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May 3, 2022

Hon. Chrystia Freeland  
Deputy Prime Minister and  
Minister of Finance  
Department of Finance Canada  
90 Elgin Street  
Ottawa, Ontario K1A 0G5

Dear Minister Freeland,

As the national voice for the public-private partnership (P3) industry, The Canadian Council for Public-Private Partnerships welcomes the opportunity to submit to the Government of Canada our views for your consideration on the draft rules relating to the proposed Excessive Interest and Financing Expenses Limitation (“EIFEL”) issued on February 4, 2022.

The Council represents a broad spectrum of the industry that supports the delivery of public infrastructure and services across the country. Our almost 300 members represent both the public and private sectors, and have been responsible for the design, construction, finance, maintenance and operation of billions of dollars of public assets over the last 30 years, including water and wastewater, highways, bridges, public transit, broadband, and health-care facilities.

The Council and its members have serious concerns that the draft rules would have (apparently unintended) consequences for Canadian P3 projects. Such projects are frequently highly leveraged in order to ensure affordability, and not for international tax planning purposes. We foresee a potential negative impact on current large-scale infrastructure projects, as well as the development of a future pipeline of P3s, should the currently proposed approach be pursued.



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As outlined in the attached submission, other nations and institutions have structured reasonable approaches to ensure essential public infrastructure projects are not inadvertently caught up in rules designed to contain other sorts of wholly unrelated transactions for wholly unrelated purposes. For example, the Organisation for Economic Co-operation and Development (“OECD”) has, in its BEPS initiative, suggested that projects that are in the public interest could be excluded from the application of rules such as EIFEL. The Council and its members recommend an analogous exclusion be afforded to those entities engaged in the delivery of such projects to support ongoing private sector investment in such public interest projects, in order to support the efficient and affordable delivery of critical infrastructure and services to Canadians.

Thank you once again for the opportunity to provide the views of our industry. We would be pleased to discuss further should you have any questions.

Sincerely,

Mark Bain  
Chair of the Board of Directors

Cc: The Hon. Dominic LeBlanc, Minister of Intergovernmental Affairs,  
Infrastructure and Communities  
Mr. Michael Sabia, Deputy Minister, Department of Finance  
Canada  
Ms. Kelly Gillis, Deputy Minister, Infrastructure Canada



# SUBMISSION ON EXCESSIVE INTEREST AND FINANCING EXPENSES LIMITATION ("EIFEL")

## EXECUTIVE SUMMARY

The Canadian Council for Public-Private Partnerships ("CCPPP") welcomes the opportunity to make a submission to the Government of Canada in respect of the issuance by the Department of Finance on February 4, 2022 of the draft rules relating to Excessive Interest and Financing Expenses Limitation ("EIFEL"), which represent Canada's response to the recommendations in Action 4 of the Base Erosion and Profit Shifting project ("BEPS") of the Organisation for Economic Co-operation and Development ("OECD").

CCPPP is seeking an exclusion to application of the proposed draft legislation to those entities engaged in the delivery of "public benefit projects" such as Public-Private Partnerships (P3s). Such an exclusion would follow the lead of other OECD countries — in particular the United Kingdom and the United States — that have enacted rules to address BEPS but have also excepted or excluded its application to these projects.

**Advantages** of excluding application of EIFEL rules to such projects in Canada would include:

- 1.) Continued **proper function** of the current market for such projects; and
- 2.) Canada, its provinces, territories and municipalities being able to continue to **benefit from the Value-for-Money (VfM)** that the P3 model generates through low cost, highly levered structures motivated by financial efficiency not tax efficiency.

**Disadvantages** of not excluding application of the EIFEL rules to such projects in Canada would include:

- 1.) A **competitive disadvantage** with our neighbours, in particular the United States, with which Canada is already competing for labour and services against a larger market and significant infrastructure spend;
- 2.) **Further increases in costs to the public sector** in order to deliver necessary public infrastructure in a post-COVID environment that is already struggling with costly supply chain and labour issues as well as inflation;
- 3.) The **viability of the P3 structure** used by developers of such projects to leverage private capital, including the incurrence of more than 90 per cent debt, **will prove less effective**;

- 4.) The **potential for default by private partners** for existing projects will escalate due to an unforeseen policy change that causes significant upheaval and untenable additional tax obligations; and
- 5.) The potential **exit of international builders** and operators from the market in Canada, lessening competition for projects, access to best global practices and innovation, and higher pricing.

Less affordable infrastructure will have a dramatic impact on Canadians. Governments will likely build less and defer maintenance needed to keep existing assets operating at peak performance for decades as would have been originally intended by the P3 model. In turn, this will lessen economic growth, hamper our ability to meet climate change/resiliency targets and increase future costs and hardships for Canadian communities.

## BACKGROUND ON THE COUNCIL

Established in 1993, CCPPP is a national not-for-profit, non-partisan, member-based organization with broad representation from across the public and private sectors. Our mission is to collaborate with all levels of government, Indigenous communities and the private sector to enable smart, innovative and sustainable approaches to developing and maintaining public infrastructure that achieve the best outcomes for Canadians.

The Council is a proponent of evidence-based public policy in support of P3s, facilitates the adoption of international best practices, and educates stakeholders and the community on the economic and social benefits of public-private partnerships.

## BACKGROUND ON P3S

P3s are approaches to the procurement and delivery of public infrastructure that provide efficient solutions to public sector objectives, provide value to taxpayers, and encompass each of the following key attributes:

- Allocate the appropriate risk transfer to the party best suited to manage it;
- Consider the whole life cycle of the asset;
- Leverage private capital; and
- Drive innovation and efficiencies.

Since the early 1990s, P3s have been used successfully in a number of assets classes across Canada, including by the federal government on projects such as the Gordie Howe International Bridge and the Energy Services Acquisition Program (ESAP)/Energy Service Modernization Project (ESM). To date, close to 300 projects are in operation or under construction in Canada valued at more than \$139.5 billion and the 'made in Canada' P3 model is recognized globally as best in class.

P3s are generally administered within a framework that allows for the integration of design, construction, operations, and maintenance of an asset and in many cases are most effective where they leverage private sector capital to ensure on-time and on-budget delivery as well as drive value over the asset's whole life cycle.

In both the Canadian and global market for infrastructure projects, it is common for the leveraging of private capital to include upwards of 90 per cent debt in the financing structures. High leverage is not only common but is planned and desirable to reduce the weighted average cost of capital (WACC) of public benefit projects, leading to

the OECD's observation that these are not abusive structures and present little or no BEPS risk. Interest deductibility is therefore a critical component of ensuring that the economics of such structures remains viable.

## OECD BEPS INITIATIVE RECOMMENDATION

Action 4 of the BEPS initiative recommends countries implement rules that limit interest deductibility, such as the proposed EIFEL regime. However, in the 2015 report on Action 4, the OECD specifically suggested that it would be an option to exclude application of such rules for "public benefit projects" and recognized that, although public benefit assets are often significant in scale and financed using a very high proportion of debt, such financing arrangements "present little or no base erosion or profit shifting risk" ... "because of the nature of the assets and the close connection with the public sector."

The OECD then goes on to suggest parameters for determining whether a particular project is a "public benefit project."

## EXCLUSIONS FROM BEPS LEGISLATION FROM OTHER OECD NATIONS

The United Kingdom and the United States have both enacted legislation in response to the BEPS initiative and have provided exclusions for public infrastructure projects.

### *The United Kingdom*

Chapter 8 of the UK's interest expense limitation rule provides for the exclusion for public benefit infrastructure projects. Companies in a group engaged in the delivery of public infrastructure projects are "qualifying companies" that are able to elect to rely on the exemption if they meet the following conditions:

- a. All of the company's profits and gains are fully chargeable to UK tax;
- b. The company, along with any other associated public benefit infrastructure exemption ("PBIE") qualifying companies, does not have significantly more debt than other comparable companies in the group;
- c. The debt for which exemption is sought must be secured only on the "qualifying exempt assets" or shares of the company or the qualifying assets or shares of other PBIE qualifying companies; and
- d. Other than to an insignificant extent, the assets and income of the company must relate to PBIE qualifying activities.

A company will be undertaking a qualifying activity, and therefore meeting the PBIE test, if it provides through construction, conversion, repair, design and/or operation, an asset that forms part of the infrastructure of the U.K. and meets the following conditions:

- a. The asset is either procured by a relevant public body or is used in the course of an activity that is regulated by a relevant infrastructure authority;
- b. The asset has an expected economic life of at least 10 years; and
- c. The asset is recognized on the balance sheet of the company (which can either be as a tangible asset or otherwise, including as a financial asset).

The holding of shares in and/or making of loans to PBIE qualifying companies are also PBIE qualifying activities.

### *The United States*

The United States' interest expense limitation rule also has an exception for public infrastructure projects under section 163(j) of the Internal Revenue Code.

Section 163(j) limits the amount of the business interest deduction claimed by certain taxpayers, where the term "business interest" means any interest properly allocable to a trade or business. However, for the purposes of the limitation on deduction of business interest, the term "trade or business" does not include an "electing real property trade or business." As a result, interest expense that is properly allocable to an electing real property trade or business does not constitute interest expense properly allocable to a trade or business, and is therefore not subject to the limitation imposed by section 163(j).

Revenue Procedure 2018-59 provides a safe harbor that, if certain requirements are met, allows taxpayers to treat trades or businesses that are conducted in connection with designing, building, managing, operating or maintaining of certain infrastructure projects as real property trades or businesses for purposes of qualifying as an electing real property trade or business under section 163(j) and is commonly referred to as the "infrastructure safe harbor."

## DISCUSSION

As stated above, in the Canadian and global markets for infrastructure projects, it is common for the leveraging of private capital to include upwards of 90 per cent debt in the financing structures. High leverage is not only common but is planned and desirable to reduce the weighted average cost of capital (WACC) of public benefit projects, leading to the OECD's observation that these are not abusive structures and present little or no BEPS risk. Interest deductibility is therefore a critical component of ensuring that the economics of structures remains viable.

The slightly higher cost of financing in a P3 does not derail the value proposition, it increases it. VfM (or taxpayer savings) is largely generated in P3 projects by savings in construction (driven by fixed-priced contracts and design manipulation) and by fixed maintenance costs over the long term. Behind these two items, the element of project finance is present and needs to be carefully managed.

From the perspective of the procuring authority of infrastructure or public benefit projects, the imposition of EIFEL on private sector developers will cause the cost of such projects to increase, thereby limiting the number of such projects that can be procured by governments at all levels across Canada and increasing the cost to Canadian taxpayers.

Given the current inflationary environment, it is critical that Canada continues to leverage the P3 model as much as possible when building necessary hospitals, schools, transportation systems, water/wastewater plants, green energy and other much-needed infrastructure and assets.

If EIFEL is enacted as drafted, international private sector developers that are playing a significant role in the development of transportation and other projects across Canada may determine it is more worthwhile to pursue projects in jurisdictions where exemptions or exceptions from the BEPS rules are available, with the result that the private sector developers who are most globally experienced with the delivery of a particular type of project will not enter (or would otherwise exit) the Canadian market, reducing the competitive nature of the process.

At the very least, CCPPP recommends the government grandfather projects procured prior to the enactment of the EIFEL rules, which projects were structured and modelled to permit full interest deductibility. If such projects are not grandfathered, the economics underpinning them will no longer be tenable, with the risk they will go into default and not be completed.

## CONCLUSION

The OECD has recognized the value in providing an exclusion for public benefit projects from BEPS, as have the governments of the United Kingdom and the United States. We urge the Government of Canada to follow suit and similarly create an exclusion from the EIFEL rules for such projects to ensure the country remains economically competitive and our pipeline of projects remains stable and attractive to Canadian and international infrastructure experts.

Governments across Canada will then be positioned to stretch taxpayer dollars further to build critical infrastructure projects using innovative and global best practices, permitting the achievement of ambitious climate change, economic and environmental targets.