

THE GLOBE AND MAIL

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UPS sues Ottawa in subsidy dispute

*Courier cites NAFTA
competition rule*

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United Parcel Service Inc., the world's largest package delivery company, is using NAFTA to sue the Canadian government for \$100-million for favouring Canada Post's courier services, *The Globe and Mail* has learned.

The Canadian arm of UPS recently filed a notice saying it intends to sue Ottawa under the North American free-trade agreement unless Ottawa makes changes to put UPS on a more level playing field with Canada Post.

UPS says it has lost \$100-million in Canadian business because Canada Post allows Purolator Courier to use its national network, but does not give other, foreign courier companies the same privilege.

"There are consultations going on with the government of Canada and UPS, and those consultations do concern Canada Post," confirmed Canada Post spokesman John Caines.

NAFTA's Chapter 11 allows foreign companies to sue Ottawa for compensation if their investments in Canada have been hurt by Canadian laws or regulations.

"We're examining the allegations in the notice of intent," said François Lasalle, spokesman for the Department of Foreign Affairs and International Trade. "Once we've analyzed all of UPS's allegations, we will prepare a vigorous defence."

Canada Post owns 96 per cent of Purolator, which operates as a stand-alone company and is one of the foremost courier companies in Canada along with UPS and FedEx.

Canada Post also owns and operates Priority Courier and Xpress Post, both of which specialize in quick delivery of parcels and mail.

The courier business is booming, Mr. Caine says, mainly because of the growth of electronic commerce and the increase in the number of parcels people and businesses are sending.

Competition between courier companies has been intense, and UPS has frequently complained about Canada Post using its monopoly on Canadian postal services to cross-subsidize the courier network for Purolator.

Please see UPS on page B6

UPS sues Ottawa

UPS from page B1

"Our hope is that we can successfully resolve the issue," said Susan Webb, spokeswoman for UPS Canada Ltd.

The Competition Bureau has already examined related issues and found that there is no cross-subsidization, the bureau's commissioner, Konrad von Finckenstein, said yesterday.

In a review in 1993, the Competition Bureau approved Canada Post's investment in Purolator, but told Canada Post that Purolator must be operated at arm's length.

Government officials say UPS filed its notice Jan. 19 with the federal government.

Under NAFTA, UPS and Ottawa must try for 90 days to work out a compromise before UPS can take the issue further. But in mid-April, if UPS and Ottawa have no deal, UPS can ask a binding arbitration panel to decide whether the federal government has to pay the \$100-million in damages.

Government sources say U.S. officials believe UPS has a good case, and even suggested that the U.S. government itself use NAFTA to fight the Canadian government for better access.

But UPS decided that it would be faster if the company acted on its own, and sued Ottawa, using Chapter 11, the sources said.

The U.S. company has engaged Toronto lawyer Barry Appleton for the case. He also acted for Virginia-

based Ethyl Corp. in a similar NAFTA case, and succeeded in winning a \$20-million settlement from the federal government, as well as getting Ottawa to change some trade laws.

Trade Minister Pierre Pettigrew has expressed concern about the NAFTA provisions that allow companies to sue foreign governments. He is trying to persuade the United States and Mexico to add a note to the NAFTA investment rules to curtail the use of the provisions, but so far neither country has agreed.

"Chapter 11 has potentially broad reach. No one knows how far it extends," said Toronto trade lawyer Larry Herman.

U.S. and Canadian NAFTA negotiators originally put the investment provisions in the trade agreement to make sure the Mexican government did not arbitrarily nationalize an industry without properly compensating foreign owners. But U.S. companies have been using the rules to tell Ottawa to soften regulations governing the Canadian environment, the forestry industry, and now the post office.

Canadian companies have also filed a handful of cases under Chapter 11 against the U.S. government.

So far, there has only been one ruling from a binding arbitration panel. Mexico successfully defended itself against a U.S. waste management firm. (The Ethyl case was the result of a negotiated compromise.)