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08:39:21

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

----- x
:
In the Matter of Arbitration :
Between: :
:
UNITED PARCEL SERVICE OF AMERICA, INC., :
:
Investor, :
:
and :
:
THE GOVERNMENT OF CANADA, :
:
Party. :
:
----- x Volume 3

HEARING ON THE MERITS

Wednesday, December 14, 2005

The World Bank
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:05 a.m. before:

- KENNETH J. KEITH, President
- L. YVES FORTIER, Arbitrator
- RONALD A. CASS, Arbitrator

08:39:21

Also Present:

ELOISE OBADIA,
Secretary to the Tribunal

Court Reporter:

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735 8th Street, S.E.
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08:39:21

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08:39:21 APPEARANCES: (Continued)

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ANDREA MENAKER
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On behalf of the U.S. Department of Justice:

RICHARD LARM

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On behalf of the U.S. Department of Commerce:

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On behalf of the U.S. Department of Treasury:

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On behalf of the Office of the U.S. Trade
Representative:

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On behalf of the Government of Mexico:

MAXIMO ROMERO JIMENEZ
SALVADOR BEHAR LA VALLE

J. CAMERON MOWATT
GRAHAM COOK

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08:42:31 1

P R O C E E D I N G S

2 PRESIDENT KEITH: Good morning.

3 MR. APPLETON: Actually, Sir Kenneth, I

4 believe we have some procedural matters. If

5 Mr. Whitehall is going to start his direct, then we

6 might need to address those first. If not, if

7 Mr. Whitehall is rising to deal with procedural

8 matters, I will defer to him first.

9 PRESIDENT KEITH: Okay, then,

10 Mr. Appleton.

11 MR. APPLETON: Mr. President, of course,

12 Mr. President, we have to start each day, and we

13 have to make sure we do that, to identify who the
14 business representatives are. And, of course, the
15 order, as we've, in essence, varied it here, is
16 that each disputing party can have two people, but
17 currently the order says that only we have to
18 identify them, and I assumed that both sides would
19 have to identify at the beginning of the day. And
20 then whenever they may be switched, we didn't have
21 that opportunity yesterday, and I want to make sure
22 we do it properly today.

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09:06:57 1 Seated over two seats from me is Mr. Amgad
2 Shehata, who is the Vice President of UPS Canada.
3 He will be the only business representative from
4 UPS at the hearing today, and he has, of course,
5 filled out the confidentiality agreement. We will
6 just take that as given, but we will assume, of
7 course, that Mr. Whitehall has done the same thing
8 with his people, and maybe Mr. Whitehall would like
9 to introduce who his representatives are.

10 MR. WHITEHALL: Firstly, the
11 representative of the Government of Canada is
12 Mr. Stephen de Boer, if he wouldn't mind standing.
13 He is the Deputy Director of International Trade.
14 I think I give him the right title. If not, he

15 will tell me otherwise.

16 And currently, I do not have Mr. Jason
17 Hergert in the room, who is the Canada Post
18 representative.

19 We do have two witnesses who gave evidence
20 yesterday, Ms. Conn and Mr. Eagles. I spoke to
21 Mr. Wong this morning. I understand that we are
22 not going to deal with any UPS restricted

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09:08:06 1 materials, so I assume since they already gave
2 evidence they may stay in the room, but they are
3 not business representatives, and they are here as
4 a matter of interest. If there is any concern,
5 they can leave.

6 MR. APPLETON: We have no dispute with
7 having them present, but, in fact, they probably
8 are business representatives. However, certainly
9 Ms. Conn certainly is, but we make no issue about
10 that since they have already given evidence, and I
11 just thought that we should clarify for the record
12 to be precise.

13 PRESIDENT KEITH: Thank you.

14 MR. WHITEHALL: I'm obliged to my friend.

15 (Pause.)

16 MR. APPLETON: I'm sorry. Before you

17 begin, Mr. Whitehall, I'm afraid Dr. Wong has an
18 administrative matter as well arising from
19 yesterday with the record. I would just like to
20 turn to him, if that's all right.

21 MR. WONG: Yesterday, Mr. President, when
22 we were looking at C105, I undertook to provide a

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09:09:08 1 copy of the original postal directive. I think you
2 will recall that in Dr. Crew's affidavit I believe
3 it was Tab 3, he put in the 2002.

4 So, at the break, Ms. Key, our document
5 specialist, will arrange to distribute to our
6 friends on the side and to the Tribunal a copy of
7 the original Post directive of 1997, and that's
8 called 97-67 EC. And then, Sir Kenneth, you
9 pointed out to me there was another document that
10 was mentioned in the consolidation, which is under
11 Tab C105 of the UPS compendium, and that document I
12 did a personal search, so this is from my own
13 information. It is a 53-page document, but only
14 one page is relevant, and that document is called
15 Regulation (EC) Number 1882/2003. And what we are
16 going to put in is page one. It's called L2481,
17 and the relevant page, which is called L248/48,
18 paragraph 75, and that actually does amend a
19 portion of the Post directive as amended by the

20 2002. So, that will be done at the break or at a
21 convenient time.

22 PRESIDENT KEITH: Thank you very much.

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09:10:23 1 That clears away the preliminaries, I think, now.

2 MR. WHITEHALL: I'm glad to hear that we
3 are not cutting down any more trees than is
4 absolutely necessary.

Pages 552 - 692 : this portion of the hearing was held in camera and the pages
have accordingly been redacted.

14 PRESIDENT KEITH: Thank you very much,
15 Professor Cooper. That ends your obligations to
16 us. Thank you.

17 THE WITNESS: Thank you very much.

18 (Witness steps down.)

19 MR. WONG: Sir Kenneth, I would like to
20 take a pause for a minute, not to leave the room,
21 but to talk about how we wish to proceed with my
22 colleagues here.

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11:53:25 1 (Pause.)

2 MR. WONG: As you know, we have to select
3 witnesses in advance about how these things would
4 go. In light of the cross-examination of Professor
5 Cooper, we will not examine Professor Bradley or
6 Mr. Price, and we would like to examine Mr. Fizez,
7 who is the last name on the list, but we would like
8 a recess so we can get ourselves shifting of our
9 team to the front here.

10 PRESIDENT KEITH: And also that's a
11 public--that's in public, isn't it? Because that
12 has consequences for the arrangements, so how long
13 do you need?

14 MR. WONG: Five minutes.

15 MR. WHITEHALL: Just before you go there,
16 let me just--I would like to reflect on what
17 Canada's position is as a result of my friends
18 having decided not to cross-examine the two
19 Professors. Obviously, we've put together our case
20 on the basis that these two witnesses are going to
21 be before you, and you will have the benefit of
22 their evidence.

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11:54:30 1 PRESIDENT KEITH: We do, of course,
2 already have the benefit of their earlier evidence.

3 MR. WHITEHALL: Well, I know that, but I
4 may still want to do at least the examination in
5 chief, so as to put their evidence in context
6 because frankly I anticipated that they would be
7 here. So, and as I see, I designed what we are
8 going to do, based on the notice we have had.

9 PRESIDENT KEITH: Sure. If you think
10 about that and--

11 MR. WHITEHALL: If I could have just a
12 couple of minutes to reflect on that and then take
13 a position.

14 PRESIDENT KEITH: But I take it that the
15 next witness will, in fact, be Professor Fizet,
16 then? Mr. Fizet?

17 MR. WHITEHALL: Yes. Again, I don't know
18 if he's in the building because I thought that the
19 examination was going to be somewhat more lengthy,
20 so let me see his whereabouts.

21 (Pause.)

22 MS. TABET: Thank you.

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12:12:19 1 PRESIDENT KEITH: Thank you, if you may
2 resume.

3 DIRECT EXAMINATION

4 BY MS. TABET:

5 Q. Mr. Fizet, may I ask you to read the

6 declaration on the piece of paper before you
7 please.

8 MR. WHITEHALL: Yes. And just before my
9 friend starts, first I was asked to remind that
10 this is an open hearing, and I'm also advised that
11 the public viewing room has a sign on it that says
12 closed to the public. So they may not be visiting.

13 (Off the record.)

14 BY MS. TABET:

15 Q. Mr. Fizez, can I ask to you read the
16 declaration on the piece of paper before you.

17 A. I solemnly declare upon my honor and
18 conscience that I shall speak the truth, the whole
19 truth, and nothing but the truth.

20 Q. Thank you.

21 You swore an affidavit on June 10th, 2005,
22 in response to matters that the claimant raised in

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12:15:57 1 his counter memorial.

2 A. I did.

3 Q. I'm putting on the screen a copy of your
4 signature. Is that your signature?

5 A. Yes, it is.

6 Q. I would like to spend just a few minutes
7 on your background. You're currently with the

8 Department of Canadian Heritage?

9 A. Yes, I am.

10 Q. And your title is Director of Periodical
11 Publishing Policy and Programs; is that correct?

12 A. That's correct.

13 Q. Can you please explain your
14 responsibilities.

15 A. The Periodical Publishing Policy and
16 Programs Directorate is a directorate within the
17 cultural affairs sector of Canadian Heritage that
18 is responsible for the support of the Canadian
19 periodical publishing industry through two
20 programs, one we are discussing today, the
21 Publications Assistance Program, as well as the
22 Canada Magazine Fund, as well as regulatory

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12:16:57 1 matters, and comments on various legislation, such
2 as Bill C55, which is a Foreign Publishers Services
3 Act.

4 Q. Can you explain to this Tribunal what are
5 the objectives of the program, the Publication
6 Assistance Program.

7 A. The Publications Assistance Program in its
8 various forms, has been in place to support the
9 distribution of Canadian periodicals to Canadians
10 across the country, no matter where they live, at

11 affordable and equitable prices.

12 Q. And how does the program achieve these
13 goals?

14 A. The program is one that offsets the costs
15 of the distribution of eligible Canadian
16 periodicals for subscribers in order that Canadians
17 can receive their periodicals throughout the
18 country on a regular basis at affordable and
19 similar prices throughout.

20 What it does is it actually takes into
21 account the distribution costs and offsets by
22 paying a portion of those costs, so that the

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12:18:07 1 subscription model in Canada is the key model in
2 terms of how we as Canadians receive our Canadian
3 Articles.

4 Q. Can you explain a little bit more how that
5 works in practice in terms of the department of
6 Heritage and Canada Post relationship and what the
7 department does and what Canada Post does.

8 A. The department is responsible for the
9 policy framework which sets the policy that we want
10 in order to allow Canadians to receive their
11 periodicals. It sets the eligibility criteria for

12 the types of publications that are eligible for the
13 program.

14 The department also ensures that monies
15 from the department are transferred to individual
16 publishers' accounts, over 1,200 of them, and it
17 also had the continuing research and policy
18 framework discussion in order to make sure that we
19 are achieving our goals.

20 Canada Post is a co--co-administers the
21 program with us in terms that it is the means by
22 which the periodicals are delivered throughout the

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12:19:18 1 country.

2 Canada Post also has an administrative
3 burden in order to allow us to have monthly records
4 of the actual periodicals that are going through,
5 and also can do special runs for us on information
6 that we may need.

7 Q. So, the Department of Heritage subsidy
8 goes to Canada Post?

9 A. No. The subsidies go to individual
10 publisher accounts that are set up within a
11 publisher's holding account at Canada Post.

12 Q. Have you considered, then, alternative
13 ways of giving out the subsidy instead of giving it

14 in to the accounts at Canada Post and requiring the
15 publishers to use Canada Post?

16 A. We have looked at determining whether
17 grants and contribution programs, which is the more
18 common way that monies are disbursed within
19 programs that actually disburse monies, whereby a
20 program will subsidize a particular action or a
21 particular event that will occur in the future,
22 based on a proposal that is sent in from the

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12:20:34 1 applicant.

2 Grants and contributions programs are very
3 expensive. They are not necessarily programs where
4 you can verify other than by audits what it is that
5 the recipient has done in order to receive that
6 money, so whether the recipient has actually
7 followed through on what he or she said they were
8 going to do.

9 So, we looked at grants and contributions
10 program, and determined that very expensive, high
11 overhead, and moreover, we are not necessarily
12 certain that the monies being spent are actually
13 being spent for what they were meant to do.

14 With the PAP, the way it works is that the
15 monies are in the accounts of the publishers, and
16 only when the publisher is actually mailed his or

17 her publication does the money trickle down. So,
18 you can only receive PAP fundings for the strict
19 objective that is laid out and that is to
20 distribute your periodical throughout the country
21 to various addresses.

22 Q. Now, why have you chosen to use Canada

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12:21:38 1 Post and not some other courier company to deliver
2 the program and the subsidy?

3 A. Canada Post has always been involved in
4 the support of periodical publications. I mean,
5 this predates confederation, and it also is
6 something that Canada Post used to do on its own.
7 The Department of Canadian Heritage is a partner
8 and has been responsible for the Publications
9 Assistance Program since 1996 when it, through a
10 Memorandum of Agreement, took over the role of
11 supporting the distribution, subsidies for Canadian
12 periodicals.

13 Other means or other delivery agents have
14 been considered. There was a report commissioned
15 by the then-Department of Communications in 1994.
16 That--that was the previous iteration of the
17 Department of Canadian Heritage. That report
18 suggested another means of delivering the

19 subsidies. However, that was during the process
20 where the publications distribution assistance
21 program, what it was called then, was going to be
22 transferred to the Department of Communications.

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12:23:01 1 So, that was a study among a certain
2 number that was proposing a different means as the
3 program was shifting completely from Canada Post to
4 a co-administered program with Canadian Heritage.
5 That Discussion Paper speaks to issues where we
6 believe or I believe, I should say, that certain
7 amounts of policy decisions would have been taken
8 away from the department. It involved a third
9 party. It was a paper proposing very--that
10 sketched out a possible management framework that
11 was incomplete, that also spoke to 2 percent
12 overhead costs.

13 And in my experience in having run
14 programs for 10 years, it's very difficult to run
15 these types of programs. The Publications
16 Assistance Program is perhaps one of the most
17 efficient programs that the Department of Canadian
18 Heritage currently manages, and that means that the
19 monies that are available for the Publications
20 Assistance Program goes to the publishers. It
21 doesn't go into the overhead administration costs.

22 Another issue, of course, is the Universal

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12:24:26 1 Services Obligation. We cannot distinguish between
2 one publication going to a certain number of people
3 and not to others. We need to ascertain and be
4 assured that publications can go to those
5 subscribers no matter where they live. Canada Post
6 can deliver on that.

7 Canada Post is also a partner that
8 contributes financially to the Publications
9 Assistance Program.

10 So, we have considered G and C's, we have
11 considered other options. The administration,
12 overhead, which is very low. The fact that we have
13 a contributor that puts money on the table in order
14 to get the program, in order to make the program
15 work.

16 Also the fact that we are assured that
17 there are the Universal Service Obligations that
18 allow us to know that every single subscriber in
19 the country can have access to his or her
20 publication.

21 Q. Thank you.

22 One final question. You said that the

12:25:29 1 program was in place since 1996. Can you tell me
2 how long the government has been subsidizing the
3 distribution of Canadian publication through the
4 Post?

5 A. It predates confederation. As a matter of
6 fact, so when the Post Office Act was set up, even
7 prior to that, subsidy of the mail and particularly
8 periodicals was an ongoing activity. We have seen
9 it through numerous reports going back to--you
10 could go back to Leveck and Massey. We can look at
11 O'Leery, we can look at Davy. We can look at
12 Applebaum Ybaum.

13 This has been part of the Canadian
14 cultural policy decision making. Supporting
15 periodicals, periodical publishers in order that
16 Canadians can have access, so it's been a long
17 standing.

18 What I meant by the PAP is that its
19 current iteration, it was transferred over and
20 called that in 1996. But the subsidy of Canadian
21 periodicals to Canadians has been an ongoing thing
22 that predates confederation.

12:26:44 1 MS. TABEL: Thank you. I understand that
2 Mr. Wisner will have a few questions for you.

3 CROSS-EXAMINATION

4 BY MR. WISNER:

5 Q. Thank you, Mr. Fizet. One point of
6 clarification on something that you just mentioned
7 earlier in response to a question from Ms. Tabet.
8 You said that in 1994 there was a study that was
9 commissioned by the Department of Communications,
10 as it was then was.

11 A. Um-hmm.

12 Q. And the authors of that study were two
13 attorneys at the law firm of McCarthy Detrow?

14 A. That's correct.

15 Q. Mr. Hanke Infant was one of them?

16 A. Yes, on the report.

17 Q. I just wanted to make sure which study we
18 were referring to. And that study considered a
19 number of different issues, only one of which was
20 possibility of an alternative delivery service;
21 right?

22 A. Yes, that's correct.

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12:27:34 1 Q. Now, one of the issues that you mentioned
2 earlier is that one of the benefits of the program

3 is that you know that the money is being used by
4 the publishers for the purpose of delivery and not
5 for some other ulterior purpose; right?

6 A. Yes.

7 Q. And the way you achieve that objective is
8 you pay the money into an account at Canada Post.

9 A. Into accounts.

10 Q. Into accounts, right. That's quite right
11 because each publisher opens up an account.

12 A. A publisher's account is opened up.

13 Q. A publisher's account. So, if I'm a
14 publisher, I would open up an account at Canada
15 Post for my publications mail.

16 A. You would first need to send an
17 application because we decide the policy, and we
18 decide the eligibility. You would first go through
19 a process whereby the eligibility of you as a
20 publisher would be put through various criteria, at
21 which point if successful, we would then
22 communicate with Canada Post, and an account would

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12:28:39 1 be set up.

2 Q. Thank you. I apologize for missing that
3 step. I would first have to be eligible. You
4 determine that at Heritage Canada.

5 A. That's correct.

6 Q. And once that determination is made, an
7 account is opened up at Canada Post?

8 A. Yes.

9 Q. And that account would be in my name, if
10 I'm the publisher?

11 A. The name of the person or the group that
12 made the submission to Canadian Heritage.

13 Q. Right. And this account, then, is--the
14 publisher is billed under that account; correct?

15 A. That's right.

16 Q. But monies are deposited by Heritage
17 Canada in that specific account for--to defray the
18 cost?

19 A. Defray a position of the cost.

20 Q. A portion of the cost, correct.

21 And do you know if a business can open up
22 an account at UPS and have an account at UPS rather

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12:29:35 1 than just paying whenever they decide to use a
2 service?

3 A. Can you repeat that, sorry?

4 Q. Do you know if a publisher can just open
5 up an account at UPS Canada?

6 A. Whether a publisher can open up an
7 account?

8 Q. Yes. Let's say they decide to use UPS
9 Canada services. They can open up an account. Do
10 you know if they can do that?

11 A. I think a publisher can--it's the
12 publisher's business.

13 Q. Sure. It's possible that they could open
14 up an account at UPS Canada, too; right?

15 A. If they so choose, I suspect, yes.

16 Q. Now, you mentioned earlier as well that
17 the latest iteration of the program is from about
18 1997?

19 A. No, 1996 is when a Memorandum of Agreement
20 transfers the responsibilities of the program from
21 Canada Post to the Department of Canadian Heritage.

22 Q. There were a number of changes to the

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12:30:34 1 program, though, that followed the decision of the
2 World Trade Organization; correct?

3 A. In 1997.

4 Q. In 1997. So, there were changes in 1997
5 after that decision; correct?

6 A. Correct.

7 Q. And notwithstanding those changes, though,
8 the objectives of the program, though, are still
9 being fulfilled; correct?

10 A. The objectives to the program remained the

11 same then as from pre-1996 and after 1987, when
12 change did occur.

13 Q. And the current program is successful in
14 achieving those objectives; correct?

15 A. We believe it is.

16 Q. Thank you.

17 Now, were you involved in any of the
18 discussions that followed the WTO's decision in the
19 Canadian periodicals case?

20 A. I was not involved the year that it
21 occurred. I joined the program in 2001.

22 Q. Okay. So, you don't have any information

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12:31:38 1 about the nature of the discussions that led to the
2 current shape of the program?

3 A. In terms of--

4 Q. Who was involved, for example.

5 A. The manager and director at the time, I
6 suspect, were the people who were involved.

7 Q. And was anybody from Canada Post involved
8 in making these decisions?

9 A. The program is a program where the policy
10 framework is determined by the Department of
11 Canadian Heritage, so anything to do with policy
12 framing of where the program should sit, what its

13 objective, its cultural objectives are, and what in
14 terms of the overall as well as with the
15 government's objectives, would have been done with
16 the Department of Canadian Heritage.

17 Q. Right, but presumably they would have
18 spoken to Canada Post before the Memorandum of
19 Agreement was signed; right?

20 A. The Memorandum of Agreement was signed
21 prior to the 1997 decision.

22 Q. Correct. That's correct. And at that

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12:32:43 1 point there would have been at least discussions?

2 A. Oh, yes.

3 Q. And there would have been discussions when
4 there was a second Memorandum of Agreement that was
5 signed later on; right?

6 A. A Memorandum of Agreement was signed in
7 1999.

8 Q. Were you involved in any of those
9 discussions?

10 A. Not the 1999, one, no.

11 Q. One feature of the pre-periodicals
12 program, when I said the pre-periodicals, the
13 pre-WTO program?

14 A. Right.

15 Q. Was that Canada Post had differential
16 rates that it had for periodicals; is that correct?

17 A. Right.

18 Q. And it was compensated for the losses that
19 it had incurred as a result of this differential
20 pricing by the predecessor at Heritage Canada?

21 A. Well, the manner in which that you had the
22 two pricing differentiations, and what was being

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12:33:50 1 supported was the Canadian periodicals during that
2 period.

3 Q. Right.

4 And what was happening was essentially
5 because Canada Post was incurring a loss in its
6 pricing of those periodicals, it was being
7 compensated for that loss by Heritage Canada?

8 A. It was determined as a cultural policy
9 that monies should be distributed in order that
10 Canadians can get periodicals at an affordable rate
11 throughout, correct.

12 Q. So, money was made to Canada Post?

13 A. That's right.

14 Q. And, in fact, I won't say the number here
15 because it's a public hearing, but it was a
16 substantial amount of money; right?

17 A. That's right.

18 Q. Now, under the current program, what's the
19 compensation for Canada Post?

20 A. Canada Post does not receive any monies
21 from the department.

22 Q. That's correct.

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12:35:03 1 So, the department doesn't compensate
2 Canada Post any more for any costs of the program;
3 correct?

4 A. That's right.

5 Q. Now, if I'm a publisher and I'm using the
6 service that Canada Post offers, that's called
7 publications mail; right?

8 A. That's correct. That's a business line.

9 Q. That's their business line. It's called
10 publications mail. And, in fact, it's a business
11 line because there's different types of publication
12 mail; correct?

13 A. Different types of mailers within the
14 publications line.

15 Q. There are different types of mailers and
16 there's different service levels; aren't there?

17 A. Yes.

18 Q. And so, you're familiar with the services
19 that Canada Post offers, I take it, as publications

20 mail?

21 A. Yes.

22 Q. And so, for example, there is such a thing

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12:36:02 1 as time committed publications mail?

2 A. Um-hmm, yes.

3 Q. And time committed publication mail, I
4 guess as the name implies, has a higher service
5 standard for delivery time for publication mail?

6 A. Correct.

7 Q. And in addition to that, the prices for
8 publications mail can vary, according to the
9 weight, for example; correct?

10 A. That's right, according to the weight,
11 yes.

12 Q. And one option that a publisher has is to,
13 for example, have a bundle of addressed copies of
14 up to a certain weight limit that they can send
15 through a publications mail service; correct?

16 A. Correct.

17 Q. And if I'm a publisher, I can use
18 publications mails, publications mail not just to
19 send it to, send publications to a subscriber in a
20 household, but I can send it to a newsstand or a
21 retailer; right?

22 A. Correct.

12:37:32 1 Q. Now, the publishers that benefit from this
2 program, you referred to them as your clients;
3 right?

4 A. Clients, recipients?

5 Q. Clients is a word that you use sometimes?

6 A. Yes.

7 Q. And I take it one of the responsibilities
8 that you feel that you have is to act in your
9 client's interests; right?

10 A. Correct.

11 Q. And to that end, one of the things that
12 you have done from time to time, when I say "you,"
13 you or your department has done from time to time,
14 is to solicit feedback from your clients; right?

15 A. That's correct.

16 Q. And at one point you even did a survey of
17 some key stakeholders; correct?

18 A. Yes, in 2001, we did.

19 Q. In 2001?

20 A. When we went through the renewal process.

21 Q. And there was a summary that was done of
22 that survey; correct?

12:38:29 1 A. A summary of 17 responses to 44 people who
2 had been sent a discussion paper.

3 Q. Correct.

4 A. So, that is in part, but there were many
5 other consultations as well.

6 Q. Let's take a look at this consultation,
7 which is in your binder, and it was binder three
8 which you have in front of you, and just for sake
9 of reference, your affidavit is at Tab C22?

10 A. C22?

11 Q. Correct. That's where your affidavit can
12 be found.

13 Your affidavit is there, there is a number
14 of exhibits to your affidavit, A through F, and
15 then there is a few--two tabs after that there is
16 C24.

17 A. Yes, that's the Publications Assistance
18 Program analysis.

19 Q. Right.

20 And this is a summary of the response to
21 the Discussion Paper that you referred to?

22 A. Yes.

12:40:31 1 Q. And this was prepared by two members of

2 your staff.

3 A. That is correct.

4 Q. And these are reliable employees?

5 A. Yes.

6 Q. And as far as you're concerned, they
7 prepared a fair summary of the responses that were
8 received?

9 A. Yes.

10 Q. And if I could just ask you to turn to
11 page one of that report. Before we turn to the
12 highlighted portion there, I would just like to ask
13 you to see the third paragraph there, and that
14 says, "Given the diverse range of commentary on the
15 Discussion Paper of the specific concerns of
16 individual publishers, organizations and
17 associations are not included in this analysis.
18 Rather, the analysis seeks to ascertain overarching
19 concerns of the publishing industry."

20 And I take it that's what the analysis
21 did; right?

22 A. That's right.

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12:41:45 1 Q. And then there is a section at the bottom
2 of page one, and that section is entitled
3 "Partnering With Canada Post," and it says there

4 that many of the respondents indicated that there
5 is currently no true alternative to the services
6 provided by Canada Post, specifically within rural
7 regions, and then under the current PAP structure,
8 industry stakeholders have no option other than
9 Canada Post if they are to receive PAP subsidies.
10 The commentaries also indicated some frustration
11 with the operational methods and financial
12 objectives of Canada Post.

13 Now, you read that when you received this
14 paper?

15 A. Yes, I did.

16 Q. And did you make any changes to the
17 program in response?

18 A. Well, we first of all decided to see what
19 the respondents indicated, that there is currently
20 no true alternative to the services provided by
21 Canada, specifically within rural regions, so we
22 made sure to review what we had, and felt that

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12:43:07 1 given that the sample that we had received, we
2 would continue to do research in this area because,
3 this is, as we said earlier, a Discussion Paper
4 before us. We wanted comments.

5 Q. So, did you decide to do any further
6 research?

7 A. We received more comments from other
8 people, and went out and consulted.

9 Q. Was there another document like this that
10 was prepared, then?

11 A. No, this is it.

12 Q. One of the--I take it, though, that there
13 are in some cases alternative forms of delivery;
14 right?

15 A. For magazine publishers, yes, there are.

16 MR. WISNER: Thank you. No further
17 questions.

18 REDIRECT EXAMINATION

19 BY MS. TABET:

20 Q. Just one point of clarification,
21 Mr. Fizet. You talked about the changes that were
22 made to the Publications Assistance Program in

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12:44:08 1 1997. Can you explain those changes?

2 A. Yes. Prior to 1997, the monies that were
3 sent by Canadian Heritage in order to subsidize the
4 mail were sent directly to Canada Post. Following
5 the decision of the WTO appellate body, monies were
6 no longer sent to Canada Post, but were sent in to
7 the 1,200 plus publishers' accounts that had been
8 created.

9 Q. So, no other changes were made to the
10 program?

11 A. No. The program continued to follow its
12 key objectives.

13 MS. TABET: Thank you.

14 PRESIDENT KEITH: Thank you, Mr. Fizez.
15 Thank you for your evidence.

16 THE WITNESS: Thank you very much. Thank
17 you.

18 (Witness steps down.)

19 PRESIDENT KEITH: Mr. Whitehall, have you
20 thought further about your position?

21 MR. WHITEHALL: No, I think we have agreed
22 that we should go directly to arguments, so I

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12:45:23 1 expect my learned friend is going to be up next and
2 telling you about his case.

3 Now, I don't know about timing, but timing
4 has changed somewhat as a result of my friend's
5 decision, so I wouldn't mind knowing just exactly
6 what the plan is. I think we have made up some
7 time as a result of their decision, so I was just
8 kind of wondering where we are in terms of timing.

9 PRESIDENT KEITH: Mr. Appleton, what do
10 you say about that?

11 MR. APPLETON: Sir Kenneth, I think this

12 is a convenient time to take our lunch break. I
13 think we are prepared to commence immediately upon
14 our return. If we need to have any other
15 discussions, I'm prepared to talk, and we can see
16 what we can do about that, but my sense is we are
17 ready to go, the witness phase is now done, and I
18 think it's time to get the rest of this underway.

19 PRESIDENT KEITH: Thank you. Do you have
20 any idea how much time you consider you need within
21 the overall parameters under which we're working?

22 MR. APPLETON: Sir Kenneth, we will

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12:46:35 1 discuss this over lunch, and then we can come back
2 and discuss this.

3 PRESIDENT KEITH: So should we resume at
4 2:00, then? Is that a sensible time? Good. Thank
5 you. 2:00.

6 (Whereupon, at 12:46 p.m., the hearing
7 was adjourned until 2:00 p.m., the same day.)

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AFTERNOON SESSION

2 PRESIDENT KEITH: Yes, Mr. Appleton.

3 MR. APPLETON: Thank you very much,
4 Mr. President.

5 And I just want to confirm that the first
6 part of UPS's closing argument is going to be
7 available to the public, and this part of the
8 closing argument is available for telecommunication
9 by closed circuit TV, and then we will advise you
10 when we turn to another part of the argument where
11 we will start looking at parts of the record which
12 involves certain encumbrances of confidentiality
13 and restricted access information, and at that
14 point we will need to turn off the cameras and go
15 in camera, so to speak, for that part of the
16 presentation.

17 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

18 MR. APPLETON: In his opening on Monday of
19 this week, Mr. Whitehall canvassed all the various
20 positions that Canada takes in response to the UPS
21 NAFTA claim. The benefit of that opening is that
22 when we clear away the clutter, all of Canada's

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14:21:25 1 disparate positions come down to this: The claims
2 made by UPS are not claims that UPS can make
3 against Canada under the NAFTA; two, if UPS can
4 make these claims against Canada under the NAFTA,
5 then UPS has offered no evidence to establish its
6 claims; and three, if there is evidence to
7 establish the UPS claims, it still doesn't matter
8 because UPS has suffered no harm or damage.

9 As we said in our opening, all UPS has to
10 show to make a central claim that Canada has
11 violated NAFTA Article 1102 is that UPS, Canada
12 Post, and Purolator are all in like circumstances,
13 and Canada treats UPS less favorably than it treats
14 Canada Post. In this context, we are going to
15 review the jurisprudence that relates the relevant
16 provisions of the NAFTA, as well as the evidence
17 before the Tribunal of the different, less
18 favorable treatment of UPS and the resulting harm

19 that UPS has suffered.

20 Now, I'm going to turn to a review of the
21 NAFTA national treatment obligations which are
22 obligations of Canada to treat UPS fairly.

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14:23:02 1 Following that, my colleague, Mr. Wisner, will
2 review the factual record. And then Dr. Wong and
3 myself will conclude the closing.

4 We would expect that we will not be
5 finished by the end of today, so I would expect
6 that some of that will take place tomorrow as well.

7 The Tribunal will recall that we began
8 this hearing by highlighting the five claims made
9 by UPS. Each claim focuses on the unfair treatment
10 of UPS by the Government of Canada through the acts
11 of its organ and agent, Canada Post, for which the
12 Government of Canada is responsible. The
13 jurisprudential basis of all of these claims is the
14 same. It is simple, clear, and incontrovertible.

15 First, Canada Post is an organ of the
16 Government of Canada. Canada Post is not an
17 ordinary organ--sorry, it's not an ordinary
18 enterprise whose shares just happen to be
19 controlled by the Government of Canada. Canada
20 Post, by the internal law of Canada, is made an
21 integral part of the Government of Canada. Canada

22 now admits this.

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14:24:28 1 More importantly, Canada has no choice but
2 to admit this because this is the incontrovertible
3 result of the plain meaning of the Canada Post
4 Corporation Act, the affirming decisions of
5 Canada's federal court, the public acknowledgements
6 of Canadian Ministers responsible for Canada Post,
7 and the benefits Canada Post gets from other
8 federal and provincial legal exceptions only
9 available to agencies of the Government of Canada.

10 So, what follows from this in law and in
11 logic is very straightforward. At the very least,
12 Canada Post is a state agent under Article 5 of the
13 ILC Articles. On that basis alone, Canada is
14 responsible for Canada Post. But Canada does not
15 admit to this self-evident conclusion, and on the
16 basis of a tortured interpretation of Sections 5
17 and 19 of the Canada Post Corporation Act, and
18 Articles 1502(3) and 1503(2)(a) of the NAFTA,
19 Canada asks you to conclude that Canada Post does
20 not exercise governmental authority, and it asks
21 you to ignore that Canada Post is the controlling
22 mind of its subsidiary, Purolator, because you

14:26:08 1 should not look behind its corporate veil. That's
2 what it asks.

3 Instead, it is precisely Sections 5 and 9
4 of the Canada Post Corporation Act that, on its
5 clear and plain meaning, delegates to Canada Post
6 the administrative, regulatory, and other
7 governmental authority that Canada Post admits it
8 relies upon for its authority to commercially
9 compete against UPS in the private sector, and
10 which also expressly constitutes the prerequisites
11 of a government measure necessary for the breach of
12 Section A of Chapter 11 of NAFTA and the exercise
13 of governmental authority for the purpose of NAFTA
14 Articles 1502(3)(a) and 1503(2), and that applies
15 both in the context of Article 5 of the ILC
16 Articles and Article 4.

17 As we observed in our opening, this
18 Tribunal would be compelled to the very same
19 conclusion just on the basis of this functional
20 approach taken by international arbitration
21 Tribunal decisions, such as Salini and Jordan,
22 Eureko and Noble Ventures. And, of course, the WTO

14:27:32 1 Appellate Body specifically considering the status
2 of Canada Post and Canada-Periodicals came to the
3 very same conclusion.

4 So by every possible legal standard,
5 Canada is responsible for the violation of NAFTA
6 Articles 1102 and 1105, resulting from the unfair
7 treatment of UPS by the actions of Canada Post.
8 Instead, Canada contends that it's just free
9 enterprise, and the position goes something like
10 this. And I have had to look very carefully at
11 this argument because it's very much like the dance
12 of the seven veils, but this one is a little less
13 transparent since Canada is giving us a dance of
14 the 10 veils, but I'm going to go through each of
15 the pieces, each of the points of logic that they
16 tell us to get us to the end.

17 The first is that we can leverage off our
18 monopoly infrastructure, which we have for the
19 purpose of fulfilling our Universal Service
20 Obligation.

21 The second point is that then we can use
22 our large size and the power of government to

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14:28:52 1 muscle UPS out of the private courier market
2 because competing with UPS has nothing to do with

3 our Universal Service Obligation since we are just
4 using our delegated governmental authority to
5 engage in commercial activity.

6 That leads to a third veil: So that we
7 can make a profit to help pay for the monopoly
8 infrastructure that we need for our Universal
9 Service Obligation.

10 The fourth step is since it's only about
11 making money, it has nothing to do with government.

12 So, the fifth veil is that that's the
13 reason why we are not in like circumstances with
14 UPS, because we are making money for the
15 government, and UPS makes money for its
16 shareholders.

17 And the sixth part is that that's
18 different, and that's not as noble as making money
19 for the government because the government can set
20 public policy with regard to matters like security
21 and culture.

22 Seventh, since we have the authority

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14:29:57 1 delegated to us by the government to decide what is
2 part of our Universal Service Obligation and what
3 is not part of our Universal Service Obligation, we
4 have decided that courier products are not part of
5 the Universal Service Obligation.

6 So, we decided that our courier services
7 do not derive from our governmental authority, and
8 so eight, as a result, the government is not
9 responsible.

10 And nine, we should understand that in the
11 world of free enterprise, it's just too bad if UPS
12 can't compete with our pricing policy because
13 Canada Post is bigger, and UPS is free to set its
14 own pricing policy any way that it wants.

15 Which leads to us the final point, is that
16 so you can see that since we are using our size and
17 our government power to compete commercially with
18 UPS and private courier services, but we are not
19 doing that because--or we are not doing that as a
20 government because we are behind a corporate veil,
21 so the government is not responsible. So, the
22 final veil is, in fact, the corporate veil of this

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14:31:12 1 dance.

2 Now, this is just absurd. This position
3 doesn't compute. UPS is, of course, happy to
4 compete. It just wants a level playing field that
5 NAFTA says it's entitled to. And the essence of
6 the UPS complaint is that it cannot price its
7 products at Canada Post rates because Canada Post

8 is using its monopoly infrastructure and its
9 governmental authority to artificially reduce its
10 costs.

11 Another way of more simply stating
12 Canada's position is that we are the government, we
13 can do whatever we want, and we resent anyone
14 telling us that we cannot do it, but that's
15 exactly, exactly what the NAFTA was intended to do.
16 Canada signed the NAFTA. Canada wanted the NAFTA.
17 Indeed, Canada's Prime Minister, Paul Martin,
18 recently came to the United States to say how
19 committed Canada is to following NAFTA rules and
20 how he wants the U.S. Government to also follow the
21 rules of NAFTA. We put the synopsis of the speech
22 in at Tabs 20 and 21 of our reply to the amicus

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14:32:45 1 submissions of the Canadian Union Postal Workers.

2 Now, in the NAFTA, the Government of
3 Canada voluntarily agreed to accept certain
4 limitations that trumpets otherwise sovereign
5 authority, and it took those limitations to
6 guarantee fair trade for those who invest in Canada
7 and fair trade for Canadians who invest in the
8 United States and Mexico, who is part of the
9 bargain.

10 Now, yesterday, in his introduction of

11 Professor Crew, Mr. Whitehall, and it's at page 426
12 of our transcript, declined to pursue the antics of
13 Humpty-Dumpty, but NAFTA prescribes that Canada,
14 even though it's the government, can no longer say
15 like Humpty-Dumpty did that words mean anything
16 that I want them to mean.

17 VOICE: It's "Alice in Wonderland."

18 MR. APPLETON: Well, Humpty-Dumpty said
19 that in "Alice in Wonderland." I'm afraid that
20 I've read that, I'm afraid, Mr. Whitehall, that if
21 we could discuss the literature here, but in fact
22 Humpty-Dumpty says it to Alice in "Alice in

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14:33:54 1 Wonderland," and in fact goes on because the fact
2 of the matter is, words cannot mean anything.
3 There is an old Roman expression that says you can
4 call a cat a fish, but it still doesn't swim, and
5 the same thing here. Words cannot mean whatever
6 you say they mean. They must have some verifiable
7 meaning, and this Tribunal must be able to
8 objectively make a determination that when you say
9 those words that they actually mean what you say
10 they mean. And the fact that you just say them
11 doesn't mean that that's what they mean. They must
12 have some objective standard.

13 Because otherwise governments would always
14 do that, and otherwise governments would never have
15 an opportunity to permit free trade and fairness
16 and economic liberalization into the economic zone
17 that was created by the NAFTA.

18 But more importantly, the onus is on
19 Canada to convince this Tribunal that the
20 provisions of NAFTA do not have the plain meaning
21 UPS says that they do to entitle UPS to bring this
22 claim and to hold Canada responsible and

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14:35:08 1 accountable for the less favorable treatment of UPS
2 that is contrary to the NAFTA. Canada's contorted
3 interpretation of the Canada Post Corporation Act
4 and the NAFTA do not even come close to meeting
5 this onus.

6 The simple factual basis of Canada's
7 violation of NAFTA Article 1102 is that Canada Post
8 treats its competitive services business and those
9 of its subsidiary, Purolator Courier, better than
10 UPS. And that is contrary to NAFTA Article 1102's
11 obligation to treat UPS fairly, and there is
12 nothing in law or fact that exempts Canada from
13 having to meet its NAFTA obligation.

14 Now, I would like to start looking at the
15 NAFTA itself. And if we could put up on the screen

16 NAFTA Article 1102, I think that would be helpful,
17 and this is slide one, but we have seen this
18 before.

19 Now, national treatment is not
20 specifically defined in the NAFTA, but it does not
21 need to be defined. It has a well established
22 meaning in international law emanating from over 50

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14:36:33 1 years of consideration. The core concept of that
2 meaning is a shared one across all predecessor and
3 related trade agreements to the NAFTA. The core
4 concept and its meaning of that core concept has
5 been consistently interpreted and applied by
6 international trade tribunals, including NAFTA
7 tribunals. That meaning is internally coherent and
8 harmoniously consistent with the context of the
9 NAFTA, the articles of the NAFTA that are integral
10 and related to Article 1102, and there are others,
11 we went through those. The internal guiding
12 principles of the NAFTA which, as we discussed
13 before, are self-defining, and Canada's own express
14 confirmation that national treatment means, and was
15 intended to mean, equality of competitive
16 opportunities. There is no reason in language,
17 law, or logic to conclude that it can possibly mean

18 anything else.

19 The phrase "national treatment" has its
20 origins in international economic law. GATT and
21 WTO tribunals have consistently interpreted the
22 phrase "national treatment" as imposing an

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14:38:09 1 obligation to provide treatment that is no less
2 favorable, and is requiring states to provide
3 equality of competitive opportunities. The
4 Tribunal will find the extensive discussion of this
5 jurisprudence in the UPS memorial, and I'm going to
6 give you the cite so you could have them in the
7 record. At paragraphs 536 to 543 of the memorial;
8 at paragraphs 498 and 505 of the UPS reply; and at
9 paragraphs six to 77 of the UPS reply submission to
10 the nonparty or nondisputing party submission of
11 the Government of the United Mexican States, which
12 we colloquially call the 1128 submission.

13 Now, following the success of the GATT,
14 the principles enshrined in that agreement were
15 applied to other areas of the economy. As trading
16 goods began to expand, the concept of equality of
17 competitive opportunities expanded to other areas
18 of the economy, and these national treatment
19 obligations were applied to new fields. Those

20 obligations were consistently interpreted as
21 requiring states to provide equality of competitive
22 opportunities. The NAFTA parties clearly intended

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14:39:47 1 like circumstances to mean the same as like
2 services and service providers used in the GATS.

3 The U.S.-Trucking Services panel applied
4 this interpretation to find that the United States
5 Government breached both its NAFTA Chapter 12 and
6 NAFTA Chapter 11 national treatment obligations in
7 that case. But NAFTA Article 1102 is not an island
8 alone in the sea of international economic law.
9 Article 31(1) of the Vienna Convention directs us
10 to consider the meaning of NAFTA Article 1102 in
11 light of its context. Every aspect of that context
12 indicates that the NAFTA embraced the concept of
13 equality of competitive opportunities in Article
14 1102.

15 The context of Article 1102 also includes
16 Article 1202, which applies the national treatment
17 obligation to cross-border trade and services. And
18 in NAFTA Article 1202, the NAFTA parties have said
19 like circumstances in that Article means the same
20 equality of competitive opportunities as it does in
21 the GATS.

14:41:36 1 screen before you, we also have to include the
2 reservations to NAFTA Article 1102, all of which
3 apply to specific economic sectors. There is a
4 simple reason for that. The reservations apply to
5 specific economic sectors because that's where the
6 obligation resides, and since an analysis of like
7 circumstances must occur in the context of a
8 particular economic sector, the parties could
9 simply have precluded the obligation of treatment
10 no less favorable by a reservation to Article 1102
11 in order to meet any social obligation that it
12 wished. Canada did not take any reservations for
13 courier services or investments in the courier
14 sector in NAFTA Article 1102.

15 If we look at slide two, I put up and
16 don't worry, I will make it easier for you to see
17 in a minute. I have taken Article 2101 of the
18 NAFTA. This sets out the general exceptions to the
19 NAFTA agreement. Now, Canada could have had an
20 exception in NAFTA Chapter 21 where the general
21 exceptions are, but we will see that between C and
22 D there is nothing, actually between B, C, and D,

14:43:08 1 that Part 3 of the NAFTA, which finishes before
2 Chapter 11, is covered, that Chapter 12 can be
3 covered, that Chapter 13 is covered, but that the
4 investment-related obligations, which are in
5 Chapter 11 and Chapter 14 in financial services
6 were not permitted general open public policy
7 exceptions. And these call in, for example, the
8 same types of public policy exceptions that we
9 would have in GATT Article XX. Well-known, well
10 established.

11 The parties knew what these were, the
12 parties all knew about the GATT. They chose
13 specifically not to do public policy as a general
14 exception, but to specify it, to limit it, and to
15 make sure that it was clear, and presumably they
16 did that so with a listed approach that governments
17 would start removing the list, they would whittle
18 it down and create more economic liberalization and
19 benefit, but that was up to them, and it was their
20 choice.

21 And the content of those reservations were
22 their choice, and the content of this Article 2101

14:44:26 1 general exceptions were their choice, and they
2 chose not to have that.

3 I will show you another example of what
4 they could have done. If we look at slide three, I
5 have set out the prudential regulation carve-outs,
6 and this is the area of financial services, an area
7 that was exceedingly difficult to be able to
8 resolve when negotiations were going on in NAFTA
9 and the WTO and its predecessor, the Uruguay Round
10 at that time, and so there is a lot of sensitivity
11 there, but here in this sector what did the parties
12 agree? They said that they can adopt or maintain
13 reasonable measures for prudential reasons.

14 Now, this is a self-judging exception.
15 This is the type of exception that my friends are
16 pushing upon you now, but the text doesn't say
17 that. In fact, the text says the opposite. The
18 context says the opposite. They could have done
19 this. This is broad. Look at what we can deal
20 with. Safety, soundness, integrity, or financial
21 responsibility of financial institutions are the
22 words here in B. And C, integrity and stability of

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14:45:39 1 a party's financial system. In A, protection of
2 investors and depositors, financial market

3 participants. In fact, the list keeps going,
4 policy holders, policy claimants. This is
5 exceptionally broad. There are no limits, in
6 essence, for what they believe are reasonable
7 measures as long as the measures are reasonable.
8 If it was discriminatory, they were probably
9 violated, but other than that, reasonable measures
10 for prudential reasons, they can do that.

11 But that's in the text. The text gave
12 them that opportunity. The text does not give them
13 that opportunity now, and they can't invent it,
14 they can't conjure it like a magician's trick.
15 That's not what's there.

16 So, the next question is, what does--what
17 does equality of competitive opportunity mean?

18 Now, applying the test is not a mechanical
19 exercise. As the WTO Appellate Body has
20 recognized, some judgment must be applied.

21 The concept of equality of competitive
22 opportunity necessarily entails a comparison. How

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14:47:18 1 does a measure in question impact on the
2 competitive opportunities of the domestic investor
3 in relation to those of the investor of another
4 NAFTA party? Is the marketplace being tilted in

5 favor of the domestic investor? That is the
6 meaning of less favorable treatment, the words that
7 we see in Article 1102.

8 Now, in this case, Canada has proposed the
9 word "treatment" in Article 1102 to be read in
10 isolation from the words "no less favorable." This
11 is at odds with the essence of NAFTA Article 1102
12 which entails a comparison, an analysis in how
13 relative terms a government measure affects
14 investors in like circumstances.

15 Let me use an example. I think that's
16 probably the easiest way. Now, I was one of three
17 children, but let's say if I was a parent; I have
18 two children, Jack and Jill. I'm not good on
19 names, but we will use that. And I choose to give
20 Jack a candy, and I refused to give Jill a candy.

21 Now, according to Canada, Jill has no
22 complaints because there has been no treatment in

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14:48:47 1 the sense that I only acted in respect of Jack and
2 had not taken any action directed at Jill. But, of
3 course, I made Jack better off in relation to Jill.
4 And so, in every logical sense of the expression,
5 we could all understand that Jill would feel that
6 she has been treated less favorably than Jack, and
7 a treatment of omission is still a treatment and

8 affects competitive opportunities. And that is the
9 essential element, even-handedness, the essential
10 element of treatment no less favorable.

11 And once we grasp the meaning of national
12 treatment in this context of fairness, that
13 equality of competitive opportunities, you will
14 understand the scorn that Jill has when confronted
15 with the tendentious retort that because she has
16 not been treated that she has no complaint about
17 being treated less favorably, and anyone who is a
18 parent knows exactly what I'm talking about.
19 Treatment denied is treatment nonetheless, and it
20 may very well be less favorable treatment when what
21 is denied to one party in like circumstances has
22 been granted to the other.

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14:50:15 1 And as for the ground rules of
2 international legal responsibility, we know that
3 wrongfulness can easily flow from omission as well
4 as from an act, depending on circumstances. Which
5 of course is what Jill knew intuitively all along.
6 Only Canada doesn't know that.

7 ARBITRATOR FORTIER: If you are going to
8 make, Mr. Appleton, if you are going to carry
9 through with this metaphor, and I find it somewhat

10 attractive, you have to factor in the USO. Where
11 does it fit in as between Jack and Jill here?

12 MR. APPLETON: That's a good question,
13 Mr. Fortier. We will be talking about the USO
14 properly, and I think it's probably best in
15 context. But when we talk about--

16 ARBITRATOR FORTIER: Like the Vienna
17 Convention.

18 MR. APPLETON: Yes, like the Vienna
19 Convention, like Article 31.

20 But I think the simple answer here has to
21 be that to the extent that the USO is relevant, and
22 we will give you a number of reasons why the USO is

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14:51:24 1 not really relevant and why it's not really a
2 burden, so we will go through that, but to the
3 extent that it is relevant, it could have some
4 relevance to likeness, but the text doesn't tell
5 you you can do that. The text doesn't give you
6 that. If the USO was to have been there, they
7 could have reserved about it, they could have done
8 all types of things about the USO, but I think that
9 we will go and tell you that, in fact, the USO
10 isn't going to be a problem here because it's not
11 going to be one of the considerations that needs to

12 be done.

13 But what we can tell you one thing about
14 the USO is that the USO tells us that in the
15 context of Jack and Jill that Jack has chores to
16 do. That's what it tell us. There are some things
17 that Jack has to do before Jack can go out in the
18 evening and play. But it doesn't make them
19 different. It just says that they have something
20 to do, and to the extent it is relevant, we will
21 acknowledge where it's relevant, but more
22 importantly where it's not relevant, and that's

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14:52:29 1 important. And we will get to one of my next
2 points, which I will talk about shortly, which will
3 be the issue of the relationship between the public
4 policy type of justification and the measure that
5 takes place.

6 I don't know if that's answered enough of
7 what you want.

8 ARBITRATOR FORTIER: For the time being,
9 yes.

10 MR. APPLETON: But no doubt, if you'll
11 have more questions, I'm happy to answer them.

12 The concept of equality of competitive
13 opportunities is different from the notion of a
14 general obligation of nondiscrimination against

15 foreigners. Now, this general obligation of
16 nondiscrimination is contained, for instance,
17 within the content and meaning of NAFTA Article
18 1105, the international law standard.

19 National treatment, on the other hand,
20 only requires governments; I will say it requires
21 government even-handedness between domestic and
22 foreign actors competing in the same marketplace.

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14:53:35 1 Now, this is a function of the likeness
2 test. A host government only has to treat an
3 investor of another NAFTA party no less favorably
4 when that investor is competition with a domestic
5 investor. Every NAFTA Chapter 11 panel that has
6 made a ruling has reached the issue of--sorry,
7 every panel that's made a ruling on like
8 circumstances has dealt with the question of
9 whether the investor of the other NAFTA party is
10 competing in the same business for the same
11 customers.

12 Now, obviously, judgments need to be made
13 about how much overlap there is concerning the
14 business and its customers. Again, we have
15 tendered ample evidence that UPS, Canada Post, and
16 Purolator are the major rivals in the Canadian

17 marketplace for express delivery services.

18 Now, they are not just competitors in the
19 market, but they are the principal competitors in
20 that market.

21 PRESIDENT KEITH: Would you--

22 ARBITRATOR FORTIER: You did invite

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14:54:52 1 questions.

2 MR. APPLETON: I didn't, but I'm happy to
3 have your questions.

4 ARBITRATOR FORTIER: I read it into your
5 opening words.

6 If Purolator did not exist, would you be
7 here today?

8 MR. APPLETON: The answer is yes.
9 Purolator is one part of a claim, but most of the
10 claim is not about Purolator, but there are issues
11 about Purolator. Purolator, as we will talk about
12 shortly, Purolator clearly is getting unfair
13 benefits, but there are very significant issues
14 that arise out of the behavior and organizational
15 approach and competitive approach or in the words
16 of the Radwanski Commission, viciousness of Canada
17 Post, which is able to use its monopoly in the
18 Canadian market in a very unfair way.

19 So, we would be here, nonetheless, I'm
20 afraid.

21 Now, the other case, I was just referring
22 to the fact that their principal competitors in the

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14:56:04 1 market, UPS, Canada Post, and Purolator, but while
2 in other cases tribunals may have to make very
3 difficult and very subtle judgments about the
4 required degree of competition, the closeness of
5 the competitive relationship, this case is not one
6 of them.

7 For each UPS claim there is less favorable
8 treatment of the competing foreign and domestic
9 interests, and given that the central focus of the
10 analysis of like circumstances is the competitive
11 relationship, how do public policy considerations
12 figure into that analysis? And that was really, I
13 think, Mr. Fortier, that you were really trying to
14 get to at, but we all are trying to get at that
15 question.

16 Now, in interpreting the like
17 circumstances language in the services chapter,
18 Chapter 12 of NAFTA the U.S.-Trucking panel--we
19 will have to put the slides back on--the
20 U.S.-Trucking panel defined the appropriate scope
21 for public policy in the determination of like

22 circumstances, given the structure and objectives

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14:57:13 1 of NAFTA, and I set these out on slide four to make
2 it a little easier.

3 The test in question is a necessity test,
4 and it's a matter of the government showing that
5 even though the investor of the other NAFTA party
6 and the domestic investor are competing for the
7 same customers in the same business, that the
8 overriding public policy objectives could not be
9 realized unless the government was able to deny the
10 foreign investor in question no less favorable
11 treatment.

12 Now, there are very good reasons why the
13 approach of the panel in the trucking case was a
14 strict one. It merely--it's merely asserting if
15 legitimate public policy were enough to exempt the
16 government from the obligations of national
17 treatment, very many aspects of the NAFTA would be
18 rendered completely meaningless. To preserve the
19 flexibility to deal with a wide range of social and
20 public policy objectives, the NAFTA parties made
21 numerous reservations to NAFTA Article 1102, there
22 would have been no reason to make these

14:58:35 1 reservations at all, to spend all that time to be
2 able to deal with that and all the thought that
3 went into that process, negotiation between the
4 parties as they put them together, if NAFTA Article
5 1102 did not apply to bona fide public policy
6 measures.

7 Correspondingly, there would have been no
8 reason to create the specific NAFTA Chapter 11
9 exceptions for government procurement, for
10 subsidies, and cultural industries if such measures
11 only needed to be taken for a bona fide public
12 policy rationale, and therefore allow a government
13 to avoid its national treatment obligation.

14 Now, government subsidies are almost
15 always given for some public purpose, and the NAFTA
16 parties knew that they were not consistent with
17 NAFTA Article 1102, and in order to give these
18 governments greater flexibility to pursue policy
19 objectives in a transparent manner, subsidies were
20 exempted. We will have a chance to talk about
21 subsidies, but subsidies were exempted. So, that's
22 why the U.S.-Trucking panel held a strict necessity

14:59:55 1 test would be required if public policy was to
2 override a conclusion of like circumstances based
3 on the reality of the marketplace.

4 Now, this Tribunal must decide whether
5 Canada has met this necessity test in its
6 invocation of public policy. Canada has not, and
7 Canada cannot meet this test. Nor, indeed, can
8 Canada even meet a more relaxed test of
9 proportionality as it cannot show a rational
10 connection between its measures that violate
11 national treatment and the public policy objectives
12 that it asserts. Canada's public stated public
13 policy objectives are patently not connected to the
14 measure.

15 Why don't we just review each of UPS's
16 claimed violations of national treatment and then
17 look at the public policy objectives Canada has
18 asserted, and then we're in a position to be able
19 to see whether the treatment in question has a
20 necessary, reasonable, or any connection at all to
21 achieving those objectives. And in so doing, I'm
22 going to give you a little bit of an upfront view

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15:01:21 1 of where we're going to take some of the evidence,
2 but I'm not going to refer to evidence. Dr. Wong

3 and Mr. Wisner will talk about evidence. Dr. Wong
4 will talk about the Universal Service Obligation,
5 as will Mr. Wisner, in depth. They will talk about
6 these types of things. I'm only going to talk
7 about things in generalities to permit us to be
8 able to have an open process right now.

9 So, I would ask the Members of the
10 Tribunal to the extent that they can hold
11 themselves back from asking some more probing
12 questions just to bear that in mind. I'm happy to
13 answer any question, but not to produce a document
14 that will force us to turn the cameras off right
15 now.

16 Both Dr. Wong and Mr. Wisner, when they
17 look at these other issues, will be able to talk a
18 little bit about the Universal Service Obligation.
19 And Canada essentially says that it must grant
20 Canada Post a monopoly and allow it to compete in
21 nonmonopoly markets to fund a Universal Service
22 Obligation for basic postal service. However, that

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15:02:40 1 doesn't work. Supplying courier services at
2 incremental costs does not generate any
3 contributions to the overhead needed to meet this
4 alleged Universal Service Obligation. Only
5 maximization of a contribution from courier

6 services is consistent with that public policy
7 objective that Canada asserts, and this is exactly
8 precisely what UPS asks for.

9 In the area of Customs, Canada's genuine
10 public policy objectives both for security and
11 economic objectives are actually undermined when
12 Customs officers failed to apply customs laws, that
13 Canada Post was the result that goods contained in
14 mail in the postal stream are not inspected. For
15 the Publications Assistance Program, Canada
16 describes its policy objectives as the protection
17 of Canadian culture, and suggests that this
18 objective would be undermined if UPS were to
19 deliver publications as opposed to Canada Post
20 because they assert that UPS Canada cannot provide
21 a guarantee that it would deliver publications
22 under the program.

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15:04:07 1 Now, in his opening, Mr. Whitehall
2 suggested UPS Canada might deliver publications
3 now, but we might change our mind next year because
4 it's no longer profitable or because we have
5 different business interests. These are his words.
6 They're at page 178 of the transcript.

7 Mr. Whitehall said that there was no

8 danger with Canada Post because it has a statutory
9 obligation to deliver to every address in Canada.
10 However, in order to achieve its public policy
11 objective, Canada needs only to ensure that Canada
12 Post is available to deliver publications in case
13 other couriers are unable or unwilling to do. It
14 need not exclude those couriers from the
15 marketplace; or alternatively, Canada could
16 contractually require that the carrier guarantee
17 that level of delivery, and this is the ordinary
18 way that commitments made enforceable in the
19 commercial world. Indeed, not only is the
20 exclusion of UPS and other competing providers from
21 the marketplace not necessary to achieve Canada's
22 goal of reliable cultural protection, but it's in

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15:05:34 1 contradiction to it. The more providers in the
2 marketplace with different products, coverages, and
3 prices, the more avenues publishers have to ensure
4 effective delivery of their publications to
5 Canadians and to readers.

6 In the absence of these kinds of
7 connections, Canada is in effect saying that Canada
8 Post is in itself a cultural industry. All it is
9 doing is taking money out of one governmental
10 pocket and putting it into another governmental

11 pocket, and that has nothing to do with public
12 policy at all.

13 The concept of equality of competitive
14 opportunities allows this Tribunal to consider
15 claims where there is explicitly different
16 treatment of the investor and domestic investor in
17 like circumstance. And it also allows the Tribunal
18 to consider a situation where even though there is
19 not an explicitly different treatment of the
20 investor, some general rule or intervention by
21 government is undertaken in the manner that is not
22 evenhanded, resulting in less favorable treatment,

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15:07:02 1 even if there is not formal or explicitly different
2 treatment.

3 I'm going to put slide five up which is
4 helpful to give some concrete examples in the
5 jurisprudence. What we have done is we have set
6 out an excerpt from the Section 337 case from the
7 GATT. And this is set out in Tab 13 of the UPS
8 authorities. In this case, of course, a very
9 famous case, a GATT panel considered the first type
10 of situation, and that is that the United States
11 applied different enforcement rules on intellectual
12 property to certain foreign products in relation to

13 domestic products.

14 Now, there is no disagreement here that
15 the treatment was different. The question,
16 therefore, was is the different treatment no less
17 favorable? Not all differences in treatment lead
18 to disadvantages to like foreign investments.

19 Now, the panel in the 337 case suggested
20 that the Government of the United States could show
21 that its measures were consistent with national
22 treatment if it showed that in all instances the

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15:08:29 1 differences in treatment would not result in less
2 favorable treatment. That is, would not show a
3 lack of equal competitive opportunities. But the
4 burden of proof is now on the government to show
5 that the different treatment nevertheless did not
6 undermine equality of competitive opportunities in
7 those circumstances.

8 Now, in this case, there are a number of
9 measures that clearly entailed different treatment
10 of Canada Post and UPS. The question for this
11 Tribunal, then, is in regard to each of these
12 measures, has Canada shown that the differences in
13 treatment do not lead to a denial of equality of
14 economic opportunities.

15 Now, if I want to look at the second kind

16 of situation, and that is the situation where there
17 is no explicitly different treatment of the
18 investor on the one hand and a domestic investor in
19 like circumstances. In such a case, the Tribunal
20 exercises a complex judgment. Does the measure, in
21 fact, deny equality of competitive opportunities
22 even though it does not contain formally different

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15:09:52 1 treatment? Now, this involves a contextual
2 analysis of the marketplace and the benchmarks that
3 the government sets in shaping or constraining
4 market competition.

5 If we look at slide six, I will give you
6 an example from the GATT again, the Canada-Beer
7 case. This is set out at Tab 161 of the UPS
8 authorities, and this illustrates how a tribunal
9 might apply the notion of equality of competitive
10 opportunities in such a situation.

11 Now, at issue in the beer case was, among
12 other measures, a minimum price requirement for the
13 sale of beer in some provincial retail outlets.
14 The minimum price applied to all beer producers,
15 whether they were imported or like domestic
16 products was the same. There was no formally
17 different treatment, but the minimum price was set

18 according to the costs of the major domestic
19 Canadian beer producers. A market baseline was
20 therefore created that prevented the producers of
21 imported products from exploiting their competitive
22 advantage, which is primarily their lower cost.

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15:11:22 1 Now, I'm going to turn to the--what the
2 Tribunal said, but, of course, the issue in beer is
3 always difficult because every country and even
4 every region of every country believes they have
5 the best beer, and they would never admit the
6 difference is price. They always say the
7 difference is taste. But if you looked and gave
8 the proper analysis of that industry, you would see
9 that fundamentally the difference is price, and
10 that's what the Tribunal came to as well.

11 If we see paragraph 5.3, which is set out
12 here on the slide, the Tribunal found that minimal
13 prices applied equally to imported and domestic
14 beer, and that did not necessarily accord equality
15 of competitive opportunities to imported and
16 domestic beer. Whenever they prevented imported
17 beer from being supplied at a price below that of
18 domestic beer, they accorded in fact treatment to
19 imported beer less favorable than that accorded to

20 domestic beer. That's what it says. When they
21 were set at the level at which domestic brewers
22 supplied beer, as was the case in two Canadian

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15:12:34 1 Provinces, New Brunswick and Newfoundland, they did
2 not change the competitive opportunities accorded
3 to domestic beer, but they did affect the
4 competitive opportunities of imported beer which
5 could otherwise be supplied below that minimum
6 price.

7 In sum, the equality of competitive
8 opportunities concept reflects the insight that
9 different treatment may in some circumstances be
10 justifiable when it doesn't actually create a
11 competitive disadvantage; whereas identical
12 treatments may skew the marketplace in ways that
13 actually result in a denial of equality of
14 competitive opportunities.

15 Governments can intervene in the
16 marketplace using a very wide variety of legal and
17 regulatory forms, and these can change over time.
18 A trade agreement like NAFTA cannot address all of
19 these forms, and thus the test is focused on
20 substance, not the form, and the principle of
21 equality of competitive opportunities is the

22 underlying theme, the leitmotif of that principle.

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15:13:57 1 Whether the intervention is explicitly
2 different or similar treatment, that cannot be
3 decisive in itself.

4 Now, let's recap for a moment the various
5 differences in treatment between Canada Post,
6 Purolator, and UPS, and consider whether Canada has
7 shown that even though the treatment is different
8 that it is nevertheless no less favorable.

9 Canada must demonstrate that equality of
10 competitive opportunities is respected, despite the
11 differences in treatment. In the case of Customs,
12 Canada has asserted that the different treatment of
13 UPS products in the courier stream rather than the
14 postal stream products, postal stream products, I
15 think, gives no disadvantage to UPS. Canada
16 doesn't explain in any way how that could possibly
17 be the result of not appropriately imposing duties
18 and taxes on packages in the postal stream. While
19 rigorously enforcing the law when it comes to UPS,
20 there is a fundamental difference of treatment
21 here. By not inspecting or charging duty on its
22 packages, Canada Post is able to offer its

15:15:38 1 customers something that UPS is not able to do. A
2 very real likelihood that they will be able to
3 avoid duties and taxes due on the shipments. This
4 is not proper. This is not legal. Canada has not
5 even tried to deny that there is a disadvantage to
6 UPS that flows from its underenforcement of Customs
7 law in the postal stream, and Canada has provided
8 no evidence of its own. No study or other evidence
9 that will controvert the evidence of UPS that there
10 is wide scale underenforcement in the postal
11 stream.

12 Let's move on to the issue of Purolator.
13 Purolator has special access to Canada Post
14 infrastructure. Canada Post gives Purolator access
15 to its monopoly infrastructure that it has not
16 given to UPS. This is a patently clear difference
17 in treatment. Canada contends, nevertheless, that
18 the treatment is no less favorable because
19 Purolator accesses--sorry, Purolator acquires
20 access through contracts that charge market prices
21 to Purolator, and therefore such access does not
22 offer a cost advantage to Purolator in relation to

15:17:16 1 UPS. And they also suggest that Canada Post has
2 offered UPS the same access.

3 Now, the actual evidence in the record,
4 however, shows that neither proposition can be
5 substantiated. Neither. Canada has not disclosed
6 information concerning the prices that Purolator
7 pays for access to Canada Post's infrastructure,
8 and the relationship of these prices to market
9 criteria, and that Canada Post has offered the same
10 infrastructure access to UPS.

11 So, except for Canada just saying so, it is
12 impossible to ascertain either--whether Purolator
13 obtains access to infrastructure at market prices,
14 or whether the same access is available to UPS on
15 equal terms. It's impossible to tell. And given
16 Canada's failure to disclose and given that the
17 burden in any case is on Canada to show that the
18 different treatment is nevertheless no less
19 favorable, it behooves this Tribunal to make a
20 finding that different treatment in this particular
21 case must be presumed to be less favorable
22 treatment.

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15:18:49 1 Now, as for Canada Post's own use of its
2 monopoly infrastructure--

3 ARBITRATOR FORTIER: On what legal basis

4 do you say that?

5 MR. APPLETON: We will take you through
6 the issue on adverse and we'll make some very
7 specific submissions as we go through. Again, this
8 is one of the areas we don't wish to address right
9 now.

10 ARBITRATOR FORTIER: That's fine, but it's
11 based on the adverse inference position of UPS?

12 MR. APPLETON: It's not entirely, but I
13 think you need to hear it all together, if you
14 understand where I am. So the answer is, yes, we
15 will get back to that at an appropriate point.

16 Given Canada's failure to disclose, and
17 given the burden is in any case on Canada to show
18 that different treatment is nevertheless no less
19 favorable, that is going to be a question that we
20 will need to carefully consider. And again, as for
21 Canada Post's own use of its monopoly
22 infrastructure, Canada suggests that even though

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15:20:06 1 there may be different treatments because UPS does
2 not have such access, the treatment is no less
3 favorable since UPS is free to develop its own
4 infrastructure. UPS can develop its own network.
5 And to compete with Canada Post in the courier

6 market using its own network.

7 But this avoids the central fact. Canada
8 Post's infrastructure is sustained by a
9 government-granted monopoly, and UPS is obviously
10 not a government-granted monopoly. Once this is
11 understood, the less favorable treatment of UPS
12 becomes obvious.

13 Any genuine cost advantage that UPS may
14 have in the Canadian market is undermined by Canada
15 Post's ability to provide its own services without
16 having to pay market costs. Canada has attempted
17 in these proceedings and its pleadings to confuse
18 the exploitation of economies of scale and scope
19 with the failure of Canada Post's courier
20 operations to pay market costs for the use of a
21 monopoly infrastructure. Proper costing of access
22 to infrastructure does not eliminate the economies

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15:21:31 1 of scope and scale. To the contrary, such costing
2 reflects or internalizes these economies.

3 Now, Canada has conferred a monopoly on
4 Canada Post for Lettermail and given Canada Post a
5 mandate to compete in the courier market. At the
6 same time, Canada allows Canada Post to use its
7 monopoly infrastructure for the provision of
8 courier services without Canada Post's courier

9 operations having to pay a market-based price for
10 that infrastructure.

11 And by contrast, UPS is subject to the
12 full market-based disciplines that it must pay
13 market-based prices for all of its resources.
14 Canada's failure to prevent Canada Post from using
15 its monopoly infrastructure to avoid market
16 disciplines is a denial of equality of competitive
17 opportunities and is a clear case of less favorable
18 treatment.

19 I think this is probably a good time to be
20 able to turn things over to Mr. Wisner. It may be
21 a good time you might want to take a short break.
22 I leave it to you. We are prepared to continue,

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15:22:55 1 but they will need to move the podium.

2 PRESIDENT KEITH: Do we also need to do
3 something about the in camera business as well?

4 MR. APPLETON: Yes, thank you for
5 reminding me, Mr. President. At this point, we
6 would be concluding this portion of the public
7 aspect of the discussion, and turning to a careful
8 review of the evidence in this case, and that would
9 mean that we would have to go in camera.

10 PRESIDENT KEITH: We will need a few

11 minutes to handle that sort of thing.

12 If we take a 10-minute break, I keep
13 saying 10 minutes and it's never actually complied
14 with, but I will keep trying, I suppose.

15 (Brief recess.)

Pages 767 - 846 : this portion of the hearing was held in camera and the pages
have accordingly been redacted.

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18:10:09 1 ARBITRATOR FORTIER: Thank you.

2 MR. WISNER: I'm done for the day.

3 PRESIDENT KEITH: Thank you very much, and
4 thanks to the cooperation of counsel.

5 If, as we have discussed, if we could have
6 a quick talk now with counsel about how they see
7 the situation, and we will resume at nine tomorrow.
8 Thank you.

9 (Whereupon, at 6:10 p.m., the hearing was
10 adjourned until 9:00 a.m. the following day.)

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18:10:29 1

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