**UNDER THE UNCITRAL ARBITRATION RULES AND THE NORTH AMERICAN FREE TRADE AGREEMENT**

**UNITED PARCEL SERVICE OF AMERICA INC.**

Claimant / Investor

**-AND-**

**GOVERNMENT OF CANADA**

Respondent / Party

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# INVESTOR'S REPLY TO CANADA'S MOTION ON REFUSALS TO REFORMULATED INTERROGATORIES

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Appleton & Associates
International Lawyers
1140 Bay Street, Suite 300
Toronto, Ontario M5S 3B4
Tel: (416) 966-8800
Fax: (416) 966-8801

Barry Appleton
Counsel to the Investor

## I. Overview

1. On July 26, 2004, Canada delivered its submissions challenging the Investor's refusals to certain of Canada's reformulated interrogatories ("*Canada's Submissions*"). The disputed reformulated interrogatories, together with the reasons for the Investor's refusals to answer them, are attached as Appendix "A" to this response.

2. Canada's disputed reformulated interrogatories are improper as:

   (a) **The original interrogatory has not been reformulated** - The Tribunal's Decision of June 21, 2004 directed Canada to reformulate *all* of the interrogatories that the Investor had refused to answer. Canada has not done so. On a number of occasions, Canada simply asserts that the original question was proper or continues to seek the same irrelevant information that was previously refused by the Investor;

   (b) **The reformulated interrogatory is not clearly directed to matters of fact** - Many of the disputed reformulated interrogatories fail to meet the requirements of paragraph 26 of the Tribunal's Decision which required that the reformulated question "be clearly directed to matters of fact". Instead, Canada's reformulated interrogatories continue to seek legal argument and expert evidence; and

   (c) **The reformulated interrogatory is a new question unrelated to matters at issue in the arbitration** - For a number of questions, Canada has not reformulated the interrogatory but has instead asked a completely different question. These new interrogatories also relate to matters which have not been pleaded. Canada is not entitled to ask new and irrelevant questions at this time.

## II. Procedural History

3. On September 12, 2003, Canada submitted its original interrogatories, consisting of 197 questions, to the Investor. On September 26, 2003, the Investor agreed to answer 89 of these interrogatories.

4. On February 26, 2004, Canada delivered its submissions disputing the Investor's refusals to certain of its interrogatories. The Investor responded to Canada's submissions on March 4, 2004.

5. On June 21, 2004, the Tribunal issued its *Decisions of the Tribunal Relating to Document Production and Interrogatories* (the "*Tribunal's Decision*"). In it, the Tribunal ordered Canada to reformulate *all* of its disputed interrogatories. Specifically, paragraph 26 of the Tribunal's Decision required Canada to submit "more specific interrogatories" which:

"(1) are more clearly directed to matters of fact (bearing in mind in particular the second sentence of Para. D.1 of the direction of April 4, 2003);

(2) will help narrow the scope of the claim as pleaded; and

(3) do not require documents to be disclosed".[1]

6. Canada submitted its reformulated interrogatories on July 6, 2004. The Investor delivered its response to Canada's reformulated interrogatories on July 19, 2004 agreeing to answer 35 of the 111 questions in full or in part.

## III. Canada's Remaining Reformulated Interrogatories are Improper

### A. Questions Which Have Not Been Reformulated

7. The *Tribunal's Decision* required Canada to reformulate all of the interrogatories that the Investor had refused to answer. Yet Canada has effectively ignored the *Tribunal's Decision* by resubmitting many interrogatories either in their original form or with only superficial changes. In order to demonstrate Canada's refusal to properly reformulate the interrogatories, the Investor has listed both Canada's original interrogatories and its purportedly reformulated interrogatories at Appendix "A".

8. For three interrogatories (questions 18, 80 and146) Canada has simply repeated the original question without any modification. Canada insists that the original questions were "proper", notwithstanding the *Tribunal's Decision*.

9. Canada made submissions to the Tribunal on its original interrogatories motion. After considering Canada's position and the Investor's response, the Tribunal ruled that *all* of Canada's disputed interrogatories had to be reformulated. The *Tribunal's Decision* did not make any exceptions. Canada cannot now have a second opportunity to effectively ask the exact same question in the face of the Tribunal's clear instructions that all interrogatories be reformulated.

10. With respect to Question 18, which seeks business information about the Investor's "market share", Canada attempts to get around the Tribunal's requirement to reformulate the original question by stating that the Investor has also asked a similar question of Canada. However, the Investor has agreed to provide Canada with internal data calculating various forms of market share for the period from 1997 to 2002. Indeed, the Investor has already provided documents containing this information.

11. Canada's interrogatory, however, is improper in two respects. First, unlike the Investor's request, Canada's interrogatory seeks information for a 21 year period (1975-1996)

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[1] Paragraph 26 of the *Tribunal's Decision*.

which is not the subject matter of this arbitration. Second, Canada seeks a definition of what constitutes "market share", which may require expert evidence and legal argument. Business calculations of market share may be different from legal definitions of market share. While the former may be appropriate questions, the latter are not.

12. Question 80 is another example of Canada repeating the exact same question. This question originally asked the Investor to "identify the customs functions that UPS alleges Canada Post performs". The Investor refused to respond to the question as it sought particulars which would be set out in the Memorial. Canada "reformulated" the question as "List and describe the 'customs functions' that UPS alleges Canada Post performed". The only difference between the original and the "reformulated" question is one of semantics, with the words "list and describe" replacing the word "identify". The two questions are exactly the same without any attempt to reformulate or narrow its scope as directed by the Tribunal. Accordingly, the Investor continues to maintain its objection and takes the position that such particulars will be dealt with in the Memorial.

13. In addition to questions 18, 80 and 146, there are other purportedly reformulated interrogatories in which Canada continues to ask questions of the Investor that suffer from the same problems as Canada's original interrogatories. The Tribunal's Decision required Canada to reformulate its questions so that they are more clearly directed to matters of fact and narrow the scope of the claim. Canada's interrogatories remain overbroad and irrelevant.

**B. Questions That Have Not Been Directed To Matters of Fact**

14. Paragraph 26(1) of the *Tribunal's Decision* required Canada to submit "specific interrogatories" which were "more clearly directed to matters of fact". The Tribunal's direction in this regard accepted the validity of the Investor's objection that many of Canada's original interrogatories were questions of mixed fact and law.

15. Despite the clear wording of the *Tribunal's Decision*, Canada has asked many interrogatories which are superficially reformulated but essentially still remain questions of mixed fact and law. For example, Canada has asked the following reformulated interrogatories :

> 121(a) When did UPS Canada first become aware of Canada Post's alleged "monopoly infrastructure". Describe the event(s) which lead to UPS Canada acquiring this knowledge.
>
> 140(a) When did UPS Canada first become aware that Canada Post had the alleged ability to engage in forms of alleged "discriminatory and unfair behaviour"? Provide a description of each such alleged "behaviour".

16. Canada has sought to justify these interrogatories by insisting that the question asks only for the date on which the Investor first acquired knowledge of the subject matter at issue. Canada takes the view that the Investor can answer the temporal component of the

question without engaging in a definition of such terms as "market share", "monopoly infrastructure" or "discriminatory and unfair behaviour".

17. Contrary to Canada's position, questions of this kind are not "straight forward matters of fact". The precise extent of monopoly and competition in various markets are matters that may require expert opinion. Similarly, the determination of "discriminatory and unfair behaviour" is a conclusion of mixed fact and law which necessarily requires legal argument on the scope of the national treatment obligation in Article 1102 of the NAFTA. There is no witness of the Investor to whom such questions could be directed. Interrogatories calling for such legal argument or expert evidence are not appropriate.

18. Other questions which seek legal determinations of "delegated governmental authority"[2] or an "agency"[3] relationship are equally problematic. Although these questions are now cloaked in the form of a temporal inquiry, they remain invalid. They relate to subject matters which invariably will require legal argument to determine. These are matters that a witness cannot deal with at the interrogatory stage. They must be left for the Memorial portion of the arbitration.

### C. The Reformulated Interrogatory is a New Question Unrelated to Matters at Issue in the Arbitration

19. Canada has asked a number of questions which constitute entirely new and unrelated questions, and as such, are invalid. These questions are not "reformulated interrogatories". Rather, they are addressed at entirely different subject matters. In any event, the new interrogatories relate to matters that are not at issue in the arbitration.

20. For example, question 110 of Canada's original interrogatory sought information from the Investor about allegations that Canada had made excessive payments to Canada Post upon Canada Post taking over administration of its pension plan. The purportedly reformulated interrogatory is a series of questions all relating to UPS' pension plan. The new interrogatory has no relation to Canada Post's pension plan or its administration.

21. Canada has attempted to justify the new interrogatory on the basis that allegations relating to the administration of Canada Post's pension plan has been pleaded in the *Revised Amended Statement of Claim* ("RASC") as a violation of Article 1102 of NAFTA. Such an inquiry, Canada alleges, is somehow relevant because it goes to whether the pension plans of the Investor and Canada Post are in "like circumstances".

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[2] See, eg. reformulated interrogatory 15.

[3] See, eg. reformulated interrogatory 118(a).

22. However, the Investor's pension plan is not at issue in this arbitration. The issue as pleaded in the RASC relates to whether excessive payments were made by Canada to Canada Post with respect to the administration of its pension plan and whether this was a violation of Canada's Article 1102 obligations. In its Statement of Defence, Canada did not raise any allegations questioning the administration of the Investor's pension plan. Canada cannot now be allowed to use the interrogatory process to obtain information with respect to an issue which was not a subject matter of any of the pleadings. Canada's action in this regard is inconsistent with the *Tribunals' Decision* requiring that the reformulated interrogatories be used as a way to "help narrow the scope of the claim as *pleaded*".

23. Canada has used a similar tactic for question 115(b). Originally, Canada had asked the Investor about what constituted fair and non-discriminatory access to *Canada Post's* infrastructure. The reformulated question now asks about the terms and conditions under which the *Investor* allegedly grants "access to its infrastructure to its corporate family and to its competitors". The reformulated question is a new, unrelated and irrelevant question and as such is invalid.

24. As with the pensions matter, access to the Investor's alleged "infrastructure" is not at issue in this arbitration, having not been pleaded in either the RASC or the Statement of Defence. In the absence of such pleading, Canada cannot use Article 1102 as a springboard to obtain information about a matter which has not been put at issue by either party. As such, the interrogatory is improper.

## IV. Canada's Submissions Do Not Accurately Summarize the Investor's Objections

25. Contrary to Canada's submissions, the Investor has not asserted that *any* information related to matters pre-dating 1997 is irrelevant.[4] The Investor has agreed to answer questions specifically directed to when it became aware of factual matters even if this enquiry may lead to answers that pre-date 1997.

26. However, Canada has not limited its requests for pre-1997 information to matters relating to the date that the Investor acquired knowledge of certain facts. As stated by Canada:

> Canada has asked for this information directly by asking for the date UPS Canada first acquired knowledge of certain alleged facts. Canada has also requested it *indirectly* by asking about actions UPS, UPS Canada or any group of which either is a member may have taken relating to these alleged facts. [Emphasis added].[5]

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[4] Canada's Submissions at para. 7.

[5] Canada's Submissions at para. 9.

Canada cites its questions relating to whether UPS Canada or any trade association it belongs to retained lobbyists as an example of questions *indirectly* relating to temporal jurisdiction.

27. The Investor has agreed to answer questions directly related to when it acquired knowledge of certain facts, but not questions that are purportedly "indirectly" related to this issue. Canada's reformulated interrogatories had to be "clearly directed" at relevant and material facts that will narrow the scope of this arbitration. Canada's "indirect" questions do not meet this standard. Questions such as those seeking information about lobbyists are merely fishing expeditions.

28. Just as the Investor does not object to questions clearly directed at temporal issues, the Investor does not object to factual questions clearly directed at issues of harm or market share. Rather, it objects to Canada's attempts to use these issues to obtain the Investor's legal or evidentiary strategy. For example, questions seeking customers lost "as a result of the alleged breaches of NAFTA" necessarily require legal argument and expert evidence. They are not matters of fact that may be answered by a witness.

## V. Conclusion

29. At Appendix A, the Investor has listed the disputed reformulated interrogatories discussed above. For each question, we elaborate upon the specific objections that apply thereto.

30. For the reasons set out above, the Investor submits that all of Canada's reformulated interrogatories attached at Appendix A are improper and asks the Tribunal to dismiss Canada's Submissions in their entirety. Canada has now been given two opportunities to ask proper questions. It has failed to do so. The Tribunal should not grant any further leave to Canada to ask further questions.

All of which is respectfully submitted.
Submitted this 4th day of August, 2004

Barry Appleton /per AG

Barry Appleton
for Appleton & Associates International Lawyers
Counsel for the Investor, UPS of America, Inc.