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

REPLY OF THE GOVERNMENT OF CANADA TO THE INVESTOR'S MOTION ON ITS INFORMATION REQUEST

(29 June 2004)

I. Introduction

1. Canada files this reply on 29 June 2004, in response to the investor's motion of 9 June 2004, concerning Canada's alleged failure to reply to the investor's information request.

2. Canada provided over 100,000 pages of documents and nearly 70 pages of answers to interrogatories in response to the investor's original request for information. On 17 May 2004 Canada tried to resolve the investor's complaints regarding Canada's production.

3. Canada is conducting further searches to determine whether any additional relevant and responsive documents can be found. Subject to any claim of privilege, Canada will produce such documents.

4. Canada has objected to specific information requests. Those requests are irrelevant, outside the scope of the Tribunal's Orders, or so broad that answering them would place an undue burden on Canada. Canada therefore submits it should not be required to answer them.[1]

5. Much of the investor's motion amounts to a complaint that Canada raised some late objections and has taken longer than anticipated in conducting additional searches of its files. Based on this, the investor asks that the Tribunal sanction Canada by permitting irrelevant questions, and by threatening it with adverse inferences.

6. The investor's requests are without merit, and should be denied. Irrelevant requests remain irrelevant, regardless of when the objection was raised. Further, as the Tribunal indicated in its Order of 21 June 2004, requests for an adverse inference cannot be considered in the abstract.

[1] All such requests are indentified in the document at Tab 2 of this Reply.

II. Canada has conducted extensive searches for documents

7. The Tribunal issued its directions for document production and interrogatories in its Orders of 4 April and 1 August 2003. The Tribunal bifurcated the arbitration into merits and quantum of damages phases. It provided a procedure for objecting to questions, and ordered that production of documents was to be completed by 1 October 2003. It also ordered that Canada not object to production on the basis of jurisdiction. The test for document production stipulated by the Tribunal was whether a document was relevant to an allegation in the *Revised Amended Statement of Claim* or the *Statement of Defence*, notwithstanding Canada's position that the *Revised Amended Statement of Claim* lacks precision.

8. Canada has undertaken extensive searches in compliance with these Orders, resulting in the production of some 100,000 pages of documents and almost 70 pages of answers to interrogatories. These efforts are described below.

A. The original searches

9. Canada received UPS' information request on 25 April 2003. Pursuant to an Order of the Tribunal, production was originally set for completion by 1 October 2003. As a result of both disputing parties having agreed to suspend the running of time, the date for production was moved to 26 February 2004.[2] Canada produced its documents and its answers to interrogatories on that date.[3]

10. Upon receipt of the investor's information request, Canada conducted a thorough search of its records. This included the files of every department, agency or Crown corporation that could in any way be implicated in this arbitration.

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[2] The facts surrounding the suspension of time are set out in Canada's submissions regarding the production of restricted documents, dated 24 February 2004 (Tab 3).

[3] Some documents were held in escrow. Canada released these documents on 1 March 2004.

11. Counsel for Canada asked all government entities for all documents that might be relevant to an allegation in the pleadings, regardless of whether they were responsive to the investor's questions.

12. The instructions to in-house counsel were to coordinate with their clients to provide all documents that could be relevant to the arbitration. This was done in searches covering about a dozen government entities and lasting for several months. These searches involved substantial discussions between counsel and the various entities concerning relevance, responsiveness, confidentiality of documents, and privileged information.

13. At the Canada Customs and Revenue Agency (now the Canada Border Services Agency) and Canada Post, which are most significantly implicated by the pleadings, the information gathering was particularly extensive.

14. At least one counsel at each entity was assigned full-time to this exercise. Several other individuals were required to gather documents. Canada and Canada Post hired additional staff exclusively for this purpose.[4]

15. Collection alone was a substantial exercise. All counsel met regularly to ensure everyone was working with the same instructions on searching for and identifying relevant documents. In-house counsel ensured their clients received and understood these instructions.

16. Documents were produced to counsel for Canada throughout the summer of 2003.

17. Once documents were collected, most of the entities had in-house counsel review them to determine their relevance and responsiveness before sending them to counsel for Canada. Counsel for Canada then reviewed as many documents as feasible a second time, checking again for relevance and responsiveness. They also checked for completeness of the response.

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[4] While Canada Post Corporation is a separate legal entity from Canada, it provided its documents to Canada voluntarily.

18. In many instances, counsel went back to the originating group asking that further searches be conducted for additional documents. Any such documents were added to the collection.

19. The result of these efforts was the retrieval of several thousand documents. Every document was reviewed at least once by counsel for relevance to an allegation in the pleadings, responsiveness to a question posed by UPS, and potential claims of privilege.

20. Canada organised a substantial team to work exclusively on the physical task of readying documents for production. It engaged a firm to scan documents and burn them onto compact discs. Within government, one counsel, two paralegals and two additional staff worked full-time for approximately six weeks to check that documents were properly scanned, were in the proper order and were appropriately marked. Other counsel and staff assisted as necessary.

21. Finally, in-house counsel worked with their clients to gather the information needed to respond to UPS' interrogatories. Counsel for Canada then spent several full days working with those counsel, ensuring that questions were fully answered.

22. The extent of this work is obvious from the volume of documentation Canada provided to UPS. Canada provided over 1,200 documents, totalling some 100,000 pages, along with another nearly 70 pages of answers to interrogatories. The non-responsive picture UPS attempts to paint does not fairly represent these efforts.

23. Subject to claims of privilege, Canada has provided all the relevant and responsive documents that were identified in the original searches of government and Canada Post records.

B. The additional answers of 17 May

24. Nevertheless, on 6 April 2004, Canada received a letter in which the investor stated it was dissatisfied with Canada's production. On 7 April 2004, Canada replied to the investor, asking for a list of questions the investor considered improperly answered.

25. In its reply, Canada stated its view that its answers were fully responsive to the investor's questions. However, as a gesture of good faith, Canada offered to consider carefully the investor's list of questions and respond to them as appropriate. Since the investor did not attach this letter to its motion, it is attached to this reply at Tab 4.

26. Canada did carefully review the investor's list of questions. Many questions included in the investor's original complaint had been fully answered; apparently, counsel for the investor simply overlooked part of Canada's production. These questions are no longer at issue.

27. Of those questions the investor has brought before the Tribunal, with very few exceptions, Canada continues to maintain that it has responded in full to all relevant questions.

28. Canada provided the investor a question-by-question response to its concerns on 17 May 2004. Where Canada had already provided an answer or did not object to the question, it either clarified its original answer or stated the question had been answered in full. In some cases, Canada offered to conduct further searches of government records to determine if any additional documents could be identified.[5]

29. In its original response of 26 February 2004, Canada produced nearly 1,000 documents just in the answers UPS identified as "incomplete, vague or non-responsive". A review of the document at Tab 2 to this reply makes it clear that on 17 May Canada provided additional answers in an effort to address the investor's concerns.

30. Canada has provided the investor with the documents in its possession, yet the investor continues to ask for additional material. For example, in question 176 the investor asked for a pamphlet entitled "Retiring from the Canada Post Corporation – Some Useful Tips". If such a

[5] The investor reproduced that response in Appendix I to its motion. The question-by-question section appears as appendix B in Canada's letter of 17 May. For the convenience of the Tribunal, the document at Tab 2 is a re-formatted version of this reply. The reformatted version simply lists all questions in numerical order. For most questions, Canada has here included a further explanation of its answers of 17 May 2004. Where there is none, it is because the first requires no further explanation, or because Canada maintains it provided the documents it located.

pamphlet ever existed, Canada and Canada Post have been unable to find it. Instead, Canada produced two documents providing information on retiring from Canada Post. The investor continues to insist Canada produce the requested pamphlet, although Canada has stated that it has produced the relevant documents.

31. In several questions, the investor has asked Canada to identify a specific statutory authority, or otherwise to interpret Canadian law.[6] On 17 May, Canada provided additional information, identifying relevant statutes and regulations, yet the investor asks for still more explanations, or for specific section references.

32. Canada submits it has responded in full to these questions. All acts and regulations are public documents, and UPS has its own counsel. Canada has no obligation to give legal advice to the investor.

33. Canada invites the Tribunal – and the investor – to review Canada's responses found in the document at Tab 2 for similar explanations of its answers. Canada submits the overwhelming majority of the investor's requests have been answered in full.

C. The offer to conduct further searches

34. Canada is nevertheless conducting additional searches with respect to several of UPS' questions. This includes three of the four questions UPS identified as "no response provided".[7]

35. Given the extent of the original searches, and the sheer volume of files kept by an institution the size of the Government of Canada, it is no surprise that further searches are taking longer than anticipated.

36. If these searches reveal any additional relevant and responsive documents, Canada will produce them, subject to any applicable privilege.

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[6] See questions 50, 52, 54, 164, 167, 168, 185 and 186.

[7] The investor identified 82B(1), 89, 90(d) and 112. Canada is conducting additional searches for the last three.

D. Allegations of Professional Misconduct

37. The investor alleged in its motion that Canada has "repeatedly breached its undertakings" in respect of this offer to conduct additional searches. This is a serious charge of professional misconduct, and is made without any basis whatsoever.

38. The investor claims that Canada stated it would provide "missing information" no later than 15 May 2004.[8] It further claims that on 17 May, Canada "promised" to produce additional answers by the end of May.[9]

39. Canada's correspondence does not bear out the investor's claim. In its letter of 7 April 2004, Canada stated its position that it had responded to the investor's questions, but would carefully consider the investor's claim that some questions are unanswered. Canada has met this commitment.

40. On 23 April 2004, Canada stated it would provide UPS with answers within the requested 30 days. Canada did so, on 17 May 2004.[10]

41. In some of those answers, Canada said it would "attempt" to produce additional documents by the end of May. However, it explicitly cautioned that this review could take longer. Canada certainly gave no "promise" to produce by a specific date.

42. Canada submits that it has complied with the Tribunal's Orders to the best of its ability. It has made every effort to respond to UPS' information request, within the scope of the Tribunal's Orders. It has produced a substantial collection of documents, including those subject to its jurisdictional objections, contrary to the investor's suggestions to the contrary.[11]

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[8] Investor's motion at para. 13.
[9] Investor's motion at para. 14.
[10] The thirty days expired on Saturday, 15 May 2004. Pursuant to UNCITRAL Rule 2(2), Canada provided its answers on the following business day.
[11] Investor's motion at para. 20. Those documents were stamped with "Jurisdictional Objection", and are listed at Tab 5 to this reply.

III. Canada need not reply to UPS' remaining information requests

43. There remain two categories of questions to which Canada has not replied. The first groups consists of irrelevant questions that do not relate to any allegations in the pleadings, many of which Canada could not answer without being subjected to an undue burden. The second consists of questions that are outside the scope of the Tribunal's Orders.

A. Irrelevant Questions

44. These questions, and Canada's objections, are listed in the chart at Tab 2 to this reply. While Canada had not previously objected to them, their lack of relevance to the proceedings became clear as counsel were preparing documents for production to UPS.

45. For example, a series of questions[12] relate to treatment Canada may have accorded to Purolator Courier Limited. The *Revised Amended Statement of Claim* contains no allegations concerning any such treatment.[13] Neither does the *Statement of Defence*. The remaining questions to which Canada objected are similarly irrelevant.

46. Canada admits that it raised its objections late, but it did so in good faith.

47. This is a complex case with multiple allegations, the investor's information request was 79 pages long, and Canada's counsel team had undergone substantial change in April of 2003. It simply took time before Canada could conclude that certain questions were not relevant to the pleadings.

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[12] Questions 5, 6, 19, 55, 56, 73, 156 and 223.

[13] The investor's allegations against Canada are found in paragraphs 25 and 32-52 of the *Revised Amended Statement of Claim*. Purolator is named only once in these paragraphs, and that in a passing mention in paragraph 40. The allegation there is that Canada failed to provide information about its measures. None of the cited questions relate to what information Canada may or may not have made publicly available. In the remaining paragraphs, containing allegations directed at Canada Post, Purolator surfaces four times. Two mentions relate to Purolator's access to Canada Post retail outlets, one to Purolator's ability to sell stamps, and one to Canada and Canada Post's "financial strength". Again, none of the questions cited are relevant to these issues.

48. Moreover, the *Revised Amended Statement of Claim* is both vague and imprecise. The investor should not be allowed to take advantage of its imprecision to conduct a fishing expedition in search of a case.

49. Requiring Canada to answer questions that are beyond the pleadings would have the effect of expanding the issues between the parties. Such a result would be contrary to the Tribunal's Order of 21 June 2004.[14]

50. Canada submits that the time, effort and cost required to answer many of these questions would place an undue burden on it, particularly given the resulting documents' lack of relevance.[15]

51. The breadth of the investor's requests with respect to the ACS is not consistent with the investor's earlier arguments on discovery. The investor has previously stated that the scope of discovery in international arbitration is narrower than that advocated by Canada.[16] The Tribunal, in its Order of 21 June appears to have accepted this position.

52. Whatever the scope of discoveries, they must be limited by some level of reasonableness. Fishing expeditions are discouraged in even the broadest discovery systems.[17]

53. The investor has asked for an enormous collection of documents relating to the ACS. Canada is not sure whether some of these documents exist at all. Many certainly do not exist in the form requested.

54. The ACS requires the collection of enormous quantities of data. These data were not – and could not realistically be – centralized into any massive repository. There is no "warehouse"

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[14] Paragraph 25.

[15] Canada refers particularly to questions 82A, 82B(1), 86 and 87. Note that it has already provided 21 documents in direct reply to question 82A. The questions to which Canada objects are the additional documents the investor requested in respect of this question.

[16] Investor's Rejoinder to Canada's Reply on Interrogatories, 9 March 2004 at para. 2 (Tab 6).

[17] See Matti Pellonpää & David D. Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied* (Helsinki: Finnish Lawyers' Publishing, 1994) at 482 (hereinafter Pellonpää and Caron) (Tab 7).

from which data can simply be transferred to interested parties, nor was such a requirement ever envisioned.

55. The ACS uses operational data from a large number of complex systems, including hundreds of legacy systems. These legacy systems are not only very large and complex, they are in many cases decommissioned or archived, presenting considerable additional challenges to acquiring old source data. The information may therefore simply not be available. Even if it were, any attempt to provide it in the form requested would present a substantial challenge.

56. Canada Post estimates that one employee, supported by two to four consultants, would need to work for four to six months to search for and produce all the requested documents. Given the difficulties of acquiring old-source data, Canada Post will also need the assistance of its information technology provider. The extent of this assistance, and the time required for it, can only be determined once the exercise is underway.

57. Such a request would be unduly burdensome in any system. In international arbitration, it is simply impermissible. For example, the International Bar Association Rules provide at Article 9(2)(c) that a Tribunal shall exclude evidence where there would be an "unreasonable burden to produce the requested evidence".[18]

58. Canada submits that its objections have not prejudiced the investor. Even if they had, it would only be in a manner that could easily be dealt with by a cost order, if the investor can demonstrate what, if any, additional costs it has incurred. Any other remedy would be excessive.

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[18] *IBA Rules for the Taking of Evidence in International Commercial Arbitration,* International Bar Association (1999) (Tab 8). See also W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (N.p.: Oceana Publications Inc., 2000) at 455 (Tab 9) and Charles N. Brower & Jeremy K. Sharpe, "Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law" in Lawrence W. Newman and Richard D. Hill, *The Leading Arbitrators' Guide to International Arbitration*, 307 at 321-22 (hereinafter Brower and Sharpe) (Tab 10).

B. Questions outside the scope of the Tribunal's Orders

59. The investor has alleged that Canada Post impermissably cross-subsidises competitive products with revenues earned by products covered by its exclusive privilege. It claims this amounts to a violation of the national treatment obligation found in NAFTA Article 1102.

60. While Canada maintains its jurisdictional objection to this allegation, it has argued in the alternative that it has adequate regulatory control, administrative supervision and other measures over Canada Post to ensure that it does not cross-subsidise in an anti-competitive manner.[19]

61. Given the Tribunal's Order that the disputing parties must produce documents relevant to an allegation in the pleadings, it follows that the investor's questions must also be relevant to such allegations. The investor's questions go well beyond any factual matters that could be relevant in a claim under Article 1102.

62. The investor has attempted to frame its argument as a national treatment issue. It must therefore demonstrate that Canada has accorded UPS treatment that is not "no less favourable" than the treatment Canada has accorded, in like circumstances, to Canada Post.

63. Canada has provided more than enough documentation to allow the investor to demonstrate what treatment Canada accorded to Canada Post. Canada has provided the complete methodology of the ACS, the financial numbers used to generate the ACS in the relevant years, and the external audits conducted in each of those years.

64. The investor is still seeking documents such as auditors' working papers, all documents used in preparing the ACS, general ledger worksheets, all documents explaining the design of Canada Post's revenue measurement system, and a host of others.

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[19] *Statement of Defence* at paras. 49-51.

65. Many of these documents, assuming they exist, would not be relevant to allegations in the pleadings. Many others were not included in the investor's original information request. Such documents are beyond the scope of the Tribunal's Orders of 4 April and 1 August 2003.

66. None of these documents are required to demonstrate what treatment Canada has accorded Canada Post, or the circumstances under which it was accorded. The investor's additional requests for documents are therefore not relevant to its case. They amount to an outright fishing expedition.

67. In addition, Canada submits that these requests seek documents not in Canada's control or not within "a narrow and specific class of documents" as required by the Order of 4 April 2003. Furthermore, nothing listed in Schedule A to Appendix B of the investor's motion was included in the investor's original information request.[20] Each of these is sufficient reason to deny the investor's request.

IV. The request for an adverse inference is premature

68. Pursuant to the terms of the Tribunal's Orders, Canada did not produce documents that were not included in the investor's original request or were not relevant to an allegation in the pleadings. Nor did it produce documents that are relevant only to quantum of damages, which the Tribunal ordered set aside for a second phase.

69. Given the irrelevance of the questions, the documents that Canada has declined to produce must also be irrelevant to any allegation in the pleadings. Not producing them therefore accords fully with the Tribunal's Order of 1 August 2003.

70. The time at which Canada raised its objection cannot change this simple fact. An order to produce these documents would be equivalent to adding new allegations to the *Revised Amended Statement of Claim.*

[20] Canada's objections to specific questions on these and similar grounds are also listed at Tab 2 to this reply.

71. UPS has had ample opportunity to make its allegations in its three statements of claim. Allowing new ones at this stage would expand the issues between the parties, rather than narrow them. Such a result would be contrary to the Tribunal's Order of 21 June 2004. Furthermore, expanding the issues after Canada has filed its *Statement of Defence* would prejudice Canada's ability to make its case and would create inequality between the parties.[21]

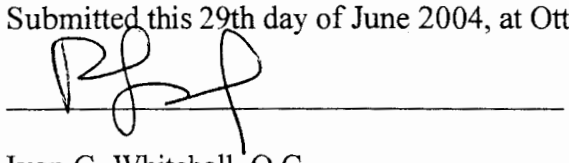
72. The investor has asked that the Tribunal put Canada on notice that failure to answer questions will result in the Tribunal's drawing adverse inferences against Canada. Canada submits that this request is premature.

73. As the Tribunal indicated in its most recent Order, the drawing of adverse inferences is not something that can be done in the abstract. Other evidence may be relevant to unanswered questions.[22]

V. Order Requested

74. Canada requests that the Tribunal deny all of the relief sought in paragraph 36 of the investor's motion.

Submitted this 29th day of June 2004, at Ottawa, Ontario, Canada.



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[21] Article 15 of the UNCITRAL Rules requires that the parties be treated with equality.

[22] Order of 21 June 2004 at para. 23. Other Tribunals appear to have accepted this position. For example, in *INA Corporation* v. *The Islamic Republic of Iran* the Tribunal declined to draw an adverse inference, saying it was up to the parties to determine what evidence to file. See Award No. 184 (12 August 1985), as reprinted in Pellonpää and Caron at 498 (Tab 7).

The Iran-United States Claims Tribunal also generally declined to draw adverse inferences unless the requesting party had already made out a *prima facie* case and the responding party had offered no satisfactory explanation for its failure to produce. See Brower and Sharpe at 342-44 (Tab 10). Canada submits that neither of these criteria have been met.

Other Tribunals have followed a similar course. The United States-Mexican General Claims Commission held that it would not make an award for the claimant in the absence of "concrete and convincing evidence", even where the respondent had produced little evidence. See Durward V. Sandifer, *Evidence Before International Tribunals* (Charlottesville: University of Virginia Press, 1975) at 170 (Tab 11).