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

**BETWEEN:**

**UNITED PARCEL SERVICE OF AMERICA, INC.**

**Claimant /Investor**

**AND**

**THE GOVERNMENT OF CANADA**

**Respondent/Party**

**INVESTOR'S REPLY TO THE CANADIAN UNION OF POSTAL WORKERS AND  
THE COUNCIL OF CANADIANS *AMICUS CURIAE* SUBMISSIONS**

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Page -1-

**I. Overview**

1. This is a reply to the *Amicus Curiae* submission of the Canadian Union of Postal Workers ("CUPW") and Council of Canadians ("Council"). CUPW and the Council purport to defend the public interest in objecting to the Investor's claim: they warn of a "flood" of NAFTA challenges to state enterprises if the claim is accepted; they invoke Canada Post's alleged universal service obligation ("USO") to excuse Canada Post from NAFTA's national treatment obligation; and they defend Canada forcing Canadian publishers to deliver with Canada Post as necessary to protect Canadian culture.
2. Behind their rhetoric, CUPW and the Council present no law or facts to support their submission. The absence of any foundation to their submission reveals that CUPW and the Council merely support protectionist interests and not the broader public interest of Canadians.

**II. CUPW and the Council Do Not Represent the Public Interest**

3. CUPW and the Council's submission does not represent the broader Canadian public interest but represents only their own protectionist interests.<sup>1</sup> CUPW, supported by the Council, seeks to protect the Canada Post jobs that it sees as jeopardized if Canada Post's aggressive expansion into courier markets is fettered by Canada's international obligations.<sup>2</sup>

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<sup>1</sup> Recent comments by the Canadian Prime Minister, Paul Martin, demonstrate his support for free trade agreements, such as the NAFTA, and his support for strictly holding states to the obligations in those agreements. See Sallot, Jeff (2005), "Martin opens Summit of the Americas in Argentina", *The Globe and Mail*, 4 November, 2005 and Martin, Paul. "Address by Prime Minister Martin at the Economic Club of New York", retrieved from: <http://pm.gc.ca/eng/news.asp?id=603>, Supplemental Brief of Documents (Tabs 20 and 21).

<sup>2</sup> See the Report of Kevin Neels, who drew from Canada Post's own documents to recognize that Canada Post's decision to pursue a growth strategy appears to reflect in part its unwillingness to downsize its workforce. Neels First Report at paras. 123-127.

Page -2-

4. CUPW is only the union for Canada Post's workers and does not represent the interests of workers in other courier companies operating in Canada. CUPW, therefore, does not represent the interests of Canadian workers employed at firms like UPS Canada, which will benefit if Canada Post's aggressive expansion is subject to Canada's international obligations. The jobs that CUPW seeks to protect come at the expense of jobs at UPS Canada and other competitors of Canada Post.
5. While it does not represent the broader Canadian public interest, CUPW does represent Canada Post workers' interests. In that capacity, CUPW has properly recognized that by prohibiting Canada Post workers from exercising collective bargaining rights, Canada Post could pay lower wages and, thereby, reduce its costs.<sup>3</sup> CUPW has also recognized that Canada's actions breached Canada's international law obligations.<sup>4</sup>
6. Despite recognizing that Canada denied its workers core labor rights, CUPW seeks to prevent the Investor from claiming for the damages suffered by UPS Canada as a result of Canada's actions. CUPW has no foundation to argue that the Investor's trivial amendment to maintain this action as a breach of NAFTA Article 1105 and not Article 1102 renders the claim inadmissible.<sup>5</sup> The Investor amended its core labor rights claim because it does not want the same unlawful treatment that Canada Post enjoys. Instead, UPS seeks compensation for having to compete with a local firm that is exempted from core labor norms. CUPW and the Council, themselves, recognize the Investor's grounds for standing when they recognize that Canada's actions reduced Canada Post's costs and, consequently, must have caused damage to competitors such as UPS Canada.

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<sup>3</sup> CUPW/Council Submission at para. 26.

<sup>4</sup> CUPW/Council Submission at paras. 27-28.

<sup>5</sup> Both the *Ethyl* and *Feldman* decisions confirm that points of claim that were "in substance" included in the notice of intent to submit the claim to arbitration are admissible: *Feldman v. Mexico*, Award, Investor's Book of Authorities (Tab 8) at para. 50; *Ethyl v. Canada*, Decision on Jurisdiction, Investor's Book of Authorities (Tab 50) at paras. 93-95.

Page -3-

7. CUPW and the Council also complain about the redaction of parts of the written submissions. These redactions were largely a result of Canada's claims of confidentiality that UPS is bound to respect. The Investor agrees that Canada has sought to keep too much information confidential. However, the Investor maintains that any third party, including CUPW and the Council, can fully understand the dispute from the public pleadings.
8. CUPW and the Council also raise issues outside the scope of this arbitration and issues not proper for an *amicus curiae* brief. The Investor will not address these issues. Consequently, the Investor will not address CUPW's and the Council's submissions regarding the pension issue, which was dropped from the Investor's claim or the United States International Trade Commission Report. In referring to this Report, CUPW and the Council violate the Tribunal's direction that *amici* cannot adduce new evidence.<sup>6</sup>

### III. The Investor's Claim Does Not Threaten To Open Any 'Floodgates'

9. The CUPW/Council submission incorrectly argues that the Investor's claim "seeks to dramatically expand the scope of investor-state litigation"<sup>7</sup> and "is likely to ... open the floodgates of litigation challenging the operations of public service providers."<sup>8</sup> CUPW's and the Council's argument is premised on their misunderstandings of the Investor's claim and the relevant law. CUPW and the Council seem to be unaware that:
  - a. The Investor's claim cannot affect public service providers that are not enterprises. The Investor claims under NAFTA Article 1102(2), which compares the treatment of "investments of investors of another Party" with "investments" of a Party's "own investments." The only investment, as defined in NAFTA Article 1139, that could provide a public service is an "enterprise."

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<sup>6</sup> Direction of the Tribunal on the Participation of Amici Curiae, 1 August 2003 at para. 3.

<sup>7</sup> CUPW/Council Submission at page 1.

<sup>8</sup> CUPW/Council Submission at para. 8.

Page -4-

- b. **The *Financial Administration Act* says that Canada Post is one of only three Crown corporations operating "in a competitive environment."**<sup>9</sup>
- c. **Canada has reserved the right to "adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care."**<sup>10</sup> The Investor's claim cannot affect measures with respect to these social services. CUPW and the Council appear particularly concerned about the impact of the Investor's claim on health and public education. Both of these sectors are specifically protected under Canada's reservation.
- d. **The Investor's interpretation of Article 1102 is no more onerous than Canada's other obligations to provide non-discriminatory treatment contained in WTO Agreements and the NAFTA. Canada has already promised to provide courier services with equality of competitive opportunities under Canada's GATS commitments.<sup>11</sup> Similarly, NAFTA Articles 1502(3)(b) - (d) and 1503(3) oblige Canada to ensure its state enterprises, including Canada Post, do not engage in various forms of discriminatory conduct.**

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<sup>9</sup> Section 3(5) and Part II of Schedule III, *Financial Administration Act* (U298).

<sup>10</sup> Annex II-C-9 of the NAFTA.

<sup>11</sup> Canada has made commitments covering the courier sector in the GATS [See Section 2 of the Canadian Schedule of Specific Commitments to the GATS, *The Legal Texts, The Results of the Uruguay Round of Multilateral Trade Negotiations*, World Trade Organization, 15 April 1994, Respondent's Book of Authorities (Tab 10)]. The GATS applies to investments: the GATS defines "the supply of a service" to include services supplied "by a service supplier of one Member, through a commercial presence in the territory of any other Member [GATS, Article I(2), Investor's Book of Authorities at Tab 77]; GATS Article XVII obliges Members to provide foreign investments with equality of competitive opportunities.

Page -5-

- e. Canada claims it already provides the Investor with the protection that it seeks. Canada claims it offers UPS Canada access to the postal infrastructure on similar terms that it offers access to Purolator.<sup>12</sup> While Canada admits that Canada Post gives its competitive services access to the postal infrastructure on better terms than it gives access to UPS Canada, Canada's expert claims that Canada Post already provides equality of competitive opportunities because Canada Post's competitive services make a contribution in excess of incremental costs.<sup>13</sup> While UPS denies these allegations, it is difficult to understand how a claim that seeks to hold Canada to a standard it purports to follow would open the floodgates to other claims.
- f. Canada could easily bring itself into compliance with its NAFTA obligations by adopting forms of regulatory control or administrative supervision of postal monopolies used around the world. The European Union has adopted such measures without abandoning its commitment to social democracy.<sup>14</sup> In addition, the European Union allows private litigants to bring claims against governments for state aid given to postal operators and their subsidiaries. The European Court of Justice has repeatedly examined the practices of postal monopolies at the behest of private litigants to determine if those practices are consistent with the *Treaty of Rome*.<sup>15</sup> Nonetheless, this has not opened the floodgates to claims against postal monopolies or undermined the ability of European governments to provide social services.

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<sup>12</sup> Canada's Rejoinder at para. 102: "If the Tribunal finds there is a treatment accorded to UPS Canada and that it is pursuant to a delegated governmental authority and that the treatment is in like circumstances with that accorded to Purolator, the obligation on Canada Post is not to enter into commercial arrangements with UPS Canada, but only to make these arrangements available on similar terms. Canada Post has done so and these offers still stand."

<sup>13</sup> Canada's Expert Witness, Professor Bradley also says that Canada Post already maximizes the contribution of its competitive services (Bradley Second Report at para. 11). See also Canada's Rejoinder at para. 184: "Canada has demonstrated that Canada Post sets prices for each of its competitive products at a level that will cover the long run incremental cost of each product and also provide a contribution above those costs."

<sup>14</sup> James Campbell Report at paras. 78-82.

<sup>15</sup> See, for example: *Chronopost*, Respondent's Book of Authorities (Tab 50); and the European Commission press release on the *Deutsche Post* decision (Tscherny, Michael and Amelia Torres, "*Deutsche Post must repay €572 million used to subsidise price undercutting in commercial parcel services*", Brussels 19 June, 2002, IP/02/890) Supplemental Brief of Documents and Authorities (Tab 23).

Page -6-

- g. Furthermore, reviews of Canada Post by the Postal Services Review Committee, the Canada Post Mandate Review and TD Securities have all recommended some form of supervision or control of Canada Post's monopoly powers. Most recently, a well-publicized judicial inquiry also noted numerous problems with Canada Post's management and business practices.<sup>16</sup> UPS' claim does not seek to impose burdens on Canada Post that are any greater than those called for by numerous independent experts appointed by Canada's own government.
10. By failing to recognize any of these facts or laws in its Submission, CUPW and the Council demonstrate that their prediction of a "flood" of claims is premised on numerous misunderstandings. CUPW and the Council display similar misunderstandings as Professor Hufbauer, the economist that Canada puts forward to warn of a "flood" of claims against public service providers.
11. Professor Hufbauer says that "[e]ven in the field of regulatory economics, access requirements and price controls only arise when the service under consideration relies on an essential facility" but says there is no essential facility in the Canadian postal industry. Canada Post's competitive services benefit from their exclusive access to the essential facility that is the monopoly infrastructure. The size and scope of this infrastructure cannot be replicated by any competitor. Access to this infrastructure is a "key in out" in the supply of postal services.<sup>17</sup>
12. Professor Hufbauer also fails to understand that UPS does not advocate a "price at-a-profit" rule. He alleges that:

One of the proposed 'equal treatment' rules would compel crown corporations to charge arm's length prices between divisions, and then make a profit (taking those arm's length charges into account) when they sell in competitive markets.<sup>18</sup>

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<sup>16</sup> In the inquiry, Justice Gomery noted, in particular, Canada Post's lax procurement practices (pages 229 - 232), Supplemental Brief of Documents and Authorities (Tab 22).

<sup>17</sup> Sappington Report at paras. 9-12,

<sup>18</sup> Hufbauer Report at para. 8.



Page -7-

13. While Professor Hufbauer calls this a "price-at-a-profit" rule, it is actually a *double price-at-a-profit* rule. Professor Hufbauer mistakenly understands the Investor as requiring Canada Post to make a profit in giving its competitive services access to the monopoly infrastructure and then make a further profit in its sale of the competitive service, even after factoring in the cost of accessing the network. Analyzing the two steps through which Professor Hufbauer arrives at his double price-at-a-profit rule demonstrates his misunderstanding of the Investor's interpretation of the equality of competitive opportunities test:

- a. He claims UPS requires Crown corporations to charge arm's length price between all divisions; and
- b. He claims UPS requires Crown corporations to make a profit whenever they sell in competitive markets.

UPS has never advocated either of these steps.

14. UPS has never required arm's length pricing between *all* Crown corporation divisions. The equality of competitive opportunity test only requires a Crown corporation to charge arm's length pricing under narrow circumstances, namely:

- a. the Crown corporation is an organ of the state or is an agent acting under delegated governmental authority;
- b. the Crown corporation operates in both monopoly and competitive markets;
- c. the competitive services divisions use the infrastructure the Crown corporation controls through the Crown corporation's position as a state monopoly;
- d. the competitive services divisions enjoy economies of scale and scope through their use of the monopoly infrastructure;
- e. the monopoly is not regulated; and

Page -8-

- f. the Crown corporation does not provide a service subject to Canada's reservations from the NAFTA national treatment obligation.<sup>19</sup>
15. These circumstances rarely combine. Indeed, neither Professor Hufbauer, nor CUPW nor the Council have identified a single state enterprise throughout the NAFTA region, other than Canada Post, that operates under these circumstances.
16. The narrow circumstances under which the obligation operates also shows there is no basis for Professor Hufbauer's claim that the equality of competitive opportunities test will reduce state enterprise spending on infrastructure.<sup>20</sup> State enterprises are free to build infrastructure with their own funds or borrowing, just like any commercial enterprise, and states are free to create, capitalize and even subsidize state enterprises in accordance with NAFTA Article 1108(7)(b).<sup>21</sup>
17. Professor Hufbauer also invents the second step through which he arrives at his interpretation of the equality of competitive opportunities test. UPS has never required Crown corporations to make a profit in every transaction when they sell in competitive markets. Canada Post is free to decide strategically to make short term losses in particular markets, just as are commercial companies. Nor would individual pricing decisions of Canada Post be reviewable. It is only when such decisions reflect a "practice" of Canada Post that they would become measures subject to review.

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<sup>19</sup> NAFTA Annex II-C-9 says: "Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care."

<sup>20</sup> Hufbauer Report at para. 17.

<sup>21</sup> NAFTA Article 1108(7)(b) says: "Articles 1102, 1103 and 1107 do not apply to ... subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance."

Page -9-

18. Professor Hufbauer's Report, therefore, cannot provide the missing foundation for CUPW's and the Council's groundless assertion that the Investor's claim will generate a "flood" of claims arising out of the activities of Crown corporations.

**IV. UPS Canada and Canada Post Are In Like Circumstances**

**A. Canada Post's Public Status Does Not Make It Unlike UPS Canada**

19. CUPW and the Council argue that UPS Canada and Canada Post are not in "like circumstances" because Canada Post is a public institution that has been granted public powers.<sup>22</sup> This argument is inconsistent with the terms of the NAFTA. NAFTA Article 1102 requires a comparison between the treatment of investors of another Party with treatment of a Party's "own investors." If the mere fact of public ownership rendered a Party's "own investors" unlike those of another Party then the NAFTA drafters would not have defined "investor of a Party" as including the Party and its state enterprises.<sup>23</sup>
20. In its claim, the Investor is impugning the conferral of certain governmental authority on Canada Post and Canada Post's abuse of that authority. CUPW and the Council now seek to rely on that same conferral to render Canada Post "unlike" any private courier company. CUPW's and the Council's interpretation produces the absurd result that Canada can escape liability through the very measure of which the Investor is complaining.

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<sup>22</sup> CUPW/Council Submission at para. 19: "The distinction between public and private entities is fundamental to the future viability of many Canadian public and social services, and is one that NAFTA investment rules require this Tribunal to take into account as the *unlike circumstances* of public service providers."

<sup>23</sup> Article 1139 defines "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."

Page -10-

**B. Canada Post's Alleged 'Universal Service Obligation' Does Not Make it Unlike UPS Canada**

21. CUPW and the Council also argue that Canada Post is unlike UPS Canada because Canada Post must fulfil an alleged "universal service obligation ... mandated by both domestic and international law."<sup>24</sup>

i. *Canada Post is under no international obligation to provide universal service*

22. In support of its claim that Canada Post has an international obligation to provide universal service, CUPW and the Council merely refer to Article 1 of the *Universal Postal Convention*. CUPW and the Council seem to be unaware that:

a. The *Universal Postal Convention* only came into force in 2001. In Canada treaties must be implemented to have effect in domestic law.<sup>25</sup> Neither the text nor the substance of the *Universal Postal Convention* have been incorporated into domestic law or otherwise implemented.

b. Canada itself accepts that the "real definition" of the USO is not in Article 1 of the *Universal Postal Convention* but in its Regulations.<sup>26</sup> Yet, these Regulations only apply to international mail<sup>27</sup> and are optional.<sup>28</sup>

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<sup>24</sup> CUPW/Council Submission at para. 9.

<sup>25</sup> *AG for Canada v. AG for Ontario (Labour Conventions)* [1937] WL 25550; [1937] AC 326; *Pfizer Inc. v. Canada (T.D.)*, Court File No. T-667-99, [1999] 4 F.C. 441; [1999] F.C.J. No. 1122, *Investor's Book of Authorities* at Tabs 148 and 170, respectively.

<sup>26</sup> Canada's Counter Memorial at para. 75.

<sup>27</sup> Expert Report of James Campbell at para. 52.

<sup>28</sup> See the discussion at paras. 102(b) and 102(c) of the Investor's Reply.

Page -11-

- c. The Universal Postal Union, which is responsible for the *Universal Postal Convention*, says that there are a variety of ways to fund universal service and countries must choose a way that is consistent with the country's other international obligations.<sup>29</sup>
- d. Canada's own expert says that any legal obligation created by the *Universal Postal Convention* is "irrelevant;" the *practice* of providing universal service is, apparently, more important.<sup>30</sup> The only evidence Canada provides of such a practice is the results of a questionnaire circulated to Members in 1997.<sup>31</sup> Canada neglects to mention that only 58% of Union Members responded to the questionnaire.<sup>32</sup>

These facts demonstrate that Canada Post is under no international obligation to provide universal service.

ii. *Canada Post is under no domestic obligation to provide universal service*

23. CUPW and the Council do not refer to any authority to support their claim that Canada Post has a domestic legal obligation to provide universal service. This is not surprising because no such authority exists. Canada's courts have repeatedly dismissed claims that Canada Post is breaching a USO by reducing services.<sup>33</sup> Furthermore, the Canada Post

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<sup>29</sup> UPU Memorandum on Universal Postal Service Obligations and Standards (Tab U185) at page 31: "There are no restrictions as to the use of sources. Two or more sources could be combined to achieve the aim of funding the universal service. It is important to seek an alternative or combination of alternatives ... which are in keeping with the national or other legislations with which the country concerned must comply."

<sup>30</sup> Crew Second Report at para. 9, Canada's Rejoinder at para. 134. November 8, 2005

<sup>31</sup> Canada's Rejoinder at para. 134.

<sup>32</sup> French Report to UPU Committee I, General Matters and Structure of the Union, Respondent's Authorities, Tab 117 at para. 3.

<sup>33</sup> *Canadian Daily Newspapers Association*, Investor's Book of Authorities (Tab 68); *Canadian Union of Postal Workers*, Investor's Book of Authorities (Tab 69); *City of Nepean*, Investor's Book of Authorities (Tab 71); *Rural Dignity of Canada*, Investor's Book of Authorities (Tab 75). These decisions are discussed at paras 65 - 79 of the Investor's Memorial.

Page -12-

Mandate Review Commission noted that “[n]either universal service nor uniform rates are specifically mandated by the CPC Act”<sup>34</sup> and recommended “[t]hat in any future amendments to the CPC Act, the obligation to provide universal service at a uniform rate for lettermail be explicitly included as part of the corporation’s mandate.”<sup>35</sup> Canada ignored the recommendation.

24. While Canada argues that the “details” of the USO are “spelled out” in a “multitude of regulations” under the *CPC Act*,<sup>36</sup> Canada fails to identify a single regulation requiring Canada Post to provide universal service.<sup>37</sup> Moreover, Canada fails to explain how these regulations impose any obligation on Canada Post, which proposes the regulations and is free to amend them as it likes.<sup>38</sup>

*iii. The Investor’s Claim is Consistent with Canada’s Stated Policy Goals*

25. While Canada Post is under no international or domestic legal obligation to provide universal service, the Investor accepts that Canada may grant Canada Post a monopoly over letter mail and that the universal provision of basic customary postal services can be a valid public policy objective for Canada to pursue. The pursuit of this objective is perfectly consistent with compliance with Canada’s obligations under NAFTA.
26. The pursuit of universal basic postal service logically requires Canada Post’s courier services to contribute the market price for using the monopoly infrastructure. Contrary to

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<sup>34</sup> Canada Post Mandate Review Report (U79) at page 66.

<sup>35</sup> Canada Post Mandate Review Report (U79) at page 124.

<sup>36</sup> Canada’s Rejoinder at para. 136.

<sup>37</sup> See Canada’s list of Regulations at para. 85 of its Counter Memorial.

<sup>38</sup> While Canada notes Cabinet is not obliged to accept such Regulations or changes (Canada’s Rejoinder at para. 136), Canada fails to identify single instance of Cabinet rejecting a Canada Post Regulation and Canada’s own expert describes Cabinet approval as a “trivial ritual” (Robert Campbell, *The Politics of Postal Transformation* at 293, Investor’s Schedule of Documents at Tab U498).

Page -13-

the misrepresentations of Canada's economic experts,<sup>39</sup> the Investor does not require the contribution to be maximized on every transaction. Nor does the Investor require Canada Post's competitive services to maximize their contribution in the short run.

27. Throughout its Submission, CUPW and the Council overlook that, by requiring Canada Post's competitive services to contribute the market rate for using the monopoly infrastructure, the Investor is merely requiring Canada to demonstrate that it pursues its alleged USO. CUPW and the Council overlook that Canada Post cannot claim to legitimately pursue a USO while its competitive services contribute anything less than the market rate. CUPW and the Council equally overlook that Canada cannot claim Canada Post legitimately pursues a USO when Canada fails to even define the alleged USO.<sup>40</sup>
28. By not defining Canada Post's alleged USO, Canada enables Canada Post to alter that definition to fulfil its own commercial needs. In defending its discriminatory levelling of the monopoly infrastructure, Canada Post retreats behind an allegedly broad USO. Yet, in defending its decisions to reduce services in Canadian courts, Canada Post argues it has complete discretion regarding what services it should provide.
29. CUPW should be particularly familiar with the flexibility of Canada Post's alleged USO. In a dispute with Canada Post, CUPW argued that Canada Post's franchising of its retail outlets was inconsistent with Canada Post's obligations in the *Canada Post Corporation*

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<sup>39</sup> See, for example, Bradley Second Report at paras. 3 - 9.

<sup>40</sup> The Canada Post Mandate Review identified in 1996 that Canada had failed to define its alleged USO and Canada has since ignored the Review's recommendation to provide such a definition. Canada's pleadings in this arbitration provide an example of Canada's inability to identify Canada Post's alleged USO. At the beginning of this arbitration, Canada did not include express services (Canada's Answers to Interrogatories, Question 257, Investor's Schedule of Documents, Tab U290) but now Canada seeks to define its USO to include express letter services (Canada's Counter Memorial at para. 68). Similarly, in response to the request to provide "all treaties, legislative, regulatory or ministerial directive or instrument upon which Canada relies to define ... [the] universal service obligation", Canada only referred to Section 5 of the *CPC Act* and Article 10 of the *Universal Postal Convention* (Canada's Answers to Interrogatories, Question 257(a)). Now, Canada argues that the USO arises from a number of other sources. Canada says the USO is the "necessary corollary" of the Preamble and Articles 1 and 10 of the *Universal Postal Convention* and arises from "international practice" as well as Canada Post regulations (Canada's Rejoinder at paras 131-137).

Page -14-

*Act*. The Canadian Federal Court rejected the claim, holding that the Act gave Canada Post "broad powers" to exercise its exclusive privilege in the manner that it saw fit.<sup>41</sup>

30. CUPW has, therefore, seen first hand how, by failing to define the alleged USO, Canada gives Canada Post the ability to change the definition to suit its commercial objectives. Despite this, CUPW now joins with the Council to argue this undefined obligation enables Canada to avoid its NAFTA obligations. Furthermore, CUPW joins with the Council to object to a claim that simply asks Canada Post to meet its stated policy objectives while complying with the NAFTA.

**V. Publications Assistance Program**

31. The Publications Assistance Program pursues the laudable goal of promoting Canadian culture by subsidizing the delivery of Canadian publications. As part of its implementation of the Program, Canada forces publishers to deliver through Canada Post to access this subsidy. It is impossible to understand how forcing publishers to deliver through Canada Post promotes Canadian culture. Canada, itself, recognizes this when Canada says it "does not accept that Canada has to demonstrate that the use of Canada Post to deliver the publications assistance helps achieve the cultural objective pursued by the program".<sup>42</sup>
32. Indeed, forcing publishers to deliver through Canada Post undermines the goals of the Program. Canada prevents other courier companies from competing to deliver the publications and, thereby, driving delivery costs down even further. The publishers themselves have recognized this fact and have requested that Canada not tie the subsidy to any particular courier.<sup>43</sup>

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<sup>41</sup> *Canadian Union of Postal Workers*, Investor's Book of Authorities (Tab 69).

<sup>42</sup> Canada's Rejoinder at footnote 300.

<sup>43</sup> See the comments of industry associations at para. 353 of the Investor's Memorial.



Page -15-

33. CUPW and the Council repeat Canada's argument that forcing publishers to deliver with Canada Post to access the subsidies is exempt from the NAFTA national treatment obligation through the operation of NAFTA Article 2106. NAFTA Article 2106 says that Annex 2106 applies to "cultural industries." The relevant parts of Annex 2106 say:

... any measure adopted or maintained with respect to cultural industries ... and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada - United States Free Trade Agreement*.

34. Article 2005 of the *Canada - US Free Trade Agreement* says:

1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.
2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

35. Fundamentally, Canada's measure of requiring delivery of publications subject to the Program exclusively with Canada Post cannot fall within the cultural industries exception because it does not promote Canadian culture. This view is supported by the text. The Annex does not say "any measure a Party claims is adopted or maintained with respect to cultural industries." Consequently, a Party cannot unilaterally declare a measure subject to the exception, as CUPW and the Council claim. Furthermore, the words "with respect to" in Annex 2106 establish that the measure must have a real connection to cultural industries.

36. CUPW and the Council do not refer to the text when supporting Canada's interpretation. Nor do they refer to the NAFTA *US-Cross Border Trucking* decision, in which the NAFTA Chapter 20 Tribunal recognized the need to interpret exemptions narrowly.<sup>44</sup> CUPW and the Council do not explain how their interpretation is consistent with the NAFTA's objective to "create effective procedures for the implementation and application of this Agreement ... and for the resolution of disputes."<sup>45</sup>

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<sup>44</sup> *In the Matter of Cross-Border Trucking Services Investor's Book of Authorities* (Tab 106) at para. 260 and footnote 234.

<sup>45</sup> NAFTA Article 102(1)(e).

## Page -16-

37. The only support CUPW and the Council present in support of Canada's interpretation is Article 2005(2) of the *Canada-US Free Trade Agreement*. CUPW and the Council argue that, by saying that Canada Post's delivery of publications under the Program falls within the cultural exception, Canada is exposing itself to commercial retaliation under Article 2005(2) of the *Canada - US Free Trade Agreement*. CUPW and the Council argue that "[g]iven the price that Canada is likely to pay for relying upon these provisions, it is reasonable to give effect to the broad wording of these provisions ... A more conservative reading might be warranted in the case of an exemption or reservation that truly removed a measure from the threat of retaliatory sanction, but has no place where a significant disincentive already exists to constrain the use of this 'exemption'."<sup>46</sup>
38. CUPW's and the Council's interpretation of the effect of Article 2005(2) on the meaning of "with respect to" is incorrect. Fundamentally, it is inconsistent with the text of Article 2005. Article 2005(1) exempts "cultural industries" from the provisions of the *Canada-US Free Trade Agreement*. It does not exempt measures "with respect to" cultural industries. Consequently, a Party can only retaliate under Article 2005(2) to measures *within* cultural industries. Parties cannot retaliate for measures that are more distantly related to the cultural industry, such as those "with respect to" cultural industries, under Canada's broad interpretation of that phrase.
39. Canada's interpretation of "with respect to" in NAFTA Article 2106, therefore, does not permit any commercial retaliation under Article 2005(2) of the *Canada - US Free Trade Agreement*. This is precisely why, despite CUPW's and the Council's warnings of "the price that Canada is likely to pay for relying upon these [cultural exemption] provisions",<sup>47</sup> Canada has not paid any price in the eight years since forcing publishers to deliver with Canada Post under the current form of the Publications Assistance Program.
40. Even if, contrary to the Article 2005(2) text, Canada was subject to retaliation for forcing publishers to deliver with Canada Post to receive assistance under the Program, such a danger does not warrant allowing Canada to unilaterally remove *any* measure from the

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<sup>46</sup> CUPW/Council Submission at para. 61.

<sup>47</sup> CUPW/Council Submission at para. 61.

Page -17-

entire scope of the NAFTA. Such a broad exception is truly extraordinary and CUPW and the Council have not helped Canada carry its burden of proving that such a broad exception applies.

**VI. Conclusion**

41. CUPW's and the Council's submission is premised on their misunderstandings of the relevant law and the nature of the Investor's claim. Once CUPW's and the Council's misunderstandings are corrected, there is no foundation to their prediction of a "flood" of claims against public service providers or to their submissions regarding the effect of the claim on Canadian cultural industries. Once CUPW's and the Council's misunderstandings are corrected, the positive effects of the Investor's claim on the Canadian public remain unchallenged: the Investor's claim is consistent with Canada Post's stated policy objectives and the Investor's claim will ensure cheaper Canadian-content publications.

All of Which is Respectfully Submitted

*Appleton & Associates per NG.*

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