

OTTAWA LRT AND THE FUTURE OF P3S: PUBLIC (INTEREST), PRIVATE (COLLABORATION) & (MEANINGFUL) PARTNERSHIPS

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On December 16, 2021, the Ontario government established the Ottawa Light Rail Transit Commission (the “**Commission**”) to conduct a public inquiry into the commercial and technical circumstances that lead to certain breakdowns and derailments on the Ottawa Light Rail Transit (“**OLRT**”) system.^[1]

The Commission published its final report on November 30, 2022. The full report can be accessed [here](#), and the executive summary can be accessed [here](#).

The Commission’s report and its recommendations follow several themes. For industry proponents engaging in public-private partnership (“**P3**”) projects, the following themes are central:

- i. improved collaboration amongst all parties and stakeholders on future projects, including a greater emphasis on the partnership aspect of the P3 model,
- ii. ensuring that all parties involved in a project (including all private sector participants) acknowledge that they are working in the public interest, which should be the core organizing principle for projects, and
- iii. the need for the early resolution of disputes.

The Commission’s Purpose and Recommendations

The City of Ottawa engaged with numerous partners on the procurement, design and construction of the OLRT system – a 12.5km light rail transit line that included underground tunneling, ten aboveground stations, and three underground stations. The City ultimately entered into a project agreement with Rideau Transit Group General Partnership (“**RTG**”) for the design, construction, financing and maintenance of the OLRT project, utilizing the P3 model for procurement.

The public inquiry was precipitated by construction delays and various technical and service failures, including alleged reliability issues and two derailments on the OLRT’s main line. In addition to determining the causes of the breakdowns and derailments, the Commission’s mandate included “making recommendations to assist in preventing the OLRT’s project issues from happening again”.^[2]

Following four weeks of hearings in mid-2022, along with dozens of witness interviews, the Commission

released its final report on November 30. The final report contains over 100 recommendations. While some of those recommendations are specific to the OLRT project and the role of government authorities in the procurement and delivery of future projects, the Commission also made recommendations that have more general application relevant to all stakeholders on future projects (particularly P3s). In particular, the Commission made the following notable recommendations:

- Regardless of the project delivery model chosen, collaboration should be at the heart of the relationship between the public entity and private-sector partner(s).
- All private-sector stakeholders should be required to acknowledge that they are working in the public interest. The public interest should be a core organizational principle that informs all steps taken on a project.
- Public entities and private-sector service providers working on complex infrastructure projects should continually foster a culture of early reporting of issues, challenges, and mistakes.
- Project participants must ensure that the entity responsible for project oversight is provided with timely, complete, and accurate information about the infrastructure to allow for effective and transparent oversight, while being mindful that they are serving the public and striving to maintain and bolster the public's trust.
- Where amendments to contracts are being considered, relevant and affected parties should be involved in those discussions, including relevant subcontractors.
- Construction contracts should include mechanisms for calculating extensions of time and adjusting schedules if obstacles arise and delays are encountered. While provisions addressing delay are not new, parties should envision delays and plan for them at the contracting stage.
- Subcontracts must align and be consistent to avoid gaps in project obligations or deliverables.
- In considering a delivery model that requires private project financing, care must be taken to ensure private creditor rights do not create additional risks for the project. For example, where changes to the project require creditor consent, limits should be placed on the additional equity they can demand as a condition to their consent.
- Early dispute resolution should be incentivized in the project agreement, particularly where those disputes will affect the work going forward. Resolving operational problems and providing reliable public service must take precedence over all other priorities, including contract enforcement. The resources necessary to address a problem should be mobilized ahead of contractual interpretation and dispute resolution, which could be done without prejudice to parties' claims against one another.
- The Ontario government should investigate how to better incentivize the timely resolution of infrastructure problems in P3 contracts to avoid delay due to disputes between the parties. Positive and negative incentives should be considered. For example, positive incentives might include a break in

payment mechanism deductions if significant problems are resolved before a Key Performance Indicator deadline in the contract.

The P3 Model

Although the Commission was not tasked with investigating the efficacy of the P3 model, the Commission did make some comments as to how the model affected the OLRT Project, ultimately determining that the use of the P3 model had a “mixed impact” on the OLRT Project.^[3]

The Commission’s comments highlight some of the benefits (from a policy perspective) of using the P3 model given some of the risks that exist on large infrastructure projects, as well as some of the challenges that may arise due to the long-term nature of such arrangements.

Two of the primary public policy rationales for the P3 model include (i) the creation of value for money, and (ii) effective risk transfer, the two of which are inextricably linked, as P3s tend to generate value where there is an effective transfer of risk between the public and private sectors.^[4] The Commission highlighted the fact that the transfer of the geotechnical risk to RTG resulted in significant cost savings to the public, stating:

“The DBFM approach to procurement effectively transferred the costs associated with certain project risks to the private party, the consortium (namely, RTG). Most importantly, while the City paid a significant premium to transfer the geotechnical risk on the project to RTG, in doing so the City obtained a material advantage, because that risk eventually materialized in the form of the Rideau Street sinkhole. The financial impact of the sinkhole was substantial, as the City avoided remediation costs that were over \$100 million. The City has also transferred significant costs associated with fixing the OLRTI and related maintenance issues to the consortium.

It is unfair to dismiss these cost savings as a lucky benefit. Indeed, the heightened geotechnical risk (due to including the downtown tunnel in the plan for the OLRTI project) was identified by the City and its advisors early on in the project. They acted in concert to mitigate that risk. The selection of a P3 model and the inclusion of the risk transfer ladder in the RFP process were deliberate choices made to reduce this risk to the City. In this case, the P3 model worked precisely as it should have by transferring the risk. The people of Ottawa were the beneficiaries of that good planning.”^[5]

As with any project delivery model, the P3 model can have certain drawbacks. The Commission noted that the OLRT project suffered from both limited public oversight and an insistence on rigidly enforcing contractual rights. The combination of these features led to an adversarial relationship that negatively affected the project.^[6] Nevertheless, the Commission’s recommendations make clear that although the long-term and

large-scale nature of P3 projects pose certain challenges to parties, those challenges can be mitigated by effective planning, execution and implementation. In other words, parties must adhere to the “partnership” component of the P3 model – working together collaboratively at a project’s early stages and during the project’s execution – in order for the benefits of the P3 model to be realized.

Conclusions and Industry Take-Aways

The extent to which the Commission’s recommendations affect future project design and delivery remains, of course, to be seen. However, we have already seen and are continuing to see gradual shifts in public-private delivery models which seek to address some of the concerns that the Commission raised in its report.

Examples of such shifts in the P3 market made by procuring authorities include:

- exploring “early contractor involvement” approaches to public-private delivery models;
- revisiting and adjusting the existing dispute resolution process between the public and private sectors;^[7]
- separating large infrastructure projects into several smaller projects and procuring them as “bundles”; and
- increasing the use of the design-build-finance model of project delivery, thereby eliminating the private sector’s obligations to operate, maintain or rehabilitate such projects.

Nevertheless, the OLRT Commission’s report and recommendations are likely to be borne closely in mind by public entities when entering into projects in the future. Bidders and contractors may need to be prepared to work within models that are meant to adhere to the Commission’s recommendations.

[1] Ottawa Light Rail Transit Commission, “Report of the Ottawa Light Rail Transit Public Inquiry, Final Report” (November 2022). Chapter 18, section 18.2, at 512.

[2] *Ibid.* Chapter 1, at 1 to 2.

[3] *Ibid.* Chapter 5, section 5.4, at 98.

[4] Murphy, Timothy J. *Public-private partnerships in Canada law, policy and value for money*, ed (Toronto, Ontario: LexisNexis, 2019). Chapter 3, at 54 to 62.

[5] Ottawa Light Rail Transit Commission, “Report of the Ottawa Light Rail Transit Public Inquiry, Final Report” (November 2022). Chapter 5, section 5.4.1, at 98.

[6] *Ibid.* Chapter 5, section 5.4.3, at 100-101.

[7] For example, prior to the Commission’s report, Infrastructure Ontario had already overhauled its dispute resolution procedure in its template project agreements in an attempt to expedite the adjudication and resolution of disputes on its P3 projects.

by [Brent Thomas](#), [Kyle Lambert](#), [Ahsan Mirza](#) and [Julie Han](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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