

## Building it up

### Industry Spotlight

Written by Andi Balla

Issue Date: April 2011

When Janis Vanderburgh looks at some of the main streets in the suburbs north of Toronto, she sees land that needs to be bought, utility lines that need to be moved, roads that need to be torn and rebuilt — and all of the legal work involved with such transactions. York Region Rapid Transit Corp., where Vanderburgh is senior counsel, has received \$790 million in provincial funding to make sure fast public transportation is available in one of Canada's fastest growing regional municipalities. It involves constructing special rapid transit lanes on main roads like Yonge Street and new transit stations in booming bedroom communities.



To achieve these plans, the Regional Municipality of York, a confederation of nine cities and towns with a combined population of one million, has been working for years in a public-private partnership with York Consortium 2002, a group of local companies that won an international competition to design and construct the infrastructure behind the rapid transit system. As with most Canadian entities involved in public-private partnerships, or P3s, the motivation comes from projects that are completed “on time and on budget.” But they are often about more than just deadlines and funding, says Vanderburgh. “The reward you get from a good partnership is not something that you can easily quantify, but it comes out in the product,” she says.

York Region is not alone. Across Canada, municipalities are increasingly relying on P3s to build new infrastructure, and these agreements come with multiple layers of legal work that keep in-house legal departments and their external counsel busy.

The City of Ottawa, for example, has had about 10 such P3 projects in the past decade. Carey Thomson, deputy city solicitor, says the municipal government sees P3s as beneficial because they allow the city to speed up timelines for development and construction of needed facilities. “With one exception in nine or 10 projects over the past eight years, the P3 projects the city has participated in have performed well and have been well-received by the residents,” he says. “It has also permitted the city to act as a catalyst of sorts for economic development and help to revitalize certain areas of the city.”

If what's happening in places like Ottawa is any indication, there will be more P3 relationships forged with Canadian municipalities in the future because the country currently has a \$125-billion infrastructure gap. Plugging it requires major investment — six to 10 times the level of current annual government infrastructure spending, according to a recent report by the international professional services firm Deloitte. “Canada's local governments alone face a \$60-billion annual infrastructure deficit — a number growing at a rate of \$2 billion a year,” the report notes.

Kasim Salim, a partner with Borden Ladner Gervais LLP who works with the City of Ottawa on its P3 projects, says a lot of the infrastructure needs have to be filled by municipal governments. “The P3 model is gaining greater acceptance at the municipal level,” he says. That's because it helps ensure needed infrastructure is delivered in an effective manner on time, on budget, and is maintained throughout its useful life in an appropriate manner.”

P3s are not new to Canada. They have been a force for building infrastructure in this country for more than a decade. The trend started strong in British Columbia, where 20 per cent of all infrastructure was done through P3s as of 2007, according to the Deloitte report. And then it moved to the rest of the country. Ontario is currently building 30 new hospitals through P3 models.

That's another key reason many public entities might choose P3s beyond funding and meeting deadlines, says Judy Wilson, a partner at Blake Cassels & Graydon LLP who specializes in P3s. In many cases, public entities need the P3s to do work they simply don't have the expertise to do themselves. “Say, if you are a hospital, probably your expertise is not building a new hospital,” says Wilson. She says the general trend of public entities using P3s has not gone up much in recent years, but the number of municipal P3s is still growing. “Getting the project done on time and on budget — I don't think there is much doubt that that has been the source of some success.”

But it's a success that requires a lot of legal work because reaching and maintaining P3 agreements can be very complex. “They are pretty intensive legal processes,” adds Wilson. “That's because they are often quite big-ticket projects.”

At the York Region Rapid Transit project, for example, there are many lawyers involved on all sides of the P3, both in-house and external. Vanderburgh works with her external counsel at WeirFoulds LLP not only to negotiate with the private partners but also to work out the contractual details with Metrolinx, the provincial agency funding the rapid transit project as part of its mandate to co-ordinate the integration of transportation in the Greater Toronto and Hamilton, Ont., areas.

Despite the legal complexities, for municipalities like York Region and Ottawa, which often run several P3s at the same time, things get easier as legal procedures and documentation become standardized. Some provincial agencies use precedents from previous deals, for example. That approach can lead to greater cost efficiencies and a better level of understanding by the investors who are considering these P3 projects, according to Salim.

And P3s work best when they have a straightforward procurement process. “Very often, the problems that are inherent in these big infrastructure transactions are really caught up on how well the procurement process goes, so that's an important issue,” Wilson says. “Where the procurement project is straightforward, where the bidders trust the organization, that really helps.”

Clarity is important because P3 projects can come under scrutiny to make sure the agreements and bidding processes are transparent and properly monitored. “A pitfall that is often cited is that P3s are less accountable. An appropriate level of disclosure is a key foundation for an accountable process,” says Salim. “The P3 model employed should provide for appropriate sharing of information in a form useful for taxpayers to hold governments to account and ensure best value for money.” He adds a lack of contracting expertise can also be a significant problem for governments with limited P3 experience, leading to inappropriate risk transfers and opportunistic behaviour by private-sector bidders and partners.

But the benefits outweigh the risks, according to advocates of the P3 model. The Canadian Council for Public-Private Partnerships says these deals have public support, based on the findings of a recent Ipsos Reid countrywide public opinion survey on attitudes about private-sector involvement in certain sectors. The results indicate two-thirds of Canadians support the use of P3s to deliver infrastructure and some public services. The poll also notes nine in 10 Canadians feel government cannot keep pace with their country's infrastructure needs.

That support comes as P3s for infrastructure projects are delivering savings in costs and time compared to conventional procurement approaches used by Canadian governments, according to a recent report by the Conference Board of Canada. “The two major benefits of P3s are cost savings and time savings. When all the project risks that the public sector bears are fully costed and included in the total cost of the project, and transferred in part to the private-sector partners, cost and time savings can be achieved,” says Gilles Rhéaume, the organization's vice president for public policy. The study notes P3s also result in efficiency gains, lower costs, quicker completion, and higher service levels due to a number of factors. That's because these deals involve performance-based contracts and a transfer of risk to private-sector providers, which also often finance some of the costs of the project.

“Some of the myths surrounding public-private partnerships for infrastructure appear to be just that. P3s are not the privatization of public assets, and there is no evidence that service standards suffer under P3s,” says Rhéaume. “Contrary to a widely circulated view, the transparency of P3 procurements is considerably better than for conventional procurements, because an abbreviated form of the P3 project agreements is made available to the public, which is seldom the case for conventional contracts.”

In the end, say lawyers interviewed for this story, successful P3s take time, effort, and building the right relationships with the partners. “A lot of success is based on developing an honest partnership with the other party,” says Wilson. Vanderburgh agrees. “Building a rapid transit system is a very complex and comprehensive exercise, and if you are working with the same people, they acquire all that knowledge and expertise about your projects,” she says. “That’s where you come up with a superior product.”