The Canadian Council for Public-Private Partnerships
Le Conseil Canadien pour les Partenariats Public-Privé

P.O. Box 565, Station Adelaide, Toronto, Ontario M5C 2J6

January 4, 2023

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 thanks the Government of Canada for its work in updating the draft rules relating to the proposed Excessive Interest and Financing Expenses Limitation ("EIFEL") and particularly for the proposed exemption for P3 projects.

In its initial submission in May 2022, the Council expressed its concern that the proposed excluded entity provisions did not provide appropriate exemption for P3s.

We want to thank you for the amendments implemented through the "exempt interest and financing expense" definition in proposed subsection 18.2(1). This is a very welcome change and will assist a substantial number of our members. As described below, we have some additional comments on these rules and how they may better address P3 projects.

Our first submission also expressed concern that the rules have retroactive effect on existing P3 projects. The "exempt interest and financing expense" definition in proposed subsection 18.2(1) and outlined in clause (d), will protect some but not all of the interest expense incurred by existing P3 projects. We remain concerned that an unexpected increase in taxes on existing P3 projects that have interest expense will have substantial negative effects on lenders, equity participants and government sponsors. The unintended economic impact on pre-existing projects is discussed in greater detail below.

Based on various research undertaken by the Council, it is estimated that there are more than 300 P3 projects in various phases across Canada. Accordingly, the Council estimates that projects with more than $100 billion value could be adversely affected by the EIFEL rules. When discussing the impact of the EIFEL rules, it is important to distinguish between new greenfield projects versus projects that have already achieved financial close. For the latter, the

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pricing of the project has been provided to the government authority and has assumed the deductibility of all interest expenses for income tax purposes, which would be incurred over the project term.

For projects for which financial close has already been achieved, the Council anticipates that there will be a material financial impact to private sector partners. Such a financial impact may be so severe that the private sector partners, who do not have the ability to readjust the project cash flow to offset the increased cost, may have no alternative but to default in their obligations with the result that the assets are either enforced upon by project lenders or are otherwise handed back to the public authority prior to the contract ending, in each case defeating the intent and purpose of the P3 model.

This is particularly unfair where all of the costs associated with the project are anticipated to be borne by the public sector. If the government were to have undertaken these projects itself, 100% of the financing cost of the project would have come from debt incurred by the government.

To this end, with regard to the definition of “exempt interest and financing expenses”, the Council requests the following:

1. that consideration be given to expanding the scope of the “exempt interest and financing expenses” definition, under clause (d), to include any interest or interest equivalents, incurred by the taxpayer – provided that the total debt amount does not exceed the total net present value or capital costs of the project. As noted above, making such amendments will ensure the EIFEL rules do not unfairly and retroactively impair the economics of the private partner’s historical investment which in some cases may pre-date the BEPS initiative and where pricing was negotiated with the government sponsors based on legislation in force at that time.

2. Regarding the definition of “exempt interest and financing expenses” and clause (a), we offer the following suggestions:

    i. Many P3 projects involve property other than real or immovable property.

    We suggest that the definition include any type of property that is the subject of a P3 project that is being undertaken for the benefit of a government authority or agency thereof. This

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includes projects that relate to integrated systems such as justice systems, prison systems, health records systems etc.

ii. In some cases, P3 projects can be owned by the proponent and not the public sector authority.

As such, we suggest that the restriction that the property be owned by the public sector authority be dropped or that it be modified such that the property is owned by or used to provide public work benefits under contract for a public sector authority.

By making the suggested changes, in these three areas, we expect that the rules will apply to substantially all P3 projects.

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,

Johanne Mullen
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
Lisa Mitchell, President and CEO, The Canadian Council for Public-Private Partnerships