

Government of Canada announces significant expansion of Integrity Regime for federal contracting

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Authors: [Christopher Naudie](#), [Michael Fekete](#), Peter Franklyn

Following an extensive consultation process over the past year, the Government of Canada announced this week that it will be implementing an enhanced Integrity Regime for government contracting and procurement that will come into effect January 1, 2019. In its announcement, the government provided an overview of the forthcoming changes, and reported that it will be increasing the number of offence and ethical circumstances that will trigger debarment from federal contracting in Canada. As a result, domestic and foreign companies that conduct material business with the federal government will have to meet new ethical standards and will face new legal and business risks for their business conduct and practices that take place both in Canada as well as internationally.

Background

In July 2012, Public Works and Procurement Canada, the main contracting arm of the Government of Canada ("PSPC") consolidated a number of oversight mechanisms that were designed to improve compliance practices among federal suppliers into a formal integrity framework. Under this framework, a supplier that has been convicted of a listed federal offence would be barred from bidding on federal contracts and conducting business with the federal government. Since that time, the Integrity Regime has been amended on a number of occasions, and in July 2015, the Government of Canada expanded the regime to apply to contracts and real property agreements awarded by most federal departments and agencies. The Integrity Regime is currently set out in a formal Ineligibility and Suspension Policy as well as in standard integrity clauses that are included in federal procurement contracts.

In general terms, under the current Integrity Regime, a supplier will be automatically ineligible to contract with the federal government if it is convicted of a listed federal offence. The list of offences is very broad, and includes "integrity" offences related to fraud, bribery, falsification of documents, specific offences under the *Competition Act* and *Income Tax Act*, as well as offences for stock manipulation, insider trading and lobbying and foreign corrupt practices. Under the current regime, a supplier that is convicted of a listed offence will be automatically ineligible to participate in federal contracting for a period of 10 years. The PSPC retains some discretion to reduce a supplier's period of ineligibility by up to five years in appropriate circumstances through the use of an administrative agreement, provided that the supplier can demonstrate that it has co-operated with law enforcement or has taken steps to address the causes of the underlying conduct.

In addition to these circumstances that will trigger automatic ineligibility, PSPC has an additional discretion to impose a finding of ineligibility in circumstances involving the mere charging of a listed offence (i.e., even in the absence of a conviction). In addition, PSPC may determine that a supplier is ineligible if the supplier was convicted of a foreign offence in a

jurisdiction other than Canada that, in PSPC's opinion, is similar to a listed offence in Canada. PSPC may also determine that a supplier is ineligible if an affiliate has been convicted of a listed offence in Canada, if the supplier directed, influenced, authorized, assented to, acquiesced in or participated in the commission of the offence. However, PSPC has adopted an important public interest exception which may exempt certain suppliers from debarment on grounds of emergencies, national security, health and safety and economic harm.

Consultation and proposed changes

In September 2017, the Government of Canada launched a public consultation regarding potential measures to improve Canada's tool kit for combatting corporate wrongdoing. As part of that consultation, the government solicited input on proposed changes to enhance and improve the operation of the Integrity Regime. The government received input from numerous stakeholders, including representatives of the business and legal communities who expressed concern relating to the harshness of the regime, and the lack of transparency and appeal rights in connection with findings of ineligibility.

This week, the Government of Canada announced that it has completed its consultation and has decided to implement new changes to the Integrity Regime. In particular, the government announced that the Integrity Regime will be enhanced to:

- Introduce greater flexibility in debarment decisions;
- Increase the number of triggers that can lead to debarment, including the addition of more federal offences, certain provincial offences, "foreign civil judgments for misconduct" and debarment decisions of provinces, foreign jurisdictions and international organizations.
- Explore alternative measures to further mitigate the risk of doing business with organized crime.
- Expand the scope of business ethics covered under the regime into key areas such as combatting human trafficking and the protection of labour rights and the environment. For example, the government has indicated that it would introduce new triggers for debarment for offences under the *Canada Labour Code* (occupational health and safety and standard hours and wages) and offences under federal environmental legislation. In addition, suppliers will soon be required to certify that they have taken reasonable steps to guard against the use of forced labour within their supply chain.

The Government of Canada announced that the enhanced Integrity Regime will be reflected in a revised Ineligibility and Suspension Policy, which will be released on November 15, 2018, and will come into effect on January 1, 2019.

Implications for business

It is a welcome development that the Government of Canada has committed to introducing new flexibility in debarment decisions. To many stakeholders, the automatic ineligibility period of 10 years was unusually harsh, and the forthcoming changes will hopefully mitigate the risks for companies that have been charged or investigated for more minor offences. However, the government's decision to expand the regime to cover certain provincial offences as well as to cover offences relating to labour rights and the environment, as well as to require certifications relating to non-use of forced foreign labour in supply chains, may dramatically increase the risks for companies that conduct business with the federal

government.

Osler will continue to monitor these developments, particularly when the new regime is released on November 15, 2018. For further information on the Integrity Regime and how it could affect you, please contact a member of Osler's [Litigation Department](#) or [Competition & Foreign Investment Group](#).