IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION B
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
and
IN THE MATTER OF AN ARBITRATION UNDER
UNCITRAL ARBITRATION RULES

B E T W E E N:

UNITED PARCEL SERVICE OF AMERICA, INC.
Claimant

and

GOVERNMENT OF CANADA
Respondent

Rt. Hon. Justice Sir Kenneth Keith, KBE
L. Yves Fortier, C.C., Q.C.
Dean Ronald A. Cass

**PETITION TO THE ARBITRAL TRIBUNAL
CANADIAN UNION OF POSTAL WORKERS
AND OF THE COUNCIL OF CANADIANS**

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SUBMISSIONS OF:

THE CANADIAN UNION OF POSTAL WORKERS

- AND OF -

THE COUNCIL OF CANADIANS

Introduction

1. The purpose of this petition is to request:

   (i) standing as parties to any proceedings that may be convened to determine the claim made by UNITED PARCEL SERVICE OF AMERICA, INC. (UPS) in this matter;

   (ii) in the alternative, should the status as party be denied to one or both Petitioners, the right to intervene as *Amicus Curiae* in such proceedings be accorded on terms that are consistent with the principles of fairness, equality and fundamental justice;

(iii) disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal;

(iv) the right to make submissions concerning the place of arbitration;

(v) the right to make submissions concerning the jurisdiction of this Tribunal, and once they are fully known, the arbitrability of the matters the disputing investor has raised; and,

(vi) an opportunity to amend this Petition as further details of this claim become known to the petitioners.

2. In accordance with the submissions we set out below, the Petitioners seek the right to participate in these proceedings on the following grounds:

(i) Both Petitioners respectively have a direct interest in the subject matter of this claim, and may be adversely affected by the award of this Tribunal. Accordingly it would be contrary to both national and international principles of fairness, equality and fundamental justice to deny them the opportunity to defend their interests in these proceedings;

(ii) Both Petitioners also have an interest in the broader public policy implications of this dispute. These not only implicate the full array of Canada Post services, but many other public service sectors as well. Notwithstanding its reliance upon UNCITRAL procedures, this dispute is not essentially private in character, but rather is likely to have far reaching impacts on a broad diversity of non party interests. Accordingly it would be unfair and inconsistent with the principles of equality fairness and fundamental justice to exclude from these proceedings those who wish to address these issues and are uniquely qualified to do so. Moreover, allowing such participation will provide this Tribunal with an important and different perspective on the questions before it and broader consequences that may follow from its determination of those questions;

(iii) Both Petitioners share two further interests in this matter. The first, is to ensure judicial oversight by the appropriate Canadian court of these proceedings in accordance with Canadian constitutional principles and the rule of law. The second, is to address the lack of transparency that has historically attended international arbitral processes. Under *UNCITRAL Arbitration Rules* only the parties have the right to make submissions concerning the place of arbitration, the arbitrability of the issues in dispute, or the in-camera nature of the proceedings. Conversely, non-parties have no right under these rules to invoke judicial review of the tribunal's award. Accordingly, a failure to accord the Petitioners standing as parties to these proceedings would effectively deny or limit their opportunity to make

submissions concerning these key questions or to invoke the supervisory jurisdiction of a Canadian court and consequently deny the treatment in accordance with fairness, equality and fundamental justice;

(iv) By reason of these interests, the Petitions have a unique and distinct perspective and expertise concerning the issues that have been raised by this claim that would be of assistance to this Tribunal; and on the grounds that,

(v) This Tribunal has the authority pursuant to Article 15(1) of the *UNCITRAL Arbitration Rules* to accord standing to third parties on whatever terms it deems appropriate subject only to the requirement that all parties are treated with equality and given the full opportunity of presenting their case. In exercising this discretion it is incumbent on the Tribunal to have regard to all applicable rules of international law including those set out in human and labour rights conventions and treaties which establish the right of all persons to equal and fair treatment before the law.

3. This Petition is made without prejudice to the Petitioners' rights to challenge the validity of these proceedings or the procedures set out in Section B of Chapter Eleven of the North American Free Trade Agreement (NAFTA).

PART I: THE PETITIONERS

The Canadian Union of Postal Workers

4. The Canadian Union of Postal Workers (CUPW – STTP) represents approximately 46,000 operational employees of Canada Post who provide postal services to Canadians throughout the country. Over half are letter carriers and spend a portion of their time handling, processing and delivering expedited and express courier products (Priority Courier and Xpresspost services).

5. Rural mail service in Canada is also provided by approximately 5000 Route Mail Couriers and Suburban Service Drivers, who are excluded by the *Canada Post Corporation Act* from the *Canada Labour Code* and collective bargaining rights. These workers are also involved in the delivery of parcel and express courier services. In March 1997, these workers formed The Organization of Rural Route Mail Couriers (ORRMC). ORRMC and CUPW-STTP have a cooperative working relationship with the latter volunteering to provide the human, material and financial resources to assist with the former with its organizing efforts. The 3rd National Vice President of CUPW-STTP is also an ex officio member of the Executive of the Organization of Rural Route Mail Couriers.

6. CUPW-STTP also represents approximately 40,000 union members who are entitled to pension benefits as Canada Post employees. For many years these

employees participated in the Canadian Public Service pension plan. But in consequence of recent statutory amendments (*Public Sector Pension Investment Board Act* - Bill C-78), Canada Post Corporation will no longer participate in the public service pension plan, effective Oct. 1, 2000.

7. To protect the pension entitlement of its members, CUPW-STTP has been actively involved in defending its members' pension entitlements. It has lobbied the federal government, joined advisory committees tasked with pension plan reform and will be negotiating with Canada Post. The issue of its members' pensions remains a critical priority for CUPW-STTP.

8. CUPW-STTP has also been actively involved in the public policy debate about postal services and has made detailed representations to government concerning the role and mandate of Canada Post; the organization and delivery of postal, parcel, courier and electronic communication services; and the public service objectives of this Crown Corporation. In this regard, it has offered the unique perspective and expertise of the thousands of men and women who are employed in the delivery of such services on a day to day basis. In this regard it has often presented views and submissions that have not been in accord with those of Canada Post or the Canadian government about how best to achieve the objectives of universal and affordable postal and related services.

9. CUPW is also firmly committed to working within the broader labour movement, and with groups in civil society, to preserve the integrity of Canadian public services across the full spectrum of these social services from heath care and education to municipal services.

10. These and other matters material to this Petition are set out in the affidavit of Deborah Bourque, 3rd National Vice President of CUPW-STTP, which is submitted in support of this Petition.

11. Together with the Council of Canadians, on March 28, 2001 CUPW-STTP issued an application in the Ontario Superior Court of Justice seeking, *inter alia*, declaratory judgements concerning the validity of the enforcement procedures set out in Section B of Chapter Eleven, in light of Canadian constitutional requirements.

The Council of Canadians

12. Founded in 1985, The Council of Canadians (the Council) is a non-governmental organization with more than a 100,000 members, many of whom participate in the activities of more than 60 chapters across the country. Strictly non-partisan, the Council lobbies Members of Parliament, conducts research, and runs national campaigns designed to raise public awareness, and to foster democratic debate about some of Canada's most important issues, including: the future of Canada's

social programs; the need to renew its democratic institutions; and, protecting public health and the environment.

13. The Council is strongly committed to preserving the integrity of Canadian postal services as public services providing high quality, reliable and affordable mail, parcel and courier services to all Canadians regardless of where they live. Moreover it believes that if the vitality of this public institution is to be assured for the years ahead, Canada Post must respond to new challenges, including those in the area of telecommunications, by expanding the types and availability of the services its provides, not by reducing them.

14. The Council also has a close working relationship with Rural Dignity of Canada (Rural Dignity), a grassroots citizens' group committed to strengthening rural communities, and maintaining and enhancing services in rural areas. Rural Dignity's coordinator, Cynthia Patterson, is a member of the Board of Directors of the Council. Both the Council and Rural Dignity made submissions to the Canada Post Mandate Review, the conclusions of which are selectively quoted by UPS in support of its claim. Those submissions are attached to the Affidavit of Cynthia Patterson which is filed in support of this Petition.

PART III: OVERVIEW

The Claim

15. The petitioners are at the disadvantage of having been denied access to the disputing investor's Statement of Claim, memorials and other pleadings which may have been communicated in this matter. In these circumstances it is impossible to identify the full nature and extent of the petitioners' interests in these proceedings. Accordingly we have requested an opportunity to make supplemental submissions should this Tribunal require that UPS make this material available to us, or in the event that it otherwise becomes available.

> Affidavit of Deborah Bourque, Sworn October 29, 2000 (Affidavit of Deborah Bourque).

16. Nevertheless certain of the issues raised by this claim can be discerned from the Notice of Intent to Submit a Claim and The Notice of Arbitration which have been communicated by UPS and made publicly available. From these documents we know that UPS has made the following allegations:

(i) that Canada Post has used its "letter mail monopoly infrastructure" to cross-subsidize its non-monopoly courier businesses (Priority Courier, Skypak [sic], Xpresspost and Purolator) in violation of NAFTA Articles 1502(3)(d) and 1502(3)(a);

(ii) that Canada Post has denied UPS National Treatment, as required by Articles 1102 and 1202, by failing to provide it the same access to Canada Post's delivery system that it makes available to its own courier services;

(iii) that Canada has also denied UPS National Treatment by "administering, operating, assuming all unfunded liabilities and negotiating the terms of the pension plan that governs Canada Post employees, including those employees who render service to Xpresspost, Priority Courier, and the parcel business of Canada Post while not providing such privileges to UPS";

(iv) that Canada has further denied UPS National Treatment by providing, through Canada Customs, preferential treatment to Canada Post and its courier and parcel services; and finally,

(v) that Canada has failed to provide UPS the Minimum Standard of Treatment required by Article 1105 by failing to carry out in good faith, its obligation under Article 1503(3)(d) to ensure that Crown Corporations not engage in anti-competitive practices.

17. In other words, UPS alleges that Canada Post has taken advantage of its monopoly position to underwrite the costs of its competitive parcel and courier delivery services. UPS argues that by allowing Canada Post to make its infrastructure available to its non-monopoly courier and parcel delivery services, Canada is in breach of several NAFTA provisions. It further asserts that Canada has failed to prevent Canada Post from conducting its affairs in this manner and has actually underwritten such practices by according Canada Post preferential customs treatment and by assuming certain responsibilities concerning the pension plan that governs Canada Post employees.

Investor-State Procedures

18. Chapter Eleven of the NAFTA is comprised of two parts. Section A establishes a number of broadly framed constraints on government measures investors of another Party and their investments. Section B establishes certain dispute resolution procedures which may be unilaterally invoked by investors of another Party to claim damages and other relief arising from alleged violations of the obligations or constraints established by Section A and two specified sub-provisions of Chapter Fifteen.

19. While analogues can be found for the provisions of Chapter Eleven of the NAFTA, these provisions should nevertheless be regarded as representing a significant departure from the norms of international law in two important ways. First, investor-state procedures give foreign investors, including corporations, the right to enforce an international treaty to which they are neither party nor under which they

have any obligations. Second, investor-state dispute procedures extend the application of international commercial arbitration regimes to claims that have no foundation in contract or any other legal relationship, and which can not properly be considered commercial in character.

> M. Sornarajah, *The Settlement of Foreign Investment Disputes*, 2000 Kluwer International Law, the Netherlands, pp. 151-170.

20. A growing number of foreign investors are now taking advantage of these enforcement procedures to claim substantial damages from the NAFTA Parties for alleged breaches of their obligations under the Agreement. The targets of these claims include water export controls, toxic fuel additive regulations, hazardous waste facility licensing procedures, hazardous waste export controls, the civil jury process of a US state, and the Softwood Lumber Agreement between Canada and the United States.

> International Institute for Sustainable Development and the World Wildlife Fund, *Private Rights, Public Problems*, 2001.

PART IV: THE PETITIONERS INTERESTS IN THESE PROCEEDINGS

21. The following submissions are organized under three headings which describe the nature of the Petitioners' interests in these proceedings:

(A) the direct and unique interests of the Petitioners;

(B) their expertise and unique perspective on the broader public interest issues that are raised by this dispute; and,

(C) their interest in making submissions concerning certain matters that are exclusively reserved to those with the status of parties to these proceedings.

(A) THE PETITIONERS' DIRECT INTERESTS

22. The relief sought by UPS includes damages in excess of $160 million US. If this Tribunal finds Canada to be in breach of its obligations under NAFTA concerning the activities of Canada Post, the attendant liability would presumably continue so long as Canada remains in non compliance. In this circumstance, it is not reasonable in our view to anticipate that Canada would maintain such offending measures at the price of paying damages in perpetuity, or suffering ongoing disapprobation for failing to honour its international obligations.

23. For example, UPS complains that by integrating the delivery of letter, package and courier services Canada Post has cross-subsidized its courier business in breach of NAFTA constraints. In support of this assertion it lists the provision of a number of services which are currently provided by Canada Post Employees, and CUPW-STTP members, including: postal box pickups, sorting, handling, storage, delivery, retail sales, accounts management, and e-commerce.

24. If this argument prevails, Canada would be under considerable pressure to restructure the current framework of Canada Post service delivery. The particular approach it chooses would obviously reflect the precise findings of this Tribunal. Nevertheless one foreseeable outcome would dismantle the integrated mail, courier and package delivery services that Canada Post currently provides. This result would have both immediate and long term consequences for Canada Post employees including those who are members of CUPW-STTP.

25. In the short term, these consequences are certain to include revised job classifications for those employees currently providing the services that Canada Post may be directed by the Canadian federal government to abandon. Such downsizing of service delivery may also include lay-offs and permanent job reductions. Indeed, postal service restructuring has had serious impacts on workers in the past. For example, when the government accepted the recommendation of the Canada Post Mandate Review that the crown corporation get out of most of its admail business, within a week of receiving that direction, Canada Post fired 10,000 admail workers. This represented the largest lay off in Canadian history.

Affidavit of Deborah Bourque , Exhibit "A," p. 8.

26. Over the longer term, and to the degree that the financial viability of Canada Post is compromised by constraints that preclude it from providing the full range of current services, the job security of all of its employees may be adversely affected. As one example, the Canada Post Mandate Review concluded that Canada Post revenues would be reduced by between $80 million and $250 million were it to divest itself of competitive courier and admail businesses. New revenue constraints often lead to efforts to cut labour costs, and indeed this did occur when Canada Post abandoned most of its admail business.

Ibid. at pp. 8 and 10.

27. Furthermore the security of CUPW-STTP members' pensions has also been put at risk by UPS allegations that Canada is in breach of its NAFTA obligations by, *inter alia*, having acted as guarantor of the pension plan's unfunded liability. The nature of this UPS complaint is not clear from the limited material available, and we can only speculate about how UPS would suggest that Canada cure this alleged NAFTA breach. This leaves entirely at large the possibility that the future financial security of tens of thousands of Canada Post employees, both past and present, may be at stake in these proceedings.

Affidavit of Deborah Bourque paras. 4 and 5.

28. Another aspect of the unique and direct interest that CUPW-STTP has in this proceeding concerns the way in which costs are assigned to the services provided by its members. The costing of postal services is central to the UPS claim, and this Tribunal's conclusions on costing are likely to influence any subsequent restructuring of Canada Post services should it or Canada be found to be in violation of the NAFTA. Moreover, on this critical issue, the views of CUPW-STTP and Canada Post have often been in conflict.

Affidavit of Deborah Bourque, sworn May 9, 2001.

29. For the membership of the Council of Canadians, this case also has foreseeable and direct potential consequences, as it does for others who depend upon the mail, parcel and courier services delivered by Canada Post. Moreover, the UPS claim threatens to undermine the integrity of the public infrastructure of Canadian postal services that the Council of Canadians, in partnership with such groups as Rural Dignity of Canada, has worked hard to defend.

Affidavit of Cynthia Patterson, Sworn Nov. 1, 2000.

30. As long as postal, parcel and courier services are delivered by Canada Post, they are subject to the statutory mandate of this Crown Corporation and to the policy direction of its sole shareholder, the Canadian government. Thus, Canada Post must provide universal service to all Canadians.

Affidavit of Deborah Bourque, Exhibit "A" pp. 21 - 25.

Affidavit of Cynthia Patterson, Exhibit "A" pp. 4 and 5.

31. If Canada Post is required to divest itself of these service functions, or otherwise devolve them to an arms length enterprise, they may no longer be subject to these statutory requirements. Potential consequences of such a divestiture would include a reduction in the availability of certain services, or an increase in their cost, or both. These impacts are likely to be most acute for residents of rural or remote communities because of the increased costs associated with providing such services to less populated communities.

Affidavit of Cynthia Patterson, paras. 8, and 9 and Exhibit "B" pp. 3 - 9.

32. For example, for residents of rural areas, potential consequences would include: reductions in the availability and quality of mail, parcel and courier services; substantial commutes to access basic postal services; a differential and higher fee structure for services; reduced employment opportunities for local residents; and a weakened support system that has played an important role in allowing many seniors to live independently.

Ibid.

33. Moreover, if post offices closures result, an important part of the institutional framework of Canadian society would be damaged. The importance of the post office to rural communities is underscored by the thousands of resolutions that have been passed over recent years by municipal councils opposing the closure of their local post office.

Ibid.

34. Furthermore, the experience in many rural areas with private courier delivery services reveals that such companies may have little interest in providing service to rural communities. For example in 1993, UPS closed more than a third of its Canadian outlets. Most of these closures took place in Northern Ontario and rural Quebec. Moreover, the quality of service offered by companies such as UPS to remote communities has often been inadequate, even when it was provided.

Ibid. at p. 21

(B) THE PUBLIC INTEREST AT ISSUE IN THIS DISPUTE

35. Notwithstanding the foreseeable impact of this claim on members of CUPW-STTP and the Council of Canadians, this claim raises issues of broad public interest. For the reasons set out below, in our submission these extend well beyond the delivery of postal, and courier services and impact other public and social services. Furthermore the expansive interpretation of NAFTA disciplines that UPS is urging would dramatically expand the scope for foreign investor claims and put at risk a broad diversity of government measures that should not be vulnerable to the such claims.

36. As noted, a key element of the UPS complaint is that Canada Post has cross-subsidized its courier business in violation of Articles 1502(3)(d) and 1502(3)(a). Arguably however, neither of these provisions apply in the present case. Indeed, the issue of compliance with the requirements of Article 1503(3)(d) can be seen as entirely beyond the scope of investor-state claims, because this particular article is not included by reference in Article 1116 which limits the ambit of such claims to those provisions explicitly cited. While Articles 1503(2) and 1502(3)(a) are noted in Article 1116, Article 1503(3)(d), is not. This point should be stressed, because many of the allegations made by UPS concerning the activities of Canada Post rely upon this provision.

37. To get around this constraint, we understand that UPS is making the following argument: Article 1105: *Minimum Standard of Treatment,* obligates Canada to treat investors of another party "in accordance with international law." UPS argues that this engenders a duty for Canada to carry out its international obligations in good faith. It would be our submission, that UPS has materially overstated the standing of the concept of "good faith" in international law, where it is only considered a background principle - "not in itself a source of obligation where

none would otherwise exist." Yet this is precisely the purpose for which UPS has cited this principle.

> *Case Concerning Border and Transborder Armed Actions. (Nicaragua v. Honduras), Jurisdiction and Admissibility*, [1988] C.J. Rep. 69 at 105. See also the statement by the Inter-American Court of Human Rights in *the Re-introduction of the Death Penalty in Peru* case (1995) 16 Human Rights Law Journal 9 at 13.

38. Thus UPS asserts that because this "good faith" obligation extends to all NAFTA obligations, any breach of NAFTA rules necessarily violates Article 1105. UPS argues that this is the case whether the violation is one that could otherwise have been directly enforced by a foreign investor or not.

39. The affect of this argument would, in our submission, elevate the concept of "good faith" to a status under international law that it has never achieved. Furthermore UPS would have this Tribunal ignore the explicit limits imposed by Article 1116 on the scope of investor-state disputes. If this argument were to prevail any provision of NAFTA could arguably be invoked, on similar reasoning, to found foreign investor claims. This would open the proverbial floodgates to investor-state litigation.

40. Furthermore, UPS invites this Tribunal to give Article 1503.3(d) such an expansive reading that it would substantially undermine the capacity of governments to maintain many public services in an era when monopoly and commercial service delivery is often comingled. Thus if the UPS view prevails, the integration of competitive services, even when offered on a not-for-profit basis, would taint the delivery of public services provided on a monopoly basis and render their providers vulnerable to similar investor-state claims.

41. If this view prevails, it would be reasonable in our submission, to expect similar claims for damages by foreign investors who have been "denied" access to the infrastructure of health care, municipal, education and other public services - in the same manner that UPS alleges it has been denied access to Canada Post infrastructure.

42. For example, in the area of public health care, an increasing array of services are now offered by public hospitals that are also provided by the private clinics on a for-profit basis. According to the reasoning UPS would have this tribunal adopt, a U.S. health care company operating such a clinic that was denied access to publicly funded hospital infrastructure, could assert a claim for damages alleging that the public hospital had engaged in anti-competitive practices. One can readily think of any number of "monopolies and state enterprises" which would be vulnerable to a

similar attack - public utilities, public auto insurance schemes and dozens of provincial and federal crown corporations.

43. On a related point, allegations concerning non-compliance by Canada with its obligations under Articles 1503(2) and 1502(3)(a) would extend the application of NAFTA investment disciplines to crown corporations and public agencies that should not arguably be subject to these requirements. This potential outcome arises because the practices complained of by UPS do not represent the exercise of "any regulatory, administrative or other government authority" that Canada has delegated to Canada Post. Indeed UPS makes no such assertion. Yet this proviso is a necessary element of the constraints established by these two provisions.

44. Rather, the activities UPS impugns can readily be regarded as business or administrative practices internal to the operations of Canada Post. Again, if the UPS position prevails, far reaching consequences are likely to ensue for many other public sector service providers operating with mandates similar to this particular federal crown corporation. Because both Petitioners share a commitment to preserving the full spectrum of Canadian public services, they also share a vital interest in the resolution of this issue.

45. Yet another issue that the Petitioners are seeking the right to raise, concerns the application of *UNCITRAL Arbitration Rules*, and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards* (New York, 10 June 1958) (New York Convention) to disputes arising under NAFTA investment provisions. In our submission, the extent to which a claim arising under NAFTA can be properly considered "commercial" in character, such as to invoke the application of these rules and convention, is a matter of broad public interest.

46. These concerns arise from what we submit is an underlying contradiction which overshadows the entire NAFTA regime of investor-state dispute resolution. Investor-state procedures seek to import to NAFTA, international arbitral processes established to resolve commercial disputes arising from defined legal relationships. Neither the *New York Convention*, nor the *Model Law*[1] was established to provide for the enforcement of broadly framed rights created by international treaty and for the benefit of an exclusive class of individual and corporate claimants.

M. Sornarajah *supra.*

47. Having drafted a treaty that substantially expands the reach of international commercial arbitration, Canada has then sought to graft this new limb onto the tree of domestic law that arguably was never intended to bear such fruit. Quite apart from the issue of its legal authority to do so, there is a serious question in our submission about the effectiveness of efforts to bring about this transformation.

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[1] The *UNCITRAL Model Law on International Commercial Arbitration (1985).*

This arises because the provisions of the *UNCITRAL Arbitration Rules* , the *New York Convention* and Canadian law - explicitly limit their application to disputes that require a more commercial, contractual, international and legal character than those arising solely from NAFTA provisions.

> *United Nations Foreign Arbitral Awards Convention Act*, [R.S.C. 1985, c.16 (2nd Supp.)], and the *Commercial Arbitration Act*, C-34.6 [R.S.,1985, c.17(2nd Supp.)] .

48. We raise these issues not for the purpose of making substantive submissions on their merit, but rather to illustrate the broader public interest that is at stake in this matter. Moreover, in our submission the Petitioners are uniquely qualified to contribute a perspective to these proceedings that would otherwise be absent.

49. Furthermore the Petitioners views on several of the issues that will arise in these proceedings are likely to be quite distinct from those of Canada and Canada Post. This conclusion is, in our submission, supported by these pleadings and by the affidavit evidence filed in support of them. Accordingly, the Petitioners' evidence and submissions would be unlikely to otherwise be presented to this Tribunal.

(C) THE SPECIAL RIGHTS OF PARTIES

50. The provisions of the *UNCITRAL Arbitration Rules* reserve, exclusively to those with standing as parties, certain matters that are of vital concern to the Petitioners. These in turn will determine the extent to which Canadian courts will maintain judicial oversight of these proceedings, and the transparency of these proceedings. Accordingly, the Petitioners' right to have their views considered on these and other key issues depends upon them being granted standing as a parties to these proceedings.

51. Pursuant to the provisions of Article 16 of the *UNCITRAL Arbitration Rules* , the parties may agree upon the place where the arbitration is to be held. Failing that agreement, the place of arbitration is to be determined by the tribunal.

52. The choice of jurisdiction is of particular importance because it will determine the extent to which Canadian courts may exercise supervisory jurisdiction with respect to these arbitral proceedings.

53. For example, certain provisions of the *Commercial Arbitration Act*, (which applies, *inter alia*, to arbitrations involving federal Crown Corporations) apply only where the place of arbitration is in Canada. These include Article 16 of the Commercial Arbitration Code which is scheduled to the Act and which effectively adopts the *UNCITRAL Model Law*.

Commercial Arbitration Act, Schedule (Section 2) Chapter I, General Provisions, Article I(2).

54. Thus, Article 16 provides the arbitral tribunal with authority to rule on its own jurisdiction and requires that any challenge to the arbitrability of the matter at issue be raised not later than the submission of the statement of defence. The tribunal may rule on such an objection either as a preliminary question or in its award on the merits. Where it does the former, subsection (3) of Article 16 provides:

> *Any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

55. Similarly Article V of the *New York Convention* delineates the grounds upon which the recognition and enforcement of an arbitral award may be refused. In addition to other grounds, Article V(2) provides:

> *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country. [emphasis added]*

56. It would be highly inappropriate, in our submission, for Canadian public policy concerning postal services to be judged by the public policy standards of the United States, Mexico or any other foreign jurisdiction which might be chosen as the place of arbitration. The same is true for the arbitrability of the issues in dispute. For these reasons the place of arbitration will not only determine whether Canadian courts may exercise judicial oversight of these proceedings but will also ultimately determine the public policy and legal framework against which the award may be judged.

57. Selecting a place of arbitration outside Canada might also cause hardship for non-parties who may be accorded the right to participate in the proceedings.

58. Furthermore under *UNCITRAL Arbitration Rules* , a number of other important

procedural matters are reserved exclusively to the parties to the proceedings. These include the right to make submissions or to participate in decision-making concerning the following matters:

(i) whether the hearings will be held in camera (Art. 25);
(ii) the right to introduce evidence (Art. 24);
(iii) the right to seek interim orders of protection (Art. 26);
(iv) the right to participate in settlement negotiations (Art. 34); and,
(v) the right to seek an interpretation of the award (Art. 35)

59. Subject to any common law or other statutory right to do so, the provisions of the *Commercial Arbitration Act* and the *New York Convention* set out procedures for invoking judicial review of arbitral awards. For the most part these remedies are only available to the parties. These include:

(i) the right to seek judicial review of a preliminary ruling by a tribunal on an objection to its jurisdiction (*Commercial Arbitration Code*, Article 16(3)).
(ii) the right to make an application to court for an order setting aside an award under the *Commercial Arbitration Code*, Article 34(2)(a).
(iii) the right to request a judicial order refusing recognition or enforcement of an arbitral award under the *Commercial Arbitration Code*, Article 36(1)(a) and under Article V (1) of the *Schedule to the United Nations Foreign Arbitrations Awards Act* which replicates the provisions of New York Convention.

60. Therefore in our submission, unless the Petitioners are accorded party status, they will be denied the right and opportunity to make submissions with respect to matters that will have a material, and potentially adverse impact on their rights and interests, and would therefore deny them treatment in accordance with the principles of fairness, equality and fundamental justice.

PART V: THE AUTHORITY TO GRANT STANDING

61. With the exception of the decision of a Tribunal convened to determine a NAFTA investor claim by Methanex Corporation against the United States of America (Methanex), this application for standing is one of first impression. Moreover, in the Methanex case no application for party standing was made by the prospective interveners.

In the Matter of Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions From Third Persons to Intervene as "Amici Curiae," made January 15, 2001. (the *Methanex* Award)

62. Article 1120:2 of the NAFTA provides:

> *The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.*

63. Several provisions of Section B modify the application of *UNCITRAL Arbitration Rules* which have been invoked in these proceedings. Among these, are the provisions of Article 1131:1 which stipulates that:

> *A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*

64. In our submission, Article 1131 is not qualified or limited in its application and applies to both matters of substance and procedure.

65. Article 38(1) of the *Statute of the International Court of Justice* is regarded as offering an authoritative definition as to the sources of international law. It provides that:

> *The court, whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
>
> *(a) international conventions, whether general or particular establishing rules expressly recognized by the contesting parties;*
>
> *(b) international custom, as evidence of a general practice accepted as law;*
>
> *(c) the general principles of law recognized by civilized nations;*
>
> *(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

66. In addressing the petitions for standing before it, the Tribunal in the Methanex case adopted the view that its authority was bounded by Article 15 of the *UNCITRAL Arbitration Rules* . Moreover while it had regard to some sources of international law, notably the decisions of arbitral tribunals, World Trade Organization dispute bodies and certain courts, it failed to have regard to other sources of international

law that it was, in our submission, obliged to consider.

The Methanex Award, paras. 29 -34 and 43.

67. In our submission therefore, it is incumbent upon this Tribunal to determine this Petition in accordance with all applicable rules of international law. The guidance that may be derived from such sources is particularly relevant in light of the novel character of this Petition. We consider the four relevant sources of international law respectively.

INTERNATIONAL CONVENTIONS

68. While the issue of third party intervention in arbitral proceedings is not without precedent, it has very rarely arisen in the modern era of international commercial arbitration. In fact, the issue of third party intervention has either been ignored, or given very low priority by those crafting the international and domestic regimes providing for international commercial arbitration.

C. Chinkin, *Third Parties in International Law*, (Oxford: Clarendon Press, 1993) at 248-249

69. In our submission, this indifference to third party rights appears to derive from certain assumptions that have guided the development of these conventions. However, for reasons that we describe below, we believe that these assumptions no longer hold, and that a much greater role must now be assigned to third parties with a legitimate interest in such proceedings.

70. With the exception of the formal Parties, the provisions of NAFTA are silent on the subject of third party rights. This is also the case with respect to the *New York Convention*. Similarly, the *UNCITRAL Arbitration Rules* offer little guidance on this subject. However, Article 15 of the *UNCITRAL Arbitration Rules* provides:

> *Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*

71. In our submission, s. 15 provides this Tribunal with considerable latitude in the conduct of these proceedings subject only to the requirement for equality in the treatment of the parties and other specific requirements of the *UNCITRAL Arbitration Rules* . Moreover, s. 15 is generally regarded as a restriction on principle of party autonomy.

Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (second edition), Sweet and Maxwell, London at pp. 292 – 293.

72. Admittedly, the requirement for equality of treatment or fairness was not established with the interests of third parties in mind, but neither do the rules proscribe the extension of this principle to them. Moreover in our submission, the notion of fairness which imbues these provisions carries with it certain broader implications which are relevant to the new era of investor-state arbitration.

73. In our submission, the public character of disputes such as the present one, and the diverse interests that may be adversely affected by such claims requires that the principle of equality now be given broader reading than would be necessary if this dispute was essentially private in character and implication.

74. Support for extending the principle of equality to third parties with an interest in arbitral proceedings can also be found in the requirements of international conventions concerning human and labour rights. For example, Article 23 of the *Universal Declaration of Human Rights* speaks of the "protection from unemployment" and to the "right to form and join trade unions...". Article 14 of *the International Covenant of Civil and Political Rights* stipulates that:

> *All persons shall be equal before the courts and tribunals. In the determination of... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

75. Article 26 of this Convention further provides:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.*

76. We also submit that in considering this Petition, the Tribunal should also be mindful of other relevant conventions including those established under the auspices of the International Labour Organization such as the *Convention (No.168) concerning Employment Promotion and Protection against Unemployment* and *Conventions dealing with Freedom of Association and Protection of the Right to Organize.*

77. We recite these conventions, not to suggest that they establish a formal right of participation in these proceedings, but rather as an important source of international law from which guidance can be taken in determining the exercise by this Tribunal of its discretion with respect to the Petition before it. In our submission, these

Conventions articulate applicable rules of international law which support the extension of the principle of equality and equal treatment before the law to third persons who may be affected by, or have a substantial interest in, claims arising under the NAFTA investment rules.

INTERNATIONAL CUSTOM AND JURISPRUDENCE

78. The doctrine of party autonomy has been accorded great weight in the interpretation and application of both domestic and international arbitration agreements that arise from private and consensual relationships among parties. In this conventional context, the consistent view has been taken that third parties have no inherent right of intervention.

Redfern and Hunter, pp.290-294.

Chinkin, pp. 247 – 274.

79. Even in this context however, intervention by third parties in international arbitrations is not without precedent. Indeed in one case, the tribunal applied the "generally recognized principle" of according standing to anyone who could show a legitimate interest which might be affected by the decision in the case.

Levis & Levis & Veerman v. Federal Republic of Germany – Decision of the Arbitral Commission on Property Rights and Interests in Germany, 28 ILR 587 (Decision of 27 Jan. 1959) as quoted in Chinkin, idem.

80. It has also been recognized as undesirable for states to conclude international agreements that are prejudicial to the interests of third parties without according them an opportunity to intervene. This has caused some knowledgeable commentators to question the validity of awards that infringe third party rights.

W.M. Reisman, *Nullity and Revision,* New Haven, Conn. Yale UP (1970), 330.

Public vs. Private Disputes

81. As noted, deference to party autonomy is arguably the first principle of international commercial arbitration. However, in our submission this guiding principle derives from the fundamental characterization of arbitration as a private not public function that should accordingly be left to the parties to guide. However there are several reasons to distinguish the procedures established under NAFTA investment rules from those that might otherwise invoke the UNCITRAL process. Moreover, these differences negate the assumptions which underlie the notion of party autonomy and

justify greater recognition of the broader public interest that has now been drawn into this arena.

Redfern and Hunter, pp. 264-268.

Treaties vs. Contract

82. To begin with, in our submission, a clear distinction should be drawn between an arbitral process which is established pursuant to a contract or other written agreement, and one which is founded upon the provisions of an international treaty. While the former may be considered as arising from private agreement, the latter can not. Conversely a similar distinction can be drawn between the role of government as a party to a commercial agreement or contract on the one hand, and as a party to an international treaty on the other. While the former may imbue its activities of a private character, the latter should not. Under NAFTA there is no requirement for privity of contract, or for any other agreement between the parties as a precondition for invoking international dispute resolution.

M. Somarajah, pp. 156 - 163.

Breadth of Issues

83. Another obvious point of distinction has to do with the nature of the issues that might be the subject of adjudication under these respective regimes. UNCITRAL awards typically arise out of disputes concerning commercial contracts between two parties. The ambit of these disputes is constrained by the parameters of the particular commercial relationships. Generally, the issues involved are of no greater public policy significance than the underlying contract itself.

84. In the case of investor-state claims, the scope of the issues that may arise are virtually unbounded and may include broad issues of public policy and law. For instance, the UPS claim alleges a breach of Canada's obligations to provide National Treatment to foreign investors and their investments. National Treatment obligations as defined by Article 1102 apply to all government measures, whether provincial or federal, unless those measures have been explicitly reserved. Moreover, "measure" is defined to mean "any law, regulation, procedure, requirement or practice." It becomes trite to note that the breadth and scope of the disputes engendered by these provisions is dramatically more expansive than those arising under commercial disputes based in contract.

Private Rights, Public Problems, supra.

M. Somarajah, pp. 168-172.

Private Rights vs. Public Policy

85. A related point concerns the public character of the issues that may be adjudicated in these arbitral fora. We will return to consider the issue of whether NAFTA disputes can be considered "commercial" within the meaning of Canadian law recognizing the validity of international arbitration awards. For present purposes however, it is important to emphasize the public character of the disputes that may arise under the broadly framed investor rights set out in NAFTA Chapter Eleven.

86. The UPS case is illustrative on this point because it puts at issue the entire framework of Canadian public policy and law as it relates to the provision of postal services. Moreover, this is a dispute that has no foundation in contract and no private character. Nor can it been seen as arising from a commercial relationship with the government of Canada. This contrasts sharply with the commercial and contractual relationships that would otherwise give rise to foreign arbitration awards.

Claims for Damages vs. Judicial Review

87. Another distinction relates to the fact that investor-state claims can be viewed as more analogous to applications for judicial review of government policy and law than akin to private disputes arising under contract. While the remedies available in investor-state proceedings are essentially limited to an award of damages, as we have noted, the consequences of such an order are likely to be just as coercive as the more directive orders or a superior court (*mandamus*, prohibition, *certiorari*...) arising from an application for judicial review.

Unilateral and Unbounded Consent

88. A final distinction between NAFTA based investor-state arbitrations and the more conventional disputes which might be resolved pursuant to *UNCITRAL Arbitration Rules* relates to the unilateral character of the consent given by Canada to be bound by arbitration with respect to Chapter 11 disputes. Under Article 1122.1, Canada has given its consent to arbitration of any dispute that satisfies the modest prerequisites of the Agreement. These prerequisites require only that a foreign investor be able to claim that status, consent to arbitration, and waive any right to pursue domestic remedies with respect to the same measure.

89. While Canada may raise objections to the arbitrability of the dispute before the tribunal, it is bound by its consent and the arbitration process will proceed under Article 1124, even if it declines to participate. In other words, under NAFTA, Canada has given unilateral consent to arbitrate claims which may be made by

unknown foreign investors with respect to matters that may concern broad spheres of public policy and law at both the provincial and federal levels. In our submission, the scope and unqualified character of this consent sharply distinguishes NAFTA investor-state claims from those arising from commercial relationships.

The World Trade Organization

90. Finally on this point, the issue of third party intervention has also been addressed by dispute panels and the Appellate Body of the World Trade Organization (WTO). In deciding to accept *Amicus* submissions the Appellate Body has noted the "ample and extensive authority to undertake and control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."

> *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12 October 1998. WT/DS58/AB/R, see para. 106.

91. Admittedly, in accepting *Amicus* briefs, the Appellate Body has distinguished between the "right" to make submissions, and the authority granted by the Appellate Body to consider *Amicus* submissions. The Appellate Body has taken the view that it had broad authority to adopt procedural rules that do not conflict with the Dispute Settlement Understanding (DSU). In one case, it concluded:

> *Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.*
>
> United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body of 10 May 2000, WT/DS138/8 – see para. 39.

92. While these decisions offer strong support for the intervention of non parties as *Amicus Curiae*, they are not particularly helpful on the question of allowing intervention as an added party. However, in our view, a clear distinction can and should be drawn between the state-to-state dispute settlement regime of the WTO, and the investor-state dispute apparatus established by NAFTA. While the former is justifiably limited to the Parties to the WTO, the latter explicitly invites non-Party participation by allowing foreign investors to invoke the dispute resolution machinery created by this treaty. Accordingly, in the case of investor-state claims, for reasons of equality and fairness, third party intervention is warranted in our submission.

93. In deciding the issue of the *Amicus* Petitions before it, in our submission the Tribunal in the Methanex case failed to acknowledge most of these important distinctions between conventional international commercial arbitration and investor-state claims under NAFTA. Moreover, having acknowledged that the case before it raised "substantive issues extending well beyond those raised by the usual transnational arbitration between commercial parties" the tribunal failed to reflect this assessment in exercising its authority under the NAFTA and the *UNCITRAL Arbitration Rules* .

The Methanex Award, para. 49

General Principles of Law

94. Under Canadian law the right to intervene as a party or *Amicus Curiae* in civil proceedings is well recognized. Indeed these rights have been codified by the rules of civil procedure of the provinces and of the federal government. Typically these rules distinguish between intervention as an added party or as *Amicus Curiae*. In the case of the former, the intervener may be accorded the same procedural rights as existing parties, including the right to file pleadings, adduce evidence, cross examine witnesses and make oral arguments.

See for example Rule 13 Intervention, *Ontario Rules of Civil Procedure*.

95. To justify a request for intervention as an added party, a person must typically establish, inter alia, an interest in the subject matter of the proceeding or that the person may be adversely affected by a judgment in the proceeding. Similar approaches have been adopted in other common law jurisdictions.

Report on the Law of Standing, the Ontario Law Reform Commission, Toronto 1993.

96. With respect to ensuring procedural fairness the Courts of several common law jurisdictions have developed rules governing the conduct of proceedings by public-decision-makers. The content of these procedural rules vary depending on the character of the decision. While the Courts have declined to review the process of legislative decision-making, the closer the process resembles that of a court, the more likely the Courts will be to require a full range of procedural protections including that individuals affected by a decision be given adequate notice in respect of the proceedings, a fair opportunity to present their case and to respond to the opposing party and a right to an independent and unbiased decision-maker.

Martineau v. Matsqui, [1980] 1S.C.R. 602 at 608

97. Thus, at common law, a person may be accorded standing if he or she is an "aggrieved person", an "affected person" or someone who is "exceptionally prejudiced" by the proceedings. In making these determinations, the courts look to first identify the interest involved and then determine whether or not the causal relationship between the decision-making process under review and that interest are sufficiently close so that there will be some "causal nexus" between the decision and the interest identified.

> See generally, Brown and Evans, *Judicial Review of Administrative Action in Canada* at pages 4-13, 4-17.

98. In our submission, the principle of according party standing to those whose interests may be directly and adversely affected by civil proceedings, represents an appropriate standard for this Tribunal to adopt. Subject to the qualification that the Petitioners do not as yet know the full nature of the UPS claim, even on the basis of available materials, the interests of the Petitioners are sufficient in our view to satisfy this standard.

99. The foreseeable consequences of these proceedings include the loss of employment and job security for CUPW-STTP members. In addition the security of their pension plan has been explicitly put at issue by the UPS claim. For these and other Canadians the universal availability of postal, package and courier services are also at risk. As we have described in paragraphs 5, and 31-34 the social fabric and economic viability of many rural communities may be adversely affected if the availability or quality of postal and related services are diminished in consequence of these proceedings. In our submission these are interests every bit as deserving of protection as those being asserted by UPS. Accordingly, it would be entirely inconsistent with any notion of fairness, equality and fundamental justice to deny those with so much at stake the right to defend their interests.

100. Furthermore, under *UNCITRAL Arbitration Rules* , certain rights and remedies are available only to the parties. This serves only to underscore the importance of full party standing.

101. Moreover the courts have been willing to accord standing to interveners even where this causal nexus is weak or even absent. Thus, in *Finlay and Minister of Finance of Canada*, the court held that a claimant for judicial review who had not suffered special damage could nonetheless be granted standing as a public interest litigant where there was no reasonable prospect that a better plaintiff would emerge. In our view, both the Council of Canadians and CUPW-STTP are uniquely qualified as interveners in this regard.

> Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 at 621-624.

JUDICIAL DECISIONS AND EXPERT OPINION

102. On May 2, 2001 the Honourable Mr. Justice Tysoe released his reasons for judgment in the Metalclad case. In that case Mr. Justice Tysoe made several findings that are relevant to these proceedings. However, of these, the most important in our submission is the deferential approach adopted toward the arbitral award and the limited scope of the jurisdiction he assumed to review that award.

> *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, Reasons for Judgment of the Honourable Mr. Justice Tysoe, May 2, 2001.

103. Thus Mr. Justice Tysoe declined to hold that he had the jurisdiction to review the Tribunal even for patently unreasonable errors of law. Moreover, he characterized the Tribunals interpretation of Article 1110 as falling short of such a standard of review even if such authority to review for patently unreasonable errors was to exist. Nevertheless he described the Tribunals decision on this point, this way:

> *The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority. However, the definition of expropriation is a question of law with which this Court is not entitled to interfere under the International CAA.*
>
> *Ibid.* paras. 97 - 99.

104. The extent to which judicial review is available of arbitral awards is defined by the legislation that may provide for such review in the place of arbitration. However, the scope of review permitted under the British Columbia International Arbitration Act R.S.B.C. is analogous or identical to that available in many jurisdictions because the Act is more or less a codification of the UNCITRAL model law as is the case so frequently.

105. The limited scope for judicial review of this award underscores the importance of providing those with an interest in these proceedings participatory rights commensurate with their interest. If those rights are denied by this Tribunal, it is extremely unlikely that they would be given a voice in any application to review this Award that might be brought forward.

106. In two separate cases, Canadian courts have recently refused public interest intervenor standing in proceedings brought to review the awards of arbitral tribunals convened pursuant to NAFTA investor-state procedures. In neither case

was the intervenor claiming a direct interest in the matter, and both cases are clearly distinguishable on several grounds from the present matter.

107. The first, involved an application for standing by the Canadian Union of Public Employees (CUPE) before the British Columbia Supreme Court. The court was seized of a petition seeking, *inter alia*, an order setting aside an award made against Mexico in favour of an investor of the United States, Metalclad Corporation. That award found Mexico to have been in breach of its obligations under Articles 1105 and 1110 of the NAFTA with regard to the approval of a hazardous waste treatment facility that Metalclad had built and wanted to operate.

108. CUPE sought standing as a public interest intervenor in those proceedings because of the broader implications of the Tribunal's award for municipal and environmental approvals processes in Canada. As noted, those concerns have been subsequently borne out by the Court's judgment but CUPE's application was declined and with only the most perfunctory explanation.

109. The second case involved an application by the Council of Canadians, Greenpeace Canada and the Sierra Club of Canada for public interest standing before the Federal Court of Canada. That court was seized of an application to review an arbitral award made against Canada and in favour of another investor of the United States, S.D. Myers Inc. That award found Canada to have been in breach of its obligations under Articles 1102 and 1105 by reason of a ban it had instituted on the export of certain hazardous wastes to the United States.

110. Their applications were refused on two grounds. The first because Mr. Justice Rouleau was unpersuaded that the prospective intervenors had expertise that would be of value to the court on the legal issues that Canada had raised. The second, because the intervenors had sought to raise issues that would, the judge concluded, have expanded the appeal beyond the bounds of Canada's application.

111. The intervenors are now appealing this decision to the Federal Court of Appeal which is now in the process of being perfected.

112. In neither case did the prospective intervenors assert a direct or proximate interest in the proceedings, and none had sought standing before the Tribunals that had made the awards at issue. The Metalclad case is further distinguishable because it involved an application for public interest standing by a trade union of Canada which was not the NAFTA Party against which the claim had been brought. The judgment of the Federal Court in the S.D. Myers case was is as noted now under appeal, including by one of the Petitioners to this application.

113. If anything, both cases underscore the importance of third parties being accorded participatory rights in the arbitral proceedings themselves which may ultimately determine their right to participate in any subsequent review of an arbitral award.

114. We have cited several acknowledged international scholars and legal authorities in

support of our submissions who have recognized the substantial departure that investor-state procedures represent from the norms of both international and domestic law. We commend these sources to this Tribunal for their further consideration.

> M. Sornarajah, *The Settlement of Foreign Investment Disputes*, 2000
> C. Chinkin, *Third Parties in International Law*
> Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (third edition)

PART VI: THE JURISDICTION OF THIS TRIBUNAL

The Question of *Amicus Curiae*

115. In our submission, the tribunal in the Methanex case correctly concluded that it has authority to allow third parties to make submissions with respect to the issues before it. However, the narrow view that it adopted with respect to the participatory rights that might be accorded such interveners is unsupported by general principles, or judicial authority.

> The Methanex Award, para. 53

116. As commonly understood, the concept of *Amicus Curiae* is a flexible one, and has been utilized to allow third party participation in judicial proceedings subject to differing terms and conditions. However, even when construed narrowly, the rights of *Amicus* commonly include access to the record and attendance at the proceedings as necessary elements in effectively participating in the proceedings.

> Ontario Law Reform Commission, *Report on the Law of Standing,* 1993, pp 111- 135

117. This flexible approach has been adopted by both Canadian and US courts that have frequently allowed *Amicus Curiae* broad participatory rights in cases involving the public interest, including the right to introduce evidence. For example the U.S. Supreme Court has characterized *Amicus* rights in the following way:

> *the privilege of being heard as amicus rests solely with the discretion of the court. Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence. There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to other otherwise desirable to the court.* [emphasis added]
>
> United States v. Barnett, 376 U.S. 681, 738 (1964), App. 13.

118. The liberal application of this standard is demonstrated by the frequency with which the US Supreme Court granted interveners the right to participate in proceedings before it. For example, Between 1969 and 1981, *amici curiae* participated in 64% of the Supreme Court's "noncommercial" cases.

> *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. OF INT'L L. 611, 618 (1994)

119. A similar approach has been adopted by the Supreme Court of Canada. The court has adopted a broad approach to the exercise of its statutory authority to permit intervention under Rule 18(3) of the *Rules of the Supreme Court of Canada* which set out two simple tests for permitting an intervention: does the intervener have an interest in the issue and does the Court believe that the submissions will be useful and provide a different perspective from those represented by the other parties. In judicial proceedings there would be no question that an *Amicus* would have the right to attend at the proceedings and have full access to the record although on occasion photocopying costs must be paid prior to obtaining materials filed.

> Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to Intervene), [1989] 2 S.C.R. 335,
> R. v. Finta [1993] 1 S.C.R. 1138

120. In our submissions the scope of participatory rights that might be accorded by this Tribunal exist along a continuum from full party standing to the unadorned right to make written submissions of a predetermined length, and addressing only those issues as the Tribunal may direct. There are intermediate points on this spectrum that might accord participatory rights to third parties which are broader than those that might be accorded *Amici*, but narrower than those accorded full parties. The critical issue is that participatory rights reflect the nature and extent of the intervenor's interest in the proceedings.

> Muldoon, *Law of Intervention*, 1989 Canada Law Book pp. 3-19

121. In our submission the appellation accorded interveners is of secondary importance and should not be used to artificially constrain the ambit of third party participatory rights. Accordingly it is open to this Tribunal to specify the particular participatory rights that it might accord third parties, however it may choose to characterization their intervention.

122. Thus, third persons might be accorded all the rights of a party save for the right to introduce new issues to the proceedings. Alternatively an intervener's right to call witnesses, or conduct cross-examination, might be limited as the Tribunal might direct. In our submission, and as pleaded, the discretion accorded this Tribunal under S. 15 of the *UNCITRAL Arbitration Rules* when read in accordance with applicable principles of international law is broad enough to engender all of these options including according an intervener standing as a full party.

123. In addressing the Petitioners' requests in the Methanex case, in our submission the Tribunal erred in concluding that the rules precluded it from providing access to either the record or the proceedings. In adopting a narrow view of the authority available to it, the Tribunal failed in our submission to have proper regard to the unique character of NAFTA investor-state claims, or applicable rules of international law.

124. In particular, in our submission, the Tribunal in the Methanex case misapprehended the nature of the constraints imposed by the stipulation by Article 25(4) of the *UNCITRAL Arbitration Rules* that hearings be held "in camera" unless the parties otherwise agree. This does not in our submission preclude the participation of third parties. While the concept "in camera" necessarily implies a proceeding that is closed to the general public it does not proscribe the persons who might be admitted to the "in camera" proceedings. If the purpose of this rule is to protect the confidentiality of proprietary business information, then that purpose can be satisfied by imposing confidentiality obligations on all participants. Taken to its logical conclusion the reasoning of the tribunal would preclude evidence being taken in an in camera hearing if the witnesses were non-parties.

125. Indeed, what little guidance is available from the jurisprudence of international commercial arbitration tribunals supports the right of third parties to appear to make written or oral statements in such proceedings.

> Iran - US Claims Tribunal: Note 5 as quoted in the *Methanex* case at para. 32

126. Similarly on the subject of confidentiality, recent developments in the law reveal that no such expectation attends the deliberations of arbitral tribunals. In a case decided by the New South Wales Court, and involving a public corporation, Kirby J. put it this way:

> *Can it be seriously suggested that [the] parties private agreement can, endorsed by a procedural direction of an arbitrator, exclude from the public domain matters of legitimate concern...*
>
> As quoted and referred to in paragraphs 43-45 of the *Methanex* Award High Court of Australia, *Esso/BHP v Plowman* (1993) 183 CLR 10 *Commonwealth of Australia v Cockatoo Dockyard Party Ltd.* (1995) 36 NSWLR 662

127. In Part II of this Petition we described the nature and extent of the Petitioners' respective interests in these proceedings. While the test for intervener or *Amicus* standing is generally considered less onerous than the direct interest test traditionally applied to determine intervention as an added party, in our submission

both the direct and public interests of the interveners illustrate the unique perspective and expertise they would bring to these proceedings.

128. Both interveners have repeatedly demonstrated their interest and commitment to an informed public policy debate about many of the issues that this claim will raise. It is apparent from the extensive submissions they have prepared, concerning the issue of postal services, that their perspective on these important issues has often been distinct from, or at odds with those of the federal government of Canada. In our submission therefore, the Petitioners participation in these proceedings is certain to make a unique and valuable contribution to the illumination of the issues before this Tribunal.

> Affidavits of Deborah Bourque and Cynthia Patterson and in particular attachments thereto.

129. In particular, the following issues are among those with respect to which the Petitioners would introduce a perspective and evidence that would not otherwise be presented to this Tribunal:

i) the costing of mail, package and courier services is one with respect to which CUPW-STTP has particular interest, expertise and a point of view that has often been distinct from that of Canada Post;

ii) the history, details and other arrangements concerning the management of Canada Post pension funds, are also issues with respect to which CUPW-STTP as the beneficiaries of this pension plan, have a unique interest and perspective;

iii) the importance of integrated postal, package and courier services to the viability of public postal services, the well being of Canadian communities and in particular of those in rural Canada is germane to the issues UPS has raised. For example, the interpretation of Canada's obligations under Article 1105 must take a sufficiently broad view of international law so as to include the rights of affected third parties. This is an issue with respect to which both Petitioners have a particular interest but also specialized knowledge and expertise; and,

iv) the Petitioners also share an interest in having the provisions of Chapter Eleven be accorded a strict and limited application in light of the extra-ordinary nature of these provisions as detailed more fully elsewhere in this brief. This certainly distinguishes their interest and perspective from Canada's, which is one of the authors of this regime, and certainly from UPS that would have this Tribunal accord these disciplines expansive and application.

130. We are prejudiced in being able to describe the full nature of the Petitioners' interests and potential contribution to this proceeding by not having knowledge of

the particular claims and arguments that UPS has brought forward and accordingly have asked for the opportunity to revise these submissions if these become known to us. Moreover, in our submission, being put to the task of justifying our request for standing in these proceedings without knowing the full nature of the claim that is being made is itself a denial of treatment in accordance with the principles of fairness, equality and fundamental justice.

131. We are also seeking with this Petition, the right to make submissions concerning the jurisdiction of this Tribunal and the arbitrability of the issues which UPS has raised. We are also unable to properly address these jurisdictional questions without having full knowledge of the nature of the allegations that UPS is making.

132. We should also indicate that we are aware of no provision of the *UNCITRAL Arbitration Rules* which explicitly precludes this tribunal from considering objections by non-parties to its jurisdiction, including objections with "respect to the existence or validity of the arbitration clause or of the separate arbitration agreement"(Article 21.1).

133. Similarly, Article 16(1) of the Code appended to the Commercial Arbitration provides that the "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Accordingly, in our view this authority is not limited to objections that may be brought forward by the parties. The tribunal has inherent authority to determine the extent of its jurisdiction and may do so on its own motion.

PART VII: ORDER SOUGHT

The Claimant respectfully submits that this Tribunal order:

(i) the Petitioners be made parties to these proceedings;

(ii) in the alternative, the petitioners be accorded standing as *Amicus* interveners, but nevertheless with the full right to present and to test any and all of the evidence which may be introduced in these proceedings;

(iii) the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal, be disclosed publicly;

(iv) the Petitioners be accorded the right to make submissions concerning the place of arbitration;

(v) the Petitioners be accorded the right to make submissions concerning the jurisdiction of this Tribunal, and, once they are fully known, the arbitrability of the matters the disputing investor has raised; and,

(vi) the Petitions be allowed to supplement these submissions to reflect the additional information made available by reason of such disclosure.

Respectfully submitted this 10th day of May, 2001.

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Counsel for the Petitioners

ATTACHMENT "A"

Chronology of efforts made to obtain a copy of the Statement of Claim and other documents in this matter.

- In April, 2000, CUPW sent a letter to letter to Allan Kaufman, Vice President for UPS, requesting the Statement of Claim. That request has been refused.

- On May 1, 2000 a similar request was made of the Department of Foreign Affairs and International Trade, and that too was declined.

- On July 3, 2000, Counsel for the petitioners wrote to the parties advising of their respective interests in this matter, and seeking certain information and documents relevant to the UPS claim.

- On July 4, 2000 a similar letter was sent to the NAFTA Secretariat which responded by providing a copy of the UPS Notice of Arbitration but directing us to the parties for further information.

- On Aug. 3, 2000, Canada's Department of Foreign Affairs and International Trade answered that correspondence by providing certain information about the proceedings, but declining our request for the Statement of Claim made by UPS.

- To date we have received no acknowledgment of our correspondence from Mr. Appleton who is identified as the disputing investor's Counsel of record. A subsequent telephone call to his office has also gone unanswered.

IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION A and B OF THE NORTH AMERICAN FREE TRADE AGREEMENT
and
IN THE MATTER OF AN ARBITRATION UNDER UNCITRAL ARBITRATION RULES

and

IN THE MATTER OF A PETITION FOR STANDING AND OTHER PARTICIPATORY RIGHTS BY THE CANADIAN UNION OF POSTAL WORKERS AND THE COUNCIL OF CANADIANS

B E T W E E N:

UNITED PARCEL SERVICE OF AMERICA, INC.
Claimant

and

GOVERNMENT OF CANADA

Respondent

PETITION TO THE ARBITRAL TRIBUNAL

Rt. Hon. Justice Sir Kenneth Keith, KBE
Hon. George W. Adams, Q.C.
Professor Kenneth W. Dam

AFFIDAVIT

I, Deborah Bourque, of the City of Ottawa, in the province of Ontario, MAKE OATH AND SAY :

1. I am the third Vice President of the Canadian Union of Postal Workers (CUPW – STTP) and as such have knowledge of the matters to which I hereinafter depose.

2. CUPW – STTP represents approximately 46,000 operational employees of Canada Post who provide postal services to Canadians throughout the country. Over half are letter carriers and spend a portion of their time handling, processing and delivering expedited and express courier products (Priority Courier, and Xpresspost services).

3. Rural mail service in Canada is also provided by several thousand route mail carriers and suburban service drivers, who are excluded by the Canada Post Corporation Act from the *Canada Labour Code* and collective bargaining rights. These workers are also involved in the delivery of parcel and express courier services. In March 1997, these workers formed The Organization of Rural Route Mail Couriers. The organization and CUPW-STTP have a cooperative working relationship with the Union volunteering to provide the human, material and financial resources to assist with its organizing efforts. As the Union's 3rd National Vice President, I am an ex officio member of the Executive of the Organization of Rural Route Mail Carriers.

4. CUPW-STTP also represents approximately 40,000 union members who are entitled to pension benefits as Canada Post employees. For many years these employees participated in the Canadian Public Service pension plan. But in consequence of recent statutory reforms (*Public Sector Pension Investment Board Act* - Bill C-78), Canada Post Corporation will now have its own pension plan, effective Oct. 1,2000.

5. To protect the pension entitlement of its members, CUPW-STTP has been actively involved in negotiations with the Canadian federal government, and has joined the advisory committees it has established to reform the pension scheme of Canada Post employees. The issue of its members' pensions remain a critical priority for CUPW-STTP.

6. CUPW-STTP is also firmly committed to working within the broader labour movement, and with groups in civil society, to preserve the integrity of Canadian public services across the full spectrum of these social services from heath care and education to municipal services.

7. In June 2000, CUPW-STTP prepared submissions to the Canadian Government concerning public postal services in the context of current negotiations concerning the General Agreement on Tariffs and Trade and the World Trade Organization. That document is titled: *Your Post Service: More Than Just the Mail, More Than Just the Quebec-Windsor Corridor.* It is attached as Exhibit "A" to this affidavit.

8. I am familiar with these submissions and believe they present an accurate and reliable assessment of many of the issues that have been raised by United Parcel Service of America, Inc. (UPS) in the claim it has made in this matter.

9. Because of CUPW-STTP's interest in maintaining the integrity of Canadian Postal Services we have taken a great interest in these proceedings. Notwithstanding this obvious and direct interest, neither the federal government, nor the NAFTA Secretariat, nor UPS has been willing to provide us with a copy of the UPS Statement of Claim, or otherwise inform us as to the details of the

allegations it has made in seeking more than $160 million (US) in damages from Canada under NAFTA investment provisions.

10. Our counsel has documented some of the efforts that have been made on our behalf to gain access to this and other material relevant to this case, as part of the Petition for Standing, in support of which, this affidavit it sworn. However in addition to these efforts access to information requests have been made under Canadian and US law seeking access to these documents.

11. Moreover, I have reason to believe that UPS has been willing to share its Statement of Claim on a selective basis with others. For example, I have been advised by a senior member of Canada Post's labour relations staff that they have been provided a copy of the UPS claim. Futhermore an account we have found on the National Post's web site describes the UPS lawsuit as containing "101 pages detailing numerous taxation, customs and labour privileges and preferences that the Government of Canada grants to Canada Post only." We are aware of and have been provided access to no document resembling the one described which we assume to be the UPS statement of claim. A transciption of the material from that internet page is attached as Exhibit "B" to this affidavit.

12. On or about the week of May 1, 2000, I received a telephone message from Mr. Allan Kaufman, who represented himself to be senior corporate counsel to UPS, offering to share with us one page of his company's claim concerning the lack of collective bargaining rights to the benefit of rural route mail carriers.

13. I make this affidavit in support of the Petition by CUPW-STTP and the Council of Canadians for standing and other participatory rights in this matter, and for no other or improper purpose.

Sworn Before Me at the City)
of Ottawa, in the Province)
of Ontario, this 27th day)
of October, 2000)

Deborah Bourque
DEBORAH BOURQUE

Molly Solomon
A Notary Public in and for the Province of Ontario

This is Exhibit "A" to the
affidavit of Deborah Bourque,
Sworn before me this 29th day of
October, 2000.

A Notary Public for Ontario

SUBMISSION TO THE CANADIAN GOVERNMENT ON PUBLIC POSTAL SERVICES AND THE WORLD TRADE ORGANIZATION'S GENERAL AGREEMENT ON TRADE IN SERVICES

YOUR PUBLIC POST SERVICE: MORE THAN JUST THE MAIL MORE THAN JUST THE QUEBEC-WINDSOR CORRIDOR

BY THE CANADIAN UNION OF POSTAL WORKERS

OTTAWA, ONTARIO

JUNE 2000

IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION A and B OF THE NORTH AMERICAN FREE TRADE AGREEMENT
and
IN THE MATTER OF AN ARBITRATION UNDER UNCITRAL ARBITRATION RULES

and

IN THE MATTER OF A PETITION FOR STANDING AND OTHER PARTICIPATORY RIGHTS BY THE CANADIAN UNION OF POSTAL WORKERS AND THE COUNCIL OF CANADIANS

B E T W E E N:

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Claimant

and

GOVERNMENT OF CANADA

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PETITION TO THE ARBITRAL TRIBUNAL

Rt. Hon. Justice Sir Kenneth Keith, KBE
Hon. George W. Adams, Q.C.
Professor Kenneth W. Dam

AFFIDAVIT

I, Cynthia Patterson, of the Village of Barachois de Malbaie, in the Municipality of Percé, in the province of Quebec, MAKE OATH AND SAY :

1. I am the coordinator of Rural Dignity of Canada and a member of the Board of Directors of the Council of Canadians, and reside in a small village in the Gaspé Peninsula and as such have knowledge of the matters to which I hereinafter depose.

2. The Council of Canadians is a non-governmental organization with more than 100,000 members, many of whom participate in the activities of more than 50 chapters across the country. Strictly non-partisan, the Council lobbies Members of Parliament, conducts research, and runs national campaigns designed to raise public awareness, and to foster democratic debate about some of Canada's most important issues, including: the future of Canada's social programs; the need to renew its democratic institutions; and, the protection of public health and the environment.

3. Rural Dignity of Canada is a grassroots citizens' group committed to strengthening rural communities, maintaining and enhancing services in rural areas and conveying in public education forums and the media the interdependence of rural and urban people. We are an informal network of approximately 3000 rural individuals, organizations and municipalities.

4. Approximately 90% of Canada is rural, and rural residents represent almost one-quarter of Canada's entire population. The demographic profile of rural Canada is shaped strongly by seniors. Over 3000 of Canada's small towns have concentrations of seniors over twice that of the national average.

5. The Council of Canadians and Rural Dignity of Canada have worked closely together to preserve the integrity of Canadian postal services as a public service providing high quality, reliable and affordable mail, parcel and courier services to all Canadians, regardless of where they live. Moreover we believe that if the vitality of this public institution is to be assured for the years ahead, it must respond to new challenges, including those in the area of telecommunications, by expanding the types and availability of the services its provides, not by reducing them.

6. Each organization made written submissions to the Canada Post Mandate Review. I am familiar with the contents of these documents and believe they reflect an accurate account of the matters addressed. The submissions of the Council and Rural Dignity are attached as exhibits "A" and "B" respectively, to this affidavit.

7. I am familiar with the general nature of the claim that UPS has made in this matter, and with the submissions and public statements it has made concerning these issues in other contexts and on other occasions. While I can not predict how the federal government might respond to an adverse ruling by this Tribunal, I am concerned that these potential consequences may include the abandonment of some of the infrastructure of rural mail service delivery, including the closure of post offices, and the withdrawal of certain services and in particular expedited mail, parcel and courier services.

8. Were this to occur, foreseeable consequences for residents of rural areas would include: a reduction in the availability and quality of mail, parcel and courier services; a substantial commute for rural residents to access basic postal services; a differential and higher fee

structure for services; a reduction in employment opportunities for local residents; and a weakened service and support system that has assisted many seniors to live independently in a rural community.

9. Moreover, if post office closures result, an important part of the institutional framework of Canadian society would be damaged. The importance of the post office to rural communities is underscored by the thousands of resolutions that have been passed over recent years by municipal councils opposing the closure of their local post office and/or the diminution of their postal services.

10. Furthermore, our experience with private courier delivery services reveals that they have little interest in providing service to remote or rural communities. For example in 1993, UPS closed more than a third of its Canadian outlets. Most of these closures took place in Northern Ontario and rural Quebec (see quote p. 21 of Rural District Submission to Canada Post Corporation Mandate Review Exhibit "B"). Moreover the quality of service offered by companies such as UPS has often been inadequate when it is provided, for reasons described in more detail in Exhibit "B" to this affidavit.

11. I make this affidavit in support of the Petition by CUPW-STTP and the Council of Canadians for standing and other participatory rights in this matter, and for no other or improper purpose.

Sworn Before Me at the City)
of Toronto in the Province)
of Ontario, this 1st day)
of November, 2000)

Cynthia Patterson
CYNTHIA PATTERSON

Natasha Musoni
A Notary Public in and for the Province of Ontario

THE COUNCIL OF CANADIANS

LE CONSEIL DES CANADIENS

THE COUNCIL OF CANADIANS

BRIEF TO THE

CANADA POST MANDATE REVIEW COMMITTEE

This is Exhibit "A" referred to in the affidavit of CYNTHIA PATTERSON sworn before me, this 1st day of NOVEMBER 2000

Natasha Mukerji

A COMMISSIONER, ETC.

SUBMISSION TO:

CANADA POST CORPORATION MANDATE REVIEW

Chairman: George Radwanski

by

RURAL DIGNITY OF CANADA

Box 70
Barachois de Malbaie
Québec GOC 1AO

15 February 1996

This is Exhibit "B" referred to in the affidavit of CYNTHIA PATTERSON sworn before me, this 1st day of NOVEMBER 2000

Natasha Mucciuli
A COMMISSIONER, ETC.

IN THE MATTER OF A CLAIM UNDER CHAPTER 11, SECTION A and B OF THE NORTH AMERICAN FREE TRADE AGREEMENT

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and

GOVERNMENT OF CANADA

Respondent

PETITION TO THE ARBITRAL TRIBUNAL

Rt. Hon. Justice Sir Kenneth Keith, KBE
L. Yves Fortier, CC, QC
Dean Ronald A Cass

AFFIDAVIT

I, Deborah Bourque, of the City of Ottawa, in the province of Ontario, MAKE OATH AND SAY :

1. I am the third Vice President of the Canadian Union of Postal Workers (CUPW – STTP) and as such have knowledge of the matters to which I hereinafter depose.

2. The issue of costing the various services that Canada Post provides is one of vital interest to CUPW-STTP members because it can have a direct impact on their jobs and job security. For example, the issue of costing certain package delivery services has provided the rationale for decisions by Canada Post to contract out certain of these services.

3.. Union representatives frequently meet with Canada Post officials to discuss costing related issues, and pursuant to the provisions of our collective agreement the Union is represented on two joint management committees that have responsibility for costing issues. Costing of postal services is routinely an important and often contentious issue during collective bargaining.

4. Our negotiations with Canada Post concerning these issues have from time to time lead Canada Post to reconsider and even reverse decisions to contract out postal services. However, our Union continues to be in frequent disagreement with Canada Post on costing issues. A key point of contention concerns the use of incremental as opposed to average cost pricing to assess the costs associated with postal services.

6. I have reviewed the Notice of Intent filed by United Parcel Service of America in this matter, and believe that the issue of costing mail, package and courier services will be absolutely central to its claim.

7 Because these are issues with respect to which there is ongoing disagreement between Canada Post and our Union, I believe that our views on these key issues would not be effectively presented to the Tribunal without our participation in these proceedings.

Sworn Before Me at the City)
of Ottawa, in the Province)
of Ontario, this 7th day)
of May, 2001)

D Bourque
DEBORAH BOURQUE

A Notary Public in and for the Province of Ontario