



**Submission for the Pre-Budget Consultations in
Advance of the Upcoming Federal Budget**

Submitted By: The Canadian Council for Public-Private
Partnerships (the Council)



Recommendation

That the government amend section 18.2 of the *Income Tax Act* to revise the Excessive Interest and Financing Expenses Limitation (EIFEL) rules to protect existing Canadian P3 projects, Canadian workers' pension funds and investors from negative retroactive impacts.



Issue Brief: Current EIFEL provisions raise significant concerns for the Canadian P3 industry, with negative impacts to Canadian workers' pension funds and project investors.

Background

Like many advanced economies, Canada has successfully leveraged Public-Private Partnerships (P3s) as one key approach to address our ongoing public infrastructure deficit. Today, our tried and tested 'made in Canada' model is globally renowned, inspiring numerous countries to emulate our practices and approach. For 30 years, governments across Canada have partnered with the private sector to deliver, operate, and maintain hospitals, highways, courthouses, bridges, schools and water and wastewater plants on which we depend daily. That's 300+ P3 projects valued at more than \$139 billion.

However, the recent amendments to the *Income Tax Act enacted through Bill C-59*, which encompasses the Excessive Interest and Financing Expenses Limitation (EIFEL), **raises significant concerns for the Canadian P3 industry, including negative impacts to Canadian pension funds and, therefore, their respective beneficiaries and investors in these infrastructure projects.**

Ongoing Issues of Concern

1. Compromising the Financial Security of Canadian Workers' Investments and Pensions

The enactment of this legislation, which came into effect on January 1, 2024, will adversely impact a wide range of parties who have invested in these public infrastructure projects in good faith and will result in real and significant financial losses for Canadian workers and their pension funds. The proposed legislation's failure to align with the OECD's Base Erosion and Profit Sharing ('BEPS') Action 4 report is a concerning oversight, particularly given the widely recognized interconnectedness of the financial and commercial aspects of P3 investments with the public sector.

The nature of these public infrastructure investments inherently mitigates base erosion and profit-shifting risks, making them a crucial component of fostering sustainable economic growth. It is crucial to emphasize that P3 projects consistently adhere to the criteria outlined in the BEPS Action 4 report, thereby warranting exemptions for public benefit entities as provided in jurisdictions such as the United Kingdom and the United States. The proposed legislation risks undermining the foundation upon which P3 investments operate by neglecting to acknowledge this alignment.

In many instances, P3 project investments have been made to strengthen and support Canadian workers' retirement security, including, among others, trade union pension plans benefitting those who have built the public infrastructure in the first instance. These workers and retirees will be



adversely impacted should the legislation be adopted as drafted when Canada and the world are already experiencing economic and affordability hardship.

These projects represent investments made in good faith in P3 infrastructure projects over the last 30 years, providing Canadian governments with efficient and low-cost bids to deliver public infrastructure. With this legislation, these pension funds have no recourse to recover these financial losses due to the locked-in financing and payment arrangements, which are agreed with the public sector from the start for periods up to 25-30 years.

2. Endangering Canada's Infrastructure Investment Environment

Investors in Canada's critical infrastructure projects, including pension funds, domestic construction firms, engineering companies, and foreign investors, have historically been drawn to the nation's reputation for a fair and open business environment. However, the proposed legislation will jeopardize this reputation and undermine the Government of Canada's strategy and effort to attract private sector investment, both foreign and domestic, in infrastructure projects moving forward. This could include those investment opportunities that fall within the intended strategies of the Canada Infrastructure Bank and potentially Invest in Canada. The legislation and its impact will fundamentally change the competitive landscape of the P3 industry, making future investments very expensive for the public sector and creating an unfavourable investment climate. If passed in its current form, it's hard to envision why investors would continue to support future Canadian infrastructure projects.

Additional Context

During the consultation on the EIFEL legislation, industry stakeholders expressed concerns about the exclusion of deductions for related party debt. Historically, in P3 projects, related party debt was aimed at providing the best value possible to the public sector counterparty, thereby reducing government costs. Canadian government agencies were the beneficiaries of these corporate tax optimisations, not the private investors. Such structuring aligned with the well-established tax rules of the time, to make these projects more cost-effective for Canadian public-sector project owners.

When the UK government introduced legislation to address the same issues EIFEL hopes to address, they introduced a Public Benefit Infrastructure Exemption recognizing the unique circumstances of P3s and their inherent connection with the public sector. The UK government's alignment with these global standards demonstrates a commitment to fostering an environment where public benefit infrastructure projects can thrive without compromising fiscal integrity. Canada should consider a similar approach to avoid unfair impacts on investors who entered into agreements in good faith and level the global market playing field.

Over the last 18 months, our Council has actively participated in the government's consultative process, collaboratively submitting our views in May 2022, January 2023, September 2023 and



December 15, 2023 (the Council would be pleased to share copies of these submissions at the Committee memberships request).

The Council worked collaboratively with officials from the Department of Finance to ensure that an exception clause for P3s was included in the revised draft law, aligning with the OECD's recommendation to provide exemptions for projects in the public interest. However, as we explained to officials throughout the consultation process, language challenges remain. In its current draft, non-arms length debt is not covered by the exemption and will have a material impact on existing projects structured with equity holder subordinated debt.

Recommendation:

That the government amend section 18.2 of the *Income Tax Act* to revise the Excessive Interest and Financing Expenses Limitation (EIFEL) rules to protect existing Canadian P3 projects, Canadian workers' pension funds and investors from negative retroactive impacts.

We implore the Government to consider the proposed redacted and yellow highlighted language revisions (which the Council included in our consultation submission of September 13, 2023, a copy of which we are happy to provide upon request), which provides more explicit provisions in the legislation to protect existing P3 projects from retroactive impacts as follows:

exempt interest and financing expenses of a taxpayer for a taxation year means the total of all amounts, each of which would, if the description of A in the definition interest and financing expenses were read without reference to "exempt interest and financing expenses", be included in interest and financing expenses of the taxpayer for that year, and that is incurred in respect of a borrowing or other financing (referred to in this definition as the "borrowing"), if

(a) the taxpayer or a partnership of which the taxpayer is a member entered into an agreement with a public sector authority to design, build and finance, or to design, build, finance, maintain and operate property ("the project") that the public sector authority, or another public sector authority, owns or has a leasehold interest in or right to acquire;

(b) the borrowing was entered into in respect of **the an investment in the project agreement**; (c) it can reasonably be considered that all or substantially all of the amount is directly or indirectly borne by a public sector authority referred to in paragraph (a); and

(d) the amount was paid or payable to

(i) a person that deals at arm's length with the taxpayer or the partnership of which the taxpayer is a member, **or**

(ii) a particular person that does not deal at arm's length with the taxpayer or the partnership of which the taxpayer is a member if it may reasonably be considered that all or



substantially all of the amount paid or payable to the particular person was paid or payable by the particular person to a person that deals at arm's length with the taxpayer or the partnership of which the taxpayer is a member. (dépenses d'intérêts et de financement exonérées), or

(iii) to a particular person that does not deal at arm's length with the taxpayer or the partnership of which the taxpayer is a member in respect of a borrowing entered into prior to February 4, 2022, to the extent that the principal amount thereof is not increased after February 4, 2022.

Conclusion

The Council appreciates this opportunity to reiterate our ongoing concerns and proposed solution to existing EIFEL legislation language to the House of Commons Standing Committee on Finance as part of its annual pre-budget consultations process. As Committee members can imagine, the consequences of this legislation coming into effect without these revisions are significant and immediate.

These revisions are straightforward, require minimum effort, and will safeguard Canadian P3 investments. The Council believes that our recommended language changes will protect the investments of Canadian pensioners and workers and continue to demonstrate that Canada is a competitive place in which to do business and invest in infrastructure.

Thank you for your consideration. We would welcome the opportunity to speak with Committee members about our concerns, answer questions, or provide supplementary information as needed.

Sincerely,

A handwritten signature in black ink that reads "Lisa Mitchell". The signature is written in a cursive, flowing style.

Lisa Mitchell
President and CEO
The Canadian Council for Public-Private Partnerships (CCPPP)