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January 24, 2003

Our File Number: 2-351701

**BY FACSIMILE AND COURIER**

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

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Dean Ronald A. Cass  
Dean's Office  
Boston University School of Law,  
765 Commonwealth Ave., 4th Floor  
Boston, MA 02215  
USA

Dear Sirs:

Re: United Parcel Service of America, Inc. v. Government of Canada

You have requested Canada's views on procedural issues relating to the conduct of this arbitration. Counsel have substantially agreed on the text of a confidentiality order, but have been unable to reach agreement on other issues. While we set out below our position with respect to the mechanics of the arbitration *per se*, the Revised Amended Statement of Claim raises a fundamental and preliminary question as to how this arbitration should proceed.

## Governance of the Arbitration

As will be evident when Canada files its Statement of Defence on February 7, 2003, serious substantive jurisdictional objections remain with respect to allegations in the Revised Amended Statement of Claim. In Canada's view, the Revised Amended Statement of Claim does not, *inter alia*, comply with the Tribunal's unequivocal analysis of the scope of Chapter 11 and the directions in its November 22, 2002 Award. Canada will identify precisely its continued jurisdictional objections in its Statement of Defence, as directed by the Tribunal, and by way of Notice of Motion.

As a general principle, Canada did not consent to arbitration on matters other than those specified in Articles 1116 and 1117 and ought not to be required to submit to arbitration, and face the attendant costs and disclosure, on matters outside the jurisdiction of a Chapter 11 Tribunal. Consistent with this view, Canada proposes two options for advancing the arbitration.

In Canada's view, the most timely and efficient way of proceeding is for the Tribunal to deal with the UPS allegations that Canada identifies as being outside the jurisdiction of a Chapter 11 Tribunal before considering the merits of any issue. Doing so removes any ambiguity from the arbitration in short order, clearly defines the issues to be determined and facilitates an expeditious disposition of the remainder of the arbitration. Canada's suggested schedule for dealing with its objections is set out in an attachment titled *Option One – Immediate Resolution of Canada's Objections*.

In the alternative, Canada proposes moving forward on those issues on which it does not raise further jurisdictional objections. In the pleadings filed by UPS to date, UPS consistently alleges that there is a "secret" Postal Imports Agreement between Canada Post and National Revenue. Under the umbrella of this allegation, 10 sub-allegations are raised, which challenge a fundamental aspect of the Canadian Customs clearance process. UPS has also attacked the Publication Assistance Program. As noted during oral hearings in Washington, this program is an integral part of Canada's cultural policy. Canada is prepared to address these matters forthwith on the merits.

Canada's proposal and schedule for dealing with these matters is set out in an attachment titled *Option Two – A Phased Approach*. Under this proposal, when Memorials and Counter-Memorials are exchanged on the merits of allegations not subject to a jurisdictional objection, written argument is also exchanged on the jurisdiction of a Chapter 11 Tribunal to hear the impugned allegations. Two decisions would then be issued by the Tribunal; the first on the merits and the second on Canada's jurisdictional challenge. The arbitration would then proceed to determine the merits of the remaining allegations, if any.

As an aid to the Tribunal, we have attached draft orders setting out the terms of *Options I and II*. The draft orders do not deal with all the issues on which the parties will require direction – for example, the manner and timing for exchanging and dealing with any expert reports, or the testimony of witnesses – leaving such matters to be addressed once the broader question of how the arbitration should be conducted is settled.

### **Principled Division of Issues: No Severance of Liability and Damages**

Canada is of the view that bifurcation of damages and liability is inappropriate for this arbitration and that it should instead proceed on the basis of a principled division of substantive issues.

Article 1116 stipulates that, for this Tribunal to find a violation of Chapter 11, there must be both a breach of obligations identified in this Article and loss or damage incurred by reason or arising out of that breach. In addition, it makes no practical sense to sever damages from liability in this case. Damages, if they exist, are inexorably linked to a measure, the resulting alleged breach, and the factual context within which the alleged breach occurred. Dealing with damages and liability separately would result in duplication of evidence.

This is not a claim for liquidated damages that can neatly be assessed subsequent to a finding of liability. For example, allegations throughout the claim demand a description of the courier services market and UPS' market share, both of which bear directly on damages. Evidence relevant to Canada's Custom Clearance process for mail and courier shipments will need to address issues of volume, costs and contracting, all of which are equally relevant to the damage claim. The attack on the CPC pension plan inherently requires evidence of funding and costs, each of which directly relate to damages.

Article 1116, together with the twin goals of efficacy and efficiency, dictate that related issues should be tried together. For this reason, Canada proposes a subject-matter approach to the arbitration in respect of allegations to which Canada does not raise further jurisdictional objections, beginning with allegations in respect of Canada's Custom treatment of mail and courier shipments and the Publications Assistance Program.

### **Documents**

Efficacy and efficiency also demand that the parties complete the document disclosure process and fix the documentary record on which they propose to make written submissions prior to exchanging Memorials, Counter-Memorials, Replies and Rejoinders on issues within the jurisdiction of the Tribunal. Document production would be conducted in accordance with the IBA Rules on Taking of Evidence in International Commercial Arbitration, 1999, a copy of

which is enclosed. Canada does not envisage any further or other types of discovery.

### **Confidentiality**

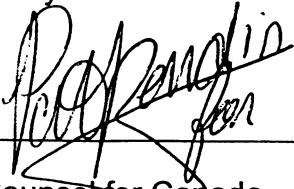
Attached is a Draft Confidentiality Order for the Tribunal's consideration. The Parties have substantially agreed on the wording of the Draft Confidentiality Order except for text in brackets. The disagreement centres on two clauses that stems from divergent views on Canadian law.

The first clause relates to potential objections to document production and reflects the fact that Canada is bound by its own laws on these matters. However, resolution of the issue, which is an evidentiary one touching on questions of privilege and immunity, is best dealt with on a case by case basis when objections are raised and not in the context of a Confidentiality Order. In the event the Tribunal wishes to address the issue now, Canada requests the opportunity to make further and full submissions.

The second clause deals with requests under Canada's *Access to Information Act* (the "Act") for documents subject to the Confidentiality Order, such as un-redacted documents containing confidential business information. The *Act* creates a binding regime that provides the public with a right of access to information in the records of Canada. This right is not absolute and is subject to a number of exemptions. One of these exemptions relates to third party information, the scope of which mirrors the definition of confidential business information in the proposed Confidentiality Order. The *Act* also makes provision for notification to third parties and a right of appeal from any decision to disclose. A copy of the *Act* is enclosed.

As a matter of policy and law, Canada cannot contract out of its obligations under the *Act*. Moreover, neither Chapter 11 nor the UNCITRAL Arbitration Rules purport to qualify Canada's domestic statutory obligations of disclosure. Reflective of this understanding is the fact that Canada and the United States did not deem it necessary to amend their respective disclosure laws when implementing their NAFTA obligations. The interrelationship between arbitration rules on confidentiality and statutory obligations of disclosure has also been recognized by a Chapter 11 Tribunal in *Mondev v. United States of America* in its Order of January 25, 2001, a copy of which is enclosed.

DATED in the City of Ottawa, in the Province of Ontario, Canada this 24th day of January 2003.

A handwritten signature in black ink, appearing to read "Donald J. Rennie", written over a horizontal line.

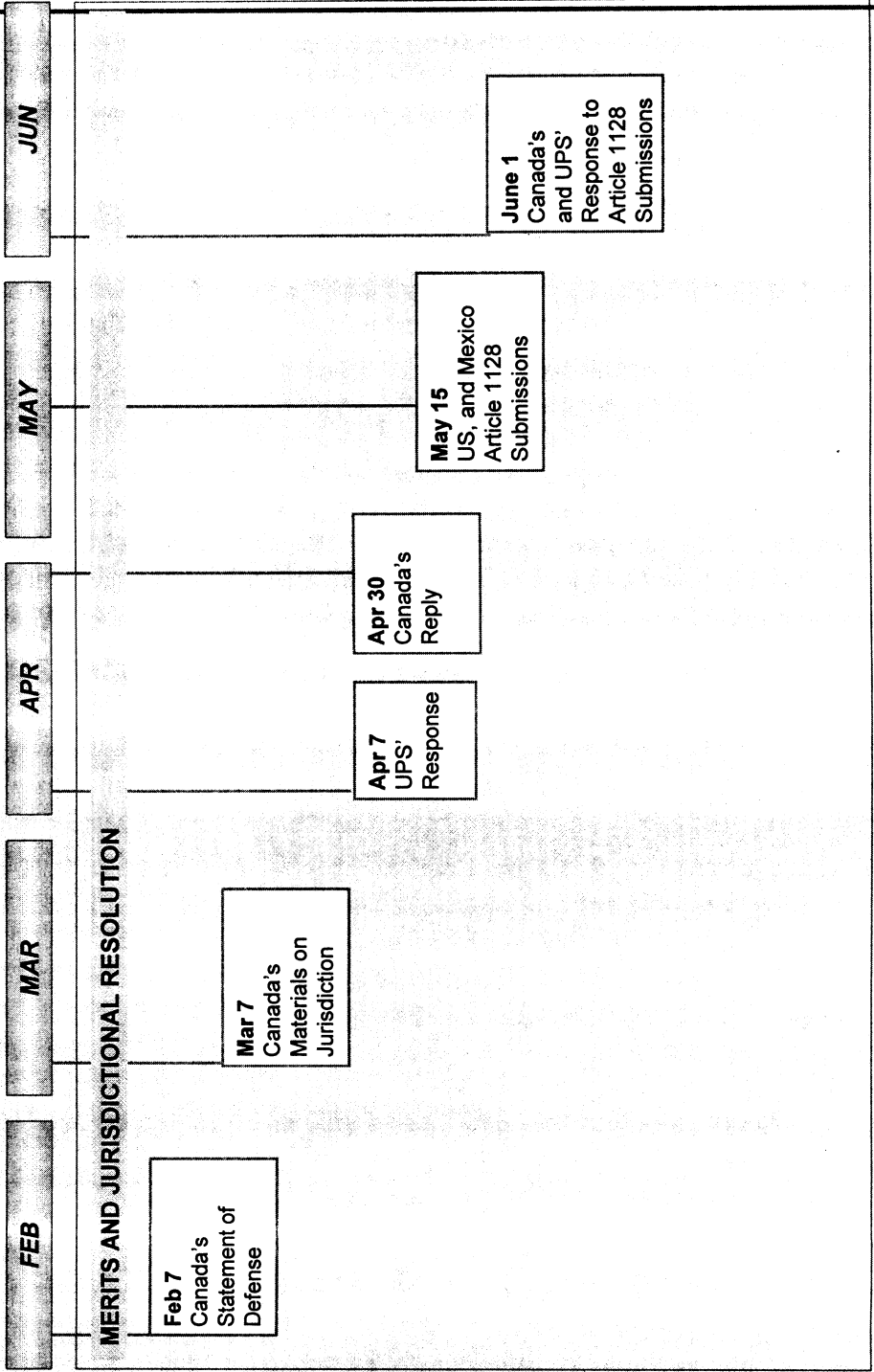
of Counsel for Canada

Donald J. Rennie

Per : Patrick D. Bendin

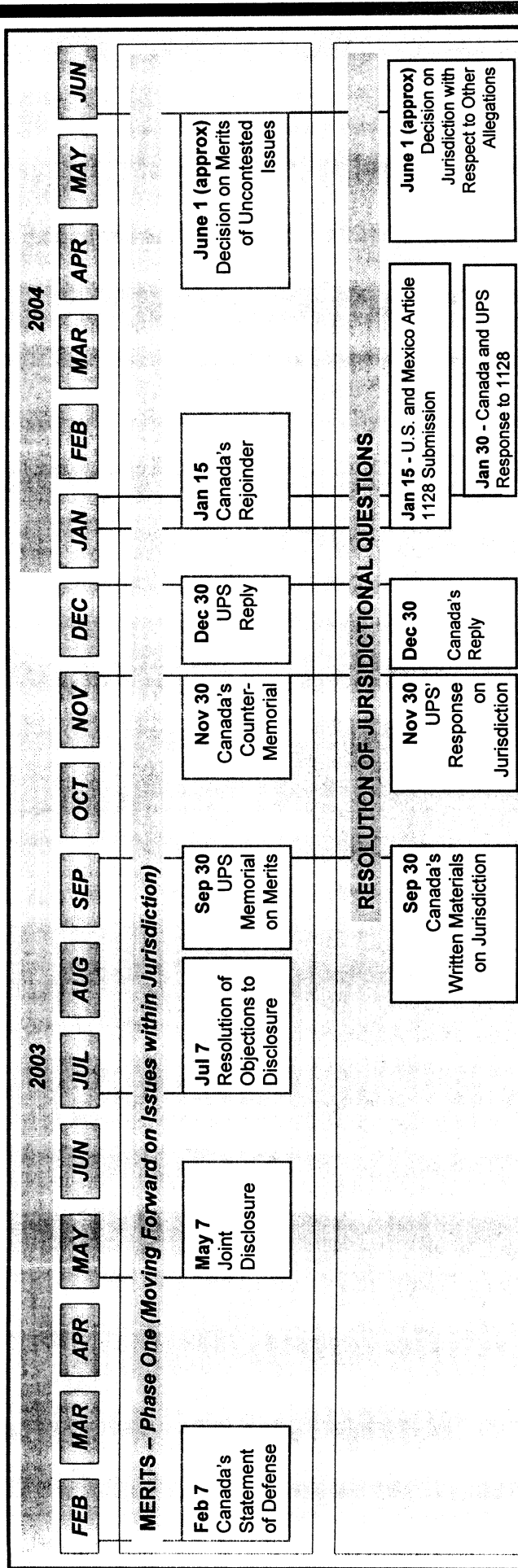
**TIMELINE OF EVENTS**      **Option One – Immediate Resolution of Canada’s Objections**

2003



# TIMELINE OF EVENTS

## Option Two – A Phased Approach





**OPTION I – IMMEDIATE RESOLUTION OF CANADA’S OBJECTIONS  
DRAFT ORDER**

**UNITED PARCEL SERVICE OF AMERICA INC. v GOVERNMENT OF CANADA  
(NAFTA CHAPTER ELEVEN)**

**TRIBUNAL: Justice Kenneth Keith; Dean Ronald Cass; and L. Yves Fortier CC QC**

**Procedural Direction of the Tribunal \_\_\_\_\_, 2003**

The Tribunal has considered the submissions of the parties and directs as follows:

1. Canada shall submit its Statement of Defence on or by February 7, 2003;
2. Canada shall submit its material and submissions on jurisdictional challenge(s) and non-compliance with the Tribunal’s Award on or by March 7, 2003;
3. UPS shall submit its Response to Canada’s material and submissions on jurisdictional challenge(s) and non-compliance with the Tribunal’s Award on or by April 7, 2003;
4. Canada shall submit its Reply, if necessary, on or by April 30, 2003;
5. The United States and Mexico shall submit Article 1128 submissions on or by May 15, 2003; and
6. Canada and UPS shall submit their Response to the Article 1128 submissions of the United States and Mexico on or by June 1, 2003.

For the Tribunal

Signature  
K J Keith

**OPTION 2 – PHASED APPROACH  
DRAFT**

UNITED PARCEL SERVICE OF AMERICA INC. v GOVERNMENT OF CANADA  
(NAFTA CHAPTER ELEVEN)

TRIBUNAL: Justice Kenneth Keith; Dean Ronald Cass; and L. Yves Fortier CC QC

**Procedural Direction of the Tribunal \_\_\_\_\_, 2003**

The Tribunal has considered the submissions of the parties and directs as follows:

1. Canada shall submit its Statement of Defence on or by February 7, 2003;
2. Canada and UPS shall complete the document disclosure process on or by May 7, 2003;
3. The Tribunal will resolve any objections raised by Canada and UPS in respect of their document disclosure on or by July 7, 2003;
4. UPS shall submit its Memorial on the merits on or by September 30, 2003;
5. Canada shall submit its material and submissions on jurisdictional challenges and non-compliance with the Tribunal's Award ("Jurisdiction") on or by September 30, 2003;
6. Canada shall submit its Counter-Memorial on the merits on or by November 30, 2003;
7. UPS shall submit its Response on Jurisdiction on or by November 30, 2003;
8. UPS shall submit its Reply on the merits on or by December 30, 2003;
9. Canada shall submit its Reply on Jurisdiction on or by December 30, 2003;
10. Canada shall submit its Rejoinder on the merits on or by January 15, 2004;
11. The United States and Mexico shall submit their Article 1128 submissions on Jurisdiction and the merits on or by January 15, 2004; and
12. Canada and UPS shall submit their Replies to the Article 1128 submissions on or by January 30, 2004.

For the Tribunal

Signature  
K.J. Keith