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Canada's Integrity Regime: The Corporate Grim Reaper

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CANADA'S INTEGRITY REGIME: THE CORPORATE GRIM REAPER

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ABSTRACT

In 2019, SNC-Lavalin made global headlines after it was revealed that the Canadian Prime Minister, Justin Trudeau, had interfered in the prosecution of the company for the bribery of Libyan officials. Although the scandal was primarily viewed as political, it also highlighted flaws in Canada's Integrity Regime; specifically, the regime's unworkable and draconian approach to debarment. This Article will address the pressing need in Canada to modify its debarment remedy and enact a system that more effectively protects the government's interests. To illuminate the current issues facing Canada's Integrity Regime, this Article will begin by examining Canada's debarment system, outlining the various iterations of the Integrity Regime. The Article then examines the debarment policies of a more mature and flexible debarment regime, focusing on Canada's neighbor and trading partner—the United States. It considers the history of this regime and outlines the scope of debarment officials' roles in this more forward-looking system. The Article next considers the repercussions of Canada's current approach to debarment, using the SNC-Lavalin affair as a case study. The Article concludes by recommending that Canada implement a discretionary debarment regime allowing government officials to make decisions that are in the best interest of the Canadian government and the population that it governs.

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I. Introduction

In 2015, the Canadian government charged Canadian construction and engineering firm SNC-Lavalin (SNC) with defrauding and bribing Libyan government officials to receive favorable construction contracts.[1] Canadian authorities alleged the company paid roughly $48 million (CAD) in bribes and defrauded Libyan agencies of $130 million (CAD) between 2001 and 2011.[2] If convicted under the 2015 Canadian Integrity Regime, SNC would be automatically debarred from receiving government contracts for ten years.[3] Faced with this severe consequence, SNC launched a lobbying campaign to change the Integrity Regime.[4]

The company advocated for the adoption of deferred prosecution agreements (DPAs), which would allow it to avoid criminal prosecution—and thus debarment—by paying a fine.[5] The lobbying paid off and in 2018, the Canadian government passed legislation amending the Criminal Code and creating DPAs, also known as "remediation agreements."[6] SNC's troubles, however, did not

1. *See* Ian Austen, *Canada Charges SNC-Lavalin in Fraud and Bribery Involving Qaddafi Regime*, N.Y. Times (Feb. 19, 2015), https://www.nytimes.com/2015/02/20/business/international/canada-charges-snc-lavalin-in-fraud-and-bribery-involving-qaddafi-regime.html [https://perma.cc/BFJ9-VVNY].

2. *See* Dave Seglins, Rachel Houlihan, & Jonathan Montpetit, *What the SNC Board May Have Known About the Firm's Dealings in Libya – Like the Office Safe with $10M Cash*, CBC News (Apr. 15, 2019), https://www.cbc.ca/news/business/snc-lavalin-trial-board-1.5096153 [https://perma.cc/M8SW-WNKC]. In December 2019, SNC-Lavalin (SNC) pled guilty to paying $127 million in bribes. Ian Austen, *Corruption Case That Tarnished Trudeau Ends With SNC-Lavalin's Guilty Plea,* N.Y. Times (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/world/canada/snc-lavalin-guilty-trudeau.html [https://perma.cc/CE9V-HBN3].

3. *See Globe Editorial: Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal*, Head Topics (Dec. 21, 2019, 2:09 AM), https://headtopics.com/ca/globe-editorial-fixing-the-bad-policy-at-the-root-of-the-trudeau-government-s-snc-lavalin-scandal-10258722 [https://perma.cc/K5BT-QKEF].

4. *See* Mark Gollom, *What You Need to Know About the SNC-Lavalin Affair*, CBC News (Feb. 13, 2019, 7:26 PM), https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271 [https://perma.cc/B94U-D4FJ].

5. *See id.*; *12-Month Lobbying Summary—In-house Corporation*, Off. Comm'r Lobbying Can. (July 20, 2021) https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/clntSmmry?clientOrgCorpNumber=4995&sMdKy= (last visited Nov. 10, 2021). A deferred prosecution agreement (DPA) is defined as follows: [a] contractual arrangement between a . . . government agency . . . and a company or an individual facing a criminal or civil investigation. Under a DPA, the agency files a charging document with the court, but simultaneously requests that the prosecution be postponed to allow the defendant to demonstrate its good conduct. *Non-Prosecution Agreement (NPA)*, Thomson Reuters "Practical L. Glossary," Westlaw 9-608-6205, https://content.next.westlaw.com/9-608-6205?transitionType=default&contextData=(Sc.Default)&firstPage=true [https://perma.cc/B8UY-T5CK].

6. Budget Implementation Act, 2018, No. 1, S.C. 2018, c 12 (Can.), https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2018_12/page-51.html#h-123 [https://perma.cc/CA4K-VGVQ].

stop there. The Public Prosecution Service of Canada (PPSC) denied SNC's request for a DPA.[7] Prosecutors cited SNC's failure to self-disclose the "degree of involvement of senior officers," and the "nature and gravity" of the crime.[8] The PPSC proceeded with criminal prosecution.[9]

Motivated by SNC's announcement that debarment would result in 9,000 Canadian layoffs, Prime Minister Justin Trudeau and his administration began a months-long campaign to get then-Attorney General Jody Wilson-Raybould to overturn the prosecutor's decision and grant the DPA,[10] even though the attorney general role is traditionally non-partisan and does not operate at the direction of the prime minister.[11] Ms. Wilson-Raybould did not acquiesce and was subsequently reassigned in January 2019.[12] News broke in February of Mr. Trudeau's alleged improper interference and undue influence on an independent government official.[13] By August, the Ethics Commissioner released a report which determined Mr. Trudeau's efforts to pressure the Attorney General to grant the DPA violated the Conflict of Interest Act.[14] The scandal plagued his reelection campaign and cost him cabinet members,

7. *See* Gollom, *supra* note 4.

8. SNC-Lavalin Notice of Appeal at 22, SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service), [2019] F.C. 282 (CanLII) (No. T-1843-18) (filed Apr. 4, 2019) (available at https://www.snclavalin.com/~/media/Files/S/SNC-Lavalin/documents/notice-of-appeal-4th-april-2019.pdf) [https://perma.cc/UZN7-H32X]; Seglins, Houlihan, & Montpetit, *supra* note 2 (quoting SNC's notice of appeal).

9. *See* Gollom, *supra* note 4.

10. *See id.*; *Globe Editorial: Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal, supra* note 3 (noting "the company strategically claimed [ten-year debarment] would force it to lay off 9,000 Canadians").

11. *See* Gollom, *supra* note 4 ("The attorney general is supposed to be an independent, non-partisan role, and the most important part of that non-partisan role is the oversight of federal prosecutions").

12. *See Trudeau and Wilson-Raybould: The Crisis that Could Unseat Canada's PM*, BBC News (Aug. 14, 2019), https://www.bbc.com/news/world-us-canada-47408239 [https://perma.cc/7U9R-YHJA].

13. *See* Robert Fife & Steven Chase, *Trudeau Spoke to Wilson-Raybould After Prosecutors Refused SNC-Lavalin Deal*, Globe & Mail (Feb. 20, 2019), https://www.theglobeandmail.com/politics/article-trudeau-reviewed-snc-lavalin-options-with-wilson-raybould-after/?ranMID=46474&ranEAID=TNL5HPStwNw&ranSiteID=TNL5HPStwNw-rNlPgwM8mRVmdQXvrZHQRw [https://perma.cc/7T9B-MT3N] (modified Feb. 21, 2019).

14. *See* Mario Dion, Office of the Conflict of Interest and Ethics Commissioner, Trudeau II Report (2019), https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/TrudeauIIReport-RapportTrudeauII.aspx [https://perma.cc/5JAN-PE4M]; John Paul Tasker, *'I Take Responsibility,' Trudeau Says in Wake of Damning Report on SNC-Lavalin Ethics Violation*, CBC News (Aug. 14, 2019, 11:15 AM), https://www.cbc.ca/news/politics/trudeau-snc-ethics-commissioner-violated-code-1.5246551 [https://perma.cc/Q3T6-X4MQ] (modified Aug. 15, 2019).

parliament seats, and a close advisor.[15] Ultimately, SNC pled guilty to the criminal charges in a uniquely structured plea deal that would allow the company to continue competing for government contracts.[16]

Although the headlines (correctly) paint this saga as a "political scandal," one aspect of this ordeal received less attention. It exposed fundamental flaws in Canada's "Integrity Regime," Canada's draconian approach to debarment that has not only resulted in enforcement challenges,[17] but also weakens Canada's procurement system, fails to protect taxpayer dollars, and disproportionately punishes innocent stakeholders, including employees and investors.[18] Many procurement experts are united in their negative assessment of Canada's debarment policies.[19] It is indeed time for the Canadian government to reassess its approach to this important procurement remedy and enact a system that more effectively protects the government's interests.[20]

This Article addresses the weaknesses in Canada's debarment policies and offers recommendations for reform. Part II of this

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15. *See Globe Editorial: Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal*, *supra* note 3.

16. *See* Kim Mackrael, *Canada's SNC-Lavalin Pleads Guilty to Fraud, Agrees to Pay Fine*, WALL ST. J. (Dec. 18, 2019, 5:38 PM), https://www.wsj.com/articles/canadas-snc-lavalin-pleads-guilty-to-fraud-agrees-to-pay-fine-11576692499 [https://perma.cc/GQB3-9NE9].

17. *See* Elizabeth Acorn, *Twenty Years of the OECD Anti-Bribery Convention: National Implementation and Hybridization*, 51:3 U. BRIT. COLUM. L. REV. 613, 640 (2018).

18. *See* Milos Barutciski & Sabrina A. Bandali, *Corruption at the Intersection of Business and Government: The OECD Convention, Supply-Side Corruption, and Canada's Anti-Corruption Efforts to Date*, 53 OSGOODE HALL L.J. 231, 253 (2015); John Bodrug, Stéphane Eljarrat, & Alysha Manji-Knight, *Government of Canada Consults on Tools to Address Corporate Wrongdoing*, DAVIES (Sept. 28, 2017), https://www.dwpv.com/en/Insights/Publications/2017/Government-of-Canada-Adresses-Corporate-Wrongdoing [https://perma.cc/792Z-67ZZ]; Ann Macaulay, *Addressing Corporate Wrongdoing*, CANADIAN B. ASS'N (Dec. 14, 2017), https://www.cba.org/Publications-Resources/CBA-Practice-Link/Business-and-Corporate/2017/Addressing-corporate-wrongdoing [https://perma.cc/GHP3-TYZZ].

19. *See* TRANSPARENCY INT'L CAN., RESPONSE TO GOVERNMENT OF CANADA CONSULTATION ON INTEGRITY REGIMES 2 (Nov. 17, 2017), http://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c8833a774003e678b023/5df7c87c3a774003e678abe9/1576519804487/TICanada-Response-Integrity-Regime-Gov-Consultation-2.pdf?format=original [https://perma.cc/G9AG-CF36]; Sarah Chaster, *Public Procurement and the Charbonneau Commission: Challenges in Preventing and Controlling Corruption*, 23 APPEAL: REV. CURRENT L. & L. REFORM 121, 143 (2018).

20. *See* W. Michael G. Osborne, *How Trudeau Can Easily Help SNC-Lavalin (and Other Corporate Wrongdoers) Without Corrupting Justice*, FIN. POST (Mar. 19, 2019), https://financialpost.com/opinion/how-trudeau-can-easily-help-snc-lavalin-and-other-corporate-wrongdoers-without-corrupting-justice [https://perma.cc/28AW-X6LS]; *Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal*, GLOBE & MAIL (Dec. 20, 2019), https://www.theglobeandmail.com/opinion/editorials/article-fixing-the-bad-policy-at-the-root-of-the-trudeau-governments-snc/ [https://perma.cc/8G86-57CX].

Article provides an overview of Canada's Integrity Regime. In Part III, the Article contrasts the Canadian debarment policies with the more mature debarment regime of the country's neighbor and trading partner—the United States. Part IV addresses the issues that have stemmed from Canada's current approach to debarment. Finally, Part V offers a proposal for reforming the Canadian regime.

II. Overview of the Canadian Integrity Regime

The Canadian debarment regime is "policy-based" and is comprised of the "Ineligibility and Suspension Policy," directives issued under the Policy, and "integrity provisions, which are contractual clauses used to incorporate the Policy into solicitations, resulting contracts and real property agreements."[21] The current policy has been in place since 2016, though there have been several iterations of the policy since 2012.[22]

Specifically, in July 2012, Public Services and Procurement Canada (PSPC),[23] the principal procurement division of the Canadian federal government, consolidated its existing oversight mechanisms into an official "Integrity Framework."[24] The goal of the Integrity Framework was to "ensure that the government conducts business with ethical suppliers, promotes further efforts to put in place strong corporate compliance frameworks, and holds suppli-

21. Pub. Servs. & Procurement Can., Integrity Regime: Annual Report—April 1, 2018, to March 31, 2019, at 1 (2019), https://www.tpsgc-pwgsc.gc.ca/ci-if/documents/rpri-irr-2018-2019-eng.pdf [https://perma.cc/3SSX-Y2XZ].

22. The journey from the 2012 iteration of the Canadian debarment policy to the current version (most recently updated in April 2016) is somewhat complicated. The background section of this Public Services and Procurement Canada (PSPC) policy update summarizes all of the changes and provides access to historical policy documents. *See generally* Pub. Servs. & Procurement Can., PN-107R2, Update to the Integrity Regime (Apr. 4, 2016), https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R2 (last visited Nov. 10, 2021).

23. Prior to 2016, PSPC was known as "Public Works and Government Services Canada (PWGSC)." For purposes of brevity, we refer to the organization as PSPC throughout this Article. *See* Pub. Servs. and Procurement Can., *Who We Were, Who We Are*, Gov't Can. (Dec. 16, 2020), https://www.tpsgc-pwgsc.gc.ca/apropos-about/canada150/qui-who-eng.html [https://perma.cc/BR38-GT2E].

24. Milos Barutciski et al., *Changes to Canada's Integrity Regime for Public Procurement Create Onerous New Reporting Requirement*, Bennett Jones (Apr. 8, 2016), https://www.bennettjones.com/Publications-Section/Updates/Changes-to-Canadas-Integrity-Regime-for-Public-Procurement-Create-Onerous-New-Reporting-Requirement [https://perma.cc/WM7Z-NSGK]; *Expanding Canada's Toolkit to Address Corporate Wrongdoing: The Integrity Regime Stream Discussion Guide*, Gov't Can. 7 (Dec. 16, 2020), https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/examiner-review-eng.html [https://perma.cc/KYM6-JB2H].

ers accountable for misconduct."[25] Under the 2012 framework, contractors were automatically disqualified from obtaining, among other things, PSPC contracts, for committing a variety of offenses, including: corruption, collusion, bid-rigging, fraud, money laundering, tax evasion, and offenses related to drugs.[26] Subsequently in 2012, "PSPC removed the leniency exemption from the Framework, which previously allowed an applicant to come forward, cooperate and plead guilty in exchange for lenient treatment in sentencing, and introduced a public interest exception."[27]

In 2014, the offenses listed in the Integrity Framework were expanded to include, among other things, extortion, secret commissions, criminal breach of contract, fraudulent manipulation of stock exchange transactions, prohibited insider trading, forgery or other offenses resembling forgery, and falsification of books and documents.[28] In addition, the 2014 revisions established a highly controversial, automatic ten-year debarment period for any supplier "convicted of or having pleaded guilty to an Integrity Framework offence[.]"[29]

This draconian 2014 iteration of the Integrity Framework was short-lived, however, after the new rules almost resulted in the ten-year debarment of Hewlett-Packard Inc., BAE Systems plc, and Siemens AG.[30] The resulting high-profile and sustained pushback against the more severe aspects of the policy[31] eventually led to additional changes to the regime in 2015, including:

- The ability for a supplier to reduce the ineligibility period by up to five years if they addressed the causes of the conduct

25. Pub. Servs. & Procurement Can., *Canada to Enhance Its Toolkit to Address Corporate Wrongdoing,* Gov't Can. (Mar. 27, 2018), https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html#bg (last visited Nov. 10, 2021).

26. *Expanding Canada's Toolkit to Address Corporate Wrongdoing*, *supra* note 24, at 7.

27. *Id.* The public interest exemption outlines the circumstances under which PSPC may enter into a contract with an entity that is currently excluded (i.e., an emergency).

28. *Id.*

29. *Id.* at 8.

30. *See* Barrie McKenna, *Ottawa Could Face Lawsuits for Strict Corruption Rules: Report*, Globe & Mail (Nov. 24, 2014), https://www.theglobeandmail.com/report-on-business/international-business/ottawa-could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/ [https://perma.cc/26ME-XXUY].

31. *See* Andy Blatchford, *Ottawa's Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study*, Canadian Bus. (Nov. 23, 2014), https://www.canadianbusiness.com/business-news/ottawas-anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study/ [https://perma.cc/3LTV-QP9V].

that led to ineligibility, including cooperation with law enforcement and undertaking remedial measures.

- The availability of administrative agreements with PSPC, requiring contractors to comply with stringent remediation measures and agree to oversight by an independent monitor.
- No longer automatically penalizing a supplier for an affiliate's independent actions without proof of involvement.
- Authorizing suspensions up to eighteen months for suppliers charged with a listed offense or who have admitted guilt. The suspensions can be extended pending final disposition of the charges.
- If a conviction occurs during the contract, the government can terminate a contract for default, although suppliers are provided an opportunity to show cause as to why the contract should not be terminated.
- Due process enhancements—including notification of ineligibility/suspension and the processes available to suppliers—as well as an administrative review process that assesses affiliate eligibility.[32]

The 2015 amendments also expanded the application of the Integrity Regime, which was previously limited to PSPC-managed contracts and real property transactions, to all federal procurement and real property transactions under Schedule I, I.1, and II of the Financial Administration Act (with some exceptions).[33] The 2015 updates were articulated in the government's "Ineligibility and Suspension Policy" and "Integrity Clauses."[34] On April 4, 2016, PSPC made additional revisions to the Ineligibility and Suspension Policy, including an anti-avoidance provision designed to close a loophole where suppliers could circumvent an ineligibility determination through corporate reorganization.[35]

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32. *See Expanding Canada's Toolkit to Address Corporate Wrongdoing*, *supra* note 24, at 8; *Ineligibility and Suspension Policy*, GOV'T CAN. (July 14, 2017), https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html [https://perma.cc/K32D-MUNK].

33. *Id.* A list of the participating federal agencies is available at: *Departments and Agencies That Follow the Integrity Regime*, GOV'T CAN. (Dec. 16, 2020), https://www.tpsgc-pwgsc.gc.ca/ci-if/pe-mou-eng.html [https://perma.cc/3U73-6K84].

34. *Expanding Canada's Toolkit to Address Corporate Wrongdoing*, *supra* note 24, at 8 (citing *Ineligibility & Suspension Policy, supra* note 32 and *Integrity Provisions*, GOV'T CAN. (Dec. 16, 2020), https://www.tpsgc-pwgsc.gc.ca/ci-if/clauses-eng.html [https://perma.cc/B337-QREU]).

35. *See Ineligibility and Suspension Policy*, *supra* note 32, § 10 ("PWGSC may determine that a successor entity to an ineligible or suspended supplier is ineligible or suspended, as the case may be, in circumstances where, in the opinion of PWGSC, the succession (e.g.,

Exclusions pursuant to the Ineligibility and Suspension Policy are made by the Registrar of Ineligibility and Suspension under PSPC and have a government-wide effect.[36] Contractors must notify the Registrar "in writing, within 10 business days, of any criminal charges, convictions or other circumstances as described in the Policy with respect to themselves, their affiliates and their first tier subcontractors, as well as any change affecting the list of directors or corporate owners."[37]

The system provides some limited due process for implicated contractors. If a contractor has not been automatically excluded under the Policy, but there is a "reasonable basis for making a determination of ineligibility," PSPC will issue a "Notice of Intention to Declare Ineligible" to the impacted contractor.[38] The contractor may then present evidence and written submissions to PSPC, which "will consider all timely evidence and submissions prior to making its determination."[39] The system includes an "appeal" process by which a contractor "may request a limited review of a determination of ineligibility on the sole basis that it did not direct, influence, authorize, assent to, acquiesce in or participate in the commission of the offence(s) of which its Affiliate has been convicted that resulted in the determination that the supplier is ineligible pursuant to the policy."[40] Notably, the request for review does not stay the determination of ineligibility.[41]

If a contract is terminated due to non-compliance with the Integrity Provisions, contractors are provided with at least two weeks' notice of the contract's termination.[42] Contractors are permitted during this time to demonstrate to the contracting officer why the contract should not be terminated.[43] In lieu of termination, PSPC may enter into an administrative agreement with the contractor.[44]

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merger, acquisition, divestiture, etc.) occurred for the purpose of avoiding the ineligibility or suspension, or where the result of the succession would be the avoidance of the ineligibility or suspension.")

36. *See* PUB. SERVS. & PROCUREMENT CAN., SUPPLY MANUAL, § 8.70.2 (2016) (available at https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/8/70/2) (last visited Nov. 16, 2021).

37. *Id.*

38. *Ineligibility and Suspension Policy, supra* note 32, § 9.

39. *Id.*

40. *Id.* § 11.

41. *Id.*

42. *Id.* § 13.

43. *Id.*

44. *Id.* An administrative agreement is a tool that the government uses to ensure a contractor adopts certain compliance measures. *See Guide to the Ineligibility & Suspension Policy*, GOV'T CAN. (Dec. 16, 2020), https://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html#s6

In response to extensive feedback from industry associations, businesses, justice sector stakeholders (including law enforcement), non-governmental organizations (NGOs), and academics and "over 40 meetings with approximately 370 participants," PSPC announced in Spring 2018 that it intended to make several enhancements to the Integrity Regime, including greater flexibility and discretion in debarment decisions.[45] Subsequently, the Canadian government announced that the enhancements would "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."[46] However, despite these promises, the anticipated "revised" Ineligibility and Suspension Policy has not been released. Indeed, in a 2018 to 2019 Integrity Regime "Annual Report," the government stated the following:

> In the fall of 2018, a public consultation was held to seek input and comments on the application and text of a proposed draft Ineligibility and Suspension Policy and any of its requirements. This consultation provided an opportunity to consider how proposed enhancements to the Regime could be implemented and administered in the context of emerging trends and risks in a changing marketplace. Following this consultation, public discourse regarding corporate wrongdoing and governments' responses to this type of misconduct increased. As a result, the Government announced that it would take additional time to assess aspects of the Policy and possible next steps regarding the Integrity Regime.[47]

As of June 2021, there have been no updates to the Ineligibility and Suspension Policy, nor formal comments on the delayed revisions since the release of the Annual report.

[https://perma.cc/V3TR-BXFG]. In comparison, a remediation agreement is a voluntary agreement between a prosecutor and the contractor that requires approval by a judge. *See Remediation Agreements and Orders to Address Corporate Crime*, Gov't Can. (Sept. 11, 2018), https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html [https://perma.cc/9VS6-QUTY].

45. *Integrity Regime Consultation: Administering Canada's Enhanced Integrity Regime*, Gov't Can. (Nov. 21, 2018), https://www.tpsgc-pwgsc.gc.ca/ci-if/ariac-aceir-eng.html [https://perma.cc/8ZGB-ANBK]; *News Release, Pub. Servs. and Procurement Canada, Canada to Enhance Its Toolkit to Address Corporate Wrongdoing*, Gov't Can. (Mar. 27, 2018), https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html [https://perma.cc/MWJ3-FSFW]; *Expanding Canada's Toolkit to Address Corporate Wrongdoing: What We Heard*, Gov't of Can. (Feb. 22, 2018), https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/rapport-report-eng.html [https://perma.cc/7DSV-DJSZ].

46. *News Release, supra* note 45.

47. Pub. Servs. and Procurement Canada, Integrity Regime: Annual Report—April 1, 2018, to March 31, 2019, at iii (2019), https://www.tpsgc-pwgsc.gc.ca/ci-if/documents/rpri-irr-2018-2019-eng.pdf [https://perma.cc/NC8T-DJZP].

III. The U.S. Suspension and Debarment Regime

In contrast with Canada, the United States offers a more flexible, discretionary, and in many instances, more informal approach to debarment. The federal procurement process is regulated by the Federal Acquisition Regulation (FAR) system, found at title 48 of the Code of Federal Regulations.[48] Part 9.4 of the FAR establishes not only the specific procedures for the suspension or debarment of a government contractor, but also articulates the regime's broader policy goals.[49] Per FAR 9.402: "The serious nature of debarment and suspension requires that these sanctions be imposed *only in the public interest for the Government's protection and not for the purposes of punishment.*"[50] Thus, the system is designed to ensure that the U.S. government only partners with "responsible" business partners and precludes the use of debarment as a punitive tool.[51]

Under FAR 9.4, suspension and debarment are government-wide and forward-looking. They prevent a contractor from obtaining new contracts or subcontracts, but do not generally nullify existing obligations.[52] Moreover, the scope of the exclusion is often calculated to ensure that it is no broader than necessary to protect the government's interests—whether that means the exclusion of an entire company, a single division, a facility, or an individual.[53]

48. *See* 48 C.F.R. § 1.

49. *See* FAR 9.4. Suspension and debarment from federal non-procurement (grants and assistance) programs is governed by the Office of Management and Budget Guidance in 2 C.F.R. § 180 and the agency regulations implementing them. Notably, an exclusion from federal procurement programs is also applicable to non-procurement programs. In other words, any suspension or debarment—regardless of its origin—is government-wide. *See* 2 C.F.R. § 180.

50. FAR 9.402(b) (emphasis added).

51. *Id.*; Jessica Tillipman, *The Congressional War on Contractors*, 45 Geo. Wash. Int'l L. Rev. 236, 236 (2013); *see also* FAR 9.402(b) (2019) ("Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart."); Nathaniel E. Castellano, *Suspensions, Debarments, and Sanctions: A Comparative Guide to United States and World Bank Exclusion Mechanisms*, 45 Pub. Cont. L.J. 403, 412 (2016) ("Given the severe consequences for contractors, which may lose their only source of revenue, and the government customer, which will reduce competition in its own procurement markets, debarment is used in the United States as a prophylactic measure designed to mitigate risk, not to punish a contractor for past behavior.")

52. Jessica Tillipman, *A House of Cards Falls: Why "Too Big to Debar" is All Slogan and Little Substance*, 80 Fordham L. Rev. Res Gestae 49, 50 (2012). Current contracts may, however, be cancelled with the approval of the relevant agency head. *See* FAR 9.405-1(a) (2019).

53. Jessica Tillipman, *Suspension and Debarment Part IV: Discretion*, FCPA Blog (July 16, 2012, 11:02 AM), http://www.fcpablog.com/blog/2012/7/16/suspension-debarment-part-iv-discretion.html [https://perma.cc/8TYB-TT7Z].

Thus, it is not uncommon for a Suspension and Debarment Official (SDO) to limit exclusion to a single division of a large contractor when the misconduct has not permeated the entire company.[54] Conversely, if the misconduct or lack of integrity taints the entire company, suspension or debarment of the whole firm may be in order.[55]

The decision to suspend or debar an organization is based on a two-step analysis. First, the contractor must have engaged in some sort of triggering misconduct, as outlined in FAR 9.406-2 (debarment) and FAR 9.407-2 (suspension). A violation of these so-called integrity offenses may indicate that the contracting entity is not presently responsible and poses a threat to the government.[56] Beyond the specific offenses listed under FAR 9.4, suspension or debarment may also be triggered by serious violations of the terms of the government contract itself, federal tax violations, unfair trade practices, and so forth.[57] In the absence of the specific triggering misconduct referenced above, an agency official may also suspend or debar based on a catch-all finding that "any other cause of so serious or compelling a nature that it affects the present responsibility of [the] contractor" exists.[58] As with other triggers of suspension or debarment, this broadly interpreted provision is designed to capture any conduct that demonstrates that a contractor cannot be trusted to do business with the government.

SDOs are responsible for determining an entity's ability to contract with the government and whether suspension or debarment proceedings are necessary.[59] An SDO's initial finding of wrongdoing or poor performance by a contractor is not conclusive evidence that an entity is an ongoing threat to the government.[60] Rather, the FAR directs SDOs to consider the public interest in "both safeguarding public funds by excluding contractors who may be non-

54. *See* FAR 9.402(a) (2019) ("Debarment and suspension are discretionary actions that . . . are appropriate means to effectuate [the] policy [of working with responsible contractors]"); Tillipman, *A House of Cards Falls, supra* note 52, at 50.

55. *See* Tillipman, *A House of Cards Falls*, *supra* note 52, at 50.

56. Kate M. Manuel, Cong. Research Serv., RL 34753, Debarment and Suspension of Government Contracts: An Overview of the Law Including Recently Enacted and Proposed Amendments 5 (2012).

57. FAR 9.406-2(b), 9.407-2(a).

58. *Id.* at 9.406-2(c), 9.407-2(a)(9).

59. Castellano, *supra* note 51, at 413.

60. *See* Todd J. Canni, *Comments on the Wartime Contracting Commission's Recommendations on Suspension and Debarment*, Service Contractor 19, 20 (Sept. 2011), https://issuu.com/professionalservicescouncil/docs/sc_sept2011_linked) [https://perma.cc/3EV8-WXNL].

responsible *and* not excluding contractors who are fundamentally responsible and could otherwise compete for government contracts."[61] Thus, even upon determining that grounds for suspension or debarment exist, an SDO must then consider whether "mitigating factors" exist that ultimately help an SDO determine whether the contractor is presently responsible.[62] The FAR's list of mitigating factors includes (but is not limited to): (i) whether the contractor had or has since implemented effective internal controls, (ii) whether the contractor self-reported in a timely manner, (iii) whether the contractor has conducted a comprehensive investigation of the circumstances surrounding the cause for debarment and has otherwise cooperated with the government investigation, and (iv) whether the contractor has taken remedial measures.[63]

To accomplish its protective aims, FAR 9.4 grants agency officials' significant discretion to preclude the award of new contracts to companies whose misconduct indicates that they are untrustworthy business partners for the U.S. government. Typically, this process begins when an SDO learns that a government contractor has engaged in a form of misconduct listed in the FAR, as discussed in greater detail below.[64] Upon "adequate evidence" or an indictment for such offenses, the contractor may be suspended from future government contracts.[65] Suspension is a temporary exclusion and may be pursued only to protect the government from imminent harm.[66] Typically, suspension lasts as long as an agency's investigation of or legal proceedings regarding the misconduct for which the contractor was initially excluded.[67] This period must not exceed eighteen months, unless legal proceedings are commenced within that time.[68]

Debarment is a more permanent remedy that generally lasts for up to three years, with the precise length of the exclusion tailored to the seriousness of the misconduct.[69] Debarment is often trig-

61. MANUEL, *supra* note 56, at 7–8.

62. Tillipman, *The Congressional War on Contractors*, *supra* note 51, at 238.

63. FAR 9.406-1(a).

64. FAR 9.406-2, 9.407-2; Jessica Tillipman, *Suspension and Debarment Part III: Mechanics and Mitigating Factors*, FCPA BLOG (June 25, 2012, 12:02 PM), http://www.fcpablog.com/blog/2012/6/25/suspension-debarment-part-iii-mechanics-and-mitigating-facto.html [https://perma.cc/K9ZA-EUFE].

65. FAR 9.407-2.

66. MANUEL, *supra* note 56, at 7–8.

67. *Id.* at 7.

68. *Id.* at 8.

69. *Id.* at 6. FAR 9.4 states that "[d]ebarment shall be for a period commensurate with the seriousness of the cause(s)." FAR 9.406-4(a)(1). While the provision holds that

gered by a criminal conviction or a finding of civil liability for the same categories of misconduct or non-compliance as suspension.[70] As with suspension, debarment is discretionary and is calculated to protect the government against the imminent harm of partnering with a non-responsible organization.[71] Under FAR 9.4, the receipt of a "Notice of Proposed Debarment" results in the immediate suspension of a contractor from the procurement system.[72] The FAR outlines the due process protections afforded to contractors that have been suspended or received a notice of proposed debarment.[73] Generally, the amount of due process afforded to the contractor is commensurate with the type of action under consideration.[74]

IV. Canada's Integrity Regime: A System of Punishment or Protection?

Despite the Canadian Government's numerous (and ongoing) attempts to address concerns about its Integrity Regime, many still criticize the regime as arbitrary, overly punitive, and lacking in transparency.[75] To this day, the Integrity Regime continues to impose lengthy mandatory debarment periods on contractors—regardless of their cooperation or extent of wrongdoing.[76] Even if a company undertakes significant remedial measures, if it is convicted of a "triggering" offense, the company is only able to reduce their automatic ten-year debarment by up to five years, resulting in the total elimination of Canadian government revenue streams for

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debarment generally should not exceed three years, it additionally outlines several exceptions and notes that a debarring official may extend the initial debarment period under certain circumstances. Manuel, *supra* note 56, at 6; FAR 9.406-4(b).

70. FAR 9.406-2(a).

71. Manuel, *supra* note 56, at 5.

72. In contrast, a notice of proposed debarment in the non-procurement context (i.e., grants and loans) does not trigger an immediate exclusion. Joseph D. West, Timothy J. Hatch, Christyne K. Brennan, & Lawrence J.C. VanDyke, *Suspension & Debarment*, Briefing Papers No. 06-9, Aug. 2006, at 6, http://www.gibsondunn.com/publications/Documents/WestHatch-SuspensionDebarmentBriefingPaper.pdf) [https://perma.cc/ZNS9-4XCS].

73. 48 C.F.R. §§ 9.406-3, 9.407-3.

74. Accordingly, as the more permanent remedy, debarment proceedings afford a contractor more extensive due process protections than suspension. *Compare* 48 C.F.R. § 9.406-3, *with* 48 C.F.R. § 9.407-3.

75. *See, e.g.*, *Globe Editorial: Fixing the Bad Policy at the Root of the Trudeau Government's SNC-Lavalin Scandal*, *supra* note 3.

76. *See Canadian Government Overhauls the Integrity Regime for Suppliers—Still Tough to Get Over Debar*, Bennett Jones (July 7, 2015), https://www.jdsupra.com/legalnews/canadian-government-overhauls-the-50240/ [https://perma.cc/ETX5-L5BX].

five years or longer.[77] In some instances, a company's mere temporary suspension—and the collateral consequences that stem from it—are enough to put it out of business.[78] Yet under the Canadian Integrity Regime, five years is the "best" case scenario, even if they cooperate.[79]

Given the inescapable corporate death sentence facing companies—even with a "reduced" five-year debarment period—the inflexibility of the Canadian Integrity Regime may have a chilling effect on company self-reporting and cooperating. Companies have little incentive to disclose wrongdoing to the government when the consequences are so harsh and inevitable. Not only does this disincentivize companies to spend resources to remediate compliance issues, it makes it more difficult for the Canadian government to identify and address wrongdoing among its suppliers.

Moreover, the current Canadian approach to debarment could likely have the impact of undermining the goals of the Canadian procurement system—not advancing them. At its core, the decision to exclude a company from future contracting opportunities drastically impacts not only the contractor, but also the government's ability to effectively serve the population it governs. As the Canadian Bar Association recently noted in its comments on the 2018 revised draft Ineligibility and Suspension Policy, debarment can adversely "affect 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."[80] Although debarment can, under the appropriate circumstances, be a powerful remedy to protect government interests, if inappropriately calibrated, the consequences can do more harm to a procurement system than good.

The SNC "scandal" is an example of what happens when an overly harsh debarment policy collides with reality. SNC, one of Canada's leading engineering and construction firms and one of the ten largest construction firms in the world had, between 2004 and 2014, approximately $4.7 billion (CAD) in contracts with the

77. *See supra* Part II.

78. Christopher Beam, *Contract Killer*, SLATE (Mar. 31, 2011), https://slate.com/news-and-politics/2011/03/usaid-aed-suspension-why-did-usaid-suspend-one-of-its-biggest-contractors-without-any-explanation.html [https://perma.cc/HPP7-3YAW].

79. *See Canadian Government Overhauls the Integrity Regime for Suppliers—Still Tough to Get Over Debar*, *supra* note 76.

80. CANADIAN B. ASS'N, REVISED DRAFT INELIGIBILITY AND SUSPENSION POLICY (INTEGRITY REGIME) 2 (2018), https://www.cba.org/CMSPages/GetFile.aspx?guid=C6eb3cc7-d9bb-4c5f-8c14-0dad5e102336 [https://perma.cc/M5H9-EA2T].

Canadian federal government.[81] In 2015, the Canadian government charged SNC with defrauding and bribing Libyan government officials in exchange for favorable construction contracts.[82] Canadian authorities alleged that the company paid roughly $48 million (CAD) in bribes and defrauded Libyan agencies of $130 million (CAD) between 2001 and 2011.[83] Specifically, on February 19, 2015, the PPSC charged SNC and two of its subsidiaries (SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc.) with one count each of fraud under § 380 of the Criminal Code of Canada and one count each of corruption under § 3(1)(b) of the Corruption of Foreign Public Officials Act (CFPOA).[84]

Notably, during this time period, Canada had no statutory framework for DPAs for companies charged with bribing foreign government officials. In contrast with other countries, including the United States, which routinely settle foreign bribery allegations via DPA, companies faced with charges under the CFPOA had no similar path towards settlement.[85] Consequently, as a Canadian government contractor, SNC faced the potentially devastating consequence of debarment under Canada's Integrity Regime. In an effort to change its fate, from 2016 through 2018, SNC held approximately eighty meetings with various government officials where it lobbied for changes to the Criminal Code.[86] Specifically, the company sought to introduce DPAs into the Canadian criminal justice system—providing it with the opportunity to settle the crim-

81. Juan G. Ronderos, Michelle Ratpan & Andrea Osorio Rincon, *Corruption and Development: The Need for Internal Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities*, 53 Osgoode Hall L.J. 334, 355 (2015). In 2017, approximately one-third of SNC's $9.3 billion (CAD) in revenues came from Canada—one-half of which was likely from federal contracts. *See Here's What a 10-Year Ban on Federal Contract Bids Would Mean for SNC-Lavalin,* CBC (Mar. 7, 2019, 5:34 PM), https://www.cbc.ca/news/business/financial-fall-out-snc-lavalin-1.5047742 [https://perma.cc/THH3-LPSU].

82. Austen, *supra* note 1.

83. Seglins, Houlihan, & Montpetit, *supra* note 2. In December 2019, SNC pled guilty to paying $127 million in bribes. Austen, *supra* note 2.

84. *See* Richard L. Cassin, *Canada Charges SNC-Lavalin for Libya Bribes*, The FCPA Blog (Feb. 19, 2015, 4:28 PM), https://fcpablog.com/2015/02/19/canada-charges-snc-lavalin-for-libya-bribes/ [https://perma.cc/HDM8-TW9H].

85. *See Does Canada Need a Deferred Prosecution Agreement Process?*, PWC, https://www.pwc.com/ca/en/services/deals/forensic-services/forensic-content-hub/does-canada-need-a-deferred-prosecution-agreement-process.html [https://perma.cc/Q3FD-ARUW].

86. *See* David Cochrane, *Inside SNC-Lavalin's Long Lobbying Campaign to Change the Sentencing Rules*, CBC (Feb. 14, 2019, 7:31 PM), https://www.cbc.ca/news/politics/snc-lavalin-trudeau-bribery-fraud-wilson-raybould-1.5020498 [https://perma.cc/2MB6-6MJW]; *see SNC Lavalin Pushes for Deferred Prosecution Agreements in Canada*, Corp. Crime Rep. (Jan 31, 2017, 9:46 PM), https://www.corporatecrimereporter.com/news/200/snc-lavalin-pushes-for-deferred-prosecution-agreements-in-canada [https://perma.cc/K5XE-G5XN].

inal charges and avoid a ten-year debarment that could stem from a conviction.[87]

Ultimately, SNC's lobbying campaign paid-off: the Canadian Government added DPAs (referred to as "remediation agreements") to the Criminal Code of Canada in September 2018.[88] The remediation agreements codified in Part XXII.1 of the Criminal Code may be used in instances including bribery, fraud, and corruption under the Criminal Code, as well as certain offenses under the CFPOA.[89] Under the remediation agreement regime, in order for a company to be eligible for an agreement, a prosecutor must be convinced it is in the public interest.[90] However, for foreign corruption cases "the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved."[91] In addition, the attorney general must approve the prosecutor's decision to pursue a remediation agreement in lieu of a prosecution.[92] Finally, unlike the U.S. regime, which permits prosecutors to enter DPAs at their own discretion, under the Canadian regime a judge must approve of the terms of the deal.[93]

87. *See* Simon Nakonechny & Jonathan Montpetit, *SNC-Lavalin Flagged Possible Breakup of Company to Quebec Government While Seeking Deal to Defer Prosecution*, CBC (Apr. 28, 2021, 5:40 PM), https://www.cbc.ca/news/canada/montreal/snc-lavalin-dpa-quebec-legault-1.6004439 [https://perma.cc/YQ5X-7EMH].

88. *See* Bill C-74, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and other Measures, S.C. 2018, c 12 (Can.).

89. *See* Criminal Code, R.S.C. 1985, c C-46, Part XXII.1, s 715.32 (Can.), *reviewed in* Pub. Prosecution Serv. Can., Public Prosecution Service of Canada Deskbook, 3.21 Remediation Agreements (2014) (last modified Jan. 1, 2020), https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html [https://perma.cc/2GP7-TSM6] [hereinafter Can. Criminal Code]; Daniel Thomas et al., *Deal or No Deal—Anticipating the Frist DPA/Remediation Agreement in Canada*, McCarthy Tetrault (Mar. 12, 2020), https://www.mccarthy.ca/en/insights/blogs/terms-trade/deal-or-no-deal-anticipating-first-dparemediation-agreement-canada [https://perma.cc/VGX8-LX46].

90. *See* Can. Criminal Code, s 715.32.

91. *Id.* s 715.32(3). According to the former clerk to the privy counsel and secretary to the cabinet, considering the "national economic interest" means you cannot provide preferential treatment to a company because it will benefit a certain country, but he stated that "the economic impacts of jobs—and it's explicitly in the criminal code, the impact on suppliers, pensioners, customers, communities—is a relevant public interest consideration." Carl Meyer and Mike De Souza, *Gerald Butts Takes Responsibility for Breakdown in Trust Between Wilson-Raybould and Trudeau*, Nat'l Observer (Mar. 6, 2019), https://www.nationalobserver.com/2019/03/06/news/gerald-butts-takes-responsibility-breakdown-trust-between-wilson-raybould-and [https://perma.cc/VA42-LJTV].

92. Pub. Prosecution Serv. Can., Public Prosecution Service of Canada Deskbook, 3.21 Remediation Agreements (2014) (last modified Jan. 1, 2020), https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html [https://perma.cc/5TED-947F].

93. *See id.*

Despite SNC's successful efforts to change the law, in 2018, the Director of Public Prosecutions (DPP),[94] Kathleen Roussel, rejected SNC's petition for a remediation agreement and proceeded with criminal charges.[95] And in March 2019, the Federal Court of Canada[96] dismissed SNC's application for judicial review of the DPP's decision.[97] In light of the high-profile breakdown in negotiations with the DPP, SNC publicly warned that the automatic debarment that would likely result from a criminal conviction could cost nearly nine thousand Canadians their jobs and have grave economic consequences, particularly in Quebec.[98]

Concerned about the economic impact of a potential SNC debarment, Canadian Prime Minister Justin Trudeau intervened in the matter by attempting to convince the then-Acting Attorney General, Jody Wilson-Raybould, to reconsider negotiating a remediation agreement with SNC.[99] Ms. Wilson-Raybould rejected Mr. Trudeau's requests, explaining that a prosecution was in the public interest due to the seriousness and breadth of SNC's conduct, the duration of time over which the illegal conduct occurred, and "how high the scheme went in the hierarchy of the company."[100] Shortly thereafter, Ms. Wilson-Raybould was reassigned

94. The Director of Public Prosecutions (DPP) is the Deputy Attorney General of Canada. *See Roles of the Attorney General and the Director of Public Prosecutions*, PUB. PROSECUTION SERV. CAN. (Mar. 19, 2020), https://www.ppsc-sppc.gc.ca/eng/tra/tr/03.html [https://perma.cc/5PBK-Z7AR].

95. *See Immunity and Leniency Programs Under the Competition Act*, GOV'T CAN. ¶ 13 (Mar. 15, 2019), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html [https://perma.cc/TAB2-HZA9]. In 2018, the DPP rejected SNC's petition for a remediation agreement and proceeded with criminal charges. *See* SNC-Lavalin, *Update on the Federal Charges by the Public Prosecution Service of Canada,* CISION (Oct. 10, 2018), https://www.newswire.ca/news-releases/update-on-the-federal-charges-by-the-public-prosecutor-service-of-canada-696586891.html) [https://perma.cc/4ZW9-GGVH].

96. The Federal Court of Canada has jurisdiction over lawsuits against the government and other specialized areas of the law. Peter K. Dooby & Patrick Bendin, *Federal Courts of Canada*, CANADIAN ENCYCLOPEDIA (Feb. 2, 2006), https://www.thecanadianencyclopedia.ca/en/article/federal-court-of-canada [https://perma.cc/B3FB-7RHV].

97. *See* SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service), [2019] F.C. 282 (CanLII); SNC-Lavalin Notice of Appeal, *supra* note 8, at 3.

98. *See* Gollom, *supra* note 4.

99. *See SNC-Lavalin Got What It Wanted. It's Still a Win for the Rule of Law*, GLOBE & MAIL (Dec. 18, 2019), https://www.theglobeandmail.com/opinion/editorials/article-snc-lavalin-got-what-it-wanted-its-still-a-win-for-the-rule-of-law/ [https://perma.cc/3939-G32S]; *SNC-Lavalin: Trudeau Denies Wrongdoing in Corruption Case*, BBC (Feb. 28, 2019), https://www.bbc.com/news/world-us-canada-47362657 [https://perma.cc/8G73-QCFC]. According to the Ethics Commissioner's report, Mr. Trudeau had contravened the Conflict of Interest Act, SC 2006, c 9. *See* DION, *supra* note 14.

100. Robert Fife, *No Deal Offered to SNC Due to Severity of Charges: Prosecutor*, GLOBE & MAIL (Feb. 28, 2020); Robert Fife, *Prosecutor Says No Deal was Offered to SNC-Lavalin Due to Severity of Charges and Past Behaviour,* GLOBE & MAIL (Feb. 28, 2020), https://

as the Head of Veteran Affairs.[101] News broke in February 2019 of Mr. Trudeau's alleged improper interference and undue influence on Ms. Wilson-Raybould, an independent government official.[102] In August of 2019, the Ethics Commissioner released a report determining Mr. Trudeau's efforts to pressure the Attorney General to grant the DPA violated the Conflict of Interest Act.[103] Mr. Trudeau's interference in a traditionally independent criminal matter became an international scandal and lost Mr. Trudeau's Liberal Party twenty-seven seats and the popular vote in a subsequent election.[104]

Several months later, on December 18, 2019, SNC entered into a unique plea deal with the PPSC where an SNC-Lavalin Construction unit agreed to plead guilty to a single count of fraud in relation to its misconduct in Libya.[105] In settling the matter with the DPP, the company agreed to pay a $280 million (CAD) fine, strengthen its compliance program, and retain an independent

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www.theglobeandmail.com/politics/article-top-federal-prosecutor-says-she-felt-no-political-pressure-on-snc/ [https://perma.cc/G4RP-LF9Z]. Five former attorneys general wrote an open letter requesting the Royal Canadian Mounted Police to investigate the "disturbing pattern of events" described by Ms. Wilson-Raybould. Samantha Beattie, *5 Ex-Attorneys General Call For RCMP Probe Into SNC-Lavalin Affair*, HUFFINGTON POST (Mar. 1, 2019, 10:49 AM), https://www.huffingtonpost.ca/2019/03/01/5-ex-attorneys-general-call-for-rcmp-probe-into-snc-lavalin-affair_a_23681656/ [https://perma.cc/MWP8-GSNB].

101. *See Trudeau and Wilson-Raybould: The Crisis That Could Unseat Canada's PM*, *supra* note 12.

102. Fife & Chase, *supra* note 13.

103. DION, *supra* note 14; John Paul Tasker, *'I take responsibility,' Trudeau Says in Wake of Damning Report on SNC-Lavalin Ethics Violation*, CBC NEWS (Aug. 14, 2019, 11:15 AM), https://www.cbc.ca/news/politics/trudeau-snc-ethics-commissioner-violated-code-1.5246551 [https://perma.cc/K6GX-4QCN].

104. *See* Cedric Sam, *Canada Election Results: Trudeau Wins Re-Election—With a Minority*, BLOOMBERG (Oct. 23, 2019, 7:00 PM), https://www.bbc.com/news/world-us-canada-47362657 [https://perma.cc/3W8C-SJCS].

105. *See SNC-Lavalin Pleads Guilty to Fraud, Will Pay a $280 Million Fine Related to Libya Work*, FIN. POST (Dec. 18, 2019), https://financialpost.com/news/fp-street/snc-lavalin-pleads-guilty-to-fraud-will-pay-a-280m-fine-for-libyan-work [https://perma.cc/C8XD-CEBD]. The Public Prosecution Service of Canada (PPSC) found a subsidiary of SNC—which had been inactive since 2015—guilty of defrauding the government of Libya. *See* Allison Lampert, *Canada's SNC-Lavalin Unit Pleads Guilty to Fraud Charge in Libya Case*, REUTERS (Dec. 18, 2019, 10:49 AM), https://www.reuters.com/article/us-snc-lavalin-court/canadas-snc-lavalin-unit-pleads-guilty-to-fraud-charge-in-libya-case-idUSKBN1YM1V0 [https://perma.cc/74AX-Q8L5]. The parent company, however, did "not anticipate that the guilty plea by [the] construction subsidiary . . . [would] affect the eligibility of SNC-Lavalin group companies to bid on future projects[.]" SNC-Lavalin Press Release, SNC-Lavalin Group Settles Federal Charges (Dec. 18, 2019), https://www.snclavalin.com/en/media/press-releases/2019/18-12-2019 [https://perma.cc/PE7F-4NP5]; *see* Lampert, *supra* note 105.

monitor.[106] In return, the PPSC withdrew all charges against SNC-Lavalin Group Inc. and its international marketing arm, SNC-Lavalin International Inc.[107] Notably, at the time of settlement, the construction unit pleading guilty to the fraud charge had been inactive (meaning it had not bid on any new contracts) since 2015.[108] Nevertheless, the structure of the plea deal enabled SNC to avoid debarment with PSPC, though four of its subsidiaries were subject to a five-year debarment in Quebec under the city's Anti-Corruption Act.[109]

The SNC/Trudeau scandal is a prime example of how a poorly drafted debarment policy can do more harm than good. At the same time SNC was negotiating with the DPP in 2019 for a remediation agreement related to its misconduct in Libya, it had already been excluded since 2013 by the World Bank for unrelated misconduct in Bangladesh.[110] Under the Negotiated Resolution Agreement between the World Bank and SNC, SNC and its affiliates agreed to cooperate with the World Bank's Integrity Vice-Presidency, improve their internal compliance program, and retain an independent compliance monitor.[111] The company was also under an administrative agreement with PSPC, which not only allowed it to remain eligible for Canadian government contracts, but also reinforced the company's commitment to improving its ethics and compliance program.[112] Consequently, by the time the DPP con-

106. *See SNC-Lavalin Pleads Guilty to Fraud, Will Pay a $280 Million Fine Related to Libya Work*, *supra* note 105.

107. *See* Lampert, *supra* note 105.

108. *Id.*

109. *See SNC-Lavalin Subsidiaries Barred From Public Contracts in Quebec for Five Years*, CTV NEWS (Feb. 6, 2020), https://www.ctvnews.ca/business/snc-lavalin-subsidiaries-barred-from-public-contracts-in-quebec-for-five-years-1.4800367 [https://perma.cc/K37A-BD9V]. SNC is barred from public procurement bids until January 2025. *See also* Lampert, *supra* note 105.

110. *See* Press Release, World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 years (Apr. 17, 2013), https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years [https://perma.cc/9W2J-JLKD].

111. *See id.* The World Bank lifted SNC's debarment two years early due to the company's overhaul of its ethics and compliance program. Robb M. Stewart, *SNC-Lavalin Says World Bank Lifts Sanctions Imposed in 2013*, WALL ST. J. (Apr. 20, 2012), https://www.wsj.com/articles/snc-lavalin-says-world-bank-lifts-sanctions-imposed-in-2013-11618942254#:~:text=the%20debarment%20stemmed%20from%20the,south%20with%20the%20capital%2C%20Dhaka.&text=the%20World%20Bank%20also%20said,the%20course%20of%20its%20investigation [https://perma.cc/ER3V-S496].

112. *SNC-Lavalin Signs Agreement with New Version of PWGSC*, CANADIAN CONSULTING ENG'R (Dec. 15, 2015), https://www.canadianconsultingengineer.com/engineering/snc-lavalin-signs-agreement-with-new-version-of-pwgsc/1003401544/ [https://perma.cc/B2M7-B6MP].

sidered whether to enter into a DPA with SNC, the company had already spent years remediating wrongdoing, enhancing its compliance program, and improving its company culture. Thus, it is hard to see how the Canadian procurement system would have benefitted from automatically excluding a company under these circumstances.

This scenario is not unique. The United States and European Union faced similar issues in 2008 and 2011 when Siemens AG (Siemens) and BAE Systems plc (BAE) faced charges under the Foreign Corrupt Practices Act (FCPA) for their alleged bribery of government officials in foreign countries.[113] At the time, then-Article 45 of the E.U. Public Sector Procurement Directive required contractors convicted of any of the following crimes to be debarred from public procurement: (1) participation in a criminal organization, (2) corruption, (3) fraud, or (4) money laundering.[114] To avoid the exclusion of what was then two of Europe's biggest contractors,[115] the United States never charged Siemens or BAE with substantive anti-bribery violations of the FCPA. Instead, both companies settled with the U.S. government, admitting to lesser charges to avoid triggering mandatory debarment.[116] Indeed, the settlement documents made clear that the agreements were purposefully structured to avoid this draconian outcome.[117] For exam-

113. *See* Department's Sentencing Memorandum, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL, at 10–11 (Dec. 12, 2008); U.S. Dep't of State Press Release No. 2011/762, BAE Systems plc Enters Civil Settlement of Alleged Violations of the AECA and ITAR and Agrees to Civil Penalty of $79 Million (May 17, 2011).

114. Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, BRIEFING PAPERS No. 11–9, Aug. 2011, https://ssrn.com/abstract=1924333 [https://perma.cc/TGK5-7J85] (citing Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, art. 45, 2004 O.J. (L 134) 144.).

115. The United Kingdom was still a member of the European Union in 2011 when BAE settled its FCPA-related enforcement action with the United States and was therefore subject to the European Union's mandatory debarment rules at that time. *See What is Brexit?*, GOV'T OF NETH., https://www.government.nl/topics/brexit/question-and-answer/what-is-brexit (last visited Nov. 21, 2021). Siemens and BAE remain two of the biggest contractors in Germany and the United Kingdom, respectively. *See We are Siemens in Germany,* SIEMENS, https://new.siemens.com/global/en/company/jobs/our-locations/germany.html [https://perma.cc/QPL3-AYTJ]; *Top 10 Defence Companies: BAE Systems #3*, DEF. IQ PRESS (June 12, 2013), https://www.defenceiq.com/air-land-and-sea-defence-services/articles/top-10-defence-companies-bae-systems-3#:~:text=headquartered%20in%20London%2C%20UK%2C%20BAE,in%20a%20%247.7%20billion%20deal [https://perma.cc/Q6A6-2AZ7].

116. *See* Department's Sentencing Memorandum, *supra* note 113, at 11; U.S. Dep't of State Press Release, *supra* note 113.

117. U.S. Dep't of State Press Release, *supra* note 113.

ple, the settlement agreement between the United States and BAE stated the following:

> Mandatory exclusion under EU debarment regulations is unlikely in light of the nature of the charge to which BAES is pleading. Discretionary debarment will presumably be considered and determined by various suspension and debarment officials. The Department will communicate with U.S. debarment and regulatory authorities, and relevant foreign authorities, if requested to do so, regarding the nature of the offense of which BAES has been convicted, the conduct engaged in by BAES, its remediation efforts, and the facts relevant to an assessment of whether BAES is presently a responsible Government contractor.[118]

The settlement agreement between the United States and Siemens contained similar language.[119] The European Union's debarment regime has since been overhauled so that it no longer triggers the many issues created by its earlier, more rigid iteration,[120] yet it remains a cautionary tale of the consequences of an inflexible debarment regime: jobs and economies threatened, charges that do not fully reflect the crimes that have been allegedly committed, and the undermining of public confidence in both the criminal justice and procurement systems.[121]

In contrast with the Canadian (and former E.U.) debarment regimes, the U.S. system grants SDOs the flexibility to suspend or debar risky contractors, while simultaneously preventing unnecessary exclusions and protecting contractors' due process rights. The significant discretion and flexibility integrated into the U.S. regime requires SDOs to consider factors beyond the triggering misconduct to ensure that any exclusion is carefully calibrated and that important business partners are not eliminated unless truly necessary to protect the government from imminent harm.[122] By providing SDOs with the discretion to determine whether exclusion is truly in the government's best interests, the U.S. debarment

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118. *See* United States' Sentencing Memorandum, United States v. BAE Sys. Plc, No. 10-cr-00035, at 15 (Feb. 22, 2010).

119. *See* Department's Sentencing Memorandum, *supra* note 113, at 11 ("The [DOJ's] analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts.").

120. *See* Lauren O. Youngman, *Deterring Compliance: The Effect of Mandatory Debarment Under the European Union Procurement Directives On Domestic Foreign Corrupt Practices Act Prosecutions*, 42 PUB. CONT. L.J. 2, 411–29 (2013) (provides an overview of issues caused by the European Union's old debarment regime).

121. *See* GERRY FERGUSON, GLOBAL CORRUPTION: LAW, THEORY & PRACTICE 726–27 (3d ed. 2018).

122. 48 C.F.R. § 9.406-1(a).

regime not only protects taxpayer dollars, but ensures that the U.S. procurement system can continue to function effectively. As the SNC scandal demonstrated, the exclusion of a large company from a country's procurement system can have a devastating impact on employees, the economy, and the procurement system.[123] For instance, in certain fields, the government relies on only one or two companies that are capable of fulfilling its contract requirements.[124] These companies are often crucial business partners to governments; thus, their exclusion goes beyond inconvenience and should not be considered lightly.[125] Indeed, the suspension or debarment of a government's largest contractor could have serious implications on basic government functions.[126] Robbing a debarring official of the discretion to decide whether a debarment is truly in the government's best interests through an automatic debarment regime can have a devastating impact on countries.

Discretionary debarment regimes have other benefits that can never be realized in a system that robs debarment officials of their discretion. In addition to protecting the government's interests, these regimes can have a beneficial impact on contractor ethics and compliance programs.[127] The threat of terminating a contractor's vital government revenue streams provides debarring officials with substantial leverage to encourage ethical transformations in a company and its employees.[128] By making "present responsibility" the benchmark for avoiding exclusions and remaining eligible for lucrative government business, debarring officials retain the powerful threat of debarment, while providing a clear route to a continued business relationship.[129] Indeed, this carrot-and-stick power would be eliminated if contractors viewed suspension or debarment as inevitability, rather than an avoidable danger.

Under the U.S. system, SDOs have the discretion to determine the best solutions to enhance compliance for a particular contractor and to improve that contractor's internal ethics and compli-

123. *See Here's What a 10-Year Ban on Federal Contract Bids Would Mean for SNC-Lavalin*, *supra* note 81.

124. Tillipman, *A House of Cards Falls, supra* note 52, at 56–57.

125. *Id.*

126. *Id.* at 57 ("The immediate debarment of one of these contractors would leave a monopoly at best, and a vacuum at worst.").

127. *See* IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION, PHASE 4 REPORT, OECD 28 (2020), https://www.justice.gov/criminal-fraud/file/1337591/download [https://perma.cc/H5RT-4AZ9].

128. Tillipman, *The Congressional War on Contractors*, *supra* note 51, at 242.

129. *Id.* at 247.

ance program in a targeted manner.[130] SDOs often enter into administrative agreements with contractors requiring the company to meet specific requirements tailored to that contractor's weaknesses.[131] For example, a contractor may be obligated to retain an independent compliance monitor, conduct employee trainings, overhaul its internal controls system, and so forth.[132] The decision to suspend or debar often turns on a company's *reaction* to discovered misconduct and the steps the company has taken to improve its culture of ethics and compliance.[133] This makes the U.S. suspension and debarment regime a powerful means to incentivize change and improve the integrity of the entire industry.

Additionally, the U.S. regime recognizes that bankrupt companies cannot afford sophisticated compliance programs. As previously discussed, the debarment of a company often amounts to a corporate death sentence.[134] But putting imperfect companies out of business or pushing them to the brink of bankruptcy is not a productive method of effecting change. By ignoring potential mitigating factors and simply excluding corporate transgressors, the procurement system "would lose the opportunity to influence and motivate positive corporate behavior."[135] The U.S. system instead allows contractors, when appropriate, to retain sufficient revenue, but mandates that they use that revenue to meet the government's present responsibility standards.[136] This is a fair and effective method of encouraging robust corporate compliance regimes.

Finally, the U.S. system's realistic focus on present responsibility and mitigating factors prevents the perfect from becoming the enemy of the good. Experienced SDOs understand that no matter how robust a company's ethics and compliance program may be, no company is immune from some degree of internal misconduct.[137] Large government contractors have thousands of employees conducting business in precarious markets around the globe.[138] Even a strong ethical culture and state-of-the-art system of internal controls and compliance measures cannot prevent

130. *Id.* at 239.
131. West, Hatch, Brennan, & VanDyke, *supra* note 72.
132. *Id.* at 14–15.
133. *See id.*
134. *See, e.g.*, Beam, *supra* note 78 (describing the collapse of a government contractor, Academy for Education Development, following its sudden suspension by the United States Agency for International Development).
135. *Id.* at 55.
136. Tillipman, *The Congressional War on Contractors*, *supra* note 51, at 242.
137. Tillipman, *A House of Cards Falls*, *supra* note 52, at 54.
138. *Id.*

employee misconduct. Designing a debarment system as if contractors can achieve *zero* misconduct is unrealistic. By instead allowing wayward contractors to demonstrate their present responsibility through cooperation, extensive ethical transformations, and compliance enhancements, the U.S. regime incentivizes good business while simultaneously protecting government interests and avoiding over-punishment.

V. Recommendations for Reform

Canada could benefit from a more flexible approach to its Integrity Regime, which, despite its progressive amendments, still remains quite rigid. In 2017, federal officials conducted a public consultation which concluded that even a five-year debarment was too long.[139] The report explained that "[t]he principal view was to favour full discretion in the determination of a period of ineligibility, including the ability to reduce the period to zero."[140]

Although the Canadian government has promised an update to its Ineligibility and Suspension Policy, it has yet to be released.[141] Procurement experts hope that if/when an update is finally released, it will eliminate the inefficiencies and rigidity that plagues the current iteration of the Integrity Regime.[142] A 2019 news report suggests that revisions may be somewhat responsive to a few of these concerns, explaining: "[a] draft of the Liberal government's new scheme released last fall shows the revised provisions will carry no minimum ineligibility period. The government official in charge of federal procurement, Public Services Minister Carla Qualtrough, believes this "change would address concerns raised by companies about the 'lack of flexibility' in the 10-year suspension terms."[143] Nevertheless, as of May 2021, the Government of Canada has yet to release the integrity-regime update.

139. *See Expanding Canada's Toolkit to Address Corporate Wrongdoing*, *supra* note 24, at 9.

140. *Id.*

141. *See* Christopher Naudie, Michael Fakete, & Peter Franklyn, *Government of Canada Announces Significant Expansion of Integrity Regime for Federal Contracting*, Osler (Mar. 29, 2018), https://www.osler.com/en/resources/regulations/2018/government-of-canada-announces-significant-expansion-of-integrity-regime-for-federal-contracting [https://perma.cc/EM48-JPWA].

142. *See* Letter from W. Michael G. Osborne, Member, CBA Anti-Corruption Team, Canadian Bar Ass'n, to Hon. Diane Finley, Minister of Public Works and Gov't Services 2 (Apr. 9, 2015), https://www.cba.org/CMSPages/GetFile.aspx?guid=7ab6baeb-edfc-499e-acf8-dd262b5a9bb3 [https://perma.cc/Y6PM-6D2U].

143. *See* Andy Blatchford, *Liberals Postpone Policy Update That Could Help SNC-Lavalin Avoid Ban From Federal Business*, Nat'l Post (June 1, 2019), https://nationalpost.com/news/delay-in-policy-update-that-could-prevent-snc-lavalin-ban-from-federal-business

Critics of discretionary debarment regimes often argue that injecting greater flexibility and discretion into a debarment regime (by eliminating mandatory minimum exclusions) will somehow weaken a procurement system or otherwise undermine a country's approach to fraud and corruption.[144] Such criticisms are unfounded. A debarment regime that ties the hands of government officials effectively leaves them with two options: (1) potentially damaging the economy, procurement system, and livelihoods of innocent employees, or (2) engaging in legal gymnastics to enter into settlements that fail to reflect the misconduct that actually occurred in order to avoid triggering rigid debarment rules.

As demonstrated by the U.S. debarment system, there is a third option: a discretionary debarment regime that empowers government officials to make decisions that are actually in the best interests of the government.[145] Canadian officials should be entrusted with the authority to determine whether a company is truly a threat to the government procurement system. Forcing the exclusion of a company that is actively addressing past misconduct, investing in compliance enhancements, and working to promote an ethical culture within the company serves no one's best interests. Moreover, it actively undermines a powerful tool that the government could use to induce ethical transformations in Canadian suppliers.

As of June 2021, only three suppliers are currently excluded pursuant to the Ineligibility and Suspension Policy.[146] There is also only one company with an active administrative agreement with PSPC.[147] In contrast, according to the latest report from the U.S. Interagency Suspension & Debarment Committee, in FY2019

[https://perma.cc/4YGS-YAGU]; Andy Blatchford & Jim Bronskill, *Changes to Federal Integrity Regime Would Add 'Flexibility' to Procurement Bans: Liberal Minister*, DAILY MAIL (Feb. 28, 2019), https://www.theglobeandmail.com/politics/article-changes-to-federal-integrity-regime-would-add-flexibility-to/ [https://perma.cc/T8E5-2BBV].

144. Peter Mantas, *Canadian DPA? Cross-Country Consultations Begin*, WHITE COLLAR POST (Oct. 31, 2017), https://whitecollarpost.com/canadian-dpa-cross-country-consultations/#page=1 [https://perma.cc/6DPX-SQEC].

145. See Samantha Block, *Defying Debarment: Judicial Review of Agency Suspension and Debarment Actions*, 86 GEO. WASH L. REV. 1316, 1345 (2018).

146. *Ineligible and Suspended Suppliers Under the Integrity Regime*, GOV'T CAN. (Dec. 16, 2020), https://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html [https://perma.cc/ZE8L-NAY4]. The list of ineligible and suspended suppliers only includes corporate suppliers. It is possible that there are currently individuals excluded from contracting with the Canadian federal government, but because Canada neither lists excluded individuals publicly, nor releases anonymized data about these exclusions, there is no way for the public to verify whether there are any other exclusions beyond this list.

147. *Suppliers with Administrative Agreements Under the Integrity Regime*, GOV'T CAN. (Dec. 21, 2020), https://www.tpsgc-pwgsc.gc.ca/ci-if/ententes-agreements-eng.html [https://perma.cc/FRY7-PQWW].

alone, federal agencies debarred 1,199 contractors, suspended 722 contractors, and entered into 54 administrative agreements.[148] Although there are stark differences between the size of the U.S. and Canadian procurement systems (as well as bases for debarment[149]), the delta between the Canadian and U.S. debarment-related statistics is too large to be ignored. It is, of course, possible that Canada has far less corruption or fraud than the United States, though it is more likely that Canada is not actively utilizing its integrity tools. To be clear, this Article is not advocating for "more debarments," as excluding more contractors does not equal a stronger procurement system. But in a system that spends roughly $22 billion (CAD) per year on procurement,[150] having only three exclusions and one administrative agreement is somewhat suspect.

As the United States has learned, debarment (and other similar tools) can be powerful drivers of ethical transformation in a procurement regime.[151] When used properly, they can protect the government by excluding unscrupulous and poorly performing contractors, while retaining contractors that have spent significant time and resources remediating past wrongdoing and investing in significant compliance enhancements. By implementing some of the "best practices" developed by other country's debarment regimes, Canada can have a debarment system that truly "protect[s] and safeguard[s] the use and expenditure of public funds . . . ensure[s] stewardship and transparency, and . . . uphold[s] the public trust in relation to its contracts and real property agreements."[152]

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148. Letter from Lori Y. Vassar, Chair, Interagency Suspension and Debarment Comm. ("ISDC"), and Monica Aquino-Thieman, Vice Chair, ISDC, to Hon. Ron Johnson, Chairman, Comm. on Homeland Sec. and Gov't Affairs 3 (Jan. 15, 2021), https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC%20FY19%20873%20Report.pdf [https://perma.cc/23G5-2FGG].

149. The grounds for exclusion in the United States are much broader than those found under Canada's Ineligibility and Suspension Policy. Whereas the Canadian debarment regime is limited to charges and convictions of violations of the law, in the United States, a Suspension and Debarment Official (SDO) can consider a wide range of causes, including any cause "so serious or compelling a nature that it affects the present responsibility" of a contractor." FAR 9.406-2(c), 9.407-2(a)(9); *Guide to the Ineligibility and Suspension Policy*, *supra* note 44.

150. *The Procurement Process*, Gov't Can. (Oct. 16, 2016), https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/the-procurement-process (last visited Nov. 17, 2021).

151. *See* Tom Webb, Automatic Debarment is "Bad Policy," Finds Report by TI and Covington, Global Investigations Rev. 2 (2015) https://www.cov.com/-/media/files/corporate/publications/2015/05/automatic_debarment_is_bad_policy_finds_report_by_ti_and_covington.pdf [https://perma.cc/SEX2-SM67].

152. *Ineligibility and Suspension Policy*, *supra* note 32.

VI. Conclusion

As the Canadian government considers potential reforms to its debarment system, it would serve the government well to look to the lessons learned by other, more flexible debarment regimes. Overly rigid and punitive debarment regimes sound "strong" and "protective" on paper, but do far more to undermine the effectiveness and integrity of a procurement system than the contractors the policies are designed to exclude. Canada would benefit from a more discretionary regime that considers all available evidence and potential remediation efforts—not just the initial wrongdoing of the contractor. Given the infrequency with which Canada appears to be utilizing these integrity tools, Canada's current regime not only inadequately protects Canadian taxpayer dollars, but also dissuades companies from proactively changing their behavior in a manner that benefits the entire procurement system. Flexible and discretionary debarment regimes, coupled with robust due process protections, enable government officials to more effectively protect taxpayer dollars and induce ethical transformations in contractors. The Canadian procurement system can only benefit from a more measured approach to this important tool.