. However, based on the nature of the P3 agreement and the criteria to differentiate between a single and multiple supply suggested by the courts and CRA, there is also a position that the services supplied under a P3 agreement could be so intertwined and commercially necessary that, similar to the Canada Trustco Case, the courts could take the position of a single supply. Arguably, it is not logical that the private sector would incur a multi million or even billion dollar cost to construct a public infrastructure without ensuring that it has the means with which to recover that cost.

Furthermore, the Canadian courts may look to other jurisdictions for guidance, such as the UK, and adopt a position that the fundamental supply by the private sector is the provision of a service relating to real property or an asset that it had to construct in order to perform the service.

While there may be termination clauses to ensure that the private sector is reimbursed for its cost of constructing the infrastructure (P3 agreements tend to ensure that the public sector has all rights to the capital infrastructure and the private sector only has an exclusive or non-exclusive licence for the purpose of performing its services under the P3 agreement) it could still be argued that a private sector is providing a single supply.

Timing of GST Payments – Section 168 of the ETA

Subsection 168(1) of the ETA provides the general rule for determining when GST is payable on a taxable supply. Section 168 of the ETA includes several other provisions that effectively override subsection 168(1).

Subsection 168(3) of the ETA provides special timing provisions for a supply that is under an agreement in writing for the construction of real property.

Notwithstanding subsections (1) and (2), where all or any part of the consideration for a taxable supply has not been paid or become due on or before the last day of the calendar month immediately following the first calendar month in which....

(c) where the supply is under an agreement in writing for the construction, renovation or alteration of, or repair to ... any real property....

the construction, renovation, alteration or repair is substantially completed, tax under this Division in respect of the supply, calculated on the value of that consideration or part, as the case may be, is payable on that day.

This provision is referred to as an over-ride rule to ensure that tax is not deferred and it becomes payable at a particular time, for example, at the time the construction of the real property is substantially complete.

Typically P3 agreements are structured where the consideration for the supply is paid on a scheduled basis (whether monthly or annually) and the consideration is determined by both parties based on a financial model that takes into account various costs to construct, maintain, operate and finance the infrastructure. Also, as a P3 agreement by its very nature obliges the private sector to construct the infrastructure at its own cost, assuming the risk for such things as an increase in the price of materials, labour disputes, unforeseen income tax implications etc., it is difficult to identify the value of consideration paid not only at the time of substantial completion but over the life of the project. It appears that there may be an unforeseen consequence with the interaction of paragraph 168(3) (c) and the P3 agreement structure such that the CRA may take a position that there is a single supply of construction services and that

GST is payable on the total value of consideration paid for the life of the P3 agreement at the time of substantial completion.

However, subsection 168(6) of the ETA provides additional rules with respect to when tax is payable.

Value Not Ascertained

Subsection 168(6) provides for cases where the value of consideration is not ascertainable at a particular time.

Where under subsection (3) or (5) tax is payable on a day and the value of the consideration, or any part thereof, for the taxable supply is not ascertainable on that day,

(a) tax calculated on the value of the consideration or part, as the case may be, that is ascertainable on that day is payable on that day; and

(b) tax calculated on the value of the consideration or part, as the case may be, that is not ascertainable on that day is payable on the day the value becomes ascertainable.

This provision contemplates the situation where there is some uncertainty regarding the value of consideration for the purposes of the tax remittance under subsection 168(3) of the ETA. In some cases there could be an argument that the value of the infrastructure is not ascertainable at the time of substantial completion due to the nature and calculation of payments over the life of the project.

In accordance with subsection 168(6) where, under subsections 168(3) and (5)¹⁷, tax is payable on a day (such as at substantial completion date) and the value of consideration is not ascertainable on that day, tax is calculated only on the value of the consideration or part that is ascertainable on that day. In the future, where the value of consideration becomes ascertainable, tax is payable on that day.

¹⁷ Subsection 168(5) relates to a supply of real property by way of sale, this does not apply to the Project Agreement and thus we will not reference this particular subsection for the purposes of this memorandum.

Therefore, while there may be a position that a P3 agreement is a single supply and based on paragraph 168(3) (c), the tax is payable at the time of substantial completion, there is still the question of when the value of consideration is ascertained.

It would appear that it is not the intent of the Department of Finance to expect GST be payable on the entire value of consideration payable on a P3 agreement at the time of substantial completion. Furthermore, it seems unlikely that the Department of Finance would want to rely on its ability to impose transitional provisions to capture any difference in GST payable if there is a rate increase or harmonization of GST with PST (discussed further below). It will be interesting to see if the Department of Finance takes a lead from the UK and provides policies on the application of GST to P3 structures or even amends the ETA.

GST on Breach, Modification or Termination Payments

P3 agreements tend to have specific provisions to address compensation amounts paid for the breach or modification of the P3 agreement and for any payments made at the termination of the agreement. Section 182 of the ETA provides a deeming provision to address the application of GST on certain amounts paid with respect to a breach, modification or termination of an agreement for the making of a taxable supply (excluding a zero-rated supply). Providing the amount paid to the GST registrant that is making the taxable supply is an amount that is not consideration for the supply, or a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation, the person is deemed to have paid an amount essentially equal to the amount paid less a GST factor. The registrant is deemed to have collected and the other person is deemed to have paid GST on the above calculated consideration. This in effect means that the amount paid with respect to a breach, modification or termination is a GST inclusive amount.

Often in P3 agreements there is a clause that requires a gross-up on termination payments to ensure that the recipient of the payment is not caught short by its requirement to remit a portion of the termination payment as tax. Therefore, careful consideration should be made while drafting P3 agreements to ensure that when both parties are negotiating the amounts to be paid with respect to breach, modification or termination that GST is considered and that an amount equal to any GST that may be payable be included in the termination payment. In other words,

although the effect of section 182 is that the GST is deemed to be inclusive of the amount paid and GST cannot simply be added to the termination payment, the amount of termination payment can be adjusted to account for all the GST that may be applicable in this situation.

Description of the Financing structures of a P3

Generally, the private sector is responsible to ensure that it receives appropriate financing for the P3 agreement and in doing so it may incur significant costs associated with obtaining the financing. The successful private sector entity generally consists of several different companies coming together to provide specialty services, and in some cases to assume some of the risks associated with a P3. There are many ways to structure this “partnership” of companies and a common structure includes establishing general or limited partnerships. Therefore, the “private sector” can be a fairly complex structure and each participant or entity has its own GST issues relating to obtaining financing for the P3 project.

The private sector may either arrange for outside financing or a major bank or lending institution may be a member of the private sector and provide direct financing as part of its participation in the P3. Therefore, the private sector has various options for structuring its affairs relating to how it obtains financing for the Project and for reasons not related to indirect taxes, it may decide to establish a separate entity to obtain and provide the financing for the P3 project.

For GST purposes it is important to understand the P3 structure to determine whether or not one particular participant of the private sector is engaged in the provision of an exempt “arranging for” financial service or is providing taxable services to other entities. This will determine whether or not there is an opportunity to recover GST paid on inputs relating to obtaining the financing.

PST

P3 agreements are generally structured with specific references to indirect tax. In particular, it is common for a P3 agreement to treat all payments made between the public sector and private sector as being GST exclusive and each party agrees to pay GST, where applicable, in addition to any consideration paid. The P3 agreement may or may not treat PST in the same manner as

other “Taxes”, in that the PST is treated as a cost incurred by the private sector and is included as an input in the financial model used to determine the payment structure for the P3 project.

From the public sector’s point of view the PST is typically treated as a recoverable cost by the private sector in both a traditional model of procurement and in a P3 agreement; therefore, the cost of the PST incurred in the P3 project may not be a significant issue for the public sector.

However, it is important for the private sector to understand the impact of the PST from a cost perspective in designing the financial model and with respect to how the private sector addresses PST on the various obligations and responsibilities where there may be a requirement for it to charge and remit PST on the sale of tangible personal property to the public sector.

For example, the private sector may be required in a P3 to provide the public sector with a “turnkey” infrastructure, such as a school or hospital which includes all the necessary operating equipment, software/hardware and furniture/office equipment for the operation phase of the P3. Furthermore, the private sector may also agree to operate the facility and to maintain the building and equipment perhaps even replace equipment from time to time. Since the payment mechanism is generally a monthly, quarterly or annual payment for the performance of the operating and maintenance phase of the project, it may be difficult to conclusively allocate the payment mechanism to the provision of an exempt or taxable service or a sale of taxable tangible personal property and therefore difficult to determine the correct application.

PST on Retail Sales

A P3 usually involves construction of real property and/or the provision of maintenance and operating services for the major elements of the agreement, the private sector is generally not in the business of selling TPP. In that case, the private sector would not fall within the definition of a vendor and would be considered a “purchaser” of the TPP. This is supported by the fact that the private sector will mainly acquire TPP such as materials and equipment for use in the construction of the infrastructure. During the operation and maintenance stage the TPP acquired will be used by the private sector in order to perform its services and any recovery of the PST paid with respect to acquisitions of property for the purposes of performing these particular services should be factored into the financial models.

However, as P3 arrangements do vary, it is important for the private sector to determine whether it is a “purchaser” or a “vendor” for PST purposes and has an obligation to collect PST on a retail sale of taxable tangible personal property or a taxable service in a province.

Purchaser for PST Purposes

It depends on the nature of the P3 agreement and the extent of obligations and responsibilities of the private sector to determine whether or not the private sector is a vendor and must collect and remit PST on a retail sale or if it is the purchaser acquiring TPP for its own consumption or use for the purpose of meetings its obligations under the P3 agreement.

In a typical P3 agreement, there is a position that the private sector is acquiring the TPP for own use in order to perform the operating or maintenance services obligations. Standard to these agreements is the fact that the public sector will acquire title to all real property and TPP; therefore, it becomes necessary to understand the definition of “purchaser” for PST purposes.

In Ontario a “Purchaser” is defined to mean:

a consumer or person who acquires tangible personal property anywhere, or who acquires or receives a taxable service at a sale in Ontario, for his, her or its own consumption or use, or for the consumption or use in Ontario of other persons at his, her or its expense, or on behalf of or as agent for a principal who desires to acquire the property or service for consumption or use in Ontario by the principal or by other persons at his, her or its expense, and includes,

(a) a person who, at his, her or its expense, purchases admission to a place of amusement for himself, herself or itself or for another person, and

(b) a promotional distributor to the extent that the full fair value or full price of admission of any tangible personal property, taxable service or admission to a place of amusement provided by way of promotional distribution exceeds any payment specifically made for it [Emphasis added]

In BC a “Purchaser” is defined to mean:

(a) a person who acquires tangible personal property at a sale in British Columbia

(i) for the person's own consumption or use,

(ii) for consumption or use by another person at the expense of the person acquiring the property, or

(iii) on behalf of or as agent for a principal, if the property is for consumption or use by the principal or by another person at the expense of that principal,...

[Emphasis added]

Exemptions – Hospitals

Ontario has a specific exemption¹⁸ for purchases of specific equipment (patient-care item or supply used in a patient's room or any other area where medical or surgical treatment normally occurs, including laboratory research and diagnostic equipment) by public hospitals for its exclusive use and not for resale purposes. The hospital must use a purchase exemption certificate at the time of purchase.

Ontario Guide 805, *Hospitals*, states that the contractor, or in the case the private sector, may acquire equipment on behalf of the hospital providing a PEC is issued and the hospital qualifies for the exemption. Therefore, where a P3 agreement is used for the construction of a public hospital in Ontario, the hospital entity should ensure that the private sector is aware of the potential exemption available on certain equipment.

BC does not have a similar exemption available for the purchase of TPP by hospitals; however, an eligible charity may apply for a refund for purchases of medical equipment that is acquired with charity funds and used by a health facility in the treatment or diagnostic of patients.

Tax Rate Changes

P3 agreements may include provisions to ensure that the public sector and private sector each do not experience an unintended benefit due to a GST or PST rate increase or decrease. This is due to the fact that the private sector factors into its financial models the recovery of certain costs

¹⁸ Subsection 7(1)(38) and regulation 1012.

incurred for the life of the project and it is assumed that any variances to this financial model (such as an increase cost of materials) will be borne by the private sector based on the level of risk. These provisions are intended to ensure that neither party recognizes a benefit or incurs an unplanned cost for a change in tax rates (generally referred to as Changes in Law).

Typically, a P3 agreement may have specific Tax provisions or compensation event clauses to address rate increases and decreases. Where there is an adjustment to the rate of tax or perhaps harmonization, it is important to ensure that the P3 agreement is structured to deal with the results of a future tax adjustment. While rate changes in GST and PST are typically addressed, harmonized sales tax issues are sometimes not considered fully.

Potential Harmonization – A BC Perspective

There has been a lot of speculation on whether or not the provinces of BC and Ontario will harmonize the archaic PST with GST to create a more business friendly harmonized tax or HST. The government of BC has recently stepped up its green policy by introducing the new Carbon Tax with the purpose to change the carbon footprint habits of the people of BC, this new tax (plus the recent amendment to the SSTA to remove the exemption on the use of coal and coke for non-residential purposes), will create additional tax burden on the resource based industries in BC. This also affects the cost of materials and operating costs for construction projects, including the P3 infrastructure projects. The current BC Liberal government has historically been a friend of business and industry by implementing budget changes and initiatives to make its resource based industries more competitive; therefore, it appears counter intuitive that it would initiate such a tax policy change or shift. However, if the current BC government were considering harmonization of the PST with GST, the result would be a reduction of the PST cost to this industry (among other businesses in BC).

What does this mean in a P3 environment? If the provinces were to harmonize the PST with GST, it would mean that most P3 projects would be able to treat the new HST as a recoverable tax rather than a cost within the financial models and the pricing structure would be adjusted accordingly. While it can be argued that the PST incurred in a province does enter into the provincial coffers so there may be no benefit to a particular province with harmonizing.

On the surface it appears that a P3 agreement is a construction contract for the construction of a public infrastructure and that the province if it were to hire a contractor to construct the infrastructure under the traditional procurement mechanism would have the same PST cost. However, depending on the P3 agreement, the PST incurred on the construction of the infrastructure may not be directly reimbursed at the time of construction and may be recovered through the fixed period payments made over the life of the P3 agreement. Therefore, since the PST forms part of the cost of the project, it is feasible that the public sector may also indirectly incur financing costs incurred by the private sector with respect to the PST and thus the public sector may be end up paying for carrying cost of financing the PST.

The movement towards harmonization becomes more relevant as the federal government expands its P3 initiative based on the fact that it does not pay PST under a traditional procurement method but it will incur a cost for PST under a P3 agreement since the PST recovered under the P3 is not levied on the federal government but on the private sector. This additional “cost” incurred on significant capital infrastructure projects may provide incentives for the federal government to encourage or support negotiations with the provinces of BC and Ontario to harmonize the two taxes.

Trends for the future

It appears that the number of P3 infrastructure projects will continue to grow in Canada since other provinces (Manitoba and Nova Scotia) are beginning to consider P3 agreements as an alternative option to acquiring capital infrastructure. As more projects reach the completion stages of construction and move towards operation and maintenance phases, we are seeing examples of success relating to construction phases being on budget and on time. For example according to PBC in March 2008¹⁹, of 11 significant projects in BC, all 11 were completed on budget and on time. In fact the Kicking Horse Canyon (Phase 2) project finished 19 months ahead of schedule, which is an accomplishment for any construction project.

In comparison to these examples, BC has also experienced some recent examples of traditional procurements, such as the Vancouver Convention Centre and Fast Ferries, that incurred significant cost and delay overruns. It would be interesting to speculate whether or not the same

¹⁹ *PPPs and the B.C. Experience Vancouver Board of Trade PPP Forum, March 6, 2008, Larry Blain, CEO, Partnerships BC*

cost and delay overruns would have incurred had each of the above projects been P3 arrangements where the private sector had assumed more of the risks associated with cost and delay overruns. In the October 2007 Auditor General review of the Vancouver Convention Centre, the Auditor General reported that three main factors relating to cost overruns for the project included (among other factors) (i) the original budget amounts were not based on detailed designs or detailed cost analysis of the construction, but based on the approved financing and/or funding from government sources; (ii) original budgets had projected inflation for the cost of construction at 4% while the actual rate of inflation during the initial phases of construction was 11%; and (iii) procurement options were limited due to deadlines for the upcoming Olympics and in fact the option of a P3 was explored but the process was not successful.

While every capital infrastructure project may not be suited for a P3 structure, it may become a more preferred method of procurement for governments looking to focus on providing timely and effective services to its public while maintaining a balanced budget.

CONCLUSION

P3s have shown signs of being successful in Canada and that they are a legitimate alternative method for procuring capital infrastructure. While the primary drivers for implementing a P3 do not tend to be indirect taxes, it is important to manage the costs and risks by both the government and the private sector partners. One way to control cost is to identify and manage the key issues at the planning stages where the agreements can be structured to minimize the burden of indirect tax, manage the related administrative responsibilities and/or cash flow, and ensure the payment structure reflects the true costs. Therefore, public and private sector entities alike should carefully review the indirect tax consequences of P3 models in considering the ultimate risks and rewards of an infrastructure project.

BIBLIOGRAPHY

2006 National Award Case Studies. The Canadian Council for Public-Private Partnerships. June 2007.

2007 National Award Case Studies. The Canadian Council for Public-Private Partnerships. June 2008.

2007/8 – 2009/10 Service Plan, Partnerships British Columbia

2007-2008 Annual Report. Partnerships British Columbia.

Alternative Financing and Procurement: Frequently Asked Questions. Infrastructure Ontario.
<http://infrastructureontario.ca/en/projects/afp.asp>

An Audit of Joint Solution Procurement and the Revenue Project Management. Office of the Auditor General of British Columbia. April 2008.

Canadian PPP Project Directory. The Canadian Council for Public-Private Partnerships. Nov 2006

Consolidated Version of the Treaty of the European Union. Office Journal of the European Communities

Delivering the PPP Promise: A Review of PPP Issues and Activity. PricewaterhouseCoopers (UK). 2005.

Iraj Afshair, *Financing of Capital Assets in the Public Sector.* Corporate & Project Finance, Provincial Treasury. Jan 2007.

J. David Pirie. “The Confederation Bridge: project structure and risk”. *Canadian Journal of Civil Engineering.* 24: 867-874. 1997

Measuring Public Reaction to PPP in Canada: A Four Year Report. The Canadian Council for Public-Private Partnerships. Fall 2007.

Michael Rutherford, Transport Canada. *Role of the Government of Canada in Fostering a Canadian P3 Market.* Northern Border Finance Conference, Chicago IL. May 16, 2007.

Overview of Successful Public-Private Partnerships in the Water Sector, The Canadian Council for Public-Private Partnerships

Partnering in Practice: New Approaches to PPP Delivery. PricewaterhouseCoopers (UK). 2004

Patrick Banham. “Critical Sales Tax Issues for Public-Private Partnerships”. *2005 CICA Commodity Tax Symposium*. Sept 26-28, 2005.

Project Finance: An Introductory Manual for Canadian PPP Project Managers and Advisers. The Canadian Council for Public-Private Partnerships. Nov 2006.

Responsible PPP Procurement for British Columbia. The Canadian Council for Public-Private Partnerships. April 2005.

Richard Adadie. *Using Private Finance to Fund Public Infrastructure*. Presentation to the Vancouver Board of Trade. March 6, 2008.

Speech by the Honourable Jim Flaherty, Minister of Finance, to the 15th Annual National Conference on Public-Private Partnerships hosted by the Canadian Council for Public-Private Partnerships. Department of Finance. Nov 26, 2007 <http://www.fin.gc.ca/news07/7-092-1e.htm>

The Value of PFI: Hanging in the Balance (Sheet)? PricewaterhouseCoopers (UK) Public Sector Research Centre

Understanding Public Private Partnerships. Partnerships British Columbia.

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¹ *Canadian PPP Project Directory – Selected Public-Private Partnerships Across Canada*, The Canadian Council for Public-Private Partnerships, November 2006

www.pwc.com/ca