

# KEEPING CURRENT

October 23, 2018

## Debarment Tentacles Reach Out – But Loosen Their Grip

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

**Kenneth Jull**  
Counsel  
416. 865.2964  
kjull@grllp.com

**Jonathan Nehmetallah**  
Associate  
416.865.6732  
jnehetallah@grllp.com

**Nicholas Argiros**  
Articling Student  
416.865.6719  
nargiros@grllp.com

The Government of Canada is seeking to amend its current policy on debarment (consultation administering Canada's expanded "integrity regime"). Debarment is the practice of excluding entities from entering and participating in government contracts. It is used to ensure that contractors supplying goods and services to the Federal Government act with integrity. The policy changes will have a significant impact on contractors and corporations who wish to do business with the Federal Government. The Federal Government provides a list of Criminal Code offenses that will result in debarment. Further information can be found in Justice Archibald and Gardiner Robert LLP's Ken Jull's analysis in Chapter 12:20 of their book *Regulatory and Corporate Liability: From Due Diligence to Risk Management*.

If implemented, the proposed changes to the debarment program would significantly increase the scope and reach of debarment. While the Canadian government has extended its debarment policy, it has also provided for some leniency for those caught within the program.

### Current Rules

The debarment integrity scheme is complex. If a contractor is convicted of a listed "integrity offence" the Canadian government will debar it from participating in government procurement contracts for 10 years from the date of conviction. The 10 year moratorium is subject to a potential five year reduction if the contractor is found to cooperate with authorities while implementing remedial activity.

The list of offenses includes bribery, collusion, bid rigging and other fraud based offenses. Upon expiry of the 10 year period, the contractor is once again eligible to do business with the Canadian government—assuming adequate compliance measures have been satisfied.

### Expanding Tentacles

There are many proposed changes to the debarment program. We would like to highlight three areas that will significantly increase its reach.

1. Under the proposed amendments, if a contractor has, within the past

three years, been issued an Administrative Monetary Penalty (“AMP”) – a non-criminal fine often issued by regulators in an administrative context or has been publicly named for having committed a violation pursuant to Part IV of the Canada Labour Code– the contractor may be debarred if the registrar determines the actions as serious, repetitive and/or otherwise egregious.

2. A contractor may be debarred if the contractor, or an affiliate, has been convicted of or pled guilty to a provincial offence which is analogous to a fraud based offense, or relating to insider trading.
3. Even if a contractor 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 mediators discretion, the acts or omissions of a contractor adversely affect commercial integrity.

### **Loosened Grip**

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

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

The proposed changes will be contemplated between October 11 and November 13, 2018, where affected stakeholders will have the opportunity to notify the Canadian government of their concerns. In light of the changes, contractors will need to rethink and review their existing compliance practices and should seek professional legal advice when doing so.

We encourage all parties to voice their concerns prior to the November 13th deadline.

### **Authors**

#### **Kenneth Jull**

Counsel  
416. 865.2964  
kjull@grllp.com

#### **Jonathan Nehmetallah**

Associate  
416.865.6732  
jnehmetallah@grllp.com

#### **Nicholas Argiros**

Articling Student  
416.865.6719  
nargiros@grllp.com