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Ref. Proposed Amendments Canadian Competition Bureau's Immunity Program

Dear Mr. Rivard,

We have pleasure in enclosing a submission that has been prepared by the Cartels Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of the Canadian Competition Bureau.

Yours sincerely,

Marc Reysen	Elizabeth Morony
Co-Chair	Co-Chair
Antitrust Committee	Antitrust Committee

cc Melanie Aitken, Randal Hughes, Emrys Davis
Bennett Jones

IBA CARTELS WORKING GROUP COMMENTS ON THE PUBLIC CONSULTATION VERSION OF THE CANADIAN COMPETITION BUREAU'S IMMUNITY PROGRAM

1. INTRODUCTION

This submission is made to the Canadian Competition Bureau ("**CCB**") on behalf of the Cartels Working Group (**"Working Group"**) of the Antitrust Committee of the International Bar Association (**"IBA"**) in relation to the CCB's public consultation version of its revised Immunity Program (**"Revised Immunity Program"**).

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org.

The Working Group hopes to contribute constructively to the CCB's public consultation on the Revised Immunity Program.

2. EXECUTIVE SUMMARY

This submission offers comments and suggestions regarding certain aspects of the Revised Immunity Program, taking into account approaches adopted by key jurisdictions on relevant aspects of immunity/leniency programs. In particular, the Working Group respectfully proposes that the CCB consider the following amendments, with the purpose to enhance transparency and certainty for applicants in the Canadian immunity process:

i) Clarify whether the obligation to produce all relevant, non-privileged documents requires production of documents and other work product created by the applicant's lawyers or at their direction in the course of their internal investigation and, if so, which types of documents (e.g., only witness interview notes or other documents);

ii) Reconsider or describe in detail how it will manage its requirement for videotaped interviews, especially in the context of cross-border investigations.

3. RESPONSE TO THE CCB'S REVISED IMMUNITY PROGRAM

The Working Group applauds the CCB's continued commitment to a strong immunity program as manifested in the Revised Immunity Program. It agrees with the CCB that a well-constructed immunity program is vital to effective cartel enforcement. Over the last three decades, immunity programs have proliferated around the world. They have detected numerous cartels that without such programs would likely have remained undetected. As importantly, by increasing the risks of detection, immunity programs deter cartel formation. Everyone benefits from the competitive markets and lower prices that result.

International experience has shown that effective immunity programs must carefully balance the benefits available to an immunity applicant with the costs imposed by cooperating with a government investigation. Benefits, and the process to obtain them, must be certain and predictable. Burdens and costs must not outweigh these benefits. Immunity applicants will not come forward if they are worse off having done so than if they had stayed silent. At the same time, immunity programs must demand cooperation from applicants sufficient to permit prosecution and conviction of other cartel participants. Immunity from prosecution is attractive only when paired with a credible threat of prosecution and conviction. If cartel participants believe that they cannot or will not be prosecuted and convicted, they will not seek immunity.

The Working Group recognizes that the Revised Immunity Program aims to balance the burdens and costs imposed on the immunity applicant with the Canadian government's

need for timely and complete cooperation to prosecute co-conspirators effectively. In this respect, the Revised Immunity Program maintains many key elements of the CCB's already strong Immunity Program: specific criteria to qualify for immunity, a clearly described application process beginning with a no-names marker request, and a hypothetical proffer process. The Working Group supports maintaining these critical elements of the CCB's Immunity Program. It also commends the CCB for combining its existing guidance into one comprehensive guidance document, which increases transparency for potential immunity applicants.

In this submission, the Working Group comments on four aspects of the Revised Immunity Program that depart from the CCB's existing Immunity Program. Two changes – the interim grant of immunity and immunity for a more limited set of employees – are consistent with some international approaches. These are unlikely to be problematic. However, we respectfully offer several comments that the Working Group considers may prove helpful to the efforts to strengthen Canada's immunity framework. Specifically, the Working Group is concerned that two changes are out of step with international practice and may reduce cooperation incentives for immunity applicants. Specifically, the potential requirement that an applicant disclose documents created by its lawyers during their internal investigation and the audio or video recording of proffers and witness interviews.

3.1 The Interim Grant of Immunity

The Revised Immunity Program introduces an additional step before the applicant receives full immunity from prosecution: an interim grant of immunity. This interim grant of immunity will cover the cooperation phase of the immunity process, such as document production, witness interviews, and trial testimony. Only once the applicant's cooperation is no longer needed will the PPSC grant full immunity. Today, an applicant and the PPSC enter into a full immunity agreement following the proffer stage and before the cooperation phase begins.

The Working Group understands that the interim grant of immunity seeks to improve the timeliness and quality of an immunity applicant's cooperation. The theory is of course that full immunity before cooperation reduces the applicant's incentive to cooperate completely and expeditiously. Perhaps. But an applicant risks losing immunity under the current Program if it fails to cooperate completely and expeditiously. Viewed from this perspective, the interim grant of immunity seems little more than a new label.

That said, to the extent that the CCB and PPSC will issue an interim grant of immunity more quickly than they currently grant full immunity, the process has the potential to

expedite full cooperation and give immunity applicants greater comfort about their exposure sooner. Both developments would contribute to a more effective immunity program.

Finally, the Working Group notes that an interim grant of immunity process is similar to international approaches, as listed below.

The practice of the U.S. Department of Justice's Antitrust Division ("Antitrust Division") is to provide an applicant with conditional leniency as an interim step before granting full immunity. Like the proposed CCB Immunity Program, the Antitrust Division's commitment not to prosecute is conditioned on the applicant's obligation to provide full cooperation. Conditional leniency is provided in writing and tracks the language of the Antitrust Division's Model Corporate Conditional Leniency Letter found on the Antitrust Division's Leniency Program website[1].

At the EU level the leniency applicant is granted either a full immunity or a partial immunity resulting in a reduction from any fine that would otherwise have been imposed. In that case, the value of the award will thus be determined on the basis of the usefulness of the material supplied. With regards to full immunity, when the European Commission has verified that the immunity applicant has satisfied all of the relevant conditions for immunity, it will grant the applicant conditional immunity from fines in writing. By contrast, if immunity is not available or if the application does not contain enough evidence to enable an inspection or an infringement finding, the European Commission will notify the undertaking concerned in writing. Faced with this situation, the undertaking concerned can withdraw the evidence disclosed or request that its application be considered for a fine reduction. If conditional immunity is granted, it will become definitive when the Commission issues its final decision, provided that the undertaking concerned has complied with the conditions of the Notice on immunity from fines and reduction of fines in cartel cases (i.e., 2006 Leniency Notice).

In the UK, an application for immunity is followed (assuming the conditions for immunity are met) by a "marker" while the CMA conducts its investigation, with the formal leniency agreement being signed in the later stages of the investigation, shortly prior to the issue of the statement of objections or shortly before any individuals are charged with the cartel offence. During the marker period, the immunity applicant must commit to complete and continuous cooperation with the CMA.

[1] Please see https://www.justice.gov/atr/leniency-program.

Brazil has a dual system, and cartels are both an administrative infringement and a crime. Applicants are also granted conditional leniency following the execution of a leniency agreement, which is typically signed by CADE and the criminal prosecutors. The company and its (current or former) employees that are part of the agreement are required to fully cooperate with criminal and administrative authorities until final decisions are issued in connection with both investigations. Under CADE's enforcement practice, at the time its Tribunal adjudicates the cases, it will limit its assessment to whether the company and the individual applicants have or not fulfilled the cooperation requirement, and will not discuss whether its investigative arm – CADE's General Superintendence should have signed the leniency letter. This has been the case in all 11 leniency cases adjudicated by CADE's Tribunal. At the criminal level, the execution of leniency agreements prevents prosecutors from pressing charges to the individuals (there is no corporate criminal liability in Brazil), and although Brazilian authorities have never dropped a leniency applicant, should the individual applicant fail to cooperate, he/she would be face the risk of criminal charges being pressed.[2]

3.2 Immunity only for Culpable or Knowledgeable Employees

The Revised Immunity Program limits immunity for a corporate applicant's current directors, officers and employees to those who admit participation in or knowledge of the conduct. Currently, all of a corporate applicant's current directors, officers, and employees who cooperate receive immunity.

Any limit to the scope of immunity offered to directors, officers and employees by definition risks interfering with a corporate applicant's ability to learn information from these individuals, since uncertainty about their criminal liability can make individuals unwilling to disclose what they know to the corporation's lawyers. This is particularly the case early in an investigation when no one knows the full scope of the conduct, and thus what may and may not be immunized. Having said that, similar restrictions on individual immunity in Brazil and UK do not appear to have reduced the effectiveness of these jurisdiction's leniency programs. This suggests that limiting immunity to those employees who admit participating in or having knowledge of the conduct does not significantly impair the immunity applicant's ability to learn information from cooperating employees.In the UK, it is not a pre-condition for gaining a marker for Type A immunity that the applicant produces an up-front list of names of its current and former employees and directors who may be implicated in the cartel. This provides certainty to

2 Please see CADE's Leniency Guidelines, Provisions 4 and 5, at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines-cades-antitrust-leniency-program-1.pdf/view.

immunity applicants that all current and former employees and directors will receive immunity from prosecution. With respect to whether any individuals will be required to admit participation in the cartel conduct, the CMA is mindful of the uncertainty described above and, as a result, will not reach a final decision on whether an individual will be required to admit participation in the offence until the investigation is at or near its conclusion and after specialist criminal counsel has had the opportunity to review sufficient evidence gathered in the case to be able to advise the CMA on the issue. If the CMA decides that it is appropriate that an individual in the cartel who qualifies for criminal immunity in principle should make an admission of participation in the cartel offence, including dishonesty, then that individual will only be offered a 'no-action letter' (i.e. formal immunity from prosecution) on condition that such an admission is made. Alternatively, the individual will be offered a 'comfort letter', which states that after analysis of the evidence it has been concluded that there is insufficient evidence to implicate the individual in the cartel offence and that the CMA does not, therefore, consider that there is any risk of prosecution for the cartel offence.

Similarly in Brazil, CADE also allows applicants to openly discuss whether/which employees should be invited to join the leniency program. Additional individuals whose involvement in the cartel is only detected after the execution of the agreement, as well as those who were not involved in the leniency discussions to ensure confidentiality of the investigation may also join the agreement and equally receive its benefits.

3.3 Potential Disclosure of Privileged Information

The Revised Immunity Program introduces a requirement that the immunity applicant provide a privilege log of all relevant documents over which it asserts privilege and thus refuses to produce to the CCB as part of its obligation to produce all documents relevant to the investigation. That additional requirement is not unusual, or in the Working Group's view, problematic. Other jurisdictions, such as the United States, require an immunity applicant to provide a log of privileged pre-existing business records.

However, the Revised Immunity Program fails to address what has become the critical issue facing Canada's immunity process today: will the CCB and PPSC treat as privileged documents created by the applicant's lawyers in the course of their internal investigation? Since the PPSC sought and obtained an order requiring the lawyers representing an immunity and leniency applicant to provide copies of their notes of witness interviews, cooperating parties have been uncertain whether production of such notes is now a requirement of the CCB's Immunity Program. The Revised Immunity Program does not address this question. It states only that an applicant must produce all relevant, non-

privileged documents and creates a process through which privilege claims can be contested and adjudicated.

The Revised Immunity Program's silence on this critical issue creates significant uncertainty for potential immunity applicants. Many may choose not to seek immunity in Canada as a result. Thus, the Working Group recommends that – at a minimum – the CCB clarify whether the obligation to produce all relevant, non-privileged documents requires production of documents and other work product created by the applicant's lawyers or at their direction in the course of their internal investigation and, if so, which types of documents (e.g., only witness interview notes or other documents). If immunity in Canada requires production of such documents, potential applicants ought to be told that. Likewise, if immunity does not require such production, the CCB benefits by removing the uncertainty that only serves to dissuade applications.

As it considers clarifying this aspect of the Revised Immunity Program, the Working Group urges the CCB to treat as privileged and not require production of documents created by or at the direction of the applicant's lawyers create during their internal investigation. Lawyers conduct internal investigations so that they can provide legal advice to the corporation. The corporation directs its officers and employees, as part of their duties to the corporation, to provide truthful information to the corporation's lawyers. These natural persons are the conduit through which the legal entity of the corporation provides information to its lawyers for the purposes of it obtaining legal advice.

Treating as privileged the information disclosed by a corporation's employees in this context serves the well-established goals of solicitor-client privilege. It encourages candour and completeness without which the lawyer cannot properly advise the corporation. Ultimately, the CCB benefits from that candour and completeness because it often leads to immunity applications and thus to cartel detection.

Moreover, the CCB does not need production of lawyer-created documents during their internal investigation to learn the relevant facts. An immunity applicant must produce relevant pre-existing business documents and make relevant employees available to testify. These are direct evidence of the offence and ought to suffice.

Other antitrust enforcement agencies recognize internal investigation documents as privileged, do not require an applicant to waive privilege over them to obtain immunity, and do not require production of these documents as part of the cooperation process.

In the U.S., Antitrust Division does not require applicant's to waive legal privilege in order to satisfy its cooperation obligations. The Antitrust Division's Model Corporate

Conditional Leniency Letter states that the applicant and its directors, officers, and employees are not required to produce communications or documents protected by the attorney-client privilege or work-product doctrine as part of their cooperation. In addition, the introductory paragraph of the Model Corporate Conditional Leniency Letter states that the Antitrust Division will not consider any disclosures made by counsel in furtherance of the leniency application to constitute a waiver of the attorney-client privilege or the work-product protection.

At the EU level, communications prepared by and/or addressed to external counsel who is a member of the Bar of a EEA Member State, for his/her clients are always --no exceptions-- subtracted from access by the EU Commission and the competition authorities of the member states to the extent that such communications are exchanged in the exercise of the client's right of defence, and are thus covered by legal privilege and cannot be used by competition authorities for the purposes of an investigation.

In the UK, CMA guidance provides that all leniency applicants will be expected to take a careful note of all the actions they have taken as part of an internal investigation, including the identities of any witnesses who were interviewed in the investigation process, the nature of the questions asked and the replies obtained. The note will need to be retained until the conclusion of any proceedings. However, there is no obligation to produce lawyer-created documents during an internal investigation. Indeed, the CMA's guidance explicitly states that the CMA "will not as a condition of leniency require waivers of legal professional privilege (LPP) over any relevant information [information, documents and evidence regarding the existence and activities of the reported cartel activity] in either civil or criminal investigations".

Under the statute that regulates the legal profession in Brazil, any communication with lawyers generally, (including in-house and presumably compliance departments as well) is privileged. Although there are no specific provisions on privilege in CADE's regulations and its interpretation of the cooperation requirement prior and after the leniency letter is comprehensive, according to its enforcement practice, leniency applicants are not required to waive legal privilege over documents or communications.

The Working Group urges the CCB to follow these examples.

3.4 Recording Proffers and Witness Interviews

The Revised Immunity Program states that the CCB may audio record an immunity applicant's proffers and may audio and/or video record interviews of its witnesses. As described below, at a minimum, the Working Group recommends that the CCB clarify the circumstances in which it will record proffers and witness interviews.

With respect to proffers, the Working Group understands that the CCB already takes detailed notes of an applicant's oral proffer. It is unclear why the CCB must also make an audio recording of a proffer. The Revised Immunity Program does not explain the rationale for this new requirement. This is troubling given that recording proffers in this way is a significant departure from the CCB's "paperless" process. While counsel may still proffer orally, making an audio recording of the proffer and potentially transcribing it moves the process further and further away from "paperless." To the extent applicants fear the creation of potentially disclosable transcripts of their proffers, recording proffers in this way may well discourage immunity applications.

In the United States, cooperating employees of leniency applicants may be required to provide sworn testimony before a grand jury investigating the suspected violation of US antitrust laws. However, transcripts of witness statements are covered by grand jury secrecy rules that protect against unwarranted disclosure. There is no equivalent in the United States for the practice contemplated by the CCB for audio recording attorney proffers.

At the EU level the European Commission will accept corporate statements in oral form, provided that their contents have not been disclosed to third parties. These statements are recorded and transcribed at the Commission's premises. The transcripts then become part of the Commission's file and any access to those transcripts will be granted only on the Commission's premises.

Just as troubling, the Revised Immunity Program does not specify when the CCB will record proffers and when it will not. This silence leaves potential immunity applicants wondering whether these new criteria will apply to their proffers. Since procedural uncertainty as a category typically discourages immunity applications, the Working Group encourages the CCB to clarify the circumstances in which it will record proffers.

With respect to recording witness interviews under oath, the Working Group understands that this change aims to create a record of the likely trial testimony to guard against the risk that the witness recants at trial. This change is welcome to the extent that it

strengthens the CCB's ability to prosecute and convict co-conspirators. However, the Revised Immunity Program states only that witness interviews may be taken under oath and may be audio/video recorded. As in the case of the introduction of lingering and troubling uncertainty surrounding the recording of proffers, the Working Group recommends that the CCB clarify the circumstances in which it will take evidence this way. If videotaped interviews will be the norm, then the Revised Immunity Program should be candid, and describe the circumstances in which the CCB may depart from this typical practice.

Similarly, the Working Group recommends that the CCB describe how it will manage its requirement for videotaped interviews in the context of a global investigation. Recording witness testimony under oath in this manner, at potentially a very early stage of the investigation, is at odds with how other investigators approach witness testimony. Many recognize that information learned during the course of the entire investigation can improve a witness' recollection of the facts. Recording testimony under oath at too early a stage can compromise a witness' eventual trial testimony should the investigation reveal additional information and the witness' recollection improve. For example, the Working Group understands that the US DOJ sees an early recording of testimony in this manner as a risk to its ability to prosecute and convict co-conspirators in the US. Having said that, the Working Group recognizes that the Revised Immunity Program's primary goal is to strengthen prosecution in Canada, not the US. But to the extent the CCB can provide guidance about how it will deal with conflicting demands on an immunity applicant, the Working Group recommends that it do so. Again, uncertainty will likely reduce immunity applications in Canada, as potential applicants choose not to risk a conflict with the US DOJ investigation.

4. CONCLUDING CONSIDERATIONS

Canada is a mature and important jurisdiction in the investigation of cartels. However, given the history of unsuccessful prosecutions and modest consequences upon conviction, Canada risks marginalizing itself in the broader framework of global cartel enforcement should its procedures depart in ways that expose companies to earlier and/or more extensive public or private enforcement consequences. The Working Group supports CCB's initiative to subject its new Immunity Program to public consultation, and commends its openness to consider the comments above and the proposed amendments to the Draft Guidelines. It believes that the Canadian Immunity Program would greatly benefit from such adjustments, which would contribute to bringing it into line with international experience.