

## Archived Content

Information identified as archived on the Web is for reference, research or recordkeeping purposes. It has not been altered or updated after the date of archiving. Web pages that are archived on the Web are not subject to the Government of Canada Web Standards. As per the [Communications Policy of the Government of Canada](#), you can request alternate formats by [contacting us](#).

## Contenu archivé

L'information archivée sur le Web est disponible à des fins de consultation, de recherche ou de tenue de dossiers seulement. Elle n'a été ni modifiée ni mise à jour depuis sa date d'archivage. Les pages archivées sur le Web ne sont pas assujetties aux normes Web du gouvernement du Canada. Conformément à la [Politique de communication du gouvernement du Canada](#), vous pouvez obtenir cette information dans un format de rechange en [communiquant avec nous](#).

**AMENDED STATEMENT OF CLAIM  
UNDER THE ARBITRATION RULES  
OF THE  
UNITED NATIONS COMMISSION  
ON INTERNATIONAL TRADE LAW  
AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**UNITED PARCEL SERVICE OF AMERICA, INC. ("UPS")**

Claimant/ Investor

v.

**GOVERNMENT OF CANADA ("CANADA")**

Respondent/ Party

*Amended Statement of Claim of UPS*

-1-

*Confidential*

Pursuant to Article 18 of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and Articles 1116 and 1120 of the North American Free Trade Agreement (NAFTA), the Claimant hereby submits its Statement of Claim.

**I THE PARTIES**

## 1. The Claimant/Investor is:

United Parcel Service of America, Inc.  
55 Glenlake Parkway N.E.  
Atlanta, Georgia 30328  
USA ("UPS" or the "Investor")

## 2. The Respondent/Party is:

Government of Canada  
Office of the Deputy Attorney General of Canada  
Justice Building  
284 Wellington Street  
Ottawa, ON K1A 0H1  
Canada ("Canada")

**II RELEVANT ENTITIES****A. Canada Post Corporation**

1. Canada Post Corporation ("Canada Post") is a Crown Corporation established on October 16, 1981 under the Canada Post Corporation Act (the "CPC Act"). Pursuant to the CPC Act, Canada Post is an "agent of Her Majesty in right of Canada" and an "institution of the Government of Canada".<sup>1</sup>

2. Canada Post has been delegated by Canada the "exclusive privilege" of collecting, transmitting and delivering first class mail and addressed admail in Canada (the "Postal Monopoly"), and has the power to make regulations including with respect to rates of postage and the definition of letters.<sup>2</sup> Canada Post exercises delegated government authority in operating the Postal Monopoly and its related businesses.

3. Canada Post is a government monopoly and a state enterprise designated or maintained by Canada within the meaning of NAFTA chapter 15.

---

<sup>1</sup>Canada Post Corporation Act, 1980-81-82-83, c.54., s.5

<sup>2</sup>CPC Act, s.23, s.14

*Amended Statement of Claim of UPS*

-2-

*Confidential*

4. Canada Post competes in the non-monopoly courier, and small package delivery and secure electronic communication markets ("Non Monopoly Postal Services Market") directly, and through the operations of its 94% owned subsidiary, Purolator Courier Ltd. ("Purolator"). Canada Post and Purolator together have a combined market share in the courier and small package delivery market of approximately 47%.

5. As part of its Postal Monopoly, Canada Post has established a postal distribution network and related infrastructure, which includes, but is not limited to,

- (a) Air and ground transportation;
- (b) Retail Post offices;
- (c) Letter boxes; and
- (d) Sorting and storage facilities.

**B. United Parcel Service of America, Inc., and United Parcel Service Canada Ltd.**

6. UPS is a corporation incorporated under the laws of the State of Delaware in the United States of America. UPS Internet Services, Inc., UPS Worldwide Forwarding, Inc., United Parcel Service, Inc. (New York), and United Parcel Service, Inc. (Ohio) (collectively, the "US Subsidiaries") are wholly owned subsidiaries of UPS. UPS also owns United Parcel Service Canada Ltd. ("UPS Canada", or the "Investment"), a company organized under the laws of Ontario, Canada. UPS Canada provides courier and small package delivery and associated services ("Express Delivery Services") and secure electronic communication services in the Non Monopoly Postal Services Market throughout Canada, and with UPS and its related companies, including the US Subsidiaries, worldwide.

7. UPS Canada is an "investment" of UPS, and UPS is an "investor" of a Party, the United States of America, within the meaning of NAFTA Article 1139. The US subsidiaries are investments of UPS under NAFTA Article 1139.

8. UPS Canada employs over 6000 employees in 54 facilities throughout Canada, and provides delivery services to every address in Canada, and through its affiliation with UPS and its related companies, to every address in the United States and over 200 countries worldwide. UPS Canada is the third largest Canadian courier with total market share in the small package delivery and small package express delivery markets of approximately 7-8%.

9. Canada Post and UPS Canada are direct competitors in the Canadian Non Monopoly Postal Services Market.

**III Procedural History of Dispute and Jurisdiction**

10. On January 19, 2000, UPS served upon Canada a Notice of Intent to Submit a Claim to Arbitration in accordance with Article 1119 of the NAFTA.

11. This claim is made less than three years from the date the Investor first acquired or should have acquired knowledge of the breaches set out herein and knowledge that the Investor had incurred loss or damage. More than six months have elapsed since the events giving rise to this claim.

12. Consultations pursuant to Article 1118 of the NAFTA were held on March 17, 2000 in Ottawa.

13. UPS and UPS Canada have filed waivers and UPS has filed its consent to the extent required by NAFTA Article 1121(1).

**IV OVERVIEW - BREACHES OF NAFTA**

14. By virtue of the facts set out herein, Canada has breached NAFTA Articles 1102 and 1105, and NAFTA Articles 1502(3)(a) and 1503(2), all in a manner such that UPS is entitled to bring this claim for compensation under Section B of Chapter 11 of NAFTA. More particularly, Canada has:

- a. Breached its obligations under NAFTA Article 1102 by not providing UPS and UPS Canada with the best treatment available to domestic competitors in the Non Monopoly Postal Services Market, and in particular, to Canada Post;
- b. Breached its obligations under NAFTA Articles 1502(3)(a) and 1503(2) by failing to ensure that Canada Post not act in a manner inconsistent with Canada's obligations under the NAFTA; and
- c. Breached its obligations under NAFTA Article 1105 by failing to accord UPS Canada treatment in accordance with international law including fair and equitable treatment.

**V. CANADA'S NAFTA OBLIGATIONS****A. National Treatment**

15. NAFTA Article 1102 requires Canada to accord to investors on another NAFTA Party and to investments of investors of another NAFTA Party such as the investments of UPS the best in-jurisdiction treatment with respect to, among other things, the establishment, acquisition, expansion, management, conduct and operation of investments in like circumstances to the investments of Canadian investors.

*Amended Statement of Claim of UPS*

-4-

*Confidential*

16. Canada has granted to Canada Post certain benefits and privileges from which Canada Post is able to benefit its businesses in the Non Monopoly Postal Services Market, which benefits and privileges are not correspondingly made available to competitors including UPS Canada competing in that market. Those benefits and privileges include, but are not limited to:

- a. Benefits and privileges accorded to Canada Post under an agreement dated April 25, 1994, between Canada Post and the Canadian Department of National Revenue (the "Postal Imports Agreement"), which agreement was not disclosed to UPS or UPS Canada until 1999, including:
  - i. Payments by the Canadian Department of National Revenue to Canada Post calculated on the basis of the number of packages imported into Canada through the postal system;
  - ii. The provision by Canada Customs employees to Canada Post of customs brokerage services or services equivalent to customs brokerage services without fee;
  - iii. The provision of Customs officers to Canada Post during evenings and weekends without cost to Canada Post;
  - iv. The exemption of Canada Post from interest and penalties for late payment or nonpayment of duties or taxes;
  - v. Permitting Canada Post employees to perform customs functions;
  - vi. The exemption of Canada Post from responsibility for the costs associated with maintenance and upgrading of the "PICS" computer system and electronic data interchanges through which Canada Post communicates with Canada Customs, and from paying for computer and processing equipment used by Canada Customs on Canada Post premises;
- b. Permitting Canada Post to levy and retain a \$5 handling fee for the collection of duties and taxes from recipients of packages imported through the postal system, irrespective of the costs properly or fairly attributable to that transaction;
- c. Exempting Canada Post from charging recipients of packages imported through the postal system 7% goods and services tax on the \$5 handling fee;
- d. Exemption from Customs Sufferance Warehouse regulations and the requirement to post
  - i. Customs Broker License Bonds;
  - ii. Temporary Importation Bonds;

- iii. Bonded Air Carrier Operation Bonds;
  - iv. Bonded Freight Forwarder Operations Bonds;
  - v. Bonded Highway Carrier Bonds; and
  - vi. Sufferance Warehouse Bonds.
- e. Exempting Rural Route Contractors engaged under contract with Canada Post from the application of the Canada Labour Code, and denying those individuals the right to unionize;
- f. Allowing non-monopoly products access to and the benefit of the infrastructure built to service Canada Post's monopoly products without appropriate charges being allocated to the non-monopoly product;
- g. Granting Canada Post the exclusive right to place its mailboxes in any public place, including a public roadway, without payment of any fee or charge when those mailboxes are also used for the deposit of non-monopoly products; and
- h. Provision to Canada Post of benefits respecting the pension plans made available to its employees, including by providing Canada Post free of charge with administrative and other services, by providing Canada Post employees with indexed pension benefits without requiring Canada Post to fund any actuarial deficiency, by prohibiting Canada Post employees' unions from negotiating improvements to the pension plan, and by making excessive payments to Canada Post upon Canada Post taking over administration of the pension plan.

17. Further, Canada has failed to accord UPS and its investment national treatment by either directly or through Canada Customs, failing or neglecting to ensure that Canada Post charges duties and taxes to Canadian importers on packages imported by Canada Post through the postal system for which duties and taxes are payable and has allowed large volumes of packages to be imported into Canada without the collection of such duties and taxes. Where packages are imported by UPS Canada, duties and taxes are appropriately collected. As a result of the differential treatment, Canada Post receives a competitive advantage over UPS Canada, to the detriment of UPS Canada.

18. Canada has further failed to accord UPS and its investment national treatment in accordance with NAFTA Article 1102, by designing and implementing a Publications Assistance Program, intended to subsidize the Canadian magazine industry, in such a way as to provide financial assistance to the Canadian magazine industry, but only on the condition that any magazines benefitting from that financial assistance are distributed through Canada Post, and not through companies such as UPS Canada.

19. By reason of the benefits and privileges set out above, which are not correspondingly made available by Canada to UPS Canada, UPS, the US Subsidiaries and UPS Canada have suffered harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share, and increased out of pocket expense. Canada has violated its obligation to accord

national treatment pursuant to NAFTA article 1102 to UPS and UPS Canada, and is therefore liable to pay compensation.

**B. Canada's Obligations under Chapter 15**

*(i) NAFTA Article 1502(3)(a) and 1503(2) Obligations*

20. Under NAFTA Article 1502(3)(a) Canada is obliged to ensure that Canada Post acts in a manner that is not inconsistent with Canada's obligations under NAFTA whenever Canada Post exercises any governmental authority that Canada has delegated to it.

21. Under NAFTA Article 1503(2), Canada is obliged to ensure that as a state enterprise Canada Post acts in a manner that is not inconsistent with Canada's obligations under chapter 11 of NAFTA whenever Canada Post exercises any governmental authority that Canada has delegated to it.

22. Canada Post is therefore required to act consistently with Canada's obligations under NAFTA Article 1105. The obligations under NAFTA Article 1105 include not engaging in anti-competitive practices while exercising governmental authority, such as the type of authority delegated to Canada Post. Examples of such anti-competitive practices include:

- a. cross subsidization;
- b. predatory conduct and predatory pricing;
- c. using a monopoly infrastructure and network developed for the delivery of monopoly letter mail to benefit non-monopoly products in an unfair manner; and
- d. failing to allocate a fair and equitable portion of the costs incurred to each of its non-monopoly products which benefit from the monopoly infrastructure and network and pricing such non-monopoly products below those allocated costs.

23. In addition, under NAFTA Article 1502(3)(d), Canada is obligated to ensure, through regulatory control, administrative supervision or the application of other measures, that Canada Post acts in a manner that does not use its monopoly position to engage, either directly or indirectly, in anti-competitive practices in the Non-Monopoly Postal Services Market that adversely affect UPS Canada, such as cross-subsidization or predatory conduct. Accordingly, wherever Canada Post engages in anti-competitive conduct in the non-monopolized postal market it is acting inconsistently with Canada's obligation to ensure that Canada Post not engage in such conduct.



---

*(ii) Breaches of Articles 1502(3)(a) and 1503(2)***(a) Background**

24. In 1995, Canada appointed a Commission to carry out an independent review of Canada Post and its mandate. An extensive review of Canada Post's activities including its non-monopoly business activities, and Canada's role in supervising and regulating those activities was carried out by that Commission.

25. In late 1996 the Commission concluded that Canada Post is an unregulated government monopoly engaged in unrestrained competition with the private sector. It found

- a. Canada Post's practices raised serious concerns of fairness and appropriateness;
- b. Canada Post is not subject to any effective accountability mechanisms and lacks the necessary supervision to ensure that its actions are fully consistent with the public interest;
- c. Canada Post has resisted repeated calls to adopt a satisfactory accounting system that identifies actual costs and revenues for specific products and continues to carry out its competitive activities on the basis of cost accounting processes that lack transparency;
- d. Canada Post is an unfair competitor in ways detrimental to private sector companies in the non-monopolized postal market in Canada;
- e. Canada Post's misallocation of costs constitutes a form of cross-subsidization;
- f. Canada Post's ability to leverage a network built-up with public funds on the strength of a government granted monopoly gives it a pricing advantage over competitors that is seriously unfair;
- g. Canada Post has developed a reputation as a "vicious competitor" whose predatory practices have led corporations to refrain from criticisms for fear of retaliation; and
- h. the competitive activities of Canada Post, based as they are on the foundation of the corporation's postal monopoly and of the network it has built with public funds, are incompatible with basic principles of fairness.

26. Canada did not finally respond to the Commission's finding until April 23, 1997 when it determined not to implement measures to redress these findings.

27. Since April of 1997, Canada Post has engaged in anti-competitive and unfair conduct including predatory conduct, predatory pricing, tied selling, cross-subsidization and the unfair use of its monopoly infrastructure and network, which conduct is inconsistent with Canada's obligations under NAFTA. Examples of such conduct include:

- a. requiring its retail franchisees to enter into a Standard Dealership Agreement prohibiting those franchisees from selling products which compete with Canada Post's "courier or messenger services" such as UPS Canada's courier products;
- b. pricing its non-monopoly products, and in particular "Xpresspost", "Priority Courier", "Regular Parcel" and "Expedited Parcel" in a predatory manner, or alternatively at prices below the cost of providing those products or below the properly attributable cost of providing those products;
- c. utilizing Canada Post's extensive network developed for the purposes of facilitating the delivery of monopoly letter mail in order to compete in the Non-Monopoly Postal Services Market without the actual cost of providing those services or products being fairly or appropriately attributed to the non-monopoly products. Examples include:
  - i. allowing non-monopoly products to be deposited into Canada Post's 936,000 red letter mail boxes for pick up by Canada Post employees using Canada Post vehicles;
  - ii. use of Canada Post's employees to pick up non-monopoly products;
  - iii. use of monopoly mail processing facilities to process non-monopoly products;
  - iv. use of Canada Post ground and air vehicles for the purpose of moving non-monopoly products;
  - v. delivery of non-monopoly products by Canada Post letter carriers as part of their regular mail delivery function;
  - vi. use of Canada Post retail outlets for the sale of non-monopoly products;
  - vii. marketing and selling non-monopoly products through a common sales and marketing staff;

- 
- viii. providing customers with free computerized shipping systems to enable customers to reduce cost by utilizing Canada Post for both monopoly and non-monopoly products;
  - ix. charging advertising expenses intended to benefit the non-monopoly products to its monopoly products, and advertising monopoly and non-monopoly products as a part of a common advertising campaign;
  - x. maintaining a common corporate security investigation service and invoicing and accounts receivable collection service;
  - xi. permitting the use of postal meters to pay for non-monopoly products;
  - xii. permitting the sale of Purolator products in Canada Post retail outlets;
  - xiii. delivering non-monopoly products to locked apartment mail boxes, to post office boxes at retail postal outlets, and to community mail boxes, access to which Canada Post employees have solely by reason of their delivery of monopoly mail;
- d. making available to its subsidiary Purolator the benefit of the financial strength of Canada and the buying power of Canada Post to reduce the costs incurred by Purolator and to improve its competitive position, and by contracting directly with Purolator for the provision of airlift services so as to reduce the costs incurred by Purolator, while not permitting UPS Canada to bid competitively for such airlift services;
  - e. using revenues from its monopoly products to subsidize its development and sale of E-commerce products at prices below the fairly or properly attributable cost of developing and selling those products;
  - f. allowing Purolator to sell stamps at its retail outlets while at the same time prohibiting the sale of stamps at retail outlets that sell UPS Canada or other competitor non-monopoly products;
  - g. allowing Global Distributing Express exclusive access to Canada Post's infrastructure and network to sell and distribute its non-monopoly product for the international market; and
  - h. not properly attributing the costs incurred in administering the Canada Post pension plan to non-monopoly products and otherwise taking the benefit of Canada's administration of the pension plan for Canada Post employees, thereby permitting Canada Post to price its non-monopoly products below their properly attributable costs.

28. Canada Post is further able to cross subsidize its non-monopoly products and to unfairly price its non-monopoly products by securing borrowings at less than market rates by using a guarantee of Canada and by virtue of the fact that Canada does not require a market or commercial rate of return upon its investment in Canada Post. Canada Post is thereby able to price its non-monopoly products at below properly or fairly attributable costs by taking advantage of below market debt charges and the lack of a requirement by Canada that Canada Post provide a return on its capital. Canada Post is further able to use these advantages to develop and compete in Non-Monopoly Postal Services Markets, without properly attributing costs incurred in so doing and while pricing below those costs.

29. Further, Canada Post has also acted inconsistently with Canada's obligations under NAFTA Article 1102 by not allowing similar access to its monopoly infrastructure and network to UPS Canada and its other competitors that it provides to its non-monopoly business.

**(b) Canada's conduct since April 1997**

30. Since April, 1997 Canada has implemented no, or insufficient, measures to ensure that the anti-competitive and unfair practices engaged in by Canada Post would not occur.

31. As a result, Canada has failed to supervise or exercise control over Canada Post to ensure Canada Post has not acted in a manner inconsistent with Canada's obligations under NAFTA, including from engaging in the unfair, inequitable, or anti-competitive practices described above and has permitted Canada Post to operate as a de facto unregulated monopoly.

32. Accordingly, Canada has violated Articles 1502(3)(a) and 1503(2) of NAFTA.

**C. Treatment in Accordance With International Law**

33. Further, Canada is obligated under NAFTA Article 1105 to accord to UPS Canada treatment in accordance with international law, including fair and equitable treatment. Pursuant to NAFTA Article 1105, Canada is obligated to:

- a. enforce Canadian laws such as in respect of the collection of goods and services tax and customs duties, as alleged herein, when Canada knows or should know that by not enforcing the laws it provides Canada Post with a competitive advantage over its competitors in the Non Monopoly Postal Services Market; and
- b. ensure the existence of a transparent and effective regime for the supervision and regulation of Canada Post in the non-monopoly postal market in Canada.

34. Canada has breached its obligations under NAFTA Article 1105, by *inter alia* failing to provide transparency in the supervision, regulation and operation of Canada Post including through its accounting and financial reporting and by failing to enforce Canadian law including in relation to the issues raised herein when it knew or should have known that by doing so it provided Canada

Post with a competitive advantage over UPS Canada in the Non Monopoly Postal Services Market.

35. By virtue of the facts set out in paragraphs 20 to 34 above, UPS, the US Subsidiaries and UPS Canada have suffered harm, loss and damage, including but not limited to competitive disadvantage, reduced profit, reduced market share, and increased out of pocket expense. Canada has violated its obligations under NAFTA and is liable to pay compensation.

#### VI POINTS IN ISSUE

36. Has Canada taken measures inconsistent with its obligations under Section A of NAFTA Chapter 11 and Chapter 15, including but not limited to Articles 1102, 1105, 1502(3)(a), 1502(3)(d), and 1503(2)?

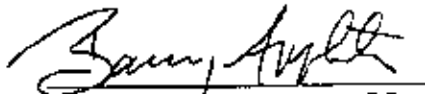
37. If so, what is the quantum of compensation to be paid to UPS as a result of the failure of Canada to comply with its obligations under Chapter 11 of NAFTA?

#### VII RELIEF SOUGHT AND DAMAGES CLAIMED

38. UPS claims damages of not less than US \$160 million as compensation for the damages caused by or arising out of Canada's breaches of its obligations under NAFTA, costs including professional fees and disbursements, costs of the arbitration, interest, compensation to remedy the tax consequences of any award and such further relief as this tribunal might deem appropriate.

DATE OF ISSUE: April 19, 2000 - Amended November 30, 2001.

Appleton & Associates International Lawyers  
1140 Bay Street, Suite 300  
Toronto, ON M5S 2B4  
Tel: (416) 966-8800  
Fax: (416) 966-8801

  
BARRY APPLETON, ESQ.  
Counsel for the Investor

#### SERVED TO:

Office of the Deputy Attorney General of Canada,  
Justice Building  
284 Wellington Street  
Ottawa, Ontario K1A 0H8