AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

B E T W E E N

UNITED PARCEL SERVICE OF AMERICA INC

AND

GOVERNMENT OF CANADA

DECISION OF THE TRIBUNAL RELATING TO CANADA'S CLAIM OF CABINET PRIVILEGE

THE TRIBUNAL:

Dean Ronald A Cass, Arbitrator
L Yves Fortier CC, QC, Arbitrator
Justice Kenneth Keith, President

Ucheora Onwuamaegbu, Registrar

8 October 2004

1. Counsel for Canada, on 11 June 2004, forwarded to the Tribunal a letter of 25 May 2004 from the Clerk of the Privy Council of Canada claiming privilege in respect of 377 documents or portions of documents "which are confidences of the Queen's Privy Council for Canada". The Clerk gave these reasons for his claim:

> In Canada there is a prohibition that does not allow the disclosure of documents that are considered to be Cabinet confidences, namely documents that contain evidence of Ministers' discussions and deliberative process. This prohibition stems from the Canadian political system, in which the government is responsible to Parliament, and must gain and maintain the confidence of the House of Commons in order to govern. The responsibility and accountability of Cabinet Ministers are essential elements of this system.
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> The principle of Cabinet confidentiality was recently clearly reaffirmed by the Supreme Court of Canada in the case of *Babcock v Attorney General of Canada* [2002] 3 S.C.R. 3. As Clerk of the Privy Council and Secretary to the Cabinet, I am responsible for the custody of Cabinet confidences. Prior to objecting to the disclosure of documents, I have to be confident that the information comes within the Cabinet confidence definition, and secondly that it is information that the government wishes to protect, taking into account the competing public interests in disclosure and retaining confidentiality. I would have made the same decision regarding these documents in a domestic dispute.
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> The 377 documents for which the Cabinet confidence privilege is claimed, relate to the Cabinet and Treasury Board (which is a Committee of Cabinet) approval of various initiatives, and financial and commercial transactions of the Canada Post Corporation. The documents consist mainly of Treasury Board submissions and decisions, Memoranda to Cabinet, briefing notes for ministers, correspondence between Ministers and draft regulations. These are at the core of Cabinet confidentiality in that they provide direct evidence of the information presented to Ministers for the purpose of their discussions and deliberations.

2. The Clerk of the Privy Council, in the words of counsel for Canada, "is the most senior non-political official in the Government of Canada. He provides professional and non-partisan support to the Prime Minister on all policy and operational issues that may affect the government".

3. On 17 June 2004, UPS filed a motion seeking the following relief:

   (i) An order requiring Canada to indicate which documents listed in the Schedule to the Clerk's letter are responsive to specific document requests in the Investor's Information Request, within three weeks time;

(ii) An order requiring Canada to produce such documents within three weeks; and

(iii) A declaration that the Tribunal will make the appropriate adverse inferences in the event of Canada's failure to comply with these orders.

4. Canada, in its reply of 13 August 2004, provided two schedules supplied by the Privy Council. The first lists 27 documents which were provided to UPS in redacted form on 30 July 2004 and the second lists 143 documents which are also responsive to UPS's Information Request but which cannot be produced as the information is privileged. The schedules give descriptions of the documents, relating them to the particular terms of the paragraphs of s39(2) of the Canada Evidence Act. They also note for each document the UPS question from its Information Request. Canada asked that UPS's motion be dismissed with costs.

5. On 26 August 2004 UPS in its rejoinder sought the following relief:

(i) An order requiring Canada to produce unredacted versions of the 170 documents identified as responsive to the Investor's Information Request, within three weeks time; and

(ii) A declaration that the Tribunal will make the appropriate adverse inferences in the event of Canada's failure to comply with this order.

Canada responded to that rejoinder on 1 September 2004.

6. The claim by the Clerk is made under the law of Canada, in particular s39 of the Canada Evidence Act which provides:

Confidences of the Queen's Privy Council for Canada

39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy

options to Council for consideration by Council in making decisions;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

(3) For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

7. Parts of the arguments made by the parties turn on this provision and on the *Babcock* decision mentioned by the Clerk in his initial claim. While the Tribunal will return to aspects of those arguments it begins with the basic principle, accepted by the parties, that Canadian law is not directly in point. Canada may not have the advantage of its own law if it is more generous than the law governing the Tribunal. As the Tribunal said in its Decision of 17 October 2001 on the Place of Arbitration a claim for Cabinet privilege "would have to be assessed not under the law of Canada but under the law governing the Tribunal". That law does not in this context refer the Tribunal to national law. Further, s39(1) in its own terms does not apply to this proceeding since the Tribunal does not have "jurisdiction to compel the production of information". Canada puts the point in these words:

> Canada does not expect the Tribunal to apply s.39 as law governing this arbitral proceeding. Instead, it asks the Tribunal to consider it

> along with the Canadian case law as a description of the mechanism by which the Clerk of the Privy Council for Canada responsibly exercises the power to claim Cabinet confidentiality. Certification is the trigger by which information becomes protected on the basis that the documents are of a certain character and that it is desirable that confidentiality be retained because the public interest in so doing outweighs other interests.

8. The parties accept that Canada may claim privilege in respect of certain documents, but they disagree on the extent of that privilege and, in fact, on the judgment or assessment involved in it. On the first matter UPS contends that the privilege is limited to state secrets (such as information the release of which would compromise national security), while Canada submits that wider categories of information, including Cabinet deliberations, are protected. We will return to that issue. It is convenient first to consider the judgment or assessment to be made by the state official who makes the claim to privilege.

9. The authorities to which the parties have referred us indicate that, in addition to determining whether the document in question falls within the particular category or whether its release would compromise the relevant protected public interest, the official is also, if that first test is satisfied, to consider and weigh the competing public interest in disclosure, in this case for the purposes of the arbitration (and not of course for general public release). (The authorities from common law countries include, in addition to the *Babcock* case, *United States v Nixon* 418 US 683, 705-713 (1974); *Sankey v Whitlam* (1978) 142 CLR 1 (HCA); *Environmental Defence Society v South Pacific Aluminium* [1981] 1 NZLR 146 and 153 (NZCA); *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 (CA and HL), and *Carey v Ontario* [1986] 2 SCR 637, 654-673.) It may be that there are interests, particularly in respect of core national security or military secrets, where no such weighing is required, but Canada does not so contend in respect of Cabinet deliberations. The Clerk, it says, must

> be confident that the information comes within the Cabinet confidence definition. He must also exercise his judgement to conclude that it is information the government wishes to protect, *taking into account the competing public interests in disclosure* and retaining confidentiality. (emphasis added)

In that it repeats what the Clerk said in the second paragraph of the extract from his letter of 25 May 2004 set out in para 1 above.

10. On their face however that letter and the schedules submitted to the Tribunal do not demonstrate that the Clerk has undertaken the weighing required. He begins by saying that "In Canada there is a prohibition that does not allow the disclosure of documents that are considered to be Cabinet confidences ...". The attached list of the 377 documents does no more than repeat the wording of the relevant paragraph of s39(2). That is also the case with the later schedules listing the 170 documents. To the extent that the claimed privilege in respect of Cabinet documents exists in the present case, the process of invoking it must involve that element of weighing. In this case the process has not included that

element and to that extent is deficient, assuming that a privilege does exist in respect of Cabinet confidences.

11. We return to that question of the extent of the privilege. Does it extend beyond state secrets and if so to what? Does it extend to Cabinet documents of the kind in issue here? The authority to which UPS referred us in support of limiting the privilege to "state secrets" does not provide a definition of that expression. Depending on the definition, that expression may of course cover a narrow or wide range of matters. We need not however attempt to resolve that matter of definition since the materials available to us, including national freedom of information laws, indicate plainly that state practice does support the protection of information falling within deliberative and policy making processes at high levels of government. Those processes cannot function completely in the open. That recognition of the need for protection exists notwithstanding the movement to be seen in many countries towards greater openness in the public sector. But the protection to be afforded is in general carefully circumscribed to protect no more than the interests that call for protection, for instance in frank and uninhibited exchanges between Cabinet members or in advice given to them, and, as already discussed, those interests in general are subject to being outweighed by the competing interest in disclosure.

12. As stated, the Clerk has not on the record before us undertaken the necessary weighing. Further, the record does not show that he has made the initial judgment in respect of each document by reference to the protection of a relevant public interest. For instance the description of many of the documents, tracking the relevant provisions of the Canada Evidence Act, says only that they "present proposals or recommendations" to the Cabinet (s39(2)(a)) or record its decisions (s39(2)(c)); but the particular "proposal" might have been accepted in full and the resulting "decision" publicly announced or promulgated in law, and disclosing those documents may not threaten in any way candour of communication or a vigorous deliberative process – the more so, if, as with many of the documents, five years or more have passed since they were prepared.

13. Accordingly, the Tribunal concludes that the claim to Cabinet privilege is not made out.

14. The Tribunal directs that Canada consider whether it wishes to assess whether the claims to privilege may be established by reference to particular stated public interests which justify protection and to weigh that justification, if it is made out, against the public interest in disclosure, for the purpose of the arbitration, to UPS and the Tribunal. The result of any such process, if it is undertaken, must be made available to UPS and the Tribunal by 29 October 2004.

15. A failure to disclose, found by the Tribunal to be unjustifiable, may lead to the Tribunal drawing adverse inferences on the issue in question. Whether it does draw such an inference will depend on the circumstances surrounding that issue. As stated in the ruling of 21 June 2004 that is not a matter that can sensibly be ruled on in the abstract.

For the Tribunal
8 October 2004