**UNDER CHAPTER ELEVEN OF THE NAFTA**
**AND THE UNCITRAL ARBITRATION RULES**

BETWEEN

UNITED PARCEL SERVICE OF AMERICA INC. ("UPS")

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

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**SUBMISSIONS OF CANADA DISPUTING REFUSALS BY UPS TO ANSWER INTERROGATORY QUESTIONS**

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## INTRODUCTION

1) On April 4, 2003, the Tribunal issued its *Procedural Directions and Order of the Tribunal* (the *Order*), in which it set out the procedures for document production and for interrogatories. The *Order* provided that the disputing parties were to serve their requests for documents by April 25, 2003. The Order did not provide a deadline for the filing of the interrogatories; rather, the Tribunal directed that, **at any time during the document production process,** a party might deliver written interrogatories to the other party.

2) In a further *Direction* dated August 1, 2003, the Tribunal directed that document production and interrogatories be completed by October 1, 2003. As a result, Canada delivered its interrogatories on September 12. In a letter dated September 26, UPS

responded to Canada's interrogatories indicating which questions it will answer, and which it objects to answer.

3) For those questions that it will answer, UPS proposed to deliver its responses by December 1, 2003. Canada accepts that proposal.[1]

4) UPS has refused to answer well over half of Canada's questions. Canada submits that the refusals are unacceptable and represent a refusal by UPS to state its case and to clarify the issues that this Tribunal will have to address in the course of the arbitration.

5) UPS wrongly asserts in its letter of September 26 that, given that the parties will file memorials that disclose the facts and arguments supporting their case, the Tribunal has limited the scope of discovery to be "narrow and specific".

6) In its decision dated November 22, 2002 this Tribunal decided that the Amended Statement of Claim was adequate for Canada to formulate a statement of defence. However, the Tribunal went on to say that:

> "As the process of production of evidence and of proof proceeds... the Investor will have the opportunity to give its claims greater precision. It is of course in its interest to do so if it is to establish its claims as a matter of fact."

7) Further, Canada refers to the letter dated August 1, from the Secretary of the Tribunal to both parties. There, the Secretary indicated that the Tribunal had directed him to inform the parties that the Tribunal:

> "... will consider addressing Canada's submissions about lack of necessary precision of the Revised Amended Statement of Claim when the document production interrogatory phases have been completed."

8) Although, Canada is of the view that lack of precision may be a continuing problem even if UPS fully answers Canada's interrogatories, clearly interrogatories perform a

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[1] Clearly, that time is now governed by the suspension agreement between the parties referenced in the letter dated January 19, 2004 to the Tribunal (Tab 5 of Submissions of Canada Regarding the Production of Restricted Documents)

meaningful role in clarifying the issues in the arbitration. Likely, they will speed up the process to resolve the matter.

9) In order to make its claim the Investor must establish a number of specific factual elements, and the Party may defend on each of those elements. For the reasons following it is clear that absent sufficient answer to Canada's interrogatories the claim will remain in the realm of generalities. Absent adequate interrogatories Canada is unable to defend adequately.

10) UPS' refusal to answer Canada's interrogatory questions exacerbates Canada's difficulty to respond to UPS' case. In the submission of Canada, the interrogatories to which UPS objects are "useful in narrowing issues before the parties". As noted by the Federal Court of Canada in *Larosa Food Importing Ltd.* v. *Cielo Di Livorno*:

> "...examination for discovery is probably the most important portion of pre-trial procedure, both in terms of avoiding any ambush through a full understanding of the case and by allowing the parties to assess the relative strengths and weaknesses of their cases and as a settlement tool."[2]

11) Although speaking in the context of an order for particulars, the principles stated by Lambert JA in *Cansulex* v. *Perry* are also apposite:

> ... to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
>
> to prevent the other side from being taken by surprise at the trial;
>
> to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
>
> to limit the generality of the pleadings;
>
> to limit and decide the issues to be tried, and as to which discovery is required; and
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> to tie the hands of the party so that he cannot without leave go into any matters not included.[3]

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[2][1999] F.C.J. No. 680, para. 5 (Tab 3)

[3][1982] B.C.J. No. 369, para. 15 (Tab 4)

12) In this case, it was for all those purposes that Canada sought to determine material facts on which the Investor relies to make its claim, however, Canada relies especially on the statement that the purpose of discoveries is to "enable the other side to know what evidence they ought to be prepared with and to prepare for trial."

This is an exceedingly complicated, multi-faceted arbitration. The Memorial stage is simply too late for the parties to start developing factual and expert evidence. Yet, that is precisely the position in which Canada, as defender in the arbitration, would find herself should UPS' position be accepted and they were allowed to further refine their case only at the memorial stage.

13) UPS' objections may be grouped under the following broad headings:

a) Questions that are said to relate to the presentation of UPS' case
b) Questions that are said to ask UPS to define legal terms, provide justifications for its claims or provide reference to authoritative sources
c) Questions that are said to be irrelevant, including the relevant time frame for the interrogatories
d) Questions that request documents
e) Questions that seek information allegedly within Canada's knowledge

14) In the paragraphs following, Canada addresses each of the reasons advanced by UPS for refusing to answer. In the Appendix to these submissions Canada has assembled the questions that UPS refused to answer under the five broad areas set out above, juxtaposed with identification of the paragraph of the pleadings to which the questions relate.

## A. Questions that UPS says relate to the presentation of its case

15) UPS refuses to answer questions that it says "... seek general information about the manner in which counsel for UPS will present its case to the Tribunal". UPS says in

its letter of September 26 that there are two "categories" of questions covered by this objection. It describes them as follows:

> "First, Canada asks a series of overbroad questions seeking 'all facts relied upon' by UPS to support allegations in its Revised Amended Statement of Claim ('RASC'). Second, Canada asks various questions seeking legal argument or expert opinion. All such questions are improper."

16) This misconceives the nature of Canada's questions. The questions do not call for the manner in which counsel for UPS will present its case to the Tribunal or the evidence counsel intends to lead in support of the facts.

17) Specifically, UPS objects to those interrogatories that seek facts on which UPS relies to support its allegation in a specific paragraph of the Revised Amended Statement of Claim (hereafter the "RASC"). As stated by UPS in its letter of September 26:

> "... UPS ... objects to those interrogatories taking the form 'On what facts does UPS rely to support its allegation that [...].
>
> ... All such questions are refused on the grounds that:
>
> a) They are directed to legal counsel in that they seek counsel's evidentiary strategy to prove the allegations in question;
> b) They are overbroad; and
> c) They are premature as the evidence requested will be presented in the UPS Memorial and reply."

18) Also in its letter of September 26, UPS gave examples of the questions to which it objects on the ground they seek facts that UPS relied upon in making allegations. Canada sets out below the examples selected by UPS, juxtaposed with the paragraph of the RASC to which they relate.

| Canada's Interrogatory Questions | RASC paragraph to which the Question relates |
|---|---|
| 19. On what facts does UPS rely to assert that Canada Post competes in the non-monopoly courier, small package delivery and secure electronic communications markets? Identify each of the markets, both domestic and international, where UPS Canada and Canada Post compete. | 6. Canada Post competes in the non-monopoly courier, small package delivery and secure electronic communication markets ("Non Monopoly Postal Services Market") directly, and through the operations of its 94% owned subsidiary, Purolator Courier Ltd. ("Purolator"). Canada Post and Purolator together have a combined market share in the |

| | |
|---|---|
| | courier and small package delivery market of approximately 47%. |
| 45. Provide the facts on which UPS relies to assert that Canada Post and UPS Canada are direct competitors in the Canadian "non-monopoly postal services market"? | 11. Canada Post and UPS Canada are direct competitors in the Canadian non-monopoly postal services market. With Canada's (*sic*) purchase of Purolator Courier in 1993, Canada Post controls the largest share of the courier market generally and also the largest share in the small parcel market in Canada. |
| 84. On what facts does UPS rely in asserting that there is an "unusual" structuring of the legal and accounting relationship between Canada and Canada Post? | 25. Canada has granted to Canada Post treatment from which Canada Post is able to reduce its cost of its non-monopoly postal services, which treatment is not correspondingly made available to UPS or UPS Canada. Canada's unusual structuring of the legal and accounting relationships between Canada Post and other entities of the Canadian government results in less favourable treatment to UPS than to Canada Post as a competitor in the non-monopoly segment of the market. The consequence of this structuring is that Canada Post is able to exploit in the non-monopoly market where it directly competes with UPS, numerous advantages to which UPS has no access. This treatment includes, but is not limited to:<br>... |

Other examples illustrate the point from a different perspective. UPS has objected to questions 144, 180, 187 and 195 in which Canada asked for the facts on which UPS relies in asserting that it suffered loss and damage. If UPS is allowed to refuse to answer those questions, it would render ineffective the Direction of the Tribunal Concerning Document Production dated August 1, 2003. The Tribunal there directed that:

"... although the Tribunal has divided the Arbitration, leaving any issues of damages for the later stage, UPS will have to demonstrate in terms of article 1116, that it has incurred loss or damage".

19) These examples illustrate that UPS' position in refusing to answer interrogatory questions amounts to nothing less than a continued refusal to state its case with precision. Yet this is exactly the kind of information that Canada needs if it is to have a fair opportunity to answer the case.

20) It is a novel and wholly unsound proposition that as part of the discovery process a party may not ask the other party for the facts on which it relies for the purposes of its case.

21) The discovery process provides the parties to a dispute with a means to obtain information bearing on the dispute. In *Lac d'Amiante du Québec ltée* v. *2858-0702 Québec Inc.*, the case turned on the implied rule of confidentiality of the information disclosed in examinations for discovery, and the Supreme Court of Canada commented on the discovery process:

> "It appears that the preferred approach is a far-reaching and liberal exploration that allows the parties to obtain as complete a picture of the case as possible."[4]

22) Interrogatories are not more restrictive than oral examinations for discovery. The Federal Court of Canada explains in *Wewayakum Indian Band v. Wewayakai Indian Band*:

> Interrogatories are not more restrictive than oral examinations for discovery, based on Federal Court Rules 466.1(1) and 465(15) prior to their amendment in 1990. There is neither practical nor logical reason why an interrogatory should be more restrictive. The questioner is already handicapped because he does not know what the answer to the previous questions will be before inserting subsequent questions in the interrogatory, and the person answering has ample time to consider the question and consult, if necessary, before answering. Although there are differences between jurisdictions as to the subject-matter of discovery before trial, there has been a general extension of the rules of practice so that the prevailing trend favours broadening fair and full disclosure to enable the party to advance his own case or to damage the case of his adversary.
>
> Past events, in so far as they constitute simple or basic facts, are fully discoverable.[5]

23) It is elementary and accepted that it is proper for a party to ask questions in interrogatories or discoveries that call upon the other party to provide the facts on which

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[4] [2001] 2 S.C.R. 743, para. 60 (Tab 5)

[5] [1991] 3 F.C. 420, at 4 (Tab 6)

it relies in making allegations in its pleadings. In *Sellick Equip. v. United States*, the United States Court of International Trade stated:

> Similarly, the court rejects Sellick's objection that the government's interrogatories need not be answered because they are contentious and seek a purely legal conclusion. Sellick Brief at 12, 19. First, the government's interrogatories do not seek a purely legal conclusion; rather, they specifically ask for Sellick to provide the factual basis for the points alleged in Sellick's complaints. n3 Furthermore, inquiries which in part call for the application of law to fact can be most useful in narrowing and sharpening the issues; indeed, this is a major purpose of discovery. *Diversified Prods. Corp. v. Sports Center Co.*, 42 F. R.D. 3, 5 (D. Md. 1967). In sum, the court finds that Sellick's objections to the government's interrogatories are unjustified.
>
> n3 For example, defendant's interrogatories state in pertinent part:
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> > In regard to the plaintiff's contention that the imported merchandise in issue was not classified correctly, state the following:
> >
> > a. each fact on which the plaintiff bases its contention,
> > b. identity of each document on which the contention is based,. . .[6] [emphasis added]

24) The U.S. Supreme Court has stated in *Hickman* v. *Taylor* that discoveries serve the following purposes:

> (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and
>
> (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."
>
> The Supreme Court went on to state that:
>
> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. [Footnote omitted] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure

[6] 18 C.I.T. 352, at 3,4 [hereinafter *Sellick*], (Tab 7)

can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[7] [emphasis added]

25) In the submission of Canada, the international and municipal jurisprudence is reflected in the decision of the Tribunal dated April 4, 2003 where the Tribunal stated in Part D of its *Order*:

> "The Tribunal considers on balance that interrogatories may be useful in narrowing the issues before the parties."

26) Another benefit of discovery is that it may eliminate surprise at trial. As early as 1840, Lord Wynford formulated this benefit as follows:

> It is of very little use to get hold of any facts in Court, unless you have knowledge of the facts beforehand, in order to use them advantageously at the time of trial... [A] bill of discovery is much better in many cases than the examination of a witness. In the examination of a witness the answers may come upon you by surprise, but by means of a bill of discovery you have the whole examination in your possession, and you have an opportunity of thinking of it before it is used in Court...[8]

27) Canada says that questions seeking "all facts relied upon" in support of an allegation made in the Revised Amended Statement of Claim ("RASC"):

a) cannot be characterized as "overbroad" because they are inherently no broader than the allegation to which they relate; and

b) are not premature because, as shown above, the underlying purpose of interrogatories, and an objective of judicial policy in relation to interrogatories and examinations for discovery, is to promote early disclosure of the facts to be proven, with a view to:

   i) Putting the inquiring party in a position to know the case it has to meet;

   ii) Avoiding unfair surprise at a late stage in the proceedings; and

   iii) Narrowing the issues in the litigation and promoting resolution of disputes, in whole or in part, before they reach the hearing stage.

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[7] 329 U.S. 495, 67 S.Ct. 385, at 6,10 (Tab 8)

[8] Julius B. Levine, *Discovery: A Comparison between English and American Civil Discovery Law with Reform Proposal* (Oxford: Claredon Press, 1982) at 2. (Hereinafter "Levine"), citing from *Portugal v. Glyn* 7 Cl. & Fin. 466, 500 (1840) (Tab 9)

28) Canada seeks the facts upon which UPS relies to make its allegations so that Canada will know before having to deliver its Memorial what is the case to be met. Provision of this information will also narrow the issues in the litigation and put both parties in an equal position at the hearing. It will contribute to economy and efficiency in the conduct of the hearing.

29) It is not reasonable for UPS to say that it is premature for Canada to raise questions calling for facts on which UPS relies on the ground that "...the evidence requested will be presented in the UPS Memorial". First, Canada does not ask for the evidence, but rather a statement of the facts that the evidence will prove. Second, the contention amounts to 'lying in the weeds" in the hope of carrying out a "Trial by ambush", particularly since UPS asserts on the first page of its letter of September 26 that the parties will submit their evidence" concurrently" (a proposition that Canada does not accept). Rather, Canada must know the case it has to meet before the delivery of memorials so that it can decide what evidence it needs to develop and present to meet the case UPS intends to present.

**B. Questions that UPS says ask it to define legal terms, provide justifications for its claims or provide reference to authoritive sources**

30) With respect to the second category of questions that UPS says relate to the presentation of its case, UPS refuses to answer all questions that it says ask UPS to:

> "define legal terms, provide justifications for its claims or provide reference to authoritative sources. ... All such questions are refused on the grounds that:
>
> (a) they are directed to legal counsel as they seek legal argument that counsel will present to support its case;
>
> (b) they seek expert opinions and analysis; and
>
> (c) they are premature as the arguments and analysis will be presented in the UPS Memorial and Reply."

31) Questions that seek explanations of allegations in the RASC or authoritative sources for such allegations seek information that is clearly relevant and are to be distinguished from questions that reveal the manner in which counsel for UPS will

present its case to the Tribunal. Canada did not ask for the manner in which counsel will present its case. Rather the purpose of the questions is to narrow and clarify the issues before the Tribunal.

32) Once again Canada will use examples provided by UPS in its letter of September 26 to illustrate the issue:

| Canada's Interrogatory Questions | RASC paragraph to which the Question relates |
|---|---|
| 114. In the context of UPS' Revised Amended Statement of Claim, what constitutes Canada Post's "monopoly infrastructure"? Explain the basis for the response. | 26. Canada Post has provided treatment more favorable than that provided to UPS or UPS Canada. UPS has been denied access to the monopoly infrastructure and network, unlike Purolator and other divisions of Canada Post which compete in the non-monopoly market. |
| 115. What would constitute fair and non-discriminatory access to Canada Post's infrastructure? | 28. Canada Post has engaged in the following activities which are inconsistent with treatment required by the NAFTA:<br>...<br>b. Providing access to the monopoly Canada Post infrastructure to permit Canada Post to provide its non-monopoly products, and in particular "Xpresspost", "Priority Courier", "Regular Parcel" and "Expedited Parcel" in a discriminatory and unfair manner; |
| 119. Provide any authoritative sources on which UPS relied in establishing what constitutes "fair and non-discriminatory behavior" and provide references to those sources. | 28 b. See above |
| 120. Provide any other justification for UPS' interpretation of what constitutes "fair and non-discriminatory behavior" | 28 b. See above |

33) In interrogatory question 114 Canada asks what constitutes Canada Post's "monopoly infrastructure" that is referred to in paragraph 26 of the RASC, where UPS alleges that it has been denied access to the "monopoly infrastructure and network". Canada needs to know what UPS intends by the allegation, because Canada wishes to meet this allegation directly with evidence that will demonstrate that the allegation is ill founded. However, Canada Post has a complex and far-reaching infrastructure, so

Canada's defence can only be prepared with precision if Canada has more precise knowledge of the allegation.

34) In interrogatory question 115 Canada asks what would constitute "fair and non-discriminatory" access to Canada Post's infrastructure in relation to the allegation in paragraph 28 b of the RASC that Canada Post has engaged in the activity of providing access to the "monopoly Canada Post infrastructure" ... "in a discriminatory and unfair manner". Canada wishes to meet this allegation directly, but the phrase "discriminatory and unfair" is so broad that it could encompass any manner of discrimination. Moreover, since the allegation is that Canada Post provides the access in relation to its own products, the allegation is illogical. At the minimum, it calls for an explanation.

35) In interrogatory questions 119 and 120 Canada asks for authoritative sources or justification for what UPS would consider to be "fair and non-discriminatory" in relation to the allegation referred to above, so that Canada will know the nature of the case to be met in this regard.

36) Questions that call for an explanation of words or phrases used in the RASC are clearly relevant, and can be answered in a way that is neutral without disclosing the manner in which the case will be presented. So also for questions that call for the application of law to fact. Such information may be useful in narrowing the issues by indicating more precisely the case to be met.[9]

37) Therefore, Canada submits that the information sought in such questions is likely to contribute to efficiency and economy in the conduct of the hearing as well as improving the basis for the Tribunal to make a just ruling.

38) Questions such as these cannot rightly be characterized as premature for the same reasons that questions calling for facts relied upon in support of allegations cannot be called premature, as discussed in paragraphs 28 (b) and 29 above. Absent elucidation in a

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[9] *Sellick, supra* note 5

timely fashion the RASC will remain as a series of bare assertions without the facts supporting the assertions.

39) One means for the Tribunal to address concerns about lack of precision in the RASC is to ensure that the interrogatories perform a meaningful role in clarifying the issues in the arbitration. Canada is asking the Tribunal to intervene in the context of the interrogatory phase because this is an appropriate time and method for the Tribunal to deal with the lack of precision in the RASC. Canada asks the Tribunal to do so by directing UPS to provide the information requested in the interrogatories.

## C. Questions that UPS says are irrelevant

40) The Tribunal has already held in its Direction of August 1, that relevance is established when a question relates to an allegation in the RASC or the Statement of Defence. Additional guidance can be found in municipal jurisprudence.

41) In *Air Canada* v. *McDonnell Douglas Corp.*, the Ontario Court (Gen. Div.) held that questions on discovery are proper if they may lead to a line of inquiry that would uncover admissible evidence:

> The present philosophy in the conduct of civil litigation in Ontario, and which applies to examinations for discovery, requires very wide disclosure. Questions on examination for discovery should be answered unless the court is satisfied that they have no semblance of relevancy: see *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.J.). Information may be elicited on discovery even though the precise question and answer might not be admissible at trial. There is a discretion in the trial judge to control what may be read into evidence from the examination of a person examined for discovery on behalf of a party: see rule 31.11(1)(b). Questions on discovery are proper if they may lead to a line of inquiry which would uncover admissible evidence. [10]

[10] (1995) 22 O.R. (3d) 140 at 4 (Tab 10)

42) The Federal Court of Appeal approved the train of inquiry principle as the correct test of relevancy for purposes of discovery in *Everest & Jennings Canadian Ltd.* v. *Invacare Corporation*:

> The correct test of relevancy for purposes of discovery was, in our opinion, propounded by McEachern C.J. in the case of *Boxer and Boxer Holdings Ltd. v. Reesor*, et al. (1983), 43 B.C.L.R. 352 (B.C.S.C.) when, at page 359, he said:
>
> > It seems to me that the clear right of the plaintiffs to have access to documents which may fairly lead them to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application.[11]

43) As for the objection that questions that relate to a time period before 1997, in the submission of Canada in the context of the specific questions they are relevant as they can relate either to the timeliness of the claim or to facts that set a context for events during the period 1997 - 2002.

44) Questions calling for facts relating to the nature and scope of the business of UPS at different points in time are relevant for testing specific allegations of fact in the RASC and assessing issues such as "like circumstances".

45) Questions calling for information about UPS' membership in and financial support for trade associations before 1997 are relevant in that the information may provide a basis for finding when it knew or should have known about facts relevant to the issue of timeliness of the claim. Timeliness and "like circumstances" are raised in the pleadings. These factual issues are also relevant to Articles 1116(2) and 1117(2) and 1102 of the NAFTA .

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[11] [1984] 1 F.C. 856 at 2 (Tab 11)

## D. Questions that UPS says call for documents

46) UPS refuses to answer questions that it says call for documents, on the ground that the Tribunal's Order of April 4, 2003 provides that document requests were to be delivered by April 25. Canada submits that the purpose of the Tribunal's Order was to move the case forward in an orderly manner, not to establish constraints that work against a just resolution of the dispute.

47) In that regard, it is appropriate to recall that in Part D of the *Order*, the Tribunal provided:

> 3. "The Tribunal reserves the power to make specific procedural directions to resolve any disputes between the disputing parties about interrogatories."

48) The Tribunal's direction in that regard is consistent with the provisions of paragraph 3 of Article 24 of the UNCITRAL Arbitration Rules (1976), which provides:

> "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."

49) The strict separation between document production and interrogatories for which UPS contends is not tenable. Both processes are designed to narrow the scope of the litigation to allow the parties to know the case they need to meet and to allow parties to make admissions where admissions are appropriate.

50) Indeed this objection is surprising in light of UPS' own conduct. UPS chose to merge its document request with its interrogatories. Canada on the other hand made its initial document request based on the pleadings and its limited knowledge of UPS' document collection.[12] UPS cannot approbate and reprobate.

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[12] This may be contrasted with UPS' likely knowledge of Canada's document production in light of Canada's *Access to Information Act* and the fact that UPS has engaged some former Government employees as consultants.

51) The interrogatories clearly raised additional questions and requirements for further document production. As will appear on a close examination of the requests to which UPS objects, they are clearly relevant within the terms of the Tribunals clarification of August 1 (which was obviously not available when the original document request was made).

52) Where it is clear that an interrogatory question calling for documents will contribute to a just outcome without causing undue delay or hardship, earlier procedural directions about the time for making document request should be applied with flexibility. This applies where parties are conducting research for information needed to provide answers to interrogatories, and are asked to provide copies of documents supporting the answers they deliver. It is appropriate for the Tribunal now to exercise the power that it reserved for itself to make directions as the matter progresses.

**E. Questions that UPS says call for information within Canada's knowledge**

53) UPS refuses to answer questions that call for information allegedly within Canada's knowledge.

54) One important purpose of interrogatories is to secure admissions from the opposite party with a view to narrowing the issues in the proceeding. When facts are conceded this avoids unnecessary proof at the hearing and facilitates the just, speedy and inexpensive resolution of the dispute:

> The proper conduct of litigation will substantially be assisted if parties are compelled to identify what are the issues in dispute. The litigation process will also be assisted if parties are required to specify which facts alleged against them are conceded so as to avoid unnecessary proof. If the court can compel the admission of facts which are not in dispute, this will reduce significantly the scope of discovery and, equally importantly, it will limit the evidence at trial. This will save the litigants time and money. In complex litigation the savings in time and expense may be quite significant.[13]

[13] *Fieldturf Inc.* and *Balsam Pacific Pty Limited et al*, [2003] FCA 809, para. 9 (Tab 11)

55) The value of obtaining admissions to ease the burden of proof has long been recognized:

> Discovery is not limited to giving the Plaintiff knowledge of that he does not already know, but includes the getting an admission of anything which has to prove an any issue which is raised between him and the Defendant. To say that the pleadings have raised the issues, and therefore interrogatories should not be allowed is an entire fallacy. The object of the pleadings is to ascertain what the issues are, the object of the interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been.[14]

56) Canada submits that it is appropriate for the Tribunal to direct UPS to respond to questions seeking information that may be within the knowledge of Canada. Indeed, as can be seen from the following examples of questions in the Interrogatories delivered by UPS, some questions raised by UPS ask Canada to provide information that UPS believed it already had:

> As previously noted, the questions that UPS objects to answer are set out in the Appendix hereto.

| UPS' Interrogatory Questions |
|---|
| 112. Confirm that Canada Post issued a lawsuit in the Federal Court of Canada against MBEC Communication Inc. and certain of its Mail Boxes Etc. franchisees on April 27, 1995 for the purpose of halting the sale of stamps and other Canada Post products by those defendants. |
| 126. Confirm that for each of the years 1997 to 2003, Canada Post's contracts with its stamp retailers across Canada have contained an express prohibition on the sale and promotion of products, including courier products, that compete with Canada Post. |
| 150. Confirm that, for each of the years 1997 to date, the rural route contractors of Canada Post have been prohibited by Canada Post from picking-up and delivering courier products of competitors of Canada Post, including UPS. |

[14] *A.G. v. Gaskill* (1882), 20 Ch. D. 519 at 528 per Cotton L.J. (C.A.) (Tab 12)

## CONCLUSION

56) Timely disclosure of the facts on which UPS relies is fundamental to Canada being treated with equality, according Article 15 of the UNCITRAL rules. UPS has made numerous allegations that Canada vigorously contests. The allegations lack precision, and this makes it impossible to know what evidence must be developed to respond to the allegations. This creates an unfairness that the Tribunal can redress by directing UPS to respond to the questions.

## ORDER SOUGHT

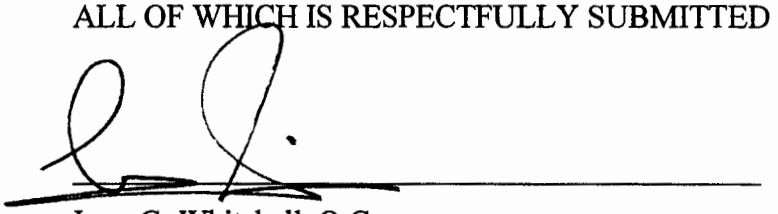
Canada asks the Tribunal to direct UPS to answer fully the questions as set out in the Appendix.

57) Canada further asks the Tribunal to direct that:

a) Failure of UPS to answer questions in category A1 will bar UPS from adducing evidence or making submissions in support of such allegation; and

b) Failure of UPS to answer questions in all other categories will be a ground for the Tribunal to draw an adverse inference in respect of such allegations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Ivan G. Whitehall, Q.C.
Agent of the Attorney General of Canada

Dated at the City of Ottawa this 24th day of February, 2004.