THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Revised Draft Ineligibility and Suspension Policy (Integrity Regime)

CANADIAN BAR ASSOCIATION
ANTI-CORRUPTION TEAM

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Anti-Corruption Team, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Anti-Corruption Team.

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I. INTRODUCTION

The Canadian Bar Association's Anti-Corruption Team (CBA-ACT) comments on the draft revised Ineligibility and Suspension Policy (Draft Policy) released on October 11, 2018.

The CBA is a national association of over 36,000 lawyers, law students, notaries and law teachers. Among our primary objectives are improvements in the law and the administration of justice, and promoting the rule of law. The CBA-ACT is a multi-Section committee comprised of members from the Business, Criminal Justice, Construction and Infrastructure, Charities and Not-for-Profit, Competition and International Law Sections, the Canadian Corporate Counsel Association and the Ethics and Professional Responsibility Subcommittee.

The CBA-ACT has previously commented on potential changes to the Integrity regime as part of an earlier consultation on expanding Canada's toolkit to address corporate wrongdoing.[1]

II. INSUFFICIENT CONSULTATION PROCESS

The Draft Policy was the subject of a one-month consultation (October 11 to November 13, 2018). Based on our general awareness and discussions with clients who are suppliers to the federal government, we believe the consultation was not long enough or sufficiently publicized to gather meaningful input from federal government contractors and other stakeholders.

The proposed changes to the Draft Policy are substantial and the government would benefit from a thorough consultation more likely to identify unintended adverse consequences. While the consultation period has passed, we trust that our comments can be still considered – either before the Draft Policy is finalized in early 2019 or for future revisions.

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1 See CBA-ACT submission on expansion of Canada's toolkit to address corporate wrongdoing (December 2017).

III. COMMENTS ON DRAFT POLICY

A. Disqualifying Material Events

The Draft Policy should clarify if a Material Event automatically disqualifies a supplier (and only the *length* of disqualification is discretionary), or if PWGSC will exercise discretion on whether to disqualify at all.

B. Environmental Offences

The new disqualifying events for environmental offences can apply to relatively minor infractions occurring in the course of the day to day operations (e.g., transferring petroleum products to a storage tank without a proper identification number, or failing to submit a declaration form before importing an engine).[2]

To the extent the scope of debarment offences moves away from offences directly relevant to government contracting, the rationale for debarment may become less clear. While the goal is laudable, using debarment to achieve other social, economic and environmental policy objectives could create uncertainty and inadvertently limit the number of companies prepared to bid on government contracts. Broader debarment adversely affects not only the debarred company, its employees and shareholders, but also taxpayers who are left with a less competitive process and may pay more or receive lower quality services.

In Canada, courts have sole authority to determine penalties for environmental offences, within legislated parameters. This ensures just punishments, as courts are in the best position to assess a variety of factors in a fair and impartial manner.

The Draft Policy would add punishments on top of the penalties already assessed by courts. These additional punishments may be unrelated to the seriousness of the offence giving rise to the conviction. The Draft Policy could interfere with just and proportionate penalties, potentially bringing the administration of justice into disrepute.

Assuming the intent is to disqualify suppliers only for "serious, repetitive or otherwise egregious" offences, the potential for disqualification can have serious consequences on a supplier's business, such as its financing ability. In addition, too much discretion is left with

[2] These are examples from the Environmental Offenders Registry incorporated by reference into the Policy.

the Registrar as the criteria of "serious, repetitive or otherwise egregious" is broad and subjective.

The offender has no right to be heard on whether it ought to be debarred. There is no right of appeal by a court. While presumably the exercise of discretion would be subject to judicial review to ensure the discretion was properly exercised, judicial review is subject to deference to decision makers that may be inappropriate in this context.

Decisions to suspend or debar a company are adjudicative decisions with a sentencing element, not simple bureaucratic decisions. For some companies, ineligibility for government contracts could mean they are no longer viable, resulting in substantial losses for employees and other stakeholders. At the very least, decisions under the Draft Policy should include judicial protections to ensure a fair hearing and a meaningful right of appeal.

If the government is going to expand the scope of disqualifying offences to environmental matters, it should more narrowly define the scope to capture only appropriately serious offences, given the potentially drastic consequences of debarment to a company and its employees, suppliers, creditors and shareholders.

Further, to avoid unfairness from retroactive or retrospective application, if environmental offences are included as disqualifying conduct, only offences occurring after the Draft Policy comes into effect should be disqualifying – i.e., only after environmental offences have become disqualifying should they be grounds for disqualification. This would give suppliers an opportunity to revise their environmental compliance policies to avoid potentially draconian consequences of disqualification.

C. Determination of Ineligibility (section 6.2)

The second paragraph of section 6.2 states "the Registrar *will* determine that a supplier is ineligible if any of the Material Events provided in the Material Event Chart is found to apply in respect of the supplier." However, not all circumstances in the Material Event Chart invoke automatic ineligibility. This paragraph should state the "Registrar *may* determine […]".

D. Solicitor-Client Privilege (sections 6.2.4 and 11.2)

The Supreme Court of Canada has stated that:

> The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole […]
>
> Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive. […] It is therefore in the public interest to protect solicitor-client privilege.[3]

In Canada, solicitor-client privilege "has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy."[4]

Legislation compelling disclosure of privileged records requires all of the following:

- clear, explicit and unequivocal statutory language;
- evidence that the disclosure is absolutely necessary to achieve the purposes of the legislation (often stated as a means of last resort); and
- an approach that minimizes the impairment of the privilege.

Further, clients must be given a meaningful opportunity to assert and protect their claim of privilege.

The Integrity Regime must be held to the same standard. We recommend removing the reference to *legal opinions* in sections 6.2.4 and 11.2 of the Draft Policy.

> Section 6.2.4
>
> […] at any time before the Registrar makes a determination, PWGSC may request from a supplier information, supporting material and/or independent third party information pursuant to section 11 *(which may include, without limitation, legal opinions)* that PWGSC considers relevant to making a determination of ineligibility.
>
> Section 11.2
>
> […] Such independent third parties may be required to provide, among other things, *legal opinions*, professional confirmations, certifications, validations, monitoring and other information. […]

Some clients may decide voluntarily to disclose material protected by solicitor-client privilege. Generally, at common law, this would constitute a waiver of the privilege and could significantly deter clients who might otherwise be comfortable disclosing privileged material in

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3 Alberta (Information and Privacy Commissioner) v. University of Calgary, [2016] 2 SCR 555, 2016 SCC 53 at para. 26, 34. (University of Calgary).

4 *Supra* note 3 at para. 20

this context. We encourage consideration of a statutory non-waiver provision and clear restrictions on sharing this information beyond those involved in the ineligibility determination process.

E. Response Time (section 6.2.6.3)

Section 6.2.6.3 states that a Notice of Intention to Declare Ineligible will set out "the time within which the supplier may file information and written submissions to the Registrar", but does not specify a minimum period. In contrast, section 7.2.3.2 states that the Registrar may not make a determination of suspension until 10 business days after the Registrar shared evidence of misconduct with the supplier. Similarly, a minimum response time should be added to section 6.2.6.3.

F. Concurrent Periods of Ineligibility (section 6.2.13.4)

Section 6.2.13.4 should expressly authorize PWGSC or the Registrar to permit periods of ineligibility to run concurrently, or indicate that concurrent running is the default in the absence of a determination that they shall run consecutively.

G. Decision Process (section 7.3)

It would be useful to explain the circumstances when a supplier will be considered to "pose a risk to Canada" for failing to retain a third party where requested by the Registrar. It would also help to require the Registrar to specifically indicate when a request to retain a third party is one that may trigger a suspension in the event of a failure to comply, rather than merely a suggestion.

H. Supplier Affiliate Misconduct (section 8)

If a supplier's affiliate engages in misconduct described in sections (f), (g) or (h) of the Material Event Chart, section 8 suggests that the only alternatives are disqualification of the supplier on the basis that it directed (or acquiesced in) the conduct or to *conditionally rescind* a disqualification based on a finding that the supplier did not direct the conduct. However, the Material Event Chart states that the Registrar is not to *consider* the actions or omissions of affiliates unless the supplier directed those actions, suggesting that the supplier should not be disqualified, even conditionally, if it is not found to have directed the conduct by its affiliate.

In any event, section 8.4 should give the supplier an opportunity to address any new evidence that leads PWGSC to restore a disqualification (that was conditionally rescinded). Further section 8.4 suggests that *any evidence* of the supplier having directed the affiliate's conduct will lead to disqualification. Instead, section 8.4 should clarify that PWGSC will weigh all relevant evidence in determining if the supplier directed the conduct by its affiliate.

I. First-Tier Subcontracting (section 12)

Section 16(b) of the current policy states that a supplier *can* verify the eligibility status of a potential first-tier subcontractor by consulting PWGSC's ineligibility and suspension list, implying that this is sufficient due diligence.

Section 12.1.2 of the Draft Policy states that a supplier *may* verify a first-tier subcontractor's status by consulting the ineligibility and suspension list. The change from *can* to *may* creates uncertainty on whether consulting the list is sufficient. The Draft Policy should be clear and, if consulting the list is not sufficient, it should identify what due diligence is required.

J. Continuing Obligation to Disclose (section 13.2)

Five business days to disclose changed information for pending offers or contracts may not be enough for a supplier to even learn about the changed information. In some cases, even the 22 business days disclosure period for executed contracts may not be sufficient. The time should not begin to run until the supplier becomes aware of the change or reasonably should have become aware.

Given the broad definition of "affiliate" that includes a person the supplier does not control but is under common control by a third person, the supplier may have no way of knowing that a change has occurred regarding the affiliate – a stricter time period may be appropriate for changes affecting either the supplier itself or affiliates controlled by the supplier.

Given that a person exercising "significant" influence over both the supplier and another entity is sufficient to make the supplier and the other entity "affiliates", it may not be apparent to the supplier that the other entity is an affiliate – the supplier may not be aware of the influence exerted by this person over the other entity.

K. Anti-Avoidance (section 15.1.2)

For the anti-avoidance provision to apply, it should not be sufficient that "the result of the succession would be the avoidance of the ineligibility or suspension" as every divestiture with that result would be ineffective. For example, if the supplier sells a business unit that was not involved in the disqualifying conduct to a third party qualified supplier, there may not be a reasonable basis for continuing the disqualification against the divested business unit.

L. Definition of "control"

The definition of "control" should clarify that shared facilities are not sufficient in themselves to establish that one of the sharing entities controls the other.

Part (b) of the definition of "control" is circular and meaningless. The intent would be clearer if it stated "a person who controls an entity is deemed to control all entities controlled by that entity"

M. Definition of "significant influence"

The definition of "significant influence" should indicate that some elements of the definition are not necessarily sufficient to constitute significant influence and control. For example, in part (e) of the definition, if a supplier consults one of its customers on the supplier's strategic direction and that customer influences decisions of the directors of the supplier, the customer could be found to *control* the supplier. However, we assume the intent is not to disqualify a supplier merely because it consulted a customer who has committed a disqualifying offence (which may or may not be known to the supplier).

The concept of *influence* in parts (c), (d) and (e) of the definition should be qualified as to materiality – as drafted, any influence at all over a company's management or direction is deemed to be "significant influence", even if it relates to a non-material matter.

N. Main Contract

"Main contract" should be defined. For example, section 2.8 identifies contracts not subject to the Draft Policy as including contracts that are ancillary or incidental to a "main contract".

O. Factors in Establishing Period of Ineligibility (Appendix 3)

Appendix 3 should allow the Registrar, in appropriate circumstances, to determine that the period of ineligibility could be zero.

P. Exceptional Circumstances

The Draft Policy imposes inflexible deadlines that do not allow for exceptional circumstances. In those cases, it would be preferable to establish a general rule but allow discretion to set time periods in appropriate circumstances, such as newly discovered evidence.

For example, in section 6.3.5, a supplier must wait at least 36 months before asking to have the ineligibility period suspended by way of an administrative agreement. In section 8.1, submissions received by PWGSC more than 22 business days following delivery of a Notice of Ineligibility resulting from the conduct of affiliates under paragraphs (f), (g) and (h) of the Material Event Chart "will not be considered". However, 22 business days may not be fair or realistic in some circumstances, such as the conduct of foreign affiliates in distant jurisdictions where language challenges and local laws could complicate internal investigations.

IV. CONCLUSION

The CBA-ACT appreciates the opportunity to comment on the draft revised Ineligibility and Suspension Policy. We trust that our comments can be still considered – either before the Draft Policy is finalized or for future revisions.

V. SUMMARY OF RECOMMENDATIONS

The CBA-ACT recommends the Draft Policy should be revised to:

1. **Clarify if a Material Event automatically disqualifies a supplier, or if PWGSC will exercise discretion.**

2. **Include judicial protections to decisions under the Draft Policy to ensure a fair hearing and a meaningful right of appeal.**

3. **Define the scope of disqualifying environmental offences to capture only appropriately serious offences.**

4. **Confirm that only offences occurring after the Draft Policy comes into effect are disqualifying.**

5. **Replace *will* with *may* in the second paragraph of section 6.2 to state "the Registrar *may* determine that a supplier is ineligible [...]"**

6. **Remove the reference to *legal opinions* in sections 6.2.4 and 11.2 and include a statutory non-waiver provision and clear restrictions on voluntarily shared legal opinions.**

7. **Add a minimum response time for suppliers to section 6.2.6.3.**

8. **Authorize PWGSC or the Registrar to permit periods of ineligibility to run concurrently, or indicate that concurrent running is the default in the absence of a determination that they shall run consecutively (section 6.2.13.4).**

9. **Explain the circumstances when a supplier will be considered to "pose a risk to Canada" for failing to retain a third party and require the Registrar to indicate when a request to retain a third party is one that may trigger a suspension in the event of a failure to comply (section 7.3).**

10. **Give suppliers an opportunity to address any new evidence that leads PWGSC to restore a disqualification and clarify that PWGSC will weigh *all* relevant evidence in determining if the supplier directed the conduct by its affiliate (section 8).**

11. **Clarify the due diligence requirements for verifying the eligibility of a first-tier subcontractor (section 12).**

12. **Extend the amount of time to disclose changed information (section 13.2).**

13. **Clarify when the anti-avoidance provision applies (section 15.1.2).**

14. **Revise the definition of "control" to clarify its intent.**

15. **Revise the definition of "significant influence" to indicate that some elements of the definition are not necessarily sufficient to constitute significant influence and control.**

16. **Define the term "main contract".**

17. **Allow the Registrar, in appropriate circumstances, to determine that the period of ineligibility could be zero (appendix 3).**

18. **Allow discretion to set time periods to accommodate exceptional circumstances.**