The Projects and Construction Review

Third Edition

Editor
Júlio César Bueno

Law Business Research

The Projects and Construction Review

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EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, *Critique de la pensée juridique modern* (Dalloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the American College of Construction Lawyers (ACCL), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). All of these institutions and associations dedicated themselves to promote an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitask group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table. That is why I am very happy to present you two new featured articles – this time from non-lawyers – specifically prepared for the introductory part of this book. Frank Giunta, Maurice Masucci and David Price, senior representatives from Hill International, propose to us 'A Guide to Alternate Project Delivery Systems' and Alexander Aronsohn, Ben Elder and Marcia Ferrari, senior representatives from the Royal Institution of Chartered Surveyors (RICS) demonstrate some innovative approaches to spatially enabling land administration and management.

These two new articles combine precisely with the variety already produced for the past editions by Robert S Peckar (Peckar & Abramson), Douglas S Jones (Clayton Utz) and Phillip Fletcher (Milbank, Tweed, Hadley & McCloy LLP), three leading professionals and lecturers of the area of project finance and construction law. Despite living miles away from each other – in the heartlands of the United States (Bob), the United Kingdom (Phillip) and Australia (Doug) – they have equally influenced the main players in project financing in dealing with the complex issues related to the development and implementation of projects, the negotiation of construction and engineering contracts and the challenges of crafting the perfect financing package.

I am also glad to say that we have contributions from six new jurisdictions in this year's edition: Austria, China, Finland, Germany, Ireland and Russia. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 33 countries has shown us that in order to understand the world we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms that graciously agreed to participate.

Finally, a sad note about the recent passing of Dr Kris R Nielsen, PhD, JD, PMP, MRICS, MJSCE, this past 16 February. I had the honour of working with Dr Nielsen in Brazil and it was a remarkable and unique experience to learn how to deal with projects with a global and strategic perspective on risk management and best practices. Dr Nielsen spent his entire career working towards bettering the construction industry and worked tirelessly to promote the areas of law and engineering with a view to their joint futures. He co-edited and authored an important book entitled *Managing Gigaprojects – From Those That Have Been There Done That*, published by ASCE Press in October 2012, which is already considered a classic and a great reference for those working in the field. In the words of his beloved wife Dr Patricia Galloway: 'Dr Nielsen was a global leader in helping contractors and owners to define what makes a successful project. He helped them examine their operations and how to address subjects like risk management, execution, project controls, value engineering, corporate strategy, construction law, dispute resolution, project sustainability, etc. While on assignments, he worked with his clients to help select younger members of their organisation, i.e., to mentor in how to achieve project success. Dr Nielsen derived great satisfaction in knowing there was a growing cadre of people who were learning and then practising their new-found skills while striving for project success.'[1]

I dedicate this third edition of *The Projects and Construction Review* to Dr Nielsen. He will be greatly missed.

I look forward to your comments and contributions for the forthcoming editions.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
July 2013

1 www.pegasus-global.com/personnel/.

Chapter 11

CANADA

John S Haythorne, Ron Stuber and Karen Martin[1]

I INTRODUCTION

Canada is a federation in which lawmaking powers are distributed among different levels of government. Under Canada's Constitution, the responsibility for much of the country's public infrastructure rests with Canada's 10 provinces and three territories. Roads, transit, schools, universities, hospitals, water and sewage are all subject to provincial or territorial regulation directly or through municipalities, which derive their powers from the provinces or territories. At the federal level, the government has the power to enact laws that may affect those activities, by regulating interprovincial undertakings in transportation, such as airports, ports and railways. Thus, all levels of government have been actively considering and promoting infrastructure projects.

Recently, Canada has seen considerable activity in infrastructure and construction projects and an increased use of project financing structures, such as PPPs. Approximately 49 new major infrastructure projects are currently planned for 2013, including 25 energy projects (C$30 billion), nine transportation projects (C$25 billion), six transit projects (C$10 billion), six municipal buildings (C$5 billion), one airport (C$1.6 billion), one port ($800 million) and one water treatment plant (C$400 million).

PPP activity in particular has become increasingly significant. Between 2009 and 2010, the Canadian PPP market increased three-fold from C$1.6 billion in volume to C$6.5 billion. Further, between 2009 and 2011, 39 PPP deals reached financial close, representing a combined capital investment of approximately C$21.7 billion. As of 2013, approximately 91 Canadian PPP projects were either in the construction phase or the pre-construction phase.

In 2007, the government of Canada launched the C$33-billion 'Building Canada Plan', which is intended to provide funding to Canadian municipalities for ongoing

1 John S Haythorne, Ron Stuber and Karen Martin are partners at Dentons Canada LLP.

infrastructure needs. Under the Building Canada Fund, administered by Infrastructure Canada,[2] priority funding categories include the national highway system, drinking water, waste water, public transit and green energy. The Building Canada Plan was originally set to expire in 2014, but in 2013, the government of Canada launched the 'New Building Canada Plan', which includes C$47 billion in new funding to be invested over the next 10 years on infrastructure needs.

To encourage PPPs in particular, the federal government established a C$1.26 billion fund, administered by PPP Canada,[3] and introduced a policy requiring federal infrastructure projects over C$100 million to be evaluated as possible candidates for PPP projects. As part of the New Building Canada Plan, the government of Canada announced in 2013 an additional C$1.25 billion in funding for PPP Canada.

Active promotion of PPPs is also present at the provincial level. For example, British Columbia established Partnerships BC[4] and Ontario established Infrastructure Ontario.[5] British Columbia has led the way in Canada, with PPP infrastructure projects for the Canada Line, a major transit line project, several highway projects such as the Sea-to-Sky Highway and various hospital projects. Most recently, Ontario has implemented and is in the process of implementing many PPP infrastructure projects, including the Windsor–Essex Parkway, several hospitals, health-care facilities, courthouses and detention centres and it intends to procure the facilities for the 2015 Pan/Parapan American Games using a similar project finance model.

Worldwide demand for energy, rising fuel costs and commodity prices, and environmental concerns are driving a boom in construction projects in Canada's resource and energy sectors. In March 2013, the province of Alberta identified over 62 current oil sands construction projects, with a cumulative value of approximately C$114.7 billion. Other energy-related construction projects are ongoing across Canada. Noteworthy energy projects include the Lower Churchill Hydro Project in New Brunswick and Newfoundland and Labrador (C$6.2 billion), the Romaine Complex Hydro Project in Quebec (C$6.5 billion), the Site C Clean Energy Project in British Columbia (C$7.9 billion) and the Comber Wind Project in Ontario (C$500 million).

II THE YEAR IN REVIEW

i Key developments in construction law

Canadian procurement law is different from other jurisdictions that have common legal roots such as the United Kingdom, Australia and the United States. While public procurement processes are subject to a diverse regulatory framework, procurement law is generally not prescribed in government statutes or regulations, but rather in developments in Canadian common law (i.e., judge-made law).

2 www.infc.gc.ca.
3 www.buildingcanada-chantierscanada.gc.ca.
4 www.partnershipsbc.ca.
5 www.infrastructureontario.ca.

A line of cases beginning with the Supreme Court of Canada's decision in *The Queen (Ont.) v. Ron Engineering and Construction (Eastern) Ltd*[6] has established that in most formal procurement processes, the owner owes strict duties to all bidders, especially a duty of fairness. Recently, these principles were affirmed and expanded by the Supreme Court in *Tercon Contractors Ltd v. British Columbia (Transportation and Highways)*.[7] The court awarded lost profits to a losing bidder in an RFP for a highway construction project on the basis that the government owner had breached its duties to the plaintiff when it awarded the contract to an ineligible party that had not been properly approved pursuant to the terms of the RFP. The court in the *Tercon* case also considered the implications of an exclusion of liability clause contained in the RFP on which the government tried to rely, finding that the clause was not clear enough to protect the government against the claims made by the bidder. In addition to formulating a new test for exclusion of liability clauses in construction and other contracts, the *Tercon* case highlights the critical importance of the duties of fairness owed by owners to bidders under Canadian procurement law.

In June 2012, the Canadian federal government enacted significant changes to the federal environmental assessment process. Under the previous system, certain projects underwent both federal and provincial environmental assessments, and the federal and provincial processes often differed significantly with regard to length, amount of detail, community participation and scope, among other factors. Under the new system, the federal government will focus on 'major' projects, meaning that it will continue to conduct environmental assessments for such projects. However, for 'standard' projects the provinces will generally be responsible for environmental assessments, albeit applying federal standards. Other highlights of the new system include (1) consolidation of the federal authorities responsible for environmental review, (2) binding timelines for federal reviews (ranging from 12 to 24 months) and (3) restricting participation at public hearings to parties directly affected by the relevant project or those having relevant expertise. In April 2013, the federal government proposed a further refinement of the environmental review process by introducing proposed amendments to its environmental assessment regulations. The goal of these amendments is to ensure that only those projects that have the greatest potential for significant adverse environmental effects qualify as 'major' projects for the purposes of federal environmental assessment.

ii Duty of consultation with aboriginal groups

A unique aspect of most large construction projects in Canada – one that has become more prominent in recent years – is the duty to consult with and, in certain circumstances, accommodate First Nations (aboriginal groups) on development projects. The nature and extent of the duty is emerging through a number of decisions of Canadian courts. Courts have recognised certain rights of First Nations peoples in relation to large projects that may have an effect on lands traditionally used or occupied by First Nations. As a result, project proponents generally adopt a strategy of entering into early discussions with the relevant First Nations with the goal of developing strong, working relationships,

6 [1981] 1 SCR 111.

7 2010 SCC 4, [2010] 1 SCR 69.

including employment, training, revenue sharing, or other agreements. According to the BC Mining Association, fewer than 20 agreements between mining companies and First Nations existed in Canada 15 years ago, compared with more than 200 today.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Project financing in Canada typically involves a combination of sponsor's equity and senior debt in the form of commercial bank debt or capital markets debt, or both. The sizing of the senior debt is largely dependent on the projected cash flow of the project.

Project transactions, particularly PPP projects, are typically structured using a BOT model, with the concession being the cornerstone. Under this model, a government or quasi-governmental authority grants a concession or licence to a private entity, usually an SPV. Significantly, the concessionaire is not given any ownership rights to the infrastructure nor to the real property on which the project is constructed.

In Canada, BOT projects are commonly referred to as DBFO or DBFM. In a DBFO or DBFM, the private sector concessionaire finances the relevant infrastructure, builds it, and operates or maintains it for a fixed period (usually 20 to 30 years). At the end of that period, it is required to hand over the infrastructure to the concession-granting authority in the condition stipulated under the concession agreement.

While BOT is commonly used in Canada, other models for project financing of public infrastructure are available. These range from DB (where the private sector designs and builds infrastructure to meet public sector performance specifications, often for a fixed price) to privatisation (where the government transfers all responsibilities, risks and rewards for service delivery to the private sector).

ii Documentation

Canadian project finance transactions typically require the production of significant documentation. Depending on the financing model, principal documentation may include concession agreements, project agreements, term sheets, credit agreements, DB agreements, operating agreements, service agreements and maintenance agreements. Security documentation, such as security agreements, subordination agreements, guarantees, collateral agreements, hedging agreements and direct agreements, are also important. Other documentation may include equity contribution agreements, letters of credit, performance bonds, labour and materials payment bonds, lender's remedies agreements, legal opinions, independent certifier agreements, dispute resolution procedure agreements, and provincial guarantees and approvals. In addition, the various sponsors or entities comprising the concessionaire generally require that the financial and project oversight arrangements among them be documented including by way of partnership agreements, co-venture agreements, shareholder agreements and management or operating agreements.

iii Delivery methods and standard forms

As for the structure of contracts for infrastructure projects, as well as construction contracts generally, Canadian practices tend to follow those used internationally, with

a 'Canadian' focus. Lenders to the Canadian infrastructure sector and investors tend to be international (many from Europe or Australia) – hence this approach. Bonding and insurance practices in Canada also reflect international norms.

The use of standard forms for construction contracts is common in Canada. The Canadian Construction Documents Committee ('the CCDC') is a non-governmental body that develops and updates a suite of standard contracts for the construction industry. Much of the 'mainstream' construction industry uses CCDC standard documents, as modified by 'supplementary general conditions' that reflect the requirements of specific projects.

Contracts for private-sector developments are awarded through a mixture of formal tenders and direct negotiation and award. Public sector contracts, on the other hand, are almost exclusively awarded through formal and competitive procurement processes, such as through invitations to tender and RFPs. Most significant public procurement projects are available through government procurement websites.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

The management of risks in Canadian project finance transactions and construction contracts depend on a variety of factors, such as the type or size of project or the project financing model used.

Risk allocation in smaller construction projects tends to follow the guidelines offered by standard Canadian contract law. Overall design risk is specifically allocated to the designer with the contractor assuming risk of improper workmanship only. A standard warranty period for workmanship is two years from the date of substantial completion. The limitation period for design error varies between provinces, but generally is around 10 years.

In project finance transactions, lenders demand that no risks be left 'stranded' with the borrower/developer unless they are properly quantified and mitigated. On larger PPP projects, significant effort is made to identify all possible risks and then allocate these risks in a way that insulates the lender completely. Commercial arrangements for the construction and operation of the project will further seek to allocate construction and operation risks to the design–builder and operator, respectively.

In certain sectors specific risk-protection agreements are fairly standard. For independent power projects, for example, long-term power purchase agreements underpinning the revenues required to service the project debt are typical, as are fuel supply agreements (or rights to use renewable fuel resources) to secure reliable sources of fuel for the duration of the project.

ii Limitation of liability

In Canada, parties to a contract may limit liability in a variety of ways. Owners generally agree to a limitation of liability for contractors, especially where the project is so large that a contractor cannot realistically accept unlimited liability. Owners on larger projects will typically seek to negotiate *force majeure* provisions with the goal of allocating the risks to the party that is best able to manage them.

Other ways of limiting liability include capping liability based on the contract price or, in the case of a loss to which insurance applies, by limiting liability to the amount of insurance available for such loss. It is common for parties under a construction or operating contract to agree that neither party will be liable to the other for punitive damages or consequential damages, including loss of profits.

iii Political risks

In Canada, foreign investors enjoy the same property rights that are available to a Canadian citizen and there is a very low risk of nationalisation or government expropriation of assets. Rather, the political risk for projects and construction generally results from interested individuals or groups that exercise property or other rights or seek to influence public opinion such as in an attempt to hinder or halt those projects. For publicly funded projects, there is a risk that elected officials who control the funding may decide to abandon the project in the face of public opposition. Thus, in Canada, it is important for large infrastructure or construction projects, particularly projects with a strong environmental or cultural impact, to have a political 'champion' so that they may withstand the potentially high levels of negative public interest that could significantly delay or result in cancellation of a project.

On projects with a public sector component, a small risk exists that the government may try to change the terms. In *Ontario (Minister of Transportation) v. 407 ETR Concession Co*,[8] for example, the province of Ontario granted 407 ETR Concession Company Limited ('407 ETR') a concession and ground lease to operate a highway. When Ontario challenged 407 ETR's right to increase tolls without the province's consent or approval, the challenge was rejected by the court and the plain terms of the contract between the parties were upheld.

As discussed earlier, projects that have an effect on lands traditionally used or occupied by First Nations will involve additional risks and uncertainty until any required consultations, accommodation or other arrangements with the First Nations can be concluded and settled.

On most major projects, various government permits and approvals may also be required at a number of governmental and quasi-governmental levels including environmental approvals, zoning, development, and construction approvals, water allocation, navigable waters approval and energy approvals creating, inadvertently, delay risk and administrative discretion in the process.

V SECURITY AND COLLATERAL

Generally speaking, all forms of personal and real property are available as collateral in Canada. The power over the creation, perfection and priority of security interests in personal property rests with the individual provinces. Each of the common law provinces of Canada have enacted specific Personal Property Security Acts (each referred to as a 'PPSA') that set out comprehensive rules with respect to all forms of security against

8 136 ACWS (3d) 266, [2005] OJ No 19 (Ont Sup Ct).

personal property. In Quebec, security can be taken under the Civil Code of Quebec ('the CCQ'), which has similar rules to the PPSAs.

In Canadian project and construction contracts, provisions relating to security and collateral are highly negotiated. Typically, projects are legally and economically self-contained through a private entity, usually an SPV, whose only business is the project. It is therefore common for lenders, who expect to be repaid from revenues generated by the project's operations, to take security with a focus on cash flow generated rather than the net realisable value of the secured assets. Primary security consists of security taken over all of the project assets, as well as the project entity's contracts, licences and property rights, so that upon default the lenders may take control of the project assets for operation or resale. Lenders may also require guarantees from sponsors. If a sponsor is required to contribute equity, the guarantee is usually a 'limited recourse' guarantee limited to the required equity contribution.

The main project documents, such as the credit agreement between the lenders and the project entity or the equity contribution agreement among the sponsors and the project entity, govern the relationship between the parties and may set out rights with respect to security and collateral. Additionally, security interests will be spelled out in a variety of separate security agreements including general security agreements, security assignments, and pledge agreements.

Lenders will also seek direct agreements or consents with key project counterparties. Under these, the counterparties consent to the lenders taking an assignment of the project contracts as security to create a direct relationship between the lenders and the project contract counterparties, whereby lenders can step in to preserve project contracts where necessary.

VI BONDS AND INSURANCE

Various types of bonds and insurance are commonly used in Canadian project finance transactions and construction contracts.

Normally, owners will demand that the general contractor – and often major subcontractors – enter into a surety contract with a licensed surety to provide bid bonds, performance bonding and labour and material payment bonding for the benefit of owners and subcontractors. The amount of required bonding is commonly 50 per cent of the contract price. Performance bonds are generally in standard form and provide funding to cover the owner's increased costs in the event the contractor defaults on the contract up to the value of the bond. Usually the bonding company has the option of paying these costs or taking proactive steps to complete the contract such as appointing a replacement contractor.

Contractors can obtain bonding only by satisfying the bonding company's requirements, including, most significantly, financial tests. Accordingly, many owners perceive a bonding requirement as a way to obtain independent, third-party confirmation that a contractor is financially sound.

In some project finance transactions, the governmental authority responsible for the project may also require the general contractor to provide one or more unconditional, irrevocable letters of credit in specified amounts. Lenders may require a bank guarantee

from a parent company or a general partner of a contractor, and bonds and letters of credit as part of the security package.

In addition to bonding, letters of credit and guarantees, insurance is typically required to cover identified types of risks and perils. The owner will carry property insurance, including course of construction or builder's risk insurance. Typically, a contractor will be required to carry comprehensive general liability insurance, covering personal and property damage. If involved in design work, a contractor may also be required to carry professional liability insurance.

Larger, more complex projects will give careful consideration to the allocation of risks that cannot be insured at all and risks for which the cost of insurance coverage is prohibitive.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

In Canada, there are various options available to a project lender to enforce its rights as a secured party over collateral.

Outside the context of a bankruptcy or insolvency proceeding, a secured project lender has rights and remedies under the provincial PPSAs and the CCQ, including the right to commence an action for arrears of payment, the right to take possession, retain or dispose of the collateral, and the right to appoint a receiver and manager.

A secured project lender also may try to recover against a debtor that is insolvent by the appointment of a receiver under the federal Bankruptcy and Insolvency Act ('the BIA') and/or provincial law or by the commencement of bankruptcy proceedings under the BIA. The Companies' Creditors Arrangement Act also may be used by a project lender when dealing with insolvent debtors.

Generally speaking, receivership allows a secured creditor to recover collateral over which a security interest has been granted by placing custodial responsibility of the debtor's assets with a receiver.

If the court issues a bankruptcy order following the filing of a bankruptcy action, the property of the debtor vests in a 'trustee in bankruptcy'. A creditor then files a proof of claim with the trustee and if the claim is approved, that creditor will share in the recovery from any realisation on the property of the bankrupt in accordance with the scheme of distribution of funds set out in the BIA.

In both bankruptcy proceedings and a receivership under the BIA, certain claims will have priority over secured creditors. These include governmental claims for certain tax liabilities; claims relating to unpaid employee pension plan contributions, and others.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Environmental matters

Jurisdiction over environmental matters in Canada is shared among all levels of government. Most Canadian environmental statutes prohibit the release of any substance that can cause an 'adverse effect' on the environment, such as emissions (and

even noise) commonly found at construction, industrial and commercial sites, unless authorised by regulation or permit. As a result, almost all construction sites will require an environmental permit from a government regulator. These permits typically set out maximum discharge quantities, impose operational conditions, require monitoring and reporting, and – to a lesser degree – may require the posting of financial security. Contravention of the terms of the relevant statutes or permits may result in significant fines and penal sanctions.

Many large projects, because of their potential harmful effect on the environment, will trigger the need for an environmental assessment before a permit can be obtained. These typically require proponents to prepare comprehensive studies for regulatory and public review and have the potential to significantly delay planned projects. Environmental assessments may sometimes be required by both federal and provincial authorities, in which case assessments are usually conducted concurrently and reviewed by a joint panel of representatives from both authorities.

Overall, environmental matters are highly regulated by all levels of Canadian government. In addition, the question of who pays for environmental damage is subject to Canadian common law principles and, in the province of Quebec, the CCQ. As a result, consideration must be given by lenders and other participants in construction projects to potential liabilities under both statutory law and general legal principles.

First Nations rights

Canadian courts have recognised a right of First Nations to be consulted and in some cases accommodated on projects that affect the lands they have traditionally used or occupied. This duty, which is imposed on the government, is triggered in virtually all cases where a proponent seeks regulatory approval to use or acquire Crown (i.e., government) lands that First Nations claim to be the subject of asserted or confirmed aboriginal rights. To discharge their duty, governments as regulators must consult and accommodate prior to rendering applicable governmental approval. Failure to do so can lead to rescission or suspension of the approval. Regulators will therefore typically (1) seek to ensure that any environmental assessment and other regulatory approval processes allow for First Nation consultation, and (2) delegate certain consultation duties to proponents. Once the duty has been properly discharged and the project approved by the regulator, the project may proceed, and First Nations do not have a subsequent veto right.

ii Equator Principles

The Equator Principles generally are applied to project finance transactions in Canada, particularly with regard to complying with all environmental laws.

iii Responsibility of financial institutions

Financial institutions must comply with applicable federal and provincial laws and regulations, and may be subject to administrative, civil or criminal liabilities. For example, lenders can assume environmental liability where they fail to disclose environmental non-compliance of which they are aware. To protect themselves against these and other liabilities, lenders will typically require broad indemnities from the borrower under the financing agreements.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

As discussed above, PPP project finance transactions have been used increasingly for public infrastructure projects in Canada, and both federal and provincial levels of government are actively encouraging their use. The adoption of policies requiring the consideration of private funding, including PPP project structures, has seen the arrival in Canada of international participants, initially from Australia and the United Kingdom, and later from other countries such as Spain, Italy, Germany and the United States. Currently, there is no formal statutory or regulatory framework specifically addressed to PPP transactions. PPP contractual agreements are governed by the federal or provincial procurement, financial and commercial laws applicable to the transaction (discussed below).

ii Public procurement

Public procurement in Canada is subject to a diverse regulatory framework, including international and intergovernmental trade agreements, federal and provincial statutes, regulations and policies, and court and tribunal decisions Although the specifics and coverage vary, this framework generally establishes detailed rules at all levels of government regarding competitive bidding, transparency, fairness and non-discrimination.

In addition to a complex regulatory framework, public procurement is subject to well-established common law principles governing competitive bidding and procurement. The Canadian legal paradigm, developed by a line of cases starting with Ron Engineering (discussed above) culminating in the *Tercon* decision (discussed above), is a unique 'two-contract' system. The preliminary contract (contract A) is formed at the time of bid submissions, where the owner's request for proposals and each proposal submitted constitute a contract that governs the tender terms and the bidder's response. The second contract (contract B) for the goods and services requested by the owner is formed between the owner and the successful bidder upon award in the procurement process.

Review by the courts of a procurement decision may depend upon the authority for the procurement process. However, Canadian courts generally have upheld judicial review of governmental procurement decisions, particularly when the decision raises issues regarding the fairness and integrity of the tendering process.[9] In addition, certain public procurement measures may be subject to review under Canada's international and/or intergovernmental trade agreements, including the WTO AGP, NAFTA, the AIT and NWPTA. The Canadian International Trade Tribunal ('the CITT'), for example, was established in part to review alleged breaches by the federal government of procurement provisions under the AGP, AIT and NAFTA.

Review of a procurement decision may or may not suspend the continuation of the procurement procedure (or the conclusion of the contract), depending on a number of factors, including the forum in which the decision is challenged.

9 See e.g., *Metercor Inc. v. Kamloops (City)*, 2011 BCSC 382, [2011] BCWLD 4104.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There are a number of considerations for foreign businesses seeking to operate in Canada, such as licensing requirements, investment restrictions and tax issues.

Businesses carried on in Canada by a foreign corporation are commonly conducted using a corporate vehicle, either through a Canadian incorporated subsidiary or through a branch operation of the foreign corporation. Registration or becoming licensed as an extra-provincial corporation is typically required in each of the provinces in which the business operates.

In addition to laws of general application to foreign businesses, there may be industry-specific regulatory laws enacted by federal, provincial and even municipal governments that require licences, permits or government approval to operate. There may also be administrative agencies, boards or commissions that exercise control over its participants. Industries such as transportation, banking, telecommunications, mining and electricity are highly regulated in Canada.

Foreign investment in Canada is regulated by the Canadian government primarily through the Investment Canada Act ('the ICA') and various federal and provincial rules applicable to specific industries, such as transportation. The ICA establishes a statutory framework for the monitoring of new foreign investment in Canada and the screening or review of a limited number of those investments, generally transactions that are significant in terms of size or because of the business sector.

Profits from a Canadian business can be freely paid out to foreign investors, as Canada has no system of exchange control. Therefore, Canadian dollar income can be freely exchanged into another currency at the best available rate and sent out of the country. The only restriction on such payments is the requirement to satisfy Canadian withholding tax obligations (discussed below).

Foreign businesses seeking to operate in Canada must consider that Canada imposes income tax on non-residents who carry on business in Canada. However, non-residents of Canada are generally only taxable on their income from Canadian activities and investments, including gains on the sale of certain types of Canadian investments. Also, Canada has entered into tax treaties with numerous countries, in order to prevent double taxation of the same income in two countries.

Amounts paid by a Canadian to a non-resident as interest, dividends, rents, royalties or most any other form of income from property, are subject to Canadian withholding tax. The rate is 25 per cent but may be reduced under an applicable tax treaty to as little as 5 per cent.

If a foreign business operates through a Canadian incorporated subsidiary, consideration should be given to loan transactions between the Canadian subsidiary and its foreign parent. Under 'thin capitalisation rules', interest that the Canadian subsidiary pays on loans from its foreign parent may be disallowed as a deduction in computing the subsidiary's income for Canadian income tax purposes.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific courts or tribunals in Canada dealing solely with project finance transactions or construction contracts.[10] Generally, such matters would be litigated in the courts of the province in which the project is located unless otherwise agreed to by the parties in the agreements.

ii Arbitration and ADR

Arbitration and alternative dispute resolution processes are common in Canada. The federal government has enacted an arbitration statute, as have the common law provinces. Arbitrations may be institutional or *ad hoc*.

Most project and construction contract documents require the parties to resolve disputes through dispute resolution processes defined in the project agreements. The processes generally attempt to encourage dispute resolution quickly and efficiently and authorise either party to escalate the dispute to a higher level when discussions fail. Parties commonly attempt to first resolve disputes through the use of appointed representatives, independent certifiers and/or panels of experts before resorting to mediation and then arbitration or litigation. Generally, each party is required to continue performing under the project agreements while the dispute process is ongoing, to prevent delays to the project.

The following organisations in Canada commonly hear disputes in project finance transactions and construction contracts: the British Columbia International Commercial Arbitration Centre,[11] the British Columbia Arbitration and Mediation Institute,[12] the Alberta Arbitration and Mediation Society,[13] the ADR Institute of Ontario Inc,[14] and the Institut de médiation d'arbitrage du Québec.[15]

Canada has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and each of the provinces has enacted implementing legislation. The courts generally grant deference to foreign arbitration awards unless there is a public policy reason not to do so. Canada has signed but it has not yet ratified the ICSID Convention.

XII OUTLOOK AND CONCLUSIONS

While it is expected that levels of government spending may decrease somewhat compared with recent years, as with other western countries, continuing demands for infrastructure

10 As discussed earlier, however, the CITT might have jurisdiction to review alleged breaches by a federal government or body in procurement matters.

11 See www.bcicac.com.

12 See www.bcami.com.

13 See www.aams.ab.ca.

14 See www.adrontario.ca.

15 See www.imaq.org.

renewal and expansion in Canada should ensure that construction will remain important to the Canadian economy.

It is also expected that Canadian construction and project activity will continue to have an international flavour. There are relatively few restrictions on foreign participants, and continued foreign investment in Canada is expected in resources and other sectors. With the strength of the Canadian economy and the amount of existing and planned construction activity in Canada, both in public and private projects, Canada has been the focus of interest from international participants, including consultants, contractors and lenders, many of whom are establishing offices in Canada to better position themselves to pursue the large variety of projects to be constructed in the next decade.

Appendix 2

ABOUT THE AUTHORS

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John S Haythorne is both the Vancouver and the national team leader of Dentons Canada's PPP team. He practises in the areas of construction, engineering and infrastructure, with special emphasis on negotiating, drafting and advising on contracts. He is particularly experienced in PPPs, advising owners on the structure and administration of procurement and legal issues relating to design and construction. He has acted for municipal, health-care authorities and the Province of British Columbia, advising on the law relating to tenders, requests for proposals and complex procurements.

Mr Haythorne has also advised clients on a variety of other technical projects including ship building and repair, and truck transportation including waste collection. He is a registered professional engineer, and prior to entering law he worked as a professional engineer on infrastructure projects. His unique background as an engineer allows him to focus on practical and workable solutions for clients.

From 1997 to 1998, Mr Haythorne was the president of the Association of Professional Engineers and Geoscientists of British Columbia. He then served on the national Canadian Council of Professional Engineers from 2000 to 2002. He is a frequent lecturer on all matters relating to construction law, procurement and PPPs.

RON STUBER

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Ron Stuber is the national co-lead of Dentons Canada's renewable energy team. His practice focuses on the development and financing of projects and major commercial transactions, particularly in the energy and infrastructure sectors.

Mr Stuber has extensive international experience advising proponents, lenders and others involved in major projects and transactions (including renewable and other electricity generation, transmission, distribution and supply; upstream, mid-stream and

downstream oil and gas; petrochemicals and liquefied natural gas; hospitals, road, rail, ports and other infrastructure).

Mr Stuber has spent many years based in London with major London law firms, where he advised extensively on energy and infrastructure projects and transactions throughout the UK, Europe, the Middle East and Africa.

He has also spent time working as corporate counsel to major international oil companies. He began his legal career as a commercial lawyer at Dentons Canada in Calgary.

KAREN MARTIN

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Karen Martin is a partner at Dentons Canada practising in the areas of construction/infrastructure, P3 and litigation/dispute resolution. She provides strategic legal advice to minimise risk during procurement and construction based on deep experience and the latest developments in the law. She provides input in the preparation of construction and infrastructure contracts designed to avoid disputes, and during the construction phase she develops pro-active solutions to project issues. When disputes arise, she negotiates resolutions, and also acts as counsel in the mediation, arbitration and litigation of all types of construction claims.

Ms Martin's experience as counsel on large construction trials in the past three decades allows her to quickly understand the technical aspects of a construction claim, and to provide creative advice as to the appropriate methods to efficiently resolve disputes. She has extensive experience in disputes involving tenders, RFPs, construction contracts, builders' liens, engineering issues, and negligence claims involving architects and engineers.

In the health-care sector she acts for health authorities in relation to complex procurements, P3s and construction projects.

Ms Martin is a frequent speaker on complex litigation and construction issues including procurement, builders' liens, construction disputes, and settlement of multiparty litigation and has authored several publications.

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