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June 10/04
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**UNDER THE UNCITRAL ARBITRATION RULES AND
THE NORTH AMERICAN FREE TRADE AGREEMENT**

UNITED PARCEL SERVICE OF AMERICA INC.

Claimant / Investor

-AND-

GOVERNMENT OF CANADA

Respondent / Party

**INVESTOR'S MOTION
ON CANADA'S NON-COMPLIANCE WITH THE INVESTOR'S
INFORMATION REQUEST**

June 9, 2004

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Overview

1. The Investor makes the following Motion arising out of Canada's failure to answer, in whole or in part, over 100 of the Investor's interrogatories and document requests.
2. Canada has failed to comply with its repeated undertakings to answer a large number of the Investor's information requests. It has raised new objections to many of these questions well beyond the deadline for refusals set by the Tribunal. A list of these untimely refusals is provided at Appendix A.
3. In addition, Canada has ignored several of the Investor's requests and produced incomplete responses for many others. A list of these unanswered or incompletely answered requests is provided at Appendix B.
4. Canada's actions demonstrate a wilful disregard for the procedures adopted by this Tribunal. By February 26, 2004, Canada was required to answer all the Investor's information requests except for five questions that are still being considered by the Tribunal. Canada breached this obligation by raising spurious untimely objections, ignoring questions and providing incomplete, vague or non-responsive answers. After the Investor threatened a motion in this regard, Canada expressly undertook to provide the missing information. Canada then partly reversed its position and re-asserted its untimely objections. Although Canada re-affirmed that it would answer other questions by the end of May, these still have not been answered to this date. This conduct is disruptive to the orderly conduct of this arbitration claim and deserves to be sanctioned by the Tribunal.

I. Procedural History

5. On April 4, 2003, the Tribunal released its *Procedural Directions and Confidentiality Order* which stipulated that: "a party to which a Request is made may within 14 days refuse any part of the Request, stating the grounds for the refusal". This deadline was applicable to both document requests and interrogatories.¹
6. On April 25, 2003, the Investor sent its Information Request to Canada.² Fourteen days later, on May 9, 2003, Canada objected to a number of the questions in the Investor's Information Request.

¹ The *Procedural Directions* are attached at Appendix C.

² The Information Request is attached at Appendix D.

7. In its *Directions Concerning Document Production* of August 1, 2003,³ the Tribunal dismissed most of Canada's objections and reserved its ruling on Canada's objections to questions 233, 252 to 255, 266, and 268 of the Investor's Information Request. As a result, Canada was required to answer all of the Investor's requests except these five questions by October 1, 2003. This date was later extended to February 26, 2004.
8. On February 26, 2004, Canada submitted its response to the Investor's Information Request. In its cover letter, Canada raised new objections that had not been stated within the 14 day deadline established in the Tribunal's *Procedural Directions* of April 4, 2003. For the first time, Canada stated that it would not be producing documents responsive to questions 5, 6, and 194-198 of the Investor's Information Request.⁴
9. Canada's actual response to the Investor's Information Request also contained many other refusals to answer a number of the interrogatories. These refusals were not delineated in the cover letter. Rather, in its response to 33 of the Investor's interrogatories, Canada stated that the interrogatory was not relevant or not relevant at this stage of the arbitration. A list of all the untimely refusals by Canada to answer the Investor's information requests is attached at Appendix A.
10. Canada also either ignored or provided incomplete responses to many of the Investor's remaining information requests. Various documents that were called for in the Investor's Request were not produced. In other cases, interrogatories were answered by Canada in a non-responsive manner. A complete list of these information requests, the corresponding incomplete responses given by Canada, and the reasons for their inadequacy is attached at Appendix B.
11. Canada's response to the Investor's Information Request contained over 100 deficiencies. The Investor has repeatedly sought Canada's confirmation that it will correct these deficiencies without the need for the Tribunal's intervention. Canada has failed to do so.

II. Canada Repeatedly Breached Its Undertakings to Provide the Missing Information

12. On April 6, 2004, the Investor requested that Canada comply in full with the Investor's Information Request. The Investor then provided Canada with a detailed listing of Canada's untimely objections and incomplete answers on April 15, 2004. Having received no reply from Canada, the Investor followed up on April 23, 2004 to confirm that Canada would be supplying the outstanding answers.⁵

³ Attached at Appendix E.

⁴ A copy of Canada's cover letter of February 26, 2004 is attached at Appendix F.

⁵ These three letters are attached at Appendix G.

13. Canada responded to the Investor's letters on April 23, 2004. In its letter, Canada stated that it would provide the missing information no later than May 15, 2004.⁶
14. On May 17, 2004, Canada failed to comply with its obligation to produce all of the missing documents and answers to interrogatories. Canada renewed most of its untimely objections and failed to produce the documents and answers to interrogatories that it undertook to produce in its letter of April 23, 2004.⁷
15. In its letter of May 17, 2004, Canada nonetheless again promised to produce some of the missing documents and answers to interrogatories by the end of May 2004. However, as of this date, Canada still has not provided even this limited information. The outstanding questions at Appendices A and B indicate where Canada has withdrawn its objections, but has still failed to produce the missing information.
16. Canada has repeatedly failed to comply with undertakings to produce documents and answer interrogatories. Canada's failure to object to the outstanding questions in the Investor's Information Request within the 14 day deadline established by Tribunal in its April 4, 2003 *Procedural Directions* constituted an acknowledgement that these questions were proper and would be answered. Canada then expressly confirmed that it would answer these questions in full by May 15, 2004 in its letter of April 23, 2004. However, Canada has failed to abide by these undertakings to the Investor. Even the limited information that was to be provided at the end of May has not been produced.

III. Timing of Objections is Improper

17. The Tribunal's *Procedural Directions* of April 4, 2003 stipulated that, after receipt of the other party's document requests and/or interrogatories, the recipient would have 14 days in which to inform the Tribunal of its refusal to answer any questions.⁸ Accordingly, all of Canada's refusals should have been conveyed to the Tribunal by May 9, 2003.
18. In its letter of May 9, 2003, Canada indicated to the Tribunal that it refused to answer certain specific questions from the Investor's Information Request. Canada thereby accepted the validity of the Investor's remaining document requests and interrogatories. It is too late for Canada to raise additional objections at this time.
19. Under Article 24(3) of the UNCITRAL Arbitration Rules, the Tribunal is permitted to require parties to produce documents or other evidence within such a period of time as it determines. Once the Tribunal makes such an order, the parties are expected to comply with it.

⁶ Canada's letter of April 23, 2004 is attached at Appendix H.

⁷ Canada's letter of May 17, 2004 is attached at Appendix I.

⁸ Procedural Directions and Confidentiality Order of Tribunal, dated April 4, 2003 at para. B4 and D1.

20. Given that Canada's objections are untimely, this Tribunal need not consider Canada's allegations that the Investor's questions are irrelevant. Furthermore, these allegations have no merit as the questions relate to issues raised in the pleadings. This Tribunal has already dismissed Canada's objections related to purported jurisdictional issues in its August 1, 2003 *Procedural Directions*.

IV. Incomplete Responses to Information Request

21. The Tribunal's *Procedural Directions* of April 4, 2003 state that a response to an interrogatory must be made to the best of the respondent's knowledge.⁹ Canada's responses to the Investor's Information Requests demonstrate that Canada did not employ the best efforts required by the Tribunal in answering these requests. Rather, it chose to supply only some of the requested information or none at all.

22. Canada's incomplete answers in Appendix B fall into four categories:

- i) First, for five of the Investor's requests, Canada simply ignored the questions and failed to provide any form of response;
- ii) Second, in other cases, the questions were only partially answered or the answers were so vague as to be non-responsive;
- iii) Third, Canada improperly claimed privilege on certain documents; and
- iv) Fourth, Canada failed to make enquiries of persons within its control in order to obtain responsive documents.

i) *Questions That Have Been Ignored*

23. Part 1 of Appendix B lists those questions that Canada has ignored in their entirety. Canada has not objected to these questions nor has it indicated that it is unable to answer these questions.

ii) *Incomplete, Vague or Non-Responsive Answers*

24. Part 2 of Appendix B lists Canada's incomplete, vague or non-responsive answers. The following examples illustrate Canada's lack of due diligence in preparing its response:

- (a) The Investor's document request 240a sought production of the submissions made by Canada Post to the Canada Post Mandate Review. Although Canada produced a report that commented on the findings of the Mandate Review, it did not produce any submissions that Canada Post made to the Mandate Review. The Canada Post Mandate Review report indicates that Canada Post made submissions to it, but these submissions were not provided.

⁹ Procedural Directions and Confidentiality Order of Tribunal, dated April 4, 2003 at para. D1.

- (b) Canada repeatedly answered that certain legislation and the regulations thereunder "spoke for themselves" or that the answer to the question is provided in the "applicable federal legislation and regulations thereunder" or the "relevant legislation" without specifying to which legislation Canada was referring.
 - (c) In its response to question 97c, which asked for particulars on changes made in Canada Post's products or services in certain categories, Canada stated that these changes were indicated "in documents provided by Canada." This response neither answers the question nor suggests which of Canada's documents might answer it.
 - (d) Canada provided minimal information relating to the critical issue of its Annual Cost Study as requested in question 82 of the Investor's Information Request. Over 36 documents relating to this issue are identified in Appendix B, but were not produced.
25. For each of the incomplete responses in Part 2 of Appendix B, the Investor has listed the specific responsive documents within Canada's possession that have not been disclosed as required. The existence of these documents has been determined from a review of the limited production made by Canada or by considering accounting records that are kept in the ordinary course of business.
26. For example, the Investor's Information Request 4 sought any documents for each of the years 1997 to 2002 which report on the performance of the parties' responsibilities under the *Postal Imports Agreement*. In its response, Canada produced documents for only some of the years between 1997 and 2002, but not others. Canada also produced documents referring to attachments, but did not produce the attachments. These deficiencies have been identified in detail in Part 2 of Appendix B.
- iii) *Improper Privilege Claims*
27. Canada has also improperly claimed privilege on certain documents that the Investor has requested (see part 3 of Appendix B). For example, question 237 requested documents relating to the Fritz Starber bid. In response, Canada produced one email and claimed that any other documents were privileged. Canada has not provided any explanation for how privilege could attach to such documents.
28. As noted, by the NAFTA UNCITRAL Tribunal in the *Pope & Talbot Claim*, a party seeking to rely on a legal privilege to excuse it from producing documents must explain clearly the basis for its assertion.¹⁰ In particular, it must provide sufficient information to allow the Tribunal to determine whether or not the disputed documents are confined to

¹⁰ Decision by Tribunal in NAFTA UNCITRAL Investor - State Claim dated September 6, 2000, Re: *Pope & Talbot Inc. and Government of Canada* at paras. 1.6 - 1.10, Appendix J.

the provision of legal advice or relate to other matters. Canada's vague and general assertions of privilege do not meet this requirement.

iv) *Failure to Make Enquiries of Third Parties*

29. Canada's failure to make appropriate enquiries of third parties to obtain documents within its control is illustrated by its answer to request 89(b) of the Investor's Information Request. This request sought:

For the years 1997-2002, the working papers of the auditors prepared for the purposes of providing the "Auditors' Report on Annual Cost Study Contribution Analysis".

In Canada's letter of May 17, 2004, Canada maintained that these documents were not in its possession, custody or control.

30. Audit working papers are required to be maintained by auditors in accordance with the standards of the Canadian Institute of Chartered Accountants. Even if we assume that such papers are not in Canada's actual possession, they are within Canada's "control" as they may be obtained by a request from Canada Post to its auditors. Canada has not provided any evidence that it has ever requested the working papers from Canada Post's auditors.
31. Canada's incomplete responses to the Investor's information request demonstrate that it did not use its best efforts as required by the Tribunal's *Procedural Directions* of April 4, 2003. As a result, the Tribunal should compel Canada to comply with the *Procedural Directions* and produce responsive answers to the requests listed in Appendices A and B.

V. **The Tribunal's Power to Draw Adverse Inferences**

32. Failure to comply with a Tribunal order should be sanctioned by a declaration that the Tribunal will draw an adverse inference from this non-compliance.¹¹ Although the precise content of the adverse inference to be drawn may be left to future submissions, the Tribunal should warn Canada that continued refusals to produce documents will be sanctioned in this manner.
33. Article 28(3) of the UNCITRAL Rules explicitly confirms this Tribunal's powers to draw adverse inferences from a failure to produce documents. This Article provides that:

If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

¹¹ Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed) at 317, Appendix K;

The *Pope & Talbot* Tribunal has interpreted this Article as granting NAFTA tribunals the power to draw adverse inferences.¹²

34. In its Procedural Order concerning disclosure of documents, the NAFTA Tribunal in the *Re: Waste Management and Mexico* case observed that the IBA Rules on the Taking of Evidence in International Commercial Arbitration provide that the ultimate sanction for non-disclosure is the drawing of an adverse inference against the non-disclosing party. After the Claimant failed to produce documents from a third party under its control, the Tribunal then put the Claimant on notice that these documents would be in issue and that it might draw corresponding inferences at the merits phase.¹³
35. In order to ensure Canada's compliance with its orders, this Tribunal should make a similar declaration in this case. Canada would thereby be on notice that its failure to produce documents will be sanctioned.

Conclusion

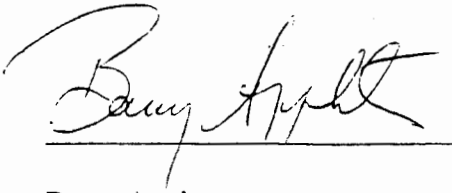
36. The Investor therefore requests that the Tribunal provide the following relief:
 - (i) An order requiring Canada to answer the interrogatories listed in Appendix A within three weeks time;
 - (ii) An order requiring Canada to provide responsive answers to the requests listed in Appendix B within three weeks; and
 - (iii) A declaration that the Tribunal will make the appropriate adverse inferences in the event of Canada's failure to comply with these orders.

All of which is respectfully submitted.

¹² *Pope & Talbot* decision of September 6, 2000 at paras 1.3, 1.4, Appendix J.

¹³ *Re: Waste Management, Inc. and United Mexican States* (ICSID Case N. ARB(AF)/00/3), Procedural Order concerning Disclosure of Documents at para. 6 citing the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) at Article 9(4); *Re: Waste Management, Inc. and United Mexican States* (ICSID Case N. ARB(AF)/00/3), Procedural Order No. 2 concerning Disclosure of Documents at para. 15. Copies filed at Appendix L.

Submitted this 9th day of June, 2004

A handwritten signature in cursive script, reading "Barry Appleton", written over a horizontal line.

Barry Appleton
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Counsel for the Investor, UPS of America, Inc.