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The Public-Private Partnership: A New Infrastructure Project Financing Model

The Editor interviews Douglas J. S. Younger, Counsel at the Toronto office of Fraser Milner Casgrain LLP, and Colin J. McIver, Partner at the firm's Vancouver office.

Editor: Would each of you gentlemen tell our readers something about your background and professional experience?

Younger: I earned my law degree at Osgoode Hall Law School and completed postgraduate work at the London School of Economics. I have experience practicing law in both the law firm environment and in the corporate sector, working as General Counsel in London for a Canadian-based financial institution. Prior to moving to England, my practice involved venture capital, mergers and acquisitions and securities work. While in the UK, I worked on a variety of P3 projects ranging from police stations to universities, schools, roads and the London Underground. I returned to private practice in Toronto in 2002 and in August 2003, joined Fraser Milner Casgrain's Business Law Group.

McIver: I graduated from the University of British Columbia in Vancouver in 1982 and was called to the Bar the following year. Following several years with the Attorney General of British Columbia, where I worked on real estate and natural resource matters, I joined the predecessor firm to Fraser Milner Casgrain in 1989. I have been with the firm since that time.

Editor: Mr. Younger, would you describe your practice?

Younger: In recent years my practice has focused on public-private partnerships, what Canadians call P3s. Together with other FMC colleagues, we are implementing a firm-wide strategy in this area, and, as a result, I am in constantly communicating and working with the other Fraser Milner Casgrain offices. We attract new P3 business from a variety of sources and then, utilizing the extensive exper-



Douglas J. S.
Younger



Colin J.
McIver

ience and resources of the firm, advise these clients.

Editor: You are resident at the firm's Toronto office. Can you tell us something about the history of that office and its evolution over the years?

Younger: I am a relative newcomer, of course, but I am well aware of the role the firm has played in Toronto. It goes back more than 150 years, and much of its growth is associated with its representation of the Bank of Montreal and other major Canadian business conglomerates. The Toronto office currently acts for a wide variety of financial institutions and business clients across a range of industries. The Fraser & Beatty firm, which was the predecessor of the Toronto office of Fraser Milner Casgrain, recognized that if it wished to continue to grow and to compete at the very highest level of legal service, it would have to evolve into a national firm. In concert with like-minded firms, it developed into a national Canadian law firm with a strong presence in Toronto and every other major city across the country. The merger has achieved its goals, enabling Fraser Milner Casgrain to better serve its existing clients and logically attract new ones. Since better servicing our clients has always been at the forefront of our strategies, the merger also allowed us to enhance and expand into cutting edge practice areas.

Editor: Mr. McIver, would you describe

your practice?

McIver: I am engaged in a broadly based real estate practice, which involves major project and infrastructure work, including both the public and private sectors. Over the last few years there has been a considerable emphasis on alternate procurement procedures and methodologies, including public private-partnerships and a variety of other ingenious ways to structure and fund infrastructure projects. I have been engaged with such projects at both the provincial and municipal government levels, acting for both private corporations and governmental entities.

Editor: And the Vancouver office. Does it specialize in certain practice areas?

McIver: The Vancouver office was established as a boutique business law firm, which in 1990 became the western foundation of the Fraser Milner Casgrain firm. Today, Vancouver doesn't specialize in any other practice area at the exclusion of our other national offices, but instead offers greater depth in most practice areas, including tax, entertainment, insolvency, corporate finance, mergers and acquisitions, financial services, real estate and energy.

Editor: You have both been engaged in dealing with public-private partnerships. Would you give us an overview of this development?

Younger: In very broad terms, a P3 is collaboration between the public sector and one or more private sector entities. The UK model, which is called the Private Finance Initiative, generally involves a public authority granting a long term license or concession to a private sector consortium, which then designs, builds and operates a piece of public infrastructure over the term of the concession. Unlike other public-private collaborations, the private sector consortium in public-private partnerships is responsible for not only constructing and operating the facility, but also for financing it. For

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the past decade this development model has been used extensively in the UK for a great variety of projects, including schools and universities, prisons, roads, mass transit undertakings, and so on. They are almost always on time and on budget, and, accordingly, are considered a great success. As a result, many Canadian jurisdictions are looking to this model for the development and financing of public infrastructure. This is particularly timely because there is a general perception that there is a significant infrastructure deficit all across Canada. The Province of Ontario alone is estimated to have a \$100 billion CND deficit.

Editor: I gather the British started this concept, and the Canadians have now picked it up. Are the Americans dragging their feet?

Younger: This model has not received much attention in the United States so far. I understand there are a couple of states considering it, but it has not taken off.

Editor: What are the factors that go into a decision to use this particular vehicle to finance an infrastructure project?

Younger: That is a good question because this model is not suitable for every project, in particular small projects and those in the IP sector. One of the main advantages of the P3 model is that it takes account of whole-life costing considerations. Further, P3 projects are completed on time and on budget, and new infrastructure winds up being built now rather than over a long period of time where the government is financing the development costs itself. Last but not least, these projects result in a significant risk transfer to the private sector, which in turn results in lower overall costs to the government and to taxpayers.

Editor: How do you deal with governmental bureaucracy oversight?

Younger: There is another advantage here. On these deals, as a concomitant of the transfer of significant risk to the private sector, the government actually steps back. The government retains the right to receive periodic reports, conduct inspections, and so on, but at no point is it entitled to approve the design or construction of the project.

Editor: He who pays the piper gets to call the tune?

McIver: There is some truth to that, but I should point out that the project agreements that govern these undertakings are very long and complicated.

Editor: Please tell us about some of the projects you have handled.

Younger: At the moment I am working on the Sea-to-Sky Highway Improvement Project, which is a high profile and time-sensitive project connecting Vancouver and Whistler that must be completed for the Vancouver Winter Olympics in 2010. I am also involved with the Kicking Horse Highway project and I am working with our Montréal office on a project involving the construction of a symphony orchestra hall and conservatory of music. On many of our projects we are acting on behalf of the government, but we have a considerable history of working with lenders and private sector consortia as well.

McIver: I have been involved in a variety of road projects, including the aforementioned Sea-to-Sky Project, the Kicking Horse Canyon project, which is an upgrade of the Trans-Canada Highway and the Sierra Yoyo Desan Industrial Road Project in North East BC, which recently won the Gold Award for Project Finance at the Canadian Council for Public-Private Partnerships Awards for Innovation and Excellence. The SYD Road provides access to oil and gas fields and will be financed through fees levied on industrial activity serviced by the 188-km multi-user road. I've also worked in connection with a variety of municipal infrastructure projects including a trade and convention centre, recreation facilities, a library and an arts centre.

Editor: This model is fascinating. I would imagine many foreign governments are looking at it.

Younger: Absolutely. Countries throughout Western Europe are focused on these projects. The model may not offer a cheaper result, but it does provide two things which are of great interest to these governments: an offloading of a substantial amount of risk onto the private sector, and the ability to get these projects done now.

McIver: Jurisdictions throughout the world are looking at this model, and I expect it is going to see increasing use. P3 financings do not constitute a panacea for all infrastructure deficit issues, but the model has captured considerable attention and, in the right circumstances, it is an extremely attractive way in which to address these issues.

Younger: Here in Canada there are increasing pressures on government – at both the provincial and federal levels – to enhance social spending. Healthcare, education and other social programs require great amounts of money just to maintain equilibrium, and if the government is going to respond to the demands, that means there is less funding available for capital infrastructure projects. For that reason, the P3 model appears to be an

increasingly interesting option. We are also beginning to see large municipalities, across the country, look to this approach as a means of addressing a variety of issues, particularly in mass transit.

Editor: All of this would indicate that there are some real opportunities for Fraser Milner Casgrain.

Younger: The emergence of the P3 infrastructure finance model in Canada does present a unique opportunity for the firm to play to its strengths. It is a brand new field, and one in which we think we have leading expertise and experience. It is also a national practice area, which requires a national platform, and we are in a position to support such a platform across the country. At the same time, it has the potential to cross borders – in fact, it may be in the process of becoming an international infrastructure finance vehicle – and Fraser Milner Casgrain has both the multidisciplinary depth and the particularized expertise to offer the appropriate services.

Editor: Fraser Milner Casgrain is a national firm today. It also has an office in New York that you regard as a gateway to Canada for investors and companies seeking to do business in Canada. This type of project would seem to be a wonderful introduction to the firm and to the country.

Younger: Yes. We are seeing a considerable number of American financial institutions becoming involved in the Canadian P3 market. With New York being the major financial centre in the United States, having an office in New York is an extremely important development for the firm.

Editor: Where would you like the firm to be in, say, five years?

McIver: As one of Canada's leading business law firms, I would hope that we continue to attract talented lawyers with our high caliber of work and unique firm culture. We want to continue to shape the firm as the leading Canadian cross-border firm of choice both for Canadian, American and international clients desiring to do business in or with Canada. The work we are doing with the P3 model – this exciting innovation in infrastructure financing – is going to provide considerable impetus, I think, to move us further in this direction.

Younger: In the years to come, Fraser Milner Casgrain will continue to gain recognition as cross-border leaders in sophisticated transactional work, and infrastructure project finance is going to play an important part in furthering this development.

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