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Debarment Proposals Loosen Their Grip But Reach Out Farther

Ken Jull, Gardiner Roberts LLP[1]

When a corporation is convicted of serious offences such as bribery of foreign officials, the Government of Canada debars that corporation from federal government work. The existing Integrity regime sets the period of debarment at ten years, which may be reduced to five years if the corporation has cooperated with law enforcement authorities or undertaken remedial efforts to address the wrongdoing.

Debarment has been in the news in the SNC-Lavalin affair, as this was cited as one of the key reasons that the company sought a deferred prosecution agreement. The Chief Executive Officer of SNC-Lavalin, Neil Bruce, said that if the engineering firm is convicted and barred from bidding on federal contracts here at home its workers would end up working for the Montreal-based company's foreign rivals.

Revision of the debarment rules may be another route to mitigate the collateral impact on jobs of innocent workers, apart from a deferred prosecution agreement.

The Government of Canada has released a very comprehensive document which describes a proposed new debarment regime.[2] This policy is effective as of a date to be determined. This date is expected to be in 2019.[3] The proposals to revise the debarment regime loosen their grip, but reach out farther.

Maximum ceilings but no minimum floors

The most important change is that the 10-year ban category is no longer a floor, but rather is a ceiling (hence the reference to a maximum period but no reference to a minimum period). The guidelines state that ineligibility dates are "no more than ten (10) years from the delivery of the Notice of Ineligibility."[4]

The new programme is complex and relies on material event charts and an appendix that sets out balancing criteria. It is therefore possible to have a debarment period as short as one or two years under the new proposals.

Loosened Grip

The proposed amendments will also add a degree of leniency to those affected by the debarment policy.

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[1] Kenneth Jull is Counsel at Gardiner Roberts LLP, Adjunct Professor, Faculty of Law, University of Toronto, and author of *Profiting from Risk Management and Compliance*. Mr. Jull testified as a witness before the Standing Committee on Justice on Remediation Agreements.
[2] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html
[3] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html
[4] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html, section 6.3.1.3.

Contractors who have been debarred may request an administrative agreement after 36 months from the delivery of a Notice of Ineligibility. It may be granted, at the registrar's discretion, if the contractor can demonstrate cooperation with authorities and has undertaken adequate remedial action.[5]

In terms of the numbers, an application for an administrative agreement would only apply to those cases where debarment exceeded three years (36 months).

Matrix analysis of factors based on two axis

For most offences, the criteria that will apply are set out in Appendix 3, which require a balancing of factors that is amenable to matrix analysis.

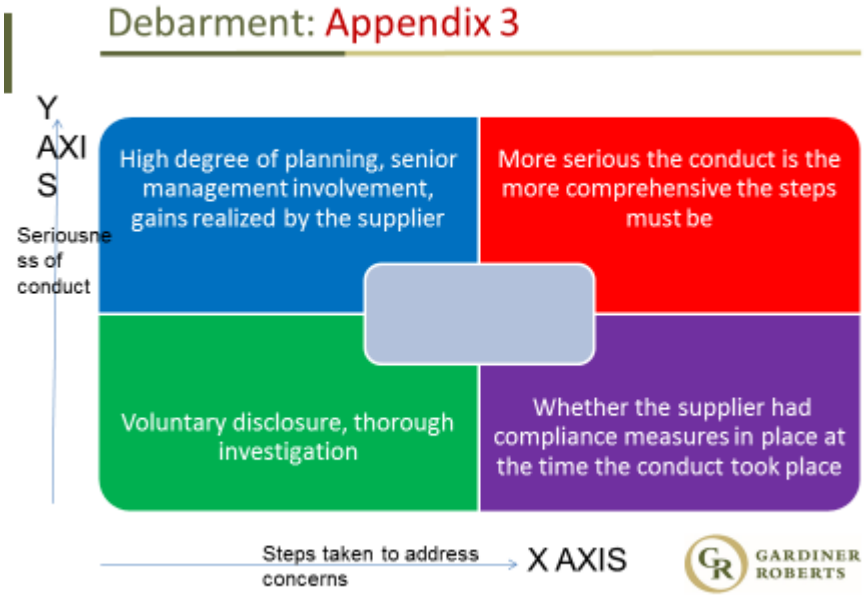
An excerpt from Appendix 3 is reproduced below:

> In determining the length of a supplier's ineligibility period, the Registrar will take into account the seriousness of the conduct engaged in, balanced against the steps taken by the supplier to ensure that similar conduct does not recur. The more serious the conduct that resulted in the determination of ineligibility, the more comprehensive the steps taken to address it will need to be. The Registrar will need to be convinced that the circumstances leading to the debarment have been addressed.
>
> Factors that the Registrar may take into account include the following:
>
> **Seriousness of the conduct engaged in**
>
> - the supplier's role in the conduct
> - the degree of planning involved in carrying out the offence and the duration and complexity of the offence
> - the extent of senior management involvement
> - the gains realized by the supplier as a result of the offence
> - the cost to public authorities of the investigation and prosecution of the offence
> - known membership in or associations with organized crime and money laundering
> - Whether the supplier is a repeat offender, or was previously warned about such behaviour, will also be a serious consideration as it indicates an unwillingness or inability to address compliance issues effectively and credibly
>
> **Steps taken to address concerns**
>
> - voluntary disclosure of involvement in the offence
> - whether the supplier has completed a thorough investigation of the circumstances that led to the debarment and cooperated with the investigating authorities
> - steps taken to address the wrongdoing, including addressing any criminal, civil or administrative sanctions and paying compensation for damage
> - appropriate disciplinary action against the individuals involved in the conduct
> - whether the supplier had compliance measures and internal control systems in place at the time the conduct took place

[5] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html#s6, section 10 Administrative Agreements.

- the adoption and implementation of a credible and effective compliance program that demonstrates the supplier's commitment to complying with the law
- whether the supplier has implemented or agreed to implement remedial measures, including through personnel changes and the adoption of new procedures and training and having regard to any measures that might be recommended by the Registrar or the investigating authority
- whether the supplier's management appears to recognize and understand the seriousness of the conduct and is committed to taking serious steps to ensure that it does not recur

Matrix analysis[6] is perfectly suited to balance the above categories on a vertical and horizontal axis, as follows:



The red quadrant represents the area where the debarment period will be most stringent. In this quadrant, the seriousness of the conduct in issue is high and the steps that must be taken to address the misconduct must be the most rigorous. In the opposite green quadrant, where the seriousness of the conduct is low, the level of steps taken to address the concerns is proportionately lower. The blue and purple quadrants are variations of these combinations.

There are many proposed changes to the debarment program that will also expand its reach. I would like to highlight five areas.

[6] See Archibald and Jull, *Profiting From Risk Management and Compliance* 2018 (Thomson Reuters).

1. Application to AMPs if conduct is serious, repetitive or otherwise egregious

Under the proposed amendments, if a supplier has, within the past three years, been assessed an Administrative Monetary Penalty ("AMP") and/or has been publicly named for having committed a violation pursuant to Part IV of the Canada Labour Code, the supplier may be debarred if the Registrar determines the actions to be serious, repetitive and/or otherwise egregious.[7]

This is a quantum leap, as AMPs are assessed on a balance of probabilities rather than the more rigorous proof beyond a reasonable doubt as required by criminal law. Perhaps this is a policy reaction to a poor track record of convictions against corporations for white collar crimes in Canada. Corporate in-house counsel may have become complacent in believing that their companies are unlikely to be convicted and therefore risk management systems are less important. If these proposals are passed, that complacency will be dangerous.

2. Conviction of a provincial offence relating to fraud, collusion or insider trading

A supplier may be debarred if the supplier, or an affiliate, has been convicted of or pled guilty to a provincial offence which is analogous to a fraud-based offense, or in relation to insider trading.[8]

This is a major extension as companies may now face federal consequences for provincial convictions.

3. Commercial integrity

Even if a supplier is not convicted of a listed offense, they may still be suspended from engaging in contracts. The proposed amendment will allow for suspensions where, at the Registrar's discretion, the acts or omissions of a supplier adversely reflect on the supplier's commercial integrity.

4. Application to foreign offences

Further proposed changes expand the regime to cover "foreign offences" which means a civil judgment, regulatory offence, decision, decree, directive, order or consent agreement or criminal judgment in a jurisdiction other than Canada or such other similar enforceable decision pursuant to the authority of such other jurisdiction.[9]

5. Actions or omissions of affiliates: acquiescence and an objective test

The Registrar will also consider the actions or omission of affiliates only if the Registrar determines, in the Registrar's discretion, that the supplier directed, influenced, authorized, assented to, acquiesced to, or participated in those actions or omissions.[10] This expands the

[7] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html Appendix 2, section l.
[8] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html, Appendix 2, section g.
[9] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.htm, Appendix 1.
[10] https://www.tpsgc-pwgsc.gc.ca/ci-if/pp-pd-eng.html, section 8.

scope of the prior rules which was restricted to "participation or involvement". The new test moves into the wider scope of acquiescence.

If a supplier's affiliate (defined by a control test) in the past three (3) years was convicted of or pleaded guilty to listed offences, and the Registrar determines that the supplier "directed, influenced, authorized, assented to, acquiesced in or participated in any action or omission, which directly or indirectly enabled the underlying action(s) or omission(s) that relate to the offence, where the supplier knew or ***ought to have known*** that its affiliate was involved in the offence", this may lead to debarment. The new test is analogous to the standard imposed on senior officers (in the *Criminal Code* provisions on corporate liability) with respect to employees under their supervision and the taking of all reasonable steps, but extends the test to the purely objective "ought to have known". This represents a significant extension from criminal law principles to civil law concepts of negligence.

Conclusion

The new debarment regime is a step forward in providing greater flexibility to meet the facts of specific cases. The proposals significantly extend the reach of debarment to areas never covered before.

The proposals underscore the importance of risk management systems. Similar to the ads that show a fast car with the caution "Professional driver, do not attempt this on your own", corporations should hire law firms with expertise in risk management.