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

BETWEEN

UNITED PARCEL SERVICE OF AMERICA INC.

Claimant/Investor

REDACTED AND REDACTED
GOVERNMENT OF CANADA

Respondent/Party

**SUBMISSIONS OF CANADA REGARDING THE PRODUCTION OF
RESTRICTED DOCUMENTS**

(February 26, 2004)

Department of Justice
Room 1012, East Tower
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Ottawa, Ontario
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Agent of the Attorney General of
Canada

**UNDER CHAPTER ELEVEN OF THE NAFTA
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Introduction

1) This is an application pursuant to the Order of the Tribunal dated April 4, 2003, for a further Order compelling the legal counsel employed or retained by United Parcel Service of America Inc., or United Parcel Service of Canada Ltd., (hereafter collectively referred to as "UPS"), their support staff or experts or consultants retained, who would have access to "Restricted" documents, to sign the Undertaking attached to the Tribunal's Order as Attachment "A" (hereafter referred to as the "Undertaking") prior to receipt of Restricted documents from Canada.

2) In the submission of Canada, it is of the utmost importance that the parties have in their possession a signed Confidentiality Agreement prior to the termination of the Arbitration proceedings.

3) While the Confidentiality Order speaks in terms of individual documents, the mosaic effect of disclosure cannot be ignored. While on the face of it a series of single documents may be innocuous, together in the hands of a skilled and knowledgeable analyst, they can disclose confidential financial, commercial, scientific or technical information leading to substantial damage.

4) Further, it is of signal importance that UPS and Canada have an ongoing regulatory relationship. UPS has much to gain from knowing Canada's policy positions vis a vis Canada Post or the courier industry.

5) Further, UPS states in its Revised Amended Statement of Claim that they "are direct competitors in the Canadian non-monopoly postal services market."¹

6) Clearly, obtaining and using the policy documents, and financial and market information of Canada and Canada Post can give an immense long-term competitive advantage to UPS, unless production is carefully controlled and the possibility of sanctions exists.

7) While Canada does not suggest this is an overriding factor or that history will repeat itself, nevertheless, Canada had to be mindful of the need to protect her confidential documents.²

8) To be clear, counsel for Canada will also sign an undertaking in accordance with the Tribunal's decision.

¹ *Revised Amended Statement of Claim*, para. 11

² See *Pope & Talbot, Inc., v. Government of Canada*, (September 27, 2000), (Decision), para. 6. (Tab 2)

Background to the Application

9) On April 17, 2001, the Tribunal issued its Procedural Decision No. 1 requiring, among other things, that the parties attempt to reach an agreement on the matter of confidentiality.

10) On April 4, 2003, the Tribunal issued its decision entitled Procedural Directions and Order. Among other things, the Procedural Directions portion dealt with the phasing of the procedure. The Tribunal directed that the remaining jurisdictional matters raised by Canada be dealt with along with the merits. The Procedural Directions also covered document production, witnesses, and interrogatories.

11) The April 4, 2003 document also contained a Confidentiality Order. The Confidentiality Order followed the draft Confidentiality Agreement proposed to the Tribunal by the parties on January 24, 2003.

12) On April 25, 2003, Mr. Appleton/Counsel for UPS, sent to Counsel for Canada a request for document production and interrogatories.

13) On August 1, 2003, the Tribunal ordered the parties to commence their document production immediately. Production was to be completed by October 1, 2003.

14) On September 23, 2003, Counsel for Canada wrote to Counsel for UPS and requested that Mr. Appleton, and others receiving confidential information, sign Undertakings in the form ordered by the Tribunal and that they do not disseminate the classified documents further without first having obtained further Undertakings from the intended recipients.³

³ Letter from I.G. Whitehall to Barry Appleton, September 23, 2003. (Tab 3)

15) On September 26, 2003, Counsel for UPS wrote to Counsel for Canada, refusing to provide the requested undertakings.⁴

16) [REDACTED]
[REDACTED]
[REDACTED]

17) [REDACTED]
[REDACTED]
[REDACTED]

18) Canada decided that notwithstanding the disagreement between the parties, Canada should produce its documents. Accordingly, on February 26, 2004, Canada delivered to Mr. Appleton, Counsel for UPS, 245 documents that Canada has classified as public documents. On the same day, in order to protect its interests pending the Tribunal's considering these submissions, Canada produced its restricted documents in escrow. Canada delivered to Roger Tassé, O.C. Q.C. of the law firm Gowling Lafleur Henderson LLP (hereafter "Gowlings") all of the restricted documents that Canada is not objecting to producing. These total 1,002 documents comprising approximately 75,000 pages. In addition, Canada delivered to Gowlings answers to the interrogatories that Canada has no objection to answering. The answers to interrogatories contain confidential information, which Canada classified as Restricted.⁶

⁴ Letter from Barry Appleton to Ivan G. Whitehall, September 26, 2003. (Tab 4)

⁵ Letter from I.G. Whitehall and Barry Appleton to The Right Honourable Sir Kenneth J. Keith, January 19, 2004. (Tab 5)

⁶ Escrow Agreement between Her Majesty the Queen and Gowling Lafleur Henderson, LLP, concerning Government of Canada Documents, February 26, 2004. (Tab 6)

Argument

The Assembly of Canada's Documents

19) The request for document production triggered an extensive search for relevant documents among several departments of the Government of Canada, the Canadian Customs and Revenue Agency, and Canada Post Corporation.⁷

20) Within the meaning of the Tribunal's Direction of August 1, 2003, there were three tests imposed to determine whether a document should be produced:

- a. Was the document subject to a request by UPS;
- b. Was the document relevant within the August 1 Order of the Tribunal;
- c. Was the document privileged as contemplated in paragraph 10 of the April 4 Order.

21) ~~Canada has produced all documents that met the first two tests and not the third. Documents were then put to a further test for the purpose of classification. If the document was a "Confidential" document within the meaning of the April 4 Order then instructions were sought to determine whether the various government departments wished to further classify them as "Restricted" as provided for by the Order of April 4. If the documents were not classified as "Confidential" then they were treated as public.~~

22) As noted above, Canada has assembled a list of documents comprising both public and "Restricted" documents. They number 1,247 documents, comprising approximately 100,000 pages. There are approximately 245 public documents and 1,002 "Restricted" documents.

⁷ Canada Post Corporation, even though not a party to the Arbitration, chose to relinquish to Canada its relevant documents on condition that the documents will be returned to the Corporation at the termination of the Arbitration and that disclosure to UPS will be governed by the April 4, 2003 Order of the Tribunal.

The Proper Interpretation of Paragraph 9 of the Confidentiality Order

23) Counsel for UPS refused to provide the requested undertakings in respect of “Restricted” documents, relying on paragraph 7 of the Order of April 4.

24) In the submission of Canada, UPS is in error. Paragraph 7 does not apply to Restricted documents. On a plain reading of the Order, it applies to disclosures of Confidential information pursuant to paragraphs 5(d) to 5(e) -- that is, independent experts, consultants or witnesses.

25) UPS’ position is that counsel does not have to sign the Undertaking prior to receipt of Restricted documents, and further, the Agreement does not have to be made available to the party supplying the Restricted documents as a condition of receipt of the restricted documents. This position is untenable. In respect of “Restricted” documents, paragraph 7 has no application. For Restricted documents, paragraph 9 governs.⁸ The applicable portion of the Order provides:

Information provided under this section... shall only be given to persons referred to in subsection (1) *(which includes counsel for UPS)* if such persons:

REDACTED

execute a Confidentiality Agreement.... (italics added)

26) Thus, signing the Undertaking is a condition precedent to receipt of Restricted documents.

27) It follows that Canada has no obligation to provide Restricted documents until Canada is satisfied that the Undertaking has been executed. This requires the signing and delivery of the Undertakings to Canada.

28) It is of significance that the Tribunal chose to limit paragraph 7 to instances where the contemplated disclosure is to independent experts or

⁸ The absence from paragraph 9 dealing with more sensitive documents of limitations such as contained in paragraph 7 would lead to the absurd result that the party who is injured by a release of Restricted documents would have no recourse in face of such release not knowing to whom the documents were released. In the submission of Canada, no such absurdity was intended. Rather, it is implicit in paragraph 9 that the Confidential Agreements would be both signed and delivered prior to delivery of the documents.

consultants retained or consulted and witnesses (but not to counsel, employees or officials). In contrast, paragraph 9 directs that all persons -- including counsel or experts or consultants retained⁹ -- are to sign the Undertaking as a condition to having access to Restricted documents.

29) In the submission of Canada, the reason for the distinction is clear. If the Undertaking contemplated in paragraph 7 were disclosed to counsel of the opposing party, the name of witnesses and experts who were not retained by counsel would be made available to the other party. As there is no property in a witness, there is understandable reluctance to make that information available to another party until ordered by the Tribunal or until the end of the arbitration. Similar concerns are apparent in domestic jurisprudence.¹⁰

30) No such concern arises out of paragraph 9, since the disclosure is to counsel and experts who were retained by counsel. There is a difference between experts who have been retained and those who were merely consulted. The evidence of experts who were retained is privileged and therefore the additional protection is not necessary. Evidence experts who were merely consulted may not be privileged, hence the protection in paragraph 7.¹¹

31) As a result, whereas paragraph 7 expressly contemplates that the Confidentiality Order is to be made available to the other disputing party upon an Order of the Tribunal or the termination of the Arbitration, no such limitation or direction accompanies paragraph 9.

32) Although not explicitly stated, the intent of paragraph 9 is that the Undertakings be both signed and, since they constitute a unilateral agreement,

⁹ Signaling that mere consulting without retainer is not sufficient for the purpose of a paragraph 9 disclosure

¹⁰ See e.g. *Davies v. Harrington*, 39 N.S.R. (2d) 199, approved 39 N.S.R. (2d) 258 (C.A.) (Tab 7), *General Accident Assurance Co. v. Chrusz*, 45 O.R. (3d) 321 (C.A.), (Tab 8), *R. v. Morris* (1995) Y.J. No. 34; (Tab 9), *R. v. Finlay*, (1996) O.J. No. 5440. (Tab 10)

¹¹ *Davies*, *ibid*; *General Accident Assurance Co.*, *ibid*.

that they also be delivered to the party in whose favour the Undertaking was signed.

The tribunal's lack of ability to enforce the Confidentiality Order after the Tribunal delivered its final award.

33) Although, the April 4 Order of the Tribunal (paragraph 23) contemplates that the obligations created by the Order of April 4 will survive the termination of the arbitration proceedings, with respect, the efficacy of that provision is questionable.

34) Article 1135 of NAFTA provides for the scope of the Tribunal's jurisdiction in making final awards: it allows the Tribunal to award monetary damages, restitution of property, and costs. There is no room for the Tribunal to retain any jurisdiction once it has made its final award, except to the limited extent provided in the UNCITRAL Rules.¹² Once the award is made it becomes *functus officio*¹³.

35) Further, even if the Order of the Tribunal survived as against UPS, it would not bind either counsel for UPS or any other third party.¹⁴ Article 1136 of NAFTA provides *inter alia* that,

An Award made by a Tribunal **shall have no binding force** except between the disputing parties ... (emphasis added)

36) Therefore, in order for Canada to be able to enforce the Undertaking by way of a suit for breach of contract, Canada must have in its possession the signed Confidentiality Agreements.

¹² In particular, articles 35, 36, 37 and 38 of the UNCITRAL Rules

¹³ The decision of the Federal Court of Appeal quoted with approval by the Supreme Court of Canada is apposite. See *Huneault v. Central Mortgage and Housing Corp.*, [1981] F.C.J. No. 905 (Tab 11) and *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, (Tab 12), also *Fanshaw College of Applied Arts and Technology v. Ontario Public Service Employees Union*, [1990] O.J. No. 1279. (Tab 13)

¹⁴ One option may be to file the Order of April 4 as an award in the Federal Court of Canada under the *Commercial Arbitration Act*, R.S. 1985, c. 17 (2nd Supp.).

Order Sought

37) Canada seeks an Order directing Counsel for UPS and others contemplated by paragraph 9 of the Order of the Tribunal dated April 4, 2003, to sign and deliver to Canada a Confidentiality Agreement as provided for in that Order as a pre-condition to receiving Restricted documents from Canada;

38) In the alternative, Canada seeks an Order directing Counsel for UPS and others contemplated by paragraph 9 of the Order of the Tribunal dated April 4, 2003, to sign and deliver to the Tribunal a Confidentiality Agreement as provided for in that Order as a pre-condition to receiving Restricted documents from Canada;

39) In the event that the Tribunal orders that Counsel for UPS and others contemplated by paragraph 9 of the Order of the Tribunal dated April 4, 2003, to sign and deliver to the Tribunal the Confidentiality Agreement(s), Canada seeks an Order to apply to the Tribunal for immediate delivery of the signed Confidentiality Agreement(s) upon Canada showing just cause;

40) An Order directing Gowlings to release the documents held in escrow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Ivan G. Whitehall, Q.C.
Agent of the Attorney General of Canada

DATED AT THE CITY OF OTTAWA, this 24th day of February, 2004.