

Secretive, Risky, Unaccountable:

**How Public-Private Partnerships
are Bad for Democracy**

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Public-Private Partnerships (P3s) are “all the rage” these days.

Increasingly, throughout Canada, and around the world, public sector managers and politicians are looking to private corporations to provide infrastructure and services that were formerly provided publicly.

Contracts with terms that stretch over several decades are being entered into for a vast array of government projects and services. What does this change portend for democratic values and democratic governance?

Because P3s are, first and foremost, commercial relationships, they are fundamentally changing the values and processes of democratic governments. The thesis of this presentation is that P3s are undermining democratic public institutions because the commercial relationships are inherently secretive, unaccountable and often very risky.

Further, the commercial, business nature of these contracts is turning normal public priorities and values upside down. Public administrative values such as responsibility of staff to elected officials, accountability to the public of elected officials, transparency, public consultation, openness, and Parliament’s “power of the purse” have increasingly been supplanted by concepts such as “investor confidence”; “commercial confidentiality”; “stability for investors”; “proprietary ownership of information and assets”; “commercial sensitivity”; “protection of shareholders” and “competitive procurement rules”. The language change reflects a change in priorities and process.

But first, before I explain how that is so, some definitions. What are public-private partnerships? They are ventures in which the private business sector becomes the lead actor in the provision of public infrastructure and services.

The form of P3s varies, but they generally entail private financing, design, construction, operation, maintenance and even ownership of public services, facilities or infrastructure.

Often, P3s involve the private sector lending funds for a public project and the public sector leasing facilities back by providing regular payments for the life of a specified contract. These contracts are generally very lengthy, usually for a term of 25 to 40 years. These lengthy terms themselves erode aspects of democratic decision-making, since a multi-decade contract by one government of a particular stripe may bind future governments for decades into the future. A child in Grade 8 today will be 50 years old by the time the contract for a Richmond/Airport/Vancouver rapid transit P3 has concluded.

P3s are quite different from normal design and build construction contracts between a public sector owner and a private sector constructor because they use the private sector for provision of operating services, financing and key decision making about issues such as cost.

Any public service or infrastructure is a candidate for P3s, including health care, education, water, electricity, transportation, municipal services and more.

There is a huge array of recent P3 proposals in Canada. Examples include: P3 schools in Nova Scotia; the Richmond/Airport/Vancouver rapid transit P3 in B.C.; the Brampton and Royal Ottawa Hospital P3s in Ontario; the Abbotsford hospital P3 in B.C.; the Moncton to Fredericton toll highway; the proposals for P3 hospitals and courthouses in Calgary and elsewhere in Alberta; the privatisation of B.C. Rail; the 407 toll highway in Ontario and many more.

P3s are a form of privatisation.

There are a wide variety of problems with P3s, which I won't have time to go into today. Problems ranging from the higher cost of private versus public borrowing; diversion of public funds to profits; inequities caused by user fees; international trade treaty concerns; inadequate risk transfer; service quality concerns; debt being hidden, but not reduced and many more.

But – for today – let me set those concerns aside to focus exclusively on democracy and accountability concerns:

- In October of 2002, a very revealing presentation on P3s was made to the Council of the District of North Vancouver by lawyers John Haythorne and Sandra Carter, from the firm of Bull, Housser and Tupper. The presentation featured a list of procedural, policy and legal challenges related to P3s. Among the obstacles identified were policies requiring public consultation and approval. One presentation slide was entitled “Inherent Diseases” which outlined some of the areas the private sector finds problematic in dealing with the public sector – including that with the public sector there is an emphasis on “process”; “stakeholders”; “transparency”; and “public justification”. The slide explained that these things are “often a threat to the success of the project”.¹

“Inherent diseases”? What do you think? Are transparency and public justification inherent diseases of democracy?

Here are some recent – often alarming, sometimes absurd – examples of the way P3s have caused private, commercial priorities to supplant the “inherent diseases” of democracy.

- Three years ago – before the decision was made to proceed with the \$2 billion Richmond/Airport/Vancouver rapid transit P3 (R.A.V.), the accountancy and investment advisory firm of PriceWaterhouseCoopers was hired to do a financial feasibility study and business case analysis of the proposed project. The decision making body in this case was “TransLink”, the regional transportation authority for the Lower Mainland. The Board of TransLink consists of elected Mayors and Councillors from around the region. The PriceWaterhouseCoopers report contained

key information about the financial viability of the whole proposal. Despite requests, project staff adamantly refused to provide a copy of this report to TransLink Directors, who were charged with making the decision about whether to go ahead or not, because the report contained information which – if revealed – might provide a competitive advantage to potential bidders. Protection of the procurement process trumped provision of key information to elected decision-makers.²

- Speaking of R.A.V., a P3 for which the federal government has committed \$450 million, a recent leaked federal Cabinet document provided a glimpse of how P3s encourage manipulation of process and deception of the public. Last May, Paul Martin announced a \$150 million top up to a previous commitment of \$300 million. But the Cabinet document said no source of funds had been identified and no one was clear which account the money should be drawn from. The document proposed politicians should tell the public the \$150 million is part of Canada's contribution to the 2010 Olympics, even though that's not true and the money won't actually come from the Olympic funds. This is so other provinces won't feel B.C. is getting more than its fair share from the Strategic Infrastructure Fund. Why the anxiety and the urgency to find a quick manipulated "fix" for this internal problem? Here's where the document is most revealing. The authors say a decision on source of funds is needed immediately so the federal government can sign an agreement for its contribution because "...the nature of the public-private bidding process means that private companies need to have more certainty about public commitments in order to finalize their bid quotes. Not providing or delaying such confirmation could impact firm's readiness to continue in the process or to submit high quality bids." Even if it means lying to the public.³
- Last year, in Hamilton, Ontario, City Councillor Sam Merulla was told he would have to personally pay nearly \$5000 to process two freedom of information requests related to a 10 year P3 with American Water Services for water and wastewater services in Hamilton. What was the information the elected Councillor was seeking? Simply details on how much the City paid in capital costs at its water and wastewater treatment plants.⁴
- Also from Ontario, we have the dispute between the new Liberal Government of Ontario and the international consortium running the major tolled expressway Highway 407. In August, the government filed an appeal of an arbitrator's ruling that determined the government had no ability to control increases in tolls for use of the highway. In the past four years, rates for some peak driving hours on the highway have gone up more than 200 per cent. During the last election, the government promised to voters that it would take action to control the toll increases but the P3 contract appears to prevent this. There are 94 years remaining until the contract expires (!), hence the government's appeal to the courts. Meanwhile, the owners of the 407 are seeking their own court order to try and compel the Registrar of Motor Vehicles to withhold vehicle permits and plates from drivers who have overdue accounts for toll payments. And, because the consortium is led by a Spanish company, the Government of Spain has threatened to veto a trade agreement between

Canada and the European Union if the Ontario government takes any further legal steps to interfere with the right of the 407 operators to increase tolls whenever and however much they want.⁵

- Or how about the case of the William Osler hospital P3 in Brampton, Ontario? Following legal action by public health advocates and a Liberal election promise to release contract details to the public, the government provided access to documents contained in a single room. If you want to look at the documents for this \$1.3 billion deal, viewing time must be booked with the hospital, is limited to two hours and requires signing of a waiver promising not to photograph or duplicate any document. Despite these extraordinary strictures, the documents which are available do not include any financial information and many other important elements have been deleted or omitted. The explanation for this extraordinary secrecy was provided by representatives of the hospital and consortium who said: “There is certain information that is not present because it is proprietary to ... (the consortium)... We have rights under the Freedom of Information Act to include or not include certain commercially sensitive items ... (the spokesperson said)... borrowing costs and the value of the entire project are deemed commercially sensitive.”⁶
- Another incredibly secretive P3 scheme was recently ruled illegal by the courts. A P3 for redevelopment of the downtown of Maple Ridge, B.C. was overturned by the courts because the City had failed to obtain public approval for the borrowing, through referendum, as required by B.C. law. Private proponents had convinced the City that it would be bad for their commercial interests if project details had to go through the public scrutiny of a public vote. In the end, as part of honouring the court decision, the City had to make a \$7.5 million payout to the private contractor so it could exit from its contractual arrangements.⁷
- There are many other undemocratic P3 examples in B.C. Such as the sale of B.C. Rail assets to CN. The taxpayers of B.C. only learned after all contracts were signed and finalised, that the lease term is not only for the initial 90 years that the government had initially admitted, but that the contracts provide for the option of 15 lease renewals of 60 years each. Guess what that adds up to. Wait for it – the total potential length of the B.C. Rail P3 is 990 years! I’m not making this up.⁸
- Also, in B.C. we have the case of the Abbotsford Hospital P3. Not only have the cost of proposed lease payments doubled between 2001 and 2003, but this so-called “competitive” process now has only one bidder (!) (Access Health Abbotsford). Any normal government tender which produced only one bidder would be cancelled immediately, but because the government and private investors have staked so much on the Abbotsford P3 process, the procurement continues merrily along with the fiction that there is anything at all competitive about it.⁹
- In B.C. too, we have the recent report of the provincial Freedom of Information and Privacy Commissioner looking into the proposed contracting out to a U.S. company (Maximus) of all individual and personal medicare records. The Commissioner has

confirmed concerns that – because the contractor is based in the U.S. – extraterritoriality applies so information managed by the company is subject to F.B.I. seizure under the terms to the U.S. Patriot Act. Under the U.S. Patriot Act, judges may sit confidentially in hearing locations that are kept secret and may order that certain personal records be seized. Companies subject to such an order to hand over private data, must keep the order under wraps and are forbidden to reveal the order even to their own lawyers. Now that B.C. has entered into a contractual “partnership” with a U.S. based company, all personal medical and pharmaceutical records of individual British Columbians will be subject to the extraordinary and draconian provisions of the Patriot Act.¹⁰

I could go on with numerous other examples, but I think these ones help to make the point. Healthy democracy depends on full information for citizens, full participation by citizens, independent advice and judgement from public servants, accountability to Parliament and accountability to electors.

Public-private partnerships are undermining all of that. In many P3 cases, the imperatives of investor certainty, commercial confidentiality, proprietary control of information and long term contractual arrangements are subverting the normal checks and balances of our democratic system.

Those of us who care about the public sphere and who have a vision of increased and ever more health democracy in Canada need to start paying closer attention to P3 proposals. We need to insist on full disclosure, full public participation, decision making by elected officials and accountability of public servants. The more we rely on public private partnerships for provision of public services, the less we’ll be able to achieve our dreams for the public good.

NOTES

1 “Public/private partnerships pitched to NVD” by Sherry Peters. North Shore News, October 2, 2002. page 3

2 Only a short executive summary of the financial feasibility study has ever been made public. For a copy of the executive summary, see the R.A.V. Project website at <http://www.rav.rapidtransit.com/en/reports.php> The website Info Centre provides the following rationale for the secrecy: “...some information during the competition and selection process will need to remain confidential in order to protect the public’s interests and ensure a fair and vigorous competitive process.”

3 “Secret plan to explain R.A.V. funds: Cabinet document reveals Ottawa’s attempt to hide \$150 million” by Frances Bula. The Vancouver Sun, October 4, 2004. page A1

4 “Group helps fund Merulla’s F.O.I. request”, by Allan Pulga. The Hamilton Spectator, May 22, 2004. page A7

5 “Ontario government will appeal Highway 407 toll-increase ruling”, by Frederic Tomesco. Bloomberg.com, January 22, 2005.

“McGuinty not worried about highway toll fight”, by Keith Leslie. Cnews Canoe, August 11, 2004.

<http://cnews.canoe.ca/CNEWS/Canada/2004/08/11/pf-578049.html>

“407 selloff Toronto’s own Churchill Falls”, by John Barber. The Globe and Mail, January 25, 2005. page A10

“Ontario toll Highway 407 owners seek court order to enforce law on plate denial” Auto Service World, July 26, 2004

6 “Row erupts over P3 pact”, by Theresa Boyle. Toronto Star, March 16, 2004.

“Newly released documents confirm massive hospital privatization”. Ontario Health Coalition media release, March 15, 2004.

<http://www.ontariohealthcoalition.ca>

7 Secret and Illegal: An Investigative Report into the Public Private Partnership Gone Wrong in Maple Ridge, B.C., Canadian Union of Public Employees. October 2002. <http://www.cupe.bc.ca/>

8 “No coverup’ in rail deal: CN control of B.C. Rail could last for 990 years”, The Vancouver Province, April 20, 2004. page A4
“When is a lease a sale? Try 990 years”, by Ben Meisner. Prince George Citizen. April 21, 2004. page 4.

9 Review of the Request for Proposals: Abbotsford Hospital and Cancer Centre. Ron Parks and Associates, Inc. Investigative and Forensic Accounting for Hospital Employees’ Union. December 24, 2003. <http://www.heu.org/2004/parks-review-of-rfp.pdf>
Abbotsford Hospital Chronology of Events. Hospital Employees’ Union. 2004. <http://www.heu.org/2004/abbotsford-hospital-chronology.pdf>

10 Privacy and the U.S.A. Patriot Act: Implications for British Columbia Public Sector Outsourcing. Information and Privacy Commissioner of British Columbia. October 2004. ISBN 0-7726-5236-8.
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