IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

UNITED PARCEL SERVICES OF AMERICA, INC.

Claimant/Investor

and

GOVERNMENT OF CANADA

Respondent/Party

CANADA'S MOTION ON THE INVESTOR'S REFUSAL TO ANSWER CANADA'S REFORMULATED INTERROGATORIES

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1. Canada brings this motion pursuant to the Tribunal's Order of 21 June 2004. On 6 July 2004, Canada submitted its reformulated interrogatories to the investor. On 19 July 2004, the investor responded, refusing to answer 76 of 111 questions in full or in part, and stating that it would require 90 days to respond to the 35 questions it agreed to answer.

2. Canada submits that all of its questions are proper and within the terms of the Tribunal's Orders on document production and interrogatories. Each of the new questions is relevant to an

issue in the pleadings, each is clearly directed to matters of fact, each is directed to a specific individual or class of individuals, none requires that documents be disclosed, and each is intended to help narrow the issues between the Parties.

3. While Canada is willing to accept the investor's proposed 90-day period, it notes that this is 30 days longer than the time UPS proposed for Canada to complete its entire defence. Canada therefore asks that the Tribunal direct the investor to answer all of Canada's reformulated interrogatories in the time proposed.

4. Canada continues to maintain that the time periods for the drafting of memorials should not begin running until all information exchange is complete.

5. A chart setting out Canada's reformulated interrogatories, the investor's response and Canada's reply is attached to this motion for the Tribunal's convenience.

6. This motion sets out some of the investor's most frequent objections and provides additional justifications for the reformulated questions.

Questions seeking pre-1997 information are relevant

7. The investor has almost always refused to provide any information on factual matters pre-dating 1997. The investor asserts that any such information is irrelevant, as it has made no allegations prior to that date.

8. Articles 1116 and 1117 provide that no claim may be brought more than three years after the investor (or the investment, in Article 1117) first acquired, or ought to have acquired, knowledge of breach and knowledge that it suffered loss or damage resulting from that breach. Interrogatories seeking specific factual information regarding UPS' knowledge in the years prior to the alleged breaches are, therefore, indisputably relevant.

9. Canada has asked for this information directly by asking for the date UPS Canada first acquired knowledge of certain alleged facts. Canada has also requested it indirectly, by asking about actions UPS, UPS Canada or any group of which either is a member may have taken relating to these alleged facts.

10. Canada has asked for information relating to any actions UPS, UPS Canada or any of the groups to which they belong may have taken in an attempt to influence the outcome of Government action, including engaging lobbyists or similar service providers. If UPS hired a lobbyist to attempt to influence the drafting of legislation, Canada submits that this is evidence that UPS knew or ought to have known the contents of the bill that ultimately became law.

11. All of these questions are relevant and proper. The information they seek is critical to Canada's assertion that many of UPS' claims are outside the Tribunal's jurisdiction *rationae temporae*. Contrary to the investor's claim, the Tribunal has not dismissed this Canadian objection. Instead, the Tribunal joined all remaining jurisdictional issues to the merits.[1]

All of Canada's questions are clearly directed to matters of fact

12. The vast majority of the investor's objections assert that Canada's questions are mixed questions of fact and law, or would require expert evidence or legal conclusions or would somehow require disclosure of "counsel's evidentiary strategy". Many of these objections relate to questions in which Canada asked for the date on which UPS Canada first acquired knowledge of alleged facts that would need to be established in order to prove a breach of the NAFTA.

13. These objections are without merit.

14. For example, Canada asked for the date on which UPS Canada first acquired knowledge that Canada Post allegedly exercises "delegated governmental authority". The investor responded that this first required a determination of what is "delegated governmental authority", which is a legal question.

15. Whether or not the question requires that such a legal determination be made, the answer requested is clearly one of fact alone. UPS alleges that Canada Post does exercise such authority, whatever it may mean. Canada has not requested the basis for this allegation. Nor has it requested the definition UPS used in reaching this conclusion.

16. Canada has asked only for the date on which UPS Canada first acquired this alleged knowledge, and for a description of the events that led to the acquisition. These are straightforward matters of fact that UPS Canada officials responsible for governmental relations, regulatory affairs or operations ought to be able to answer without expert assistance.

17. Canada notes that at paragraph D.2 of its Order of 4 April 2003, the Tribunal stated that persons to whom interrogatories are directed may consult the lawyers representing them in the arbitration for "general advice". This should be sufficient to allow the persons in question to answer all of Canada's interrogatories.

18. Canada has also asked a number of questions relating to which of Canada Post's products compete with UPS Canada's products, and relating to the date on which UPS Canada first acquired knowledge of this alleged competition. UPS has refused to answer any of these questions on the grounds that they seek a definition of the market, or require expert evidence on the nature of the market and of competition itself.

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[1]See Section A of the Tribunal's Procedural Directions and Order of 4 April 2003.

19. Canada notes that UPS asked many similar questions. Either the questions are proper, or UPS deliberately asked questions it believes are improper. Canada submits it is the former.

20. Many firms keep close track of their competitors or perceived competitors. Among other things, they monitor their relative market shares and they keep a record of bids lost and won. Canada's questions seek only this type of information, which can be provided by UPS Canada officers responsible for marketing, without any legal or expert assistance.

21. Finally, Canada asked two series of questions requesting that UPS provide lists of customers, contracts or other opportunities that UPS Canada may have lost as a result of the alleged breaches of the NAFTA. UPS claims these questions seek "legal counsel's evidentiary strategy, legal argument and expert evidence".

22. Canada submits that this is commercial information that many firms keep as a matter of course. Furthermore, the question of whether UPS Canada and Canada Post both bid on the same contract is clearly a matter of fact that has nothing whatsoever to do with legal counsel or expert witnesses. The same is true of the question of who was successful.

23. Moreover, these questions are plainly relevant to this stage of the bifurcated proceedings. All the requested information is relevant to whether UPS Canada has suffered loss or damage. Since Canada has not asked for the value of any of these alleged lost opportunities, the questions do not go to quantum of damages.

Canada's questions are all within the terms of the Tribunal's Orders

24. The investor has frequently asserted that Canada's reformulated interrogatories do not comply with the Tribunal's Order of 21 June 2004. Canada submits this is not true – all of Canada's questions are clearly directed to matters of fact, and have been posed to individuals or classes of individuals who should be capable of answering them.

25. Canada has included two of its original questions unchanged, as it asserts that these questions are fully compliant with the Tribunal's Order. The first of these (question 18) is a request for UPS Canada's market share from 1975 to 2002. As Canada demonstrated above, this is a question of fact, not law. Furthermore, Canada has directed it to UPS Canada officials responsible for marketing, who can reasonably be expected to keep track of this information for commercial purposes.

26. The second (question 146) asks whether UPS, UPS Canada or any group of which either is a member has ever alleged that Canada Post is involved in cross-subsidization, cost misallocation or predatory pricing. These are matters of fact that are relevant to when UPS Canada first acquired knowledge of alleged breaches of the NAFTA. As such they are relevant, necessarily including the time prior to 1997. Moreover, as required by the Tribunal's Order, Canada has directed the question to a specific class of individuals.

Relief Requested

27. Canada requests that the Tribunal direct UPS to answer all of Canada's questions by 18 October 2004.

Dated at the City of Ottawa this 26th day of July, 2004.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

for Kirsten Hillman
Counsel to the Government of Canada