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

BETWEEN

UNITED PARCEL SERVICE OF AMERICA, INC.

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

**CANADA'S REPLY TO UPS' RESPONSE TO
CANADA'S MOTION ON INTERROGATORIES**

(March 5, 2004)

Department of Justice
Room 1012, East Tower
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234 Wellington Street
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VIA FACSIMILE

March 5, 2004

The Right Honourable Sir Kenneth J. Keith
Court of Appeal of New Zealand
Corner Molesworth & Aitken Streets
P.O. Box 1606
Wellington, New Zealand

Dear Sir Kenneth:

**Re: NAFTA UNCITRAL Investor-State Claim
UPS of America, Inc. and the Government of Canada
Your File No. A5245**

**CANADA'S REPLY TO UPS' RESPONSE TO CANADA'S MOTION ON
INTERROGATORIES**

Introduction

1. On March 4, 2004 UPS delivered a faxed copy of its response to Canada's Motion on Interrogatories, hard copy with authorities to follow. Likewise Canada will deliver her reply by fax, with hard copy and authorities to follow. For the sake of time

Canada will send her hard copy and additional authorities by courier rather than mail. Canada relies on her submissions made in the Motion, but it intends to address specific issues and cases raised by UPS in its Response to Canada's Motion.

2. International arbitration rules and international law grant Arbitration tribunals considerable discretion in the conduct of the proceedings. This Tribunal has exercised its discretion by permitting interrogatories in addition to document discovery. Thus it recognized that in order to conduct this arbitration efficiently, more than documentary evidence will be required at this stage of the Arbitration.
3. Indeed, the role of Interrogatories was recognized by UPS in its letter dated March 26, 2003. Mr Appleton stated:

UPS believes that a clearly circumscribed process for interrogatories would greatly increase the efficiency of these proceedings. Through a process of interrogatories, the disputing parties may significantly narrow the issues in dispute, limit the risk of multiple document requests and materially enhance the evidence before the Tribunal before the merits hearing.

4. In the interest of efficacy Canada drew her interrogatories narrowly and tied the questions to specific parts of the pleadings. Hence relevance or over-breadth cannot be an issue. Rather, the purpose of Canada's interrogatories is to narrow the issues between the parties. This will contribute to the efficient resolution of the factual issues between the parties.

Submission

5. Whether in domestic litigation, arbitration or international arbitration the purpose of the exercise is to provide the trier of fact with the best available means to get to the truth. UPS suggests that discoveries ought to be narrow and confined. Canada on the other hand submits that they should be sufficient to accomplish the purpose behind them – to enable the defendant to know the case she will have to meet.
6. James Arnott¹ quoting from the IBA Working Party Commentary² makes the point that early disclosure of evidence is the preferable course:

It is also clear, as it is in most domestic systems, that “the taking of evidence shall be conducted on the principle that each party shall be entitled to know, reasonably in advance of any evidentiary hearing, the evidence on which the other parties rely”. Thus, orders from the tribunal relative to exchanges of documentary evidence, witness statements and expert reports, among others,

¹ “Presenting Evidence and Arguments in an International Arbitration”, in Dennis Campbell and Susan Meek (eds.) *The Arbitration Process: The Comparative Law Yearbook of International Business, Special Issue, 2001* (Kluwer Law International: Boston, 2001) 189 at 201.

² [2001] B.L.I. Issue 2 @ International Bar Association p. 16

which provide each party with significant information about the other side's evidence, lie at the heart of the procedure. There should be no surprises.

7. UPS in its submission (para. 10) criticizes Canada for relying on domestic authorities in support of her submission setting out the purposes of interrogatories. This mistakes the brunt of Canada's submissions. Canada is not suggesting that domestic jurisprudence binds this arbitration. Rather, Canada cited domestic jurisprudence simply to indicate the type of reasoning that experienced trial and appeal court judges use when dealing with the question of the scope of discoveries.
8. It is generally recognized that as part of customary international law tribunals may have reference to domestic practices for guidance especially when that law is well recognized by both parties. For example in *ADF Group Inc. v. United States of America*³ the Tribunal considered US case law in determining the scope of documentary production.
9. In fact UPS has not been able to cite a single case relating to interrogatories. Rather it cited cases dealing with documentary discovery. In the absence of international arbitration jurisprudence on the scope of interrogatories, the reasoning of experienced judges may be used to fill the gap.⁴
10. Further, UPS is incorrect in submitting that in international arbitrations discoveries are generally narrow. John W. Hickey and Elisabeth Taylor in "Exchanges of Documents and Depositions in International Arbitration":⁵

Generally, however, one can expect to get more discovery in international arbitration than one could in a European court, but less than in a United States court. As the IBA Rules reflect, there is a trend toward use of document production, witness affidavits, site inspections and expert opinions. Depositions are typically not utilized to a significant degree, but might be allowed depending on a showing of exceptional circumstances.

11. UPS ignores the Tribunal's statement that "interrogatories may be useful in narrowing the issues between the parties" and suggests that the directions of the Tribunal dealing with document requests (that they be narrow and specific) apply to interrogatories as well. The Tribunal included no similar limitation with respect to interrogatories.
12. UPS relies on the statement by Redfern and Hunter⁶ for the proposition that the scope of discovery in arbitrations is narrow. However, on closer examination that is not

³ *ADF Group Inc. v. USA*, Case No. ARB(AF)/00/01) *Procedural Order No. 3*.

⁴ See Jennings and Watts (eds.) *Oppenheim's International Law, Volume 1* (9th ed.), (Longman: New York, 1996) at 40.

⁵ In Campbell and Meek, *supra* n. 1 at 217.

what Redfern and Hunter suggest at all. Rather, they make the point that in arbitrations the very expansive discovery process available in US civil litigation is not available as a matter of course. Thus arbitrations will not generally have pre-hearing depositions of the opposing side's witnesses.

13. However, the substance of their statement is in the following: "The reality is that in the Unites States there is generally no *right* to any discovery in arbitrations and **the extent to which discovery is permitted is entirely in the hands of the arbitral tribunal if the parties do not agree.**" (Italics in the original, bold added.)
14. In the interest of efficiency, the Tribunal has allowed for interrogatories in addition to documentary discoveries. It was free to do so. As Born notes:

...the specifics of the parties' dispute often significantly affect arbitral procedures. Indeed, one of the advantages of arbitration is the possibility of tailoring procedures to a specific set of factual and legal issues to provide an efficient and **accurate fact-finding mechanism.**⁷ (Bold added.)
15. Faced with a \$160 million (US) claim, an extremely complicated case and an ill-prepared *Revised Amended Statement of Claim* the Tribunal obviously thought that interrogatories may be efficient "to narrow the issues". UPS would narrow the scope of interrogatories and gain tactical advantage over the defendant. In that context it is well to recall that they are the plaintiffs. They had years to prepare their case. It is only fair that the defendant should know at the earliest opportunity the case she has to meet. Otherwise, excessive delays will be experienced as Canada attempts to assemble her factual and legal defence in respect of facts that are likely to be contentious.
16. UPS relies on *Waste Management v. Mexico*⁸ for the proposition that Canada's interrogatories are overly broad. However, that decision dealt with documentary evidence that the parties may rely on in support of their case. To be clear, Canada is not seeking evidence UPS may rely upon in this Arbitration. Rather Canada is seeking the material facts UPS is relying in support of its allegations against Canada.
17. It is of significance that UPS in formulating its own interrogatories did not follow the standards it now seeks to impose on Canada. For example at p.3 (of 79) UPS put the following interrogatory to Canada:

Q 10 At paragraph 93 of the Statement Defence, Canada states that the Postal Imports Agreement was "*made public under a process which began in 1992.*"

⁶ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed.), (Sweet & Maxwell: London, 1999) at 317.

⁷ *International Commercial Arbitration: Commentary and Materials* (2nd ed.), (Transnational Publishers: The Hague, 2001) at 478.

⁸ Procedural Order No. 2 Concerning Disclosure of Documents, November 27, 2002 at para. 36.

a. describe in detail the “*process which began in 1992*” that resulted in the *Postal Imports Agreement* being made public;

Q.11 Paragraph 93 of the Statement of Defence refers to “*extensive consultations with stakeholders*” concerning the development and implementation of the *Postal Imports Agreement* and changes to the *Customs Act*.

a. identify the “*stakeholders*”;

b. describe what consultations occurred with UPS or subsidiaries which in any way led Canada’s decision to enter into the *Postal Imports Agreement* with Canada Post when no similar agreement was entered into with UPS or its affiliates;

c. describe the input into the development and implementation of the “*proposed changes*” of stakeholders from the Canadian Courier industry.

Q. 14 Provide particulars of the total amounts paid by CCRA to Canada Post and Canada Post to CCRA for services provided to CCRA or Canada Post by the other, for each of the years 1997 to 2002 pursuing to the following causes of the *Postal Imports Agreement*:

j. Any other provision of the *Postal Imports Agreement* (and identify the provision).

Q.21 Canada states, at paragraph 92 of the Statement of defence, that “*certain non core functions previously performed by Canada Customs*” were outsourced to Canada Post.

a. provide full particulars of those functions....

Q.44 For each of the years 1997 to 2002 provide:

(1) day shift;

(2) evening shift; and

(3) weekend shift.

Q. 73 What was the market share of Canada Post and Purolator in what Canada refers to as the “*courier or small parcel express market*”?

Q. 96 At paragraph 19 of the Statement of defence, Canada states that Canada Post and its subsidiaries “*...collect, process and deliver nearly 10 billion messages and parcels...*” Provide the following data for each year from 1997-

2002, with respect to the domestic Canadian market broken down by product or service;

- a. the number of pieces or individual items delivered;
- b. the number of kilograms delivered;
- c. the number of cubic metres delivered.

18. The above are simply examples of the extensive interrogatories UPS put to Canada. In light of the breadth of UPS' questions, their protestation that international arbitral practice "generally does not use this type of expansive discovery" sounds somewhat hollow. Indeed, Canada was not able to formulate the type of detailed questions UPS put to Canada because UPS failed to plead the material facts it relies on to make its very broad assertions.⁹

Conclusion

19. Canada submits that neither principle nor UPS' actual practice supports UPS' submission that interrogatories are to be narrowly construed.

20. James M. Arnott in "Presenting Evidence and Arguments in International Arbitration" quotes Sir John Donaldson MR in *Davies v. Ely Lilly & Co.*, and characterises the problem as a "thorny question". However, the words of the Master of Rolls quoted by Arnott are apposite:

In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. Why, they ask, should I be expected to provide my opponent with the means of defeating me? The answer, of course, is that litigation is not a war or even a game, it is designed to do real justice with the opposing parties and, if the court does not have all the relevant information, then it cannot achieve this object.¹⁰

21. UPS has consistently refused to state its case while at the same time in its own interrogatories it descended to the minutia. As Pallonpaa and Caron stated:

⁹ Canada has supplied the complete text of UPS' interrogatories in her submission to the Tribunal on June 13, 2003 as part of her authorities attached to her submissions in reply to UPS' *Motion Requesting Document Production*

¹⁰ *Supra* n. 1 at 202.

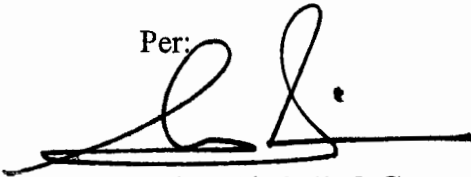
While the importance of arbitral autonomy is recognized, so is the principle that certain fundamental guarantees of fairness must apply to the exercise of that autonomy.¹¹

22. Canada asks no more than fairness. Fairness in narrowing the issues and fairness in knowing the case she needs to meet and fairness in having that knowledge in a timely fashion so that she may prepare her defence.

Yours very truly,

McCarthy Tétrault LLP

Per:

A handwritten signature in black ink, appearing to be 'I. G. Whitehall', written over a horizontal line.

I. G. Whitehall, Q.C.

IGW/mn

¹¹ *The UNCITRAL Arbitration Rules as Interpreted and Applied* (Finnish Lawyers' Publishing: Helsinki, 1994) at 15.