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08:46:00

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

----- x
:
In the Matter of Arbitration :
Between: :
:
UNITED PARCEL SERVICE OF AMERICA, INC., :
:
Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Party. :
:
----- x Volume 2

HEARING ON THE MERITS

Tuesday, December 13, 2005

The World Bank
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:06 a.m. before:

KENNETH J. KEITH, President

L. YVES FORTIER, Arbitrator

RONALD A. CASS, Arbitrator

08:46:00

Also Present:

ELOISE OBADIA,
Secretary to the Tribunal

Court Reporter:

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08:46:00

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On behalf of the U.S. Department of Commerce:

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J. CAMERON MOWATT
GRAHAM COOK

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P R O C E E D I N G S

2 PRESIDENT KEITH: Mr. Whitehall?

3 MR. WHITEHALL: You mentioned yesterday
4 that if there were any matters. I know it wasn't
5 an invitation, but nonetheless I will rise to the
6 semi-invitation.

7 And there are two problems that I would
8 like to address you on, and I gave you a package of
9 documents, and what you should have is a letter
10 from Mr. Appleton. A letter from myself, dated
11 October 14; a letter from myself to the Tribunal,
12 dated the 18th of October; the order of the

13 Tribunal; and then the investor's merits hearing
14 compendium.

15 Now, yesterday morning we had received, as
16 you have received, nine volumes accompanying the
17 investor's index. I might tell you some of the
18 documents are as long as 500 pages, others are as
19 little as 200, and others yet are smaller yet. I
20 haven't counted precisely how many documents there
21 are, but in the order of magnitude of 140 I think
22 would be a fair estimation.

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09:10:34 1 Now, Mr. President, you recall the
2 exchange, and that's why I gave you the two
3 letters. Mr. Appleton was reluctant to give to
4 Canada a compendia until the actual witnesses were
5 examined because he felt that we would be getting
6 advance notice of what the subject matter of the
7 examination might be, and you recall there was also
8 a discussion whether or not he should give us
9 notice of the specific subject matters, and
10 initially he told us they would be examined on
11 their affidavits. We thought it was not specific
12 enough. We have made a further order, we had
13 received some further specificity, and I was
14 prepared to leave it there, frankly. I did not
15 think that giving us essentially the subject

16 matters that are covered by the affidavit meet the
17 spirit of your order, but given the time, I was
18 prepared to leave it there.

19 On the compendium, however, your order is
20 very, very specific. Our compendia are to be
21 provided by the outset of the hearing including
22 those used for specific witness examination, and

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09:11:55 1 put that in context, as I understand, that there
2 has to be some relationship between the documents
3 and the witness.

4 And the reason behind the request was, you
5 will recall, so that we will not be taken by
6 surprise at the time of cross-examination. I have
7 said Canada continues to be of the view that it
8 would expedite matters if witnesses were able to
9 examine the documents they will be called--it
10 should be they will be examined on before he gives
11 evidence. Admittedly, this would avoid the witness
12 being taken by surprise, but in Canada's submission
13 taking witnesses by surprise should not be the
14 governing standard in these proceedings.

15 Now, we have had these documents copied
16 yesterday; we actually had them available in a
17 copied form by 7:00 in the afternoon. I have asked

18 my friend if I can in any way relate documents to
19 the specific documents, and as I understand, his
20 position is he had no obligation to do that.

21 In my respectful submission, he failed to
22 abide by the order of this Tribunal. The very

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09:13:18 1 purpose of the order was, albeit it's a one-liner,
2 it's very clear what was intended. What was
3 intended that Canada should be able to go to the
4 documents and say okay, these 30 documents relate
5 to witness X, and even, although it's a rather
6 brief period from the morning of yesterday or the
7 beginning of the hearing yesterday, it's not the
8 morning, the beginning of the hearing yesterday to
9 today when witness examinations start, nevertheless
10 it is some ability for the witness to reflect on
11 the documents rather than have the witness spend,
12 frankly, everybody else's time looking at the
13 document, studying the document, before the witness
14 answers the questions.

15 So, I have this dilemma. On the one hand,
16 I think this does not comply with the Tribunal's
17 order. On the other hand, I'm conscious of the
18 fact that we are already, for unavoidable reasons,
19 somewhat behind schedule. At the minimum,
20 Mr. Chairman, Canada needs some adjournment and

21 some advice from Mr. Appleton so that we may
22 associate specific documents with witnesses, so

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09:14:45 1 that essentially while one witness is giving
2 evidence, perhaps the other witness can have a
3 chance to review the documents that he or she may
4 be asked the questions about.

5 So, that's my first issue for the morning,
6 and no doubt my friend will want to address you,
7 but this second issue is unrelated to that one, but
8 I need to raise it.

9 MR. APPLETON: Perhaps it might be most
10 convenient if we dealt with this first issue first
11 because it's a bit of a mouthful, and then we might
12 deal with the second. We will have other issues as
13 well, but I leave it to you and the judgment of the
14 President as to how we would like to proceed.

15 PRESIDENT KEITH: The question my
16 colleague was just asking me, I take it that the
17 compendia--this is your problem--all the witnesses,
18 aren't they, and your problem you is don't know
19 which relates to what?

20 MR. WHITEHALL: Right. The nine volumes
21 relate to any of the eight witnesses.

22 PRESIDENT KEITH: But I think the

09:16:01 1 suggestion that Mr. Appleton just made that he
2 respond to this now.

3 MR. WHITEHALL: I would be happy to do
4 that, but I will restore the equipment.

5 PRESIDENT KEITH: Yes, Mr. Appleton, on
6 that first point about matching the materials to
7 the witness.

8 MR. APPLETON: Sir Kenneth, I think it's
9 important first that we just discuss what's in this
10 compendia. Quite regularly for an international
11 arbitration of this kind, what generally occurs is
12 that there might be a joint book of documents of
13 the parties to make it easier to facilitate things,
14 and there might be, in fact, an extract done of key
15 documents that counsel will jointly rely upon to
16 make it a little bit easier and to facilitate
17 things.

18 Generally, in our practice, what has been
19 the case has been that counsel would provide to a
20 witness just before they are examined, in fact, a
21 cross-examination book, and the other side might,
22 in fact, present a redirect book, when--just before

09:17:05 1 they do a redirect. These are all documents from
2 the record. Nothing that is new, everything that
3 is there.

4 And, of course, we always assume that
5 experts are familiar with their own documents.
6 That's why we want them before the Tribunal in any
7 event.

8 But what we, of course, have done is tried
9 to comply specifically with the order made by this
10 Tribunal in the most sensible way possible, and
11 that required us to put together materials that
12 would have documents, and our intention was not to
13 have to replicate documents and make the set even
14 larger.

15 And since documents that could very easily
16 be used by one witness will also be used for the
17 closing, and documents that are used by one witness
18 might be relevant because they have been referred
19 to by that witness in their own witness statement,
20 rather than replicating the same documents once,
21 twice, sometimes three times, we have created one
22 small set, although it's not as small, but if you

09:18:05 1 look at the record of hundreds of plus volumes,

2 it's relatively small, that will have it.

3 And if we look specifically at what's
4 there, and as I told my friend this morning, in
5 general, every witness has their material in the
6 same general area of the compendium. But what
7 Mr. Whitehall has asked for is something that is a
8 little bit different. He asks today, not by letter
9 before, but today, that we tell him in advance that
10 every single document that every single witness is
11 going to see and be examined on be presented to him
12 now, and we tell him the game plan of exactly what
13 our cross-examination is going to be that is going
14 to take place in the next few minutes. And that is
15 actually where we have a bit of a difference.

16 In fact, though, I have a very reasonable
17 and practical solution because we are in a
18 difficult situation this morning, but certainly an
19 adjournment cannot be contemplated. These are
20 documents from the record, documents that have been
21 filed six months ago, eight months ago. If
22 Canada's own witnesses are unfamiliar with their

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09:19:22 1 own witness documents, that's Mr. Whitehall's
2 bigger problem than just needing a little
3 adjournment now.

4 But what I propose is the following: That
5 we proceed, the materials are pretty well set out
6 in order, in any event, and if there happens to be
7 a problem that there is a document that is
8 identified that the witness somehow is unfamiliar
9 with, then we can come back to the Tribunal and see
10 how we should deal with that. So we will cross
11 that bridge, if we get there, but otherwise, we
12 have a difficulty because the order didn't say
13 please separate out specifically or please give a
14 plan and tell the other side exactly how you're
15 going to cross-examine, and that would be unusual
16 in our experience in doing this.

17 So, what we are trying to find is a very
18 sensible, practical way to be able to deal with
19 this, and that would permit to you judge whether or
20 not that would be necessary. But the material is
21 laid out, and most of the material that we are
22 dealing with, because we already very clearly have

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09:20:33 1 articulated our examining witnesses and experts on
2 their own material that has come from their witness
3 statements. If it's not in their witness or expert
4 report, we are not going to go there, unless it's
5 something they referred to in that witness report.

6 So, I think this basically should not be a

7 very significant problem. I have tried to come up
8 with my friend this morning with a compromise. It
9 seemed to be not possible. I don't want to take
10 very much time up, but I just thought it was better
11 to try to walk through what's there, and go from
12 there. We are happy, though, to be in your capable
13 hands, sir.

14 PRESIDENT KEITH: Thank you. Any quick
15 comment on that Mr. Whitehall?

16 MR. WHITEHALL: Yes.

17 Let me be clear. I'm not asking my friend
18 to duplicate documents. That would be nonsensical.
19 Your order could have been complied with by giving
20 us simply an index that document number five
21 relates to witness number eight. That doesn't call
22 for any duplication of any document, and

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09:21:48 1 essentially that's the same question I've asked my
2 friend this morning, and he said we are not
3 entitled to that.

4 So, I submit that effectively he admitted,
5 just like with the affidavits, that he failed to
6 comply with your order. And I'm not asking him to
7 give me a question-by-question on
8 cross-examination, but even with this small

9 community of documents, nine volumes, literally
10 thousands of pages, I submit that it would have
11 served, and it continues to serve all of our
12 interests if the witnesses have some opportunity to
13 examine the documents.

14 And we are not talking necessarily about
15 documents that are appended to a witness's own
16 affidavit. For all I know, these are documents
17 that they argue that the witness ought to have seen
18 or may shed further light on what the witness has
19 said. I don't know, frankly. We adjourned at 7:00
20 last night. That's when I got the list of
21 documents. That's when I identified the problem,
22 and I have attempted to address it with my friend

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09:23:10 1 this morning. We were not able to come to a
2 resolution for reasons that are obvious to you. My
3 friend takes one position, which is identical I
4 might say, to the position he took in the first
5 instance. That is his letter of October 14th.

6 PRESIDENT KEITH: Mr. Whitehall, the
7 letter that you have given us is November 14th, I
8 think.

9 MR. WHITEHALL: Beg your pardon?

10 PRESIDENT KEITH: The letter you have
11 given us is 14 November rather than--

12 MR. WHITEHALL: It reads October 14 in my
13 copy.

14 ARBITRATOR FORTIER: That's your letter?

15 MR. WHITEHALL: No, that's Mr. Appleton's
16 letter.

17 ARBITRATOR FORTIER: What's your date?

18 MR. WHITEHALL: My letter is dated
19 October 18, it should be, and Mr. Appleton's letter
20 should be October 14.

21 PRESIDENT KEITH: Well, we have been given
22 the November one, so...

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09:24:10 1 MR. APPLETON: Mr. Whitehall, your letter
2 indicates November 14.

3 This is really not very material. We will
4 stipulate that whatever date it is, the letter is,
5 and when Mr. Whitehall is finished, we will have a
6 very brief comment.

7 MR. WHITEHALL: In any event, whatever the
8 date of the letters are, I'll be happy to provide,
9 but the principle has been articulated.

10 PRESIDENT KEITH: I remember the exchange.

11 MR. WHITEHALL: My friend has taken the
12 position beforehand that he should not be giving
13 advance notice, but we have taken the position that

14 we ought to have some advance notice. We
15 understood the Tribunal to say yes, and it should
16 relate to the specific witness, and we don't have
17 anything related to the specific witness.

18 PRESIDENT KEITH: Yes. Understood.
19 You had a brief comment?

20 MR. APPLETON: Yes.

21 Sir Kenneth, I think that this is very
22 simple to resolve by just looking at the first

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09:25:10 1 volume of the compendium, and I'm going to ask my
2 colleague, Mr. Wisner, who is going to do the first
3 cross-examination, if we ever get to do that this
4 morning, but whenever that may be, I'm going to ask
5 him to just show you based on this compendium what
6 are the documents that he expects that we will deal
7 with, because I think that once you see that, you
8 will see that I'm afraid that my friend has made a
9 tempest in a teapot.

10 So, if I could ask the Secretary--just
11 wait, let's get the Secretary to actually bring
12 compendium one, and practically let's reasonably
13 look at what's there, so as to give the Tribunal a
14 moment, and Mr. Whitehall, so he too can see
15 compendium one, and we can just look at this
16 together for a moment.

17 MR. WHITEHALL: I may say this, sir. If
18 my friend is now going to say that all I have to do
19 is look at Volume 1, and that relates to witness
20 number one, that is all I have asked. I mean,
21 that's--he's now going to demonstrate that actually
22 there is a series of documents that actually relate

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09:26:23 1 to witness number one. That is what my question
2 is. Tell me when witness number one starts and
3 finishes. Tell me when witness number two starts
4 and finishes.

5 PRESIDENT KEITH: I have a note that
6 earlier Mr. Appleton did say that the documents
7 were in order, and I assumed that meant in order of
8 the witness, but maybe if we hear very briefly.

9 MR. WISNER: If I may, this will be very
10 simple. In binder one we have Mr. Jones's
11 affidavit that he filed with the memorial, plus
12 exhibits that were attached to that. Then there is
13 Mr. Jones's reply evidence that was filed with
14 Canada's rejoinder, and then we have the exhibits
15 that were attached to that, or, in fact, there were
16 none. Then we have a few documents or other
17 materials filed in the record, like expert reports,
18 all of which deal with Customs matters, and that's

19 all of binder one, and those are the documents that
20 Mr. Jones will principally be examined on.

21 Now, I suspect that all we will need for

22 Mr. Jones's examination is binder one. It is

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09:27:39 1 possible that in one answer that is given it may
2 lead to a line of questioning that leads to another
3 document needing to be put to the witness. If that
4 happens, then the witness will have time to review
5 that other document, but it is unlikely that that
6 will happen. It's possible, but we don't know
7 what's going to happen.

8 And in the index, you will have the index
9 to the other volumes, it continues on pretty much
10 the same way. In binder two, we have Ms. Conn's
11 affidavits, the documents that she's--that deal
12 with her areas of testimony, and because we
13 couldn't fit all of those in one binder, that
14 continues a little bit into binder three, and then
15 the next witness's affidavit will start in binder
16 three with their documents to follow.

17 Now, that's generally the way things go,
18 and if something happens where there--you know, I
19 think in photocopying sometimes things get not well
20 organized, but that's generally how things are in

21 the record, and that's generally the way things
22 will proceed.

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09:28:54 1 Now, having said that, there may be other
2 documents that do come up in the course of the
3 cross-examinations. If those come up, the witness
4 will be asked to turn to it, and will have an
5 opportunity to review the document before the
6 question is asked.

7 (Tribunal conferring.)

8 PRESIDENT KEITH: Well, we too, I think,
9 were a little surprised at the bulk of the
10 claimant's compendium, but it seems to us in the
11 light of what we just heard that the best thing is
12 to start and see how it goes, and if there is a
13 problem, then we will have to deal with it. And
14 then, of course, any extra time that is required
15 during the cross-examination is time that has to be
16 attributed to UPS, and that may in the end be to
17 its disadvantage, but I think we've also had a
18 pretty clear indication from the comments that have
19 just made by Mr. Wisner about the sequence of the
20 material and the sequence of the witnesses, and it
21 may be that that can be clarified between counsel,
22 but we will leave that to them. So, I suggest that

09:30:52 1 we just get on with it.

2 But perhaps first we'd better have
3 Mr. Whitehall's second point.

4 MR. WHITEHALL: Thank you very much, and
5 thank you for that.

6 The second point arises out of the order
7 of yesterday, dealing with who may--the amendment
8 to the confidentiality order, and you have ordered
9 that effectively each party may have one
10 representative.

11 Now, from a business sector point of view,
12 my client would be Canada Post as opposed to UPS.
13 But the Government of Canada is--also had another
14 hat, if you will, and the official, if I may put it
15 this way, representative of the Government of
16 Canada, who has nothing to do with either UPS
17 business or Canada Post business, is Mr. Stephen
18 de Boer, and he is the official representative of
19 Canada. My difficulty arose that I can only, as my
20 friend, we are--we only have one witness or one, I
21 should say, representative, but as I see, the
22 Government of Canada has at least two persona.

09:32:31 1 I have asked my friend this morning if he
2 could accommodate to ensure that, indeed, the
3 business representative of Canada Post can sit in
4 the hearing as well as Canada's representative,
5 Mr. Stephen de Boer from International Trade, and
6 he said, well, if we can have two, then you can
7 have two.

8 Well, you know, I'm almost happy with
9 that, except that he then put in something that
10 astonished me, and he said, well, you know, we are
11 going to have a rotating representation anyway.
12 That is to say that on any given day, even with the
13 one witness, we don't necessarily see the same
14 representative on day number two as we have on day
15 number one, and on day number three we may have
16 somebody other than we have had on day number one
17 or day number two.

18 So, theoretically, just based on your
19 order, on the rotational basis, we could have most
20 of the senior executives of UPS listen to Canada's
21 confidential information. The effect of that is
22 that we might as well just ignore the

09:33:53 1 confidentiality order.

2 What I understood your ruling is that
3 there is to be one representative, and I think it
4 is implicit that that person remains the same
5 throughout. Otherwise, you know, as I say, it's
6 just "open sesame."

7 So, there are two issues: Did you intend,
8 and I submit you should not have a rotational
9 representation; and secondly, can the parties have
10 two, but on this basis that they name the two
11 people, and those two people may attend or may not
12 attend. They may have other responsibilities, but
13 they are the two who would be present throughout
14 these proceedings.

15 PRESIDENT KEITH: Well, just on the second
16 issue, Mr. Whitehall, in terms of replacement, I
17 don't know whether I read out the whole of the
18 proposed amendment from Mr. Appleton's letter to
19 you of October, I think--sorry, December 7, but
20 that did provide for replacements, and that was
21 certainly my understanding of what we were doing.
22 And that was clarified when I was reminded by my

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09:35:15 1 colleagues that I wrongly used the plural in terms
2 of the people who were present at any particular
3 time. So, there was that requirement.

4 And so as far as "open sesame" is
5 concerned, the individuals who are to be present,
6 only one at a time are obliged to comply with the
7 confidentiality order and to execute a
8 confidentiality agreement.

9 So, there is that obligation. That was
10 certainly my understanding of what we were ruling
11 was exactly in terms of the proposal that was put
12 by Mr. Appleton in December.

13 MR. WHITEHALL: And you are, of course,
14 aware no doubt that we have opposed that proposal?

15 PRESIDENT KEITH: Yes, I know.

16 MR. WHITEHALL: And the difficulty, the
17 practical difficulty is this, sir. If we have, for
18 example, the President of UPS Canada in the room,
19 he can make independent decisions. He doesn't have
20 to consult others. He is the man, so if he hears
21 confidential information, that irrespective of the
22 confidentiality order, he can take into account--he

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09:36:23 1 cannot divorce his mind, he does not want to
2 divorce his mind from the information he heard.
3 Yet, that was the very purpose of the
4 confidentiality order of April 2003: To ensure
5 that confidential information cannot fall to the
6 other side, which, in turn, can form the basis of a

7 business decision by that other side.

8 So, if I now understand you correctly, and
9 I thank you for that clarification, effectively
10 what we're going to have possibly six people and
11 likely 12 people, each of whom have executive
12 capacity, who don't have to communicate with third
13 parties, but they can simply take into account the
14 information they heard in this Tribunal for the
15 purpose of issuing directives, and that is, with
16 respect, completely contrary to the spirit of the
17 order that you issued two years ago, and on the
18 basis of which we have conducted ourselves.

19 And you have to recall that we have two
20 entities here who are not parties. Neither
21 Purolator nor Canada Post is a party to these
22 proceedings, yet they produced documents based on

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09:37:37 1 the understanding of the confidentiality order.

2 They didn't have to.

3 PRESIDENT KEITH: Thank you.

4 (Tribunal conferring.)

5 PRESIDENT KEITH: Mr. Appleton, how many
6 people do you contemplate having? And does that
7 include the President of UPS or UPS Canada?

8 MR. APPLETON: I will answer your question

9 directly, and I don't know if you will permit me a
10 few moments.

11 PRESIDENT KEITH: Surely, yes.

12 MR. APPLETON: We do not have the
13 President of UPS or the President of UPS Canada,
14 but we have senior executives at the Vice President
15 level who are here, and a former President of UPS
16 Canada who now--who has filed a statement and, as
17 you know, is now President of another division of
18 UPS, who was identified yesterday, Mr. Alan
19 Gershenhorn, to be able to instruct.

20 With respect to the number, UPS, we would
21 normally have had three people here to be able to
22 instruct because there is UPS of America, an

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09:39:31 1 intermediary body, UPS Americas, and UPS Canada.

2 And so, normally, we would have had three.
3 That's the way the company is structured, the
4 way--but in light of the order yesterday, we made
5 arrangements so that we only had one, but, in fact,
6 we had some of the very senior from the UPS
7 Americas who wanted to be here, had planned to be
8 here, and is sitting in a hotel room with airplane
9 tickets, not knowing where to go pending your
10 determination.

11 If Mr. Whitehall now agrees that there can
12 be two, now that we've clarified the order for him
13 and he knows that we are able to be able to switch
14 this in that way, and there is a very specific way,
15 then that's good. We might have some agreement
16 between the parties.

17 But I have to say, one point I think very
18 important here. I'm quite astonished that
19 Mr. Whitehall would suggest that the senior
20 executives of UPS, who have signed a
21 confidentiality order, who have complied with this
22 process, could not be trusted to maintain that, and

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09:40:42 1 that I just need to take a moment to just reiterate
2 that that is insulting and astonishing, and I hope
3 he did not intend that, but there is no way but to
4 take it because this is a company that conducts
5 itself at the highest ethical standards. And
6 Mr. Gershenhorn, for example, executed a
7 confidentiality order to be here. They have
8 complied completely throughout this process, and
9 have produced evidence in this process, as you
10 know, we will talk about that letter, and we will
11 get there.

12 So, I just want to put that on the record
13 that that is highly inappropriate. I'm sure my

14 friend will have an opportunity to be able to make
15 clear that that was not his intention because that
16 would be even more problematic.

17 I think that the other thing that we are
18 prepared to do is also say that of the three
19 representatives of UPS that we could possibly have
20 in our universe, we could only have, if we agreed
21 to two, only two of those three present at any
22 given time, or otherwise one. So, we are not

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09:41:50 1 talking about an ongoing mass of people. We are
2 talking about specific senior people to be able to
3 instruct us.

4 And the last point, I guess, is that you
5 would have thought that Canada, being a public
6 body, would have been more interested in being able
7 to have this open, and UPS, being a private
8 company, would want to keep everything confidential
9 and to be as protected about it, and, in fact, it's
10 exactly the other way around.

11 PRESIDENT KEITH: Mr. Whitehall, do you
12 want to comment on the middle point? I don't know
13 that we need--

14 MR. WHITEHALL: I will comment. I
15 absolutely did not say, nor did I intend to say

16 that Mr. Gershenhorn or any other UPS senior
17 executive would breach the order. That's not what
18 I have said. And had my friend listened carefully,
19 rather than anticipated my comments, he would have
20 heard these people can make executive decisions,
21 and therefore, they can perfectly abide by the
22 confidentiality order and the undertaking they've

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09:42:58 1 signed. But not having the judicial training, they
2 may not be able to divorce their mind of
3 information that they have heard in this
4 arbitration.

5 So, therefore, they don't have to
6 communicate. They don't have to breach the
7 confidentiality order, but they are fixed with the
8 knowledge, and therefore if and when they make a
9 decision that affects my client, naturally that
10 would be in their mind. That's not a breach of the
11 order. They are doing nothing wrong, but
12 nonetheless, they adversely affect--they may
13 adversely affect the business interests of my
14 client.

15 MR. APPLETON: Sir Kenneth, I just want to
16 clarify, in case there is any misunderstanding,
17 that I suggested particularly that there would be
18 any two of three of the representatives at any

19 given time, and I just want to make sure that we
20 were clear.

21 PRESIDENT KEITH: Yes, I certainly
22 understand that.

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09:44:02 1 MR. APPLETON: Okay. Very good.

2 (Tribunal conferring.)

3 PRESIDENT KEITH: Well, we understand that
4 we are at this point that there can at any given
5 time two business representatives of each side in
6 the room. On the UPS side that would be two out of
7 the three who have signed the confidentiality
8 agreements and who are bound by those obligations,
9 and they are to be identified, of course, as we go
10 along in the UPS case as and when the
11 representatives change.

12 And now we should really get on with the
13 business of the witnesses.

14 MR. WHITEHALL: Thank you, sir.

15 PRESIDENT KEITH: Mr. Conway, I think.

16 MR. CONWAY: Thank you, Mr. President.

17 The first witness is Bryan McLean. Excuse me,
18 Bryan Jones, I'm sorry. First mistake of the day.
19 Although I wouldn't mind having Bryan McLean sit in
20 the witness box and be cross-examined by

21 Mr. Wisner, but maybe another day.

22 ARBITRATOR FORTIER: You may live to

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09:45:44 1 regret that.

2 BRIAN JONES, RESPONDENT WITNESS, CALLED

3 MR. CONWAY: I believe this part of the
4 proceeding is in camera.

5 MR. APPLETON: Before we proceed, there is
6 an administrative matter about that. Let's make
7 sure this is clear.

8 I'm told that it is impossible for the
9 parties to be able to mutually vary the terms of
10 the confidentiality order. Yesterday, the
11 President of the Tribunal asked the parties to
12 consult to see if parts of the record could be made
13 more public. We were informed this morning by
14 counsel for Canada that Canada Post has refused to
15 waive confidentiality issues. In fact, I assume
16 that means Canada has refused to waive on behalf of
17 confidentiality or to restrict the scope of the
18 confidentiality and restricted information that has
19 been claimed, which would mean that today, in its
20 entirety, would have to be done in camera. So, we
21 should have addressed that absolutely first this
22 morning.

09:47:02 1 MR. WHITEHALL: I wish Mr. Appleton would
2 stay with the facts. Mr. Wisner came up to me
3 yesterday and said, can we discuss the matter. I
4 said absolutely. Would you give me a proposal
5 tomorrow which I will take to my client? I'm yet
6 to hear the proposal. Once I have it, I will take
7 it to my client.

8 MR. CONWAY: Mr. President, Mr. Wisner and
9 I did have a discussion about this this morning. I
10 don't think Mr. Whitehall was aware of that, and
11 the instructions that we have is to maintain the
12 confidentiality over this particular evidence.
13 Those instructions have not changed, but I should,
14 for the record, indicate, that Mr. Wisner and I did
15 discuss this this morning.

16 PRESIDENT KEITH: Thank you. Well, in
17 that event, I take it this part of the hearing is
18 in camera, and that has a consequence, I guess.

19 THE SECRETARY: Please wait so we make
20 sure that the technical aspects is being dealt
21 with.

22 (Off the record.)

Pages 228-420 : this portion of the hearing was held in camera and the pages have accordingly been redacted.

2 PRESIDENT KEITH: Ladies and gentlemen, if
3 we could resume, please, and have the next witness,
4 thank you.

5 MICHAEL CREW, RESPONDENT WITNESS, CALLED

6 MR. WHITEHALL: And this is a public
7 hearing, just as a reminder.

8 DIRECT EXAMINATION

9 BY MR. WHITEHALL:

10 Q. Professor Crew, firstly, would you mind
11 looking at the sheet in front of you. And this is
12 a form of oath. Would you mind reading it, please,
13 to tell us that you are, indeed, bound as indicated
14 on that sheet.

15 A. Right. I solemnly declare upon my honor
16 and conscience that I shall speak the truth, the
17 whole truth, and nothing but the truth.

18 Q. Good.

19 Now, would you bring the microphone a bit
20 closer to you or you closer to the mike, which is
21 equally good, and so that we can all hear you.

22 Sir, now, did you file a report on behalf

15:41:50 1 of the Government of Canada on the 9th of June,
2 '05?

3 A. Yes, I did.

4 Q. And I point you to the display. Is that
5 your signature, sir?

6 A. It is.

7 Q. Thank you.

8 And did you file a second, a rejoinder
9 report on the 20th of September?

10 A. I believe it was the 21st, actually.

11 Q. It says the 21st, okay. And that is again
12 your signature, sir?

13 A. Yes.

14 Q. All right. Now, I wonder if you would be
15 good enough to turn to book four, and I believe it
16 is Tab 50.

17 Do you have book four?

18 A. That's book four.

19 Q. And you turn to Tab 50, you may have what
20 appears to be your affidavit.

21 And if you just go to just behind your
22 affidavit, you will find your curriculum vitae.

15:43:09 1 A. I found it, yes.

2 Q. Have you found it? All right. Just very,
3 very quickly, without taking much time, are you a
4 Professor at Rutgers Business School, sir,
5 currently?

6 A. Professor of economics, yes.

7 Q. Yes. And how long you have been with
8 Rutgers?

9 A. Since the beginning of '77.

10 Q. Okay. And you have been a Professor with
11 that university since then?

12 A. Well, I was Associate Professor, then
13 Professor one and Professor two. I sort of moved
14 up the ranks as it were from lieutenant to captain
15 or whatever.

16 Q. Okay. You're a captain now?

17 A. Well, I'm a major now.

18 Q. All right. Those equivalences always
19 troubled me.

20 And just to turn the page, and I'm not
21 going to go through, as you end up from lieutenant
22 to major, but just to turn the page, I see that

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15:44:07 1 you're a member of the editorial board of utilities
2 policy.

3 A. Yeah, I was a member of that.

4 Q. In 1994.

5 A. Right.

6 Q. Then you're editor and founder of Journal
7 of Regulatory Economics?

8 A. Yes, I am.

9 Q. And that's from 1988 on.

10 A. Right.

11 Q. All right. And then we come down and look
12 at your Ph.D. thesis, and you do have an earned
13 Ph.D., I take it?

14 A. Oh, yes.

15 Q. It's "Peak Load Pricing and Its
16 Application." That was your thesis?

17 A. That's right.

18 Q. And then just turning the page, would it
19 be fair to say that you have authored a number of
20 articles between and you Professor Kleindorfer, on
21 postal economics?

22 A. Yes, definitely.

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15:44:57 1 Q. And I noticed about one third down
2 "Competition and Innovation in Postal Services,"
3 you appear as editor with Paul Kleindorfer?

4 A. Yes.

5 Q. And just dropping down a bit more,

6 "Commercialization of Postal and Delivery Services,
7 National and International Perspective," again as
8 an editor with Paul Kleindorfer?

9 A. Yes, that's correct.

10 Q. And I notice one above as well, but--two
11 above actually, "The Economics of Postal Service"
12 with Paul Kleindorfer in 1992.

13 A. Right.

14 Q. And then "Regulation and Evolving Nature
15 of Postal and Delivery Services" in 1992 with Paul
16 Kleindorfer.

17 And incidentally, Paul Kleindorfer is one
18 of the other affiants in these proceedings; right?

19 A. Yes.

20 Q. And then dropping down the page, and I
21 won't go through them all, "Current Directions in
22 Postal Reform" in 2000, again with Paul

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15:46:02 1 Kleindorfer.

2 A. Yes.

3 Q. Below that, "Future Directions of Postal
4 Reform" with Kleindorfer?

5 A. Yes.

6 Q. The bottom of the page, "Postal and
7 Delivery Services, Pricing Productivity,
8 Regulation, and Strategy," appearing as editor with

9 Paul Kleindorfer?

10 A. Yes.

11 Q. Turning the page, "Postal and Delivery
12 Services, Delivering on Competition," with
13 Kleindorfer?

14 A. Yes.

15 Q. You have written a number of professional
16 papers, you note, and again I will just turn to
17 what appears to be page six.

18 And did you write with Kleindorfer
19 "Governing Structure of Natural Monopoly, A
20 Comparative in Institutional Assessment"?

21 A. Yes, I did.

22 Q. And then turning the page, page eight,

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15:47:09 1 efficient entry--towards the bottom of the page,
2 "Efficient Entry Monopoly and the Universal Service
3 Obligation in Postal Service" in the Journal of
4 Regulatory Economics with Paul Kleindorfer in 1998?

5 A. Yes.

6 Q. Okay. Just the next page, "Liberalization
7 and the Universal Service Obligation in Postal
8 Service" with Kleindorfer, and "Current Directions
9 in Postal Reform," just at the top of the page?

10 A. Yes, 2000, yes.

11 Q. Then just below that, "Privatizing the
12 U.S. Postal Service" with Kleindorfer and Hodgins.

13 A. Yes, edited by Hodgins, right.

14 Q. And there is a very interesting looking
15 article, "Putty-Putty-Clay, Humpty-Dumpty Universal
16 Service Under Entry." I don't think I will ask you
17 to explain who is Putty Putty or Putty Clay or
18 Humpty-Dumpty, but did you write that in any event,
19 or did it have something to do with the Postal
20 Service?

21 A. It did, and thinking up the title was
22 quite a big part of that project.

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15:48:25 1 Q. Next below that, "Two Tier Pricing Under
2 Liberalization."

3 A. Yes.

4 Q. "Balancing Access and Universal Service
5 Obligations" with Kleindorfer in "Postal and
6 Delivery Services, Delivering on Competition"?

7 A. Yes, yes.

8 Q. Below that, "Postal Privatization in
9 General and for the United States Postal Service,"
10 with Kleindorfer.

11 A. Yes, and that was an edited volume by
12 Parker and Sol.

13 Q. Just below, "The Regulation of Postal
14 Service" with Kleindorfer in an encyclopedia of
15 public choice.

16 A. Yes.

17 Q. Below that, "Access and the USO for
18 Letters and Parcels" with Kleindorfer?

19 A. Yes.

20 Q. And then turning the page, the third item,
21 "Graveyard Spiral, Another Exciting Topic for the
22 Universal Service Provider Under Liberalized

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15:49:28 1 Entry"?

2 A. Yes.

3 Q. Below that, "Regulation Pricing and Social
4 Welfare"?

5 A. I should add a correction. It's not
6 forthcoming anymore. We forgot to take out the
7 "forthcoming," but it did appear in '04.

8 Q. Right.

9 And just turning to the page dealing with
10 consultancy, did you appear and give evidence
11 before the President's Commission? Firstly, before
12 Congress, dealing with the Postal Reform Act in
13 1997?

14 A. Yes, I did, before the House Subcommittee.

15 Q. Did you give evidence before the

16 President's Commission?

17 A. Yes, I did.

18 Q. Of the United States Postal Service?

19 A. Yes I did, in 2003.

20 Q. Just below that, your consultancies, did
21 they include the United States Postal Service?

22 A. Yes, they do.

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15:50:32 1 Q. 80 Kearney Links Postal Cost Study?

2 A. Yes.

3 Q. The Role Mill?

4 A. Yes.

5 Q. Deutsche Post?

6 A. Yes.

7 Q. Canada Post Corporation?

8 A. Yes.

9 Q. Federal Trade Commission Postal Service?

10 A. Yes.

11 MR. WHITEHALL: Your witness.

12 MR. WONG: Mr. President, let me begin
13 first of all by introducing the person setting next
14 to me. He's not a member of the counsel team, so I
15 thought it would be appropriate to put his name on
16 the record as James I. Campbell, who is an expert
17 who has filed an affidavit on behalf of UPS.

18 Mr. Campbell will be assisting me in this
19 cross-examination.

20 CROSS-EXAMINATION

21 BY MR. WONG:

22 Q. Dr. Crew, nice to see you again.

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15:51:22 1 A. Same to see you, Dr. Wong or Mr. Wong I
2 guess I should call you in these proceedings.

3 Q. You could call me anything you like.

4 In your affidavit, Dr. Crew, at the
5 paragraph two, you referred to at the bottom on
6 your first affidavit.

7 A. Yes.

8 Q. Paragraph two at the bottom, you say, I
9 have written one research study with Paul R.
10 Kleindorfer where I examined, inter alia, issues of
11 the USO as it affects Canada Post.

12 I assume that is the same study you
13 referred to in your CV.

14 A. Okay.

15 Q. So, you have your affidavit, sir?

16 A. I managed to find it again, yes.

17 Q. Okay. There is no trick question here.
18 It's very simple.

19 At the bottom of your page 2.

20 A. Yes.

21 Q. Sorry, paragraph two, you referred to,
22 inter alia, that the study you had done with Paul

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15:52:28 1 Kleindorfer.

2 A. Right.

3 Q. About USO, you say inter alia issues of
4 USO as it affects Canada Post.

5 A. Yes.

6 Q. Now, I take it that's the same study
7 that's referred to in your CV.

8 A. Which one are you referring to in the CV?

9 Q. I think there is only one Canada Post
10 Corporation reference.

11 A. Okay, if you could just--

12 Q. On the last page of your CV, sir. All it
13 says is Canada Post Corporation, bracket, USO.

14 A. Yes, it's the same one.

15 Q. So, the fact that it says inter alia, what
16 else did you do in this study?

17 A. Oh, we examined some issues of regulation.

18 We looked at different types of regulation, but it
19 was--it was basically the context for the USO. It
20 was a context we were looking at.

21 Q. So, this was a study about the USO in
22 Canada, and you looked at related issues such as

15:53:35 1 regulation; would that be a fair statement?

2 A. I think so, yes.

3 Q. Now, when did you do this study?

4 A. That must have been around '93.

5 Q. Now, when did that study end?

6 A. It was not a long study. Probably it was
7 over the course of a couple of months or so. I
8 think it was during the summer.

9 Q. So, I take it, then, that you did not do
10 any further work for Canada Corporation until you
11 were retained to become an expert witness here?

12 A. Yes, that's correct. It would--it would
13 just be expert witness after that.

14 Q. As I read your affidavit as a whole, and I
15 appreciate there are many different aspects of it,
16 one main theme is what you say is that Canada's
17 USO, as it's implemented, whatever it is, is
18 roughly equivalent to what goes on in advanced
19 industrialized countries. Is that a fair
20 paraphrase of one of the things you did?

21 A. I think that's fair, yes.

22 Q. Now, in determining Canada's USO and your

15:54:55 1 study, what did you look at?

2 A. What did I look at?

3 Q. You referred to the Canada Post

4 Corporation Act.

5 A. Right.

6 Q. You looked at the Financial Administration

7 Act.

8 A. Yes.

9 Q. I think you said I examined the Canada
10 Post Corporation Act?

11 A. Yes.

12 Q. I assume you also examined the Financial
13 Administration Act?

14 A. Yes.

15 Q. And I know that in your various tabs you
16 have at least one regulation.

17 A. Right.

18 Q. The Lettermail regulation.

19 A. Right.

20 Q. Did you look at the other regulations on
21 the Canada Post Corporation Act such as the Letter
22 Definition Regulation?

15:55:31 1 A. I did look at--I did, I believe, look at

2 those. That was included in there.

3 Q. Included where?

4 A. In the regulations that I filed. It was
5 in there.

6 Q. I may not see it, but what you included
7 was the Lettermail regulation.

8 A. Yes.

9 Q. And that's under Tab 6.

10 A. But I thought there was a definition in
11 there, too.

12 Q. There is a definition regulation, and for
13 the convenience of the record, that's in the Book
14 of Authorities of the Government of Canada at Tab
15 28. It's not in your materials, Professor Crew.

16 A. Oh, okay.

17 Q. Did you look at Letter Post item
18 regulation?

19 A. I don't recall that.

20 Q. And that, for reference again, the Book of
21 Authorities of Canada at Tab 27.

22 What else did you look at? We have got

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15:56:25 1 the regulations. I'm sorry, I should give you an
2 opportunity to answer whether there is any other
3 regulation you recall looking at.

4 A. Specific regulation I don't recall, but I
5 look at the--I did look at the Annual Report. I
6 looked at the regulation on the price cap. I
7 looked at something in the Canada Gazette. These
8 are the kind of things I looked at.

9 Q. All right. You obviously spoke to
10 representatives at Canada Post.

11 A. I spoke to some executives at Canada Post.
12 I spoke to some managers at Canada Post, and I
13 spoke to a number of their lawyers.

14 Q. Let's just start with the executives of
15 Canada Post. Can you tell me by title or roughly
16 which executives you spoke to at Canada Post.

17 A. Well, I had spoken to a number of
18 executives at Canada Post.

19 Q. In connection with this assignment.

20 A. Oh, okay.

21 Q. I'm not going to ask you to recall 1993.
22 I think most of us may not be able to recall that,

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15:57:25 1 so let's just stick to the assignment of this case.

2 A. I'm sorry, 1993, I thought you said 2003.

3 Q. I think you said 1993.

4 A. I'm sorry, I meant 2003 for that.

5 Q. I will now go back.

6 A. Okay.

7 Q. So, you were retained in 2003?
8 A. Right.
9 Q. You did a small study?
10 A. Yes.
11 Q. Was that in connection with this case?
12 A. I don't believe--I think the case had just
13 been--just been filed, the complaint had just been
14 filed.
15 Q. All right. Let me now just treat now what
16 you did in 2003--
17 A. I had seen the complaint when I did the
18 study.
19 Q. Let me now go back and say, let's just
20 treat what you did in 2003, and what did you for
21 the purpose of this affidavit, these two affidavits
22 filed in this proceeding.

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15:58:10 1 A. Right.
2 Q. As sort of one big thing.
3 A. Right.
4 Q. Is that fair?
5 A. Yes.
6 Q. I want to ask you each of them because it
7 would be too tedious.
8 A. Some of the stuff I learned in 2003, I

9 learned, I have been able to apply.

10 Q. Did you prepare a report in 2003?

11 A. Yes, we did. We put it to paper, really.

12 Q. How long is that paper?

13 A. It's probably about 20 pages or so.

14 Q. Would much of it be included in the

15 affidavit you filed here?

16 A. Some of it was in there, but not

17 absolutely directly.

18 Q. All right.

19 A. One of the things we would talk about in

20 there was--we had something in there about

21 deregulation in other sectors, and that's clearly

22 not here.

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15:58:54 1 Q. Let me now go back to see who did you meet

2 with at Canada Post.

3 A. Right.

4 Q. Could you tell me now, just treating your

5 assignment at Canada Post as one big entity.

6 A. Right.

7 Q. Who did you see at Canada Post?

8 A. In other words, who have I discussed

9 information with that might affect my report at

10 Canada Post?

11 Q. Yes. I appreciate that I have been at

12 your conference and Canada Post people are there.
13 I'm not talking about that. I'm talking about for
14 the purpose of this assignment, who did you speak
15 to at Canada Post about the work you did here, to
16 get information to talk about ideas?

17 A. Well, I had spoken to a number of the
18 lawyers that were in Canada Post, and they obtained
19 some of the information for me. Two of the lawyers
20 are present, in addition to Mr. Whitehall, who is
21 not a Canada Post lawyer, but I spoke to--

22 Q. Could you speak closer to the microphone.

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15:59:49 1 A. I spoke to John Deveen, and I also spoke
2 specifically to Donna Campbell and Jeremy Cotton.
3 There was a young fellow who left Canada Post,
4 Raoul Watchmaker. He's no longer with Canada Post.
5 I may have had a very brief discussion about this
6 with Gerard Power.

7 I have had discussions with Jason Herger
8 providing me with information. I cited his
9 affidavit.

10 Q. Let's stop for a minute. Mr. Herger is
11 not a lawyer, as I understand it?

12 A. No, no. These are--

13 Q. We are done with the lawyers--

14 A. I think those are all the lawyers.

15 Q. All right. And what did you speak to them
16 about?

17 A. Well, I was looking for information on the
18 nature of the USO, how --I wanted to know where I
19 could--

20 MR. WHITEHALL: I don't know how far my
21 friend is going to be, but generally speaking,
22 discussions between experts and counsel are

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16:01:04 1 privileged.

2 MR. WONG: With the greatest of respect,
3 when an expert is presented to a tribunal hearing
4 as an independent expert, everything he discusses,
5 everything he looked at, in my respectful
6 submission, is open for cross-examination. Not
7 that I'm going down the road too far. I'm just
8 trying to understand what he did.

9 PRESIDENT KEITH: Well, I think you have
10 had a fair range of answers, haven't you, to that
11 set of questions, so, as far as the lawyers are
12 concerned, I think you're also seeking information
13 about who else at Canada Post, and I think the
14 witness was starting to answer that question.

15 MR. WONG: Well, he's already indicated
16 that he got some information through the lawyers

17 from someone else, and I want to know what that
18 information is. I mean, if he talked to the
19 lawyers about what is Canada's USO, if they gave
20 him documents, I want to know what he looked at.
21 It seems to be reasonable to me.

22 PRESIDENT KEITH: Well, you also sought

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16:02:03 1 that information right at the very beginning,
2 didn't you, in terms of the relevant legislation
3 and regulations and so on, and then some of that
4 is, of course, appended, and that is, of course,
5 public information. So, it is a question, I
6 suppose, of how much further you knew need to take
7 these questions, really.

8 MR. WONG: Well, I mean, I guess I will be
9 very blunt. If Professor Crew was told by one of
10 the counsel, said well, this is Canada's USO, I
11 would like to know that. I want to know where the
12 source of it is because that's what I'm going to be
13 examining him on. But I'm quite prepared to just
14 go directly to the points that he would make, and I
15 will ask him, where does he get that.

16 PRESIDENT KEITH: Yes. Well, you have
17 already elicited the comments, haven't you, about
18 the statute and the regulations, and isn't it a

19 matter of however he got those, wherever they came
20 from, isn't that a matter of testing him in terms
21 of that basis for his views on the USO?

22 MR. WONG: I'm content to just go down

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16:02:57 1 that road, and we will just see where we go on that
2 exercise.

3 PRESIDENT KEITH: Yes, thank you.

4 BY MR. WONG:

5 Q. You spoke to some staff members at Canada
6 Post. You mentioned Mr. Herger.

7 A. Yes.

8 Q. Anyone else you recall?

9 A. I recall talking very briefly to Louis
10 O'Brien.

11 Q. And who is Mr. Louis O'Brien?

12 A. Well, Louis O'Brien is--I guess he's one
13 of the officers.

14 Q. I think he's VP Finance or something like
15 that.

16 A. I don't think he was finance, but
17 something like that.

18 Q. Anyone else that you can recall?

19 A. At Canada Post, I'm trying to think of who
20 else I've talked to about this case.

21 No, I think that's about it.

22 Q. All right. Now, as I also take--

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16:03:51 1 A. Oh, could I just call qualify that. I
2 remembered a couple of other guys I spoke to.
3 These are a couple of guys whose names I cannot
4 remember, but they worked for Jason.

5 Q. Jason Herger.

6 A. Yes. One of them was Eugene, but I can't
7 do any better than that.

8 Q. I'm sure if it's relevant, you will
9 mention it to me as we go through.

10 Now, one of the things I understand from
11 reading your affidavit is that USO is a kind of
12 governmental obligation to its people?

13 A. Right.

14 Q. Which advanced industrial country will
15 have obligation to its people, I will supply postal
16 services throughout?

17 A. Yes. But you said if I remembered to let
18 you know, I just rememberers. It's Eugene Ritz.

19 Q. Thank you.

20 Now, let me go back to my governmental
21 obligation, USO. I think that's one of the themes
22 that comes out of your paper, and nobody disputes

16:04:47 1 that. Now, did you speak to anybody in the
2 Minister responsible for Canada Post?

3 A. Directly about the case? No, I haven't.
4 I have met with people at the Ministry, but not
5 directly on this case.

6 Q. Did you ask to speak to anyone at the
7 Minister's office?

8 A. I didn't.

9 Q. Did anyone offer you to see someone at the
10 Minister's office?

11 A. No, I don't believe so.

12 Q. Now, starting at about page 2, paragraph
13 five to 13, again I'm going to summarize, you
14 sketch out the broad parameters of what USO is
15 about.

16 A. Correct.

17 Q. Generically, if you will.

18 And among the things you identify, and I'm
19 not going to take you to a specific passage unless
20 you think I'm misstating something, by all means
21 you will stop me, and I'm sure my friend
22 Mr. Whitehall will as well. As I take what you

16:05:48 1 say, you say uniformity of service, ubiquity of
2 service, I'm sorry, and uniformity of prices are
3 fundamental to USO. That's one of your
4 observations about USO generally.

5 A. Yes, yes, that's correct.

6 Q. Thank you.

7 And you also mentioned that uniformity of
8 service standards is also one of the
9 characteristics of a USO obligation.

10 A. I did indicate, I think, that uniformity
11 of service standards couldn't be absolutely uniform
12 because in some places there's so remote you can't
13 possibly give them the same standard as you could
14 give them in a dense urban area. So, the uniform
15 service standard cannot be absolute by any means.
16 I do make that point in here.

17 Q. Yes. I think it's obvious. I wasn't
18 meaning to--I'm trying to just give broad
19 parameters, and you could say that, I'm not
20 disputing that.

21 A. Right.

22 Q. You also say that obligation to collect

16:06:52 1 letters and obligation to collect and deliver

2 parcels are the USO generally.

3 A. Yes.

4 Q. And then you say USO for letters, although
5 there is a USO for letters, post offices usually
6 have a USO for small packets and parcels, and
7 that's your basic description of the USO, and that
8 takes me right up to the last sentence, last
9 paragraph of paragraph 13 at page three.

10 A. Before you ask me that, what you said, and
11 I appreciate you were saying that this is intended
12 to be in general terms, but, of course, there is an
13 obligation as part of the USO not just to deliver,
14 which is what we basically dealt with a moment ago,
15 but there is also an obligation to provide access
16 to the public, to the postal network through post
17 offices, boxes, and so on. And that is also part
18 of the USO.

19 Q. And then in paragraph 13 you talk about
20 how the USO can be financed, and you indicate that
21 exclusive privilege is a common method of
22 financing, and perhaps as I read the rest of yours,

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16:08:18 1 it's the preferred or the general method of
2 financing USO. Some sort of reserve area. In
3 Canada we call it exclusive privilege.

4 A. No, that's the position that based upon my

5 research I have come up with.

6 Q. And then the last sentence is perhaps a
7 bit dramatic, but nevertheless you say it, take
8 aware the reserve area and funding of the USO by the
9 P.O. becomes exceedingly tenuous.

10 A. This is correct.

11 Q. This is part of your graveyard spiral
12 thesis?

13 A. That is correct, which you have obviously
14 read.

15 Q. I'm going to your conferences, Professor.

16 A. That's right.

17 But for an academic to know that one of
18 his papers has been read for whatever reason is
19 always a great thing. I mean, I heard once that
20 the average readership of a paper is 1.1 or
21 something. I'm least ahead because I know that you
22 and Jim Campbell have read these.

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16:09:22 1 Q. Yeah, But the difference, Professor Crew,
2 is I get paid to read it.

3 A. I will take it wherever way it comes.

4 Q. Let me now take to you the USO and Canada
5 and the reserve area.

6 I want to take to you the Canada Post

7 Corporation Act, and this is one of the documents
8 that you examined, and let me take you to Tab 3.
9 And you probably will have to keep your finger on
10 page seven, where you describe the USO and reserve
11 area. I'm sorry, I have to get you to flip back
12 and forth.

13 Now, at paragraph 31 of your affidavit,
14 you need sort of stickies and whatever things you
15 need to keep it propped open.

16 A. I got a bit of help from this side, yes.

17 Page 31; right?

18 Q. No, paragraph 31 of your affidavit.

19 A. Yes.

20 Q. But have your finger on the Canada Post
21 Corporation Act. We are going to go to that in a
22 minute.

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16:10:27 1 A. Okay.

2 Do we really need this?

3 Q. I think you do because otherwise it will
4 be too much crackling sounds.

5 I'm sorry, let me just take you back to
6 the page III and IV before we go there. I'm sorry,
7 you don't have to put your finger in everything. I
8 apologize. I just to want try to understand the
9 USO in Canada. We started with paragraph 13 where

10 you say there is a reserve area in Canada of
11 exclusive privilege.

12 A. Yes.

13 Q. Then you turn over, so you say in Canada
14 there is a USO that covers uniform letter rates;
15 right? That's part of your thesis of ubiquity and
16 uniformity.

17 A. That's correct.

18 Q. Affordable parcel service and daily
19 delivery five days a week.

20 A. That's correct.

21 Q. And then you go on in paragraph 15, you
22 say, well, Canada, like most countries will have

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16:11:25 1 obligations to deliver publications, newspapers,
2 and advertising mail. In some countries that's
3 called direct mail; right?

4 A. Yes, newspapers and direct mail, right.

5 Q. And then 16 you talk about that there is a
6 need to have a network, counter service. That's
7 ubiquity of, I know you like the word ubiquity,
8 ubiquity of counter service as part of the USO.

9 A. Yes, that's correct.

10 Q. And then we will come back to this idea of
11 whether they have too many outlets.

12 Now, I'm now ready to go into the Canada
13 Post Corporation Act.

14 In paragraph 31 of your affidavit, and I
15 will just read it out, in maintaining the words in
16 particular the words maintaining, quote,
17 "Maintaining basic customary Postal Service," would
18 be generally recognized as the basic USO. And
19 there you are quoting from the Canada Post
20 Corporation Act which is under Tab 3,
21 paragraph--section five.

22 Right? Do you see that?

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16:12:41 1 A. Yes.

2 Q. So, you say that is generally recognized
3 as the basic USO.

4 How did you come to that conclusion that
5 is generally recognized?

6 A. Well, from practice elsewhere. Other
7 advanced countries follow similar practices.

8 Q. Well, just hang on a minute. It says that
9 in paragraph five, sub two, while maintaining basic
10 customary postal service, you say from that, you
11 can read all the items of USO that we just read or
12 I read to you, in paragraphs 14 and 15 and 16. I
13 certainly don't read that.

14 A. I'm not sure--if that's what came across,

15 that was not--one also has to look at the practice
16 as well. The practice in other countries, in other
17 advanced countries, is as I describe it; namely,
18 providing ubiquitous service at a uniform price.
19 And the practice--practice can never be completely
20 specified in something like a piece of legislation.
21 Things are usually too complicated for that.

22 So, I didn't--I don't draw my conclusion

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16:14:14 1 about what is the USO just from that. I draw it
2 from that, from the practice in Canada and
3 elsewhere.

4 Q. All right. But as I understand in simple
5 English the word obligation, it speaks of a duty.
6 Would you agree with me? There is a duty to
7 provide the USO. In Canada that's being discharged
8 by Canada Post.

9 A. Indeed, it is. Now, to think about duties
10 are that the duty as specified in the Act, as I
11 indicated, no legislation, no contract even can be
12 completely specific. It can't be specific
13 according to every term of the--and practice is
14 going to be more complicated.

15 Now, what happens with a USO in most
16 advanced countries that--well, all of the ones that

17 I'm aware of, including Canada, is that a practice
18 of what's considered a USO develops, and the
19 national post office has the obligation to put that
20 into effect. In effect, postal service is seen, in
21 fact, as an entitlement, and if you start to take
22 away entitlements, you typically run into

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16:15:46 1 difficulties. And what's clear in Canada and in
2 other advanced countries is that there is an
3 entitlement to mail service, and that's basically
4 what drives the USO.

5 Q. That is not my question. My question is:
6 What is the source of the obligation. I appreciate
7 that you looked at the practice. I'm not disputing
8 that we have mail five days a week in Canada. I'm
9 not disputing that there are counters everywhere
10 and that the rates are affordable. I'm not
11 disputing that as a practice, but I'm trying to
12 find out where you came to the conclusion that the
13 obligation, as I read it, is a duty, comes from
14 looking at basic customary postal service. If you
15 say I learned this by looking at what Canada do, I
16 assume they are obligated to do it, then I'm
17 content to move on.

18 A. Well, as economists, we do assume a lot.

19 That's part of being an economist. We make
20 assumptions.

21 I've got something more than an assumption
22 for purposes of argument here. This is a practice.

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16:17:02 1 The practice, the obligation is derived from
2 history and from practice, and the actual--what is
3 actually specified in the Act may be very minimal
4 compared to what is actually carried out.

5 The UPU Convention, for example, is
6 another source of the obligation that attempted to
7 codify what is the USO obligation. For many year,
8 the USO obligation originated from effectively 1840
9 with Roland Hill in England with the penny post,
10 and it evolved since then, and it's no less an
11 obligation because it's grown over time and people
12 have come to expect it, than if it had been
13 specified for, at least from a practical point of
14 view, in some act which by its very nature is very
15 brief, which I, as a nonlawyer, am not legally
16 qualified to interpret.

17 Q. Would it be fair to say for you that you
18 came to the conclusions that I read out to you on
19 14, 15, and 16 about the practice which is really
20 an issue about practice. You observed uniform
21 rates, you have observed affordable parcel service,

22 you have been told, I assume, you didn't check

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16:18:34 1 there was five day delivery, I assume you were told
2 there was five day delivery. I'm not disputing
3 there is five-day delivery?

4 A. I didn't check.

5 Q. No, but you were told these things. And
6 you say, well, that looks like what it goes on in
7 other countries. That must be the obligation.

8 A. Right.

9 Q. Right? Is that fair?

10 A. That's very comparable to what goes on in
11 other countries.

12 Q. We will come to that in a moment.

13 A. In other advanced countries, I should say.

14 Q. Now, in Canada at one time we had six days
15 of delivery and we have now moved to five-day
16 delivery. Do you say that is a change in practice
17 or is that a change in obligation?

18 A. That's a change in both.

19 Q. And where would the source of that
20 obligation?

21 A. It developed over time. It was six-day
22 delivery.

16:19:30 1 And in the U.K. they did the same once.
2 They went from six-day delivery to five-day
3 delivery, and I think it was in the seventies, and
4 then they went back to six-day delivery again.

5 Q. I appreciate that you're not a lawyer, so
6 I'm going to take and I will be very careful here

7 that what you're describing as obligation is what
8 you see as a practice, and you say, everybody does
9 this, so therefore my advanced industrialized
10 country standards, civilized country, probably

11 that's not the politically correct word to use, is
12 the norm among advanced industrialized country.
13 Would that be a summary of what you have just said
14 about USO?

15 A. I would say it's a summary, but I don't
16 completely agree with it.

17 Q. Please explain.

18 A. My view is that just because it's not
19 codified in every detail in a law doesn't mean it's
20 no less an obligation. It's quite difficult to
21 take, as I indicated before, to take away an
22 entitlement, and if you take--and the practice

16:20:37 1 throughout the advanced economies is that there is
2 an interest in maintaining the USO, and whether in
3 some places it's specified in more detail than
4 others, but it generally arose out of practice. It
5 was a practice that was followed, the idea that
6 there was this entitlement to mail service. But
7 it's no less an obligation. If you're a politician
8 and you try taking this away, it may affect your
9 chances of getting re-elected. If you're trying to
10 take an entitlement away.

11 Q. But this is not something we find in
12 statute because you said those words, basic
13 customary postal service, you've interpreted based
14 on observing practice in Canada and elsewhere.

15 A. Basic customary--let me see this again.
16 Where--

17 Q. Paragraph five, sub two.

18 MR. WHITEHALL: If you are going to ask
19 the witness for a legal opinion, which I don't
20 think is appropriate, then in fairness to the
21 witness you should put all of five to the witness
22 because five goes on, as you well know, Mr. Wong.

16:22:02 1 But my objection is more basic. I think we will

2 argue law, I will take the position that there is a
3 legal as well as a practical obligation, but, and
4 it's not appropriate to ask this witness legal
5 opinions.

6 PRESIDENT KEITH: As I understand the
7 questioning, it's directed at how it was that the
8 witness came to the conclusion that he did, and
9 that does and--I mean, that does start to get into
10 the area that presumably in the end the Tribunal
11 may have to address as a matter of law.

12 But you have made the point, Mr. Wong,
13 that the opinion Professor Crew is giving is based
14 on that phrase in Section 5 is the perfectly proper
15 point that Mr. Whitehall's made that there is also
16 Subsection 1 with other language, and then there is
17 the Convention, but those are matters in the end,
18 aren't they, for legal argument rather than expert
19 economist opinion?

20 MR. WONG: Well, I think that I can wear
21 two hats here, but my point here is not simply one
22 of saying I'm not asking Professor Crew about legal

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16:23:08 1 opinion. He's opining that the obligation in
2 Canada is similar to everywhere else in the world.
3 So I'm just asking where is the source of that

4 obligation, and he said, well, I look at practice.
5 Okay. I think nonlawyers are entitled to offer
6 views, especially an expert one, about what that
7 obligation is. I think have gone enough there.
8 Let me move on.

9 THE WITNESS: Well, I look at practice. I
10 look at this section, I look at the UPU Convention
11 that codifies things. I look at a number of things
12 in deciding that, including Subsection two, part of
13 Subsection two.

14 BY MR. WONG:

15 Q. Do you determine who determines the
16 practice of Canada Post? That is, for example,
17 Canada Post has five days of delivery. I'm not
18 disputing that. Do you know what is the source of
19 that decision?

20 A. The source of that decision is from Canada
21 Post and the Canada Ministry to which it is
22 responsible.

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16:24:12 1 Q. Now, how did you determine that it came
2 also from the Minister responsible? I certainly
3 don't--you said you didn't speak to anyone relating
4 to this. I don't see it in the Act. So, how did
5 you get to the conclusion that it was determined by

6 Canada Post and the Minister responsible?

7 A. Well, I was informed of that when in
8 discussions with people at Canada Post.

9 Q. Thank you.

10 A. And it also would seem to me to be
11 something that the Ministry would be interested in.
12 I don't believe that the Ministry would suddenly
13 allow Canada Post to stop delivering to certain
14 outlying districts or to cut its deliveries to two
15 days a week in places. That would be something the
16 Minister would have a big interest in.

17 Q. But this is not based on actual factual
18 knowledge of what the Minister may or may not have
19 done.

20 A. It's not based upon discussion with the
21 Minister on that, that's correct.

22 Q. By the way, Professor Crew, do you see

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16:25:18 1 anywhere in the Canada Post Corporation Act that
2 the Government of Canada has an obligation to
3 provide universal service?

4 A. I don't recall seeing that in the Canada
5 Post Corporation Act, but it would appear that
6 Canada Post is acting as an agent for the
7 Government of Canada here in carrying out its USO.

8 Q. Let me just take you to some sections of
9 the Canada Post Corporation Act. Let's go to
10 paragraph--section 14. Tab 3, Canada Post
11 Corporation Act. Tab 3 of your affidavit.

12 A. Is this the one called Exclusive
13 Privilege?

14 Q. That's correct. And this is the privilege
15 over letters.

16 Did you examine what is a letter for the
17 purpose of the Canada Post Corporation Act?

18 A. I do recall looking at that.

19 Q. That's the Letter Definition Regulations?

20 A. I think that was what--I saw the
21 definition somewhere in one of these Lettermail
22 regulations.

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16:26:51 1 Q. It's not in the Lettermail regulations,
2 and I'm not trying to be tricky. It's not. I've
3 looked at it. It's in the letter definition regs
4 which is not part of your materials.

5 A. Okay. Well, apparently I don't know. I
6 thought I had, but apparently, no.

7 Q. Now, we go to Section 19. 19(1) said that
8 the corporation may with the approval of the
9 Governor and counsel, and we know that means the
10 cabinet, make regulations for the efficient

11 operation of the business of the corporation and
12 for carrying the purpose and provisions of this Act
13 into effect, and without restricting the generality
14 of the foregoing make regulations. Look at some of
15 them. A, among other things, it can make
16 regulation regarding what is a letter, and I have
17 already referred to you the Letter Definition
18 Regulations. Remember reading that?

19 A. You mean section A?

20 Q. Yes, 19(1)(a).

21 A. Yes.

22 Q. And then there are other details and since

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16:28:02 1 it's general, this is only some illustrations.

2 A. All right.

3 Q. Now, to be fair, let's look at paragraph
4 20 about how regulations are made. I'm going to
5 jump to it, if you think you need a little time to
6 look at it. I just assume because you've examined
7 the act that you are familiar with it, and if I'm
8 moving too fast, please stop me.

9 Let me just summarize paragraph 20.

10 Paragraph 20 basically says, Canada Post can
11 propose regulations, and when it proposed
12 regulations, ultimately the cabinet has authority,

13 the governing council. There are several ways of
14 doing it. The governing council can say yes
15 affirmatively, and the cabinet can say no, and it's
16 also over, or Canada can do nothing and sit,
17 because 60 days thereafter that it becomes regs,
18 regulations. That's the summary, and my friend
19 will interrupt me if that's unfair presentation.

20 Did you ask about the regulation making
21 power of Canada Post in trying to understand the
22 corporation? Did you ask Canada Post?

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16:29:37 1 A. No, I didn't.

2 Q. Wouldn't that be an important thing to
3 look at in hindsight now to understand the
4 relationship between the government and Canada
5 Post?

6 A. It would certainly be something that would
7 be of assistance beyond what we have here. It
8 would be a further way of informing one's self
9 about it, that's correct.

10 Q. Please get a little closer to the mike.

11 Thank you.

12 I can hear you well, but the reporter and
13 others won't.

14 On the same vein, I think it would also be
15 helpful if one were pursuing that line of inquiry

16 to determine whether--how many regulations have
17 been rejected by the Government of Canada, would it
18 not? As part of the study about the relationship
19 between government and Canada Post.

20 A. I do not know how many reg--

21 Q. I'm not asking you. I'm saying if we are
22 designing a research project together, you said it

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16:30:40 1 would be interesting to look at the relationship
2 between the government and Canada Post. You've
3 already agreed with me on that. I'm saying as part
4 of the exercise, it would be useful to find out how
5 many regulations have the Government of Canada
6 rejected proposed by Canada Post?

7 A. That would be--that would be a useful
8 study, particularly for someone who is interested
9 in public administration. It might be somewhat
10 less interesting for an economist, but I do agree
11 that it would--it would be an interesting thing
12 to do.

13 Not that I'm supposed to ask you
14 questions, but why don't you just put me out of my
15 misery and tell me how many.

16 Q. Professor Crew, now you can understand why
17 I changed professions. I get to ask the questions

18 but I don't have to answer them. And I'm changing
19 professions again, as you know, so it's a moving
20 target.

21 Now, we have gone through roughly the
22 regulation making power of Canada Post, and I want

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16:31:53 1 to take you to and just see whether you remember
2 seeing this. If you look at paragraph 19(3)--

3 A. This the same act?

4 Q. Same act. I'm sorry. Same act.

5 A. Go back now, right?

6 Q. No, you had 19(1) we just finished; right?
7 That's what you and I talked about a research study
8 together.

9 A. Yes, yes.

10 Q. 19 sub three talks about regulations the
11 governing council itself may make. Remember
12 previously it's regulations made by Canada Post,
13 and the Governor of Canada, the cabinet asserted
14 rights on how to deal with that, but this one says
15 that the governing council, not Canada Post, can
16 make regulations and to deal with materials for the
17 use of the blind, which is not unusual because most
18 countries have special provisions dealing with the
19 use of the mail for the blind.

20 A. Right.

21 Q. If you turn back now--we'll come back--to
22 paragraph 36 sub three. 35 and 36.

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16:33:08 1 A. This is called government mail.

2 Q. That's right.

3 And paragraph 35, to put it briefly, is
4 that parliamentarians get free mail. That's what 35
5 says.

6 A. Not unusual in North America.

7 Q. I agree.

8 And then you see at 36, sorry,
9 subparagraph one deals with parliamentarians.
10 Subparagraph three talks about other types of House
11 of Commons mail. We will just lump it up as
12 government mail, there is free mail service, called
13 franking or something like that. And we get to
14 paragraph 36. You said the governing council may
15 make regulations for the transmission of free mail.

16 Do you see that?

17 A. For purposes of Subsection 35(1) and (3).

18 Q. As we just reviewed that.

19 Now, that's probably not unusual, too.

20 A. Probably not, yeah.

21 Q. Now, let's go back to paragraph 22,
22 section 22. And this is the power of the Minister

16:34:36 1 responsible for Canada Post to issue under the
2 authority of this section of the Act a directive,
3 and then it provides for the possibility, no,
4 guarantee, to provide compensation. Do you
5 remember reading that?

6 A. I see in there, yes.

7 Q. All right. And again, there is a
8 comparable section, there is a reference here to
9 section 89 of the Financial Administration Act, and
10 I won't get you to have your fingers and toes
11 holding all the pages, but it's a comparable
12 section, section 89, but that one applies to the
13 governing council as a whole as opposed to the
14 minister, and again my friends on the opposite side
15 will tell me if I'm wrong, but that's by and large
16 what section 89 of the Financial Administration Act
17 speaks of.

18 It's also a matter of public record that
19 not one single directive has been issued under this
20 provision, section 22, as well as section 89 of the
21 Financial Administration Act.

22 Do you find that, from your experience, a

16:35:51 1 bit unusual?

2 Let me put it this way. Did you ask about
3 whether there were any directives under section 22?

4 A. I did not.

5 Q. Did you ask about section 89?

6 A. No.

7 Q. Let me go back to your affidavit, sir, at
8 paragraph 76.

9 ARBITRATOR FORTIER: Dr. Wong, I wonder
10 if--I know that you're not supposed to answer
11 questions which a witness may put to you, but maybe
12 you will consider my question. In line 16 of page
13 277, you said with respect to the power of the
14 Minister to issue directives, you said that there
15 hadn't been any, and don't you find this unusual?
16 What do you mean by the use of the word "unusual"
17 in the context of your examination of the witness?

18 MR. WONG: Well, I changed my question. I
19 changed my question because Professor Crew was a
20 little taken by that question. I asked him whether
21 he ever looked at--whether he ever asked Canada
22 Post whether any directives were issued, and he

16:37:35 1 said he did not under section 22 or under 89 of the
2 Financial Administration Act.

3 ARBITRATOR FORTIER: And it's in that
4 context that you used the word unusual, not the
5 fact that there were no directives?

6 MR. WONG: Well, there were no directives,
7 that's clear, and obviously we will argue that's
8 somewhat unusual if the government--

9 ARBITRATOR FORTIER: That is my question.
10 That is my question, why the use of the adjective
11 unusual.

12 MR. WONG: Well, I was just trying to lead
13 the witness.

14 ARBITRATOR FORTIER: You're
15 cross-examining, so you can do it.

16 MR. WONG: My friend, Mr. Appleton, will
17 address that when we get to closing argument, but
18 it's--all I got from Professor Crew is that he
19 never asked about these things, and it is a matter
20 of record that no directives have ever been issued,
21 and this is admitted by Canada under either Act.

22 I did answer the question. See how I had

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16:38:25 1 to answer that question.

2 THE WITNESS: Yes, you did. You kept me
3 waiting long enough, but you did answer.

4 ARBITRATOR FORTIER: Dr. Wong said

5 Mr. Appleton would answer that.

6 MR. WONG: That's a lawyer speaking.

7 THE WITNESS: On the matter of whether
8 it's unusual or not, and I guess it really depends
9 upon how well the government believes Canada Post
10 is doing its job. If it feels it's satisfying its
11 USO in a satisfactory manner, there may not be any
12 need for directives. Just depends upon the
13 circumstances, and I couldn't investigate every
14 detail of the history of Canada Post for the last
15 almost 25 years as to--the government surely has
16 other ways of affecting Canada Post through its
17 Ministry, in contact and discussions.

18 There may not need to have had a directive
19 if things were--if the corporation were pulling
20 filling its USO, if it were self-sufficient, if it
21 were making a return on capital. There may not be
22 perceived any need--I can't really--I'm sort of

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16:39:50 1 answering your question telling you whether it's
2 unusual or not.

3 Q. Thank you.

4 Let's go to paragraph 76. Paragraph 76
5 reads, "Although CPC lacks a traditional regulatory

6 commission, it is still highly regulated because of
7 its accountability to the Government of Canada.
8 The control and oversight exercise by the
9 government is an alternative to traditional
10 commission regulation. A regulatory commission
11 would be redundant in the current situation as it
12 would duplicate many of the controls exercised by
13 the Government of Canada."

14 What do you have in mind about the control
15 and oversight? What did you have in mind?

16 A. The Government of Canada has established
17 controls in a number of ways. The corporation, the
18 Crown corporation, is required to be
19 self-sufficient. It's required to make a return on
20 its capital. That in itself is a discipline.

21 It's, at least as far as its exclusive
22 privilege products are concerned, its prices are

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16:41:13 1 regulated by a price cap. There is a price cap on
2 the first weight step of two thirds of the rate of
3 inflation. That is in itself a discipline. What
4 it says is, it says that Canada Post must reduce
5 prices in real terms, not by--as long as inflation
6 stays low, it's not by a huge amount.

7 This price cap differs from other price
8 caps in that price caps normally take the form of

9 inflation or in the U.S. we say CPI minus X where X
10 is the "X" factor which would be some percent.

11 Here, it's the inflation rate times a
12 fraction.

13 Now, what that's going to do in times of
14 low inflation, it's not going to be--it's going to
15 be different, but from the other one, it's going to
16 have the same proportion of the inflation each
17 time, whereas the other one you are taking off an
18 absolute amount of X, but that's the only thing
19 that makes it slightly different from other
20 practices of CPI. It's sort of a times CPI instead
21 of CPI minus X where A is two-thirds.

22 Q. So the Government of Canada as the owner

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16:42:37 1 is basically putting these controls the way you
2 see it.

3 A. It's doing it by financial discipline and
4 by this price cap.

5 And Canada Post applies this price cap and
6 has to--can't raise its rates beyond the price cap.

7 Q. Let me now take you to your second
8 affidavit, and that is under Tab--I'm not sure what
9 tab it is--51. That's the next one.

10 A. Right.

11 Q. You go to paragraph nine of 51.

12 A. I'm still not quite there. 51?

13 Q. 51. There are lots of tabs.

14 A. I found it.

15 Q. And this is your reply or rejoinder or
16 whatever these things are called. This is your
17 second one. I call it Crew number 2.

18 A. Right.

19 Q. At paragraph nine, I take it you used the
20 word Attorney Campbell, referring to this gentleman
21 sitting next to me rather than James Campbell,
22 because there is another Campbell, Robert Campbell.

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16:43:51 1 Is that the reason you call him Attorney Campbell?

2 A. No, I was trying to be polite. They are
3 referring to me as Dr. Crew or Professor Crew, so I
4 just thought I would try to give Jim the
5 appropriate handle.

6 Q. I never call him Attorney Campbell.

7 A. All right. Mr. Campbell, then, if you
8 like.

9 Q. I was going to call him R. Campbell, but
10 that would only confuse with the Robert Campbell.

11 A. Right.

12 Q. At paragraph nine, you say: "Attorney

13 Campbell implies that Canada faces the minimal
14 burdens of the USO as a result of UPU treaties,
15 international law, and Canada law. Whether this is
16 correct or not is irrelevant to the issue at hand.
17 Canada's interpretation is what it is, and Canada
18 and CPC stand by it."

19 So, basically this probably summarized
20 what you said earlier to say, I'm not going to say
21 whether it's specific or nonspecific. I've looked
22 at the practice. It is what it is, and it seems to

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16:44:52 1 be comparable to what other people do around the
2 world.

3 A. Yes.

4 Q. That's in your own words what we just
5 talked about?

6 A. Yes, that's in--yeah, that's in your
7 words, but it's a good paraphrase of what I said.

8 Q. Thank you.

9 And let's just for greater clarity turn to
10 paragraph 11. This is your reply to one of the
11 points that Professor Sappington made, one of the
12 expert's affidavits filed by UPS. I think you know
13 Professor Sappington.

14 A. I know Professor Sappington. He's an
15 Associate Editor of the Journal of Regulatory

16 Economics.

17 Q. You haven't promoted him yet?

18 A. Well, it would be tough to promote him,
19 wouldn't it? I would have to get demoted myself;
20 right?

21 Q. At paragraph 11 it reads, "Dr. Sappington
22 states that the less standard portions of

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16:46:03 1 Dr. Crew's report offer assertions that are
2 difficult to assess because Dr. Crew doesn't
3 provide detail required for a thorough assessment.
4 In particular in a case that I offer no evidence
5 regarding likely magnitudes of the relevant
6 benefits and costs of Canada's regulatory regime
7 relative to alternatives," and then you say, "In
8 the same vein as UPS witnesses, my approach was not
9 to offer an empirical assessment of post regulation
10 of Canada. Rather my purpose was to argue that the
11 approach taken in Canada was well within the
12 boundaries of what would be considered reasonable
13 on the basis of extensive literature regulatory
14 economics."

15 So, this is a part of the same comment.

16 You're saying this makes sense from a term of
17 regulatory economics what Canada is doing?

18 A. That's what I'm saying.

19 Q. That's from wearing your hat as an
20 economist?

21 A. That's what I'm saying.

22 Q. Let me now take to you some international

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16:47:00 1 practices, and at Tab--we will see where we are.

2 Tab 2.

3 You cite Tab 2, Professor Crew, as being
4 the E.U. 1997 directive. Let me just for
5 everybody's sake, there is the 1997 E.U. postal
6 directive, Professor Crew, you're very familiar
7 with that?

8 A. Whether I'm very familiar with it, it's
9 sort of legal stuff, but I've read it a few times
10 on occasion, yes.

11 Q. And then there is the 2002 postal
12 directive which amended the 1997 directive.

13 A. Right.

14 Q. Now, from my reading of your affidavit, it
15 footnotes a reference to the 1997 directive, but
16 unfortunately, and I'm not being critical, what you
17 put in really is the 2002 or what was put in for
18 you as the case may be, were the 2002 directive.

19 A. Where are you pointing to on here?

20 Q. Well, this is Tab 2 of your materials

21 under the first affidavit, under Tab C50.

22 I know Europeans like small print, and we

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16:48:34 1 will learn how to read these things.

2 Now, the small print here says, "The
3 directive 2002/39 EC of European Parliament of the
4 council of 10 June 2002, amending Directive
5 97/67/EC with regard to the further opening in
6 competition of community postal services.

7 And when I was preparing for this, I
8 realized that this isn't the '97 directive. It's
9 the 2002.

10 A. Just point me to it again. I finally got
11 to Tab 2.

12 Q. Yes, Tab 2, if you look at the heading, it
13 really is the 2002 directive.

14 A. This is the 2002 directive I'm looking at.

15 Q. And you cited the '97 directive, and I'm
16 not being critical, so what I have done is that I
17 sort of combed through the materials and found what
18 I have now been advised by Mr. Campbell sitting
19 next to me that the consolidated version of '97 and
20 2002. And my understanding is that there are some
21 additions, but by and large, it's fundamentally the
22 same, so I would like to go through the 1997

16:49:44 1 directive, and it's in--now I will tell you which
2 binder this is.

3 ARBITRATOR FORTIER: Dr. Wong, could you
4 direct me to the paragraph in Dr. Crew's first
5 affidavit where he refers to the European
6 directive.

7 MR. WONG: Absolutely. If you look at
8 page five, at the foot of page five, he cites E.U.
9 directive, the foot of it, you see footnote three?
10 Actually paragraph 19 refers to the E.U. directive.

11 ARBITRATOR FORTIER: I have it.

12 MR. WONG: And then if you go right to the
13 end of his affidavit after page 20, he lists the
14 footnote references at the E.U. directive. But
15 these things happen. It turns out that the 2002
16 directive was included, and so I thought in the
17 interest of trying to get down to sort of the heart
18 of the matter, I found a document in our materials
19 that Mr. Campbell told me consolidates the two.
20 And if there are any differences, I'm quite happy
21 if Mr. Whitehall would like, we could file later a
22 copy of the '97 directive.

16:50:54 1 MR. WHITEHALL: That's fine. Where is the
2 compendium?

3 MR. WONG: I'm going to tell you in a
4 moment. I'm just trying to find it in my own note
5 where I put it. I think it's 105. Binder seven,
6 105. And I apologize. It's yet another binder,
7 but there is no way I could solve that.

8 THE WITNESS: Binder seven isn't here.

9 BY MR. WONG:

10 Q. We will bring that around to you, sir.

11 Do you have that?

12 A. Yes, she opened it up for me.

13 Q. If you turn, this is a consolidation
14 prepared by the office for the official publication
15 of the European Communities, and it appears to have
16 updated. If you turn to the second page, it sort
17 of shows the amendment of this document. Again, if
18 anything turns on it, it may be a matter of good
19 form for us to just file copies of the '97, since
20 we already have the 2002, just so if there are any
21 differences, it would be fair to everyone to see
22 the differences, if any. I don't know there are

16:52:21 1 for our purposes, and I stand directed if there

2 are, and I apologize for that.

3 MR. WONG: So, we will put it as 105,
4 Mr. President, a copy of the 1997 postal directive.

5 PRESIDENT KEITH: I say for what it's
6 worth, is the 2003 amendment included in this
7 amendment, in this consolidated version as well.

8 So, I don't know whether it's significant.

9 MR. WONG: Mr. Campbell tells me there is
10 no 2003 amendment, although I see that it does say
11 something here about regulation. That is a
12 regulation, not a directive. So, it won't be part
13 of this document. This document is a directive.

14 PRESIDENT KEITH: Well, it says it's
15 amended by it.

16 MR. WONG: We'll look at it. If it's
17 relevant, I will put it in the materials.

18 BY MR. WONG:

19 Q. Professor Crew, this is the basic document
20 for the European communities; right?

21 A. This is one of 15 December, 1997?

22 Q. Yes.

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16:53:27 1 A. Yes, this is 18 pages; is that correct?

2 Q. I'm sure it is. Yes, it is.

3 A. I just want to make sure we are talking
4 about the same thing.

5 Q. We are.

6 A. Given a little bit confusion about this, I
7 want to make sure I now have the right thing.

8 Q. Now, this is the--as we all know, in the
9 postal world there is the E.U. postal directive of
10 1997 which sets out, and that constitutes really
11 legislation for the European, members of the
12 European Union; correct, Professor Crew?

13 A. Yes, I believe so.

14 Q. And then that was amended in 2002.

15 A. Yes, there was a 2002 directive as well.

16 Q. And as I said, when I asked to you turn up
17 this page, this tab, this document is consolidated.
18 That is the '97 as amended by 2002 is in this
19 document. Just assume that's right. If I misled
20 you, my friend Mr. Campbell will be held
21 accountable.

22 A. I will take your word for that.

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16:54:29 1 Q. All right. Let's now go to page nine of
2 the document. Now, it starts with Article 3(1).
3 We see in here the statement of an obligation of
4 the part of member states to provide universal
5 postal service. Member states shall ensure that
6 users enjoy the right to a universal service

7 involving the permanent provision of a postal
8 service of specified quality at all points in their
9 territory at affordable prices for all users.

10 So, we see that as a basic requirement of
11 member states, a governmental requirement, if you
12 will, an obligation imposed on governments; right?

13 A. I agree. It says that, and I have read it
14 before, that particular Article 1. Section 1 I
15 mean.

16 Q. And we see, and I will paraphrase, in
17 Section 3, it talks about, and I will paraphrase,
18 the obligation to provide the universal service
19 every working day, but not less than five days a
20 week.

21 A. Yes, that's right.

22 Q. And then it goes on to say a minimum of

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16:55:58 1 one clearance and one home delivery.

2 A. Right.

3 Q. This is again general parameters.

4 And then it goes on to look at paragraph
5 four talking about what the standards should apply
6 to. It says for postal items up to 2 kilograms and
7 for packages up to 10 kilograms, and then it talks
8 about registry items and insured items as being
9 part of the universal service.

10 A. Yes, it does.

11 Q. And then at paragraph seven we see that
12 universal service applies not only to national,
13 i.e. domestic, but also cross-border.

14 A. Yes, it does.

15 Q. And I think that it would be fair to say
16 none of these things show up in our Canada Post
17 Corporation Act.

18 A. I think that's fair to say. Yes. This is
19 quite, quite detailed, and there may be a good
20 reason why this is different from Canada. The
21 European Union.

22 Q. Let me stop you, Professor Crew. That's

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16:57:05 1 not responsive to my question. I'm going to give
2 you an opportunity. I don't want to cut you off.
3 I know you know a lot, but I want to make sure that
4 I get my job done. If it's responsive, then I will
5 definitely let you go ahead.

6 If you go to Article VII.

7 A. On the next page, yes.

8 Q. Next page, Article VII, it talks about
9 what the reserve area is.

10 A. Right.

11 Q. It says here: "To the extent necessary to

12 assure the maintenance of universal service, member
13 states may continue to reserve services to
14 universal service providers." Right? And then it
15 goes on and talks about weight limits. Hundred
16 grams from January 5th, 2003, and then 50 grams
17 from January 1st, 2006.

18 A. The first sentence, member states may
19 continue--yes, yes.

20 Q. And I know I didn't take you to that, but
21 in Canada the exclusive privilege is 500 grams;
22 right?

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16:58:05 1 A. Yes, it is.

2 Q. And that has remained unchanged since
3 quite a number of years?

4 A. I believe since the founding. Right?
5 That's when it was reduced to 500 in Canada.

6 Q. I think that's right, but again, nothing
7 turns on it. But it's found in the Letter
8 Definition Regulations.

9 A. It's also found--there is also another
10 source for it which I looked at, but I can't recall
11 it right now, but it was stated. It's found in a
12 number of places, not just in the letter
13 definition.

14 Q. But it's not in the statute?
15 A. Not in the statute.
16 Q. It is where it is.
17 A. Right, it is where it is.
18 Q. I'm going to use one of your words. I
19 like that. It is where it is.
20 A. It may be in more than one place.
21 Q. Now, if you turn to Article 16--
22 A. Yeah, I found it.

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16:59:07 1 Q. --Article 16 also obligates the member
2 states to set standards of service; right? We
3 don't see that in the Canada Post Corporation Act,
4 do we?
5 A. Canada Post Corporation Act has not this
6 kind of detail.
7 Q. And you--
8 A. But you want to cut me off.
9 Q. No, please, I apologize.
10 A. And there are reasons for that that I can
11 think of, but including the fact that this is much
12 more recent, this is dealing with a number of
13 disparate countries, a number of countries that
14 didn't really have a tradition of a USO of the high
15 quality that some of them had, and it was an
16 attempt to bring a sort of minimum standard of

17 quality.

18 So, I guess there was a sense that more
19 needed to be articulated in this directive than has
20 been the sense in North America and other places
21 where there has always been a standard of a USO
22 that was quite comprehensive and even rigorous.

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17:00:32 1 Q. Now, this directive, of course, predates
2 the recent enlargement of 10 additional countries
3 to the original--to the 15 who were subject to
4 this.

5 A. Right.

6 Q. And the 15 includes United Kingdom,
7 Ireland, Germany, France, Netherlands, Italy,
8 Spain, Portugal; right?

9 A. Right.

10 Q. Which ones of those, by the way, didn't
11 sort of have high standards?

12 A. Well, I think it's rather common knowledge
13 that Italy has had problems with service standards,
14 which they have been working on improving, and
15 perhaps Portugal, but--and they may have had
16 different standards. I don't know every detail of
17 the standards, but this was an attempt to form an
18 agreement as to what we could expect when we--when

19 our mail goes from your country to another member
20 country, what we can expect, and there was a desire
21 for some uniformity of standards.

22 Q. Let's now turn to paragraph 19, sorry,

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17:01:48 1 Article 19. Article 19 provides for complaint
2 procedures and another requirement of European
3 directive.

4 Are you ready, Professor Crew?

5 A. A complaint procedure; right?

6 Q. Yes.

7 A. That's Article 19, right.

8 Q. And we didn't see any of that in the
9 Canada Post Corporation act, did we?

10 A. I didn't see it, no.

11 Q. Neither have I.

12 If you go to Article 22 while we're after
13 19 on the next page, Article 22 provides for a
14 national regulator; right?

15 A. It does.

16 Q. And they are the ones who are supposed to
17 be one monitoring the universal service provider
18 and postal operators to assure compliance with
19 whatever the national standards are.

20 A. That is their role, yes.

21 Q. You are also aware that at least with the
22 15 countries before the enlargement, every country

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17:03:23 1 has an independent postal operator, by independent
2 meaning independent of the postal operator and
3 independence of the government, except for France.

4 A. Yes, I think that's correct.

5 Q. And France, of course, was using in a
6 typical French way the Ministry as being a quote,
7 independent post operator.

8 A. Yeah, the independent regulator, right.

9 Q. And, in fact, that was recently--France
10 finally complied. I think they put it in a
11 Commission called Raccept.

12 A. That's right.

13 Q. And that just happened.

14 A. It's a communications regulator. It's not
15 just Post. It's telecommunications too.

16 Q. But that's not unusual. I think some of
17 the other ones also have duplicate roles. I think
18 Ireland has that too.?

19 A. Island does, but Britain, for example,
20 doesn't. Germany has a dual role.

21 Q. We will come back to some of these in a
22 moment.

17:04:20 1 And we, of course, don't see anything like
2 that in Canada, obviously.

3 A. We don't see that kind of commission with
4 commissioners that are specialized. We don't see
5 the formalized complaint procedures that you had
6 there.

7 On the other hand, what really matters
8 ultimately to an economist the output. It does
9 Canada provide a USO that is very similar to that
10 that is provided in the European Union, which most
11 of the other advanced countries, the U.S., Canada,
12 and the European Union, and Australia and New
13 Zealand and other parts of Europe.

14 And Canada's USO is very similar to that,
15 and that's what matters. Output is what matters.
16 It may be possible for Canada to achieve the same
17 results for its citizens, the same entitlement to
18 affordable postal service for its citizens by a
19 different regulatory apparatus from the formal
20 regulatory apparatus that's developed--that has
21 been developed in Europe. In some ways, you get
22 regulation waves. What happened in Europe was you

17:05:47 1 saw a wave of regulatory commissions with the
2 privatization of the British utilities and network
3 industries. There was a setting up of a lot of
4 regulatory agencies similar to these, electricity,
5 gas, telephone, but post was never regulated in--by
6 a formal regulator in Britain until around, I
7 guess, five, six, seven years ago, when Postcom was
8 set up. So Post was the last to be regulated by
9 Commission in the United Kingdom.

10 There are different ways of achieving your
11 objective to provide universal service. Europe's
12 going the regulatory route, the formal regulatory
13 route.

14 Q. I wasn't asking for an explanation, but I
15 wanted to give you an opportunity to say your
16 piece. But as I interpret what you say, when you
17 keep talking about Canada's Universal Service
18 Obligation, it really requires to us translate to
19 say that is Canada's practice and is what Canadians
20 from what you have determined are entitled to
21 receive, and that's what Canada Post interpret they
22 must do.

17:06:58 1 A. Yeah, I believe that's a fair summary,

2 yes.

3 Q. Now, turn up to Article 12.

4 A. Go back to 12?

5 Q. Article 12, yes. This is the tariff
6 principles and transparency of accounts.

7 Now, nowhere do I read in here an
8 obligation to charge uniform tariffs. I see it as
9 permissive. Is that a fair reading of Article 12
10 with respect to uniformity of tariffs?

11 A. It says the prices must be affordable, as
12 the price to costs, et cetera, and then you are
13 talking about like the third point down,
14 application of a uniform tariff does not exclude
15 the right of universal service, right to conclude
16 individual agreements with prices to include
17 individual agreements on prices with customers.

18 Q. Well, if you read the second point,
19 Professor Crew, it says prices must be geared to
20 costs. Member states may decide that a uniform
21 tariff should be applied throughout their national
22 territory. It's permissive?

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17:08:23 1 A. It would be possible under this directive
2 for a country to choose something other than a
3 uniform tariff, and they may well do so for

4 parcels. I'm not actually aware of any that do so
5 for letter, and for good reason.

6 Q. But the point here is that there is no
7 requirement in law by E.U. directive to a member
8 state.

9 A. Again, I'm not a lawyer, but just reading
10 plain words, the plain words say what you just said
11 they said, and I don't disagree with this, and the
12 plain language says that. There may be other
13 reasons, however, why from a practical point of
14 view, a uniform tariff--from a feasibility point of
15 view, a uniform tariff is imposed. There may be no
16 other alternative to a uniform tariff, and part of
17 that comes from the requirement of affordability.

18 It's much easier to monitor affordability
19 if you have a uniform tariff, and it's transparent,
20 and that's one reason why, just one reason why a
21 uniform tariff may de facto be an obligation, even
22 though de jure it doesn't say so in the law here.

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17:10:04 1 Q. And the point is that early on in your
2 affidavit you say ubiquity and uniformity are
3 essential to the USO.

4 A. Right.

5 Q. I take the word USO as obligation as
6 opposed to practice. I'm not disputing uniformity

7 is the common practice of Lettermail, at least;
8 right?

9 A. Yes, uniformity of Lettermail is
10 ubiquitous.

11 Q. Let's now turn to Article 14. Article 14
12 deals with accounting.

13 Paragraph two reads, "Universal service
14 providers shall keep separate accounts with their
15 internal accounting system at least for each of the
16 services within the reserve sector on the one hand,
17 and for nonreserve services on the other hand."

18 So, the first thing it says, reserve,
19 nonreserve. So, in K, in terms exclusive
20 nonexclusive; right? That's what the first
21 sentence means.

22 A. Yes, I think so.

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17:11:07 1 Q. And then the second sentence says: "The
2 accounts for the nonreserve services shall clearly
3 distinguish between services which are part of the
4 universal service and services which are not."

5 Take that in Canadian parlance means for
6 nonexclusive privilege products, you have got to
7 identify in accounting terms what is part of
8 universal service and what is not part of universal

9 service.

10 A. That's what you say in Section 2 is
11 saying. It appears to say that.

12 Q. Now, we don't see any of that in the
13 Canada Post Corporation Act, do we?

14 A. We don't see it in the Canada Post
15 Corporation Act as far as I'm aware.

16 Q. Now, when you go to paragraph 3(b) that
17 deals with common costs.

18 A. Yes.

19 Q. And I will paraphrase the sub bullets, and
20 please stop me, since this is an area that
21 economists know something about. It says, "Common
22 costs shall be allocated on the basis of direct

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17:12:08 1 analysis of the origin of the costs. That is, if
2 it's product-specific, it should be assigned to the
3 product." That's what subparagraph one says;
4 right?

5 A. Whenever possible, yes, it does.

6 Q. And then subparagraph two really is a
7 concept of dependent costs. If it indirectly links
8 to the product, it should also go that same way,
9 putting roughly.

10 A. Yes, I think that's fair.

11 Q. All right. Then the third one reads,

12 "When neither direct nor indirect measures of cost
13 allocation can be found, the cost category shall be
14 allocated on the basis of a general allocator
15 computed by using the ratio of all expenses
16 directly or indirectly assigned or allocated on the
17 one hand, to each of the reserve services on the
18 other hand to the other services."

19 To put it in simple language, remember we
20 talked about common costs. So, if you can't assign
21 it directly or indirectly, then you use it roughly
22 using a ratios. That's what it says there.

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17:13:26 1 A. It's what it's saying. It seems to be
2 close to the notion of fully distributed cost.

3 Q. But we are not going to talk about whether
4 that's good or bad, but they do have a rule that
5 says roughly in proportion of the expenses that you
6 have allocated, that's the proportion you should
7 take or assign of the unallocated costs.

8 A. It seems, yeah, that's what it--it seems
9 to be saying well, we fully distributed costs based
10 upon this ratio that's mentioned here.

11 Q. We, of course, didn't see anything like
12 that in Canada Post, do we, in the Act or in the
13 regulations, anything ever like that?

14 A. I would hope not because this is really a
15 way of allocating costs that many economists have
16 criticized over the years, and even accountants
17 have criticized, and Canada has got witnesses on
18 its cost study and cost allocation that can address
19 these points in much more detail than I can.

20 But I'm certainly glad that you didn't see
21 something like this in the Canada Post Act because
22 I think it's basically a wrong-headed principle.

500

17:14:47 1 Q. I will take that up when the witnesses
2 appear next.

3 Let me take you to Mr. Campbell, this
4 Mr. Campbell's affidavit, and that's in C46 and
5 binder four. We will get somebody to help you.

6 A. This lady has been very good in assisting
7 me, so I'll take any help I can get.

8 Q. She wanted you to make sure you don't mess
9 things up.

10 A. Well, if she can do that, she's doing a
11 good job.

12 So, you said six--

13 Q. C46, which is in binder four, which is
14 James I. Campbell report.

15 A. Okay.

16 Q. I would be remiss if I didn't at least
17 touch on that with you.

18 A. I have got Jim's report right here.

19 Q. Now, if you go way in the back--

20 A. This is a very long report, like 200
21 pages.

22 Q. You go right to the end of the report, and

501

17:15:54 1 you go to Appendix D.

2 A. Oops. I saw that a moment ago, yeah.

3 Q. Appendix D.

4 A. Yes, Appendix D.

5 Q. Now, again, we'll move things fairly
6 quickly. Postcom is the English--is the U.K.
7 postal regulator?

8 A. Yes.

9 Q. An independent commission, if you will,
10 charged with responsibility of supervising all
11 postal operators, including the Royal Mail.

12 A. Yes, it is charged with supervising the
13 postal sector, but its principle client is clearly
14 the Royal Mail.

15 Q. But there are other operators in the
16 United Kingdom?

17 A. Yes, there are.

18 Q. Now, this document under D-4 is the

19 License for the Royal Mail. It's an excerpt. I
20 think it's too long to reproduce.

21 A. I saw that once. It's a much bigger thing
22 than this.

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17:17:22 1 Q. But we are just perusing a few things. If
2 you turn to page D-12, it speaks of the conditions
3 of, you see at 3(A) (1), at least one delivery.

4 A. Right.

5 Q. And it has one collection. Sounds like
6 the postal directive.

7 A. Right. Complies--complying with the Post
8 directive, right.

9 Q. And then if you go to page D-15, for
10 example, you will see under Part II condition two,
11 they use the word universal postal service, and you
12 will see at paragraph one of condition two, it says
13 the licensee shall provide a universal postal
14 service within the United Kingdom; right?

15 A. Yes, it does.

16 Q. And then if you turn over to page D-16 at
17 paragraph 2(b), it talks about access points;
18 right?

19 A. It does.

20 Q. And it sets certain standards.

21 A. B-1 and 2, right.

22 Q. It says 95 percent within five kilometers

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17:18:32 1 and so forth.

2 A. Right.

3 Q. This is not part of the--the specifics
4 here are not part of the postal directive.

5 A. I didn't see anything specific to that in
6 the postal directives.

7 Q. This is the Postcom's license. They set
8 this up for the Royal Mail.

9 Now, let's go to, apart from the
10 overregulated Europeans, let's see if we can go to
11 another country. Let's take Australia, which is
12 the next starting at D-46. These are regulations
13 for the Australian Postal Corporation; right?

14 A. Yes.

15 MR. WHITEHALL: Where are you?

16 MR. WONG: At D-46, which is the same as
17 Mr. Campbell's affidavit.

18 BY MR. WONG:

19 Q. And we see for example again I just want
20 to do it in sort of highlight terms.

21 MR. WHITEHALL: This appendix?

22 MR. WONG: C-46 of Mr. Campbell's, and

17:19:58 1 then his Appendix D-4, 46. Page 46 of D.

2 BY MR. WONG:

3 Q. And so, we have here D-46, Australian
4 postal regulations, and we see here the terms under
5 which the Australian Postal Corporation, which is
6 the universal service provider in Australia.
7 Professor Crew?

8 A. Am I right in thinking this is a six-page
9 document?

10 Q. Yes. It's a very short document. I don't
11 know whether this is all of it, but I'm only
12 putting this out for broad illustrative purposes.
13 Okay.

14 We see at the bottom of page two of this
15 document, D-46, about mail deliveries. We see at
16 the at bottom it says frequency of delivery. And
17 we say here Australia Post must have daily delivery
18 and so forth; right?

19 A. Except Saturday--except on a Saturday.

20 Q. Five-day delivery; right? And also a
21 specification of what the coverage should be,
22 specifies ubiquity, 98 percent of all delivery

17:21:04 1 points; right?

2 A. Yes.

3 Q. And then we go over to the next page, page
4 three. You look under accuracy and speed of
5 delivery.

6 A. Oh, yes. Just on that frequency, it goes
7 over to say it's least two days a week for 99.7;
8 right?

9 Q. Right. I'm sorry. I wasn't managing to
10 jump over other than to say they specified what it
11 is?

12 A. Yes, indeed.

13 Q. And then we see at the accuracy and speed
14 of delivery.

15 A. Right.

16 Q. Specifying letters, what the standard for
17 letters are, and then we go over to the next page
18 at four, we now have service standards, if you
19 will, for various types of--for letters, depending
20 on whether it's metropolitan, cities, outside
21 cities.

22 A. Yes, that was the service standards on

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17:21:53 1 page 4.

2 Q. It's in the regulations?

3 A. Yes, it is.

4 Q. And then we go further down at page six of
5 the document, that we have retail outlets. In
6 fact, there is a specification of where outlets
7 should be located and how near they are to people.
8 This is your ubiquity. This is their
9 implementation of your ubiquity of retail accounts.

10 A. Yes, right, it is.

11 Q. Now, the next page is New Zealand, I don't
12 want to be seen to be pandering, but it is
13 important to mention New Zealand here. New Zealand
14 because it's a liberalized post office. And we'll
15 come back to it in a moment. In New Zealand their
16 way of doing things is by a deed of understanding.
17 You see that, the next page at D-52, Professor
18 Crew?

19 A. I do. By this deed.

20 Q. This Deed of Understanding made on the
21 17th day of February 1998.

22 A. Yes.

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17:23:07 1 And I don't know what recitals are, but
2 apparently they're not musical.

3 Q. We could try singing, but we won't.

4 Basically the recitals say we are now

5 removing the reserve area for New Zealand Post.
6 And we also are going to designate New Zealand Post
7 as the universal service provider for a period of
8 five years. That's what A and D do, just to put
9 this in context.

10 But we see at paragraph four, Professor
11 Crew, service standards. They get six days a week
12 for 95 percent of delivery points; right? And then
13 it goes on.

14 A. Yep, yes, similar to the Australian one.

15 Q. Then we go to D-54, we have under
16 paragraph 10, actually prescribing what the price
17 of a letter should be for three years.

18 A. Yeah, 45 cents.

19 Q. Okay. And then we see that the paragraph
20 13 talks about the number of network points that is
21 supposed to happen. At least 880 postal outlets
22 and postal centers, including stamp retailers?

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17:24:23 1 A. Yes, I see it.

2 Q. And then paragraph 17 talks about
3 nondiscrimination and access; right?

4 A. Yes, it does.

5 Q. Now, I don't recall, that any discussion
6 in the Canada Post Corporation Act about terms of

7 access.

8 A. Well, the Canada Post Corporation Act is
9 dated 1981, and probably no one had thought about
10 these kind of things at the time. It was--there is
11 nothing in there about that. Access was a new--was
12 unheard of in '81, so it's not surprising it wasn't
13 there.

14 Q. Well, acts do change. I'm not asking you
15 to give your opinion, but since you did say, the
16 Act was passed in 1998--in 1981. I assume you also
17 know that parliaments change acts from time to
18 time.

19 A. They do, and practices change, too.

20 Q. Yes. We are not going to dispute that,
21 and I'm not going to ask you any more about law.

22 (Brief recess.)

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17:35:08 1 BY MR. WONG:

2 Q. Professor Crew, just bear with me a bit
3 longer.

4 One of your central theses is, and I will
5 read that same line again, "take away the reserve
6 area and the funding of USO by the PO becomes
7 extremely tenuous." This is because what you see
8 is the burden of the USO, and then you further

9 explain this, and I will just give you the
10 paragraph reference for others' benefit. That's
11 Crew 1, paragraph 13.

12 And then you later on talk about
13 ubiquitous outlets and the burden, and you say at
14 paragraph 17 of Crew 1, "one measure of CPC's
15 burden is the extra outlet it is obligated to
16 operate. The presence of scope economies"--and I'm
17 paraphrasing now, excluding some words, mitigates
18 the costs of meeting this burden somewhat, but the
19 provision of the ubiquitous outlets clearly remains
20 one of the burdens of the USO.

21 Then you say, "With respect to parcels,"
22 again this is Crew 1 at paragraph 28, you say, "the

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17:39:45 1 obligation to provide ubiquitous counter service
2 and the USO and parcels are significant expenses to
3 CPC. Right?

4 Would it be fair to say that it really is
5 not sufficient just to look at the burdens because
6 there are certain benefits that Canada Post gets?

7 And, in fact, the proper way of looking at it is to
8 look at the benefits and the burden and see what
9 the net burden is.

10 A. Indeed, I would. In fact, there is--the

11 way you calculate the burden of the USO, I think,
12 there is some agreement on this which was derived
13 by John Panzer which, in fact, sort of taken an
14 approach not exactly like that, but it's the same
15 basic notion behind it. What Panzer says is you
16 can't just calculate the burden by saying what
17 would it cost? Well, what would we save in costs
18 if we got rid of this particular service or the
19 service to this particular area?

20 He says what you have to do is look at
21 something that's much more complicated than that.
22 You have to say what would be--what would be the

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17:41:04 1 dollar figure you would get if you went to a
2 completely open situation and then the burden of
3 the USO would then be that dollar figure that you
4 had to come up with to keep the Post Office
5 solvent.

6 And he argues, depending on how
7 competitive the scenario, that will increase, if
8 it's more competitively increased.

9 Q. It's almost like looking at two worlds.
10 I'm sorry we are talking as economists now, but you
11 look at the world of competitive versus what it is
12 today. That's one way of looking at it.

13 A. Yeah, yeah.

14 Q. Now, you didn't do that for Canada Post.

15 As a fact, you didn't do an analysis of the net
16 burden to Canada Post.

17 A. No, I didn't do the cost analysis of that
18 kind, of the Panzer kind. That would be a very
19 complicated exercise, and it didn't seem to me or
20 to counsel of Canada to be required to go into that
21 much detail as to come up with a dollar figure.

22 Q. All right.

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17:42:14 1 A. As far as I'm concerned, based on my
2 experience and my research, there is a significant
3 burden of the USO, and my research confirms this
4 into models that I have looked on with Paul
5 Kleindorfer which Mr. Whitehall mentioned in his
6 opening direct examination that, in fact, shows
7 that it's the burden and shows that it is quite
8 difficult to maintain a meaningful USO without some
9 kind of reserved area, and that's why I had that
10 statement.

11 Q. All right. You're not aware of Canada
12 Post having done a study other than retaining you
13 and Professor Paul Kleindorfer to do it. Do you
14 know if a study has been done by Canada Post or
15 Commissioned by Canada Post on the burden of USO to

16 Canada?

17 A. I'm aware of no study, and I would doubt
18 whether one had been done because I wouldn't have
19 thought it would be a good use of their resources.

20 Q. Okay. Now, you have done work for
21 Postcom. I think it's mentioned. My friend
22 Mr. Whitehall mentioned that you had done work for

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17:43:22 1 Postcom, and you are familiar generally with the
2 operations of Postcom, the U.K. regulator?

3 A. No, I don't think I have done any work for
4 them. He mentioned the Royal Mail.

5 Q. It was the Royal Mail you did work for?

6 A. Yes.

7 Q. I apologize.

8 A. You had me worried for a moment.

9 Q. It wasn't a trick.

10 A. Maybe I shouldn't say this to you, but
11 this is a story that really had me wondering once.
12 This guy came up to me and said I was the external
13 examiner on his dissertation, and this was the
14 first time I had met the guy, and so I was
15 wondering what was going wrong, and you almost put
16 me through that for a moment.

17 Q. I apologize. I will buy you a Guinness.

18 A. I will need it.

19 Q. Now, you are aware that Postcom in 19--in
20 2001 did a study on the cost of the USO of the raw
21 mail. In fact, they went so far as to say, and
22 maybe if you don't, I will tell you what they said,

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17:44:33 1 and tell me whether you know of it or not, that
2 Postcom said the fact that they had to deliver to
3 every point in the country, your ubiquity point,
4 was a commercial advantage rather than a burden,
5 and that, in fact, the costs of the USO, according
6 to an external study done by--for Postcom was
7 estimated at 1.7 percent of revenues, some
8 81 million pounds.

9 Do you remember coming across that?

10 A. I can't recall the exact figure that you
11 just quoted. I remember reading it a few years
12 ago, because the Postcom guys said, have you seen
13 our latest study, and I really recall reading it.

14 But as far as I'm concerned, that's not
15 the way to do the analysis. The way to do the
16 analysis is, I believe, the way that Panzer
17 proposed. It's more difficult, but that is the way
18 to do it.

19 What happens, what's the burden, if you
20 open up everything, how much is the--how short is

21 the Post Office being fiscally whole.

22 Now, what this study seems to be saying,

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17:45:54 1 if I recall, and I think what you said is correct,
2 is saying, Well, it really is--it really would be
3 if you did a Panzer type of analysis, they didn't
4 do it, the Panzer type of analysis, it really would
5 be a trivial amount to make up. You're saying 1.7
6 percent, 1.8 percent--

7 Q. 1.7 percent of Postcom.

8 A. It's trivial.

9 It's one of these things you don't know if
10 you don't do it. If you--some things you could be
11 pretty confident about it, if you do it. If you
12 jump out of a 20-foot window, you are probably
13 going to do yourself some injury. Some things you
14 could be confident about, but I don't think I could
15 be quite that confident, that okay, open up
16 everything and okay, the Royal Mail will be able to
17 get by.

18 It depends on a number of factors. If the
19 competition is intense, 1.7 percent, 2 percent or
20 whatever, that could be quite--that could be quite
21 painful. It could be the difference between making
22 a profit and not. I mean, you could be on a tight

17:47:09 1 margin, and I just couldn't say ex ante, I couldn't
2 say looking forward on that of forward-looking
3 projection of that.

4 Q. Let me take you then to another study, and
5 I'm sure you're familiar with this one because it
6 was presented at one of your conferences. I was
7 even there. This is the Potsdam paper presented by
8 Kristin Bergen of the Directorate of Regulatory
9 Affairs of Norway Post, which is cited in
10 Mr. Campbell's affidavit, and it's produced at
11 tab--binder five, and I apologize I'm jumping all
12 over. C55, binder five, C55. C55.

13 A. I must say that I am very familiar with
14 Kristin Bergen. She's been an active participant
15 in our conferences for several years.

16 And we said it was C55?

17 Q. Yes, it is.

18 A. All right.

19 This paper--I do recall Kristin giving a
20 paper there, yes, that's right.

21 Q. And this really is--she didn't do the
22 study. It was commissioned. She's reporting on

17:48:22 1 results of a study that was done by Norway Post.

2 I'm not going to go through details, and I probably
3 would be shot if I did in this room, but I want to
4 talk about it in general terms. This was a study
5 attempting to measure the USO burden on Norway
6 Post; right?

7 A. I guess that's a fair characterization of
8 it.

9 I guess what she was trying to do was she
10 was trying to say, well, what are the costs
11 associated with making adjustments in her USO
12 burden.

13 This paper, incidentally, was one that she
14 presented, but we didn't actually publish it in the
15 book that came out of the conference. At these
16 conferences, we have I think it's usually about 40,
17 42 papers, and we usually end up with a book that
18 has between 20 and 25 papers in it, and this one
19 was one that we didn't publish.

20 Q. Let me defend Ms. Bergen by saying this is
21 really a report of a study done. She didn't do the
22 study.

17:49:27 1 A. That's right. She reported on some

2 consultant reports, basically.

3 Q. I would do exactly what you did. I would
4 not put it into your book, and I accept that. This
5 is really a report of a study.

6 A. Right.

7 Q. My point of mentioning this is that what
8 Norway Post was doing was to say, what is the
9 burden to Norway Post of USO because, once that
10 burden is calculated, you are going to go to the
11 government and say, pay us that amount for the
12 burden, because the way they did it in a sense is
13 somewhat like John Panzer's analysis. Here is the
14 world the way we would do it if we didn't have an
15 obligation, and here is the world when we have an
16 obligation, and let's do up a modeling and do a
17 calculation, and the results here is 2 percent of
18 revenues.

19 A. It's half of John Panzer's approach.
20 Basically, as far as I can tell from this paper,
21 she didn't say okay, what happens if we open up the
22 market and have--and determine the cost of the USO

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17:50:30 1 obligation. As far as I'm aware, they still have
2 their market the same as it was.

3 So, I think it's half of what John--I
4 don't think it's any different, and I don't think

5 he says it is from other approaches that have been
6 employed to cost the USO, namely looking at the
7 services that if you take these services away, what
8 are we going to say from that?

9 So, I don't really believe that it is John
10 Panzer's approach. I think John--it isn't, in
11 fact. It's the approach that consultants have been
12 using, I guess, since around the mid to late
13 nineties to try and assess the cost of the USO.

14 Q. All right.

15 A. So, it isn't the same as John's.

16 Q. I accept that. We are not going to debate
17 Panzer's approach at this point.

18 A. But what the implication of this is, I
19 don't really set much thought by this. One of the
20 reasons that we didn't publish this paper is not
21 because we disagreed with it because, you know, we
22 publish a number of things we don't agree with.

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17:51:44 1 It's just the fact that Paul and I don't agree with
2 the paper is not a reason for not publishing it.

3 A paper needs to have originality. It
4 needs to have something, data or something. None
5 of this here.

6 Q. I agree with you. I would have rejected

7 it as well for the very reason.

8 A. I'm kicking it already out of an open
9 door; right?

10 Q. Let's--now, we have talked about the
11 attempt to cost the net burden. I accept that
12 you--I'm not asking whether you agree with the
13 study, but you know the study is taking place in
14 the U.K. and in Norway.

15 We have another indication of whether or
16 not the sky will fall if you didn't have a reserve
17 area because we have a number of countries that are
18 already liberalized in the sense there is no
19 reserve area. For example, we have Sweden.
20 Swedish Post has been liberalized since 1993;
21 right? Approximately that date.

22 A. I thought it was '94, but that's close

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17:52:46 1 enough.

2 Q. They still, and as I recall--and it's in
3 the documents, and I'm not going to get you to turn
4 it up; it will be too much commotion. I will just
5 make reference to the document, binder six, C66,
6 UPS document 523, page 94. This is the WIK 2004
7 report, W-I-K, acronym for "Wischenshau" something
8 whatever. This is a study commissioned for the
9 European Union--European Commission.

10 A. It just means Institute for
11 Telecommunications and Postal Service.

12 Q. And I think to be fair, it identified one
13 of the principle authors as Mr. Campbell.

14 A. Absolutely.

15 Q. In that report they said even after the
16 liberalization of Swedish Post, they still enjoyed
17 93 percent of the Lettermail market. Do you
18 remember that?

19 A. No, I think that number is about right. I
20 would have said low nineties, and that's
21 reasonable.

22 Q. And, of course, we have another country

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17:53:50 1 that has no reserve area, New Zealand, since 1998.

2 We went through their deed of undertaking.

3 A. Yes.

4 Q. And as far as I understand, they are a
5 profitable corporation. They still enjoy the
6 dominant position in New Zealand.

7 A. Yes. I'm not sure their percentage is,
8 but it's going to be pretty high.

9 Q. We also have, apart from the countries
10 that have already liberalized, we also have a
11 liberalization trend, which I think you sort of

12 inferred in your paper in your affidavit, but you
13 really don't mention that, and that is the fact
14 that, first of all, the E.U., although has not
15 finalized it, announced its intention to start in
16 2009 to fully liberalize the postal sector.

17 A. In 2009--I would have said 1909. 2009.

18 Q. We can't go backwards, as much as we would
19 like.

20 A. 2009 is what we call the FMO, full-market
21 opening.

22 Q. That's what they are planning to do, and

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17:54:56 1 to be correct, it has not been formalized yet.

2 A. It's actually not yet set in stone, as
3 they say.

4 Q. But, of course, we already have three,
5 actually four countries announcing in the European
6 Union jumping the gun, if you will, that they
7 intend to liberalize. U.K., the Royal Mail Postcom
8 has decreed that the monopoly for Royal Mail
9 reserve area, to the extent they have any left,
10 that's going to be taken away as of January 1st,
11 2006; right?

12 A. I think that's right, yes.

13 Q. And although Norway is not part of the
14 European Union, if you don't know this, take this

15 as a fact.

16 A. I do know it's not part of the European
17 Union, but they do observe certain Conventions of
18 the European Union.

19 Q. Correct, under the "EAFTA" agreements, so
20 they basically follow the directive?

21 A. Right.

22 Q. And they have announced tat they will

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17:55:53 1 fully liberalize maybe on the basis of the study, I
2 don't know, as of 2007.

3 A. Right. I will accept that.

4 Q. And Germany has announced that as of
5 January 1st, 2008, a year before the free-market
6 opening, that they will liberalize completely.

7 A. I believe that's correct.

8 Q. And like a lot of things in the postal
9 area, the Dutch Post Office has said the same
10 thing?

11 A. Yes, I think so, yes.

12 Q. So, as of January 1st, 2008, we have the
13 Dutch, we have the U.K., we have Germany, and we
14 will put aside Norway for the moment. My
15 understanding is that is about 60 percent of the
16 European Lettermail market will be liberalized.

17 A. 60 percent could be. It's about half, I
18 will agree. It should be at least half.

19 MR. WONG: Just bear with me for one
20 minute and consult with my colleagues.

21 (Pause.)

22 MR. WONG: Well, Professor Crew, it's time

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17:57:32 1 for us to have a Guinness. We are done.

2 MR. WHITEHALL: Not quite.

3 MR. WONG: He will be harder on you than
4 me.

5 REDIRECT EXAMINATION

6 BY MR. WHITEHALL:

7 Q. My friend asked you about your statement
8 that it is difficult to maintain the USO without a
9 reserve.

10 Do you recall that?

11 A. Oh, I do.

12 Q. Now, let me ask you just a continuation of
13 that question.

14 Even with that reserve, is it sufficient
15 to pay for the USO, the reserve alone?

16 A. Typically not. You usually need something
17 extra. And as it happens in the postal sector, you
18 have what's known as economies of scope. In other
19 words, it's basically economies of multiproduct

20 operation. By adding another product, you could
21 use your infrastructure, you could spread your
22 common costs further, you get economies of scope.

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17:58:45 1 And traditionally what Postal Services have done,
2 instead of delivering letters, they deliver parcels
3 as well. So, you do--that has become in many cases
4 a source of funding for the USO.

5 Now, it's not the world's greatest source
6 because the problem with the parcel sector is it's
7 a competitive sector, so, by definition, you have
8 got to--your profits are going to be limited by the
9 market.

10 Q. And my second question, and now it's
11 really getting close to the dinner hour, my friend
12 asked you about these two or three countries who
13 are already liberalized, and that's a Post
14 colloquialism, as I understand. We think in Canada
15 we are liberal, but in any event my question is
16 about those countries: Are the conditions for the
17 delivery of the Post the same in, say, New Zealand,
18 Sweden, and I forget what the third country was,
19 Finland, was it? Norway?

20 A. You said Norway was coming up, but Finland
21 is also one that is ostensibly liberalized.

22 Q. He may not have mentioned Finland, but--

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18:00:04 1 A. I can believe that Mr. Wong did.

2 Q. My question, sir, is: Are the conditions
3 in those countries the same so far as you know as
4 they are in Canada that may lead to liberalization?

5 A. As far as I know some of them are similar,
6 but there are some quite big differences.

7 I think that the Swedish example is an
8 interesting one. What Sweden found or Sweden Post
9 found was that they started to compete when a
10 competitor came along, called "Sitimal" that
11 started to compete, and they were able to compete

12 fairly successfully, but then they found that there
13 was an issue--that they were sued in the courts for
14 violations. In other words, they found that they
15 ran afoul of competition law.

16 The other thing about Sweden Post is you
17 should be careful what you ask for, they were
18 always saying be careful what you ask for, because
19 you might get it. What happened when Sweden became
20 liberalized, the single piece rate increased
21 dramatically. There is a paper in one of the books
22 that Paul Kleindorfer and I have done by someone

18:01:30 1 from the Swedish regulator. It was in the 2001
2 book, I think, where she demonstrated this large
3 increase in the first--in the single piece letter
4 rate. So, that kind of increase would be certainly
5 way beyond two thirds of the rate of inflation that
6 Canada Post faces.

7 So, what happened in effect was they were
8 allowed a large increase in the single piece rate,
9 and a number was posted--was postage still
10 affordable then? Well, Sweden is a rich country.
11 Maybe, but a lot less affordable to being before
12 the deregulation, as it were.

13 Q. Thank you, sir.

14 MR. WHITEHALL: Those are my questions.

15 Thank you, Mr. President.

16 QUESTIONS FROM THE TRIBUNAL

17 ARBITRATOR FORTIER: Dr. Crew, I would
18 like you to assist me. You referred in your
19 opinion as well when you were examined by counsel,
20 of course, to the Canada Post Corporation Act, in
21 particular Article 5.

22 Do you have it easily accessible?

18:04:33 1 THE WITNESS: It is somewhere here easily
2 accessible--I will give it a shot.

3 ARBITRATOR FORTIER: Tab 3. I have my own
4 book, so I'm not going to give you any paragraph
5 reference.

6 MR. WONG: Binder four, C, Tab 50.

7 THE WITNESS: Yes, I have it here.

8 ARBITRATOR FORTIER: You refer to the
9 words in 5(2), the introductory words in 5(2), and
10 I quote, "while maintaining basic customary Postal
11 Service" as being the words which are generally
12 recognized as the basic USO.

13 I'm mindful of the chairman's statement
14 earlier this afternoon that at the end of the day
15 it may be for us as a tribunal to answer that
16 question, but as to whether or not the basis for
17 the USO are, indeed, those words. But my question
18 to you is, I guess, two-fold. And I'm conscious of
19 the fact that you have referred both to the Act and
20 to the practice.

21 Leaving the practice to one side, are
22 there any other provisions in the Canada Post Act

18:06:42 1 which we, as a tribunal, could look at to find the

2 basis for the USO?

3 THE WITNESS: My understanding, Section 2
4 of paragraph five, that's the basis of it. That's
5 where Canada derives the basis for the practice of
6 the USO.

7 ARBITRATOR FORTIER: So, the short answer
8 to my question is, this is it?

9 THE WITNESS: I believe so. I believe it
10 is.

11 ARBITRATOR FORTIER: And if I or the
12 Tribunal wanted to find the scope of the basic
13 customary Postal Service, where would we look?

14 THE WITNESS: You would need to look at
15 the practice in Canada. There must be some--I seem
16 to recall there is something in the Annual Report
17 that describes what--how Canada Post performs its
18 functions, which there is a description in there,
19 but there is really no substitute for looking at
20 the practice.

21 ARBITRATOR FORTIER: But you can't provide
22 us with any additional assistance as to where we

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18:08:52 1 could turn to in order to find what is encompassed,
2 what is included in the words "basic customary
3 Postal Service"?

4 THE WITNESS: You could inquire with
5 Canada Post. You could check with them.

6 ARBITRATOR FORTIER: But you're the
7 expert. You have been offered as the expert in
8 respect of the USO in particular, and we avail
9 ourselves of your presence here today--at least I
10 do--to get some assistance. I want you to assist
11 me, to help me.

12 And I take it that you cannot add to the
13 answers that that you have given up to now?

14 THE WITNESS: Yes, I have nothing to add
15 to those.

16 ARBITRATOR FORTIER: Thank you.

17 ARBITRATOR CASS: I have just a couple of
18 short questions, Dr. Crew.

19 Toward the end of your testimony, you
20 talked about economies of scope and scale.

21 THE WITNESS: Yes.

22 ARBITRATOR CASS: And indicated that

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18:10:12 1 exploiting economies of scope would be helpful to
2 financing the Universal Service Obligation.

3 Are there any concerns that regulators
4 should have about the use of economies of scale by
5 an enterprise with a monopoly over some portion of
6 its service?

7 THE WITNESS: There are certainly some
8 concerns, and one of them is you want to make sure
9 you're not getting cross-subsidy from the monopoly
10 to the competitive area, and you have got a number
11 of ways of making sure--of attempting to avoid
12 that. One way, and I'm sure there will be other
13 people who can talk to you about this--it is in
14 other reports--one way is the incremental cost test
15 as long as the price charge exceeds the incremental
16 cost. That's what's known as the burden test.
17 There is no cross-subsidy.

18 Another is to regulate the price of the
19 reserve service so that there is really--there is
20 nothing left over, in fact, to cross-subsidize, and
21 in Canada's case they have a fairly tight price cap
22 that does that: Two-thirds of the rate of

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18:12:06 1 inflation.

2 So, there are concerns and different
3 countries to address them in different ways. I
4 believe Canada has addressed them by its price cap,
5 by requiring that the corporation be
6 self-sufficient, and by having a costing system
7 which enables it to price its competitive products
8 more than the incremental cost.

9 ARBITRATOR CASS: The price cap which you
10 reference, does the ability of the price cap to
11 constrain subsidy depend on what the price is at
12 the start before the cap applies, or is there some
13 sort of uniform capacity of price caps to function
14 in this way?

15 THE WITNESS: You have hit on an
16 interesting point in price cap regulation. How
17 that is set at the start is--is not only important,
18 and in some ways is the 64,000-dollar question.
19 And that's why the Swedish experience was so
20 interesting because they got that set at a nice,
21 high level to begin with, and then they got a price
22 cap applied to that.

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18:13:35 1 So, you are absolutely right. It
2 does--setting of the initial price cap is critical
3 in any price cap regulation.

4 ARBITRATOR CASS: One more question. On
5 the economies of scale, you were speaking
6 specifically about economies of scope before. Do
7 economies of scale have a different impact on
8 pricing, on cost, and on competitive settings?

9 THE WITNESS: Yeah, the notion of
10 economies of scale is really a--it really arises

11 from a single product notion. The idea is that the
12 average costs are everywhere decreasing, so what
13 is--the notion is that if you have got the notion
14 of average costs everywhere decreasing, ultimately
15 the result of that--the result of the natural
16 evolution of the process is that you get one firm
17 because it just--you can have lower costs than
18 everyone else because costs are decreasing as
19 output is increasing. So, scale economies were
20 originally the source of traditional natural
21 monopoly.

22 And, of course, in Postal Service there

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18:14:53 1 are some considered to be significant scale
2 economies have been considered to be occurring in
3 local delivery.

4 ARBITRATOR CASS: When you said in your
5 report that without a reserve area there would be
6 no way of satisfying the USO. Does that make some
7 assumption about the domain of scale economies?

8 THE WITNESS: In my report, I didn't
9 actually say there would be no way. I just said
10 that it would be extremely difficult.

11 I don't know if it says anything about the
12 domain of scale economies. What it seems to be
13 saying is the issue that really is driving that is

14 a cream-skimming issue. If you have a uniform
15 price, and if a competitor enters your low-cost
16 area, what happens is your scale economies, the
17 range of which you get scale economies diminish so
18 you stop moving up that cost curve.

19 So, what could happen in the
20 cream-skimming situation, an area that was once
21 highly profitable is now a loser, and that's the
22 origin of the graveyard spiral, as briefly as I can

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18:16:15 1 put it.

2 ARBITRATOR CASS: Thank you.

3 I have one more comment for Dr. Wong. I
4 wanted to correct one misapprehension. You were
5 concerned, you said, about seeming to be pandering
6 to the Tribunal. I don't think you need to have
7 any concern about that. We encourage that whenever
8 possible.

9 PRESIDENT KEITH: I just had one tiny
10 follow-up to Mr. Fortier's question, Professor
11 Crew. At Tab 4 to your affidavit, you have
12 extracted from the 2004, I think, Annual Report,
13 and I think that may have been what you had in mind
14 when you were answering the question, there is a
15 reference on that page in the second and third

16 paragraph to the providing reliable, affordable and
17 universal service and so on. Again that's a
18 statement in practice and policy rather than of
19 law, but I think that may have been what you had in
20 mind.

21 THE WITNESS: It was what I had in mind
22 earlier, I must admit, last time looking at the one

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18:17:33 1 version on the Internet rather than the page of my
2 exhibit, but it's a very same thing.

3 PRESIDENT KEITH: Yes. Thank you.

4 Well, thank you very much.

5 MR. WHITEHALL: If I may, arising out of
6 the couple of questions that the panel asked.

7 FURTHER REDIRECT EXAMINATION

8 BY MR. WHITEHALL:

9 Q. Mr. Fortier asked you particularly about
10 the introductory words of Section 5 of the Canada
11 Post Act. I wonder, Professor, if you would be
12 good enough to look at paragraph 2(b), and we are
13 still at--do you have it?

14 A. I found it.

15 Q. Looking at 2(b), and whether or not that
16 particular subsection informed your opinion for the
17 purpose of your report.

18 A. It did. In fact, one of the things I did

19 say in response to Mr. Fortier was that it was the
20 whole of Section 2 that applied not just to the
21 first section. And B, I think, is quite important
22 to this. It says self-sustaining, meets the needs

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18:18:53 1 of the people of Canada, and similarly with respect
2 to communities of the same size.

3 Q. Okay.

4 A. That's a very important part that should
5 be in there.

6 Q. I would now like next to turn to section
7 19, and in particular Subsection 2. It's on page
8 10 of that document, if you turn to the right-hand
9 side. You see Subsection 2?

10 A. Yes, I do.

11 Fair and reasonable; right?

12 Q. Yes.

13 Does that inform your opinion regarding
14 the USO, or did it?

15 A. Well, that's part of the--it does. It's
16 sort of for me an elaboration of the notion of an
17 affordable postal service. It's fair and
18 reasonable, affordable. It's the same--it's an
19 elaboration. It does inform my opinion, yeah.

20 Q. Okay. Now, as part of your attempt to

21 pander to the Tribunal, you have indicated to
22 Professor Cass that his question was the

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18:20:04 1 64,000-dollar question. But let me ask you this:
2 Just coming out of that--and you may or may not
3 want to pander further--in terms of the rate of the
4 basic Lettermail in Canada, the 50-cent rate, how
5 does that compare to other countries?

6 A. That's a tricky question in the sense that
7 if you just take it at the dollar rate, it looks
8 pretty reasonable, but I would say it looks pretty
9 reasonable compared to most countries. It's
10 comparable with the U.S. It's cheaper than most
11 European.

12 Q. Okay. Now, of course, that is not the
13 basis for the three times the letter rate. It's
14 actually the 85-cent rate, as you're aware.

15 A. You mean for the exemption?

16 Q. Yes.

17 A. For the urgency exemption?

18 Q. Right.

19 A. I know you have 50 grams, I think it is.

20 Q. How does that compare to the rest of the
21 world?

22 A. It says around 85 cents.

18:21:14 1 Well, that's going to be higher because
2 the--in the rest of the world, the typical postage
3 is, whatever the directives said, was it 50 grams
4 now or hundred grams, 150 grams? It's actually
5 going to result in a higher dollar value.

6 MR. WHITEHALL: Thank you.

7 PRESIDENT KEITH: Well, we have had a long
8 day. There was some suggestion earlier that UPS
9 might want to start another witness, but given the
10 time and given that we have caught up an hour, I
11 think, from yesterday, we must be getting close to
12 that time, I think we should call it a day now and
13 start at nine tomorrow, and I should thank
14 Professor Crew for his testimony today.

15 (Witness steps down.)

16 PRESIDENT KEITH: So, we are adjourned
17 until nine tomorrow. Thank you.

18 (Whereupon, at 6:21 p.m., the hearing was
19 adjourned until 9:00 a.m. the following day.)

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18:22:20 1

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