CONFIDENTIAL

MEASURES AFFECTING DOMESTIC AND FOREIGN COMPETITION IN THE CANADIAN COMPUTER-TELECOMMUNICATIONS SECTOR

by

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ABSTRACT

This thesis examines the Canadian policy and law affecting those services sectors affected by the provisions of the Canada - U.S. Free Trade Agreement which relate to telecommunications, enhanced network services, and computer/information services.

In particular, constitutional law and administrative law in telecommunications matters are examined. Also examined in detail are those provisions of the Free Trade Agreement which affect the regulatory measures relating to the telecommunications transport sector and regulatory measures relating to other services which extensively utilize telecommunications, computer and information services.

RÉSUMÉ

Cette thèse examine les politiques et le droit canadiens dans leur rapport avec plusieurs secteurs touchés par les dispositions de l'accord de libre-échange entre les États-Unis et le Canada, notamment les secteurs des télécommunications, des services de réseau améliorés et des services d'information assistés par ordinateur.

Une place de choix est réservée au droit constitutionnel et au droit administratif concernant le contrôle et la concurrence dans le secteur des télécommunications au Canada. Les dispositions de l'accord de libre-échange et leurs répercussions sur la concurrence réglementée dans le secteur des télécommunications et autres qui utilisent les services de télécommunications et d'information assistés par ordinateur y sont longuement traités.

PREFACE

This dissertation deals with the Canada - U.S. bilateral accord in enhanced network services and computer/information services, and changing Canadian laws and policies relating to the screening of investment in and regulation of these, and underlying telecommunications transport services. Existing scholarship does not deal with these matters as an integrated phenomenon. This thesis endeavors to provide a framework for continued scholarship in this vein.

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INTRODUCTION

Enhanced network services, computer data processing and information (or data) retrieval services are all digital, microchip-based services. Telecommunications transport services are also becoming digital, microchip-based services, as more network transport systems utilize fibre optics conduits and digital switching technologies. These microchip based transport and enhanced network/computer/information services are merging in marketplace utilization by big and small users alike.

Records (data) communications is increasing in volume, as business consortia harness these networks and services to act as the media for transactions, and in some cases, to automate transactions. Various services industries, most notably financial and travel, have formed consortia around new records/transactions "highways". Some new commercial entities are dominating telecommunications-based "highways" which "bundle" the delivery of and transaction in numerous services.

For the greatest part, these activities are taking place in the U.S.A., where the public telecommunications transport system has been opened wide to market entry, and deregulated. However, the U.S.A. is exporting these services-based activities to foreign markets, for growth potential, due to competitive failures in its manufacturing base.

The Canada-U.S. Free Trade Agreement ("The F.T.A.") is reflective of this U.S. trade policy, and of the complementary Canadian policy favouring diminished foreign investment screening and diminished regulation in the telecommunications and other services markets.

Enhanced network, and computer/information services are covered in the F.T.A. while ostensibly telecommunications transport markets are not. Nonetheless, enhanced/computer/information services are telecommunications-based, and from a policy (and eventually legal) perspective, liberalization therein must have a liberalizing effect in the telecommunications transport markets and in the markets of those other services sectors which utilize enhanced/computer/information services.

This thesis will illustrate the Canadian status quo in these areas, and also the "market-oriented" agenda of the present 1989 Canadian federal executive, which is importing U.S. policies towards liberalization in the telecommunications and other services markets which are developing pursuant to the competitive, technological influence of enhanced network/computer/information services under the F.T.A. impetus.

PART I

COMPUTER-TELECOMMUNICATIONS SERVICES AS INTERNATIONALLY TRADED SERVICES

PART I

CHAPTER 1

The U.S. Position on Trade in Telecommunications and Enhanced Network/Computer/Information Services, and Competition Therein.

(a) The "S.P.A.C." (Services Policy Advisory Committee) Report and the Proposed General Framework Agreement in Services

It is in largest part a result of U.S. insistence that trade in services was negotiated in the F.T.A., and is being negotiated in the present G.A.T.T. rounds, known as the Uruguay Rounds.[1]

It is of great relevance therefore, to examine the U.S. position on trade in the telecommunications/computer/information sectors, and the special role of those sectors in its trade and industrial strategies in general.

In a brief written by The U.S. Services Policy Advisory Committee (hereinafter "S.P.A.C.") to the United States Trade Representative entitled Telecommunications and Information Services in the Trade in Services Negotiations: An Industry View (March 20, 1987),[2] the Committee discusses at page 3, a proposed General Framework Agreement for all international trade in services, in the following terms:

> "Such a General Framework Agreement would set forth the trade principles applicable to all services trade. In addition, separate sectoral codes would be negotiated that would seek to apply the agreed trade principles to specific service sectors; eg: advertising, ... telecommunications, information services, ... tourism. There also seems to be an increasing recognition that telecommunications services, because of their critical and strategic role in the provision of all other services, should receive priority treatment in any services trade negotiation.
>
> Government negotiators should recognize the central importance of telecommunications services for all companies wishing to provide their own services between and within foreign countries. The ability to utilize telecommunications services in this fashion can be distinguished from the more specific needs and concerns of companies wishing to compete in the provision of telecommunications and

information services in foreign countries. Because all services firms rely on telecommunications services to manage their operations and/or to deliver their service products to customers, they share an interest in maintaining reasonable, liberal access to and use of public telecommunications services." (Emphasis added)

The S.P.A.C. Report, most of which has been proposed or endorsed by the United States Trade Representative (U.S.T.R.)[3] details proposals for the implementation in trade agreements of its recommendations, in those terms outlined in (b) as follows:

(b) The Proposed "Centrality of Telecommunications" Principles, Respecting Trade in All Services Industries

The S.P.A.C. report emphasizes the necessity of two first level priority principles on behalf of all services sectors.[4] Such principles would govern a multilateral or bilateral model "Framework Agreement in Services" so as to ensure that all services markets might be free to utilize telecommunications facilities and services for international intra-corporate and intercorporate message and data flows. These two principles constitute "The Centrality of Telecommunications" principles.

The two "centrality of telecommunications" principles are stated in the S.P.A.C. report at page 8, as follows:

> "1. Access to and Use of Public Telecommunications Services; and
>
> 2. Unrestricted Movement of Information Among Countries and Companies."

Clearly, these principles favour the U.S. - based corporate users of foreign (eg: Canadian) telecommunications services. These users might include resellers and sharers of basic transport services (ie: providers of services-based transport services) and providers and resellers/sharers of services-based enhanced services.[5] However the extent to which a U.S. entity would benefit from such international trade law principles would depend entirely on the degree to which a foreign jurisdiction (eg: Canada) would permit its domestic users to

engage in the regulated activities of reselling and sharing of basic transport services and in the unregulated provision/reselling/sharing of enhanced network services. Domestic regulation which generally prohibits sharing/reselling of certain transport services or provision of certain enhanced network services is considered by the SPAC/USTR to be impediments or barriers to trade or investment in telecommunications services; moreover, domestic prohibition of foreign entry into such business activities, or discriminatory regulation of foreign entities would even more clearly be considered barriers to foreign trade/investment. The F.T.A. addresses these concerns, in accordance with the S.P.A.C. principles. The operative governing principle in the F.T.A. is "national treatment". This means that the liberalization principles discussed in the S.P.A.C. must be secondary to domestically-determined levels of acceptable competition. The "national treatment" principle must be contradistinguished from the principle of "reciprocity", whereby investment, regulatory, and other barriers between trading partners are sustained at the highest level practiced by one of the partners.

It must be noted that the "centrality" principles largely ignore the interests of American facilities-based, basic telecommunications transport carriers which would compete in Canadian markets and by the same token they ignore the interests of Canadian facilities-based carriers who would compete in U.S. markets. As it turns out, these facilities-based markets are excluded from the F.T.A.

The"Centrality" principles are detailed more completely in the Report and may be paraphrased as follows:

1. Access To and Use of Public Telecommunications Services:

   a) Effective access to a range of public telecommunications services both between and within countries on reasonable terms and conditions,

   b) Reasonable freedom to use public telecommunications services; and

   c) Reasonable opportunity to select, to provide and attach and to utilize telecommunications equipment.

   (emphasis added)

More specifically "access to and use of" is outlined as being:

a) interconnection of external private network systems with existing public network systems b) leasing of privately dedicated trunk lines c) attachment of terminal equipment provided by customer subscribers (Customer - Provided Equipment (C.P.E.) Attachment) d) reselling and sharing of telecommunications transport capacity/services and e) provision/resale and sharing of enhanced network services.

The point behind "access to and use of" telecommunications services is to ensure the flexible, competitive and efficacious business use of information (ie: data records and voice messages). This leads to a more specific description of the second "centrality of telecommunications" principle, the "information" principle.

2. Unrestricted Movement of Information Among Countries and Companies:

ie: "Subject only to regulations directly and necessarily related to the protection of individual privacy, intellectual property, public safety, and national security, the recognition of the general right to communicate and to move information both within their territory and between countries."[6]

A third, subsidiary principle raised in the S.P.A.C. report, is the principle that domestic measures must be maintained to ensure the fair competition of monopolies (ie: dominant facilities-based carriers) with other enhanced and computer/information service providers.

These "access", "information", and "fair competition" principles, have essentially been included in the F.T.A., in more specific terms. These terms are discussed, in Parts IV and V of this thesis.

Access to and liberal use of (underlying) basic telecommunications transport services, as well as free flow of information are collectively crucial to the effective implementation of the enhanced network systems and remote computer/information services described in Chapter Two, below. Recognition by the S.P.A.C. of the "special role" of the foreign implementation of these systems and services to all U.S. services industries as a whole, is discussed in section (c) of this Chapter, as follows.

(c) The Special Role of "Value Added Telecommunications (or Enhanced Network) Services" and "Remote Electronic Information Bank Services and Computer Processing (or Computer/Information) Services"

At page one, in the recommendations of the S.P.A.C. report, it is stated,

> "In applying the principles of the General Framework Agreement to the telecommunications and information services in a sector code, the U.S. Government should support fair competition in the provision of all telecommunications services. The most important objective of these negotiations, however, should be to achieve market access for the provision of value-added and information services directly to customers located in foreign markets."
>
> (emphasis added)

At page 13, the report states:

> "The process of opening the telecommunications services market to competitive supply is an evolutionary process. Recognizing that some telecommunications services will be opened to competition more slowly than others, the principal efforts of U.S. negotiators should be directed toward value-added and information services."

The above notes indicate that telecommunications services are central to the U.S. services industries, and that enhanced network services and computer/information services are central to telecommunications services, in the industrial/commercial strategy and international trade strategy of the U.S.

It is necessary to examine how utilization and provision of such services (collectively known as "computer-communication" services, or "enhanced/computer/information" services) will be carried out, in what context, and how the inclusion of such matters in international trade agreements, (and in particular the F.T.A.) will affect regulation of, foreign investment in, and competition in the Canadian domestic telecommunications sector, and other services sectors in which such "computer-communications" services are provided and utilized.

Chapter Two of this Part of this thesis, following, examines these questions.

CHAPTER 2

A Normative Breakdown of Some Market Utilizations of Enhanced Networks and Remote Computer/Information Services: Domestic and Foreign Provision and Utilization of Such Services in Canada, and the Effects Thereof on Regulation and Competition in the "Central" Telecommunications Sector and Other Services Sectors

(a) The Telecommunications Sector

A discussion of commercial utilizations of computer-communications systems must make a fundamental distinction between the underlying basic telecommunications transport aspect of the system and the "value-added" or "enhanced" use of the network.

In regards to enhanced network services, a corporate entity must access one or a number of transport facilities and/or services in order to establish a telecommunications network configuration that will suitably serve the technical parameters of the enhanced service as utilized and the territorial markets for the enhanced service.

In regards to stand-alone "online" computer services which are accessed on a casual basis via a public telecommunications transport network, a corporate entity is majorly concerned with being able to access the public networks, at reasonable rates.

In regards to both activities, corporate entities are concerned with the right to resell and share excess capacity acquired in these transport services, and to interconnect their own specialized terminal (computer) equipment, so as to cost-effectively utilize such services.

In more specific terms, liberal access to public transport services, utilization thereof, terminal attachment thereto and resale or sharing thereof are important in the context of the following general situtations. It is most important to keep in mind throughout, that even the "basic" public telephone (voice) network is quickly becoming a conduit for many computer-communications activities:

(i) access to dedicated (private line) lease of local and intercity digital and analog (voice and data) channels required to implement the private, bulk-capacity fixed point-to-point segment of an enhanced service system.

Such an enhanced service system, or such a segment of an enhanced service system would provide a bulk capacity channel for computer-communications between major plants and head office of a multinational corporation (ie: Intra-Corporate).
Such a system might also provide a channel between central records-keeping offices of various commercial entities (such as banks or airline companies) for the inter-corporate, network-based clearing and settling of accounts. (Such accounts would relate to the processing of outside retail or wholesale transactions by an entity on behalf of other corporate entities with membership in the inter-corporate network group.) Such services, whether intra-corporate or inter-corporate are generically "on-line" enhanced network services if the services are private telecommunications-network based: ie: offered or shared by a private, non-public network-operating group.[7]

It is important to note that "enhanced services" denotes a network-based computer service or computerized information service in the sense that the provider of the computer service or computerized information service is also the provider of the telecommunications transport service. A major legal issue to be revealed below, both at the Canadian domestic regulatory level and also in terms of the application of the F.T.A., centers on the distinction between an unregulated "enhanced service" in respect of which a computer enhances the information, and a regulated "telecommunications data transport service" in respect of which a computer enhances the efficiency of the transportation of the information, or a monopoly voice transport service which has been slightly modified.

(ii) access to long distance, flat rate, telecommunications transport network services (in the nature of Wide Area Telephone Service) and bulk-rated, wide area public data network services (in contradistinction to toll-rated services). These transport services might be utilized to provide a low-volume traffic, enhanced "clearing and settling" network of the type described in "(a)" above, with network nodes spread out over a large geographical area. They might also be utilized to provide an enhanced network with terminal nodes spread out over a large geographical area, which terminal nodes might provide commercial information services (eg: real estate inventory) or financial or commercial transactions services (ie: financial services in the nature of banking; commercial services in the nature of purchasing/order-taking; combined financial services/commercial services.) These financial and commercial services are discussed below in section (b) of this Chapter, and also in Part V of this thesis. It is significant to note that such services might be provided to the end-user client of one corporate entity on behalf of that corporate entity by another corporate entity via an enhanced network through which the latter entity provides services. This "agency" service is usually provided for a fee.[8]

(iii) access to toll-rated public voice and data telecommunications transport services; required to electronically access and deliver remote "stand-alone" computer processing services provided on a casual basis or required for mere remote record storage or retrieval in or from a remote data base. The public telecommunications transport systems, (voice or data) can be utilized to access or provide "stand-alone", remote "batch processing" services, or "stand-alone" remote "data bank" or "data storage" services in a great number of commercial applications. Generally, such services are provided by "computer service bureaus", but as large financial and commercial services providers gear up to utilizing digital services on a larger scale for their own purposes, they are in turn offering to provide such services to their respective clients.

Other more mundane uses of the public telecommunications system in this context might be remote electronic data-base research, and remote diagnostic services for house or consortia-owned computer systems. It is important to note that these services are often combined, and that they may be termed "computer services" or "information services" depending on the precise service. Moreover, an "information service" and a "computer service" may be mixed with a "data transport" service but neither of the former will be regulated unless the provider is the same entity providing the regulated "data transport" service.

In discussing access to the public networks it is also necessary to note that "plain old telephone service" (POTS) is also very important insofar as long-distance toll-rated business "POTS" is considerably more expensive than "flat rate" services. Small business in most countries are beginning to use the public "POTS" system extensively for "stand-alone" (as opposed to "network-based") computer-communications and remote data processing services. This raises two "basic telecommunications transport services" concerns which are largely specific to small business. These two matters are discussed in (iv), below.

(iv) A. resale and shared use of basic telecommunications transport services such as long-distance, WATS and bulk-rated private-line toll services is required by small businesses which cannot marshall sufficient common interest in establishing a consortium for the purposes of providing specialized, narrow enhanced services on the institutional scale established by airlines and banks. The desire of small business as a class of users, is to ensure the right not only of access to basic telecommunications transport services, but also the right to share or resell excess bulk capacity (ie: timesharing or excess dedicated-channel capacity sub-letting) in order to be able to efficiently utilize its telecommunications resources, around its voice message and remote data processing needs.

B. competition in facilities-based provision of basic telecommunications transport services (and associated price reductions) is of particular interest to small business users insofar as they are not generally in a position to acquire

bulk-rated services, unless they undertake to organize the administrative headaches of establishing a sharing or resale undertaking; moreover, even in the event of sharing or reselling, costs are tariff-controlled by the facilities-based providers, in the absence of real competition in the facilities-based provision of such services. This matter takes on a particularly interesting hue in the international arena, in consideration of the fact that Canadian entry into facilities-based telecommunications transport competition is virtually limited to existing entry by reason foreign entry is not permitted, and more domestic entry into the market would be on an uneconomic basis, with no domestic "champions" capable of affording to eventually dominate the industry by losing money in the short and middle term. As will be discussed below, the F.T.A. perpetuates this status quo.

(v) liberal rules affecting attachment of customer provided equipment (C.P.E.) to public telecommunications facilities are required insofar as computers are coming to comprise both network-addressing terminal devices, and network-non-addressing terminal devices; moreover some public network services are "Open Systems Integrated", in which terminal device computers are effectively routing and switching their own messages via the protocols contained in the digital message. Users want to ensure that they can buy from the hardware supplier with the most innovative products, at the best possible prices, rather than being relegated to buying or leasing from the telephone companies or other facilities-based carriers. This is particularly true in the age of Integrated Services Digital Networks. With public I.S.D.N. networks, the transport infrastructure can carry voice, data-record and facsimile services between users via one simultaneous channel.

The above discussion has expanded on the provision and utilization of enhanced network and computer/information services from the perspective of telecommunications transport service-user markets. Clearly the salient effect of increased demand for such enhanced/computer/information services is that this demand will continue to exert pressure for the liberalization of access to, provision of and interconnection with publicly-provided telecommunications transport facilities and services, in order to ensure the expanding supply of enhanced/computer/information services.

Moreover, the immediate focus of U.S. services-based industries, and the corresponding interest of the U.S.T.R. is in guaranteeing access by U.S. nationals to the combined supply-side of and demand side for enhanced and computer/information services, for in-house use and for inter-corporate and related wholesale/retail provision. The commercial services sector and

financial services sector aspects of this demand and supply are discussed in section "(b)" of this chapter, below.

The important point here, is that despite the focus on unregulated "enhanced" and "computer/information" services, the underlying intent of the S.P.A.C. and the U.S.T.R. is the restructuring of the balance between competition and regulation in foreign (eg: Canadian) telecommunications transport markets, in favour of increased access to and use of, (meaning increased competition in,) the provision and subsequent utilization of services-based (ie: reselling) of common carrier-provided telecommunications transport services.

Although it might appea, that only business-oriented and specialized "data transport" (network) services would be affected by the restructuring of telecommunications transport markets which cater to the provision of enhanced and computer services, in fact the telecommunications markets are very interrelated and interdependant. One must consider, for example the cross-subsidization of public voice services by telephone company revenues from the more business-oriented services.[9] The result is that an increase in competition, and the reduction in rates in any one market will necessarily affect the others, particularly in a relatively smaller national market, such as that of Canada. Virtually all telecommunications-based supply markets are economically integrated.

This regulated economic "integration" of telecommunications markets is also being augmented by a "technological integration" of markets.

Greater blurring in the functional boundaries of the various services, as provided, is increasingly causing a natural integration of the markets and a resulting failure on the part of regulation to differentiate between the various markets.

For example, the P.O.T.S transport system is used as a highway for much data communications. Moreover, specialized "data transport" systems which transport business records (data) at high speed, and high volumes, and which store and delay the data in the process of transporting, are providing services which are difficult to distinguish from "enhanced services" which process and manipulate the data in other ways. Basic voice transport services which have a storage and message feature may be defined for regulatory purposes as either an "enhanced" or a "basic transport" service, depending on which authority interprets the definition.

The point to be made here, is that both the economics of the telecommunications markets and the technological development of telecommunications services (wherein data processing and data transport functions are integrating) favour the deregulation, and cost-based pricing of all underlying transport services. It is a short and natural step from the cost-based pricing of services to total competition in the provision of such services.[10]

It is sufficient to state, at this point, that the U.S. domestic market has taken this step, insofar as the only remaining monopoly service is the "natural" monopoly service of the local public telephone exchange. Virtually all other U.S. telecommunications transport markets are subject to the competitive forces of open markets, with the exception of regulated "dominant" carriers, which are regulated in the interests of promoting effective competition.[11]

In summary then, the central question relating to the effects of U.S. trade pressures, microchip technology determinism, and increased electronic services marketing is the extent to which Canada will harmonize its telecommunications transport market structure (ie: monopoly versus competitive entry, in the supply side) and its regulatory structure (ie: regulated tariff pricing versus open market "cost-based" pricing) in regards to various telecommunications transport and "enhanced" services.

U.S. interests appear to have recognized, as at March, 1987 (in the S.P.A.C. report) that there is protective sentiment in foreign jurisdictions to the continued view of certain telecommunications services as public utilities, operated within finely tuned regulatory schemes, such as that in Canada, which balance (a) market competition services, (b) regulated competition (tariff-based) services and (c) monopoly services.

The S.P.A.C. report states at pp. 4 and 5:

> "... the concept of the competitive provision of telecommunications services is not yet shared by all governments, many of whom currently provide all or most of these services through state-sanctioned monopolies ... Equally important for them, however are national regulatory frameworks that set the parameters and conditions of competition in those markets. In

> many countries, including the U.S., this regulatory framework is currently undergoing review and/or change. Controversy has arisen with respect to market structure, competitive entry, safeguards which protect against anticompetitive activities boundaries for regulation of telecommunications facilities and services, as well as the relationships between the telecommunications and the data processing sectors ... It is recognized that many governments will be unwilling to open up the provision of certain telecommunications services to competition. It should also be recognized that the liberalization of telecommunications markets is an evolving process."

That the S.P.A.C. report recognizes foreign policy differences in regards to what is and is not a monopoly-provided service, and/or what is and is not a regulated (ie: basic transport) service is very important.

It indicates that the main proponent behind the elevation of telecommunications issues into trade negotiation forums (ie: the U.S.) is recognizing the social policy aspects and smaller economy of scale aspects that restrict a foreign state (eg: Canada) in harmonizing its telecommunications market structure and regulatory structure with that of the U.S.

It must be noted that the question whether a particular service (eg: long distance voice) is to be provided on a monopoly basis or on a regulated entry "tariff" basis is generally a broad policy question. In contradistinction, the question whether a regulated entry "tariffed" (eg: data transport) service, or a monopoly (eg: long-distance voice) service is to be opened to unlicensed entry (and market-pricing forces) may be either a broad policy question or a question of whether that service is defined as an unregulated, unlicensed, open market "enhanced" service, or a basic data or voice transport service.

Even in regard to the definitional question, the S.P.A.C. proponents display as sophisticated a respect for Canadian regulatory boundaries between open-market enhanced and limited-entry tariffed services/monopoly services as they displayed in regards to the broad policy choice.

The S.P.A.C. report states at p. 11:

"No internationally-agreed description of value-added services and information services, however, has yet been reached. Nevertheless, the concepts are widely used and generally understood as follows:

- Value-Added Services ... application-oriented (versus network systems-oriented) services that travel over public telecommunications services, that in some manner add value or function to the transportation of information, and that are provided to individual organizations or a collection of organizations (e.g., industry order-taking and inventory control systems); and

- Information Services ... services that offer information or information processing in electronic form, where telecommunications services are used to facilitate the delivery of the information (e.g., data banks or data processing bureaus).

Given the dynamic state of telecommunications technology and the vastly different national approaches to telecommunications policy around the world, the U.S. should attempt neither; 1) to reach a technology-based definition of value-added services, nor 2) to apply a rigid, universal approach to competitive provision of value-added and information services. These services will necessarily need to be defined at a high level of generality so as to be applicable across a broad range of national telecommunications structures. The U.S. should however seek stable, understandable boundaries between those services that will be open for competitive supply and those services that will be supplied by the monopoly".

(emphasis added)

Ostensibly then, the S.P.A.C. report does not purport to "ask" for terms that might permit a U.S. incursion into foreign (ie: Canadian) telecommunications transport supply markets. As indicated, the S.P.A.C. report, and in fact the F.T.A. ostensibly focus on telecommunications supply markets only to the extent that such markets deliver enhanced services and computer/information services.[12]

Nonetheless the underlying thrust of the S.P.A.C., and of the F.T.A., as indicated, has been towards ensuring liberal use and cost-based rates in such telecommunications transport resources. As indicated above natural economic integration and technological integration of transport and enhanced markets support this thrust.

As will be discussed below, a combination of factors have transformed the relatively moderate "S.P.A.C." position, into strong Canadian domestic policy towards total harmonization of most Canadian services-based, (but not facilities-based) telecommunications enhanced network and transport supply markets, with U.S. market practices.[13]

These factors constitute a complex interplay between the following:

a) the progressive pre-F.T.A. liberalization of the telecommunications environment by the C.R.T.C. (and most particularly, liberalization in rules respecting resale and sharing of basic transport services, as well as the deliberation that enhanced services are outside of C.R.T.C. jurisdiction);

b) poorly drafted (and/or perhaps poorly negotiated) F.T.A. terms which lend to an interpretation whereby the provision of basic telecommunications transport services is the subject of the "national treatment" principle, whether or not such are utilized in the provision of enhanced or computer/information services;

c) the emergence of federal Department of Communications policies, in July of 1987, which permit foreign entry into and unregulated competition in "Type 2", services-based (ie: reselling of facilities-based) basic transport services;

d) federal Cabinet intervention in C.R.T.C. decision-making which effectively permits direct services-based competition in monopoly long-distance voice services, and which might be subject to the F.T.A. "national treatment" principle.

The point raised in outlining the above issues, is that the hurried domestic Canadian drift towards competition in the supply of most basic transport services, the clumsy and expansive drafting of the F.T.A., and the domination of the public regulatory process under the political will of the federal Cabinet might engender the international perception that a trade agreement with the U.S. in the area of merely enhanced and computer/information services must necessarily disrupt the domestic monopoly structure and regulatory values of social and regional integration established under pre-existing domestic regulatory policies and procedures.

In particular, it is the developing countries, (which group opposed the inclusion of "services" in the Uruguay Round of the G.A.T.T.) which would demonstrate against the value of the F.T.A. provisions as a G.A.T.T. model in the realm of trade in telecommunications services.[14]

On the other hand, developing countries may decide, as has Canada, that the strategic competitive value of a competitively based market structure for the provision and use of telecommunications services will contribute to a desirable type of development. In a way, it is this argument that the federal Cabinet of Canada is attempting to politically "sell" to the leaders of the more rural provinces of Canada.

It is necessary at this point to discuss briefly the effects of the emergence in the U.S.A. of the applied marriage between digital microchip technology and telecommunications transport technology, on the market structure and regulation of other (non-telecommunications, non-data processing) services sectors, in Canada.

(b) Other Services Sectors

As indicated above, the U.S. services industries perceive the telecommunications sector as central to all services sectors, and enhanced/computer/information services as central to the telecom sector. Nonetheless it is the market applications of such enhanced/computer/information services that are coming to drive the telecommunications sector, financial and commercial services sectors, and the manufacturing, resource and agricultural sectors that are coming to depend more and more on the services sectors.

The most salient function that an enhanced network service, or a remote computer/information service can perform is to electronically initiate and complete a transaction between two parties, and electronically record the transaction.

In section (a) of this chapter, above, it was noted that important inter-corporate clearing and settlement functions (transactions) are

provided by a number of enhanced networks, and by various remote batch processing computer services. As indicated above, both types of services are being provided on a growing basis by various market sector proponents, who are integrating such software programme-oriented services as an extension of their main business (and thereby co-opting computer service bureaus).[15]

It was also noted above that enhanced networks are emerging along sectoral lines, which permit corporate entities to execute transactions with retail and wholesale-level clients.

Furthermore it must be noted that such enhanced network services are provided by network "owners" who put up the capital cost (computer software and hardware; transport system leasing) and permit "customer" corporations, as "members" to utilize the network to provide retail and wholesale services on their own behalf. Moreover, one "owner" or "customer" user of a network may execute transactions with the end-user "clients" of another "owner" or "customer" user, on behalf of that other "owner" or "customer" user, and subsequently "clear and settle" inter-corporate accounts pursuant to yet another different enhanced or batch computer/information service provided by the "owners".

Thus far, various international and domestic networks have emerged in various countries including Canada. Most notably, these have been in the airline industry (ie: for reservation booking) and in the various financial industries (ie: banking, stock trading and other investment services; insurance services).[16] Clearly, the U.S. push for free international trade and investment in services is accompanied by the strategy of marketing, delivering, and closing transactions in such services via enhanced services in foreign jurisdictions, including Canada.

As will be indicated in Chapter Three of Part V of this thesis, one U.S. "umbrella corporation" with numerous service industry subsidiaries, including credit card services, travel services and merchandising services, also provides enhanced network services for U.S. financial institutions and proposes to do the same thing in Canada. This company, American Express,

has shaken the Canadian banking industry insofar as it has been perceived that the company will be permitted to provide commercial services as well as financial services, and that it will be permitted to do so via existing Canadian enhanced banking networks, or via its own enhanced network systems.

The point in this is to illustrate the reason for the U.S. international trade and foreign investment policy of tying enhanced services to other financial and commercial services. It is necessary to consider the competitive edge and speed with which U.S. investors/services providers might occupy Canadian services markets via enhanced services penetration (ie: electronic links to clients), if Canadian telecommunications and other services sector regulations are harmonized with the free market models adopted in the U.S.

U.S. incursions into many foreign markets might be similarly undertaken if barriers to entry and operation in those markets were to be toppled in the G.A.T.T., pursuant to negotiations in services and investment.

Moreover, the U.S. has indicated on numerous occasions that it will not hesitate to utilize trade barriers pursuant to domestic legislation. The U.S. Trade Act of 1974, (Public Law 93-618, 3 January 1975) section 301 authorizes the operant U.S. administration to implement unilateral, domestic measures which respond to foreign treatment of U.S. trade interests which is "inconsistent" with any existing trade agreement, or which is merely "unjustifiable, unreasonable or discriminatory, and burdens or restricts U.S. commerce".[17]

By the terms of the related Trade and Tariff Act of 1984, Section 301 of the Trade Act of 1974 is operative in respect of trade in services as well as foreign direct investment between U.S. nationals and nationals of other countries.

Generally, unilateral sanctions may be imposed against foreign states which impose against the U.S. "any act, policy or practice ... which denies national or most-favoured nation treatment, the right of establishment, or protection of intellectual property rights".[18]

The unilateral sanctions in question include the following. The U.S. administration may "... suspend, withdraw or prevent the application of, or may refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement". Furthermore, the U.S. administration may "impose duties or other import restrictions on the products of such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate."[19]

Whether utilization of the section 301 weapon will be necessary to ensure G.A.T.T. agreement and enforcement respecting trade and investment in services generally, (and enhanced network services specifically) remains unclear.[20] However it is clear that the F.T.A. has been ratified in the U.S. largely out of the need to provide a model respecting this new field of trade negotiations known as trade in services, particularly in respect of the global information highway for the global services economy engine.[21] Perhaps the extent to which the U.S. utilizes the unilateral measures authorized by section 301 in respect to enforcing its interpretation of the F.T.A. in regards to services, will be determinative of the perceived success of this first "model" international trade agreement in services and investment.

An overview of the F.T.A., as a whole, is provided in Chapter Three of this Part, as follows. Thereafter, Part II commences a study of the Canadian experience in the deregulation of domestic information highways.

CHAPTER 3

An Overview of the F.T.A.

On January 1, 1989 the Canada - United States Free Trade Agreement ("F.T.A.") came into effect.[22]

In the words of one Canadian trade law expert, Debra P. Steger, "The F.T.A. is a classic, comprehensive free trade area agreement and qualifies easily under Article XXIV of the General Agreement on Tariffs and Trade ("the G.A.T.T")".[23] Article XXIV permits countries that have agreed to eliminate duties and other restrictive regulations of commerce on "substantially all the trade" between them to treat each other differently than they treat all other countries."[24]

The F.T.A. breaks new ground in policy, law and economics. It addresses the traditional area of trade in goods, but also addresses for the first time in a binding and comprehensive international framework the liberalization of trade in services and associated foreign direct investment (hereinafter "F.D.I."). The F.T.A. affirms existing G.A.T.T. obligations and rights and confirms the future co-operation of the two parties in the most recent Uruguay Rounds of the multilateral trade negotiations ("M.T.N.").[25]

Generally, the F.T.A. implements many tariff reductions immediately. However, in respect of trade in services and investment, ostensibly, "existing laws and practices will be maintained but new obligations and rights will coexist with them in future".[26] Steger refers to the services and investment aspects as "cautious and modest".[27] Nonetheless, much uncharted territory remains to be negotiated in these areas, and specific commitments to further consult and negotiate are found in the relevant Chapters of the F.T.A. It is the opinion of the writer that the effects of the F.T.A. in the field of telecommunications transport services and of enhanced/computer/information services could be substantial.

Morever, the degree to which existing F.T.A. obligations, and future consultations and negotiations succeed or fail in establishing binding norms may have direct impact on the creation of new rules in the Uruguay Round.

The major, general provisions are laid out, below.

The objectives of the F.T.A. are stated in Article 102, and they are to

a) eliminate barriers to trade in goods and services between the territories of the Parties;

b) facilitate conditions of fair competition within the free-trade area;

c) liberalize significantly conditions for investment within this free trade area;

d) establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and

e) lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement.

(emphasis added)

Article 103 of the F.T.A. ensures that measures necessary to the implementation of the Agreement shall be observed by state, provincial and local governments.

Article 104 of the F.T.A. gives precedence to the provisions of the F.T.A. over provisions in any other bilateral or multilateral agreements which create rights or obligations as between the U.S.A. and Canada.

Article 105 of the F.T.A. provides that each party shall accord national treatment with respect to investment and to trade in goods and services. The principle of National Treatment, is the fundamental principle observed in the F.T.A., and it is significant that it applies to investment as well as trade, and to "trade in services" as well as trade in goods.[28]

The F.T.A. is broken down into eight "Parts" with a total of twenty-one "Chapters". The "Parts" are, in order, as follows:

1.) Objectives and Scope 2.) Trade in Goods 3.) Government Procurement 4.) Services, Investment and Temporary Entry for Business Persons 5.) Financial Services 6.) Institutional Provisions (relating to dispute settlement and antidumping and countervailing duty procedures)

7.) Other (miscellaneous) Provisions and 8.) Final Provisions (respecting annexes, entry into force and duration).

It is significant to note that Chapter 18 of the F.T.A. establishes a Canada - United States Trade Commission for the negotiation and binding arbitration of any dispute arising out of a proposed or actual measure which might materially affect the operation of the F.T.A.[29]

Provisions relevant to the telecommunications and computer/information sectors are found in many different parts, including Part Two respecting "Trade in Goods" which covers telecommunications, computer, and related goods. However, it is the "ground-breaking" Part Four, respecting "Services, Investment and Temporary Entry" which is most significant to this study of the telecommunications and computer/information sectors. In particular, Chapter Fourteen, pertaining to "Trade in Services" is a major focal point, and it largely covers regulatory practices in the signatory states.

As indicated above, the reasoning behind this is that "services trade" (or the provision of services) is a matter of political economy which is coming to be recognized by theorists, by U.S. - based business and the U.S. government as the engine of competition in manufacturing, resources and services sectors alike.

The fuel for that engine has come to be seen as the "information economy", consisting of the married telecommunications and data (or computer) sectors. Thus, the right to develop and provide this infrastructure for the "information economy" in foreign jurisdictions, by direct investment or by "trading" such services within or into foreign jurisdictions (as "disembodied" computer-communications services) is a central "trade" right, completed in importance by the right to "access" the means (ie: the network facilities and services) by which to distribute such data services.[30]

As indicated above, the "information economy" operates on an intra-corporate, inter-corporate and wholesale/retail basis. It is not limited to the commercial network-based delivery of computer-based services,

but also involves the in-house and shared transfer of computerized information. Thus the right to move information within, or between signatory states whether as a trade or mere in-house transfer has also been included in Chapter Fourteen, in sectoral annex 1404 C. pertaining to enhanced network-based and computer services (reproduced below in Part IV).

The various "relevant" sections of the F.T.A. will be canvassed in Parts IV and V of this thesis, with special emphasis on Part Four of the F.T.A. (ie: Services, Investment and Temporary Entry) and particular emphasis on the effects of Chapter Fourteen and Sectoral Annex 1404 C. attached thereto.

In the Canadian government publication of the F.T.A. distributed by the Minister of Supply and Services Canada (Copy 21/01/88) there is a preamble to Part Four of the Agreement which reads in part

> "Trade in services represents the frontier of international commercial policy in the 1980's. Dynamic economies are increasingly dependent on the wealth generated by service transactions. International trade in services, of course, does not take place in a vaccuum without rules and regulations. What it has lacked is a general framework of rules incorporating principles of general application such as those embodied in the G.A.T.T. for trade in goods. Chapter Fourteen provides for the first time, a set of disciplines covering a large number of service sectors.
>
> The issue is also more than a matter of opening up service markets. It is no longer possible to talk about free trade in goods without talking about free trade in services because trade in services is increasingly mingled with the production, sale, distribution and service of goods. Companies today rely on advanced communications systems to co-ordinate planning, production, and distribution of products. Computer software helps design new products... In other words, services are both inputs for the production of manufactured goods (from engineering design to data processing) and necessary complements in organizing trade (from financing and insuring the transaction to providing installation and after-sales maintenance, especially critical for large capital goods).
>
> The basic economic efficiency and competitiveness gains expected from the removal of barriers to trade in goods between Canada and the United States also apply to the service sectors. To achieve the same

economic gains in services it was necessary to focus the negotiations on the nature of regulations that constitute trade barriers. In some cases the focus was on the right of establishment where such a right is an economic pre-condition to supplying the service, for example travel agencies.

(emphasis added)

The above commentary is provided by way of illustrating the combined significance of information technology and telecommunications services to competitive (market) trade and transfer in services, and in manufactured goods generally. It is also provided to illustrate the importance of regulation and foreign investment to international competition in these fields.

As indicated above, the competition-oriented effects of market and microchip-based technological forces, and of the F.T.A. on Canadian telecommunications policy will be examined in depth in Parts III and IV of this thesis, while the effects thereof on other services sectors will be examined in depth in Part V. The next Part, Part II will provide a basic discussion of the Canadian market, jurisdictional, and regulatory frameworks respecting the telecommunications sector.

Footnotes: Part I

1. For a comprehensive discussion of the U.S. influence over the inclusion of services and specifically of telecommunications-related services in the Uruguay Round of trade negotiations, refer to Sauvant, Karl P., International Transactions in Services: The Politics of Transborder Data Flows, Westview Press, Boulder, Col. (U.S.A.), 1986, at p.258

2. Mimeograph

3. Most of the major policies, principles and strategies discussed in the S.P.A.C. report were earlier proposed by the U.S.T.R. Advisory Committee on Trade Negotiations (A.C.T.N.) in a Report of the Chairman thereof made in May 1985, and entitled "New Round of Multilateral Trade Negotiations." It is probable that the industry group subsequently published its own report for political emphasis.

4. At p. 8, the S.P.A.C. Report states that "services industries include but are not limited to advertising, banking, information services, insurance, telecommunications and transportation".

5. It must be noted at this stage that "users" of facilities-based (common carrier) transport services are often "providers" of what is termed "services-based" transport services. "Services-based" provision of services denotes that the transport services provided constitute resold or shared transmission capacity acquired from a facilities-based carrier.

6. Found at p. 7 of the S.P.A.C. Report.

7. Such intra-corporate or inter-corporate private, internally utilized networks may be national or international in scope. Examples of national-sized networks include The Federal Reserve Wire System ("Fedwire"), and Bankwire, in the U.S.A. (Generally, refer to Falconbridge, J.D., Crawford and Falconbridge, Banking and Bills of Exchange, 1986, Canada Law Book Inc., Toronto at 1015). In Canada, the Canadian Bank Card Association is the principal financial organization to establish and coordinate a consortia-based network system. Such domestic systems, whether Canadian or American, have tended to develop into continental (regional) or overseas networks. A U.S. example of network "overspill" is the Clearing House Interbank Payments System ("CHIPS") which provides electronic credit transfer services between Canadian and U.S. banks.

   An example of an inter-corporate overseas financial network is the Society for Worldwide Interbank Financial Telecommunications ("SWIFT") (Falconbridge, at 1016).

   In a different sector, the air transport sector, an international data network known as SITA (La Société Internationale de Télécommunications Aéronautiques) provides a flight information system for over 220 airline passenger carriers. See generally, Williamson,

J., "SITA - Thirty Years of Airlines Telecommunications", Telecommunications, February 1979. An equivalent, private U.S. domestic network, operated by American Airlines is known as SABRE. Use of SABRE is provided for other airline "customers" who wish to share online flight reservation and ticketing information. For a discussion of Sabre and SITA, refer to Zubkov, Wladimir D., (Director of Air Transport, ICAO), "The Development of Computer Reservation Systems: The ICAO Viewpoint", ITA Magazine, No. 42 - March/April 1987 at p. 3.

For a discussion of the utilization of antitrust laws in the U.S. with regards to unfair business practices in the provision of Customer Reservation Services (C.R.S.) to travel agents, and other users, as against other airlines sharing or wishing to share information on the system, see Fahy, Richard J., "Regulation of computerized reservation systems in the United States and Europe", Air Law, vol. XI, number 6, 1986, at 232, and see also Saunders, Derek, "The Antitrust Implications of Computer Reservation Systems (CRS's)," Journal of Air Law and Commerce, Vol. 51, 1985, at p. 157.

8. Examples of such enhanced services networks in Canada are the "Plus" network and the "Interac" network, essentially "owned" in Canada by the Canadian Bank Card Association (ie: the large Canadian banks), the services of which are leased to (customer) banking and non-banking financial institutions. Such a network is distinguishable from a strictly inter-corporate or intra-corporate network insofar as end-user "clients" of various "owners" or "customers" directly interact with and are provided services by the network.

It should be noted that non-banking data processors might provide enhanced network services on behalf of financial institution "customers" (in the U.S., American Express provides such services even though it is not a "bank" in the U.S.) but in Canada such data processors may not be in the business of providing "banking services" without a licence. This means, in Canada, it is the banks which control enhanced banking networks (see Crawford and Falconbridge: Banking and Bills of Exchange, op. cit., p. 936). It must also be noted that such Canadian enhanced networks are electronically linking up with U.S. enhanced networks (I.B.I.D., p. 973) via standardization of network protocols, and accompanying institutional agreements. See also Part V of this thesis, respecting the entry of American Express into the Canadian banking markets. It should be noted that in the U.S., no bank licence is required to provide such electronic enhanced banking network services.

9. For an exposition of the full significance and practice of cross subsidization of basic, universal services with revenues from non-universal services, refer to Janisch, H.N., Winners and Losers: The Challenges Facing Telecommunications Regulation, 1984, presented at the "Conference on Competition and Technology Change: The Impact on Telecommunications Policy and Regulation in Canada", Toronto, September 25, 26, 1984 (mimeo).

10. The convergence of the technological integration of computer and telecommunications technologies with the economic integration of various digital information services markets is evidenced by the fact that dominant telephone companies which are most strongly resisting the advent of competition in carriage services are those companies that have most quickly invested in fibre optics and digital switching "plant" facilities. Such "plant" investments permit the prepared carrier to take early advantage of higher demand for digital data/video/image/ voice transport capacity, and to maintain a dominant position as against those emerging facilities-based carriers who have not yet carried public voice services. Manitoba Telephones is one such anti-competition proponent, which has kept pace with or outstripped the monolithic Bell Canada, in respect of such advanced investment.

11. For an in-depth analysis of the U.S. process of deregulation in the telecommunications markets, refer to the following: - Goldstein, S., Banking and Communications in an Electronic Age: Contemporary Issues of Law, Policy, and Regulation, 1984, (A thesis submitted to the Faculty of Graduate Studies and Research of McGill University, Montreal, Quebec, in fulfillment of the requirements for the degree of Doctor of Civil Law.); - Bortnick, J.; Gilroy, A; and Siddall, D.; A Glossary of Selected Telecommunications Terms, January 1, 1984, Congressional Research Service, The Library of Congress; - Brotman, Stuart N. (Ed) The Telecommunications Deregulation Sourcebook, 1984, Artech House: Boston and London.

12. Moreover, the F.T.A. guarantees only "national treatment" in respect of "covered services", as opposed to the principle of "reciprocity". Whereas the former principle observes the sanctity of a nationally-derived balance of competition and regulation, the latter principle permits one state to regulate foreign activity in its generally unregulated service market to the extent that such activities are regulated in the home of that foreign actor. Clearly, by employing the former principle there is less pressure on a more regulated country (like Canada) to harmonize its regulatory levels with other trading partners.

    As will be discussed in Part IV of this thesis, such harmonization in many transport and enhanced network services markets is occurring as between Canada and the U.S. as a function of Canadian federal executive policy. Moreover, such harmonization, as explained therein, stands a good chance of being perpetuated pursuant to the F.T.A. dispute resolution system in regards to definitional issues respecting unregulated enhanced network versus regulated transport services.

13. This policy is in direct conflict with recommendations made in March of 1979, by the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty ("The Clyne Commission") in their report, Telecommunications and Canada (Minister of Supply and Services Canada, 1979). Specifically, in Chapter 10, (Informatics), the Committee recommended an extremely protectionist and nationalist

approach to the market provision and utilization of data processing and computer-communications services. It recommended in part that Canada ... "require that data processing related to Canadian business operations be performed in Canada except when otherwise authorized". (ie: at p. 65).

See also Branching Out (Ottawa, Department of Communications, 1972).

It should be noted that the McDonald Commission, (The Royal Commission on the Economic Union and Development Prospects for Canada, 1985), enjoyed a mandate to inquire into trade in telecommunications and information services with the U.S.A. However, in its 1985 Report, it did not discuss related issues.

14. Reference Sauvant, op. cit., at Part V, (F.N. 1, above). See also "GATT Negotiators begin liberalizing services trade", The Financial Post, Friday, April 21, 1989 at p. 10.

15. Falconbridge chronicles the concerns of federal authorities over fair competition as between the banking sector and the data processing sector; (op. cit., at p. 908.) Such concerns were responsible for the promulgation of the Banking Related Data Processing Services Regulations, SOR/ 81-424, Canada Gazette, Part II, Vol. 115, No. 11 (May 28, 1981). Conversely, note discussion in Part V of this thesis, of the Canadian prohibition of non-bank suppliers such as American Express of enhanced network-based banking services.

16. Reference footnotes 7 and 8, above.

17. Reference Sauvant, I.B.I.D., at p. 107.

18. Trade and Tariff Act of 1984, Subsection 304(a).

19. Trade and Tariff Act of 1984, Section 301.

20. In a July 12, 1989 meeting between Canadian Prime Minister Brian Mulroney and British Prime Minister Maragret Thatcher, Mr. Mulroney is reported to have said of an imminent meeting of the G-7 (Group of Seven leading national economies), "We are looking for a strong statement against protectionism ... Mrs. Thatcher and I discussed Super 301, and neither of us like it." (Financial Post, July 12, 1989 "Britain, Canada want G-7 to condemn protectionism").

21. Refer to The Globe and Mail, Friday, January 20, 1989 at p. A-6. "The Bilateral Agenda".

22. For a history of the development and implementation of the F.T.A., refer to a McGill Law Area Library Research Guide entitled Canada - United States Free Trade Agreement, March 1988, by Kuo-Lee Ki, Senior Reference Librarian for Research and Collection Development. Therein, it is indicated that the F.T.A. is based on a Declaration by the Prime Minister of Canada and the President of the United States of America

Regarding Trade in Goods and Services made in Quebec City, 18 March 1985. The Elements of Agreement by the two countries were reached on October 3, 1987.

In December 1987, drafting of the F.T.A., based on the Elements of Agreement was completed.

On January 2, 1988, the F.T.A. was signed by the Prime Minister of Canada and the President of the United States.

The Agreement was implemented into law in Canada by the passing of Bill C-2, An Act to Implement the Free Trade Agreement between Canada and the United States of America, passed by third reading in the House of Commons, December 23, 1988. As indicated above, the actual provisions of the F.T.A. will be phased in over a ten year period, with many provisions taking effect on promulgation of the Act.

23. Steger, D.P., A Concise Guide to the Canada - United States Free Trade Agreement, Carswell, 1988, Agincourt, Ontario, at p. 1.

24. Under Article XXIV of the GATT, the F.T.A. must refrain from damaging the interests of other countries. Refer to the Globe and Mail, February 9, 1989 at B-3, "Working Party of GATT to probe free-trade pact". See also the Globe and Mail, January 30, 1989, "Free-Trade pact to be put before international body".

25. Generally, refer to Articles 101 and 102 of the F.T.A., and the Preamble to the F.T.A., in regards to the affirmation of existing GATT rights and obligations. Note also that other bilateral negotiations have been undertaken between various states in regards to investment (Reference Sauvant, op. cit. f.n. 1 above, at p. 229.) Also, in regards to trade in services, the U.S.A. and Israel concluded a bilateral Free Trade Agreement in 1985 which contains provision for the recognition of the importance of trade in services, and an annexed Declaration on Trade in Services. (Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel; Article 12; and Annex VIII to the Agreement. Generally, refer to Sauvant, op. cit. at 231.)

26. Steger, op. cit., p. 2.

27. Steger, op, cit., p. 194.

28. Reference f.n. 12, above, respecting the distinction between the principle of reciprocity and the principle of national treatment.

29. The dispute resolution system implemented pursuant to the F.T.A. is somewhat convoluted. A Canada - United States Trade Commission is established, but does not play a role in dispute resolution until the Parties have made "every attempt to arrive at a mutually satisfactory resolution of any matter through consultations" ... (Sub-Article 1804(2)).

If consultations do not resolve the dispute within 30 days, the Commission is required to converse within 10 days to "endeavour to resolve the dispute promptly". (Sub-Article 1805(1)).

If the Commission is not capable of resolving the dispute within 30 days, it may, (and in regards to a dispute regarding actions taken pursuant to Chapter Eleven (Emergency Action) it shall) refer the dispute to binding arbitration. (Article 1806)

In this regard, note that Canada has implemented into domestic law her rights and obligations pursuant to the international Commercial Arbitration Code, (adopted by the U.N. Commission on International Trade Law on June 21, 1985), by means of the Commercial Arbitration Act, S.C. 1986, c. C-108. The U.S.A. is also a Party to the said U.N. Code.

30. These themes are discussed by numerous publicists who are familiar with the issues related to trade in services, and from various institutional, ideological and policy perspectives. Consider the following:

- Sauvant, op. cit. (f.n. 1, above) from the perspective of the U.N. Centre on Transnational Corporations;
- Markoski, Joseph P., "Telecommunications Regulation as Barriers to the Transborder Flow of Information", Correll International Law Journal, 1981, Vol. 14; at 287; from the perspective of large U.S. - based private users of international telecommunications circuits;
- United Nations Conference on Trade and Development, "Services and the development process: further studies pursuant to Conference resolution 159 (VI) and Board decision 309 (xxx)", 2 July, 1986, (Report by the UNCTAD Secretariat), from the perspective of the developing world;
- Organization for Economic Co-operation and Development, Elements of a Conceptual Framework for Trade in Services, Paris, March 1987, (mimeo), from the perspective of the interest constellation in the developed western world and Japan;
- Feketekuty, Geza and Aronson, Jonathan D., Meeting the Challenges of the World Information Economy, October, 1986, (Mimeo: Background Paper Prepared for the Atwater 1986 Conference on The World Information Economy: Risks and Opportunities, Montreal, November 4-7, 1986), from the perspective of the United States Trade Representative;
- Robinson, P. "From TDF to international data services", Telecommunications Policy, December 1987, (Butterworth & Co.) at 369, from the perspective of the Canadian delegation to the O.E.C.D.
- The "Frazee Proposal", a summary of views regarding "cross-border trade in information services", and proposals therein, developed at the 1985 EMF Davos Symposium, and submitted by Rowland C. Frazee, then Chairman and Chief Executive Officer, The Royal Bank of Canada, to the Symposium, from the perspective of a Canadian data-intensive service industry. Similar proposals were submitted to the then Hon. Prime Minister Pierre E. Trudeau in 1983, by the Royal Bank.

PART II

THE CANADIAN TELECOMMUNICATIONS SERVICES MARKETS AND POLICY FRAMEWORK

PART II

CHAPTER 1

A Normative Overview of the Canadian Facilities - Based Telecommunications Transport Supply Markets

As indicated above, computer/information services are often, and enhanced network services are always based on an underlying "basic telecommunications transport network" for access and delivery. Such a network provides "basic telecommunications transport services". There are two generically different kinds of transport systems: voice and data.

Both voice and data-oriented transport systems are relevant to a discussion of data (ie: records) - oriented computer-communications services, because data may be transported quite easily via a voice-oriented transport system, with minor modifications to the signal. (Usually the modification involves the conversion from a digital signal to an analogue signal, for carriage and analogue "switching" or routing.)

The major utilization of a voice transport system at the present time would be in the context of isolated utilization of a computer/information service. (Consider as an example the occasional remote "batch processing" of transaction records provided in the "clearing and settling" service described above in Part I, Chapter 2.)

However, it is the mass penetration of the public telephone system that makes this network transport system so important to the future of the wholesale/retail provision of enhanced services described above.

The public telephone network system's most essential element, that element which would be most difficult to replicate, is the local exchange service. The local exchange service is a "natural monopoly" insofar as domestic subscribers from the general public usually wish to subscribe to only one service to gain access to a multiplicity of remote parties or services, which in turn, may or may not originate from their end on the same

system network. The point in this is that the "computer/information" and "enhanced services" hinterland is "bottlenecked" at each public local exchange, and it is the necessity of a party, a service or indeed another non-telephone company network system to interconnect with the local "monopoly" exchanges of a telephone company, for high-volume subscriber penetration, that precipitates much of the marketable value of the service, or system, at least in the retail provision of computer/information and enhanced services. In contradistinction to the public (voice-oriented) telephone system one must also consider the "public" data system as a generic system and market.

The "public" data system is generically one in respect of which access is also available to any subscriber from the general public, and which principally provides basic or specialized (eg: high speed) transport of digitalized data (ie: records). Because "records" transport is largely a business activity, data networks are largely business networks.

Numerous competing public data systems constitute an exception to the "hinterland bottleneck" created by the monopoly over local exchange service provided by the telephone companies. However, the exception only constitutes a bypass to the telephone system bottleneck to the extent that the exception (ie: the "public data transport" systems) attracts a "hinterland" of subscribers to its "exchange" facilities/service. In real terms, the subscription class is limited to medium and larger-sized business users, because the "data transport" service is a "records transport" service in respect of which no other constituency requires the specialized scale and facility of a data transport network service.

For the above reasons, the local public telephone exchanges, and the interexchange network/service that interconnects the multiplicity of local exchange facilities in Canada, will be of enduring importance to the provision of computer/information and enhanced services.

It is sufficient to state at this point, that in both Canada and the U.S.A., the provision of local public voice exchange services is a regulated monopoly activity. However, in the U.S., the interexchange (ie: long

distance) provision of voice services is open to market entry, in both the sense that a "carrier" may establish and maintain his own facilities and provide the service publicly, and in the sense that a "carrier" may lease bulk "interexchange capacity" (eg: private leased lines; Wide Area Telephone Service) from a "facilties-based carrier", and resell capacity to subsequent users.[1]

It is relevant, also, to note that the coaxial cable infrastructure, as an information network with considerable public penetration, is capable of being transformed into a public "records" or data exchange system, although to date it has been utilized in Canada most largely as a one-way program delivery service in the nature of broadcasting.

It is also relevant to note that a facilities-based radio common carrier, Cantel, which provides "cellular radio" telephone service in competition with Telecom Canada, provides a network of local radio-based voice service exchanges.

The president and controlling shareholder of Cantel, who is also a major shareholder in the major Canadian cable service provider (Rogers Cablesystems Inc.), has already suggested publicly that his organization is ready for facilities-based competition with Telecom Canada in the provision of local (intraexchange) and interexchange voice service by means of a corporate alliance with the alternative non-telephone company interexchange carrier, C.N.C.P. Telecommunications.[2] (Interexchange transport of Cantel's public cellular voice service is presently relegated to provision by Telecom Canada because as indicated above, facilities-based interexchange voice transport service is still a monopoly service.)

In light of the above, it is relevant to examine the Canadian facilities-based voice transport and data transport markets, in terms of ownership, territorial monopolies and services monopolies. (Services-based market structures are discussed in a following chapter.)

In Canada, the public (voice) telephone exchange system is comprised of the interconnected facilities of a consortium of companies, private and public, known as Telecom Canada. These are Bell Canada, British Columbia Telephone, Northwest Tel Inc., Terra Nova Telecommunications Inc., Alberta

Government Telephones, Saskatchewan Telecommunications, Manitoba Telephone System, New Brunswick Telephone Co. Ltd., Maritime Telegraph and Telephone Co., Island Telephone co., Newfoundland Telephone Co. Ltd. and Telesat Canada. (Quebec Tel is an associate member)

A.G.T., Sask Tel and Manitoba Tel are provincial-government owned, while the other telephone companies are at least 50% privately owned. These companies operate terrestrial networks comprising microwave, copper wire and fibre-optics technologies. Each "Telco" enjoys a territorial monopoly in basic voice service in its respective serving area.

Telesat Canada which is half-owned by the Government of Canada and half-owned by the other telephone companies, owns and operates telecommunications satellites, uplink earth station facilities and downlink facilities for point-to-point and for broadcasting transport purposes.

Telecom Canada provides "Public Switched Telephone Network" (hereinafter "PSTN") Services to 98 percent of Canadian residential households and virtually all Canadian business users.

Telecom Canada also utilizes its facilities and existing penetration levels to publicly provide availability of a wide range of basic and specialized digital data (records) transport services to virtually any subscriber on the network. Moreover, the various members of Telecom Canada have been upgrading their respective transport facilities for the conversion of the P.S.T.N. into an "Integrated Services Digital Network" (hereinafter "I.S.D.N."), capable of providing a wide range of integrated data and voice transport services, as well as data and voice enhanced services.

The point in this is that the dominant Canadian facilities-based carriers (ie: the members of Telecom Canada) presently enjoy a monopoly in the facilities-based provision of long distance voice services, enjoy a virtually universal existing subscriber base through its monopoly in voice message exchange service, and therefore enjoys a dominant position in the provision of data transport services, private line leasing, and enhanced voice and data services. Moreover, Telecom Canada is poised to continue dominating the market by means of new I.S.D.N. facilities, in the event of regulated competition or open competition in the facilities-based provision of interexchange voice services.[3]

Telecom Canada co-ordinates interconnection with U.S. carriers in the provision of transborder voice and data transport services, and with Teleglobe for the exchange of overseas traffic. (The overseas market is not relevant to the scope of this thesis. It is sufficient to state that generally, the Canadian overseas telecommunications transport market is a monopoly market enjoyed by Teleglobe Canada).[4]

The second national "facilities-based", carrier network in Canada is CNCP Telecommunications ("C.N.C.P.") which until recently was jointly owned by Canadian National Railways and Canadian Pacific Limited. C.N.R. has since sold its portion to C.P., which has taken a new "partner", Rogers Cablesystems.[5]

C.N.C.P. is most largely a data (records) transport, facilities-based carrier. It is permitted in federally regulated serving areas and in some provincially-regulated serving areas, to interconnect with P.S.T.N. for the purpose of providing this service to any P.S.T.N. subscriber.

Although C.N.C.P. is a "truly" national network insofar as it is a single corporate entity with a "facilities based" (ie: wholly owned and operated) trans-national interexchange transport system, it is excluded from competing in public inter-exchange voice carriage services.

C.N.C.P. is permitted however, to cater to a big-business oriented demand market in the provision of separate or integrated voice and data services by means of leasing "dedicated" high-capacity lines.

C.N.C.P. interconnects with U.S. carriers for the provision of public data transport services and private leased voice and data line service.

It is significant that C.N.C.P. is capable in most provincial jurisdictions of being accessed by large and small business users for transnational and international data (records) transport services in the context of public data transport or private line data or voice transport.

The first major point to be concluded is that generally there is regulated (ie: tariffed) competition in the facilities-based provision of business-oriented data (records) transport services, on a national and Canada - U.S. transborder scale.

The second major point to be concluded is that the large subscriber-based monopoly in interexchange voice transport services enjoyed by Telecom Canada creates an indisputable position of dominance over C.N.C.P. in the data (records) transport market to the extent that smaller, occasional senders of data, rely on the P.S.T.N. in combination with "modulators-demodulators", by reason of P.S.T.N. convenience, and increasingly competitive pricing in interexchange voice services.

The third major point is that the voice/data (records) "hybrid" nature of the P.S.T.N., which will only become more technologically entrenched with the advent of I.S.D.N., will ensure that increased usage of the hybird PSTN/ISDN network as a data transport network. Moreover, the detariffing of data transport services by respective regulators will ensure more cost-based pricing of services, leading to a possible jump in basic "plain old local telephone service" and the "dropping off" of residential subscribers to the network.[6]

Before proceeding to a review of the regulatory infrastructure in Canada, the fourth major point must be made that the provisions of the F.T.A., which effectively permit entry by U.S. parties into the provision of network-based computer/information and enhanced services (in the nature of voice or data), will guarantee the acceleration of the market process whereby the PSTN/ISDN becomes a cost-based priced services network.

CHAPTER 2

The Jurisdictional Framework for the Regulation of Telecommunications in Canada

The current state of jurisdiction over regulation of telecommunications in Canada is succinctly described in a federal Department of Communications report published in 1988 entitled Canadian Telecommunications: an Overview of the Canadian Telecommunications Carriage Industry, 1988:

"The exercise of regulatory powers over telecommunications in Canada is currently divided between federal and provincial governments. As a result, carriers are regulated either by the federal agency, the Canadian Radio Television and Telecommunications Commission ("C.R.T.C."), a provincial public utility board/commission or, in some cases, a provincial or municipal government. The allocation and use of the radio spectrum is regulated by Communications Canada. The complex division of regulatory responsibilities between federal and provincial jurisdictions is being examined in the context of a legal proceeding now before the Supreme Court. This case is the result of a CNCP application to the CRTC for systems interconnection with A.G.T., a provincially regulated company."

The existence of a de facto fragmented Canadian regulatory regime has precluded a uniform national telecommunications policy respecting regulated and unregulated competition in the provision of facilities-based and services-based services. There is extensive inconsistency in the rules adopted by the various regulatory authorities in respect of customer-provided terminal attachment, interconnection of external (eg: C.N.C.P.) systems with the P.S.T.N., the services in which regulated competition is permitted if systems interconnection is permitted, and the extent to which capacity in facilities based services may be resold (ie: services based competition) and/or shared.

As will be discussed below, the F.T.A. probably does not require consistent national regulation as a function of the F.T.A. "national treatment" principle, if provincial regulators enjoy legitimate exclusive constitutional jurisdiction in their respective fields. However, if exclusive constitutional jurisdiction is de juris within the federal sphere, then the F.T.A. could very well have the effect of requiring consistent national treatment in regards to such matters.[7]

As a matter of policy the federal Minister of Communications has proposed a general framework for the development of a consistent national policy in these matters, but it has yet to be implemented by way of legislation, in the absence of conclusive juridical confirmation by the Supreme Court of Canada that the federal Parliament enjoys exclusive legislative jurisdiction in regards to such matters.[8]

It is important therefore that the constitutional jurisdiction of provincial versus federal legislators (and regulators) be discussed briefly, along with an exposition of and the political realities derived from the de facto division of the regulatory exercise.

Constitutional legislative jurisdiction enjoyed by Parliament in respect of point-to-point telecommunications activities has traditionally been based on either the federal incorporation of the legal entity operating the service or on the proposition that that entity operates an inter-provincial undertaking within the meaning of paragraph 92(10)(a) of the Constitution Act, S.C. 1982.

In The City of Toronto v. Bell Telephone Co. of Canada (1905) A.C. 52, the Privy Council indicated that both of these grounds could be relied upon in support of the proposition that Parliament enjoys jurisdiction over both the local carriage of intra-provincial traffic and the inter-provincial carriage of traffic.

On one or the other of these grounds, the federal regulator, the Canadian Radio-Television and Telecommunications Commission ("CRTC") has, since its inception regulated Bell Canada, British Columbia Telephone Co., C.N.C.P. Telecommunications, Telesat Canada, Teleglobe Canada, Northwest Tel, and Terra Nova Telecommunications. (Edmonton Telephones, which is controlled by the city of Edmonton has voluntarily suborned to C.R.T.C. jurisdiction.)

A more immediate line of judicial reasoning has appeared in a case that is now before the Supreme Court of Canada.

The basic fact situtation is as follows: C.N.C.P., having applied to the C.R.T.C. for an order requiring Alberta Government Telephones (A.G.T.) to provide facilities "for the interchange of telecommunication traffic between the telegraph and telephone systems and lines operated by C.N.C.P. and those operated by A.G.T.", was met with the argument by A.G.T. that the C.R.T.C. has no jurisdiction to deal with this application.

The grounds for the A.G.T. argument are summarized on the first page of the judgment of the Federal Court (Trial Division) rendered by Madame J. Reed (Re: A.G.T. and C.R.T.C. (1984) 15 D.L.R. (4th) 515 (F.C.T.D.).

This summary reads as follows:

> "Two reasons for this (A.G.T.'s) contention are given: (1) A.G.T. is a local work or undertaking and consequently not within the constitutional jurisdiction of the federal Parliament (the constitutional issue); (2) A.G.T. is a provincial Crown agent and therefore not within the jurisdiction of the C.R.T.C. because it is not bound by the relevant federal legislation (the Crown immunity issue)."

For present purposes, the only significant issue is "the constitutional issue" insofar as it, solely, is determinative of the absolute power of Parliament to implement a harmonized national telecommunication policy in regards to issues such as public systems interconnection and traffic exchange. (In fact the court held on the Crown immunity question, that A.G.T. does enjoy Crown immunity, but this could be overcome by a mere amendment providing an exception thereto, to bind the Crown to the relevant provisions of the federal Railway Act.[9] Refer infra, to the jurisdiction granted to the C.R.T.C. by the federal Railway Act).

In respect of the constitutional issue, the Federal Court trial division held that the activities of A.G.T. come within the scope of s. 92(10)(a) by reason A.G.T. engages in a significant degree of continuous and regular interprovincial activity, and therefore these activities, in their entirety fall within exclusive federal legislative jurisdiction.

The case was heard on appeal in the Federal Court (Appeal Decision), as Re: C.N.C.P. Telecommunications and A.G.T. (1985) 24 D.L.R. (4th) (F.C.A.). In the appeal decision, Pratte J. upheld the Trial Court decision on the basis that A.G.T. indeed "engaged in a significant degree of continuous and regular interprovincial activity" because A.G.T.'s undertaking "operated as an integral part of a national telecommunications system".

The appeal decision also overturned the trial decision that A.G.T. enjoys Crown immunity, with the result that the de facto regulatory jurisdiction enjoyed by the Public Utilities Board of Alberta over telecommunications (pursuant to the Public Utilities Board Act, R.S.A. 1970,

c. p-37), and by other similar provincial regulators, enjoys no de juris endorsement. Accordingly, even in the absence of any amendment to the federal Railway Act, there appears to be no impediment to the full scope of regulatory authority enjoyed by the C.R.T.C. (outlined below) over all regulated telecommunications activities in Canada.

As indicated above, the Re: A.G.T. and C.R.T.C. case has yet to be decided in the Supreme Court of Canada, at the time of writing of this thesis. However, as Janisch and Romaniuk state in Canadian Telecommunications: A Study in Caution,[10] most knowledgeable observers believe the court will find matters relating to point-to-point telecommunications to fall exclusively within federal jurisdiction.

Since it appears likely that the Supreme Court will determine in favour of exclusive federal legislative jurisdiction, it is reasonably likely that the federal Cabinet will be responsible for honouring the principle of "national treatment" in the F.T.A. by implementing a national approach to the competitive provision of telecommunications services.

The particular importance of the emerging role to be played by Cabinet in the development of a national policy, as a function of its own political priorities, and of the F.T.A. obligations (which reflect those political priorities) cannot be overstated.

A copy of a table of the major carriers, and their respective regulators has been reproduced from the said 1988 D.O.C. document,[11] and is included herein on the following page. For the purposes of this thesis, it is most important to note that Bell Canada; British Columbia Telephone, Northwest Tel Inc. (covering the territories), Terra Nova Telecommunications Inc. (covering Newfoundland) and Telesat Canada are federally regulated "companies" (within the meaning of S.3 of the Railway Act) covering 70% of public telecommunications activities in Canada. In this context it is also important to note that the federal regulator, the C.R.T.C. has been to date, incrementally setting competition policy in telecommunications activities as a function of regulatory decisions to permit market entry, and decisions to forbear from regulating certain activities that were previously tariffed. The C.R.T.C. has been setting

TABLE 3

MAJOR CANADIAN TELECOMMUNICATIONS CARRIERS
AND THEIR REGULATORY AGENCIES

Carrier	Regulatory agency
Bell Canada British Columbia Telephone Company CNCP Telecommunications Teleglobe Canada Telesat Canada NorthwesTel Terra Nova Telecommunications	Canadian Radio-television and Telecommunications Commission (CRTC)
AGT	Alberta Public Utilities Board
SaskTel	Responsible to the Government of Saskatchewan
Manitoba Telephone System	Manitoba Public Utilities Board
The New Brunswick Telephone Company Limited	New Brunswick Public Utilities Board
Maritime Telephone and Telegraph Company Limited	Nova Scotia Public Utilities Board
The Island Telephone Company Limited	Prince Edward Island Public Utilities Commission
Newfoundland Telephone Company Limited	Newfoundland Public Utilities Board
'edmonton telephones'	City of Edmonton
Northern Telephone Limited	Ontario Telephone Service Commission
Québec-Téléphone	Régie des services publics du Québec*
Télébec Ltée	Régie des services publics du Québec*
Thunder Bay Telephone System	Ontario Telephone Service Commission

* In December 1987, the Quebec government introduced a Bill aiming at the creation of a new agency to be called the Régie des télécommunications du Québec.

precedents which lead the trend towards competition in a government policy vaccuum, and at a rate which is progressive, as compared with that of provincial regulators.

The sensitivity of the role of Cabinet in bridging C.R.T.C. policies with provincial regulatory activities is great, in view of the fact that three provincial telephone companies are provincially owned, that all but three have historically been regulated by provincial authorities, and that many provincial economies do not enjoy the level of commercial development necessary to substantially benefit from increased competition in provision of, and business-user access to expanded data/records transport services.

It is the view of many informed industry-watchers that federal executive authorities are not interested in awarding the "watchdog" responsibility to the C.R.T.C., at any time in the future, in regards to intra-provincial activities.[12] Rather, the role of the federal level is perceived by Cabinet as a policy-making role, which policies will be implemented and supervised by existing provincial regulators.

In view of the above, it is necessary to discuss the legal grounds on which, and means by which various federal authorities are capable of developing a national telecommunications policy. Much of the discussion to follow in the next chapter will focus on the legislative framework for the C.R.T.C., and to some extent the D.O.C., and important reference is made to legislative provisions affecting the role of the federal Cabinet in policy development. Of particular importance is the discrepancy between the C.R.T.C. policy-making role as a public process-oriented tribunal, and the Cabinet and D.O.C. roles of policy development as a function of executive authority.

CHAPTER 3

The Regulatory and Executive Frameworks for Federal-Level Development of a National Telecommunications Policy Respecting Transport Services

(a) C.R.T.C. Powers

A complete overview of the legislative framework for the constitution and powers of the C.R.T.C. in regards to its role of regulating telecommunications activities (and specifically of regulating competition in telecommunications) is provided in an article published by Romaniuk and Janisch, in (1986) Ottawa Law Review, pp. 561-661.[13]

Herein follows a summary of C.R.T.C. powers, and limits thereon.

The C.R.T.C. Act, R.S.C. 1985, c. C-22 legislatively created the C.R.T.C. in 1976. Subsection 14(2) states that the Commission

> "Shall exercise the powers and perform the duties and functions in relation to telecommunication other than broadcasting, vested by the Railway Act, the National Transportation Act or any other Act of Parliament in the Canadian Transport Commission and the President or Vice-President thereof, respectively."

Although there is no legislative indication in any statute of a policy mandate for the C.R.T.C., it is the Railway Act R.S.C. 1970, c.R-2, as am. which plays the most important role in setting out the jurisdiction, duties powers, responsibilities and obligations of the Commission.

In particular, Subsection 321(1) of the Railway Act states that rates shall be "just and reasonable"; Subsection 321(2) states that rates and the actual provision of services shall be "not unjustly discriminatory or unduly preferential".

These subsections are of considerable importance in satisfying, with respect to federally regulated "companies", the F.T.A. requirement of "National Treatment", insofar as they guarantee provision of services on a

basis that is neither discriminatory nor preferential, regardless of whether the user of the service is a Canadian entity or a non-Canadian entity. (Consider discussion below in Part IV, Chapter 4.)

The jurisdiction of the C.R.T.C. is limited to covering "companies" as defined in Subsection 320(1) of the Railway Act; ie:

> "a railway company or person authorized to construct or operate a railway having authority to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls".

Cellular radio providers have been held by the C.R.T.C. to be "companies" for the purposes of C.R.T.C. regulation under the Railway Act (Cellular Radio Service, C.R.T.C. Telecom Public Notice 1984-85, 118 Can. Gazette Pt. I 8472 (25 October) 1984).

In contrast, a services-based provider of an enhanced service (ie: an entity that leases a basic transport service and resells capacity in combination with the "value-added" enhanced service) has been held to not be a "company" for regulatory purposes, (Enhanced Services, Telecom Decision C.R.T.C. 84-18, 118 Can. gazette Pt. 1, 6117 (12 July 1984).

Pursuant to sections 320 to 322 of the Railway Act the Commission is specifically empowered to regulate pricing of services (Ss. 320 (2)-(6), (10) and 321(1)-(5)), the terms and conditions of interconnection to public network exchanges (Ss. 320 (7)-(9) and 265) and the terms under which traffic may be carried by a "company".

The C.R.T.C. is empowered to impose other restrictions pursuant to various "Special Acts" (ie: as defined in S. 320(1)) of the Railway Act, such as An Act Respecting the Bell Telephone Company of Canada, S.C. 1902 c.41), and may also do so pursuant to its general power to ensure "just and reasonable" rates and the provision of services and rates on a basis that is not "unduly discriminatory".

These other restrictions may be imposed by the C.R.T.C. to create, for example important limitations on terms and conditions which facilities-based carriers are permitted to impose on customer provided terminal attachment equipment.

Two fundamental powers by which the Commission implements control over carriers are the powers contained in S. 321(4) of the Railway Act to

> "suspend, postpone and disallow tolls, to require new tariffs to be submitted or to prescribe other tolls in lieu of ones which have been disallowed;"

and in S. 320(4) to

> "classify services and establish different rate structures".

The power to require Tariff filing is the regulator's central tool for rate control, and it is available to the C.R.T.C. in regards to those services which it decides should be monopoly-based (ie: local exchange and interexchange voice services) and those which are permitted on the basis of regulated competition (eg: data transport services).

It is very significant, in this regard, to consider the power to forbear from requiring a tariff filing of a "company" with respect to a particular service which the Commission perceives should be subject to pricing by market competition. (S. 320(3) of the Railway Act).

The C.R.T.C. has engaged in forbearance from the tariff requirement, and rate regulation thereunder in respect of a number of data transport services. (See in particular Telecom Decision C.R.T.C. 87-12, 22 September 1987, in which C.N.C.P. was exempted from the requirement to file tariffs for all transport services, except for telegrams and interconnected voice services. The decision was based on the facts that it was unlikely to be able to raise prices to any signficant degree withut losing business, and that C.N.C.P. was not in a position to cross-subsidize services from revenues from other services. This was also held to be consistent with the C.R.T.C. approach to streamlining the regulatory process and reducing the regulatory burden. Moreover, the Railway Act requirement of just and reasonable rates, it was held, would survive the detariffing of those services).

The above discussion outlines the general delineation and philosophy of regulatory power practised by the C.R.T.C. Generally, the focus of this discussion has been on the approach to, limits on, delineation of, and legislative requirements for regulation of facilities-based service providers.

A different matter involves services-based providers (ie: resellers and sharers of bulk-rated capacity). The general rule is that services-based providers, whether of a pure transport service or in the context of provision of an enhanced service, are permitted to provide certain services in the absence of direct tariffs, but indirect tariffs may apply insofar as the original facilities-based providers are tariffed and rate-regulated.[14]

These resale and sharing decisions, and other decisions relating to the substantive liberalization of the utilization of transport services (such as systems interconnection and customer provided equipment attachment), are considered below in the discussion of C.R.T.C. decisions respecting competition, in Part III Chapter 2.

For present purposes, it is sufficient to note that the C.R.T.C. has (a) delineated its own jurisdiction to exclude the regulation of "non-Railway Act companies" which provide enhanced or computer/information services; (b) taken an approach in regulation towards forbearing from rate regulation of basic transport services wherever possible; (c) perpetually reserved the power, in any event, to utilize rate regulation, respecting the terms of facilities-based service provision, and/or interconnection rights; (d) reserved these said powers in respect of all underlying facilities-based transport services which may be utilized in the resale/sharing of such services (by services-based service providers) and which may be utilized in the provision of enhanced or computer/information services even though enhanced and computer/information service providers are not Railway Act "companies" and; (e) recognized the Railway Act rights enjoyed by a user to reasonable rates and to non-discrimination in access.

(b) Federal Cabinet Powers and Powers of the Federal Department of Communications

Generally the Federal Cabinet enjoys the following powers for the purpose of implementing a national telecommunications policy respecting competition;

(i) The power to review or rescind a C.R.T.C. measure pursuant to Subsection 64(1) of the National Transportation Act, R.S.C. 1970, c. N-17, as am.

(ii) The power to control telecommunications service markets pursuant to the Radio Act, R.S.C. 1970, c. R-1, as am.

(iii) The power to introduce legislation before Parliament in respect of telecommunications activities within the constitutional jurisdiction of Parliament;

(iv) The power to introduce legislation before Parliament in respect of various services markets, and to thereby create regulatory policy in respect of the telecommunications-related aspects of those services.

These various powers are discussed, as follows.

(i) Cabinet Review Power Over C.R.T.C. Decisions

> Pursuant to Subsection 64(1) of the National Transportation Act "The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion and without any petition or application vary or rescind any order, decision, rule or regulation of the Commission ... and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties".
>
> (emphasis added)

It is significant to note that the Cabinet review power may be exercised by Cabinet on its own Motion or on application by an interested party. Moreover, there are no procedural limitations. The power applies in respect of virtually any form of official measure taken by the C.R.T.C.

In A.G. Canada v. Inuit Tapirisat of Canada (1980) 2 S.C.R. 735, at 753, Mr. Justice Estey states "while the C.R.T.C. must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function ... in short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1)".[15]

Thus, the limitations on the Cabinet review process under s. 64(1) are circumscribed by the jurisdictional limitations imposed on the C.R.T.C. (ie: by valid, intra-jurisdictional "orders, decisions, rules or regulations").

This is important insofar as a Cabinet decision in this regard might be subject to judicial review, on the grounds of error in jurisdiction.

(ii) The Power to Control Telecommunications Service Markets Pursuant to the Radio Act, R.S.C. 1970, c. R-1, as am.

The federal Minister of Communications and the federal Department of Communications (hereinafter "D.O.C.") enjoy a general authority over Canadian point-to-point telecommunications activities to the extent that the Parliament of Canada enjoys legislative jurisdiction therein, by the terms of the Department of Communications Act, R.S.C., 1970, c. C-20, as amended. (In particular, Section 4 legislatively awards the mandate.)

Specifically, the Minister and the D.O.C. enjoy this mandate in respect of all intra and inter-provincial radio activities in Canada, by reason that jurisprudence awards such jurisdiction to the Parliament of Canada. (See the Radio Reference case, cited as Re Regulation and Control of Radio Communication, [1932] A.C. 304 (P.C.))

For practical purposes of implementing this control mandate, it is the Radio Act R.S.C. 1970 c. R-1 that specifically empowers the Minister, and the D.O.C. to regulate and control access to and the utilization of radio apparatus and radio undertakings in Canada. This power is particularly significant to the point-to-point telecommunications industry in many respects. The most salient is the extensive use of microwave technology in all interexchange transport systems. Other growing areas are cellular radio

telephone technology, and satellite technology, both of which are radio-transport technologies.

Section 3 of the Act contains a licence requirement in respect of radio stations and radio apparatus. The Minister (or D.O.C. qua delegate of the Minister) may set terms and conditions to the issue of such licences by Paragraph 4(1)(e). Moreover, the Minister may make regulations prescribing the type of radio apparatus to be utilized with each class of radio station, assigning radio frequencies and power levels, and establishing the nature of various services (excluding broadcasting services) that may be utilized.

The point in this is that any party wishing to provide facilities-based telecommunications transport services by any radio-based technologies must be licenced by the Minister, and may be regulated thereby in many aspects.

Thus, the Minister enjoys an exclusive, broad, and discretionary legal base of power with which to shape telecommunications policy in respect of the radiocommunications aspects thereof.

(iii) The Power to Introduce Legislation Before Parliament in Respect of Telecommunications Activities

The executive function of Cabinet to propose legislation to Parliament is fraught with problems in respect of telecommunications activities.

First, as indicated above, it has not been conclusively decided in the Supreme Court of Canada that federal jurisdiction is legally exclusive. Secondly, even if federal jurisdiction is de juris exclusive, it is not de facto exclusive. Not only do most provinces presently occupy the regulatory field, but three provincial Crown corporations occupy the monopoly proprietary field. However, in conjunction with this "legislative" power should be discussed a concurrent power which might be entitled "the authority to negotiate a national telecommunications policy with the Canadian provinces". In order to facilitate federal-provincial relations, federal-provincial cooperation is virtually the only way of ensuring the implementation of an agenda towards a harmonized national policy in respect of telecommunications-related competition.

This has been recognized by the present Conservative government, and accordingly, a national Committee of Ministers of Telecommunications has been struck in efforts to build such a policy. This said Committee of Ministers has commissioned a "Federal-Provincial-Territorial Task Force on Telecommunications" to study the harmonization of telecommunications policies therein, with particular emphasis on competition.

Numerous reports have been published as a result.[16]

(iv) The Power to Legislate Policy in Regards to Entry Into Various Service Markets, and Regulation of The Telecommunications-Related Aspects of Those Services

As indicated above, non-facilities based enhanced network services providers are not "companies" within the meaning of the Railway Act, and are therefore outside the ambit of C.R.T.C. jurisdiction. (Except to the extent that the underlying transport services are regulated.)

Moreover, computer/information services, although they may be accessed via underlying telecommunications transport services, are outside the ambit of C.R.T.C. jurisdiction.

However, both types of activities may be regulated at the federal and/or provincial levels under a number of various authorities, and in respect of numerous aspects. These include: the sectoral regulation of those sectors which utilize enhanced or computer/information services in the provision of their primary services (including the regulation of transborder data flows); consumer-oriented regulation in respect of privacy; and the regulation of unfair competition in the business utilization of such services.

The most significant federal bases for control and policy-making in the above matters include the exclusive legislative jurisdiction over banks,[17] (which, to date, utilize the most sophisticated enhanced network services in Canada), and legislative jurisdiction exercised over competition in the federal sphere.[18] Federal measures in these areas are extensive, and their relation to the shaping of a liberal national telecommunications policy, and to the F.T.A., are discussed in Part V., below.

Chapter 4: Conclusions for Part II

We have seen that the Canadian facilities-based telecommunications services supply markets, are in essence a duopoly. The major public network system is fragmented in ownership, fragmented territorially in serving areas, and fragmented by regulatory design. The delineation of federal versus provincial jurisdiction has yet to be conclusively determined as a matter of law. There are varying degrees of competition permitted by different regulators in different serving areas in respect of the facilities based provision of services, and general access to and utilization of facilities (ie: interconnection, terminal attachment) and services (ie: resale and sharing). There is no domestic harmonization respecting the classification of services provided by monopoly versus those subject to regulated competition, versus those subject to untariffed competition, or to competitive and regulatory forces outside the jurisdiction of telecommunications regulation (ie: enhanced services).

The political agenda of the present Conservative federal government favours a national telecommunications policy which harmonizes and implements a liberal marketplace for users, and resellers/sharers, in accordance with the terms of U.S. policies and the F.T.A.. This government is utilizing a number of powers in trying to give effect thereto. The C.R.T.C. has, to date, acted as the leader in the development of competition-oriented "national" policies, and has liberalized markets within its sphere of influence to a great extent. The federal executive has, in previous administrations, been content to permit the C.R.T.C. to perform this policy role. However, the present federal Cabinet appears to have a more hurried political agenda, and it has marshalled the forces of provincial Ministers in attempting to implement the agenda at a higher level and to harmonize policies as between provinces in such a way as to satisfy F.T.A. obligations of national treatment. Although the F.T.A. does not patently require harmonization of Canadian telecommunications policies with those of the U.S., federal policies which will require provincial support are moving in that direction. In view of the above, it is necessary to examine the actual measures taken by the C.R.T.C. and the Cabinet, often with the consultation of the provinces, towards implementing their respective "competition" agendas.

Footnotes: Part II

1. Refer generally to Goldstein, op. cit. found in Footnote 11 in Part I, above, for a discussion of the deregulation of U.S. telecommunications markets.

2. In this regard, reference the following:
"Don't rule out phone competition", The Financial Post, Friday April 21, 1989, p. 12;
"Rogers' $1.1 billion blitz to enhance sight and sound", The Toronto Star, Thursday, March 30, 1989, p. D-1;
"CNCP to make new bid to offer long-distance phone services," The Globe and Mail, Friday, January 27, 1989, p. B-3.
"Let the Second Force be With You", Maclean's March 20, 1989, p.46

3. C.R.T.C. policy anticipates such competition eventually. Refer to the Interexchange Competition and Related Issues hearing, of August, 1985 (Telecom Decision C.R.T.C. 85-19) as discussed in Part III of this thesis, below.

4. Teleglobe Canada was for a number of years a Crown Corporation, until the present Conservative government legislated its divestiture, pursuant to An Act Respecting the Reorganization and Divestiture of Teleglobe Canada S.C. 1987, c. C-38.
The company was acquired in the private sector by Memotec Inc., and very shortly thereafter by Bell Canada. Teleglobe still enjoys the overseas monopoly in voice and data carriage for Canada, and is guaranteed the monopoly until 1992.

5. Reference F.N. 3, supra.

6. The detariffing of services is technically accomplished by the "forbearance from regulation" by the C.R.T.C. in respect of matters within its jurisdiction. See generally, Janisch, H.N. and Romaniuk, B.S. "The Quest for Regulatory Forbearance in Telecommunications", Ottawa Law Review, Vol. 17, No. 3, 1985 at 455.

7. Reference discussion in Part IV, Chapter 4, in this regard.

8. Reference the federal policy statement entitled "A Policy Framework for Communications in Canada" (released by then federal Minister of Communications Flora MacDonald in July, 1987). This is discussed extensively in Part III, Chapter 4 of this thesis, below.

9. The Railway Act, R.S.C. 1970, c. R-2, as am.

10. Mimeo, found in Janisch, H.N. Communications Law II, 1989, Vol. 1, Teaching Materials for the study of Communications Law at the University of Toronto, p. 1, (on this reference, see p. 36).

11. Canadian Telecommunications: an Overview of the Canadian Telecommunications Carriage Industry, 1988; at p. 131.

12. In one article on the subject of jurisdiction, published in the Globe and Mail, October 30, 1984 at p. 139, federal D.O.C. authorities were reported to have "speculated that authority over intraprovincial service could be delegated to the provinces."

13. Romaniuk, B.S. and Janisch, H.N., "Competition in Telecommunications: Who Polices The Transition?", (1986) 18 Ottawa L.R., 561.

14. Reference C.R.T.C. Telecom Decisions 87-1 and 87-2 with respect to the ruling that the facilities-based provision of transport services for the purpose of resale or sharing shall be facilities-based carrier-tariffed, where appropriate, rather than services-based carrier tariffed. In regards to enhanced services, it was determined in Decision 84-18 that the provision of transport services for the end provision of enhanced services shall not be tariffed at either level, but shall be an open market. Reference the discussion in Part III, chapter 2, section (d), of this thesis.

15. For an extensive discussion of subsection 64(1) of the N.T.A., reference Janisch, H.N., "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada", 1979 Osgoode Hall Law Journal, Vol. 17, No. 1 at p. 47 See also Romaniuk and Janisch, "Competition in Telecommunications: Who Polices the Transition?", (1986), 18 Ottawa Law Review, p. 561 at 603 (F.N. 157 therein) and at 628.

16. Reference for example Competition in Public Long-Distance Telephone Service in Canada, December, 1988.

17. Pursuant to head 15 of s. 91 of the Constitution Act, "Banking (and the) Incorporation of Banks". For more information on the extent of federal authority respecting Banking, reference Crawford and Falconbridge: Banking and Bills of Exchange, op. cit., at p. 14.

18. For a discussion of federal jurisdiction respecting the power to regulate competition, reference Hogg, Peter W., Constitutional Law of Canada, 1985, Carswell Co. Ltd., at p.p. 406-409.
The federal power may be based on the criminal law power, trade and commerce, or even peace, order and good government.

PART III

CANADIAN POLICY DEVELOPMENTS TOWARDS LIBERAL-COMPETITIVE MARKETS IN THE PROVISION OF TELECOMMUNICATIONS FACILITIES AND SERVICES, AND IN ACCESS TO AND UTILIZATION THEREOF

PART III

CHAPTER I

Background: The Nature of the Services

In the discussion in Part I above, the dominant facilities-based carriers were described, and their respective service markets and territorial markets were delineated.

Market entry, per se, into facilities-based carriage is not regulated by Canadian law,[1] except that no common carrier may be more than 20% owned by a foreign entity.[2] Moreover, as will be recalled, the radio segment of any telecommunications undertaking must be licenced by the D.O.C.

Given the small domestic economies of scale in the telecommunications industry relative to the capital intensive "uneconomic entry" that a new common carrier would be required to make, it is unlikely that one will see over the medium term, the emergence in Canada of a significant new national facilities-based carrier. In contrast, as indicated in Part I, above, many "private systems", can be expected to emerge for business usage of large-volume, basic transport services and/or for utilization of enhanced services. These "services-based systems" will utilize a combination of the transport and public switching services of the existing common carriers, and customer provided equipment attached thereto.

Users of facilities-based services who wish to establish their own services-based systems will want the greatest flexibility possible in the available choice of facilities-based carriers, in the extent to which they may supply and attach their own terminal device equipment, and in the extent to which they may resell and share capacity in their services-based systems.

Thus, these "services based systems" are dependant on liberalization in the four major areas outlined in the S.P.A.C. report, and highlighted in the F.T.A. (infra).

These areas are a) interconnection of external network systems with the P.S.T.N. (or with public data systems); b) leasing of privately dedicated lines; c) attachment of terminal equipment provided by customer subscribers (Customer Provided Equipment [C.P.E.] Attachment) and d) reselling and sharing of telecommunications transport capacity or of enhanced network services.

In particular, the resale and sharing of services is the cutting edge of competition in the Canadian telecommunications supply markets because resale and sharing of bulk-rated capacity in various services effectively permits competition by the "services based system" provider with the facilities-based provider, if the former can buy bulk capacity (wholesale) at a price that is sufficiently lower than the retail price of the facilities-based provider.

Moreover, some transport (ie: interexchange voice) services are still provided on a monopoly basis even in federally-regulated serving areas, and cannot be shared or resold in competition, except to the extent that such services are utilized in the underlying transport of enhanced services.

Since the level of competition permitted is generally determined by the service and/or facility involved, and the regulatory category it falls within, there follows herein a brief generic description of various services, and some information respecting the economic and functional dynamics thereof.

Local Exchange service is that service which utilizes the "local loop" switching facilities of a public data network or voice network. The telephone company carriers have traditionally enjoyed a monopoly over such services (ie: the P.S.T.N.) in regards to voice exchange of both local and long distance voice transport services, but the lucrative monopoly in voice transport services is being threatened. The isolated provision of local exchange facilities and services is capital intensive and not lucrative, and the right of "foreign systems" interconnection with a "dominant carrier" system (ie: the high-penetration network of Telecom Canada) tends to erode the value of the network to the "dominant carrier" because competitive services may thereby be publicly provided via that network. Thus Telecom

Canada members have fought against such outside systems interconnection with their local exchange facilities.[3]

C.N.C.P. offers a national public data exchange network and Cantel offers a number of local radio-based voice and data exchange networks. (It is the interconnection of all the local exchanges of a carrier that create the "network" system of a carrier.)

Interconnection of an external system with a more dominant (ie: higher penetration) network is the first step towards integrated facilities-based competition. Interconnection with a more dominant carrier may be sought for exchange of traffic onto the network of the more dominant carrier ("Foreign Network Exchange"), for inter-network switching of private lines traffic ("trunk tie") or merely for connecting a remote "off premises" line extension. (O.P.E.).

Although the major-penetration public network is a "telephone network" by reason its public purpose is to provide Plain Old Telephone Service (P.O.T.S.), it is used extensively as a conduit for (non-voice) data records (digital or analogue).

Presently, many public data services and enhanced services are provided via the P.S.T.N., pursuant to (relatively) liberal federal interconnect policies.[4]

As indicated below, C.N.C.P. and Cantel may interconnect with federally regulated telephone network exchanges, and with some provincially regulated telephone network exchanges for the provision of many services.

However, because of the July, 1987 "Framework" Policy of the federal Department of Communications, foreign-owned (ie: over 20% of voting control) private networks will not be permitted to provide <u>public</u> services in Canada on a stand alone basis <u>or</u> via a public switched network.

<u>MTS or Message Toll Service</u> generally refers to long distance, pay per call voice service. It is also a term sometimes used to include primary (local) loop voice services.

<u>WATS</u> is Wide Area Telephone Service. It is a flat rate, long-distance voice service providing coverage over a given geographical area.

MTS and WATS have traditionally been lucrative monopoly services exclusively provided by the telephone companies. Pursuant to regulatory rate structures, profits from these services subsidize the cost of the local public telephone exchanges. Effectively, the C.R.T.C. controls these rates insofar as the members of Telecom Canada set long distance toll rates and present these to their respective serving area regulators for approval. Over 70% of such business provided in Canada originates in the federally regulated serving areas.

Data services (or Data Transport Services) constitutes a term encompassing the provision of network facilities and services, for the principal purpose of transporting data records (as opposed to voice messages). Generally data services are delivered via a "digital network".

The major distinction between data services and enhanced services is that in the former, digital (computerized) facilities are attached to the transport network (as terminal equipment, or as integrated network facilities) for the principal purpose of upgrading the reliability and efficacy of the transport function (ie: high speed transmission; specialized packet switching for "batches"; and unswitched transmission lines for customer-created "virtual" networks, created by implementation of standardized customer equipment protocols and formats.)[5] In contrast the principal purpose of the pure enhanced service is to change or store the data for end-user convenience. The former is for transport-purposes, while the latter is for information content purposes. Publicly-switched data transport services have traditionally been provided by telephone company common carriers, and other facilities-based carriers on a regulated tariff basis. The liberalization of resale and sharing of capacity in such facilities (eg: private lines) and services, permits a new class of services-based systems carriers to compete in the provision of these services, by purchasing wide-area or trunkline capacity in bulk, and reselling or sharing.

It should be noted that voice and data (records) transport services can be provided by satellite, (and particularly by Telesat Canada) but satellite transport services have been most largely utilized in the provision of broadcasting services. Satellite transport services may prove to be a

transitional technology in the continental provision of point-to-point services, as terrestrial fibre-optics systems are implemented to permit even higher cost-efficiency benefits and greater reliability.

Private Line Services constitute the leasing of a trunk circuit which is dedicated to the use of a specific customer.

The telephone companies and facilities-based common carriers such as C.N.C.P. and Telesat have been providing such services on a regulated Tariff basis for some time. Utilization thereof has been made more flexible, and competition therein has been developed with the evolution of liberalization of systems interconnection with the P.S.T.N. (access), terminal attachment (for data transport and enhanced services) and more recently, resale and sharing of facilities and transport service capacity.

Enhanced services, (also known as value-added services in the U.S.) is a combined telecommunications transport/content service (of either voice or data).

In the creation of an enhanced service, value is added by a function (often computerized) which manipulates or stores the content, for purposes of output (ie: end user) manifestation. The distinguishing feature is the change of information content (in the hands of the end user) from the form thereof in the hands of the transporter or a time lag in delivery desired by the end user. The C.R.T.C. has adopted (mutually exclusive) definitions (infra) of "basic" and "enhanced" services which are consistent with those of the U.S. Federal Communications Commission (F.C.C.) (see the resale and sharing decision re: enhanced services, C.R.T.C. Telecom decision 84-18 infra).[6]

As indicated below, such services are provided competitively without tariff requirements, except in regards to facilities-based carriers which may be regulated, as Railway Act "companies" by the C.R.T.C.

In Telecom Decision 84-18,[7] the Commission indicated concern over the "marginal" enhancement of a monopoly voice or data transport service (ie: MTS, WATS) to mask the real purpose of competing in such monopoly service, by reselling/sharing capacity on leased lines carrying the marginally enhanced service. (See also the Call-Net decision 88-11, infra).

Accordingly, the commission permits only provision or resale of enhanced services respecting which the "primary function" is only the provision of "enhanced services" versus transport services. (Telecom Decision 84-18, infra). The impact of this policy was reviewed vis-a-vis voice services in Telecom Decision 88-11, (infra).

Summary: Chapter 1

From the above discussion, it is clear that a "new" class of competitive services-based systems creators might lease bulk-rated wide-area data or private line data or voice capacity on one carrier system, and access the higher-penetration system of a more dominant carrier (eg: the P.S.T.N.), and exchange traffic onto the latter system, or another foreign system interconnected thereto, for the purpose of providing a resold/shared transport service (if permitted by the regulator) or of an enhanced service.

This proposition, however, is based on regulatory liberalization.

The specific C.R.T.C. regulatory decisions which implement liberalization in interconnection, terminal device attachment, resale and sharing, and leasing, for facilitating the competitive provision of such services are discussed in Chapter 2. Also discussed is the extent to which different services are capable of being regulated, and are regulated, when provided by a dominant (ie: telephone company) carrier, a less-dominant facilities-based carrier, and by a reseller/sharer.

CHAPTER 2

C.R.T.C. Regulatory Policy

(a) Introduction

As indicated above, it has until recently been the C.R.T.C., in its quasi-judicial regulatory role which has led federal and provincial policy in the move towards liberalized markets in the provision and utilization of telecommunications facilities and services.

Virtually any formal ruling of the C.R.T.C., by Order, Policy Statement, Decision, or otherwise has force of law which will be observed by a Canadian Court as enjoying the effective status of regulation, being Prima Facie intra vires, and binding on all parties. (Capital Cities Communications Ltd., et al v C.R.T.C. et al (1978) 2 S.C.R. 141 (S.C.C.).

It is convenient to discuss C.R.T.C. regulatory policies as policies which affect competition in the provision of the following categories of services: (a) monopoly services; (b) regulated competition services; and (c) unregulated services. Herein follows a summary of the C.R.T.C. decisions which have classified various services within these three generic categories and their sub-categories. Also discussed are the major issues affecting the way a service is classified, and the important impact of classification in regards to certain services.

(b) Monopoly Services

Presently, in the federally regulated sphere, MTS and WATS services are the only monopoly-based services. (Minor exceptions to the MTS and primary exchange (local) voice service are considered below, in the discussion of C.R.T.C. decision 87-1, wherein certain of such services were permitted to be shared and resold). It is of principal significance that competitive interexchange (long-distance) carriage of voice services is not permitted, as this is the major revenue base of the telephone companies which cross-subsidize local exchange service therewith.[8]

The C.R.T.C. has set the wheels of rate restructuring ("rate rebalancing") in motion in anticipation of eventual competition in primary interexchange voice (MTS and WATS) service.

This process, aimed at stabilizing rate increases respecting local voice services at levels which will continue permitting universal accessibility, and at decreasing long distance MTS service rates was initiated by the seminal watershed C.R.T.C. case known as the Interexchange Competition and Related Issues hearing, of August 1985 (Telecom Decision C.R.T.C. 85-19).

In this case, which considered the major aspects of facilities-based competition, it was held that pursuant to the rate rebalancing proposals of Bell Canada and B.C. Tel, long distance rates should be capped, and effectively decreased relative to inflation. Later decisions have permitted the rebalancing process to actually decrease nominal long distance voice rates, but not to permit hikes in real basic local service rates.

Because MTS and WATS services are true monopoly services, exclusive to the telephone companies, they are by nature relegated to facilities-based provision. However, an enhanced service which only marginally enhances the underlying WATS service has been provided by a company named Call-Net, on a services-based provision basis. The C.R.T.C. has ruled that the provision of this service is effectively an incursion into the monopoly service, and legally not an enhanced service, but a voice transport service. If this decision were successfully challenged in a tribunal of competent jurisdiction, the facilities-based monopoly enjoyed by the telephone companies in these services could be broken by effective services-based competition (ie: resale and sharing of bulk-rated capacity).[9]

(c) Regulated Competition Services

(i) Network Exchange Services

As indicated above Telecom Canada provides a facilities-based, universal public voice and a public data exchange service, while C.N.C.P.'s facilities offer only limited public data and private line (voice and data)

exchange services in many cities. Moreover, Cantel's facilities offer a limited cellular radio exchange service in many cities. Exchange services are by nature facilities-based. The competition issue is "who may interconnect to which exchange network and thereby benefit from the subscriber base of the other network?"

Pursuant to the C.N.C.P. Interconnection cases (C.N.C.P. Telecommunications: Interconnection with Bell Canada, Telecom Decision C.R.T.C. 79-11 and C.N.C.P. Telecommunications: Interconnection with the British Columbia Telephone Company, Telecom Decision C.R.T.C. 81-24) the federal serving area precedent was established that a "foreign" public$_{10}$ carrier system may interconnect with the public-switched telephone network to publicly provide long-distance and local private-line voice and data services and public data transport services to P.S.T.N. subscribers.

With respect to private lines, interconnection is permitted to facilitate private intraexchange "off premises extension" systems, private interexchange "trunk tying" of systems, and also "foreign exchange" systems (ie: the exchange of traffic between the dominant P.S.T.N. system and interconnecting "foreign" systems).

Moreover, beyond private-leased lines, a multiplicity of public data transport services were permitted to be provided by C.N.C.P. through the public telephone exchange, pursuant to interconnection with the P.S.T.N.

In essence, interconnection of facilities is permitted to the extent that it does not damage network facilities, and to the extent that it is for the purpose of the provision of services that are not monopoly services. The interconnection/exchange service is a rate-regulated service, in the sense that the C.R.T.C. approves for example Bell Canada and B.C. Tel tariffs for a systems interconnection.

This decision does not consider, however, the non-carrier interconnection of network system facilities with a carrier (ie: a purely private-owned local network, including "private branch exchange" facilities.)

Such systems are used extensively by governmental and business

proponents in the local utilization of voice and computer-communications services.

On this issue, the seminal case is C.R.T.C. Telecom Decision 85-19, Interexchange Competition and Related Issues.

In regards to interconnection of intra-exchange systems, the Commission framed the competition question as:

> "the question of whether the interconnection, with carrier facilities or services, of non-carrier provided intraexchange systems (ie: local area networks), used to provide interexchange and intraexchange services should be permitted."

It proceeded to define an intraexchange system as:

> ... one which is configured to operate within an exchange or any two-way extended area service (EAS) associated with that exchange.

A description of Intraexchange systems follows, in these terms:

> "Intraexchange systems can be either public or private. They can utilize a number of technologies including microwave, fiber optics and coaxial cable, to carry voice, data or video traffic. Private Intraexchange systems are those which are dedicated to the exclusive use of a single user or shared by two or more users for their exclusive use. Private intraexchange systems are not provided for the use of the general public. Such systems can provide users with alternatives to telephone company dedicated local channels for the carriage of voice, data or video traffic (eg: a private local area network (LAN) for the carriage of a customers computer communications traffic) as well as access to the carrier's network services.
>
> Public intraexchange systems are systems other than private intraexchange systems and include both voice and non-voice systems which offer their services to the public. Such systems could provide voice services such as primary (local) exchange voice equivalents and non-voice services such as local data communications services as well as access to carrier network data communications services (such as those operated by C.N.C.P.).
>
> In regard to the interconnection of intraexchange systems, there are several instances where interconnection is permitted. Included are the interconnection of:

(i) radio paging systems

(ii) radio common carriers (RCC's) and cellular telephone systems (to provide a variety of voice and data communications in intraexchange and interexchange markets); and

(iii) systems to provide enhanced services." (Emphasis added)

The Commission concluded (at p. 100) that it is in the public interest to permit the interconnection of non-carrier provided private intraexchange systems and non-carrier provided public non-voice intraexchange systems to the facilities or services of the federally-regulated carriers.

The above discussion illustrates that network exchange services are "regulated competition services" to the extent that interconnection of external facilities to a dominant carriers' network (ie: that of a member of Telecom Canada or that of C.N.C.P.) is permitted to provide services which are not monopoly-based services already being provided by the dominant carrier.

In this vein, it is convenient also to discuss the central issue in the 85-19 decision, of facilities-based competition in monopoly interexchange voice services, and preliminary rate rebalancing (ie: cost-based pricing) of interexchange and local loop services.

In Telecom Decision 85-19, the C.R.T.C. adjudicated an application by C.N.C.P. to permit expansion of the interexchange voice services permitted to be provided in the 79-11 and 81-24 cases (ie: private line voice services only) to public voice services, including the primary interexchange MTS and WATS voice services which form a substantial revenue base for the telephone companies. The C.R.T.C. decided that it was not in the public interest to approve the application by reason that competition in long-distance voice services which constitute such a substantial revenue base for the public telephone companies would impact on a number of controversial matters including the relatively low cost of local service, which is subsidized by profits from long distance services and which effectively supports the utility-oriented principle of universal residential access to primary local

telephone serice. In the same decision it was decided however, that C.N.C.P. interconnection with federally regulated telephone company networks would be permitted for the provision of an expanded number of public data transport services.

Furthermore, a request was made by B.C. Tel and Bell Canada to rebalance telephone rates to reflect costs of provision by increasing local rates and decreasing long distance rates. This was denied. A major concern expressed by the C.R.T.C. was that such rebalancing would affect the rates and revenues of provincially regulated members of Telecom Canada, and the Commission proposed to address the issues in consultation with provincial interests.

However, The Commission specifically recognized the important need for rate rebalancing, (and immediate freezing of MTS/WATS rates), insofar as it would yield important economic and societal benefits by reducing bypass of traffic from Canadian carriers' systems and by reducing diversion of jobs to areas outside Canada where MTS/WATS service is less expensive (thus "strengthening Canada's ecomony and its ability to play a leading role in the emerging global information economy"), and by increasing national communication and understanding. (Emphasis added)

Moreover, it was held in obiter,

> "Finally, a lowering of MTS/WATS rates would reduce incentive for uneconomic entry leasing bulk capacity (leasing bulk capacity purely for peak purposes, an inefficient use of the system) and create an environment better suited for competitive entry in the MTS/WATS market should that, in the future, appear desirable."

In effect, the Commission froze MTS and WATS rates, and committed itself to the future rebalancing of rates, with provincial and public consultation. As indicated above, such rates are being rebalanced. See for example the Tariff filing of Bell Canada, dated February 3, 1987 providing for the implementation of a rate rebalancing plan.

The above discussion illustrates that with regards to facilities-based competition in various transport services, be they interexchange services or

intraexchange services, interconnection with the network of a dominant carrier who will subsequently allow traffic exchange onto and off of the dominant carrier, is a precondition to the effective, competitive, facilities-based provision of a given service. Moreover, unless a less dominant facilities-based carrier is permitted to interconnect for the purpose of providing a service provided by a more dominant carrier, the former is at a competitive disadvantage insofar as network penetration is far less. Moreover, where interconnection is permitted for the facilities-based provision of a service, then the regulated tariff of the dominant carrier in providing the service will serve effectively as a price ceiling to users of the service as provided by the dominant and less dominant carriers. Finally, where such services are tariffed like this, on a "facilities basis", the dominant facilities-based carriers who provide such services effectively control the floor price to be charged by "services-based" providers who have leased bulk-rated transport capacity and who are reselling or sharing.

The above discussion also illustrates the cross-subsidization of certain monopoly transport services provided by the dominant telephone companies (ie: local voice system exchange services) with revenues from other monopoly services (ie: long distance voice services), and even from "competitively provided" services, to the extent that the latter are limited to duopoly facilities-based competition, as opposed to services-based competition, or local facilities-based, non-carrier (ie: L.A.N.) competition.

(ii) Data Transport Services and Private Line Services

Data transport services and private line services (interexchange and intraexchange) which are provided by a (dominant) telephone company continue to be rate-regulated and subject to cost accounting rules. (By reason of regulatory concern over cross-subsidization and/or predatory pricing practices.)

In regards to the provision of these services by less dominant carriers, such as C.N.C.P., these regulatory requirements do not apply (except in regards to telegram and interconnected voice services). See C.N.C.P. Telecommunications - Application for Exemption from Certain

Regulatory Requirements, C.R.T.C. Telecom Public Notice 1986-64, 24 October 1986.

(iii) Enhanced Services Provided By "Railway Act Companies" (Facilities-Based Common Carriers)

Pursuant to C.R.T.C. Telecom Decision 84-11 ("Enhanced Services"), facilities-based common carriers which are "companies" within the meaning of the Railway Act are required to file Tariffs in regards to enhanced services. Moreover, federally regulated Telephone Companies (eg: Bell, B.C. Tel) are not permitted to engage in electronic publishing or in the creation/distribution of its own data bases.

(d) "Unregulated Competition" Services

There are three classes of telecommunications network services in regards to which provision is unregulated. These are:

(i) Those facilities-based (ie: large common carrier-provided) services described in "(c)" above, in respect of which the C.R.T.C. is forbearing from regulating, notwithstanding that they are provided by "companies", within the meaning of the Railway Act, and are within the regulatory jurisdiction of the C.R.T.C. The exception to the forbearance from regulation, as indicated, is in regards to the provision of such services by telephone companies, which are tariff-regulated in respect of all services, by reason of their dominant (monopoly-based or subscriber-based) position. Thus, the rate regulation of the telephone companies generally sets the standard for market pricing in such services;

(ii) Those services-based services which are purchased on a bulk-rated basis and which are subsequently provided by way of resale or sharing, in respect of which the C.R.T.C. is forebearing from regulating; and

(iii) Those services provided by entities which are not "companies" within the meaning of the Railway Act; (ie: most importantly, providers of exclusively enhanced services).

It is necessary to indicate the types of services which fall into each of the above sub-categories of "unregulated competition" services, and to identify important issues surrounding each regulatory categorization. It is important to note that such issues might arise in a C.R.T.C. proceeding, in a federal Cabinet review proceeding, in a judicial review proceeding, or in an arbitration proceeding (to be discussed below) pursuant to the dispute resolution provisions of the Canada-U.S. Free Trade Agreement. The outcome of a dispute over "categorization" of a particular service can (as will be seen) affect the extent to which open competition in a class of services will impinge upon regulated competition, or even upon a monopoly (eg: voice transport) service. Let us consider each sub-category identified above.

(i) Unregulated Facilities-Based Services

Those important facilities-based services in respect of which the C.R.T.C. forbears from regulating are interexchange and local area network intraexchange data transport services provided by non-telephone company common carriers such as C.N.C.P. (C.N.C.P. Telecommunications-Application for Exemption from Certain Regulatory Requirements, C.R.T.C. Telecom Public Notice, 1986-54, 24 October 1986).

It is important to note that these services provided by a "company" within the meaning of the Railway Act may at any time in the future, be regulated by the C.R.T.C. by reason that the mere forbearance from regulation thereof does not take a "company" outside the jurisdiction of the C.R.T.C.

The definition of "Company" is found in subsection 320(1) of the Railway Act, as amended, which states:

> "a railway company or person authorized to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls."

While it is outside the scope of this thesis to enumerate every facility-based provider to determine a list of "companies", (Quaere whether an L.A.N. is a "company"), it is relevant to note that if services were to be provided by an alleged "non-company", and the C.R.T.C. were to attempt to regulate, a jurisdictional challenge might be launched in the federal Cabinet, in the courts, or before a binding arbitration panel pursuant to the terms of the F.T.A. If such a jurisdictional challenge were to succeed, then an unregulated but "regulatable" service would suddenly become an "unregulatable" non-company-provided service. This question of whether a service provider is a "company" is also important respecting "services-based providers".

(ii) Unregulated Services-Based Services (Resellers and Sharers)

In Interexchange Competition and Related Issues Telecom decision 85-19, the C.R.T.C. noted that

> "At present, the General Regulations of the federally-regulated carriers prohibit the resale and sharing of their services except by special agreement."[11]

After noting that such special agreements between carriers and users were rare, the Commission proceeded to identify C.R.T.C. decision-based exceptions to the general rule against resale and sharing. These included Telecom Decision C.R.T.C. 84-18 in which the Commission required all federally-regulated carriers to permit resale and sharing for the purpose of providing enhanced services. Moreover, in Telesat Canada - Final Rates for 14/12 GHz Satellite Service and General Review of Revenue Requirements, Telecom Decision C.R.T.C. 84-9, the Commission required that Telesat permit licensed broadcasting undertakings to resell excess capacity to other such undertakings for broadcast programming purposes.

In the Interexchange Competition and Related Issues decision, (decision 85-19) the C.R.T.C. considered as a "related issue", whether or not existing restrictions on resale and sharing of carrier services should be removed. The commission adopted definitions at p.70 of "Resale" and "Sharing" as follows:

> "Resale is the subsequent sale or lease on a commercial basis, with or without adding value, of communications services or facilities leased from a carrier." (emphasis added)
>
> "Sharing is the use by two or more persons, in an arrangement not involving resale, of communications services or facilities leased from a carrier."

The major breakthrough in the resale and sharing of basic transport services is found in the 85-19 decision.

In considering the "related matter" of resale and sharing of capacity in transport services, the Commission decided that resale and sharing in most services is in the public interest. The exception is in regards to monopoly MTS and WATS services, by reason such services are priced significantly above costs. It was determined that with facilities-based, or services-based competition in these monopoly services, revenue erosion, to telephone companies, and subsequently the erosion of cross-subsidization of universal service by the telephone companies would be significant, in the absence of rate rebalancing. (The Commission determined also that federally regulated carriers shall embark on a rate rebalancing process for the eventual elimination of monopoly services. See generally Telecom Decisions 85-19 and 88-4: the "Interexchange Competition", and "Bell Canada - 1988 Revenue Requirement, Rate Rebalancing and Revenue Settlement Issues" decisions, respectively.)

Thus, with regards to interexchange services other than MTS/WATS (ie: private leased lines and public switched data services) and with regards to intra-exchange services, (voice and data), such resale and sharing of capacity was permitted. (MTS and WATS reselling is permitted by landlords providing PBX services).

By Public Notice 86-42 the Commission ruled that the facilities-based carriers would establish restrictions respecting resale, and sharing. Thus, although the "services-based providers" of these services are not regulated, their activities are regulated by tariff measures filed by facilities-based supplies.

The details of the implementation of the liberal resale and sharing policy are found in two decisions, namely decisions 87-1 and 87-2.

In Telecom Decision 87-1 (entitled Resale to Provide Primary Exchange Voice Services), transport capacity in regards to voice services was permitted to be resold and shared.

This includes liberalization of resale and sharing in regards to local voice services except to provide public pay phone capacity, but including provision of resold/shared Business Individual Line Service, PBS Trunk Service, and Centrex Service. (As Ken Engelhart, general counsel for the Canadian Business Telecommunications Alliance indicates (at p.22 of Canadian Telecom Magazine Vol. 1, No. 3, December 1987) this will allow shared tenant service (S.T.S.) buildings, which will develop the building of "smart buildings".)[12]

In regards to MTS and WATS services, c.ly in the one "landlord" situation are such services generally permitted to be shared or resold. This situation is where a landlord provides a common PBX for his tenants and he needs to share/resell message toll service to provide message toll service. (There is another irregular exception. Reference the Call-Net cases respecting enhanced voice services, infra.)[13]

In regards to private voice lines which are not connected to the P.S.T.N., capacity thereon may be shared or resold, pursuant to Telecom Decision 87-2 ("Tariff Revisions Related to Resale and Sharing").

Moreover, capacity on private data lines which are connected to the P.S.T.N. can be shared or resold, by Decision 87-2.

Rules regarding sharing require that the sharing group establish an agreement stating each member is jointly and severally liable for the unpaid telephone company bills. Other restrictions are placed on resale services such as dedicated access to one circuit per resale customer.

It should be noted that by C.R.T.C. Telecom Public Notice 1989-1, the Commission seeks comment on whether it is appropriate to modify its rules in Decision 87-2. This is perhaps a call for proposals for resale and sharing in voice services, in view of unfair advantages enjoyed by large scale telecommunications users.

The large user, who will in turn be a sharer or a reseller, such as a large U.S. company based in Canada, is awarded a business advantage over small Canadian business insofar as the small user is limited to toll-measured voice services, except to the extent that he can share with a private voice line market. Furthermore, he is relegated to non-trunk capacity data services, unless he can organize such a sharing or resale market. The large (foreign and domestic) user however is capable of economically reselling excess bulk-rated capacity by reselling legitimate "value-added" voice services or by sharing with another large user, capacity on a private leased line. (The Call Net company is one small business reseller that has been permitted to resell voice capacity in the nature of M.T.S. service, but only by federal Cabinet intervention. Refer to discussion in the following chapter.)[14] Moreover, the small business user that is territorially based on the U.S. side of the border, and who is competing with small Canadian business in U.S. markets, enjoys lower U.S. telecom toll-measured rates in the open U.S. telecom market.

The extent to which resale and sharing of basic transport services is permitted, is the cutting edge issue for competition in the Canadian telecommunications environment, and as indicated above, it is a non-harmonized extent to which it is allowed in the various federal and provincial territorial-based jurisdictions. Liberalization effectively creates a new class of "carriers" (services-based service providers) which class is supplied by facilities-based service providers and which will compete in and amongst its own class and with facilities-based carriers for retail customers. This class is significant in terms of the federal July 22, 1987 "Framework Policy," and the F.T.A., by reason there will be increased foreign entry in the field, and foreign entities will likely seek entry into these markets in virtually every province.[15] The

"competition" implications under the 1987 federal "Framework Policy", the F.T.A. and Cabinet reviews of C.R.T.C. decisions are discussed below, in Chapter 4 of this Part.

(iii) Non-Railway Act Companies

A) Resellers/Sharers

In the Interexchange Competition and Related Issues decision (Telecom Decision C.R.T.C. 85-19) the C.R.T.C. was somewhat unclear on this point, but it seems that "resellers and sharers" are, according to the C.R.T.C., "companies" as defined in subsection 320(1) of the Railway Act by reason that the Commission considered the option (at p.89 of the decision) of rate regulating such parties, but declined to do so on the grounds that "the Commission is of the view that the absence of regulation of resellers and sharers will not confer an undue competitive advantage on them." (This decision was made in spite of argument that resale and sharing of bulk-rated capacity in various services would permit undercutting of retail prices by resellers unless rate rebalancing was first completed by the common carriers.)

As indicated in (i), directly above, while it is beyond the scope of this thesis to argue conclusively whether every type of reseller/sharer is a "company", the issue must be raised that a court or an arbitration panel, reviewing an interpretation by the C.R.T.C., might hold that such a reseller/sharer is not a company, and therefore outside the regulatory competence of the C.R.T.C.

It must be noted that a determination would probably hinge on the nature of the particular service "resold" or "shared"; (ie: most importantly, whether the voice or data service in question is enhanced or non-enhanced).

The C.R.T.C. inclusion of "resellers and sharers" in "companies" is of significance in that the C.R.T.C. would enjoy the jurisdiction to regulate such activities in the event it deemed to do so, in direct contravention of

the July 1987 Framework Policy (infra) which proposes to leave all "services-based" - service providers (ie: "Type II Carriers") unregulated.[16]

It should also be noted that if a reseller/sharer is not a "company", or is a "company" but the regulator forbears from regulating (as the C.R.T.C. has generally decided to do in respect of resold/shared services per Telecom Decision 85-19), competition is regulated to the extent that facilities-based carriage rates in particular services are tariffed. Thus, in most public data services, in respect of which only the dominant telephone company carriers are regulated, (by the C.R.T.C.), it is this one tariff that determines the market-wide retail pricing standard for a service, and thus the bulk-rated pricing standard. (By C.R.T.C. Public Notice 86-2, it was determined that restrictions on resale and sharing are to be facilities-based.)

B) Enhanced Services Providers

As indicated above, enhanced services are not regulated by the C.R.T.C. because their providers are not "Railway Act companies" unless they also provide telegraph or telephone system services (Enhanced Services C.R.T.C. Telecom Decision 84-18).

It should be noted that "companies" which are facilities-based (ie: telephone companies and other common carriers) which provide enhanced services, are regulated in this regard to ensure no unfair competition (Telecom Decision 84-18) by cross-subsidization.

It is relevant to the discussion below, of the F.T.A. provisions, to provide a substantive summary of the C.R.T.C. liberalization of the provision of enhanced services.

Again, by C.R.T.C. design, a services-based service is outside the "company"-delineated regulatory ambit of the C.R.T.C. if it is found to be an "enhanced service", but is generally within C.R.T.C. jurisdiction, if found to be a "basic transport service". Thus, where, on a review of a C.R.T.C. decision in this regard, a service is found to be "enhanced" it may be taken out of C.R.T.C jurisdiction by the courts, by the federal Cabinet, or by a binding arbitration panel pursuant to the F.T.A.

For these reasons, a summary of the major "enhanced services" decision follows.

The C.R.T.C. has defined "enhanced services" in its decision 84-18, respecting the resale and sharing of enhanced services.

This definition is consistent with the F.C.C. decision.[17]

The C.R.T.C. comments as follows at page 12 of decision 84-18:

"Having considered the positions of the parties, the Commission has decided to adopt definitions of basic and enhanced services that conform in substance with the definitions adopted by the F.C.C. (in its Second Computer Inquiry Final Decision, 77 F.C.C. 2d 384 (1980)) The wording of the F.C.C. definitions has, however, been modified to provide further clarity and to ensure that a service is not classified as enhanced simply because it is provided by a party other than a common carrier. The definitions adopted are as follows:

1. Basic Service

A basic service is one that is limited to the offering of transmission capacity for the movement of information.

o o o

2. Enhanced Service

An enhanced service is any offering over the telecommunications network which is more than a basic service."

Herein follows a brief discussion of what the C.R.T.C. had to say in 84-18 about each definition:

1. Basic Service

The definition is expansive. (a) Transmission may be analog or digital, (b) information may be voice, data, or video, and (c) different types of basic services may be offered according to:

(i) bandwidth;
(ii) analog or digital transmission capabilities; fidelity/distortion/conditioning parameters; and
(iii) amount of transmission delay acceptable to subscriber.

Moreover, (d) switching techniques, signal companding techniques, error control techniques or other techniques which facilitate economical, reliable movement of information (which must by provided by facilities internal to the service provider), and speed, code and protocol conversion (not manifest in the outputs of the service) do not alter the basic nature of the service. Finally, (e) memory and storage within the network can only facilitate transmission, for the basic nature of the service to be retained.

2. Enhanced Service

Once again, the definition is expansive. Such services include computer processing applications (which) are used to act on the content code, protocol and other aspects (of information). Different or restructured information may be provided to the subscriber through processing (editing, formating). Information content need not be changed (merely subscriber interaction with stored information is sufficient to constitute an enhanced service.)

Other points made in the same decision include:

- That the provision of enhanced services would be an unregulated activity, except in respect of common carriers (ie: facilities-based "companies" under the jurisdiction of the C.R.T.C. by reason of subsection 320(1) of the Railway Act which are considered to be operating a telephone or telegraph system). These carriers would be required to file tariffs in respect of such services.

- Interconnection and terminal attachment restrictions would be unnecessary in respect of interconnection with the telephone exchange and terminal attachment of the "enhancing" facilities. (at p.24 of the decision)

- Resale and sharing of all carrier services should be permitted for the provision of enhanced services, except where the enhanced service has as its primary function the provision of a basic service.

- Resale and sharing of the enhanced service as used, is permitted, with the exception in (C) above.

- Bell Canada is not permitted to engage in electronic publishing involving editorial control over content, or in the creation or distribution of its own data bases. (Other federally regulated carriers may do so unless such activities are deemed to prejudice the diversified development of this market.)

In C.R.T.C. Telecom decision 85-17, the Commission determined that various services were or were not enhanced services. The guiding principles involved were:

- The "enhanced" part of a mixed enhanced/basic service (ie: where data was manipulated for the purposes of transmission) does not render the service enhanced unless the manipulated form was available at the output;
- That availability rather than use of an enhanced feature is relevant for the purposes of characterization; and
- Transformation of the signal from one medium to another (eg: copper wire to radiowave), for facilitation of carriage only, does not constitute an enhanced service.

The important points in the above summary include the major point that there is an expansive regulatory description of both enhanced services and basic transport services and, therefor, that overlap is possible between the two, rendering uncertainty in the precise status of a given service, be it a voice service, a data service, a video service, or a mixed voice/data/video service.

(e) Customer Provided Equipment - Terminal Attachment

Terminal equipment is utilized both to provide services, and to utilize services which have been provided to a customer. The central competition issue is whether a customer of a facilities-based service provider (ie: a common carrier) may provide and attach his own equipment, or whether that customer must buy or lease such equipment from the common carrier to whose network facilities the equipment is proposed to be attached. Generally, "C.P.E." attachment is permitted in federally regulated serving areas, pursuant to the C.R.T.C. cases outlined below.

C.P.E. may be classified as network-addressing and network non-addressing, or a combination of the two. Examples of the former are the telephone, and the "private branch exchange" or "P.B.X.". The most obvious example of the latter is a microchip device which provides an enhanced (ie: content) service or a remote data processing service.

In some ways it is the P.B.X., (and similar local network voice and data switching devices), as well as network non-addressing microchip devices which are driving competition in telecommunications services. As indicated above, the former is being utilized by business and public sector customers wishing to create their own local area networks (ie: intraexchange networks). In respect of the latter, it is network-external microchip devices which are permitting large organizations to store, process and transport large volumes of digitally formatted data records, both manually and automatically. It is this capability which is creating pressure for more economic utilization of, and competition in the interexchange public transport networks, for cost-based pricing in (ie: rate rebalancing of) local intraexchange and long distance interexchange carrier services, and for cost-efficient resale and sharing of transport capacity. Moreover, it is this capability which is permitting the growth of enhanced network services, which is creating pressure for the economic utilization of the underlying transport services.

At the federal level, C.P.E. terminal attachment was first permitted, in regards to private line services provided by C.N.C.P. pursuant to Telecom Decisions 79-11 and 81-24.

The breakthrough decisions however were the "Interim Decision" (Interim Requirements Regarding the Adjustment of Subscriber - Provided Terminal Equipment: C.R.T.C. Telecom Decision 80-13, November 13, 1980) and the "Final Decision" (Attachment of Subscriber-Provided Terminal Equipment: Telecom Decision 82-14).

In the latter, the Commission determined that a general policy of liberal terminal attachment is in the public interest. The decision deals with telephone sets, multi-line devices - ownership (ie: Private Branch Exchanges) and maintenance of inside wiring of leased versus fully owned devices, as well as technical standards. The Decision approves the procedure of TAPAC standards recommendations to the D.O.C. and subsequent D.O.C. laboratory certification of specific terminal devices, in concert with the Canadian Standards Association.[18]

However the most important aspects of the decision for the present purpose relates to the distinction between network addressing terminal

devices and network non-addressing terminal devices, and the application of the liberalization principle to both types. The ostensible result is that terminal attachment liberalization paves the way for competition in the provision of equipment used for monopoly (voice) services, regulated competition (ie: facilities-based data transport services) and competitive-entry (enhanced) services.

Nonetheless, the distinction must be made between terminal equipment used in connection with the basic telephone system and equipment used in connection with specialized public data transport systems provided by common carriers. In regards to the latter, it is only recently that barriers to customer freedom to attach and utilize such equipment have been eradicated by the C.R.T.C. Access to some such data services are dependant on codes (protocol signals) which are built into the terminal devices. The dominant public telephone companies either keep these codes confidential and manufacture the equipment themselves (or via non-arms length subsidiaries or related companies such as in the case of Bell Canada, Northern Telecom) or relegate disclosure to a preferred arms-length manufacturer (such as Amdahl Canada). Generally, see the Globe and Mail, Tuesday May 2, 1989 "C.R.T.C. ends Monopoly on private-line phone service" which summarizes a C.R.T.C. decision of May 1, 1989. (This decision ends the monopoly enjoyed by Bell, B.C. Tel and Amdahl in regards to provision of equipment capable of accessing Telecom Canada's "open systems integration" service known as "dataroute" which permits the creation of "virtual networks" thereon by use only of common protocol codes. This is representative of only one data service that has been de-monopolized. Others have yet to come. It is relevant that this C.R.T.C. ruling held in favour of Paradyne Canada Ltd., a subsidiary of the U.S. dominant carrier, A.T. & T.).

Although terminal equipment eligible for customer-provided attachment was defined as and limited to on-(customer) premises equipment in Telecom Decision 82-14, it was later expanded, in effect, to include off-premises equipment insofar as local area network facilities were permitted to be customer provided for intra-exchange use. (Decision 85-19, supra.) This latter decision essentially recognizes that a terminal device known as a private branch exchange (PBX) or a Centrex, which locally switches

multiple-channel capacity to end users is effectively a network system, (analagous to the network of C.N.C.P.) for the purposes of interconnection with the P.S.T.N., and is generally allowed by the 85-19 decision to be used by a customer in the provision of internal local area network services and for interconnection with the local public network. Effectively, a customer is hereby permitted to be a facilities-based competitor with the local telephone service, in providing such exchange services to himself. The provision of exchange services to <u>others</u> by such facilities would render the customer a facilities-based carrier of sorts, but for regulatory purposes, a reseller of the services (voice, data enhanced) provided thereby.

As indicated in more depth in the discussion of resale and sharing (above), the parameters for L.A.N. resale and sharing differ with the (voice or data) service in question.

CHAPTER 3

A Note Respecting Provincial Regulation

In a recent paper on liberalization in Canadian telecommunications market activities by Janisch and Romaniuk, (Telecommunications: A Study in Caution, mimeograph, October 1988) the authors indicate that it is impossible to review in detail the regulatory practices of each provincial regulator.[19]

In summary, the governing legislative principles in most provinces are the same as at the federal level, and include the duty to provide service to users at just and reasonable rates, and to avoid unjust discrimination or undue preference with respect to rates or provision of any services, or facilities (as in S.321 of the Railway Act).

However, liberalization in provincial regulation affecting systems interconnection with the P.S.T.N., resale and sharing of bulk-rated services, provision of enhanced services and terminal attachment of C.P.E. has proceeded on a very slow agenda.

Although some C.R.T.C. decisions regarding liberalization have been adopted by various provinces (after delays of a number of years), the "hold-out" provinces of Saskatchewan and Manitoba, have resisted liberalization even in customer provided telephone terminal attachment, which is very remote from transport and enhanced services competition, and not threatening at all to rate structures. Janisch and Romaniuk suggest the sluggish move towards competition is a function of the fact that these provinces are rural, rely heavily on residential telephone toll revenues as opposed to high volume business revenues to subsidize the rural telephone exchange system, and that these provinces enjoy no strong indigenous business infrastructures to support those revenues if rates are rebalanced to reflect costs in a more competitive telecommunications environment.[20]

Thus, while many provinces have permitted limited facilities-based competition in data transport services, no provincial regulator has decided in favour of permitting resale and sharing (ie: services-based provision) of any basic voice or data transport services.

This underlines two facts. First, the introduction of competition into telecommunications markets is an extremely political, and economically integrated matter from the grass roots level (ie: universality of telephone service) to the international trade level (ie: foreign right to compete in enhanced services or resale of data services). Secondly, the relationship between revenues from monopoly services, revenues from regulated-competition transport services, and revenues from open market-competition services is very sensitive to the ratio of business use and residential use in a region. (Quaere whether Canadian provincially-owned telcos will privatize as competition develops).

Anti-competition pressures might be less in the Atlantic region where there is less of a telephone network infrastructure to be subsidized (because of smaller geographical areas and more concentrated demographics than in the prairie regions).

The leap of faith for the provincial ministers of communications is in relinquishing the political benefit of lower local rates, for the potential benefit of the regional development to be derived from the high-technology utilization of the public network "information highways". The potential risk is that public ownership of the provincial "telcos" will become uneconomic, if regional development is slow.

It is fair to say that opening these supply-side markets to services-based non-telephone companies (Canadian and American) will reduce the cost of transport services to medium and small-size business, which reduction can only enhance the competitiveness of such business classes in those regions. Perhaps the Ministerial Committee and the Task Force[21] will succeed in harmonizing provincial competition, before U.S. providers press the question whether the F.T.A. requires of Canada a uniform national scope and level of competition, or merely a collection of clear provincial policy positions.[22]

CHAPTER 4

The Federal Executive Initiative Towards a National Telecommunications Policy

The federal Depaitment of Communications commenced a review of telecommunications policy in 1983, and solicited and received submissions thereon in 1984.

In February 1986, federal, provincial and territorial Ministers responsible for communications met for co-operative consultation in the matter of telecommunications policy review, and established a Committee of Ministers for the purpose of developing a new telecommunications policy. The Committee concerns itself primarily with national policies, including interconnection (and related competition) and roles/responsibilities of the federal and provincial governments in telecommunications.

At a meeting in Edmonton, in April 1987, six policy principles were adopted to guide in the development of such national policies: ie: Uniquely Canadian approach to telecommunications problems and policies; universal access to basic telephone service at affordable prices; the international competitiveness of Canadian industry; technological progress to benefit all Canadians; the goal of fair and balanced regional development; and the need for government (as distinguished from regulators) to assume responsibility for policy development. (The Ministers undertook to seek ratification thereof by its legislators.)

Moreover, the Ministers of Communications, at that April meeting, agreed to review the desirability of competition in public long distance phone service. They also agreed to request that federal, provincial and territorial representatives begin an investigation prior to any regulatory determination on the issue, and to report back to the Ministers. The result was the creation of the "Federal-Provincial-Territorial Task Force on Telecommunications." The major report thereof; Competition in Public Long Distance Telephone Service in Canada was delivered to the Ministers in the Fall of 1988.

In July, 1987, a policy paper entitled "A Policy Framework For Telecommunications in Canada" was released by the Honourable Flora MacDonald, then Minister of Communications, which was a comprehensive federal policy statement (as opposed to a statement by the Committee of Ministers) and the first of its kind since the early 1970's.

This was followed by a subsidiary document in January 1988 entitled "Proposed Guidelines for Type 1 Telecommunications Carriers".

The main points in these policy documents are as follows:

- Recognition of telecommunications networks as the basic infrastructure of the information economy.

- Emerging new market segmentation in the telecommunications industry based on three types of telecommunications businesses:

  a) The provision of public network facilities, which comprises the technical infrastructure used for the transmission and distribution of telecommunications messages. (ie: facilities-based services);

  b) The provision of telecommunications services, including advanced computer-based services as well as conventional telephone and data services. (ie: Services-based services); and

  c) The supply of telecommunications equipment, especially terminal devices such as Private Branch Exchanges (PBXs);

- Recognition of major structural changes to British and Japanese telecommunications industries through competition (ie: in computer and enhanced services) and deregulation (ie: in basic data transport services), and through privatization of state-owned monopolies; but the absence, in these countries of U.S.-type unlimited entry into telecommunications facilities-based services.

- Recognition of divided "responsibility" (as opposed to divided legal "jurisdiction") for telecommunications regulation, between federal and provincial levels of government.

- Adoption of the six principles (noted above on prior page) promoted by the Committee of federal, provincial and territorial Ministers,

- Cabinet (versus legislative) ratification of two provincial-federal Agreements in telecommunications including:

  i) Agreement for sharing governments' responsibilities in the field of telecommunications that would facilitate the coordination of government policies and regulation; and

ii) Agreement on interconnection and competition policy that would establish a uniform level of competition in telecommunications services and equipment throughout Canada. (Emphasis added)

- Recognition that regulatory decisions of the C.R.T.C. in competition matters have been consistent with past and present policy of the federal executive, and the Department of Communications.

- Identification of two central policy goals, and of the means for their implementation; namely:

(goals)

(i) creation of a market environment which allows for open entry and exit for suppliers of services and equipment; and

(ii) fostering an efficient network infrastructure that permits economic and cost-effective delivery of these products/services to end users;

and (means of implementation)

(i) implementation of a nation-wide policy which provides for the interconnection of services and equipment to the network facilities of Canadian telecom common carriers; and

(ii) establishment of a framework for policy and legislation which

(A) designates national and international facilities-based carriers and which limits new entry to these classes of facilities-based carriers, ("for the time being")

(B) would render efficient the national carrier systems by ensuring carriage of Canadian traffic on Canadian network facilities (ie: no U.S. facilities-based bypass)

(C) would liberalize interconnection of lesser networks and services with common carrier facilities on a nation-wide basis for provision of authorized services; and,

(D) ensure Canadian control over common carrier networks.

Out of this very lengthy policy formulation, the Minister has as at this time only undertaken specifically to implement on a national basis, via "legislation where necessary", (in concert with consultations for provincial and federal regulatory implementation) a framework which distinguishes between Type 1 telecommunications carriers and Type 2 carriers.

This policy framework is stated as "a comprehensive national policy" in respect to the establishment and operation of telecommunications common carriers in Canada, consisting of:

- The designation of a class of telecommunications carrier (Type 1) that may own and operate interprovincial and international telecommunications network facilities for the purpose of providing basic telecommunications services to the general public;

- The authority to establish the general terms and conditions for the operations of Type 1 carriers, especially their obligations to serve and to provide access to their network facilities for other carriers;

- Statutory guidelines requiring effective Canadian ownership and control of all Type 1 carriers operating in Canada that would include provisions prohibiting foreign nationals from holding more than 20 per cent of their voting shares (with appropriate arrangements made to exempt any existing Type 1 carrier which is currently foreign-owned or controlled);

- The designation of a class of telecommunications carrier (Type II) that will be authorized to provide services to the public utilizing in whole or in part the network facilities of Type I carriers; and

- The legislative and regulatory measures necessary to ensure that Type II carriers obtain access to the network facilities of Type I carriers on just and reasonable terms and conditions and in a manner which promotes fair and equitable competition in the provision of new telecommunications services.

These measures are to be implemented, according to the policy statement, for these purposes:

- to encourage the rapid growth of innovative and competitive new telecommunications business (data transport, enhanced and computer-related) services; (ie: Type II carrier services, and non-carrier services);

- to ensure that Canadian-controlled network facilities continue to be Canadian-controlled, and that emerging network facilities (ie: new facilities-based carriers) are Canadian controlled.

- to maintain the affordability of local telephone service (which will continue to be provided on a monopoly basis according to the policy) by efficient use of Type 1 Canadian facilities.

The issue of competition in long distance telephone service was stated to be deferred pending consultation.

As indicated above, the Federal-Provincial-Territorial Task Force submitted its report on competition in public long distance telephone service in Canada, in the Fall of 1988, but clearly no official executive (or regulatory) policy has been directly forthcoming from either the federal or provincial level.

However, an indirect policy has been forthcoming from the federal Cabinet on competition in long distance telephone services in the form of Cabinet review of a C.R.T.C. regulatory decision, and in a context which underlines the unseverability of the underlying public voice (and data) transport services from the enhanced services provided thereon. The particular Cabinet review in question is in regards to an "enhanced services provider" by the name of "Call Net", which was determined by the C.R.T.C. to actually be a disguised services-based competitor (reseller or sharer) in the monopoly long-distance voice market.

The ultimate significance of this "unseverability", and of this particular Cabinet review, is that the F.T.A. makes provision for the review of just such a "categorization" question. Thus the authority of a bilateral international tribunal may be pitted against the authority of the Canadian Cabinet and/or Courts.

This important case is discussed in the next Part of this thesis, along with relevant analysis of the F.T.A.

Chapter 5

Summary and Conclusions Respecting Federal Policies Governing Competition in Telecommunications Services

As M.T.S. rates are rebalanced (as approved in principle by the C.R.T.C.) so that service prices reflect costs (as they do in the fragmented, competitive U.S. telecommunications markets), so will pressures mount to permit competition in long distance voice services. When this occurs the telephone companies will find their monopoly reduced to the public voice exchange function. The C.R.T.C. has anticipated this. Accordingly, the Commission has permitted systems interconnection with the public exchanges of the telephone companies for the provision of non-monopoly services. The C.R.T.C. has also permitted terminal device attachment to the public voice and data systems of all carriers. This has resulted in the emergence of specialized services-based systems which are capable of publicly providing services as specialized (data) carriers, and enhanced (data or voice) services providers. Liberalization is complete to the extent that only certain voice services, particularly revenue-intensive M.T.S. and W.A.T.S services, may not be resold or shared. One major reason behind such liberalization, is the policy desiring growth and "trade" in such services.

The agenda of the C.R.T.C. has clearly been aimed at domestic liberalization and competition in the provision of services and utilization of terminal equipment for both resellers/sharers and end-users, to ensure the efficient use of Canadian network facilities, and the flexible provision and utilization of specialized transport and enhanced services, and growth in these markets. A new class of services-based carriers has been permitted to enter the field by liberalization in resale and sharing. However, the C.R.T.C. has faced two structural problems in realizing its agenda on a national basis. First, a lack of historically confirmed national jurisdiction has rendered a conspicuous lack of harmonization in the national scope and level of competition. Second, there has only recently

(July 1987) been an indication of federal executive policy on the international "trade" questions of foreign ownership of common carrier facilities, and the limits to foreign entry and competition generally in domestic services based-services.

Ostensibly these problems are being addressed by the federal government insofar as a political initiative has been undertaken towards federal-provincial harmonization underpinned by the A.G.T. v C.N.C.P. precedent (favouring exclusive federal constitutional jurisdiction respecting even local traffic carried over interprovincial networks), by the Committee of Ministers of Communication, and by the July 1987 "Framework Policy" of the federal Minister of Communications.

What is still in question, however, is the relationship between the C.R.T.C. frame of reference for setting a national, regulatory-oriented telecommunications agenda (replete with public input) on the one hand and the respective frames of reference for policy and rule-making to be shared by the federal executive, the various provincial executives, and the F.T.A. review regime, on the other hand.

Also in question is the extent to which the federal executive can succeed in harmonizing provincial policies with its July 1987 policy favoring open foreign entry into a competitive services-based transport services environment, or even with F.T.A. obligations to liberalize the provision of enhanced network services.

These questions are discussed below, with particular reference to the recent position taken by the federal Cabinet in the Call-Net case, which appears to disrupt the C.R.T.C. agenda, and which holds in favour of an accelerated agenda towards competition in the provision of services-based-services. The associated issue is whether such policies are expected to favour residential users, and small and medium-sized Canadian business, or merely large domestic and foreign corporate "user" interests. A major related issue is how long it will take for liberalization in enhanced services, and services-based transport services to lead to the collapse of monopoly voice services.

Footnotes: Part III

1. At Common Law, any private entity may, in the absence of specific barriers to entry, carry on the activities of a common carrier: see generally Halsbury's Laws of England, 4th ed., Vol. 5, page 133, para-301, "Carriers Generally".

2. Reference the July, 1987 "Policy Framework For Telecommunications in Canada", released by then Minister of Communications, the Hon. Flora MacDonald. The "20% rule" is laid out therein. The policy framework is discussed in Chapter 4 of this, Part III of this thesis. Note that the 20% rule does not apply retroactively or retrospectively, so that existing foreign controlled carriers, such as B.C. Telephone may so remain.

3. Reference the A.G.T. v. C.R.T.C case, discussed in Part II, Chapter II of this thesis, above.

4. Note the discussion in Chapter two of this, Part III, respecting systems interconnection with the P.S.T.N.

5. For a list of "data network services" provided by carriers in Canada, reference a Canadian Department of Communications publication entitled Canadian Telecommunications: An Overview of the Canadian Telecommunications Carriage Industry, 1988, at p.116.

6. For a discussion of the distinction between "basic" and "enhanced" services under the F.C.C. regime, reference Goldstein, op. cit., (Found at F.N. 11, Part I) at p. 449.

7. C.R.T.C. Telecom Decision 84-18, "Enhanced Services"

8. For more information respecting the dynamics of cross-subsidization, reference Janisch, Winners and Losers, op. cit. at F.N. 9, Part I, above, at page 31. For the dominant common carrier view (ie: of the telephone companies) in Canada of cross-subsidization (as opposed to cost-based-pricing), reference "Bell Wants Long-Distance Rates Cut, Local Raised," The Gazette, Wednesday, February 4, 1987.

9. Reference the Call-Net case, discussed in Part IV, Chapter 4, below.

10. In this context, "foreign" means "external" network system, as opposed to non-Canadian network system.

11. At. p. 70.

12. "Smart buildings" are in essence, buildings which have a built-in Private Branch Exchange facility.

13. Reference Part IV, Chapter 4 below.

14. I.B.I.D.

15. The said policy proposes to open to foreign entry, services-based transport supply markets, and to permit the operation of such markets in an unregulated environment.

16. Reference F.N. 15, above.

17. For an extensive discussion of the U.S. regulatory approach to the distinction between a "basic service" and an "enhanced service", reference Goldstein, op. cit. at F.N. 6, above. In the Second Computer Inquiry (Final Decision), 45 Federal Register 31319; Docket 20828; F.C.C. 80-189; 77 F.C.C. 2d 348 (1980), at p. 31334, paragraph 97, the term "enhanced services" is defined as:

"services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information."

In contrast, "basic transmission service" is described as follows: (at paragraph 95 of the same citation);

"a basic transmission service should be limited to the offering of transmission capacity between two or more points suitable for a user's transmission needs and subject only to the technical parameters of fidelity or distortion criteria, or other conditioning. Use internal to the carrier's facility of compending techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. that facilitate economical, reliable movement of information does not alter the nature of the basic service. In the provision of a basic transmission service, memory or storage within the network is used only to facilitate the transmission of the

information from the origination to its destination, and the carrier's basic transmission network is not used as an information storage system. Thus, in a basic service, once information is given to the communication facility, its progress towards the destination is subject to only those delays caused by congestion within the network or transmission priorities given by the originator."

18. TAPAC is the "Terminal Attachment Program Advisory Committee", a private organization which advises the Department of Communications in establishing technical standards. Reference Part V, Chapter 2 of this thesis for more information respecting TAPAC, technical standards and the F.T.A.

19. Found in Teaching Materials prepared for use at the Faculty of Law, University of Toronto, by Professor H.N. Janisch, entitled Communications Law II, Vol. 1, p.1; this reference, at p. 47.

20. I.B.I.D. at p. 48

21. Reference is made here to the "Committee of Ministers of Communications" from the federal and provincial/territorial governments, as established in February, 1986, and discussed on the first page of Chapter 4, of this Part III. The "Task Force" referred to here, is the "Federal-Provincial-Territorial Task Force on Telecommunications" established by the said "Committee of Ministers of Communications," and also discussed at page one of chapter four of this Part III.

22. Reference is made here to ambiguity in the F.T.A. in regards to the question whether "national treatment" means "provincial treatment" where the two are at variance, and the province in question enjoys jurisdiction over the matter in question. Refer to the discussion on this in Part IV, chapter 4 of this thesis.

PART IV

F.T.A. PROVISIONS RELATING TO TRADE AND INVESTMENT IN TELECOMMUNICATIONS AND COMPUTER/INFORMATION SERVICES

PART IV

CHAPTER 1

A Note on Foreign Competition by way of Investment in and Utilization of Computer-Telecommunications Resources Within or Into Canada

In the previous part of this thesis, it was proposed that liberalized utilization and competition in provision of basic Canadian telecommunications services and facilities has been driven by increased demand for specialized business services (ie: data transport services, enhanced voice and data services and stand-alone computer/information services), the accelerated development of microchip technology in telecommunications applications, and the government policy desire for growth in the market utilization of such services and technologies.

In particular, it is large scale users, of multinational proportion, which have been the first to take advantage of such liberalization, and which will continue to lead in development of the specialized data transport, enhanced network and remote computer/information services. These large scale users will be able to utilize basic data and voice transport services and enhanced network services for simultaneous provision of in-house service networks, private inter-corporate networks, and retail service - providing networks.[1]

With the advent of increased liberalization, middle-sized and smaller users will increasingly lease bulk-rated transport facilities or services and resell the same, or share the same with other users, and efficiently create specialized transport or enhanced business systems and services.

Such systems and services might be utilized and provided from within Canada, or into Canada (having originated outside of Canada).

Part III of this thesis has illustrated a brief history of Canadian liberalization in the utilization and provision of the basic "information highways" (ie: telecommunications transport facilities and services). Such liberalization has involved "measures" taken by regulators, legislators and the federal Cabinet.

In this Part, the focus is on participation by foreign entities in the utilization and provision of the Canadian "information highways" (ie: telecommunications network facilities and network services) as an adjunct to the utilization and provision of those enhanced network services and computer/information services permitted by the F.T.A. Major issues include the effects of the F.T.A. on U.S. investment in the Canadian telecommunications sector, the obligatory scope of U.S. competition in Canadian services-based telecom network services markets required by the F.T.A., the effects of federal executive and bilateral trade authority intervention on regulation and competition, and the federal responsibility to police provincial telecommunications activities, under the F.T.A.

In particular, it is the provisions of the Canada-U.S. Free Trade Agreement relating to foreign direct investment ("F.D.I.") and trade in services ("Services") which create the most important obligations on the State Parties. These obligations, studied together with Canadian "Measures" towards liberalization in utilization and provision of the "information highways" reveal a trend towards the harmonization of Canadian competition in services-based telecommunications services with the fully open U.S. model. Three comments follow this observation: first, the F.T.A. ostensibly "covers" only enhanced and computer/information services, but it has unavoidable impact on the utilization and provision of services-based basic transport services (and possibly on the facilities-based Telecom Canada Monopoly over M.T.S. and W.A.T.S. interexchange services) because it guarantees foreign rights of entry into transport services markets, for the provision of enhanced network and computer/information services and possibly for the resale and sharing of basic transport services; secondly, the F.T.A. institutionalizes a bilateral decision-making procedure respecting trade disputes, which complicates existing conflicts between the C.R.T.C. and Cabinet, and also between federal and provincial authorities in the resolution of competition disputes and policies; thirdly, the F.T.A. "covers" decisions made by authorities which adjudicate definitions of basic transport services versus enhanced services. The result is that the bilateral trade dispute resolution procedure may ultimately dictate which activities may be subject to the jurisdiction of the C.R.T.C., and which activities are unregulated enhanced services.

Thus, the F.T.A. process could feasibly have the effect of usurping the public domestic process in telecommunications regulation, and of determining which services shall be regulated by telecommunications authorities in Canada.

Moreover, in the event that the F.T.A. process (or the domestic telecommunications regulation and review process) determines that a particular service is not a transport service, rather it is an enhanced network service, the activity might then be regulated domestically by sectoral regulators in a different field (eg: banking; anti-combines regulation; consumer protection regulation). These latter authorities, and the effects of the F.T.A. thereon are considered in Part V, below. In this, Part IV, are discussed the following major questions:

A) What level of competitive foreign entry in telecommunications transport markets is guaranteed by the F.T.A. for the resale/sharing of transport services and for the provision of enhanced/computer services;
B) Which authority determines the jurisdictional question whether a particular service is a basic transport service or an enhanced service?
C) What constitutes foreign "investment" in the telecommunications/enhanced services sectors, and how does the F.T.A. affect existing Canadian "Measures" which screen or forbid such foreign investment? and;
D) What is the federal obligation under the F.T.A. to govern provincial telecommunications policy?

Chapter 2

Relevant Provisions of the F.T.A.: Part Four and Related Provisions

a.) "Part Four" of the F.T.A.

Part Four of the F.T.A. is entitled "Services, Investment and Temporary Entry for Business Persons". The foreword to Part Four, provided by External Affairs Canada (Minister of Supply and Services Canada, 1988, The Canada-U.S. Free Trade Agreement, Copy 21/01/88) states in part, at p.194, in regards to Services:

"Chapter Fourteen provides for the first time, a set of disciplines covering a large number of service sectors.

The issue is also more than a matter of opening up service markets. It is no longer possible to talk about free trade in goods without talking about free trade in services because trade in services is increasingly mingled with the production, sale, distribution, and service of goods. Companies today rely on advanced communications systems to coordinate planning, production and distribution of products. Computer software designs new products ... In other words, services are both inputs for the production of manufactured goods (from engineering design to data processing) and necessary complements in organizing trade (from financing and insuring the transaction to providing installation and after-sales maintenance, especially critical for large capital goods.)"

Thus, opening up service markets is central to free trade in goods (in the eyes of External Affairs Canada), and according to the U.S.-S.P.A.C. report, opening up telecommunications (and most importantly enhanced) services markets is central to opening up service markets. By extension, F.D.I. in the telecommunications sector, and liberalization of regulation (ie: permitted competition) in access to, and utilization of transport/ enhanced network/computer/information services is central to free trade in goods and in all services markets.[2]

Liberalization in regulation and investment in telecommunication facilities, telecommunications-based services and enhanced services undertakings are affected most largely by F.T.A. Chapter Fourteen, (Services) and by Chapter Sixteen (Investment).

With respect to Chapter Fifteen (Temporary Entry of Business Persons), which is discussed in Part V of this thesis, it is the computer aspects of enhanced network services, and of remote computer services that are the matters most affected, by reason computer-related service is labour intensive pursuant to intensive software support, modification and development requirements. (Chapter Fifteen, because of its natural application to computers/information is discussed in the next Part of this thesis, along with other "informational" aspects of the F.T.A. relating to telecommunications-related services, and Transborder Data Flows.)

Relevant provisions in chapters Fourteen and Sixteen of the F.T.A. are reproduced directly below. Note that there are provisions in the Services chapter which relate to investment. In Chapter three of this Part of the thesis, follows a discussion of the effects of these F.T.A. Chapters Fourteen and Sixteen on relevant Canadian "measures", and markets.

b) Chapter Fourteen: Services; Article 201: "Measures"; Annex 1404C.: Computer Services and Telecommunications-Network-Based Enhanced Services.

Chapter Fourteen of the F.T.A. is reproduced in its entirety, as follows:

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Chapter Fourteen

Services

Article 1401: Scope and Coverage

1. This Chapter shall apply to any measure of a Party related to the provision of a covered service by or on behalf of a person of the other Party within or into the territory of the Party.

2. In this Chapter, provision of a covered service includes:

a) the production, distribution, sale, marketing and delivery of a covered service and the purchase or use thereof;

b) access to, and use of domestic distribution systems;

c) the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering, or facilitating a covered service; and

d) subject to Chapter Sixteen (Investment), any investment for the provision of a covered service and any activity associated with the provision of a covered service.

Article 1402: Rights and Obligations

1. Subject to paragraph 3, each Party shall accord to persons of the other Party treatment no less favourable than that accorded in like circumstances to its persons with respect to the measures covered by this Chapter.

2. The treatment accorded by a Party under paragraph 1 shall mean, with respect to a province or a state, treatment no less favourable than the most favourable treatment accorded by such province or state in like circumstances to persons of the Party of which it forms a part.

3. Notwithstanding paragraphs 1 and 2, the treatment a Party accords to persons of the other Party may be different from the treatment the Party accords its persons provided that:

a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;

b) such different treatment is equivalent in effect to the treatment accorded by the Party to its persons for such reasons; and

c) prior notification of the proposed treatment has been given in accordance with Article 1803.

4. The Party proposing or according different treatment under paragraph 3 shall have the burden of establishing that such treatment is consistent with that paragraph.

5. Paragraphs 1, 2, and 3 of this Article and Article 1403 shall not apply to:

a) a non-conforming provision of any existing measure;

b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or

c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of paragraphs 1, 2 or 3 or of Article 1403.

6. The Party asserting that paragraph 5 applies shall have the burden of establishing the validity of such assertion.

7. Each Party shall apply the provisions of this Chapter with respect to an enterprise owned or controlled by a person of the other Party notwithstanding the incorporation or other legal constitution of such enterprise within the Party's territory.

8. Notwithstanding that such measures may be consistent with Paragraphs 1, 2 and 3 of this Article and Article 1403, neither Party shall introduce any measure, including a measure requiring the establishment or commercial presence by a person of the other Party in its territory as a condition for the provision of a covered service that constitutes a means of arbitrary or unjustifiable discrimination between persons of the Parties or a disguised restriction on bilateral trade in covered services.

9. No provision of this Chapter shall be construed as imposing obligations or conferring rights upon either Party with respect to government procurement or subsidies.

Article 1403: Licensing and Certification

1. The Parties recognize that measures governing the licensing and certification of nationals providing covered services should relate principally to competence or the ability to provide such covered services.

2. Each Party shall ensure that such measures shall not have the purpose or effect of discriminatorily impairing or restraining the access of nationals of the other Party to such licensing or certification.

3. The Parties shall encourage the mutual recognition of licensing and certification requirements for the provision of covered services by nationals of the other Party.

Article 1404: Sectoral Annexes

The provisions of this Chapter shall apply to the Sectoral Annexes set out in Annex 1404, except as specifically provided in the Annexes.

Article 1405: Future Implementation

1. The Parties shall endeavour to extend the obligations of this Chapter by negotiating and, subject to their respective legal procedures, implementing:

a) the modification or elimination of existing measures inconsistent with the provisions of paragraphs 1, 2 or 3 of Article 1402 and Article 1403; and

b) further Sectoral Annexes.

2. The Parties shall periodically review and consult on the provisions of this Chapter for the purpose of including additional services and for identifying further opportunities for increasing access to each other's services markets.

Article 1406: Denial of Benefits

1. Subject to prior notification and consultation in accordance with Articles 1803 and 1804, a Party may deny the benefits of this Chapter to persons of the other Party providing a covered service if the Party establishes that the covered service is indirectly provided by a person of a third country.

2. The Party denying benefits pursuant to paragraph 1 shall have the burden of establishing that such action is in accordance with that paragraph.

Article 1407: Taxation

Subject to Article 2011, this Chapter shall not apply to any new taxation measure, provided that such taxation measure does not constitute a means of arbitrary or unjustifiable discrimination between persons of the Parties or a disguised restriction on trade in covered services between the Parties.

Article 1408: Definitions

For purposes of this Chapter

activity associated with the provision of a covered service includes the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, or other facilities for the conduct of business; the acquisition, use, protection and disposition of property of all kinds; and the borrowing of funds;

covered service means a service listed in the Schedule to Annex 1408 and described for purposes of reference in that Annex;

investment has the same meaning as in Article 1611; and

provision of a covered service into the territory of a Party includes the cross-border provision of that covered service.

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"Measure" is defined in Article 201 of the F.T.A. as follows:

> **"measure** includes any law, regulation, procedure, requirement or practice;" (emphasis added)

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It should be noted that "practice" hereunder might include a practice carried out by a telephone company or other common carrier pursuant to its filed tariffs, and most certainly would include a decision, public notice or tariff approval of the C.R.T.C.[3] A "measure" may be a decision made in respect of the application of a pre-1989 regulatory rule to a post-1989 fact situation. Thus, the pre-1989 rule might be changed by the post-1989 "measure", which will constitute a new precedent, which will be binding under the F.T.A.

As stated in Article 1401, Chapter Fourteen applies to "measures" related to the provision of "covered services" which "provision oriented" - activities are enumerated in Sub-Article 1401(2). These activities constitute the provision of "covered services" which are defined in Article 1408 as those services listed in Annex 1408. Annex 1408 includes the terms "Computer Services" and also "Telecommunications-network-based enhanced services." These are defined in Article 7 of Sectoral Annex 1404 C. (hereinafter "Annex C"). Annex C. is entitled Computer Services and Telecommunications-Network-Based Enhanced Services, and Chapter Fourteen "applies" thereto (by Article 1404).

Annex C. is reproduced below in its entirety.

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C. Computer Services and Telecommunications-Network-Based Enhanced Services

Article 1: Objective

The objective of this Sectoral Annex is to maintain and support the further development of an open and competitive market for the provision of enhanced services and computer services within or into the territories of the Parties. The provisions of this Sectoral Annex shall be construed in accordance with this objective.

(emphasis added)

Article 2: Scope and Coverage

This Sectoral Annex shall apply to any measure of a Party related to the provision of an enhanced or computer service by or on behalf of a person of the other Party within or into the territory of the Party.

Article 3: Rights and Obligations

1. This Chapter shall apply to all measures covered by this Sectoral Annex, which includes measures related to:

a) access to, and use of, basic telecommunications transport services, including, but not limited to, the lease of local and long-distance telephone service, full-period, flat-rate private line services, dedicated local and intercity voice channels, public data network services, and dedicated local and intercity digital and analog data services for the movement of information, including intracorporate communications;

b) the resale and shared use of such basic telecommunications transport services;

c) the purchase and lease of customer-premises equipment or terminal equipment and the attachment of such equipment to basic telecommunications transport networks;

d) regulatory definitions of, or classifications as between, basic telecommunications transport services and enhanced services or computer services;

e) subject to Chapter Six (Technical Standards), standards, certification, testing or approval procedures; and

f) the movement of information across the borders and access to data bases or related information stored, processed or otherwise held within the territory of a Party.

2. The establishment of a commercial presence as set out in this Chapter shall include the establishment of offices, appointment of agents, and installation of customer-premises equipment or terminal equipment for the purpose of distributing, marketing, delivering or facilitating the provision of an enhanced or computer service within or into the territory of a Party.

3. Investment as set out in this Chapter shall include the purchase, lease, construction, or operation of equipment necessary for the provision of an enhanced or computer service.

Article 4: Existing Access

1. Each Party shall maintain existing access, within and across the borders of both Parties, for the provision of enhanced services through the use of the basic telecommunications transport network of the Party and for the provision of computer services.

2. Nothing in paragraph 1 shall be construed to restrict or prevent a Party from introducing measures related to the provision of enhanced services and computer services provided that such measures are consistent with this Chapter.

Article 5: Monopolies

1 Where a Party maintains or designates a monopoly to provide basic telecommunications transport facilities or services, and the monopoly, directly or through an affiliate, competes in the provision of enhanced services, the Party shall ensure that the monopoly shall not engage in anticompetitive conduct in the enhanced services market, either directly or through its dealings with its affiliates, that adversely affects a person of the other Party. Such conduct may include cross-subsidization, predatory conduct, and the discriminatory provision of access to basic telecommunications transport facilities or services.

2. Each party shall maintain or introduce effective measures to prevent the anticompetitive conduct referred to in paragraph 1. These measures may include accounting requirements, structural separation, and disclosure.

Article 6: Exceptions

1. Nothing in this Agreement shall be construed:

a) to require a Party to authorize a person of the other Party

i) to establish, construct, acquire, lease or operate basic telecommunications transport facilities, or

ii) to offer basic telecommunications transport services within its territory;

b) to prevent a Party from maintaining, authorizing or designating monopolies for the provision of basic telecommunications transport facilities or services; or

to prevent a Party from maintaining or introducing measures requiring basic telecommunications transport service traffic to be carried on basic telecommunications transport networks within its territory, where such traffic

i) originates and terminates within its territory,

ii) originates within its territory and is destined for the territory of the other Party or a third country, or

iii) terminates in its territory, having originated in the territory of the other Party or a third country.

2. The inclusion of intracorporate communications in this Sectoral Annex shall not be construed to indicate whether or not such communications are traded internationally. Their inclusion is to indicate that they may serve to facilitate trade in goods and services.

Article 7: Definitions

For purposes of this Sectoral Annex:

basic telecommunications transport service means any service, as defined and classified by measures of the regulator having jurisdiction, that is limited to the offering of transmission capacity for the movement of information;

computer services means those services, whether or not conveyed over the basic telecommunications transport network, that involve generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information in a computerized form, including, but not limited to

computer programming,
prepackaged software,
computer integrated systems design,
computer processing and data preparation,
information retrieval services,
computer facilities management,
computer leasing and rental,
computer maintenance and repair, and
other computer-related services, including those integral to the provision of other covered services;

enhanced service means any service offering over the basic telecommunications transport network that is more than a basic telecommunications transport service as defined and classified by measures of the regulator having jurisdiction; and

monopoly means any entity, including any consortium, that, in any relevant market in the territory of a Party, is the sole provider of basic telecommunications transport facilities or services.

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c.) Chapter Sixteen: Investment (Relevant Provisions)

Relevant provisions contained in Chapter Sixteen of the F.T.A. which relate to F.D.I. in the Canadian telecommunications services sector are reproduced below.

Chapter Sixteen

Investment

Article 1601: Scope and Coverage

1. Subject to Paragraphs 2 and 3, this Chapter shall apply to any measure of a Party affecting investment within or into its territory by an investor of the other Party.

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3. The provisions of subparagraph 1(c) of Article 1602 shall not apply to any measure affecting investments related to the provision of services other than covered services.

Article 1602: National Treatment

1. Except as otherwise provided in this Chapter, each Party shall accord to investors of the other Party treatment no less favourable than that accorded in like circumstances to its investors with respect to its measures affecting:

a) the establishment of new business enterprises located in its territory;

b) the acquisition of business enterprises located in its territory;

c) the conduct and operation of business enterprises located in its territory; and

d) the sale of busines enterprises located in its territory.

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4. The treatment accorded by a Party under Paragraph 1 shall mean, with respect to a province or a state, treatment no less favourable than the most favourable treatment accorded by such province or state in like circumstances to investors of the Party of which it forms a part.

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8. Notwithstanding paragraph 1, the treatment a Party accords to investors of the other Party may be different from the treatment the Party accords its investors provided that:

a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;

b) such different treatment is equivalent in effect to the treatment accorded by the party to its investors for such reasons; and

c) prior notification of the proposed treatment has been given in accordance with Article 1803.

9. The Party proposing or according different treatment under paragraph 8 shall have the burden of establishing that such treatment is consistent with that paragraph.

Article 1603: Performance Requirements

1. Neither Party shall impose on an investor of the other Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a requirement to:

a) export a given level or percentage of goods or services;

b) substitute goods or services from the territory of such Party for imported goods or services;

c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or accord a preference to goods or services produced in such territory; or

d) achieve a given level or percentage of domestic content.

2. Neither Party shall impose on an investor of a third country, as a term or condition of permitting an investment in its territory, or in connection with the regulation of the conduct or operation of a business enterprise located in its territory, a commitment to meet any of the requirements described in Paragraph 1 where meeting such a requirement could have a significant impact on trade between the two Parties.

3. For purposes of Paragraphs 1 and 2 and Paragraph 2 of Article 1602, a Party "imposes" a requirement or commitment on an investor when it requires particular action of an investor or when, after the date of entry into force of this Agreement, it enforces any undertaking or commitment of the type described in Paragraphs 1 and 2 or in Paragraph 2 of Article 1602 given to that Party after that date.

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Article 1607: Existing Legislation

1. The provisions of Articles 1602, 1603, 1604, 1605 and 1606 of this Chapter shall not apply to:

a) a non-conforming provision of any existing measure;

b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or

c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of Articles 1602, 1603, 1604, 1605 or 1606.

2. The Party asserting that Paragraph 1 applies shall have the burden of establishing the validity of such assertion.

3. The Investment Canada Act, its regulation and guidelines shall be amended as provided for in Annex 1607.3

4. In the event that Canada requires the divestiture of a business enterprise located in Canada in a cultural industry pursuant to its review of an indirect acquisition of such business enterprise by an investor of the United States of America, Canada shall offer to purchase the business enterprise from the investor of the United States of America at fair open market value, as determined by an independent, impartial assessment.

Article 1608: Disputes

1. A decision by Canada following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of this Agreement (However, see Para. 4, below).

2. Each Party and investors of each Party retain their respective rights and obligations under customary international law with respect to portfolio and direct investment not covered under this Chapter or to which the provisions of this Chapter do not apply.

3. Nothing in this Chapter shall affect the rights and obligations of either Party under the General Agreement on Tariffs and Trade or under any other international agreement to which both are party.

4. In view of the special nature of investment disputes and the expertise required to resolve them, where the procedures of Chapter Eighteen (Institutional Provisions) are invoked, the Parties and the Commission shall give the fullest consideration, in any particular case, to settling any dispute regarding the interpretation or application of this Chapter by arbitration or panel procedures pursuant to Articles 1806 or 1807, and shall make every attempt to ensure that the panelists are individuals experienced and competent in the field of international investment. When deciding a dispute pursuant to Articles 1806 or 1807, the panel shall take into consideration how such disputes before it are normally dealt with by internationally recognized rules for commercial arbitration.

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Article 1610: International Agreements

The Parties shall endeavour, in the Uruguary Round and in other international forums, to improve multilateral arrangements and agreements with respect to investment.

Article 1611: Definitions

For purposes of this Chapter, not including Annex 1607.3:

acquisition with respect to:

a) a business enterprise carried on by an entity, means an acquisition, as a result of one or more transactions, of the ultimate direct or indirect control of the entity through the acquisition of the ownership of voting interests; or

b) any business enterprise, means an acquisition, as a result of one or more transactions, of the ownership of all or substantially all of the assets of the business enterprise used in carrying on the business.

business enterprise means a business that has, or in the case of an establishment thereof will have:

a) a place of business;

b) an individual or individuals employed or self-employed in connection with the business; and

c) assets used in carrying on the business.

NOTE: A part of a business enterprise that is capable of being carried on as a separate business enterprise is itself a business enterprise.

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establishment means a start-up of a new business enterprise and the activities related thereto.

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investment means:

a) the establishment of a new business enterprise, or

b) the acquisition of a business enterprise;
and includes:

c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and

d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor.

investor of a third country means an investor other than an investor of a Party, that makes or has made an investment.

measure shall have the same meaning as in Article 201, except that it shall also include any published policy.

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CHAPTER 3

U.S. "Investment" in the Canadian Telecommunications and Computer-Communications Sectors

Article 1602 of the F.T.A. requires that Canada accord to investors of the U.S.A. national treatment (ie: no less favourable than that accorded in like circumstances to its investors) with respect to its measures affecting:

> "a) the establishment of new business enterprises located in its territory;
>
> b) the acquisition of business enterprises located in its territory;
>
> c) the conduct and operation of business enterprises located in its territory; and
>
> d) the sale of business enterprises located in its territory."

On the face of this provision, it would appear that Canada is bound by this F.T.A. obligation to permit foreign takeovers of a Canadian common carrier or of other facilities-based telecommunications carriers, or the new establishment of such carriers, without safeguards to support the policies of Canadian control over the domestic information highways or of the efficient use of the public network systems. (Such policies are stated in the July 22, 1987 federal "Framework Policy for telecommunications".)

Nonetheless, by Paragraph 1607(1)(a) of the F.T.A., Article 1602 shall not apply to:

> "a) a non-conforming provision of any existing measure."

Such a measure does exist in the July 22, 1987 federal "Framework Policy" in which a twenty percent limitation on foreign control over a domestically operating facilities-based (ie: "Type 2") common carrier is imposed.

It is reasonable to conclude that the said "policy" is an F.T.A. "measure" even though it has not been passed as Canadian law, insofar as "measure" is defined in Article 1611, in part, as including "any published policy".

Thus the F.T.A. treatment of U.S. Investment in facilities-based telecommunications systems limits U.S. control (and foreign control generally) to 20% because of the "Framework Policy." The F.T.A. treatment of U.S. investment in services-based telecommunications systems (ie: those providing resale of capacity in leased lines and of capacity in various (data and voice transport) services with or without value-added features) permits the application of existing "Investment Canada" screening.[4]

The existing Investment Canada regime is permitted to apply in spite of the Article 1602 National Treatment principal by reason of Sub-Article 1607(1)(a) which guarantees that this principle "shall not apply to: a non-conforming provision of any existing measure".

However, the rules governing the "Investment Canada" regime are liberalized pursuant to the terms of the F.T.A. in favour of increased foreign investment.

Article 1607(3) provides that Canada has agreed to phase in higher threshold levels for direct acquisitions. Article 1607 provides that the review threshold will be raised in four steps to $150 million by 1992. For indirect acquisitions, (which involve the transfer of control of one foreign-controlled firm to another), the screening process will be totally phased out over the same period.

It is significant to note that these investment provisions do not apply only to businesses which provide "covered services" as defined in F.T.A. Chapter 14 (ie: "enhanced services" and "computer services"). Rather they apply also to "basic telecommunications transport services" - providing businesses which are services-based.

Thus a services-based transport service-providing business which is U.S.-controlled may be subject to screening (where appropriate) under the Investment Canada regime, whether or not a services-based transport service is a "covered service".

This is not, however, a guarantee that a U.S. entity is entitled to "national treatment" in the Canadian regulation of such a business, once established in Canda.

By Sub-Article 1601(3), a foreign-controlled business which provides non-covered services does not enjoy national treatment in regards to "the conduct and operation of business enterprises located in its (the host States') territory;".

Thus, although a non-covered services-based, transport services-providing business may be foreign controlled, it may, by the F.T.A., be regulated differently from a domestically controlled services-based transport services-providing business. This is, however, not a scenario envisaged by the federal Minister of Communications, as revealed in the July 22, 1987 "Framework Policy".

The "Framework Policy", although as of yet unlegislated, proposes to permit the provision of services-based telecommunications services (ie: "Type 2" carrier services) by domestic and foreign entities alike, on an unregulated basis.

Moreover, as discussed below in regards to "Services", it is feasible that the services-based provision of basic transport services does actually constitute "covered services" for the purpose of enjoying "national treatment" in the regulation thereof.

Thus, the net effect of the provisions in Chapter 16 (Investment) in relation to foreign investment in facilities-based services is that foreign control is capped at 20 percent. The net effect of those provisions in regards to foreign investment in services-based services (basic transport services or enhanced services) is that the Investment Canada regime continues to apply, except that the regime will be changed so that higher investment threshold levels will be phased in progressively over the next three years.

It is necessary at this point to consider from a practical perspective those "investment" activities which might bypass a screening review under the Investment Canada regime, and those which will not.

A crucial distinction must be made between "Investment" and "Commercial Presence" in this regard. The first ground on which the provision of an enhanced/computer/information service in Canada would not be subject to review is that it is not an "investment".

As indicated in F.T.A. Paragraph 1401(2)(c),

> "the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering, or facilitating a covered service" ....

is a matter in relation to which Canadian "measures" are subject to the Article 1402 National Treatment principle. While the Investment Canada regime is a pre-existing, non-conforming "measure" which will stand, there are no pre-existing non-conforming measures in regards to "commercial presence". By Article 3(2) of Annex 1404 C.,

> "(2) The establishment of a commercial presence as set out in this Chapter shall include the establishment of offices, appointment of agents, and installation of customer-premises equipment or terminal equipment for the purpose of distributing, marketing, delivering or facilitating the provision of an enhanced or computer service within or into the territory of a party." (emphasis added)

In contradistinction, the definition of Investment, found in Article 1611 is stated as follows:

> "investment means:
>
> a) the establishment of a new business enterprise, or
> b) the acquisition of a business enterprise;
> and includes
> c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and
> d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor."

By the same Article 1611 the definition of "Investment" is augmented as follows:

> "establishment means a start-up of a new business enterprise and the activities related thereto."
>
> "business enterprise means a business that has, or in the case of an establishment thereof will have:
>
> a) a place of business;
> b) an individual or individuals employed or self-employed in connection with the business; and
> c) assets used in carrying on the business

These provisions are augmented by Sub-Article 3(3) of Annex 1404 C. which states:

> "Investment as set out in this Chapter ("Services") shall include the purchase, lease construction or operating of equipment necessary for the provision of an enhanced or computer service".

It is impossible to distinguish conclusively between a "commercial presence" and "investment" in the absence of precedent under the F.T.A. dispute resolution procedure set out in Article 1608, respecting "Investments".

However, it is clear that a "commercial presence" in respect of a telecommunications-related service includes a situation wherein the service is a "disembodied" (computer or enhanced) service which originates outside of Canada and is exported into Canada via transnational telecommunications transport services, and which is marketed and administered in Canada only by means of the mere importation of signal into Canada.

The major apparent distinction between a "commercial presence" activity and an "investment" activity is the acquisition of "assets" for the operation of an "investment" activity.

The "leasing" of Canadian-provided private lines by Sub-Article 3(3) of Annex 1404 C. appears to constitute evidence of an "investment", as does the mere acquisition and use in Canada of a network non-addressing terminal computer for the provision of customer on-line "computer services".

Thus, an investment in business enterprise which provides an "enhanced service" or a mere stand alone "computer service" in respect of which leased lines or merely computer equipment is located in Canada, may well constitute a reviewable investment.

Moreover, the provision of enhanced services from outside the territory of Canada "into Canada", in respect of which "host computer terminals" were leased in Canada might constitute a "reviewable investment" as opposed to a mere "commercial presence". It is difficult to say whether a licence fee paid for access to an existing enhanced network would constitute an "investment".

However, from a practical point of view, it is necessary to keep in mind the exclusion from review of such "investments" below certain dollar figure threshold level amounts, (to the point of $150 million by 1992).

This constitutes the second ground on which provision of a service into Canada would not be subject to review.

On the basis of these "threshold level amounts", relatively few "stand-alone" computer services would be sufficiently capital-intensive to be categorized as reviewable "investments" whereas a larger enhanced services network "investment" (including collectively, a private line leasing investment, a customer-provided switching equipment investment, a central mainframe computer investment and multiple "host terminal computer" investments) would be a reviewable investment.

In summary, it is conceivable that if the regulatory will is present, major foreign investments in services-based enhanced services networks could be screened under the Investment Canada regime to permit a fair and desirable balance of "investment" as between foreign competitors and domestic competitors in various sectors in which services-based transport and enhanced network services are provided.

As for the foreign-originated provision of services (ie: enhanced or computer services which originate in the U.S., and are delivered by a telecommunications service across the border) which constitute mere "commercial presence" in Canada, such services would be controlled by Canadian telecommunications regulation or regulation in the sector relating to the nature of the service provided (eg: banking; insurance).[5]

It should also be noted, in regards to "commercial presence", that sub-Article 4(1) of Sectoral Annex 1404 C. imposes an obligation on the Parties to "maintain existing access within and across the borders of both parties for the provision of enhanced services through the use of the basic telecommunications transport network of the Party and for the provision of computer services."

Also, in the vein of foreign investment is the provision in Sub-Paragraph 6(1)(a)(i) of Annex C., which states that nothing in the F.T.A. shall be construed to require a Party to establish, construct, acquire, lease or operate basic telecommunications transport facilities (ie: in the provision of an enhanced service).

This provision, together with the "commercial presence" provision, above, constitutes an effective "right to not invest" in favour of U.S. entities desiring to provide enhanced or computer/information services into Canada. This has also been termed the "right to plug in", in trade negotiation circles.

CHAPTER 4

Canadian Regulation of U.S. Commercial Presence in the Canadian Telecommunications and Computer-Communications Sectors: The Effects of F.T.A. Chapter Fourteen (Services)

This Chapter focuses on F.T.A. guarantees provided in favour of U.S. entities with respect to Canadian "measures" governing access to telecommunications facilities and facilities-based services, and the subsequent utilization and/or provision by U.S. entities of services-based transport, enhanced, and computer/information services within or into Canada.

Article 1402 provides that Canada and the U.S. shall each accord national treatment to persons of the other Party. The standard for national treatment owed to a U.S. entity by Canadian policy makers is "treatment no less favourable than that accorded in like circumstances to its persons with respect to the measures covered by this Chapter."[6]

Thus, on the face of the F.T.A., Canadian regulation of the demand side and supply side of telecommunications transport and enhanced network services remains a "national" policy framework, not subject to harmonization requirements with levels of regulation or market competition provided by the U.S. model. However, it is conceivable that the F.T.A. will exacerbate existing market and political pressures towards harmonization of Canada's services-based telecommunications markets (including transport services and enhanced services). Moreover, such harmonization would result in competition on the part of services-based transport services with enduring monopoly-provided, facilities-based voice services in Canada.

Ostensibly, by Annex 1408, only "computer services" and "telecommunications-network-based enhanced services" are "covered" by Chapter Fourteen.

However, there are a number of arguments on which to base the proposition that the F.T.A. extends to "cover" also those services-based

basic transport services which are permitted to be provided competitively in Canada, with the effect that the F.T.A. binds Canada to permit foreign entities to compete in these markets. (The magnitude of the implications therein are revealed when it is recalled that competition in the services-based provision of these services creates competitive pressures as against (common carrier) facilities-based providers.)

The first argument is based on the proposition that the F.T.A. Chapter Fourteen provisions are so poorly drafted that services-based telecommunications transport services, as stand-alone transport services (as opposed to, "services utilized in the provision of an enhanced service") constitute "covered services."

The basis of this interpretation, which would expand the scope of national treatment-applicable services from enhanced and computer services to resale and sharing of facilities-based basic transport services is dependent on the following argument: that "covered services" include basic transport services by reason "covered services" include, (by Paragraph 1401(2)(b)) "access to, and use of, domestic distribution systems". (emphasis added)

Thus, Sub-Article 1401(1), would logically apply the National Treatment principle to the "use of domestic distribution systems", regardless of whether the "use" thereof was for provision of an enhanced service, a computer service or for resale or sharing of the basic transport capacity.

In support of this interpretation is the fact that paragraph 1401(2)(b) does not read:

> "access to, and use of, domestic distribution systems for the provision of a covered service".

Rather the wording denotes that the "use of" a "domestic distribution system" is, on its own, a "covered service". (Nowhere in the F.T.A. is a "domestic distribution system" defined, nor is the phrase "use of" defined.)

Moreover, the above interpretation is supported by Sub-Article 3(1) of Annex 1404 C. which states:

3 (1) This Chapter shall apply (ie: provide for National Treatment in regards) to all measures covered by this Sectoral Annex, which includes measures related to:

a) access to, and use of basic telecommunications transport services, including but not limited to the lease of local and long-distance telephone service, full-period, flat-rate private-line services, dedicated local and intercity voice channels, public data network services, and dedicated local and intercity digital and analog data services for the movement of information, including intracorporate communications;

b) the resale and shared use of such basic telecommunications transport services; (emphasis added)

o o o

Again, Paragraph 3(1)(a) does not state

> "use of ... for the provision of enhanced or computer services",

nor does Paragraph 3(1)(b) state:

> "the resale and shared use of such basic telecommunications transport services . . . for the provision of enhanced or telecommunications services,"

In fact neither Paragraph even goes so far as to state that "use of" and "resale and shared use of" such basic transport services should be afforded national treatment only in respect of "covered services".

On this basis it is submitted that the liberal interpretation of Paragraph 1401(2)(d) to include basic telecommunications transport services within the scope of "covered services may be sustainable, and is consistent with Annex 1404 C.

In contrast to the above interpretation is Sub-Article 6(1) of Annex C. which states in part:

"(1) Nothing in this Agreement shall be construed:

a) to require a Party to authorize a person of the other Party

o o o

(ii) to offer basic telecommunications transport services within its territory;"

This provision, however only excuses Canadian authorities from being obliged to authorize the offering by a U.S. entity of "basic telecommunications transport services", which are by definition (Article 7 of Annex 1404 C.) as follows:

"any service, as defined and classified by measures of the regulator having jurisdiction that is limited to the offering of transmission capacity for the movement of information".

As indicated in Part III of this thesis, only the monopoly-based services, (ie: most M.T.S. and W.A.T.S. services) are so limited. All other transport services under federal regulation may also be offered for the provision of enhanced services, (ie: offered for the manipulation of content) in addition to being offered for the limited purpose of "capacity for the (mere) movement of information". Arguably then, by definition, only M.T.S. and W.A.T.S services may be prohibited from being provided in Canada by U.S. sharers/resellers.

If the above argument is fallacious, and generally the services-based provision of transport services is not a "covered service" then it is still feasible that a particular type of data transport service, or voice transport service might be subject to the national treatment principle, for the purpose of permitting a U.S. entity to provide services-based transport services. This would be on the basis that it is actually a "covered" enhanced service, as held on a review of a post-January 1, 1989 "measure" (ie: decision) made by an authority with jurisdiction, and relating to categorization of such a particular service. Such review might be by binding arbitration by a panel appointed by the Canada-U.S. Trade Commission, or it might be a court review, or federal Cabinet review.

The most notable type of transport service to be found an enhanced service, on review, would be a monopoly-based transport service.

Recategorization of such a service would not merely mean that Canada would be bound to observe national treatment in respect thereof, but such a recategorization might have profound effects on the Canadian telecommunications transport system as a whole, to the extent that services based competition with the facilities-based monopoly services would follow from the recategorization.

It is sufficient to state that in the U.S., there is virtual free market competition in (ie: resale of capacity in) services-based provision of all basic telecommunications transport services (including interexchange voice transport and data transport services).[7]
Such services-based competition is possible in the U.S., because there is free market provision of all facilities-based services such as the M.T.S. and W.A.T.S. services which still constitute monopoly-based services in Canada.

A case has already arisen in Canada which illustrates how review of a C.R.T.C. "measure" might recategorize a monopoly-based transport service as an enhanced service, with the result that services-based competition might prematurely threaten facilities-based monopoly services. (ie: prior to across-the-board rate rebalancing).

The Call-Net case which involves the C.R.T.C., the federal Cabinet, the Supreme Court of Canada and potentially the U.S.-Canada Trade Commission centers on the issues A) what constitutes an enhanced versus basic monopoly M.T.S. service, and B) what consitutes mere sharing versus competitive resale of basic monopoly M.T.S. service. In the answers lay the future of competition in what are presently monopoly telecommunications services in Canada.

Call-Net Telecommunications, of Downsview, Ontario (hereinafter "Call-Net") began, in 1986, releasing capacity on private leased interexchange voice lines and bulk-rated voice services (W.A.T.S.), to provide a discount service similar to M.T.S., and distinguishable only by the additional facilities of Customer Dialed Account Recording (C.D.A.R.) service, and Selective Call Forwarding (S.C.F.) service.

This service has been of particular interest to small businesses which, as per the general rule, have not been permitted to share W.A.T.S. services, which cannot on their own, cost-efficiently utilize the full capacity of a bulk-rated W.A.T.S. service, and which do not enjoy lower "rebalanced" M.T.S. rates enjoyed by residential subscribers.

In Telecom Decision C.R.T.C. 87-5, 22 May 1987, (Bell Canada - Application to Deny the Resale by Call-Net Telecommunications Ltd. of Services and Facilities Provided by Bell Canada and C.N.C.P. Telecommunications) the Commission held that the C.D.A.R. and S.C.F. services provided by Call-Net are basic voice transport services (as defined by Enhanced Services, Telecom Decision C.R.T.C. 84-18). Thus the resale by Call-Net of the services provided by Bell and C.N.C.P. to provide these basic services was held to contravene Decision 84-18 which permitted resale only for the purpose of providing an enhanced service, and Bell and C.N.C.P. were ordered to disconnect the service provided to Call-Net within thirty days. (Effectively in the 87-5 hearing, Bell convinced the C.R.T.C. that the mass provision of Call-Net services would precipitate significant revenue erosion in the M.T.S. business market, which revenue erosion would threaten subsidies to residential local voice service, also to residential M.T.S. service, and also in effect to big business-affordable, bulk-rated interexchange W.A.T.S. services.)

In June 1987 the Governor-in Council, (ie: federal Cabinet), by Order-in-Council, granted Call-Net an extension of time in the use of the Bell and C.N.C.P. services, so that Call-Net might develop services that would be clearly distinguishable from basic voice services. This extension was further extended by Order-in-Council, (O.I.C. - P.C. 1988-265 dated 11 February 1988 (P.C. 1988-265) wherein the G.I.C. permitted Call-Net access to Bell and C.N.C.P. services until 19 August 1988.)

On August 16, 1988 the C.R.T.C. issued a clarification of its position with respect to the legal distinction between enhanced MTS/WATS services and basic MTS/WATS services (in Telecom Decision C.R.T.C. 88-11 entitled Resale To Provide Enhanced Services), pursuant to an application from Call-Net requesting a reassessment of the existing enhanced services regime.

Among other things, the C.R.T.C. decided in 88-11 (at page 23 of the decision) ....

> ..."the Commission finds it in the public interest to clarify the current rules by hereby requiring all resellers who provide interexchange voice services with access to the public switched telephone network to comply with the type of facilities-based restrictions established in Decision 87-2. (Entitled Tariff Revisions Related to Resale and Sharing.) This will make it absolutely clear that resale of interexchange private lines and W.A.T.S. to provide direct competition with MTS/WATS, whether or not the competing service is enhanced, is currently not permitted. In practical terms, it will also have the effect of eliminating the need for resellers to distinguish between enhanced and basic services since the same facilities-based restrictions will apply to both." (emphasis added)

By the terms of Decision 87-2, the Commission set out the conditions under which carrier services could be resold and shared.

The following extract from a related decision (Telecom Letter Decision C.R.T.C. 88-9) summarizes the significance of Decision 87-2, to the provision of M.T.S. and W.A.T.S. services.

The Commission states at p.6,

> "In Decision 87-2, the Commission set out the conditions under which carrier services could be resold and shared. The basis for these conditions derived from the Commission's findings in Interexchange Competition and Related Issues, Telecom Decision C.R.T.C. 85-19, 29 August 1985 (Decision 85-19). In that decision, the Commission concluded that allowing resale and sharing of carrier services is in the public interest provided that there would be no substantial erosion of MTS/WATS contribution revenues. Accordingly, the intent of the conditions imposed on resale and sharing was to ensure that the competitive entry of resellers and sharers does not result in the provision of services that are in the nature of MTS/WATS.
>
> With respect to resale, the Commission established conditions that are similar to those applied to C.N.C.P in C.N.C.P. Telecommunications, Interconnection with Bell Canada, Telecom Decision C.R.T.C. 79-11, 17 May 1979. Under these conditions, C.N.C.P. is allowed to interconnect with the P.S.T.N. of Bell and B.C. Tel to provide data services and private line voice services. Decision 87-2 allowed competitors to provide similar services on a resale basis.

> The Commission concluded that if private lines are resold on a dedicated basis, the resulting service is not in the nature of MTS/WATS. On the other hand, resale of private lines for joint use by a number of individual users was found to result in a service in the nature of MTS/WATS and, hence, was not allowed.
>
> With respect to sharing, the Commission concluded that the joint use of private lines by members of a sharing group would not constitute a service in the nature of MTS/WATS, and therefore, such sharing was allowed.
>
> The Commission, however, was aware that the differences in the restrictions for resellers and sharers with respect to the joint use of private line circuits to provide interconnect voice services could potentially tempt resellers to try to organize their customers into a sharing group so that the private lines could be jointly used. It was to preclude this type of activity that the Commission required such sharing groups to enter into an agreement pursuant to which each member of the sharing group is jointly and severally liable to the carrier in respect of all charges incurred for the lease of services and facilities by the sharing group."

The upshot of this exposition is that, although, by decision 88-11 the C.R.T.C. disallowed Call-Net the right to resell the Bell and C.N.C.P. - provided services to provide enhanced services, Call-Net reorganized its business activities to ostensibly constitute a sharing group as distinguished from a reseller-clientele arrangement.
Thus, in spite of Decision 88-11, Call-Net succeeded in avoiding the termination of Bell-provided interexchange private line and bulk-rated services-based (W.A.T.S.) services by acquiring a C.R.T.C. interim order dictating that Bell transfer these facilities and services to the Call-Net successor, CDAR/SHARENET sharing group. In Telecom Letter Decision C.R.T.C. 88-9 dated September 6, 1988, the C.R.T.C. held that the interim injunction should be rescinded.

The reasons behind Letter Decision 88-9 were first; that the proposed CDAR/SHARENET sharing group and particularly the member (and sole agent of the group) Call-Net continued to conduct illegal reselling of services in the nature of MTS/WATS by reason Call-Net was formerly a reseller of such services, and that "It was not the intent of Decision 87-2 that a telecommunications reseller, by assuming the role of a sharing group agent,

could do indirectly that which it could not do directly under Decision 87-2";[8] and secondly that the joint and several liability-sharing agreement requirement (as evidence of a sharing activity versus a resale activity), while adhered to in letter, was undercut in spirit by the existence of liability insurance coverage for the members of CDAR/SHARENET. This insurance undercut the application to CDAR/SHARENET of the principle in Decision 87-2 that the existence of joint and several liability on each sharing group member constitutes conclusive proof of the absence of a reselling activity.

On October 17, 1988, the G.I.C. (ie: federal Cabinet) ordered Bell to restore services to Call-Net, pending "final judicial determination" of the matter. Judicial relief for Call-Net was denied in the Federal Court of Canada, and a request for an appeal, launched in the Supreme Court of Canada by Call-Net was denied.[9] This appeal to the Supreme Court was made pursuant to a rejection by the Federal Court of Appeal of the attempt to overturn the Order of the C.R.T.C. that Bell disconnect Call-Net's lines.

In January of 1989, the Commission initiated new hearings into the issue of reselling and sharing, and is permitting Call-Net to maintain access to Bell and C.N.C.P.-provided services for another full year.

The Call-Net case illustrates the complexity and true importance of Canadian post-January 1, 1989 "measures" which will be subject to the national treatment principle. Such a measure, which categorizes services for the purpose of determining whether they are monopoly services or competition-oriented, unregulated enhanced services will determine the extent to which U.S. as well as domestic entities might compete on a services-based basis with facilities-based monopoly voice services.

The application of national treatment to all measures which categorize services is guaranteed by Paragraph 3(1)(d) of Annex 1404 C., which provides that "covered", are measures related to "regulatory definitions of, or classifications as between, basic telecommunications transport services and enhanced services or computer services".

With respect to more basic aspects of the Call-Net case, there is impact in terms of the procedures by which competition policy in

telecommunications activities is developed in Canada, and there is impact in terms of the substantive scope of competition in telecommunications activities in Canada. Both have international significance.

In substantive terms, the principal impact is that C.R.T.C. Decision 88-11 purports to diminish the scope of enhanced voice services which may be provided competitively, from the more expansive definition of "enhanced services" provided in Decision 84-18, and in so doing, preserves the existing monopoly-based interexchange voice services, and turns many enhanced interexchange voice services into monopoly services.

Of equal substantive importance is that the Supreme Court of Canada might have overturned C.R.T.C. decision 88-11, and effectively broken the only remaining telephone company monopoly field of service. Of similar substantive importance, but of a much more more profound procedural importance is that decision 88-11, even if upheld by a ruling of the Supreme Court of Canada, might have been overturned by binding arbitration pursuant to a referral by U.S. proponents to the Canada-U.S. Trade Commission. Thus, in effect, an international tribunal might hold that the Call-Net service, or an equivalent service provided by a U.S. entity within Canada is an unregulated enhanced service which is outside the jurisdiction of the C.R.T.C., when provided by a "non Railway Act company" (ie: by a services-based lessee of transport services). Jurisdiction of the Canada-U.S. Trade Commission over the C.R.T.C. decision or a subsequent court ruling would derive from the F.T.A. Chapter Eighteen provisions, which award jurisdiction over any "proposed or actual measure that it considers might materially affect the operation of this agreement". (Article 1803)[10]

As indicated above, a "measure" as defined in F.T.A. Article 201 "includes any law, regulation, procedure, requirement or practice."

By the same token, the Canada-U.S. Trade Commission might enjoy jurisdiction to submit to binding arbitration the question whether the definitionally limiting 88-11 decision contravenes the rule in F.T.A. Annex C., Sub-Article 4(1) that:

> "Each party shall maintain existing access ... for the provision of enhanced services through the use of the basic telecommunications transport network ..."

That is to say, the 84-18 ("Enhanced Services") C.R.T.C. Telecom Decision proposed open access and resale of basic transport services for the provision of all enhanced services,[11] whereas the 88-11 decision limits that access in regards to those enhanced services which it deems to be "in the nature of MTS/WATS services."[12]

It is equally interesting to consider that the Canada-U.S. Trade Commission might enjoy jurisdiction to hold that the Cabinet interventions (Orders in Council) by which Call-Net (or any similar U.S. service provider in Canada) is permitted to stay in business as an "illegal" reseller of a service in the nature of M.T.S., constitute "measures" in respect of which the national treatment principle applies, and permit U.S. companies to provide similar services in Canada.

In this regard, the Trade Commission would not only usurp the quasi-judicial independence and public-interest process of the C.R.T.C., and the judicial independence of the Supreme Court of Canada, but also the sovereignty of the Executive of the Canadian federal government.

Another immensely significant proposition is that if the Trade Commission were to submit the definitional question of "enhanced services" and/or the "existing access" question (of Sub-Article 4(1)) to binding arbitration, and it was held that indeed the F.T.A. was violated, and foreign entities were permitted to compete in the services-based provision of enhanced voice services which were "in the nature of M.T.S.", then the telephone company monopoly of bulk-rated selling of voice services would disintegrate, and significant revenue erosion might well threaten the telephone company cross-subsidization of universal, local residential service, and low residential M.T.S. rates. It is relevant to state that if the federal Cabinet is interested in breaking the Telecom Canada monopoly in this regard it is not doing so directly, insofar as it has merely extended the amount of time during which Call-Net might continue to be provided Bell and C.N.C.P. services, rather than having reversed the C.R.T.C. Decision 88-11. However, the situation is open for the dispute to enter the F.T.A. field of jurisdiction, in which case the demise of the Telecom Canada (or at least the federally-regulated carrier) monopoly over M.T.S. could be blamed on the "necessary evil" of free trade.

The above discussion has focussed on various categories of transport services, and telecommunications-related regulatory measures in respect of which the F.T.A principle of national treatment applies, and on the related implications of review of such measures within the jurisdiction of the Canada-U.S. Trade Commission.

The second major area of discussion respecting telecommunications and the F.T.A. relates to the standard of treatment afforded a U.S. service provider under the "National Treatment" principle.

As indicated above, there is a discrepancy in the extent of competition permitted as between federal regulators, and various provincial regulators in Canada.

Only Bell Canada, B.C. Tel, C.N.C.P., Telesat Canada, Northwest Tel, Terra Nova Tel, and Edmonton Telephones, among those carriers providing basic transport services in Canada, are federally regulated, while the rest are provincially regulated. The policies adopted by the various provincial regulators and the federal regulator are not yet harmonized. As indicated by the case of A.G.T. v C.R.T.C., C.N.C.P. is still not permitted to interconnect its facilities with the Alberta telephone company, Alberta Government Telephones. In Saskatchewan and Manitoba terminal attachment of the customer-owned basic telephone is still not permitted.[13]

While the federal regulator and the federal Ministry of Communications are working towards a policy which orients the regulation framework around the distinction between tariffed, regulated facilities-based (Type I) service providers and non-tariffed, unregulated (Type II) services-based service providers, some provincial (particularly prairie) policy-makers are refusing to liberalize the services-based service markets, and are denying domestic entry as well as foreign entry into many of those markets.

This presents the major "interpretation issue", whether the federal government has bound itself in the F.T.A. to grant treatment to U.S. entities which constitutes a national standard of competition in the provision of "covered services" (ie: that standard set by the more

progressive C.R.T.C.) or whether a U.S. entity is entitled only to "provincial treatment", where provincial authorities adhere to existing, less liberal standards of competition.

As indicated above, Sub-Article 1402(2) states:

> "The treatment accorded by a Party under Paragraph 1 (National Treatment) shall mean, with respect to a province or a state, treatment no less favourable than the most favourable treatment accorded by such province or state in like circumstances to persons of the Party of which it forms a part." (emphasis added)

The built-in distinction between treatment accorded with respect to measures of a province or state on one hand, and those of the respective federal governments of the U.S. and Canada, on the other hand, indicates that both signatories to the F.T.A. admit the "de facto" lack of exclusive federal jurisdiction in measures (regulations and regulatory decisions) affecting some services.

This is supported by the drafting of Sub-Article 1402(1) which presents the obligation of National Treatment in terms which do not actually say "national" treatment, rather in terms guaranteeing "no less favourable (treatment) ... in like circumstances": ie:

> "(1) Subject to paragraph 3, each Party shall accord to persons of the other Party treatment no less favourable than that accorded in like circumstances to its persons with respect to the measures covered by this Chapter."

On initial perusal, it would be reasonable to conclude, that the F.T.A. recognizes the validity of "provincial treatment" standards, anti-competitive as they may be, and does not impose upon the federal government the obligation to afford a foreign entity the more favourable "national treatment" derived from federal regulatory standards where no jurisdiction may sustain such "national treatment". Nonetheless it is important to note that if indeed, exclusive de juris federal jurisdiction is enjoyed in respect of all intra-provincial and inter-provincial telecommunications activities, it is conceivable that the Canadian federal government does bear such an obligation. Thus, in view of the Federal Court

holdings (Trial Division and Appeal Division), and the anticipated Supreme Court of Canada holding in the A.G.T. v. C.R.T.C. case, in favour of exclusive federal jurisdiction, it is conceivable that the federal government does bear such an obligation. It is little wonder then, that the federal Cabinet has been so conciliatory and consultative in its relations with the provincial Ministers of Communications, in view of the potential "de facto" power enjoyed by the telephone company-owning prairie provinces, in the shaping of national telecommunications policy.

In closing on federal-provincial relations and the F.T.A. in the realm of telecommunications-based services, it is relevant to illustrate the possible effect of the Call-Net case, (and of potential revenue erosion of telephone company revenue by Call-Net-type services-based competition in M.T.S.) on federal-provincial relations.

If the Canada-U.S. trade commission were to hold that a foreign entity must enjoy the "treatment" afforded Call-Net, then effectively, services-based market competition in services-in-the-nature of M.T.S. would ensue.

This would, as indicated, tend to erode the revenue base of the telephone companies, and drive up local exchange service prices. As indicated above, the "treatment" of Call-Net by Cabinet, the C.R.T.C., and the courts relates only to "companies" operating in federally regulated serving areas. Nonetheless, it is feasible that repercussions, and harmonization pressures would be felt by provincial regulators and provincially-owned telephone companies alike, for two reasons: first, as indicated above, if federal constitutional jurisdiction is exclusive in telecommunications, then the F.T.A. might require that truly national treatment be afforded to foreign entities proposing to compete with Call-Net; secondly, if federally-regulated Bell Canada was to lower its M.T.S. (particularly business subscriber) rates in order to compete with Call-Net, then the provincially regulated/owned telephone companies would be pressured to do the same, insofar as Telecom Canada sets identical MTS rates as a group, so that the same long distance call orginating in Calgary and connecting to Toronto would not cost less if it were to originate in Toronto and connect to Calgary.

One way of avoiding "damaging" revenue erosion to telephone companies would be for the C.R.T.C to permit services-based competition with telephone companies in M.T.S. and W.A.T.S services, with the caveat that the bulk-rated services/facilities provided by the telephone companies to such services-based competitors would be subject to facilities-based tariffs. Such services would then be "rated" at levels which would regulate the economic price of resold capacity. The dangers inherent in this, however, include a.) uneconomic reselling of capacity by services-based providers who wish to gain market share at the expense of profit and b.) that under such a scheme, C.N.C.P., (the facilities-based interexchange competitor) would have to be permitted to compete, subject to the tariffs, and this might arguably constitute an inefficient use of public Canadian network facilities, contrary to the July 22, 1987 federal "Framework Policy". C.N.C.P. is not the only facilities-based carrier interested in the voice transport markets.

There has been a great deal of recent publicity respecting the proposals of a consortium of Rogers Cablevision, Cantel Cellular Telephones and C.N.C.P. to provide an alternative, facilities-based local and interexchange public telephone network for provision of all telephone services on a competitive basis. (Toronto Star, Thursday, March 30, 1989; Maclean's, March 20, 1989; Financial Post, Friday, April 21, 1989).

The introduction of such facilities-based competition in a totally separate (from Telecom Canada) local and long distance facilities-based telephone service might be desirable in the policy terms of maintaining low long distance costs for national and international business telecommunications (and for national unity in terms of personal telecommunications).[14] However the problem of objections by provincially-owned telephone monopolies and other provincial ministers of communications to competition in this primary public service would at this time probably be insurmountable, if federal-provincial relations in this field were to remain steady and even. As indicated above, the largely scattered residential population of the western provinces requires higher long distance rates to subsidize the infrastructure, and facilities-based

competition to a greater extent than services-based competition, would drive such rates down, to the extent that provincially-owned "telcos" might not continue to operate economically or might operate at a politically unacceptable deficit. C.N.C.P. telephone service competition, would mean that a private nationally-operated public network would be regulated totally by the federal C.R.T.C. probably under terms which would require long distance service in those provinces to be subsidized from profits in other regions of the country. The scenario of facilities-based competition is unpalatable to provincial authorities, and this issue of the agenda for competition in M.T.S. and W.A.T.S. will likely be debated with great interest.[15]

The policy of the federal cabinet favouring competition in M.T.S. service generally has been illustrated in its handling of the Call-Net case. Essentially, in that case, Cabinet has permitted regulatory-prohibited bypass of the monopoly-based public telephone system.

"Reselling"-oriented competition in these "monopoly voice transport services" is the cutting edge of the "competition versus monopoly" issue, with federal cabinet policy and the F.T.A. principles and procedures on the one hand, the C.R.T.C. in the middle, and the provincial regulators/some provincial (notably prairie) executive policy priorities, on the other hand.

Increases in the scope of competition in "services-based voice transport services" (reselling) has preceded Canadian competition in "facilities-based voice transport services", and pressures for the quick evolution of the latter will be driven by subsequent court or Cabinet rulings in the Call-Net case and by F.T.A. pressures for U.S. entry into the Call-Net "enhanced voice services" market.

In this way, the review power of the federal Cabinet and the review potential of the U.S.-Canada Trade Commission may exacerbate existing tensions (respecting the timing and form of basic voice services de-monopolization) between the Cabinet, U.S. interests, and C.N.C.P./Rogers on the one hand and the provincial governments, Bell Canada and the C.R.T.C. on the other hand. That this major rift has begun over a dispute in the permissibility of the provision of the enhanced voice services provided in

the Call-Net case is indicative of the extent to which enhanced services is driving telecom markets towards deregulation, and the significance of "free trade" in such "limited" markets to U.S. trade policy.

The above discussion has focussed on the influence of the F.T.A. on federal-provincial concerns over competition in interexchange voice services.

Other aspects of the F.T.A., as they relate to competition in Canadian telecommunications regulation are addressed below.

The central principle of national treatment (Article 1402) is already embedded in various federal and provincial statutes, in the sense that access to public telecommunications facilities and services must be provided without discrimination and at just and reasonable rates. (eg: section 321 of the Railway Act.)[16]

Moreover, the July 22, 1987 federal Framework Policy ensures that services-based "Type 2" services providers, whether foreign or domestic, shall enjoy access to the extent permitted by the tariffs of facilities-based providers.

Sub-Article 1402(3) provides an exception to the "national treatment" principle. This provision permits "different treatment ... for prudential, fiduciary, health and safety, or consumer protection reasons". (emphasis added)

It is conceivable that "national treatment" could be denied to a foreign competitor wishing to provide services similar to Call-Net services within Canada on the grounds that the net effect would violate "consumer protection" insofar as local residential voice rates and possibly even residential M.T.S. voice rates might increase, if no longer "subsidized" by higher business M.T.S. rates charged by telephone companies.

Moreover, the "consumer protection" exception might be utilized to deny the retail-level provision of a particular, undesirable enhanced service. (for example an Automated Teller Machine [ATM] service with a history of faulty dealings.)

Moreover, such "different treatment" at telecommunications regulation might be augmented by measures in the areas of competition law, consumer

protection legislation or regulation in a specific non-telecommunications services sector. (The obvious forseeable consumer-oriented violation might be the unfair "bundling" of services.)[17]

Also in this regard, Article 1406 is of interest. It states that where the covered service (ie: an enhanced network service) is provided indirectly by a person of a "third Party" (ie: a non-signatory to the F.T.A.) then the F.T.A. benefits may not apply. Thus, for example, where an international enhanced services network includes data creation or processing originating in France, then a Canadian T.D.F. barrier such as those found in the Bank Act[18] will not be impugned by the F.T.A., where they might be if originated in the U.S.A.[19]

Sub-Article 1405(2) states that Canada and the U.S. shall periodically review and consult with respect to Chapter Fourteen for the purposes of increasing access to each others' services markets, and of including additional services as "covered services". This is consistent with the proposition that the U.S.-driven intent behind the F.T.A., and Canadian federal policy favour imminent national treatment and liberalization in monopoly telecommunications voice transport services and tariff-regulated data transport services, over and above the already unregulated and "covered" enhanced services.[20]

Article 5 of Annex 1404 C. states that a monopoly provider of basic telecommunications services shall not engage in anticompetitive activities in regards to its concurrent provision of enhanced services, and that a Party shall introduce effective measures to prevent such conduct.

As indicated above, the C.R.T.C. has determined in Decision 84-18 (Enhanced Services) that facilities-based common carriers will be regulated (being "Railway Act companies") in regards to the enhanced and computer services they provide, and moreover, that telephone companies may not provide electronic publishing services.

Paragraph 3(1)(a) of Annex 1404 C. states that access to and use of basic transport services for the movement of information including intracorporate communications are "covered" by the national treatment principle. This, coupled with Sub-Article 6(2), makes it clear that Chapter

Fourteen is not strictly concerned with the services-based provision of enhanced services, but also with the liberalization of access to facilities and services, for the movement of information within and into Canada (by Article 2 of Annex 1404 C.), for multinational corporate purposes, in internal basic transport matters.

Two observations arise.

First, the guarantee of liberalization of access for foreign large-scale users (at low bulk-rated rates) exacerbates the plight of the small-business Canadian "Call-Net" service user, who, except for the federal Cabinet intervention which permits Call-Net to stay in business, is relegated to subsidizing the multinational user. This predicament, and the policy ground on which Cabinet bases its intervention underlines the underlying telecommunications economics. These economics make it impossible for national treatment regarding access to competitively priced bulk-rated voice transport services to yield any other result than extreme political pressure for competitively-priced voice transport services in all other user sectors (eg: small business) in Canada.

Secondly, this provision (Paragraph 3(1)(a)) coupled with paragraph 3(1)(f) of Annex 1404 C. underlines the existence of a salient liberalizing effect on transborder data flow, insofar as the latter provision ensures national treatment in that regard.[21]

In a different vein, Article 2 of Annex 1404 C. states that the national treatment principle shall apply in regards to measures relating to enhanced and computer services (note that these specific terms are used, in contradistinction from "covered services") provided "within or into" a signatory state.

This provision, in effect creates a right for a foreign U.S. entity to provide U.S.-originating disembodied enhanced services into Canada via Canadian telecommunications channels.

Article 2, together with the "access to basic telecommunications transport services" principle found in Sub-Article 3(a) of Annex 1404 C. effectively creates a "right to plug in" an enhanced network service at the border. Moreover, the "terminal attachment" principle contained in Sub-Article 3(c)

effectively creates a "right to plug a foreign-based services-providing computer" in to a domestic Canadian transport network.

Moreover, each signatory state retains the right to require "basic telecommunications transport service traffic" which "terminates in its territory, having originated in the territory of the other party or a third country" or which "originates within its territory and is destined for the territory of the other party or a third party" to be carried on domestic transport systems. (Paragraph 6(1)(b) of Annex 1404 C.)

This right has been confirmed, and entrenched in the July 1987 "Framework Policy" of the federal Minister of Communications. Effectively it renders mandatory the use of "jointly-provided lines" in basic transborder telecommunications transport activities. "Jointly provided lines" connotes transborder telecommunications channels constituted of facilities of a carrier of one nation interconnected with facilities of a carrier of another state, in constituting a transnational telecommunications channel.[22] An example of the alternative, which is generally disallowed by the July 1987 "Framework Policy" is the point-to-point transmission of data via a foreign-owned satellite system from a fixed point in the U.S. to a fixed point in Canada, in the absence of Canadian permission.

Finally, the last "services" provision to merit comment is Paragraph 3(1)(e) of Annex 1404 C. which applies national treatment, (subject to F.T.A. Chapter 6) to measures related to "standards, certification, testing or approval procedures" in regards to customer-provided equipment attachment. This effectively eases the utilization of U.S.-manufactured terminal device equipment in Canada, and facilitates trade in these goods. (Trade in such goods is discussed below in Part V.)

Chapter 5
Conclusions For Part IV

1. The F.T.A. Chapter Sixteen permits retention of the existing Canadian policy "cap" of 20% foreign control respecting public facilities-based telecommunications carriers in Canada.
   Any services-based services undertaking, invested in by foreign "controlling interests" may be 100% foreign-controlled, but such investment will be subject to review under the Investment Canada Act. By 1992 no such investment below $150 million may be reviewed. Such review procedure applies to investment in or establishment of enhanced and computer services-providing businesses as well as basic transport-providing businesses.

2. "Commercial presence" (short of investment) is permitted under the F.T.A. without screening. This will be of particular aid to U.S.-originated stand-alone computer services which may be provided into Canada without need for "investment". (ie: without leasing of Canadian "lines" or "services".)

3. The July 22, 1987 "Framework Policy" of the federal Minister of Telecommunications (yet to be legislated) permits as a matter of regulatory policy, foreign entry into those services-based (ie: resold or shared) basic transport services permitted by the C.R.T.C. to be provided competitively, and into all "enhanced" services. Depending on the interpretation given the F.T.A. by the Canada-U.S. Trade Commission, the F.T.A. might, as an international treaty matter cement into place the requirement of "national treatment" for foreign entities in regards to those services-based transport services liberalized (ie: permitted to be resold/shared) after January first 1989, by the C.R.T.C., by Cabinet, by a provincial regulator, or by a Canadian court. The F.T.A. definitely requires national treatment in respect of

foreign entities providing enhanced services and computer services, to the extent permitted as at January 1, 1989, and pursuant to later "measures". The 1987 Canadian D.O.C. "Framework Policy" confirms the C.R.T.C. ruling that enhanced services and computer services are not matters to be regulated pursuant to the telecommunications regime (ie: they are "non-Railway Act company"-activities) but it is the regulatory categorization of a data or voice service that is determinative of whether it is a regulatable transport service or an unregulatable enhanced service.

4. U.S. service providers are guaranteed national treatment in access to and utilization of basic transport services, private line leasing, resale and sharing and terminal attachment in relation to the provision of "covered services". It is feasible that Article 1401 and Sub-Article 3(5) of Annex 1404 C. might be interpreted to include "basic transport services" within "covered services", as well as enhanced network services.

National Treatment applies only to "measures" relating to "covered services" which are established after the January 1, 1989 F.T.A. implementation.

Thus such "measures" do not include pre-January first C.R.T.C. liberalization permitting competition in the provision of virtually every services-based transport service excepting interexchange voice service.

Article 4 of F.T.A. Annex 1404 C. requires, however that existing access to basic telecom services be maintained for provision of enhanced services, (but not for pure resale or sharing of telecommunications transport services). Nonetheless the said Canadian "Framework Policy" which does not yet have force of law, states that foreign entry is permitted in resale and sharing of transport services as well as in enhanced services markets.

5. It is probable that the federal Parliament enjoys exclusive constitutional jurisdiction in regards to all telecommunications traffic and services in Canada carried via a system interconnected with an inter-provincial network system, in view of the A.G.T. v C.R.T.C. case. Thus the "national treatment" principle may require, as a matter of international treaty, that the federal State require provincial conformity with federal regulatory levels of permitted competition, in regards to "covered services".

6. There is extensive disparity in the scope of competition permitted by federal and various provincial regulators. In order to implement a harmonized national level in the scope of competition permitted in Canada, pursuant to the federal obligation to observe "national treatment" respecting "covered services" (possibly including services-based transport services) within its jurisdiction, federal authorities will be required to negotiate (within the "committee of ministers" arrangement) towards the provincial adoption of the July 1987, D.O.C. "framework policy". Such federal-provincial cooperation will be necessary due to the de facto provincial ownership of the three prairie telephone companies, and existing de facto provincial regulation in all but four provinces.

7. The Federal Cabinet has established policies whereby unregulated U.S. commercial presence (and foreign presence generally) in telecommunications services-provision is permitted to an extent greater than that necessitated by the F.T.A., and that permitted by provincial regulators. The obvious example is the pre-F.T.A., 1987 "Framework Policy" which states that "Type 2" services providers (including foreign service providers) shall be unregulated. (As indicated above, the F.T.A., on its own may or may not be interpreted so as to "cover" the pure resale of these transport services.) The other example is the "Call-Net" case, in which Cabinet has effectively sanctioned the provision of an M.T.S.-type service by a reseller, which has otherwise

been ruled illegal by the C.R.T.C. as being in competition with a monopoly-categorized service. (This uncertainty may extend the operation of "national treatment" beyond existing F.T.A./C.R.T.C. notions of "enhanced services".)

8. To the extent that the Cabinet and/or the federal Ministry of Communications is deciding telecommunications policy in regards to the expansion of categories in which services may be resold generally (ie: MTS) and/or in which foreign entry may be permitted into the provision of services, these entities are co-opting, albeit with authority, the autonomy of the regulatory function of the C.R.T.C., and also the antonomy of the public process inherent in that regulatory function.

9. To the extent that the F.T.A. allocates jurisdiction to the Canada-U.S. Trade Commission to submit disputes respecting the interpretation of domestic measures "related to covered (telecommunications) services", the Trade Commission co-opts not only the C.R.T.C. decision-making process but also the sovereignty of the Federal Cabinet.

10. To the extent that a decision under binding arbitration (pursuant to referral of a dispute by the Canada-U.S. Trade Commission) would override a contrary decision of a Canadian court (for example in the categorization of the Call-Net service) the Trade Commission co-opts the authority and autonomy of the Canadian judiciary.

11. Progressive federal liberalization in the regulation of enhanced services and computer/information services, in conjunction with federal Cabinet, Ministry of Communications and F.T.A. policies regarding foreign investment and commercial presence in the services-based provision of data transport services, enhanced services, and (ie: Call-Net) interexchange voice transport service, will put downward pressure on the retail pricing of these services by domestic facilities-based carriers. These facilities-based carriers' will become "carriers carriers" (known as "dominant carriers" in the U.S.),

and a new class of services-based "carriers" in Canada will arise to service the middle-sized business and small business community. The provinces, in choosing whether to acquiesce to the existing federal administration's agenda for rapid regulatory liberalization and market restructuring, and to an expansive effect of the F.T.A., will have to make an important choice. This choice is as between the benefits of potential stimulus to regional economies and to foreign investment in computer-communications systems derived from lower telecommunications costs and greater network-user flexibility (on the one hand), and the dangers of telephone company-revenue erosion from increased transport competition and related erosion in the subsidized funding of public exchange facilities (on the other hand).

The road to federal-provincial harmonization may be long, and it may require evidence of such benefits to the various regions. Without such intra-Canadian harmonization, it is difficult to see how U.S. interest groups (ie: large corporate telecom users) will be satisfied with the implementation of the F.T.A., and how trade wars in the telecom field, and the U.S. invocation of Section 301 of the 1984 Trade and Tariff Act will be avoided.[23]

12. F.T.A. Sub-Article 1405(2) states that future consultation shall take place in regards to including "additional services" in covered services".

13. Effective Liberalization respecting foreign entry and commercial presence in the provision of telecommunications-related (computer-communications) services into or within Canada depends on the reduction of non-tariff "barriers" other than those relating to investment and telecommunications transport regulation. These others, which range from barriers to trade in goods (terminal device hardware), to barriers against the transborder flow of information, are also addressed in the F.T.A. These matters are discussed below in Part V of this thesis. These barriers include: equipment tariffs (ie: border measures); transborder data flow barriers; temporary entry for business persons; unfair government procurement practices; unfair technical standards; the absence of effective competition laws (ie: anti-trust laws); unfair government subsidies; and unfair taxes.

Footnotes: Part IV

1. Reference Part I, chapter 2 of this Thesis.

2. This position is supported, in the context of development of an economy generally, in a report by the United Nations Conference on Trade and Development (U.N.C.T.A.D.) dated 2 July, 1986 and entitled "Services and the development process: further studies pursuant to Conference resolution 159 (VI) and Board decision 309 (XXX)." This report (TD/B/1100) indicates that data services provide "interlinkages" between trade in various goods, and services, and develops the same. Moreover, it stresses that "networks", like foreign direct investment and the foreign entry of business persons, are means of penetrating foreign markets. Moreover, it indicates that "international cooperation on services is continuing in various specialized fora, including ICAO, ITU, IBI and WTO", and in "organizations of a more general or regional scope such as OECD, SELA, UNCTAD and GATT".

   Finally, the report indicates that it is crucial to the U.S.A. to export tradable services because of trade imbalances and the present fiscal dependency on foreign investment as a tax base.

3. C.R.T.C. decisions, public notices, tariff approvals and other rulings have force of law and are enforceable as would be promulgated regulations. Reference Capital Cities Communications Ltd. et. al. v C.R.T.C. et. al., 1978, 2 S.C.R., 141 (S.C.C.) at 171, (Laskin C.J.C.).

4. Pursuant to the Investment Canada Act, R.S. 1985, c. 28 (1st Supp.), and Regulations thereunder, the Investment Canada Regulations, 27/6/85, S.O.R./85-611.

   The key features of the Act are as follows:

   a) to encourage investment and technological advancement for Canada (Sections 4-9).

   b) to change the requirement of "significant benefit" under the previous Foreign Investment Review Act, S.C. 1973-74, c.46 as am. by S.C. 1976-77, c.52, to a requirement of mere "net benefit" to Canada, for reviewable foreign investments.

   c) to change the reviewability threshold under the Foreign Investment Review Act from investments in enterprises which exceed $250 thousand to investments in enterprises which exceed $5 million.

   It is of great significance to note that the F.T.A. makes provision for even greater liberalization in foreign direct investment into Canada less than four years after the implementation of the already liberal Investment Canada Act.

5. Reference Part V, chapter 3 for a discussion of regulation of these activities in non-telecommunications activities.

6. "National Treatment" is to be distinguished from reciprocal treatment. Reference the discussion in F.N. 12 in Part I of this thesis. In spite of the National Treatment principle, the F.T.A. dispute resolution process and other factors discussed in this chapter will expedite the harmonization of Canadian telecommunications market structure and regulation/laws with that of the U.S., as if the principle of reciprocity were actually employed.

7. Reference the following:
Record Carrier Competition Act of 1981, 47 U.S.C. 222; and
Specialized Common Carrier Service, First Report & Order, 29 F.C.C. 2d 870 (1971); reconsideration denied, 31 F.C.C. 2d 1106 (1971); affirmed sub nom. Washington Utility and Transportation Comm'n v F.C.C., 513 F. 2d 1142 (9th Cir. 1975); and
American Telephone and Telegraph 1982 Consent Decree: the judicially-accepted modified final judgment antitrust Consent Decree requiring AT & T divestiture; see United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.C.D.C. 1982); affirmed 103 S. Ct 1240 (1983).

8. C.R.T.C. Telecom Letter Decision 88-9, 6 September, 1988 at p.8.

9. The citations for these court Actions and Petitions are unavailable at the time of writing.

10. For a complete overview of the F.T.A. dispute resolution procedure, reference F.N. 29, in Part I of this Thesis.

11. Reference C.R.T.C. Telecom decision 85-17 Identification of Enhanced Services, 13 August, 1985, for an enumeration of specific services so identified.

12. Note that a post - January 1, 1989 judicial decision respecting the interpretation of an enhanced (versus a basic transport) service will undoubtedly constitute a "measure" within the meaning of the F.T.A. Article 201, and is subsequently subject to review under the dispute settlement process set out in Chapter 18 of the F.T.A.

13. Reference Janisch & Romaniuk, "Canadian Telecommunications; A Study in Caution;" op. cit. (F.N. 19, Part III, above), at p. 48.

14. The undesirable aspects might be that Canadian network facilities would be uneconomically utilized, and moreover, that domestic competition might lessen the domestic power base from which a Canadian facilities-based carrier might launch competition in foreign markets.

15. For some of the provinces, openly competitive markets in MTS might result in only marginally profitable or even uneconomic crown corporation telephone companies. If so, it is forseeable that such crown corporations will be divested. The positive side to this would be that costs to telecommunications users in remote provinces would be lower, and this would make business (and particularly information-intensive business) in those regions more competitive. In contrast, the negative side would be that provincial authorities would lose financial and proprietary control over this important, hidden telecommunications resource.

16. R.S.C. 1970, c. R-2, as amended.

17. Reference discussion of the Competition Act in Part V, chapter 3, section (c) of this Thesis.

18. S.C. 1980-81-82-83; c. 40 as amended. Reference Part V, chapter 3, section (b) in this thesis.

19. Consider for example the international enhanced networks discussed above in F.N. 7, in Part I, above.

20. Reference the S.P.A.C. report discussed in Part I, chapter 1 of this Thesis.

21. Note that paragraph 3 (1)(f) provides for national treatment as regards measures affecting the transborder movement of "information", whether in machine-readable form, or not.

22. Reference the S.P.A.C. report, discussed in Part I, chapter 1 of this thesis, at p. 18.

23. Reference discussion of this Act in Part 1, chapter 2 of this Thesis.

PART V

OTHER RELATED F.T.A. PROVISIONS; AND CANADIAN MEASURES OUTSIDE OF THE TELECOMMUNICATIONS SPHERE WHICH RELATE TO ENHANCED NETWORK, OR COMPUTER/INFORMATION SERVICES

PART V

CHAPTER 1

Introduction - Summary: Part V

Growth and competition in Canadian telecommunications services markets will be driven by increased demand for corporate in-house use, inter-corporate use, and wholesale and retail provision of specialized data transport services, enhanced voice and data services, stand-alone remote computer services, and combinations thereof. All these services are dependant for development on liberal access to, utilization of, and resale and sharing of the underlying basic transport facilities and services described in the preceding Parts of this thesis. Canadian development in the provision of and utilization of these services are also dependent on a reduction of rates charged for Canadian interexchange transport services, by means of rate rebalancing, and increased competition. Thus, Part IV, above, has discussed in part, the way that definitional uncertainty over enhanced services, exemplified by the Call-Net case, may lead to services-based competition with facilities-based interexchange transport services. Part IV, above, has also discussed the pressures created generally by Canadian federal policies, the F.T.A., and U.S. domestic trade policies and law, towards increased competition in Canadian transport and enhanced services markets, and towards more liberal policies regarding foreign investment in these markets.

The complex of policy and market forces described above, when given full effect as a national policy, legal framework, market practice, and as an international treaty will expedite domestic competition and the foreign provision of services and investment, but not solely in the telecommunications services sphere. U.S. entry into the supply side of enhanced and computer/information services will: first, stimulate private and public sector Canadian demand for more sophisticated computer and

computer-communications (microchip) hardware and (labour and expertise-intensive) software; secondly, create pressures towards more liberal transborder and domestic data-handling regulation and control; and thirdly, and most importantly, increase competition in, and influence the modes and patterns of retail and institutional accounts-based transactions that coincide with data flows that follow computer-communications network services. These three aspects are discussed in this, Part V.

For U.S. transnational corporations to take competitive advantage of the evolving liberalization of the regulation of and investment policies regarding the telecommunications services sector in Canada, concurrent reductions in, and abeyance of future "trade barriers" relating to areas other than the C.R.T.C. regulation of services and other than the Investment Canada Act screening of investment in telecommunications services will also be necessary to sustain liberalization in the provision and utilization of enhanced services and computer/information services. The F.T.A. treatment of these many areas are discussed in Chapter Two of this Part, below. In Chapter Three of this Part, below, are discussed in greater detail Canadian sectoral regulations outside of C.R.T.C. (and provincial) telecommunications regulation, namely the banking sector and the consumer reporting sector, in which regulations now exist which have an important bearing on the development of competition in the use of enhanced network and computer/information services. Chapter Three continues to discuss the role of Canadian competition law authorities in such banking regulation and in competition in the use of enhanced network services in other commercial sectors.

CHAPTER 2

The F.T.A.: Other Provisions Affecting the Telecommunications Transport, Enhanced Network Services or Computer/Information Sectors in Canada

The following matters are provided for in the F.T.A., and have a bearing on telecommunications services, enhanced services and computer/information services in Canada. They are: Trade in Goods; Technical Standards; Government Procurement; Temporary Entry for Business Persons; Taxes; Subsidies; Intellectual Property; Cultural Industries; and Monopolies.

a) Trade in Goods (Border Measures: Chapter Four)

Part Two of the F.T.A. considers "Trade in Goods".

Therein, Chapter Four (the operative Chapter) deals with "Border Measures". "Article 401: Tariff Elimination" states in part as follows:

> "1. Neither Party shall increase any existing customs duty, or introduce any customs duty on goods originating in the territory of the other Party, except as otherwise provided in this Agreement.
>
> 2. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on goods originating in the territory of the other party in accordance with the following schedule:"

Computers and computer-related equipment are included in "Schedule A" in Annex 401.2, in respect of which tariffs are eliminated entirely and such goods are to have been free of duty effective January 1, 1989. Such equipment may be used as network addressing (ie: able to logically interact with the network) or network non-addressing (applications-oriented) terminal devices, switching systems for small networks (eg: PBX systems) or computer equipment capable of enhancing a network in some other way (eg: by providing electronic message storage services).

Large telephone switching equipment is a specialty item in respect of which tariffs will be phased out in three annual steps ending January 1, 1991.

It should also be noted that pursuant to Part Two, Chapter Three of the Agreement, there are rules respecting the question whether goods "originate" in the territory of one or both of the parties, which hinges on whether they were "wholly obtained or produced", or "transformed" in the territory of either Party or both Parties. Generally, pursuant to sub-article 3. of Article 301, "origination" in the territory of one of the Parties (and hence freedom from tariff) does not exist if the good has merely undergone "simple packaging or combining operations".

Clearly, the above provisions relating to "border measures" have impact on the utilization of telecom facilities and the provision of specialized transport services or enhanced services insofar as the untariffed entry into Canada of such technologies will permit not only increased competition in the domestic hardware trade but also in the rate at which such hardware is developed and distributed, as demand markets pressure hardware manufacturers for increased innovation.

b) Technical Standards (Chapter Six)

Chapter Six of the F.T.A. considers "Technical Standards" in respect of goods.

The operative principal, is contained in Article 603, which states:

> "Neither Party shall maintain or introduce standards-related measures or procedures for product approval that would create unnecessary obstacles to trade between the territories of the Parties. Unnecessary obstacles to trade shall not be deemed to be created if:
>
> a) the demonstrable purpose of such measure or procedure is to achieve a legitimate domestic objective; and
> b) the measure or procedure does not operate to exclude goods of the other Party that meet that legitimate domestic objective." (Emphasis added)

In support of Paragraph 603(b), is Paragraph 3(1)(e) of Sectoral Annex 1404 C., which states that the provisions in Chapter 14 apply to measures related to:

> "3(1)(e) subject to Chapter Six (Technical Standards), standards, certification, testing or approval procedures;"

Thus, the provisions in Article 1402 apply to such "standards, certification, testing or approval procedures". Thus the principle of "national treatment" applies with respect to terminal attachment and utilization of foreign telecommunications and computer products.

Also in support of Article 603, Article 602 affirms the respective rights and obligations under the G.A.T.T. Agreement on Technical Barriers to Trade, illustrating an intent on the part of the F.T.A. signatories to harmonize with international standards.[1]

Moreover, Article 604 creates an obligation to take reasonable measures to promote compatibility between the Parties in their standards-related measures and procedures for product approval, even where such are developed or maintained by private standards-related organizations within a Party's territory.

These latter provisions would apply to compel the federal government to monitor and influence the process by which technical standards are developed by the Terminal Attachment Program Advisory Committee (T.A.P.A.C.), a "private standards related organization", (within the meaning of Article 604) which makes recommendations to the federal Department of Communications (D.O.C.) Terminal Attachment Program, which in turn certifies equipment pursuant to its published standards for both network addressing and non-addressing equipment.

It should be noted however, that Article 601 holds that the above mentioned "Standards" provisions do not apply in respect of a measure of a provincial or state government. Thus, pursuant to the "de facto" provincial regulation of at least some telecommunications activities in all Canadian provinces some discrepancy in standards is feasible, but not likely.

The precise point behind the above-mentioned provisions is to avoid rigid attachment standards in emerging microchip products based on unfounded concern with protecting network equipment. (The international development of I.S.D.N., and of other standards in the International Telecommunications Unions' C.C.I.T.T. should help avoid discrepancies in standards and overly stringent standards.)

c) Government Procurement (Chapter Thirteen)

Article 1301 affirms the G.A.T.T. Agreement on Government Procurement, as binding on the F.T.A. Parties, in the interest of

> "... expanding mutually beneficial trade opportunities in government procurement based on the principles of non-discrimination and fair and open competition for the supply of goods and services...."

Article 1303 incorporates the G.A.T.T. Agreement on Government Procurement (with the annexes thereto) and modifies the same in the following respects:

a) Coverage of the obligations thereunder are expanded from including only purchases over a threshold of approximately $171,000 U.S. to purchases over $25,000 U.S. (Article 1304)

b) Obligations respecting transparent procedures in the procurement process, (based on national treatment) are expanded relative to the G.A.T.T. Agreement. (Article 1305)

c) An obligation is imposed on the F.T.A. parties to bilaterally negotiate within one year of the conclusion of the Uruguay Round of G.A.T.T. negotiations, towards the improvement and expansion of the Procurement provisions in the F.T.A.

The following comments are relevant.

First, the F.T.A. Government Procurement provisions apply only to goods, and services incidental to the delivery of goods. Thus, support services ancillary to the delivery of hardware and/or software products are probably covered, but not isolated computer development services. Article 1402 (9), relating to "services", states "No provision of this Chapter shall be construed as imposing obligations or conferring rights upon either Party with respect to government procurement ..."

Secondly, pursuant to Annex 1304.3, 22 Canadian government departments and 10 agencies are covered, (although the Department of Communications is not). The Canadian Department of Defence is covered within certain defined product categories including automatic data processing equipment, software, supplies and support equipment. Moreover, for the U.S., eleven out of thirteen government departments, forty governmental agencies and commissions, NASA and also the U.S. Department of Defence are all covered, all in respect of "general purpose" computer software and equipment, and in respect of a further category known as "service and trade equipment" which category probably does not include more conventional telecommunications equipment.

The matter of procurement policies, and the F.T.A. treatment thereof is significant to the development of competition in enhanced and computer services, to the extent that it develops cost-effective innovation of new technology-oriented services. It is no secret that many new microchip devices which contribute enhancements or specialized features to transport services, as well as applications software and support services therefor, are acquired in the first instance by public agencies. These laboratory-like testing grounds will contribute to the more efficient diffusion of technology in more liberalized private commercial markets, if public sector acquisitions are made from a broader (ie: foreign-included) base of products (and "incidental services").

d) Temporary Entry for Business Persons (Chapter Fifteen)

In the "copy 21/01/88" issue of the External Affairs Canada document entitled "The Canada-U.S. Free Trade Agreement" (published by the Minister of Supply and Services Canada, 1988), the prelude to Chapter Fifteen (which does not actually constitute a part of the Agreement) reads, in part, as follows:

> "Export sales today require more than a good product at a good price. They also require a good sales network and, most of all, reliable after-sales service. Free and open trade conditions therefore, require not only that goods, services and investments be treated without discrimination, but that the people required to make sales and manage investments or provide before and after service of those sales and investments, should be able to move freely across the border. Furthermore, trade in professional and commercial services cannot take place unless people can move freely across the border. The challenge, therefore, was to ensure that immigration regulations would complement the rules governing the movement of goods, services and investments, but would not compromise the ability of either government to determine who may gain entry."

Thus, the Chapter 15 rules of the F.T.A. are based on reciprocal access to markets for both Canadian and U.S. business travellers.

Article 1501 ("General Principle") states as follows:

> "The provisions of this Chapter reflect the special trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and protect indigenous labour and permanent employment." (emphasis added)

The major obligation under the Agreement is contained in Sub-Article 1502(1), which states as follows:

> "The Parties shall provide, in accordance with Annex 1502.1, for the temporary entry of business persons who are otherwise qualified for entry under applicable law relating to public health and safety and national security." (emphasis added)

Article 1506 contains the following definitions:

"Business person" means a citizen of a Party who is engaged in the trade of goods or services or in investment activities. (emphasis added)

"temporary entry" means entry without the intent to establish permanent residence.

Pursuant to Annex 1502.1, a business traveller must qualify for entry generally, (in regards to health and safety, and national security requirements) and also establish that the reason for entry is within one of four categories, namely: business visitors; traders and investors; professionals; and intra-company transferees.

In the present context, of temporary entry for the purposes of providing intermittent computer support services or other computer related services (including those integral to the provision of other covered services), the following provisions in Annex 1502.1 (and related provisions in Schedules thereunder) are relevant:

A. Business Visitors

A business person is guaranteed entry if that person is engaged in an occupation or profession set forth in "Schedule 1", demonstrates proof thereof, and describes the purpose of entry, without need for prior approval, procedures, petitions, labour certification tests, or other procedures of similar effect.

In particular, the following "Schedule 1" items are relevant:

"After-Sales Service

- installers, repair, and maintenance personnel, and supervisors, possessing specialized knowledge essential to the seller's contractual obligation, performing services or training workers to perform such services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States/Canada, during the life of the warranty or service agreement." (emphasis added)

o o o

"General Service

- computer specialists: with respect to entry into the United States of America otherwise classifiable under section 10(a)(15)(H)(i) of the

Immigration and Nationality Act, but receiving no salary or other remuneration from a United States source; and, with respect to entry into Canada, exempt from the requirement to obtain an employment authorization pursuant to subsection 19(1) of the Immigration Regulations, 1978, but receiving no salary or other remuneration from a Canadian source." (emphasis added)

B. Professionals

Generally, a business person seeking temporary entry into Canada or the U.S., and who meets existing requirements under the relevant provision in the immigration statutes of those respective countries, and who presents proof of Canadian or U.S. citizenship, respectively, and who presents proof of documentation demonstrating that that business person is engaged in one of the professions set forth in Schedule 2, shall not be subject to prior approval procedures, petitions, labour certification tests, or other procedures of similar effect.

Schedule 2 contains a list of "professions" which include ... "computer systems analyst".

C. Intra-Company Transferees

A business person seeking temporary entry into Canada or the U.S.A. as an intra-company transferee shall be granted entry under the relevant provisions of the Immigration Acts of these respective countries provided that the business person:

a) has been continuously employed by the firm for a period one year prior to entry,

b) seeks temporary entry to continue to render managerial, executive or specialized knowledge services. (emphasis added)

and c) meets existing requirements for entry.

Clearly, in the case of a large scale, multinational corporation, the above provisions would facilitate the temporary entry into Canada of in-house computer expertise.

The above provisions of Annex 1502.1 relate to temporary entry for the purpose of provision of computer services. In contrast, Annex 1502.1 also contains provision for temporary entry for the purpose of augmenting a "commercial presence" or an "investment" pertaining to "substantial trade in goods or services". This contrasting aspect of Annex 1502.1 may be summarized as follows:

D. Traders and Investors

The business person seeking entry into the U.S. or Canada shall be granted entry under the relevant provisions in the Immigration laws of the respective countries if that person meets existing requirements for visa issuance and entry thereunder, but only if....

a) the purpose of the visit is to carry on substantial trade in a capacity that is supervisory or executive or involves essential skills, or

b) the purpose is solely to develop and direct operations of an enterprise in which the business person has invested, or

c) the business person is actively in the process of investing "a substantial amount of capital..."

By way of closing, in regards to the matter of "temporary entry" it is relevant to note also the following F.T.A. provisions:

Article 1503 provides in part that the Parties shall consult in regards to the further facilitation of temporary entry;

Article 1504 provides that the dispute settlement provisions of Chapter Eighteen may be involved, but only where denial of a business person's request for temporary entry....

a) is part of a pattern of practice by a Party and,
b) has already been the subject of exhaustive remedial administrative remedies.

e) Taxes

Taxes on services, investments, or goods which treat foreign providers differently from domestic providers can constitute non-tariff trade barriers. The F.T.A. takes this into account and addresses this matter in the following provisions:

- Article 1407 (Services) reads as follows:

  "Subject to Article 2011, this Chapter shall not apply to any new taxation measure, provided that such taxation measure does not constitute a means of arbitrary or unjustifiable discrimination between persons of the Parties or a disguised restriction on trade in covered services between the Parties." (emphasis added)

- Article 1609 (Investment) reads as follows:

  "Subject to Article 2011, this Chapter shall not apply to any new taxation measure, provided that such measure does not constitute a means of arbitrary or unjustifiable discrimination between investors of the Parties or a disguised restriction on the benefits accorded to investors of the Parties under this Chapter". (emphasis added)

- Article 2011 (Nullification and Impairment) reads, in part, as follows:

  "If a Party considers that the application of any measure, whether or not such measure conflicts with the provisions of this Agreement, causes nullification or impairment of any benefit reasonably expected to accrue to that Party, directly or indirectly under the provisions of this Agreement, that Party may, with a view to the satisfactory resolution of the matter, invoke the consultation provisions of Article 1804 and, if it considers it appropriate, proceed to dispute settlement pursuant to Articles 1805 and 1807, or with the consent of the other Party, proceed to arbitration pursuant to Article 1806".

  The effect of the above provisions is as follows:

  - Generally, pre-F.T.A. taxation "measures", even should they be arbitrary or discriminatory as against foreign services providers, or foreign investors, may stand. Article 2011 might conceivably be invoked even in regards to a pre-existing measure if it so much as merely "impairs" any benefit reasonably expected under the F.T.A.

- New taxation measures which discriminate as against foreign services providers or foreign investors or which are arbitrary, or which constitute a disguised restriction on benefits accorded to foreign investors, are disallowed.

In regards to the domestic taxation of goods covered by the F.T.A. (including computer and telecommunications equipment) Chapter Five of the F.T.A. provides in part, that each Party shall accord national treatment to the goods of the other Party in accordance with the existing provisions of Article III of the G.A.T.T.

Chapter Five thus has the effect of ensuring that internal domestic (provincial or federal) taxes, such as sales or excise taxes, cannot be higher on imported U.S. goods than on domestic goods.[2]

f) Subsidies

Government subsidies granted to domestic industries are common in both the U.S. and Canada, and particularly in information-intensive services sectors and/or the high-technology computer and telecommunications sectors. On initial examination, the F.T.A. ostensibly leaves these matters untouched. In regards to the "Services" provisions, Sub-Article 1402(9) states:

> "1402(9) No provision of this Chapter shall be construed as imposing obligations or conferring rights upon either Party with respect to government procurement or subsidies".
>
> (emphasis added)

In regards to the "Investment" provisions, Sub-Article 1609(2) states:

> "1609(2) Subject to Article 2011, this Chapter shall not apply to any subsidy, provided that such subsidy does not constitute a means of arbitrary or unjustifiable discrimination between investors.
>
> (Emphasis added; Note also that Article 2011 is reproduced above under the heading "Taxes".)

Sub-Article 1402(9) has the effect of disclaiming the application of Chapter Fourteen to subsidies given to services-providers. However with respect to investors, sub-Article 1609(2), in combination with Article 2011 has the effect of providing for application of the Chapter 18 settlement dispute provisions to alleged "subsidies" which "constitute a means of arbitrary or unjustifiable discrimination between investors of the Parties, or a disguised restriction on the benefits accorded to investors of the Parties under this Chapter".

It is most significant to note that as of yet, "subsidies" have not been defined for the purposes of interpretation or of dispute settlement under the F.T.A.

It is also significant to note that in Canada, the computer software and hardware industries have traditionally been heavily subsidized.[3]

g) Intellectual Property

There are a number of intellectual property issues relevant to the computer-communications field.[4] The salient domestic "competition" issue involves the extent of legal protection afforded, in a given national jurisdiction, respecting data base formats, proprietary software, and proprietary designs of computer hardware. The international (and therefore "trade" issue) involves the extent to which such legal protection is harmonized among national trading partners which trade or transfer enhanced services, computer/information services and information.

The question of international protection and enforcement of intellectual property rights is particularly important in view of the extent to which transborder electronic networks today are capable of interconnection with digital (microchip-based) terminal devices which create, transport and store various forms of information (eg: alphanumeric data, diagram facsimile, photograph facsimile, video-imaging) and the greater latitude for abuse of proprietary rights that results thereby.

This harmonization question is of great importance to the U.S. in particular, which has persuaded the G.A.T.T. conference to negotiate such

issues as trade issues in the ongoing Uruguay Round. The U.S. and Canada have declined to include intellectual property matters in the F.T.A., with certain exceptions. The most general exception is found in Article 2004, which states:

> "The Parties shall cooperate in the Uruguay Round of multilateral trade negotiations and in other international forums to improve protection of intellectual property".

It is perhaps a combination of a recent overhaul of Canadian copyright laws,[5] and the fact of existing general intellectual property laws which are relatively similar to those of the U.S. that have kept these matters out of the F.T.A., except to bind the U.S. and Canada under an obligation to persuade the rest of the world to implement their shared standards of protection.

The second exception to the F.T.A. vaccuum respecting intellectual property matters is found in Article 2006 respecting "retransmission rights" in the context of cable undertakings. This is discussed at more length below, under "Cultural Industries".

h) Cultural Industries

It is relevant to note that the F.T.A. generally exempts "cultural industries" from the provisions of the F.T.A. (by Article 2005), but that neither telecommunications transport services, enhanced services nor computer services per se are specifically included within the definition of excepted "cultural industries" contained in Article 2012.

This is consistent with the proposition contained in this thesis that foreign investment in and regulation of virtually all types of these services, are "covered" by the F.T.A. national treatment principle and affected by the F.T.A. bias favouring international competitive markets in these services. One inconsistency however, in this aspect of the F.T.A. is identified as follows: namely, it is possible that the F.T.A. "covers" the computer service of "information retrieval services", (which are included in

the definition of covered "computer services" found in Article 7 of Sectoral Annex 1404 C.) and simultaneously "excludes" such services (which are effectively included in the definition of excluded "cultural industries" found in Article 2012).[6]

This internal conflict in the text is a reflection of the broader difficulty in ascertaining whether particular computer/information services, and enhanced or specialized data transport services (with microchip intelligence somewhere in the network) are "cultural" services which should remain outside a trade agreement, or whether they are tradeable "computer" services which should be "covered" by a trade agreement.[7]

As digital terminal devices come to be used more extensively in telecommunications activities other than voice-message service (eg: facsimile; picture phones), and as I.S.D.N. transport architecture (ie: involving broadband fibre optics facilities) is being implemented in public networks in various national jurisdictions, the general issue of "cultural activity" versus "commodity activity" will gain significance. In fact, as digital transport and terminal device technologies come to be implemented in a way that supports the transport of video signal via the public switched telecommunications network, the public network will become in part, a "cultural" infrastructure. By the same token, networks which have traditionally remained "cultural (broadcast) networks" are in some ways taking on the characteristics of mere transport networks.
For example, the cable infrastructure in Canada, which has traditionally been legally categorized as a "broadcast undertaking"[8] has been transformed in nature into a telecommunications transport undertaking, insofar as Article 2006 binds Canada to implement intellectual property-related "retransmission rights" respecting distant "off-air" broadcast signal (ie: transmitted by U.S. stations) intended for reception by the general public. This obligation effectively harmonizes the economics of the Canadian cable system with that of the U.S. The irony of this obligation lies in the inconsistency that it renders the cable industry a carrier of what are essentially enhanced "video" services, (and effectively permits U.S. entry into Canadian broadcasting markets on a profit basis)

while another unrelated provision (Article 2012) of the F.T.A. specifically excludes from F.T.A. coverage, as a "cultural industry,"

> "... all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services,".
>
> (emphasis added)

The only conclusion to be drawn from these inconsistencies is that for legal, policy and market purposes, both the public switched telecommunications networks and the cable-broadcasting networks are becoming hybrid networks which will provide simultaneously, public commercial services which provide intellectual properties, and the public carriage of other private information.

This conclusion is evident from the facts that the cable system in Canada already provides non-programme services (eg: fire alarm systems), and also that the leading Canadian cable company, Rogers Cablesystems is publicly proposing to utilize its existing urban cable network as the infrastructure for a grid of local public-switched networks capable of competing with the existing telephone companies.[9]

(i) Monopolies

As indicated above, the local public telecommunications exchange in Canada is still a telephone company monopoly service as are public long distance voice services. Moreover, in various provincial jurisdictions there are yet additional monopoly services.

Sectoral Annex 1404 C. addresses these monopolies. It states, in Article 5:

> "Article 5: Monopolies
>
> 1. Where a Party maintains or designates a monopoly to provide basic telecommunications transport facilities or services, and the monopoly, directly or through an affiliate, competes in the provision of enhanced services, the Party shall ensure that the monopoly shall not engage in anticompetitive conduct in the enhanced services market, either directly or through its dealings

with its affiliates, that adversely affects a person of the other Party. Such conduct may include cross-subsidization, predatory conduct, and the discriminatory provision of access to basic telecommunications transport facilities or services.

2. Each Party shall maintain or introduce effective measures to prevent the anticompetitive conduct referred to in paragraph 1. These measures may include accounting requirements, structural separation, and disclosure".

(Emphasis added)

The above provision is augmented by F.T.A. Sub-Article 2010(1) which states as follows:

"Article 2010: Monopolies

1. Subject to Article 2011, nothing in this Agreement shall prevent a Party from maintaining or designating a monopoly."

"Monopoly" is defined in Article 2012 of the F.T.A. as follows:

"Monopoly means any entity, including any consortium, that, in any relevant market in the territory of a Party, is the sole provider of a good or a covered service;"

It will be recalled that the C.R.T.C. has held in its "Enhanced Services" decision (C.R.T.C. Telecom Decision 84-18) that the monopoly-holding facilities-based carriers in Canada shall be regulated in regards to their provision of enhanced services, in order to avoid anti-competitive conduct, or abuse of the dominant position in the marketplace of such a carrier.

Moreover, by the same decision, federally regulated telephone companies are forbidden from providing electronic publishing services.

Clearly, these measures favour Canadian and U.S. services providers which are relegated to a non-dominant services-based position in the enhanced network and computer/information markets.

CHAPTER 3

Canadian Measures Outside of the Telecommunications Sphere Which Relate to Enhanced Network Services or Computer/Information Services Provided Into and Within Canada

a) Framework

As indicated in Part I of this thesis, enhanced and computer/information services are not provided in a vaccuum. Their provision is made in the context of many commercial frameworks, and there are as many genres of such services as there are commercial undertakings. Generally, such services are provided on the following bases:

a) intra-corporate, private utilization (or intra-consortium utilization) by "owners", in the nature of in-house services;

b) inter-corporate utilization (or inter-consortium utilization) by "owners" in the nature of establishing, settling and/or clearing of transaction accounts as between corporate entities or consortia, provided on a sharing basis, and/or on a reselling basis to corporate "customers".

c) Retail provision of services by "owners" directly to "clients" of "owners" (eg: automated teller machine services); or provision of services to wholesale providers ("customers") who retail such services directly to "clients" of "customers" (eg: computerized booking services retailed by travel agents).

As indicated above, none of these activities, per se, (ie: utilizations of enhanced services or computer/information services) are regulated within the framework of telecommunications law, regulation or policy except in regards to (a) the provision of underlying transport services, and (b) the provision of enhanced/computer/information services by facilities-based carriers.

Nonetheless, these activities are regulated under various other legal and/or policy frameworks.

Herein is a list of such frameworks in Canada, with an indication of the extent to which the various above-enumerated categories of utilization are regulated.

b) Sectoral Regulation

Particular commercial and business sectors are data processing-intensive. As reflected in the S.P.A.C. report, above, more data-based sectors emerge as time goes on.

To date, particular sectors which have been regulated in regards to enhanced services and/or computer/information services have been regulated in terms of (a) who may provide which services to whom, and on what terms; and (b) setting of standards respecting the permissible disclosure of certain types of information handled in providing/utilizing a service.

(i) The Banking Sector

The most important Canadian sectoral regulation of enhanced services/ computer/information services has been in the Banking sector.

This is due to the facts that a) banking services markets in Canada have traditionally been dominated by a few powerful and well organized multinational-scale corporations; b) data processing and data records maintenance are the fundamental services provided by the banking industry; c) the class of data handled by banks is generically private, sensitive credit and debit (accounts) data; and d) banking services are increasingly coming to be internationally-provided services in an era of increased transborder investment, joint venture, and demographic movement.

The first aspect of banking regulation in such matters relates to impediments to the extraterritorial provision of a computer/information or enhanced service by a foreign data service provider for a bank or bank branch (Schedule "A" or Schedule "B"), which is situate in Canada.[10]

The principal provision is contained in subsection 157(4) of the Bank Act, S.C. 1980-81-82-83, c.40 as amended.

It states:

"(4) A bank shall maintain in Canada

(a) a record showing, for each customer of the bank on a daily basis, particulars of the transactions between the bank and that customer and the balance owing to or by the bank in respect of that customer, and

(b) all registers and other records referred to in subsection (1), and shall maintain and process in Canada any information or data relating to the preparation and maintenance of such records." (emphasis added)

As J. Fraser Mann (Computer Technology and the Law in Canada, 1987, Carswell) summarizes at 259,

> "The effect of subsection 157(4) is that all registers and records required or authorized to be kept by any bank must be maintained in Canada, and information or data relating to the preparation and maintenance of such records must be both maintained and processed in Canada".

Thus, in the first instance of processing, all data processing of bank records (required or authorized by S.155 of the Bank Act) must be carried out in Canada. However, by subsection 157(5) of the Act, "further processing" services may be provided for a bank in Canada, from a location outside of Canada, in regards to "copies or extracts" of data orginally processed in Canada. Where such copies or extracts are further processed, the Inspector of Banks must be informed, pursuant to subsection 157(6), and may forbid such foreign data processing if not in the "national interest".

Clearly, such foreign-located data processing services (ie: disembodied services) might be provided as transborder enhanced services, wherein the data processing service provider also provides the transport service (ie: an "online" configuration) or as foreign computer/information services wherein the Canadian-located bank accesses the foreign "batch data processing service" via public telecommunications services.[11] Both types of services are "covered" by the F.T.A., but the F.T.A. does not apply to non-conforming provisions of Canadian measures existing as at January 1, 1989, and so the above-mentioned provisions are not impugned by the F.T.A.

The rationale behind these restrictions is ostensibly to permit the Inspector of Banks to carry out his role in protecting the interests of depositors, shareholders and creditors. However, as Mann states at 260, it is possible that "such restrictions may reflect "extraneous" considerations such as the protection of a domestic data processing industry". This latter rationale is consistent with the fact that many exemptions to the application of subsection 157(4) have been granted by "Bank Activities Permission Orders" (pursuant to subsection 269(1) of the Bank Act) in respect of maintenance and processing of required records, outside of Canada. Although such exemptions might threaten the privacy of depositors, and threaten the interests of shareholders, depositors, and creditors, these exemptions have been allowed in regards to numerous "Schedule B" banks which are largely subsidiaries of foreign entities. It is submitted that the exemptions have been permitted by reason that the foreign processing of the small aggregate volume of accounts generated by these "Schedule B" banks (in contrast to the dominant "Schedule A" domestically-controlled banks) is not sufficient to threaten the Canadian data processing industry.

The above discussion, centering on Subsection 157(4) of the Bank Act relates to the extent to which banks situate in Canada may utilize outside, foreign-situated, (ie: disembodied) data processing services (as "enhanced" services or "stand alone computer/information" services) for in-house or inter-corporate processing of accounts.

In contradistinction, the following discussion centers on other provisions of the Bank Act which determine the extent to which Canadian law permits banks to utilize their own facilities to provide enhanced/computer/information services to customers, on a wholesale basis (ie: for resale) or on a retail basis (ie: directly to bank customers).

The first rule is that a "foreign bank" (ie: a foreign-located bank that is neither licenced as a Schedule "A" bank (ie: Canadian-controlled) or a Schedule "B" bank (ie: foreign-controlled) shall not, pursuant to subsection 302(1) of the Bank Act:

...(1)(a) undertake any banking business in Canada,

(b) maintain a branch in Canada for any purpose, or

(c) establish or maintain in Canada, or acquire in Canada for use in Canada, an automated teller machine, a remote service unit or a similar automated service or accept data from such a machine unit or service in Canada ...."

In immediately relevant terms, this means that no foreign entity may provide within or into Canada any banking service, directly or indirectly, by means of a computer/information service, or by means of an enhanced service.[12]

This is of great relevance insofar as various banking and non-banking entities in Canada and the U.S. (mostly consortia), have linked Automated Teller Machines ("A.T.M.") into enhanced communications networks to allow cardholder customers of other deposit-taking institutions to use such "A.T.M." for "banking" transactions. Clearly subsection 302(1) prohibits a foreign-located entity from delivering services to Canadian customers via such already established networks, unless this foreign-located entity is a licenced Canadian (Schedule "B") bank. Crawford and Falconbridge[13] indicate at p.930:

> "At the same time that these domestic networks are being organized, individual banks are forming associations between themselves and with large American networks so as to provide their customers with cash and balance information when they are in the areas served in the United States by the associated networks. The Bank Act appears to prevent totally reciprocal services being offered in Canada to American bank cardholders".
>
> (emphasis added)

As indicated above, the F.T.A. "covers" such enhanced services, but it does not "cover" non-conforming Canadian measures which were in place prior to January 1, 1989. Thus, the F.T.A. does not impugn subsection 302(1)(c) of the Bank Act, and therefore a foreign entity still must acquire a Canadian bank licence in order to provide "enhanced telecommunications network-based" banking services, on a wholesale or retail basis.[14]

It should also be noted that even where such a foreign entity acquires a Canadian bank licence, it is subject to paragraph 174(2)(j) of the Bank Act. This paragraph restricts Canadian banks from providing data processing services other than banking-related data processing services which are prescribed by the regulations to be services that a bank may provide in Canada. These regulations are the Banking Related Data Processing Services Regulations SOR/81-424 (May 28, 1981).

These regulations permit not only the retail-level data processing (ie: enhanced or computer) services that a bank has developed for its own use and that are an integral part of banking operations (eg: retail A.T.M. services and in-house clearing and settling of client accounts); these regulations also permit the wholesale-level provision of data processing services to other financial institutions (eg: advancing A.T.M. cash and balance figures on behalf of other financial institutions, or performing clearing and settling of accounts on behalf of other financial institutions, in respect of their banking clients).

In this context, it should also be noted that subsection 33(1) of the Competition Act (S.C. 1986, c.26)[15] makes an offence of the entering into of an agreement or arrangement by a bank with another bank with respect to the amount of any charge for a service, the kind of service to be provided to a customer or the persons for whom any service is to be provided. However, an exemption is provided for agreements or arrangements respecting the development and utilization of systems, or the utilization of common facilities in connection therewith.[16]

The 1986 Competition Act also makes the Director of Investigation and Research, thereunder, responsible for the administration of competition law respecting banks, whereas this responsibility used to be that of the Inspector of Banks.

The first and final question asked by a foreign entity wishing to provide banking-related data processing (enhanced or stand-alone computer) services in Canada, on behalf of its own banking business and as agent for other financial institutions then, is what are the requirements for acquiring a "Schedule B" bank licence.

The answer to this question is beyond the scope of this thesis, but the question raises a recent case which is important to an appreciation of the significance of the data processing regulations which regulate services provided by Schedule "A" and "B" banks, and the significance of subsection 302(1) of the Act which bars foreign banks from providing electronic services.

The relevant case is in the matter of the licencing of American Express, a U.S. "services company". The company does not operate as a bank in the U.S. Rather, its central business is the provision of retail credit card services, in relation to which it operates an enhanced telecommunications network and associated data processing services. American Express, although it is not a U.S. bank, provides such banking-related data processing services for various financial institutions in the U.S. It also provides investment services through subsidiaries (eg: Shearson Lehman Hutton Inc., a New York based brokerage firm), and travel services, insurance services, and merchandising services. In summary, it provides both "credit (financial) and commercial services", and the heart of its combined "commercial-financial" operation is its economy-lubricating credit card/electronic enhanced services network.

On November 21, 1988, the Canadian Cabinet announced it would grant a schedule "B" bank licence to American Express, which would permit the company to provide bank services in Canada, and also to provide banking-related data processing services in Canada for other financial institutions (as it does now in the U.S. via its existing networks). Reference is made to The Globe and Mail, Tuesday June 17, 1986, page B-11, "Automatic Tellers" in which the U.S. Supreme Court is reported to have allowed national banks in that country to make use of A.T.M. owned by other non-banking (ie: commercial) companies without violating branch-banking restrictions.

Indeed, an Amex Canada spokesman has been reported ("Amex deal would let banks into insurance", Financial Post, Friday, February 3, 1989, p. one) to have said the company would like to help build up the bank consortium-owned Interac automated teller machine network in Canada, in respect of which it would enjoy membership on becoming a schedule "B" bank.

On gaining such a bank licence, and access to this Canadian Payments system, American Express would be permitted to resell not only "banking-related data processing" enhanced network services, but it would be permitted to provide also, via the same network, those "non-banking, commercial data processing" enhanced network services permitted pursuant to the general deregulation of the financial services in Canada. Although a legal and policy analysis of federal deregulation of financial services is beyond the scope of this thesis, it is sufficient to state that reform legislation is expected to be tabled in Parliament this summer and that Canadian banks will not only be permitted to provide investment services through subsidiaries (as they are now), but they will also be permitted to provide insurance services. (See "Amex can enter insurance, travel", Financial Post, Thursday, May 25, 1989, p.3).

There was major concern on the part of existing Canadian Banks when it was announced that American Express would be granted a schedule "B" bank licence that a precedent would be set thereby which permitted Canadian banks to immediately provide insurance services and possibly even travel services and other commercial services (and related "commercial" enhanced network services) over and above mere investment services.

However, these fears have been somewhat allayed by the delayal of the awarding of the licence to American Express for one year, and by federal statements by Junior (federal) Finance Minister Gilles Loiselle to the effect that "Amex will have to run its worldwide travel business separate from its Canadian banking operation...." ("Amex Can Enter Insurance, Travel," Financial Post, Thursday, May 25, 1989, page 3)

The above case, set against the backdrop of other elements in this thesis, illustrates the following: (a) enhanced services networks generally, as they exist in Canada today, are dominated in terms of "policy significance" by the huge Canadian Payments Association-related electronic banking networks in place; (b) although permitted banking services are, as a policy matter, being expanded and diversified, the services permitted to be provided on banking-related networks are limited by "Banking Related Data Processing Services Regulations"; (c) U.S. entities, like American Express,

and perhaps other foreign entities will wish to create and provide or resell banking related data processing services in Canada, as provided via networks "owned" by the Canadian Payments Associated and/or by other foreign entities, and such permitted services will expand with expansion of permitted banking services into "commercial services" (eg: insurance services) pursuant to federal reform legislation and revised sectoral regulation in the banking sector; (d) American Express and perhaps other foreign "services companies" will wish to provide non-banking related commercial services via both banking-related and non-banking related enhanced communications networks, (eg: travel services; real estate services; insurance services; merchandising services), and the network-based provision of such services may come to be regulated sectorally, as in banking. The F.T.A. guarantees national treatment to U.S. entities in respect of particular sectoral regulation governing the electronic "enhanced network" provision of such services (Chapter Fourteen) and the F.T.A. diminishes the scope of reviewability of investment into Canada in respect of the establishment of such networks (Chapter Sixteen).[17] The G.A.T.T. may eventually extend similar national treatment to other non-U.S.-originated entities; (e) Foreign "services companies" with existing credit card and "service card" operations, and with worldwide operations in related services (eg: travel services; car-leasing services; investment and insurance services; retail merchandising services) will enjoy a distinct competitive advantage in these discrete services markets, and in the electronic marketing of these services on behalf of other companies, to the extent that they are permitted to provide such services via their own electronic enhanced networks, and also to the extent that providers are permitted to "bundle" the marketing of one service with others on the same network. This advantage is compounded with the kind of credit card/debit card service that a company like Amex could provide as a Schedule "B" bank;[18] (f) Potentially unfair market practices in the electronic enhanced-services-based provision of discretely-isolated commercial services (eg: airline booking services) could be regulated and restrictively delineated sectorally, as in the banking sector, but the "bundling" aspect

of such services, (and indeed other market practices) will likely be regulated pursuant to authorities which administrate competition laws. This has been the practice in the U.S., and will likely be the practice in Canada. (These matters are discussed briefly below in the discussion of competition law. As indicated above, the jurisdiction of the C.R.T.C. does not extend to cover enhanced services.)[19] Measures taken in Canada under the rubric of competition law, in relation to enhanced services must apply equally to U.S. entities under the F.T.A. Chapter Fourteen national treatment provisions.

(ii) Consumer Reporting Services

Consumer reporting legislation exists in every province in Canada. As J. Fraser Mann states at 256

> "This legislation is significant because it represents the only comprehensive set of controls governing the maintenance of data banks, either in computerized or printed form, by the private sector in Canada".

The provision of consumer reporting services is not per se the provision of enhanced or computer/information services. However, such services are almost by definition data handling and communication (disclosure) services, and the provisions covering the provision of such services are cognizant of the fact that a machine-recorded base of private data about individuals (consumers) has been privately compiled and is disclosed to third parties for profit. This genre of legislation addresses data handling practices, and reflects the privacy "rubric" of the domestic regulation of computer/information services.[20] It is important to note that, to the extent that any U.S. entity provides such computer/information-based services in Canada, or any similar "private data-handling" service which could be definitionally classified as an "enhanced service", a "computer service" or an "information service" within the meanings so assigned in Sectoral Annex 1404 C. of the F.T.A., the U.S. entity in

question providing those services is generally entitled to national treatment pursuant to Chapter Fourteen in the application of Canadian "measures" thereto. The important exception however is contained in Paragraph 1402(3)(a) of the F.T.A., which permits "different treatment" of foreign entities for "prudential, fiduciary ... or consumer protection reasons".

The significance of this discussion of regulation in consumer reporting services lies in the illustration of the significance of privacy regulation respecting large scale commercial data-handling operations. While some services sectors (such as the financal sectors) have already developed standards, regulation and jurisprudence in respect of privacy, confidentiality and fiduciary duty, most commercial sectors have no such history because they are only beginning to become large scale data-based sectors.[21] The point in all this is that one can expect more domestic privacy-oriented sectoral regulation, and/or jurisprudence to emerge with the emergence of more commercial data networks in Canada.

c) Competition Law

The purpose of the Canadian Bill C-91 Competition Act (Being part 2 of An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and The Banking Act and Other Acts in Consequence Thereof, 1st Sess, 33d Parl.(1986)[22] is stated in section 1.1 of the Act, as follows:

> "1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".
>
> (emphasis added)

As Bohdan S. Romaniuk and Hudson N. Janisch note ("Competition in Telecommunications: Who Polices the Transition?" (1986) Ottawa Law Review, p.p. 561-661, at 629), the mandate of the Director (of Investigation and Research) and of the Competition Tribunal is "to maintain and encourage competition in Canada". The mandate is circumscribed to end where regulation begins. This proposition is based on the 1985 Annual Report of the Tribunal, which states that many areas of the economy's commercial aspects (including competitive aspects) are subject to regulation, and that ....

> ....."Although such controls may restrict competition, if they are imposed pursuant to valid legislation they may provide a defence to charges under the Combines Investigation Act".[23]

The following points follow from this proposition: (a) as telecommunications transport markets become less regulated in scope, so will the principal mandate of the Competition Tribunal over provision of such transport services expand in scope; (b) since enhanced and computer/information services are outside the scope of the C.R.T.C. (ie: being "non-Railway Act Company" services, except where provided by a facilities-based carrier), the Director and Competition Tribunal enjoy the principal mandate, including a positive duty to "maintain and encourage competition in Canada" in these commercial activities; (c) only the banking sector in Canada has salient "measures" affecting limitations on market entry into certain enhanced/computer/information services; thus, outside of these "measures" the Director and Competition Tribunal enjoy the principal mandate to "maintain and encourage competition in Canada" in regards to the provision of such services; and (d) it is crucial to recall that the function of competition law is to encourage fair competition, while in contrast, the function of regulation is to prescribe limits to competition.

It should be noted that even where the regulation of certain commercial activities pertaining to competition fall squarely within the mandate of a sectoral regulatory body, the Office of the Director will, pursuant to subsection 97(1) of the Act, assume an intervenors role ex officio, in

proceedings which may affect the scope or level of competition "maintained or encouraged" by that regulatory body.[24] As Romaniuk and Janisch indicate, the Director has intervened extensively in C.R.T.C. hearings:

> "Among the most important regulatory proceedings at which the Director has made representations are the following: (a) the 1976 C.N.C.P. application for (limited) system interconnection with Bell Canada (b) the Challenge Communications case; (c) the hearing dealing with Telesat Canada's proposed connection agreement with T.C.T.S.; (d) the Bell Canada terminal interconnection hearings; (e) the Bell Canada and B.C. Tel applications for approval of rate increases for T.C.T.S. services; (f) Phase III of the C.R.T.C. cost inquiry; (g) the Bell Canada corporate reorganization; (h) the radio common carrier interconnection decision; (i) the interexchange competition proceedings; (j) the structural separation hearings with respect to multiline and data terminal equipment; (k) the enhanced services decision (l) a host of Bell Canada and provincial telephone company rate increase applications, as well as (m) a number of other proceedings involving both federal and provincial telecommunications service providers".[25]
>
> (emphasis added)

The major point here is that the Director has demonstrated a consistent history of intervening in C.R.T.C. competition policy-related process in matters of telecommunications transport services, where neither the Director nor the Competition Tribunal enjoyed a principal mandate. Thus, it is submitted that this history of intervention will continue in respect of competition policy-related processes in the non-telecommunications sectoral regulation of enhanced/computer/information services (such as in the banking sector regulation). Indeed, the Director and the Competition Tribunal have been given a general legislative signal in favour of transforming what used to be a secondary, "intervenors role" in the regulatory process, into a primary mandate over "maintaining and encouraging competition in Canada" even in regards to heavily regulated sectors like the Banking sector. As indicated above, the new Competition Act effectively transfers the mandate for administration of competition law in regards to banks from the Inspector General of Banks to the Competition Act's Director. Thus, the Director assumes principal responsibility for the administration of competition law (ie: for encouraging fair competition) in banking-related data processing,

as well as for encouraging fair competition in relation to those non-banking (eg: insurance, travel, real estate) commercial sectors which have thus far, avoided sectoral regulation respecting the provision of such commercial services by means of enhanced/computer/information services.

It remains to be discussed, the operation of the Competition Act, and the types of enhanced/computer/information services activities that might be the subject of review.[26]

Bill C-91, being An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof, 1986 is comprised of part 1, known as the Competition Tribunal Act of 1986, and of part 2, known as the Competition Act of 1986.

Part 1 abolishes the Restrictive Trade Practices Commission (R.T.P.C.), and establishes the quasi-judicial Competition Tribunal which enjoys only a civil law (versus criminal law) field of jurisdiction.
The Competition Tribunal's civil jurisdiction permits the Tribunal (pursuant to part 2), to adjudicate and enforce the provisions relating to mergers, to review and rule on a number of identifiable restrictive trade practices formerly reviewable by the R.T.P.C., and to review and rule on a new class of "anticompetitive acts" which fall into the statutory category "abuse of dominant position". The role of the Director of Investigation and Research remains investigative (s.5) while the Tribunal's role is adjudicative.

In particular, one very relevant enumerated "anti-competitive act" which would constitute the prohibited "abuse of dominant position" is found in subsection 50(e) of the Competition Act, which reads:

> "(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of witholding the facilities or resources from a market",

This provision, in combination with section 51 would permit the Competition Tribunal to make an order prohibiting such a practice (on application by the Director).

This provision would cover the hypothetical case in which a company such as American Express operates an enhanced services network, providing a

combination of commercial (eg: travel booking; merchandising; insurance; investment services; car rental booking) and perhaps financial (eg: debit card; credit card;) services, on behalf of its own subsidiaries and on behalf of other commercial and financial service providers. If such network facilities or services were denied to particular competitor-suppliers, or users, subsection 50(e) might apply to prohibit such denial.[27]

As indicated in a recent Financial Post article (Banks' insurance moves go against law; Financial Post, Tuesday, June 6, 1989 at p.3):

> "While the banks and insurance firms feud over who will sell insurance in Canada, a five-year research program by Massachusetts Institute of Technology proclaims that the real winner will be the industry with the best electronic ties to its customers".
>
> (emphasis added)

Thus the power of the Competition Tribunal to order that an enhanced services network provider supply network services to competing service providers (be they in the nature of financial network services, commercial services, or combinations thereof) is a power that is fundamentally necessary to the competitive operation of such services sectors.

Other powers found in the Competition Act are also relevant.

By section 49 of the Act, if American Express, in providing its enhanced commercial and/or financial network services, was to provide similar enhanced services for others, and was to practice (a) "exclusive dealing", (b) "market restriction" or (c) "tied selling", in the provision of its services, the Competition Tribunal might make an order prohibiting such practices. These practices, respectively, constitute practices whereby a supplier of a service (eg: Amex) as a condition of supplying the service to a customer, requires that customer (a) to deal exclusively with the supplier; (b) to restrict himself from supplying the supplied product in certain markets, or (c) to "tie" himself to end-supplying only Amex-supplied services.

These are examples of Competition Act provisions which illustrate the scope of authority the Competition Act tribunal might exercise in avoiding the kind of anti-competitive behaviour that might be indulged by a

combination commercial services provider/financial services provider like American Express, which delivers these services via enhanced networks and which will (presumably) soon provide such network services in Canada.

Other relevant Competition Act sections include section 47 ("refusal to deal"), section 52 ("delivered pricing") and sections 32 and 32.1, respectively ("conspiracy" and "foreign directives giving effect to a conspiracy").

In respect of disembodied (ie: foreign territory-originated) enhanced/computer/information services, section 56 of the Competition Act is significant insofar as it provides that where a foreign supplier has refused to supply a service or otherwise discriminated in the supply of a service to a party in Canada by reason of exertion by another party of buying power on the supplier, the Competition Tribunal may remedy this unfair trade practice. (ie: section 56: "Refusal to suppy by foreign supplier".) In view of subsection 302(1) of the Bank Act, and the Banking-Related Data Processing Regulations, this (Section 56) provision is not relevant in regards to the foreign "disembodied provision" of enhanced network-based banking services (which are effectively prohibited thereby.) Nonetheless, section 56 is relevant in regards to the U.S.-based "disembodied provision" of enhanced network-based commercial (non-banking) services. It will be recalled that Paragraph 3(1)(f) of Sectoral Annex 1404 C. of the F.T.A. provides that the national treatment principle shall apply to measures relating to "the movement of information across the borders, and access to data bases or related information stored, processed or otherwise held within the territory of a Party".

Moreover, no existing Canadian "non-banking", commercial sector regulation has thus far prohibited the provision of such "disembodied services", and so any competition law "measure" ordered after January 1, 1989 which restricts the provision of a disembodied enhanced/computer/information service into Canada will set a precedent, and will be reviewable by the Canada-U.S. Trade Commission. In fact, any Order made by the Competition Tribunal which prohibits the provision of an enhanced/computer/information service wholly within Canada by a U.S. service provider will also be reviewable by the Trade Commission.

However, should any such competition law "measures" in respect of any of the above matters be reviewed by the Canada-U.S. Trade Commission, and be submitted to binding arbitration pursuant to the terms of the F.T.A., then it is feasible that a decision in such arbitration may be overridden by the Competition Tribunal pursuant to Section 54 of the Competition Act. Section 54 reads as follows:

"FOREIGN JUDGMENTS, ETC.

54. Where, on application by the Director, the Tribunal finds that

(a) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada, would

(i) adversely affect competition in Canada,
(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency,
(iii) adversely affect the foreign trade of Canada without compensating advantages, or
(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages

the Tribunal may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or
(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs (b)(i) to (iv). 1986, c. 26, s. 47."

(d) Conclusions Respecting Chapter 3 of Part V

Enhanced network services and computer/information services are regulated under the telecommunications regime only to the extent that they

are provided by facilities-based common carriers, or to the extent that they are subject to review for the purposes of classification as a basic transport service or as an enhanced network service. Other measures outside the telecommunications regime regulate market activities in the provision of enhanced network services and computer/information services within and into Canada. The two major areas of law in Canada governing the domestic and foreign provision of such services within or into Canada are banking law (ie: regulation of banking-related services) and competition law (ie: regulation of competitive practices in favour of encouraging fair competition in the provision of services). A third, limited area of Canadian provincial law (ie: regulation of consumer reporting services) regulates a limited information services sector, and saliently reveals the privacy aspect of regulation of information services. It is the first two areas of law (banking and competition) that we are most concerned with, by reason they do and will continue to govern growth and competition in the use of network-based and network-related provision of financial and commercial services.

Existing banking laws effectively prohibit the records-related utilization of data processing services provided from a foreign territory, without distinction as to whether such services are provided as enhanced network services (ie: network-based) or as remote computer services (ie: network-related). This prohibition is effective by subsection 157(4) of the Bank Act. Moreover, a foreign entity may not provide or utilize in Canada an electronic automated banking-related service unit unless that foreign entity is resident in Canada as a "Schedule B" bank. This prohibition is effective by subsection 302(1) of the Bank Act. Finally, even if a foreign entity is established as a resident bank in Canada, it may not provide electronic banking-related data processing services (be they enhanced, network-based services or computer, network-related services) on behalf of other financial institutions (customers), or to end-user banking clients (clients), unless such services are prescribed in the Banking Related Data Processing Services Regulations.

These said regulations permit such a foreign entity, operating as a

"Schedule B" bank to provide most existing enhanced, network-based banking services, and most existing computer, network-related banking services to their own banking clients, and to the banking clients of other financial institutions on behalf of those other institutions.

Due to imminent changes in the Bank Act and banking regulations, such foreign entities operating as "Schedule B" banks in Canada will soon be permitted to offer commercial services in the nature of insurance services, by means of enhanced network-based systems or by means of computer, network-related services. Such enhanced network-based insurance services might be permitted to service insurance (ie: commercial versus banking) clients of the bank, as well as to service the clients of other insurance companies on behalf of which the bank provides the enhanced network or computer service.

It remains unclear, the extent to which a Canadian bank ("Schedule A" or "Schedule B") will be permitted to offer other commercial services through subsidiaries (eg: travel services;) via enhanced network-based systems which also provide financial (ie: banking-related) services. There is no existing sectoral regulation which would prohibit a commercial (ie: non-banking) subsidiary of a bank from establishing a different, separate enhanced network-based or computer network-related system which would provide only enhanced commercial network services, but there are clearly greater advantages and economies of scale in providing as a "package", many financial and commercial services on the existing enhanced banking networks in Canada, which already enjoy great market penetration. Moreover, where a foreign entity, such as American Express, operates a world wide credit-card/debit card service system, combined with subsidiaries in various commercial service sectors (eg: investment; travel; merchandising; insurance; car-leasing), such a foreign entity enjoys a great incentive to utilize, and advantage in utilizing existing high-penetration banking-related/ commercial enhanced network systems in countries throughout the world. Such a worldwide system would facilitate the domination of worldwide service markets geared towards domestic consumer use and use by foreign travellers in a given country.

Pursuant to the Competition Act and the Competition Tribunal Act, it is the Director and Tribunal created thereunder which will oversee, in largest part, the regulation of the provision of financial services, commercial services, and combinations thereof via enhanced network systems or computer network-related systems. In particular, these authorities are permitted to prohibit anti-competitive activities which might arise by reason of the "dominant position" of a network service provider, whether the "dominant position" derives from dominance in one (eg: worldwide credit card services) market or in a combination (eg: travel, investment; merchandising; insurance; credit card, car leasing) of markets.

The F.T.A. provides that the existing measures described above are not impugnable. Nonetheless, future measures, including specific decisions made under any of these "measures" which relate to a U.S. entity must be accorded "national treatment", as if that entity were indigenous to Canada.

It should be noted that it has been reported that the American Express company, and U.S. Trade Administration spokespersons have indicated hope that the Canada-U.S. F.T.A. will serve as a model for the G.A.T.T. in the area of services.[28]

Although the above scenario depicts an environment in which U.S. financial and commercial services will be permitted to encroach and dominate in foreign markets, Canada retains some important legislative and regulatory safeguards. By section 54 of the Competition Act, the Competition Tribunal may order that a judgment given by an arbitration tribunal pursuant to the F.T.A. shall not be implemented in Canada, where such judgment would adversely affect competition in Canada.[29]

Footnotes: Part V

1. It is significant to note that the Parties to the F.T.A. referred to international negotiations respecting standards only in the trade Forum of the G.A.T.T., as opposed to another international non-trade forum which is entertaining such issues, such as the Intergovernmental Bureau for Informatics. ("I.B.I.")

2. Reference Article 501 of the F.T.A.
For a complete overview of the taxation aspects of computer transactions, within Canada and as between Canadians and foreign entities, reference Mann, Fraser J. Computer Technology and the Law in Canada, Carswell, 1987. In chapter 20 thereof, Mann discusses the Canadian tax aspects of the transfer of computer products. In chapter 21 are discussed the tax aspects of the servicing and development of computer products. In these discussions, "products" include hardware and software.

3. It has been widely reported that Canada and the U.S.A. continue to negotiate in the field of subsidies. Moreover, these negotiations coincide with negotiations in the G.A.T.T. Uruguay Round. Reference "Canada Tables Plan to Control Huge Trade - Distorting Subsidies," The Financial Post, Thursday, June 29, 1989, in which it is reported that a new "Canadian initiative represents the first effort in the Uruguay Round of trade talks to put together a comprehensive proposal for halting the subsidies race and reducing tensions created by the action taken to counter subsidies." This initiative hopes to extend the scope of commitments contained in the G.A.T.T.'s existing subsidies code (which is reported to have "proved inadequate," I.B.I.D.), by enforcing the curtailment of such subsidies by disciplining the use of countervailing measures, revising the dispute settlement procedure, and establishing a standing panel to monitor compliance with the rules.

4. For a broad exposition of such issues, Reference Mann, op. cit., (F.N. 2, above), at p.39; reference also Millard, Christopher J., Legal Protection of Computer Programs and Data, Carswell, Toronto, 1985.

5. Reference amendments to the Copyright Act, R.S.C. 1970, C-30, provided for in An Act to Amend the Copyright Act and to amend Other Acts in consequence thereof, S.C., 1988, C-15.

6. Article 2012 of the F.T.A. reads in part, as follows:

"Cultural Industry means an enterprise engaged in any of the following activities:

. . .

a) the publication, distribution, or sale of books magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing."

(emphasis added)

7. Reference "Foreign Direct Investment in the Canadian Electronic Intelligence "Super-Sector": Cultural Protectionism Versus Technology Capital Pragmatics Under the Federal Investment Review Agency and Investment Canada", a term paper submitted to Professor J.G. Castel, Institute of Comparative Law, McGill University, in partial fulfilment of the degree of Master of Laws, 1985; by Frits, Paul K.

   It is also an interesting notion that the telecommunications infrastructure of a nation, as its "information highway" is a "cultural industry" in its entirety. Although the 1979 "Clyne Commission" did not so identify the telecommunications transport nor the informatics industry, it did (at p.57) recognize a reference by the Science Council of Canada to the possible impact thereof on Canadian culture and society, and it did register the implications for Canadian sovereignty generally. Reference Telecommunications and Canada: Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, Minister of Supply and Services Canada, 1979, at p.57.

8. Reference the Broadcasting Act, R.S.C. 1970 as am. S. 2, in which "broadcasting undertaking" includes a "broadcasting receiving undertaking." The cable network has been judicially characterized as an extended "receiving undertaking." See "Re Public Utilities Commission and Victoria Cablevision Ltd. (1965), 51 DLR, (2d), 716. Note that while Canada has traditionally characterized cable as a legally non-carrier activity, the U.S. law has consistently characterized cable as a distinct carrier medium, as opposed to a broadcasting medium, pursuant to the second Part of the U.S. Communications Act of 1934, codified in 47 U.S.C.

9. Reference F.N. 2 in Part II of this thesis.

10. Essentially, a "Schedule A" bank is one which is Canadian controlled. A "Schedule B" is one which is foreign-controlled. For a comprehensive discussion as to the differential treatment of these two classes of banks, reference Crawford and Falconbridge: Banking and Bills of Exchange, eighth ed., Vol. 1, Canada Law Book, 1986 at 720.

11. Reference discussion of multinational enhanced network services such as S.W.I.F.T., and S.I.T.A. in F.N. 7 of Part I of this Thesis. Also, reference text relating to this footnote in Part I, chapter 2.

12. Reference Crawford and Falconbridge: Banking and Bills of Exchange, op. cit. at F.N. 10, above, at p. 711.

13. Op. cit. at F.N. 10, above, at p. 930.

14. It is significant to note that Annex 1408 "Services Covered by this Chapter" does not include "Banking services", but does include "Telecommunications-network-based enhanced services", with the apparent result that a bank which delivers its banking services by means of such "network-based enhanced services", if affected by domestic "measures" affecting such "network-based enhanced services", is subject to the

treatment of those measures as determined by the F.T.A. As indicated above, the F.T.A. does not impugn existing (pre January 1, 1989) measures. Moreover, Sub-Article 4(2) of Annex 1404 C. provides that Canada or the U.S.A. may introduce new measures related to the provision of enhanced services, provided that such measures are consistent with the Chapter Fourteen principle of National Treatment.

15. An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof is the long title.

16. Section 50 of the Competition Act repeals s. 309 of the Bank Act, and s. 33 of the Competition Act re-establishes the same provision.

17. As indicated in F.N. 14, above, Article 4 of Annex 1404 C. provides that new measures may be introduced by Canada or the U.S.A. in the regulation of an enhanced service, but that such measures must be consistent with the principle of national treatment. The glaring question, which is impossible to answer without any precedent, is whether Article 4 permits a provider/operator of the enhanced network service who is not licenced to provide the underlying commercial or financial service, to act as electronic distributor for those entities which are so licenced. For example, American Express is permitted in the U.S.A. to provide credit services via its own enhanced network service on behalf of various banks, even though it is itself not a licenced bank in the U.S.A. The question is whether Article 4 would permit American Express to provide similar services in Canada, without a bank licence, on behalf of licenced banks. The answer appears to be that, by Article 4, if an existing, or a post-January 1, 1989 Canadian measure restricts such activity as regards Canadians, it may also do the same in regards to U.S. entities.

18. Reference "Banks insurance moves go against law: Finance panel", The Financial Post, Tuesday, June 6, 1989 at p.3. In this article, Hyman Soloman states as follows:

"While the banks and insurance firms feud over who will sell insurance in Canada, a five-year research program by Massachusetts Institute of Technology proclaims that the real winner will be the industry with the best electronic ties to its customers.

Results of the M.I.T. study are being discussed at this week's Insurance Accounting & Systems Association meeting in Toronto."

19. Reference the anti-trust matters referred to in F.N. 27, below.

20. For a comprehensive documentation of the relevant regulations, reference Mann, op. cit. at F.N. 2, above, at p. 250.

21. For a comprehensive documentation of privacy regulation generally, reference Mann, op. cit. at F.N. 2. In chapter 10 therein, Mann discusses privacy issues and measures respecting the public sector. In chapter 11 therein, Mann discusses privacy issues and measures

respecting the private sector. Privacy issues and measures relating to computer-readable data are also known as "data protection" issues and measures.

Note that "Credit bureau services" are "covered" F.T.A. services (per Annex 1408), but note also that "national treatment" may be denied a U.S. entity wishing to provide such a service on the grounds of "prudential, fiduciary ... or consumer protection reasons", per Sub-Article 1402(3) of the F.T.A.

22. The Act was proclaimed in force June 19, 1986. Its citation is S.C. 1986, c. 26.

23. "Canada, Director of Investigation and Research, Combines Investigation Act, Annual Report" (Ottawa; Minister of Supply and Services, 31 March 1985) at p. 1.

24. Subsection 97(1) relates to federal regulatory authorities. Subsection 97(1) awards the right to intervene to the Office of the Director in regards to provincial regulatory activities. This could be a significant federal power in the process of the deregulation of what are now provincial telecommunications matters.

25. Bohdan, R.S. and Janisch, H.N., "Competition in Telecommunications: Who Polices the Transition?" (1986) Ottaw Law Review, p.p. 561-661, at 630.

26. It should be noted that the Competition Act not only replaces and amends the Combines Investigation Act, and further modifies the regulatory approach to selected trade practices, but most importantly, for the purposes of this thesis, it extends the application of that Act to services for the first time. Reference Addy, George N., and Vanveen, William L., Competition Law Service, Gowling and Henderson, Barristers and Solicitors.

27. "Abuse of dominant position" is a head of "anti-competitive acts" which corresponds to the U.S. head of "unlawful exercise of monopoly power". Such "unlawful exercise" is unlawful to the extent that it reduces competition in a related industry or that it is predatory in nature. Reference Saunders, Derek, "The Antitrust Implications of Computer Reservation Systems (C.R.S.'s)", Journal of Air Law and Commerce, Vol. 51, 1987, p. 157, at p. 179, in which Mr. Saunders discusses Section 2 of the Sherman Antitrust Act, 15 U.S.C. 1381 (1980) and the offence thereunder of "monopolizing ... trade or commerce...". Of particular interest are the discussions of "system bias" at p. 180, and "customer selection and the essential facility" doctrine at 184. With regards to the latter, Saunders states, "The premise of the doctrine is that when a vertically integrated monopolist controls a nonduplicable resource, (it is sufficient if duplication of the facility would be economically infeasible ...) at one level that is essential to competition in a second level, it must offer the resource to all on the same terms: Hecht v. Pro-Football, Inc., 470 F. 2d 982, 992 (D.C. Cir. 1977)."

28. Reference "U.S. Backer of Free Trade Pact Argues Against More Such Deals" The Toronto Star, Thursday, May 18, 1989.
Also, "The Bilateral Agenda (2)", The Globe and Mail, Friday, January 20, 1989, in which James Baker, President Bush's new Secretary of State is quoted as having told a U.S. Senate committee, "There are geopolitical implications that go far beyond the economic significance of this agreement. The United States - Canada agreement represents a signal success in a strategy designed to move all nations toward a more efficient trading system."

29. The distinction between Competition law measures and other (eg: privacy; sectoral regulation) measures which complicate foreign investment or foreign commercial presence in Canada must be explained as an important distinction. Competition law measures must, in order to avoid being impugned as discriminatory and deviant from the principle of "national treatment", be seen as measures which promote fair competition in otherwise open (ie: unregulated) markets, and such measures do, by nature bear legitimacy as such, by purporting to promote "prudential, or consumer" interests, as the F.T.A. puts it. (Annex 1404 C.). On the other hand, privacy measures and sectoral regulation have traditionally been attacked by U.S. proponents as vague frameworks with arbitrary procedures and scopes of jurisdiction behind which discriminatory non-tariff barriers are created by way of administrative or quasi-judicial decisions. In the international arena, various authorities have wrestled with the problem of trying to establish consensus with respect to what constitutes a legitimate domestic measure which may impede international trade/transfer in enhanced network/computer/information services, and what constitutes an "illegitimate" non-tariff barrier. In particular the Organization for Economic Cooperation and Development has seized itself most effectively, in the multilateral arena, of this broad problem. Evidence suggests that where the prior approach of the O.E.C.D. has been to establish non-binding agreements which legitimize certain generic domestic barriers (such as Guidelines Governing The Protection of Privacy and Transborder Flows of Personal Data, Paris, September 23, 1980), the new approach is to establish non-binding agreements which will promote multilateral and bilateral trade agreements, on the ground that enhanced network/computer/information services should be traded and transferred freely across borders (reference O.E.C.D. Declaration on Transborder Data Flows April 11, 1985).

CONCLUSIONS

From a reading of this Thesis, it is apparent that telecommunications transport, enhanced network, and computer/information services and activities collectively constitute one interrelated market, and one interrelated field of international trade and investment. This field has come to be known in some trade circles as the "information economy", but it has profound social aspects in the sense that regions and demographic classes may be "information and technology rich" or "information and technology poor". The "information economy" is based on automated information technologies.

To date, this complicated field has been regulated by domestic authorities in various countries, with an eye to the hybrid social and economic nature of its complex of telecommunications transport and machine-readable information resources. Simply put, the monopoly or near-monopoly structure respecting telecommunications transport resources has been sufficient to ensure State control over the policies respecting the rate of competition in the diffusion and utilization of information networks, information technologies and thus, information trade and transfer in the economy. Other policies have ensured domestic versus foreign proprietary control.

A radical change in the ability of, and indeed the desire of many States, including Canada and the U.S.A., to continue with the monopoly paradigm, or even continue with a stringent regulatory regime over competitive provision and utilization of this complex of resources, has diminished considerably. Technological determinism (with accelerated diffusion of integrated transport and "terminal device" technologies), new national industrial strategies based on "technology capital" development, and a growing internationalization and interdependence of service economies, particularly in the developed western world and Japan, have contributed to this radical policy change. In particular the major agent of change is the U.S.A., which has been receding in its competitive manufacturing position

relative to Japan and West Germany, and which has been reorienting industrial strategy towards the underlying information - intensive "services-based" economy, the intangible elements of which are internationally tradable within, and into foreign territories by means of telecommunications transport, enhanced network, and computer/information services. It is to this end that the U.S.A. has adopted as a matter of domestic industrial policy, an international trade policy that favours multilateral and bilateral free trade instruments, towards the implementation of free trade and investment in services generally, and in the field of telecommunications transport/enhanced network/computer/ information services, particularly. The Canada - U.S.A. Free Trade Agreement is the first solid example of the implementation of this international trade policy, the first solid example of a comprehensive international trade agreement in services, and the first superpower move aimed at avoiding the global trend towards protectionism on the respective parts of emerging "pacific rim", European Economic Community and North American "trading blocs". To the extent that Canada is perceived internationally to be a champion of the interests of developing nations, the F.T.A. is also a signal to that constituency that "hard" legal international agreements in trade matters, including the controversial area of trade in services, may coincide with domestic policies which perpetuate domestic economic growth and development, and which are simultaneously sensitive to social considerations.

Such a "signal", may be erroneous, in the sense that the F.T.A. represents only part of the implementation of a new Canadian environment in which foreign trade and investment in these "tradeable services" is liberalized. The other aspect of such implementation, is constituted of the domestic Canadian changes in regulatory environment, legal framework, and executive policy that will determine the rate and scope of competition to be developed in the provision and utilization (ie: end-use provision, or resale) of such services. These domestic changes, and particularly changes in telecommunications regulation have given a new, laissez-faire meaning to "national treatment".

With regards to "national treatment" and the Canada - U.S. situation, the said Canadian domestic changes have been most favourable to the liberalization of markets for foreign commercial presence. This has been revealed in the discussion in this Thesis of the pre - F.T.A. executive and regulatory developments toward liberalization of telecommunications transport markets, and enhanced network services.

In particular, it is enhanced network services, and computer/information services which form the major, central "matter" to be specifically "covered" by the F.T.A. Specifically, the F.T.A. requires that liberal access to telecommunications transport services and facilities must be maintained for the subsequent provision of enhanced/computer/information services, and that such "liberal access" be maintained to the extent that access was permitted as at January 1, 1989.

In fact, the actual provision of enhanced network services is generally not regulated by domestic telecommunications regulatory authorities, and the major questions in the telecommunications sphere are, first, what distinguishes an enhanced network service from a transport service, and secondly, does "national treatment" mean "federal treatment" or "provincial treatment". The answer to the first question is not an answer, but an observation that the issue will continue to exacerbate federal-provincial tensions over jurisdiction and competition issues, and that the courts and the Canada-U.S. Free Trade Commission will be required to intervene increasingly to resolve disputes between federal, provincial and U.S. authorities.

The answer to the second question is that "national treatment" probably means "federal treatment" because exclusive jurisdiction respecting telecommunications activities are probably exclusively federal, in Canada.

Returning to the first question, it must be noted that the terms of the F.T.A. may feasibly be interpreted to "cover" (ie: require the domestic status quo, and national treatment) in respect of the reselling of services-based transport services for pure transport purposes, and they definitely "cover" liberalization in terminal device attachment, private line leasing and the resale of services-based transport services for the

purpose of the provision of enhanced network services.

The policy/legal confusion over the distinction between enhanced and transport services, and the possibility that the F.T.A. "covers" resale of transport services for the purposes of providing "pure" transport services, creates a situation wherein the F.T.A. dispute resolution procedures will probably permit policy input by the U.S.A. into the national issue of competition in resale and sharing of transport services for the purpose of provision of pure transport services. This will lead to disruption in provincial "liberalization" agendas, and possibly to disruption in even the federal regulator's agenda for competition in the monopoly voice transport services. The Canadian Executive (ie: Cabinet) has already furthered such disruption by interceding in the "Call-Net" case.

The combination of an increase in services-based transport services competition, and the threat of the demise of the monopoly in voice transport services could feasibly result in across-the board facilities-based transport competition, and thereby, result in inefficient utilization of Canadian networks, reductions in the quality of universal public transport service, and subscriber drop-off as local subscription prices increase. Moreover, as domestically competitive Canadian facilities-based carriers, (and the overseas carrier, teleglobe) attempt to target foreign markets, and compete abroad, so will pressures build for foreign facilities-based carriers to compete in Canada, a development which might threaten Canadian sovereignty, particularly at a time when fibre optics transport technologies are transforming carrier networks into a video-capable "cultural" medium.

With regards to the issue of foreign direct investment, the F.T.A. provides for a diminished scope for review of investments into Canada, (even beyond the 1986 Investment Canada measures), but only in regards to investment in non-facilities based (Type 2) carrier undertakings. Foreign investment in Type 1, facilities-based carriers, is limited to 20% foreign control. Thus, investment in an enhanced services provision business is unreviewable to a greater extent than before. With regard to foreign investments in a commercial services business which underlies the enhanced network service business, (eg: retail merchandising, travel booking), there

is less scope for reviewability as well, by reason the F.T.A. requires a general change in the Investment Canada regime which applies to all sectors, and which changes seem to be required to have operation with regards to other foreign investors as well as U.S. investors.

With regards to the underlying services industries whose services might be distributed through enhanced network or basic telecommunications transport systems, these services industries must be distinguished from a separate industry which might be termed the "electronic services distribution industry" and which would be constituted of entities such as American Express Inc., which, although not a licenced bank in the U.S., does provide credit card and other banking services on behalf of "customer" licenced banks in the U.S. through its own enhanced network system.

The first question in this regard is whether the F.T.A. requires Canada to permit such activities to be carried out by a network owner/operator even though that owner/operator is not licenced domestically in the field of services in respect of which he electronically distributes or transacts on behalf of others who are so licenced. The answer to this question is, "national treatment" permits Canada to exercise existing laws that require the foreign entity to be so licenced in order to access an existing network (eg: existing bank networks) for the provision of such services, and that Annex 1404 C. permits Canada to pass new measures requiring a foreign entity to be so licenced prior to establishing a new network, provided that domestic entities also be subject to the requirement.

The second question in respect of Canadian measures affecting the provision of enhanced network or computer/information services through the underlying services industries, is what existing measures presently operate, which discriminate against the foreign provision of such services within or into Canada, and what future measures are impugnable?

Chapter three of Part V of this thesis illustrates existing banking provisions which so discriminate, but which are not impugnable because they are pre-January 1, 1989 provisions. Future measures which discriminate, which would not be impugnable are of the type found in the regulation of consumer reporting services which relate to privacy, prudential, fiduciary

or other consumer concerns. Moreover, Canadian competition law provisions are in place which regulate business practices in the hope of encouraging fair competition. If a U.S. entity was to allege discriminatory treatment on the basis of the invocation of competition law measures, it would be required to substantiate its claim in the F.T.A. dispute resolution process. It must be noted that Canadian competition law authorities are empowered to overrule foreign judgements, (and by extension F.T.A. dispute resolutions) which they deem to be anti-competitive.

By way of final comment in these conclusions, it should be noted that it remains to be seen whether this competition law power may be sufficient to rescue Canadian interests from the negative side effects of increased U.S. commercial presence in the enhanced services markets (such as corporate concentration and foreign control) and in the services-based transport markets (such as inefficient network utilization, diminished universality and quality of public service). It is feasible that these F.T.A. provisions may be implemented in a multilateral forum, with similar legislative safeguards in other signatory states, with the eventual result that Canada, and her lesser trading partners will become branch plants to foreign superpower, technology-rich services distributors.

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