

**What's
the Big Deal?**
Understanding the
Trans-Pacific
Partnership

Signed, Sealed and Delivered?

The TPP and Canada's public postal service

Daniel Sheppard and Louis Century



CCPA

CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES



CCPA

CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

ISBN 978-1-77125-298-0

This report is available free of charge at www.policyalternatives.ca. Printed copies may be ordered through the CCPA National Office for \$10.

PLEASE MAKE A DONATION...

Help us to continue to offer our publications free online.

With your support we can continue to produce high quality research—and make sure it gets into the hands of citizens, journalists, policy makers and progressive organizations. Visit www.policyalternatives.ca or call 613-563-1341 for more information.

The CCPA is an independent policy research organization. This report has been subjected to peer review and meets the research standards of the Centre.

The opinions and recommendations in this report, and any errors, are those of the authors, and do not necessarily reflect the views of the funders of this report.



ABOUT THE AUTHORS

Daniel Sheppard is a lawyer at Goldblatt Partners LLP where he maintains a broad public law practice with a focus on constitutional litigation and public international law. He is also an adjunct professor at Osgoode Hall Law School where he serves as clinical director of the school's Test Case Litigation Program.

Louis Century is a lawyer at Goldblatt Partners LLP and former law clerk to Justice Wagner of the Supreme Court of Canada. Louis has a diverse civil litigation practice that includes professional regulation, class actions, employment law, and constitutional law. He is also a fellow of the Philippe Kirsch Institute.

ACKNOWLEDGEMENTS

We wish to thank Steven Shrybman, Scott Sinclair, and Stuart Trew for their guidance, encouragement, and helpful feedback throughout the entire process. We also wish to thank Katherine Steinhoff for providing us with the initial opportunity to explore the complexities of the TPP in general and as applied to Canada's postal system.

- 5 Introduction
- 7 The TPP and Canada Post's integrated postal service model
- 13 Concluding remarks
- 14 Notes

Signed, Sealed and Delivered?

The TPP and Canada's public postal service

Introduction

In 1867, months after Confederation, the Parliament of Canada enacted legislation creating a single, public postal system. It was a significant endeavour, and an essential one for a new country that needed to connect and unite disparate communities over large distances. On the eve of Canada's 150th birthday, our public postal service continues to play this role, in particular for remote communities with low levels of infrastructure. In many places, the post office is the only face of the federal government, and a primary point of access to the rest of the country.

The right to a universal postal service is recognized in international law. Article 3.1 of the Universal Postal Convention, to which Canada is a party, affirms "the right to a universal postal service involving the permanent provision of quality basic postal services at all points in [member countries'] territory, at affordable prices." This right is reflected in the Canada Post Corporation Act, which defines the objectives of our public postal service to include providing a standard of service that "will meet the needs of the people of Canada," and that despite Canada's vast geography, "is similar with respect to communities of the same size."¹

The act also requires that Canada Post provide the above services on a “self-sustaining financial basis,” i.e., that the postal service should pay for itself. While its postage rates must be “fair and reasonable,” they must also be “consistent so far as possible with providing a revenue, together with any revenue from other sources, sufficient to defray the costs incurred” by Canada Post in fulfilling its universal service mandate.

This challenge – to provide affordable postal services to all Canadians in a cost-effective manner – has become more difficult in recent years, as developments in communications technology have contributed to a decline in physical mail volumes. In order to remain financially sustainable while still achieving its public interest mandate, Canada Post has expanded to provide services that complement the delivery of letter mail, notably parcel and express delivery services. The Canadian public cares deeply about the future of public postal services and Canada Post. Just observe the widespread public backlash following the reduction of door-to-door mail delivery under the Conservative government of Stephen Harper.

The Liberal government of Justin Trudeau campaigned on a platform to “save” home mail delivery, and in May 2016 it announced an independent review of Canada Post, “to ensure Canadians receive quality postal services at a reasonable price.”² This review will include public consultations and an examination of potential new revenue-generating lines of business for the corporation. For instance, some argue that Canada Post should follow the model of other industrialized countries by expanding into the provision of basic financial services, also known as postal banking. In announcing the review, the minister of public services and procurement, Judy Foote, said the government was “not ruling out anything” when it came to potential new lines of business.³

Unfortunately, any consultative project for reinventing Canada’s public postal service must contend with a medley of international trade rules, including those contained in the recently finalized Trans-Pacific Partnership trade agreement (TPP). If ratified, the TPP would create binding obligations on Canada that are enforceable through arbitration proceedings initiated by any of the eleven other signatory states, and in some cases by corporations from those states. Many general rules in the TPP may have an impact on how Canada Post functions today and in the future.

The agreement also contains a surprising number of rules targeting postal services that were inserted at the request of U.S. industry groups, notably express delivery services. In contrast to the Canada Post review currently underway, these rules in the TPP were negotiated in secret by trade nego-

tiators and lobbyists, on a fast-tracked basis, without parliamentary oversight or public consultation.

The purpose of this paper is to determine the extent to which the rules contained in the TPP may constrain the current and future activities of Canada Post. This is not an easy task. Much of the TPP language is broad, vague, or novel. The application of the rules therein to Canada Post will turn on complex factual considerations and the interpretations of governments and international arbitrators. In this paper, we focus primarily on how the TPP may impact Canada Post's *current* integrated service model involving the monopoly provision of letter mail, supported by revenues from courier and express delivery services.

We conclude that the TPP would not necessarily render Canada Post's current activities unlawful or firmly close the door to innovation in the future. However, the TPP's convoluted, overlapping, and ambiguous rules, many of which directly respond to industry lobbying, create real risks of future trade and investment disputes triggered by corporations or member states unhappy with Canada's policy choices in the area of postal services.

The risk of costly trade litigation, even when it is largely hypothetical, can influence policy decisions at the front end. On the back end there would always be a possibility that international arbitrators would rule against Canada. These risks could have been avoided had Canada included better reservations to the TPP rules affecting postal services, as some other countries did.

The TPP and Canada Post's integrated postal service model

The TPP does not require the privatization of Canada Post, or insist that its monopoly over letter mail services should be broken up. In fact, by defining limits on the scope of postal monopolies, the TPP presupposes that states can and will maintain public postal systems.⁴ But the trade deal does create serious economic challenges for Canada Post by threatening its ability to perform more profitable, non-core services that help make letter mail delivery economically feasible. It is these economic challenges that should concern anyone who wishes to see Canada maintain a viable, universal public postal service across the country.

Funding universal letter mail through express delivery services

Providing letter mail service to many of Canada's remote and rural communities is not economically viable on its own. In the past, fees charged on high-volume, lower-cost postal routes in major urban centres provided the revenue to offset unprofitable routes. However, dramatic changes in communications infrastructure have disrupted this model by reducing reliance on letter mail for many Canadians. In 2015, Canada Post delivered 1.6 billion fewer letters than it did in 2006.⁵ The rapid and sustained decline in Canada Post's main line of business has required the corporation to find other ways to subsidize service to rural Canada. To date, its most profitable innovation has been entry into the express delivery services industry.

Express delivery services involve the expedited collection, transport, and delivery of papers, parcels, or other goods while tracking and maintaining control of the items throughout the process. The industry is a key component of the modern e-commerce economy. Long dominated by global logistics companies like FedEx and UPS, the express delivery sector has proven to be highly profitable. While global letter mail volumes have been in steady decline for some 20 years, express delivery services generate in excess of US\$130 billion (about C\$167 billion) globally, with an annual growth rate of 6% since 1998.⁶ It is not at all surprising that postal systems the world over, including Canada Post, have chosen to enter this lucrative field.

Involvement in the express delivery industry has been a highly profitable endeavour for Canada Post. Between 2014 and 2015, while Canada Post saw a 6.1% decline in letters sent, parcel delivery grew by an astonishing 9.7%.⁷ Parcels generated over \$1.6 billion for Canada Post that year, making up over a quarter of the corporation's 2015 revenue.⁸ Without the operation of Xpresspost, Canada Post's brand for its express delivery service, the corporation would have operated at a loss.

Canada Post is also involved in the express delivery market through its 91% stake in Purolator, the Mississauga-based global delivery company. Founded in 1960, Purolator was acquired by Canada Post in 1993 for \$55 million. In 2014, Purolator generated pre-tax earnings of over \$73 million, offering an additional source of revenue for Canada Post in the express delivery industry. Both of these express delivery services have been foundational in maintaining Canada Post's profitability, and its ability to meet the universal service mandate.

Industry efforts to dismantle Canada Post's integrated service model

Canada Post's involvement in express delivery services, including its relationship with Purolator, has been a source of controversy and risk. Competitor companies, most notably UPS, have long argued that Canada Post's relationship with Purolator is not only anti-competitive but also unlawful under international trade rules. In 2000, UPS launched a lawsuit against the government of Canada under the North American Free Trade Agreement (NAFTA), raising numerous allegations related to issues as diverse as pension regulation and customs processing rules. Among the various complaints UPS raised were allegations that Canada Post violated rules related to equal treatment for foreign investments and competition policy by granting Purolator access to its infrastructure and facilities (thousands of post offices and delivery networks across the country) while denying equal access to UPS, and that Canada Post's own courier services unfairly took advantage of monopoly infrastructure. UPS launched a similar case under European Union competition rules after the European Commission signed off on Deutsche Post's acquisition of a significant interest in DHL.⁹

UPS lost both lawsuits, but the company never abandoned its campaign against these kinds of arrangements by national postal entities. In parallel to their legal battles in North America and Europe under existing trade rules, UPS and other private companies aggressively lobbied the U.S. government for new trade rules that would, from their perspective, level the playing field. These efforts saw expression in a number of bilateral trade agreements between the U.S. and other countries that included special provisions related to express delivery services.

For example, the 2003 Chile–U.S. Free Trade Agreement required that Chile, but not the U.S., refrain from imposing new restrictions on express delivery services in its territory.¹⁰ The 2004 Australia–U.S. FTA included language designed to restrict the ability of state postal monopolies to compete with private companies in the express delivery market.¹¹ The U.S. also enacted domestic reforms in 2006 that prohibited “subsidization [by the U.S. Postal Service] of competitive products by market-dominant products.”¹²

The TPP replicates and expands upon these targeted provisions, and can rightly be seen as representing the high-water mark for efforts by the express delivery industry to establish international trade rules that serve its objectives. Their crowning achievement is Annex 10-B of the TPP (“Express Delivery Services”), which directly targets how postal systems are permitted to

operate in the express delivery market. As acknowledged by the U.S. Trade Representative (USTR), the annex was included “to address the unique challenges private suppliers face when competing with national postal entities in express delivery,” and includes “new commitments that address long-standing issues for U.S. service suppliers.”¹³

The express delivery services annex: a coup for courier companies

The TPP annex on express delivery services imposes a wide range of restrictions and rules that challenge arrangements such as those between Canada Post and Purolator, and even how postal services can engage in express delivery directly, such as through Xpresspost. In doing so, the annex raises the real risk that Canada Post’s use of express delivery revenues to maintain universal domestic postal services could be subject to more trade challenges.

The express delivery annex contains two key rules that could challenge Canada Post’s continued operations in the express delivery sector. The first prohibits a postal service using money generated from monopoly activities (i.e., the delivery of letter mail) to “cross-subsidize” its own or anyone else’s express delivery services.¹⁴ The second rule requires that postal monopolies not “abuse [their] monopoly position” in a way that treats foreign companies (like UPS) less favourably than domestic ones (like Purolator) or undermines the cross-border trade in services between signatory states.¹⁵ These provisions go well beyond comparable rules in existing trade agreements such as NAFTA or the World Trade Organization’s General Agreement on Trade in Services (GATS).

It is hard to predict what these rules will mean for Canada Post’s continued work in the express delivery market. For one thing, the prohibition against cross-subsidization is remarkably difficult to apply in practice. The allegation, broadly speaking, is that Canada Post uses revenues from its exclusive privilege letter operations to subsidize express courier services (both Xpresspost and Purolator). Numerous investigations and reviews, including by Canada Post’s auditors, consistently find no evidence of direct financial cross-subsidization.¹⁶ However, this does not preclude arguments by unsatisfied companies that cross-subsidization is occurring indirectly.

The TPP may offer a new venue to assert such claims since the express delivery services annex speaks of “subsidies” in general. International trade law also recognizes the concept of an *indirect subsidy*, which might include the use of infrastructure developed over decades to deliver mail to facilitate

the processing, tracking, and shipment of packages.¹⁷ But evaluating the existence of an indirect subsidy, particularly within a fully integrated corporation like Canada Post, would be extremely difficult conceptually and empirically. Claims that a dominant position is being abused – the second significant rule in the annex – can also be factually complex.¹⁸ Regardless of how difficult it is to work through such arguments, the existence of rules in the TPP directly targeting postal operators constitutes a significant risk that Canada Post’s current operations will be scrutinized, criticized, and potentially challenged.

State-owned enterprises, designated monopolies, and non-commercial assistance

While the TPP’s express delivery services annex poses the most specific and obvious risk to Canada Post’s ability to maintain profitability through parcel delivery, several of the agreement’s more general provisions present challenges to the corporation’s links to Xpresspost and Purolator. Chapter 17 of the TPP contains extensive, complex rules related to state-owned enterprises (SOEs) and “designated monopolies,” which would apply to Canada Post and Purolator. Among other things, these rules would prohibit Canada Post from using its monopoly in the letter delivery market to engage – even indirectly through a subsidiary – in anti-competitive practices, in a non-monopoly market, that negatively impact trade or investment between TPP members.¹⁹ This rule is broader than NAFTA’s comparable competition and SOE rules.²⁰

Chapter 17 of the TPP also contains expansive rules, unparalleled in prior trade agreements, regulating the provision of “non-commercial assistance” (NCA) to SOEs.²¹ The novelty and complexity of the NCA rules makes any prediction of their impact speculative. But the argument has been made, despite an absence of any compelling evidence, that by granting Purolator access to Canada Post infrastructure the latter provides the courier a form of non-commercial assistance.²² The TPP requires parties to ensure that their SOEs, like Canada Post, do not provide non-commercial assistance to other SOEs, like Purolator, in a manner that has “adverse effects on the interests of another Party” with respect to the SOE’s supply of services into the territory of other TPP parties. To the extent that any alleged Purolator access to Canada Post infrastructure, now or in the future, assists it when it comes to its global delivery operations in other TPP member states, this rule pro-

vides a further way for the corporation’s opponents to attack its activities under trade agreements.

The risk of investor–state claims

Neither the express delivery annex nor the SOE and NCA rules of Chapter 17 are subject to the TPP’s investor–state dispute settlement (ISDS) system in which foreign investors are permitted to sue a country before international arbitrators for allegedly breaching the agreement’s generous investment protections.²³ In other words, while a TPP country could bring a claim regarding postal services against Canada based on these rules, a corporation like UPS could not, or at least not directly. However, a corporation could bring a claim against Canada under some other provision of the TPP that is subject to ISDS, and argue that the rules discussed above should be used as “interpretive aids” to help ground a claim under that other provision.

Like NAFTA, the TPP’s investment chapter contains rules safeguarding a foreign investor’s right to national treatment and most-favoured-nation treatment, as well as a more vague “minimum standard of treatment.” Investors are also protected from direct and indirect expropriation without compensation.²⁴ All of these protections *are* subject to ISDS and could be used to creatively bring a case that incorporates the postal services rules discussed above.

It is tempting to take some comfort from the decision in *UPS v. Canada* under NAFTA’s ISDS process, where a majority of arbitrators rejected the company’s claims against Canada Post, many of which were similar to the issues discussed above. However, we cannot lose sight of the fact the TPP is a different agreement than NAFTA; there is no guarantee international arbitrators would interpret its rules in the same way. Given that past ISDS awards are persuasive, not binding, on future arbitrators, and the NAFTA award was not unanimous (a dissenting arbitrator would have found for UPS on at least some of its claims), it is not so difficult to imagine a similar challenge under the TPP resulting in a different outcome.

One thing is certain: the TPP is unique in multilateral trade agreements in its dedicated focus on postal services and their interaction with express delivery. This alone represents a new kind of risk to Canada Post’s current activities. It would be very serious if these rules do ultimately get interpreted as prohibiting the kind of integrated letter mail and express delivery service model that characterizes Canada Post today. The current “solution” to the problem of providing universal service in an era of declining letter mail

would be seriously challenged, and could force Canada Post to look elsewhere for new revenue streams.

Concluding remarks

For those who are concerned about the future of Canada Post it is perhaps most frustrating that all of the challenges described here were entirely avoidable. The TPP, like most trade agreements, permits states to exclude existing and future measures, or entire sectors, from its services and investment obligations through the use of reservations. For example, Canada took advantage of the agreement's Annex I and II reservations to protect cultural industries, which has the effect of protecting Canada Post from trade challenges regarding assistance it provides in the delivery of Canadian periodicals.

Other countries, however, went much further in protecting their public postal services from the impact of international trade rules. Japan reserved "the right to adopt or maintain any measure relating to investments in or the supply of...postal services in Japan."²⁵ Singapore reserved "the right to adopt or maintain any measure relating to Public Postal licensee(s)."²⁶ Canada could have included its own reservation granting Canada Post general protections. Yet, behind the closed doors of the TPP's secret negotiations, Canadian negotiators decided, for unknown reasons, not to do so. As a result, we are left with a trade agreement that combines broad, generally applicable rules with specific sections and annexes that directly and explicitly target Canada Post.

It is unfortunate that Canada agreed to these ill-defined new rules, which cast doubt on the federal government's policy-making authority in respect of postal services at the very moment when the public is participating in a consultative project to reimagine the role of our public postal service. Legal interpretations aside, the TPP is a powerful tool that can and will be used by companies to lobby against, and potentially challenge, Canada Post initiatives that cut into their bottom line. The TPP is not fatal to Canada Post's current integrated business model, nor should it impede expansion into new lines of business, but it introduces a number of risky factors into the calculus. It is more than fair to ask whether these new risks are worth it.

Notes

1 Canada Post Corporation Act, R.S.C. 1985, c. C-10, s. 5(2)(b). Further to these broad objectives, the act also requires that Canada Post maintain uniform postal rates throughout the country, standards regarding frequency of collection and speed of delivery, and appropriate proximity of postal boxes and post offices.

2 See, e.g., the Liberal Party campaign petition, “Saving Home Mail Delivery” (www.liberal.ca/petitions/saving-home-mail-delivery). Accessed May 21, 2016.

3 “Judy Foote ‘not ruling out anything’ in Canada Post Review”, *cbc News*, May 5, 2016 (www.cbc.ca/1.3565888).

4 TPP, *supra*, Annex 10-B, s. 3 imposes general restrictions on how the scope of a postal monopoly may be defined (which the Canada Post Corporation Act already complies with). This section is only intelligible if states are permitted to have postal monopolies in the first place.

5 Canada Post Corporation, *What’s In the Truck: Annual Report, 2015* at p. 3 (www.canadapost.ca/assets/pdf/aboutus/financialreports/2015_ar_complete_en.pdf).

6 Ruosi Zhang, “The liberalization of postal and courier services: ready for delivery”, *Opening Markets for Trade in Services Countries and Sectors in Bilateral and wto Negotiations*, eds. Juan A. Marchetti, Martin Roy (Cambridge: Cambridge University Press, February 2009), pp. 387–388.

7 2015 Annual Report, *supra* at i.

8 *Ibid.* at p. 4, 80.

9 *UPS Europe SA v. Commission (Deutsche Post AG intervening)* Case T-175/99, Judgment of March 20, 2002 (Court of First Instance of the European Union).

10 Chile-U.S. Free Trade Agreement, Chapter 11, Annex 11.6.

11 Australia-U.S. Free Trade Agreement, Art. 10.12.3.

12 Postal Accountability and Enhancement Act, Pub. L. 109–435, 120 Stat. 3198, 39 U.S.C. §3633(a)(1).

13 United States Trade Representative, *TPP: Made in America*, “Chapter 10: Cross-Border Trade in Services.”

14 TPP, Annex 10-B, s. 5.

15 TPP, Annex 10-B, s. 6.

16 For a summary of these reviews and investigations, see Scott Sinclair, *The GATS and Canadian Postal Services* (Ottawa: Canadian Centre for Policy Alternatives, March 2001), p. 26 (www.citizen.org/documents/Sinclair%20POSTAL.pdf); Jim Grieshaber-Otto and Scott Sinclair, *Return to Sender: The Impact of GATS “Pro-Competitive Regulation” on Postal and Other Public Services* (Canadian Centre for Policy Alternatives, January 28, 2004), p. 123 (www.policyalternatives.ca/publications/reports/return-sender).

17 Siva Somasundram and Iain Sandford, “Regulation of postal services in a changing market environment: lessons from Australia and elsewhere”, in *WTO Domestic Regulation and Services Trade: Putting Principles into Practice*, eds. Aik Hoe Lim, Bart De Meester (Cambridge: Cambridge University Press, 2014) pp. 189–190.

18 UPS’s claim of abuse of dominance through cross-subsidization under EU competition rules failed in large part due to their inability to identify the specific acts of the postal system that were said to be abusive: see *UPS Europe SA v. Commission*, *supra* at paras. 59–61.

19 TPP, Art. 17.4(2)(d).

20 NAFTA rules prohibit abuse of monopoly positions in non-monopolized markets where they have the effect of adversely affecting the investment of a foreign investor. The TPP rules are framed in terms of negative impacts on trade or investment between parties generally, opening the door to a broader range of complaints than could be raised under NAFTA. *Compare NAFTA*, Art. 1502(3)(d) with *TPP*, s. 17.4.2(d).

21 TPP, Art. 17.6.

22 See “Separate Statement of Dean Ronald A. Cass,” In *United Parcel Services of America v. The Government of Canada: Award on Merits*. International Center for Settlement of Investment Disputes, Washington D.C., June 11, 2007, at paras. 184–188.

23 See *TPP*, Art. 10.2.2(a), footnote 1, and Chapter 9, Section B: “Investor-State Dispute Settlement” (Arts. 9.18–9.30).

24 TPP, Articles 9.4, 9.5, 9.6 and 9.7.

25 TPP, Annex II (Japan), No. 2.

26 TPP, Annex II (Singapore), No. 21.



CCPA

CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES