



Preparing for the 2015 Pan American Games, Toronto is relying on a distinctively Canadian deal form: the public-private partnership.

If You Build It, They Will Come

By Victor Li



HERE WERE 41 PIANOS on the streets of Toronto last summer. Each one was painted in the national colors of one of the 41 countries set to participate in the 2015 Pan American Games. From “Heart and Soul” to Haydn, it was not unusual to be serenaded by pianists of varying talents while walking around in downtown Toronto during July. Three years before the start of the games, Toronto is already working to build excitement.

Of course, the Toronto 2015 Pan Am/Parapan Am Games Organizing Committee (TO2015) will need more than pianos and hype to get the games off the ground. The infrastructure needed for the games—numerous sports facilities, an athletes’ village, and an air rail link from Pearson International Airport to downtown—is considerable. To build it, TO2015 has turned to a deal structure widely used in Canada, although it’s less common in the United States. In public-private partnerships (P3s), a consortium of design-build contractors, operating companies, and equity providers generally assumes part of the financial burden of building the asset and is compensated by the government for maintaining it over the next 20–30 years before the asset reverts to government ownership. According to trade group Canadian Council for Public-Private Partnerships, Canada has seen some 180 P3 projects started, completed, or announced over the past 20 years, totaling an estimated \$57.6 billion in value. Among the largest: a \$4 billion highway extension in Toronto, a \$1.7 billion light rail line in Vancouver, and a \$1.6 billion hospital in Montreal. About half of P3 projects have been located in Ontario, giving a leading role to Infrastructure Ontario (IO), the agency that builds, manages, and finances that province’s public works projects.

**McCarthy Tétrault’s
Godyne Sibay and Gordon
Willcocks: Assembling
the deal to build the Pan
Am athletes’ village**



PHOTOGRAPH BY SYLVAIN DUMAIS

P3 deals require lots of lawyers: counsel for IO or other public agencies; for the consortiums that bid for the work of designing, constructing, and operating facilities; and for the lenders that finance the construction. Still, the P3 bar tends to be relatively small and clubby; the practice area combines elements of real estate, corporate finance, energy, construction, government procurement, M&A, and infrastructure. “There [are] a small number of firms that do this kind of work and do it well,” says Stikeman Elliott’s Lewis Smith. “It’s still a relatively young practice.” Among those firms are Canada’s so-called Seven Sisters—Osler, Hoskin & Harcourt; Goodmans; Davies Ward Phillips & Vineberg; Blake, Cassels & Graydon; McCarthy Tétrault; Stikeman; and Torys—as well as Borden Ladner Gervais, Fasken Martineau DuMoulin, and Fraser Milner Casgrain (FMC). Stikeman and Borden Ladner have two of the largest P3 groups, at 53 and 74 lawyers, respectively; most of the other firms have between 10 and 20 lawyers doing P3 deals.

On the Pan Am P3 deals, Goodmans, Osler, and Davies represent three winning consortiums, while IO has turned to Blake, McCarthy,

IT TAKES A VILLAGE

The P3 deal that aims to revitalize Toronto’s waterfront.

From any of the eastern-facing conference rooms in the Toronto offices of the Seven Sisters law firms, you can see a patch of bare brown land tucked between two car dealerships and the trendy Distillery District near the Toronto Harbour: the future site of the Pam Am Games Athletes’ Village. The project is the linchpin of the long-delayed revitalization of Toronto’s waterfront; at \$504 million, it ranks as one of Canada’s largest public-private partnerships ever. After the Games, the Village will be converted mostly into condos, with one-third of the units set aside for low-income and government-subsidized homeowners. (A separate part of the Village will become a YMCA, while another section will be sold to George Brown University for student housing.)

The Village deal wasn’t a typical “design, build, finance, maintain” P3 project. Given the uncertainty of the residential real estate market and the complexity of the deal, getting funding was a challenge, says Fasken Martineau DuMoulin’s Brian Kelsall, counsel to the lenders [see chart, page 76]. “P3 deals bring a certain type of discipline and predictability, and the Village deal was almost a large real estate deal overlaid with a P3 framework,” says Kelsall. The problems Vancouver experienced in trying to recycle the Athletes’ Village from the 2010 Olympics weighed heavily on everyone’s mind. The city of Vancouver had to bail out the project after it went over its \$750 million budget; the property eventually cost over \$1 billion and went into receivership in 2011. “There were a lot of bad outcomes in Vancouver that [Infrastructure Ontario] sought to avoid by adopting a P3 model from the beginning,” adds IO counsel Gordon Willcocks of McCarthy Tétrault.

Willcocks and his partner Godyne Sibay took the lead structuring, negotiating, and drafting the project documents for the Toronto 2015 village. McCarthy lawyers also advised IO on real estate and zoning matters and guided it through the environmental certification process. Lawyers for winning consortium Dundee Kilmer Developments, led by Ira Berg and Carla Saltzman of Goodmans, put together the loan agreement and advised on real estate matters—in particular the conversion process from athletes’ dorms to condominiums. Additionally, Berg and Saltzman made sure that the penalties for late delivery in the contract weren’t too draconian for their clients. “The penalties in this deal are stiff and aren’t comparable to other P3 deals,” says Saltzman. Unlike other P3 deals, the province can step in immediately and take over the project if the consortium defaults. Clearly, it’ll be a sprint, not a marathon. —V.L.

and Gowling Lafleur & Henderson [see chart, page 76]. There’s no bright-line division between representing the government and representing private parties, but Blake and McCarthy appear often for IO. “IO became very focused on attorney fees, and some of our competitors offered them much lower rates,” says Osler’s Rocco Sebastiano. “It didn’t make financial sense for us.” The agency hires law firms using a scoring system that takes expertise and experience into account while weighting fees at 40 percent of a firm’s total score. McCarthy’s Godyne Sibay declined to comment on fees. Blake partner Judy Wilson agrees that IO is concerned about fees but says that it is more interested in how deals are staffed. “IO has a much more aggressive project management style,” she says. “You have a good mix of senior and junior lawyers, as opposed to just senior lawyers.”

P3 projects have a reputation for finishing on budget and on time—a big reason why IO chose to use P3s for the Pam Am venues. Both the private and public sectors build various incentive and penalty clauses into P3 contracts to promote cost and time certainty. The consortium isn’t paid until the project is substantially complete, says McCarthy partner Gordon Willcocks. “There’s also reputational risk,” he adds. “You want to be considered for future projects.” Osler’s Sebastiano, who represented the Greater Toronto Airport Authority on the \$124.4 million Air Rail Link deal, says, “I’m not aware of any projects that [IO] was a part of that were late or over budget” and adds that “projects will sometimes come in three or four months early.”

Still, it’s not uncommon for a city hosting a major international sporting event to wind up swimming in red ink. For the 2010 Vancouver Olympics, British Columbia exceeded its original budget of \$563 million by over \$300 million, while the recent London Olympics cost more than twice its original budget. Meanwhile, Toronto hasn’t yet broken ground on most of the athletic facilities for the Pan Am Games, while construction on the athletes’ village is barely under way.

THE P3 CONCEPT ITSELF is a Japanese import to Canada. In the early 1990s Prime Minister Brian Mulroney got the idea from Prime Minister Yasuhiro Nakasone of Japan, which had turned to P3s to help fund public works projects. The first Canadian P3 project, the \$662 million Confederation Bridge linking Prince Edward Island with New Brunswick, was completed in 1997. The emergence of provincial procurement agencies, such as Partnerships BC in 2002 and IO in 2005, significantly streamlined the P3 process, and P3s began to boom starting in 2005, when Partnerships BC, represented by FMC, closed on the \$513 million Sea-to-Sky Highway built for the Winter Olympics. McCarthy and Goodmans both represented short-listed bidders, while Blake represented winning bidder S2S Transportation Group. In Ontario, many early IO deals were for hospitals, including the \$157 million Montfort Hospital in Ottawa and the \$473 million North Bay Regional Health Centre in North Bay, both announced in 2005. Torys’s Mark Bain—then a partner at Bennett Jones who represented IO and the hospital on the North Bay deal—says that these early hospital deals helped provide the templates that IO still uses for medical facility procurements.

With templates for most of the paperwork, P3 deals tend to follow a fairly standard form. “If you work for IO, the focus is on managing the procurement process to ensure that it’s smooth, open, fair, and competitive,” says Blake’s Wilson. On the bidding side, lawyers say that the main issue involves how

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**FASKEN
MARTINEAU** 

PAN AM GAMES: THE P3 LINEUP

PROJECT	GOVERNMENT AGENCY/ COUNSEL	WINNING BIDDER/ COUNSEL	LENDERS/ COUNSEL	VALUE OF DEAL
Athletes' village	Infrastructure Ontario/ McCarthy Tétrault	Dundee Kilmer Developments/ Goodmans	Bank of Montreal and Bank of Tokyo-Mitsubishi UFJ, among others/ Fasken Martineau DuMoulin	\$504 million
Pan Am Centre, Olympic training facility, and field hockey venue	Infrastructure Ontario/ Gowling Lafleur & Henderson	Bondfield Construction Company/ Osler, Hoskin & Harcourt	Bank of Montreal, National Bank of Canada, and Laurentian Bank of Canada/ McCarthy Tétrault	\$82 million
Aquatics center, field house, coaching and training center	Infrastructure Ontario/ Blake, Cassels & Graydon	PCL Aquatics Center/ Davies Ward Phillips & Vineberg; Reynolds Mirth Richards & Farmer	Toronto Dominion Bank, Alberta Treasury Branches, and Laurentian Bank of Canada, among others/ McCarthy Tétrault	\$156 million
Two stadiums and a velodrome	Infrastructure Ontario/ Blake, Cassels & Graydon	Ontario Sports Solutions/ Bull, Housser & Tupper	<i>Not yet announced</i> /Norton Rose	\$210 million

much risk their developer, construction, and operator clients are willing to take on. Private companies like to negotiate for higher availability payments, says Bain: money they earn for keeping a facility open and up to the government's (often rigorous) standards.

When the Pan American Sports Organization awarded the Pan American Games to Toronto in November 2009, TO2015 put IO in charge of procuring large-scale infrastructure projects for the games. The first project, the athletes' village, went to a consortium, represented by Goodmans, that includes construction company EllisDon Corporation, Dundee Realty Management Corp., and Kilmer Van Nostrand Co. Limited, an investment company run by billionaire construction magnate Larry Tanenbaum. That left eight sports facilities to be constructed, including a soccer stadium, a velodrome, and an aquatics center. All had to be built to standards set by sports governing bodies and had to be ready for test events well ahead of the opening ceremonies. "This demanded a very elite group of bidders," says Blake partner Marianne Smith.

IO decided to bundle projects together, creating three separate packages, to make the work more attractive to potential bidders. "Individually, the Pan Am Games facilities might not have attracted the same level of attention," says IO counsel Wilson. "Bundling them together puts us on a similar order of magnitude as compared to a brand-new hospital, for instance." The winning consortium for the aquatics center package, which also includes a field house and training facility in Toronto, was led by PCL Constructors Canada, a large contracting company. (Davies and Reynolds Mirth Richards & Farmer represented the consortium, while McCarthy advised the lenders.) Bondfield Construction Company Limited, another big Canadian construction company, was short-listed for the aquatics center, but won an \$82 million bid to construct a multisport building, renovate an aquatic sports training facility, and build a field hockey stadium. On October 12, IO awarded the final contract: a \$210 million deal to Ontario Sports Solutions—advised by Bull, Housser & Tupper—to build a soccer stadium, a track-and-field stadium, and a velodrome.

Unlike typical P3 projects in which the winning bidders have to maintain the facility for decades, most of the Pan Am venues will be turned over to universities such as the University of Toronto. With bidders exiting earlier, the projects are funded with more short-term bank loans than most traditional P3 projects. "There's less financial skin in the game for the winning bidders and lenders," says Bain. "But it solves a different subset of goals, mainly forcing the projects to be on time and on budget."

Although construction has begun only on the village and the Aquatics Centre, most attorneys involved are confident that everything will

be done on time and on budget. "Between the extensive planning and being cognizant of the timetables, I'm confident that these facilities will be ready," says McCarthy's Willcocks.



THE PIPELINE OF P3 DEALS has shrunk slightly since 2011, according to top P3 attorneys. "Deals are fewer, but still there," says Carla Saltzman of Goodmans. "It's consistent with the natural flow of deal work." One area of potential growth: municipal-level projects. Morton Gross, who chairs Borden Ladner's P3 practice, says the firm made a conscious decision to focus more on municipal level deals. For instance, the firm is representing the city of Ottawa on a \$2.2 billion light rail system and a wide-ranging plan to redevelop Lansdowne Park in Ottawa, including building a football stadium for a Canadian Football League expansion team. Baker & McKenzie partner Denis Chamberland, who specializes in municipal P3 deals, says he's never been busier. Municipalities in Canada are turning to P3s to fund water treatment facilities, solid waste management, and infrastructure, he says: "P3s give municipalities access to funds that, ordinarily, wouldn't be available."

Another opportunity lies in the U.S., where P3 projects are in their infancy. Davies Ward has already worked on several American projects, including acting for the successful bidders for a \$900 million tunnel project in Miami that closed in October 2009. "There are a handful of top American firms doing P3 deals, and there are several large U.S. firms looking to get in," says partner Carol Pennycook. "But we got that work because of our expertise." Their U.S. competitors include Orrick, Herrington & Sutcliffe and Ballard Spahr, which in August closed a deal on behalf of a consortium called 95 Express Lanes in a \$935 million highway project to ease congestion along Interstate 95. (Winston & Strawn represented bond underwriters and Hunton & Williams served as bond counsel.) Orrick partner Daniel Mathews, who led the team on the I-95 deal, is also representing Macquarie Infrastructure Partners and Skanska Infrastructure Development on the \$1.5 billion financing of a Virginia tunnel connecting Norfolk to Portsmouth that closed in April.

In the meantime, all eyes will be on Toronto to see whether P3s really can overcome the spendthrift culture of major international sporting events. If so, it might be the most impressive feat accomplished in Toronto in 2015.

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