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Telecom Notice of Consultation CRTC 2010-43

Obligation to serve and other matters

Further process regarding legal opinions

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SUBMISSION BY

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Introduction

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) is filing this submission on behalf of its client, OpenMedia.ca (OM), to present its views on the legal arguments expressed respectively by Arnold & Porter LLP[1] and Dr. Barbara A. Cherry[2] with respect to the Commission's statutory capacity to ensure all Canadians receive access to broadband services.[3] We conclude that the *Telecommunications Act*[4] enshrines the need for universal access to telecommunications services in its policy objectives and provides the CRTC with broad discretionary powers to achieve this objective. Within this broad set of powers, the CRTC has a number of statutory tools at its disposal for ensuring universal access to broadband, should it choose to exercise them.

2. Indeed, the obligation to serve has a long and distinguished history in common law, irrespective of the Commission's statutory powers. As noted by Dr. Cherry in her opinion, the 'monopoly' or competitive aspect of the common law obligation to serve has been misunderstood and its impact overstated. The underlying principle animating the common law rule is that those who undertake to provide essential services should do so universally and without discrimination. In CIPPIC's view, this principle survives where a competitive environment fails to ensure Canadians access to basic and essential services.

3. Far from limiting this common law rule, the Act serves to expand the power of the CRTC to ensure that universal access is achieved through regulatory measures. While the specific question of whether and to what extent the CRTC *should* impose this obligation is one of fact, left to be determined in TNC CRTC 2010-43, its statutory authority to do so is broader and more varied in scope than that provided at common law. The Act empowers the Commission to carry out its policy objectives by numerous industry wide solutions not available at common law.

4. CIPPIC concludes, then, that the Commission has ample jurisdiction and varied statutory tools at its disposal should it decide that universal broadband access is necessary to achieve this its policy objectives. In support of this, CIPPIC argues as follows:

(a) the Act confers jurisdiction on the CRTC to impose an obligation to provide broadband services as long as such powers are exercised in a manner that is reasonable in light of the competing interests involved;

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[1] M.H. Ryan, *Memorandum of Opinion to Bell Canada regarding TNC 2010-43 – Obligation to Serve*, April 26, 2010 [the Porter opinion].
[2] B.A. Cherry, *Legal Opinion to PIAC regarding TNC CRTC 2010-43 – Obligation to Serve*, June 15, 2010 [the Cherry opinion].
[3] J. Macri, *Letter to interested Parties in TNC CRTC 2010-43 Re: Further process regarding legal opinion*, July 27, 2010.
[4] *Telecommunications Act*, S.C. 1993, c. 38, T-3.4 (as amended) [the Act].

(b) the common law obligation to serve is not limited to monopolistic utilities; and

(c) the interplay between the Act and the common law obligation to serve is such that the former is far broader than the latter.

While CIPPIC addresses tangentially some factors the CRTC may consider in deciding whether to impose an obligation to serve broadband and the forms that this obligation may take, these are intended to be no more than illustrative of the scope of the power granted to the Commission.

A. Broad powers to mandate broadband access in the Act

5. As noted recently by Madam Justice Abella, speaking for a unanimous court in *Bell Canada v. Bell Aliant*:

> The CRTC has broad powers which…demonstrate the comprehensive regulatory powers Parliament intended to grant [it]. These include the ability to order a Canadian carrier to provide any service in certain circumstances (s. 35(1)); to require communications facilities to be provided or constructed (s.42(1)); and to establish any sort of fund for the purpose of supporting access to basic telecommunications services (s.46.5(1)).[5]

As further pointed out in *Bell*, the Act confers broad discretion on the CRTC to balance the oft competing interests of consumers, incumbents, and competitors in carrying out its various policy objectives.[6] This balance is embodied in the Commission's policy objectives. In CIPPIC's submission, the CRTC has both the power to determine whether this balance requires universal broadband access and, furthermore, a number of enumerated powers under which to implement that obligation if it so chooses.

(i) Policy Objectives

6. Section 47(a) obligates the CRTC to exercise all its powers and duties with a view to implementing the policy objectives embodied in s. 7 of the Act. These objectives specially envision a comprehensive regulatory scheme that attempts to provide all Canadians with access to the benefits of telecommunications services without exclusion and irrespective of geographical locale:

> (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
>
> (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

[5] *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, 2009 SCC 40, (S.C.C.) at para. 32.
[6] *Ibid*. at para. 1.

The Act also maintains as an objective that people from across the country will have access to new and innovative technologies and that the governance of the telecommunications industry will be responsive to the needs of users:

> (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
>
> (h) to respond to the economic and social requirements of users of telecommunications services;[7]

Thus in carrying out its powers one of the Commission's primary objectives is to ensure all Canadians are provided with access to high quality telecommunications services.

7. The CRTC has the additional task of reconciling these social objectives with the economic interests of incumbents and competitors:

> (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
> ...
> (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;[8]

In attempting to balance these competing interests, the Commission must additionally, under s. 47(b), give weight to orders in council including the Policy Direction which obligates it to rely on market forces "to the maximum extent feasible" in order to achieve its public policy objectives and to rely on efficient and proportionate regulatory measures that are minimally intrusive on market forces.[9] The Policy Direction affirms that the CRTC may exercise its statutory powers where it is necessary to achieve a policy objective that is not being adequately addressed by the industry as is. In doing so, however, the Commission must ensure the measures it adopts have a *de minimus* impact on existing competition and are proportionate to fulfilling the policy objectives. It must additionally attempt competitive neutrality in using its powers.

8. As the Commission is mandated to consider the policy objectives in the exercise of its powers, this should be the starting point for any consideration of its statutory capacity to impose some form of universal broadband access obligation. Policy objectives a, b, g and h clearly envision regulatory activity aimed at ensuring broad or universal access in Canada to telecommunications services including broadband. In deciding whether and to what extent it *should* impose universal access obligations, the CRTC must balance these policy

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[7] *Supra* note 4, my emphasis.
[8] *Ibid*.
[9] *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, December 14, 2006.

obligations against the interests of incumbents and competitors as well as the need to minimally impair market forces, and it must act reasonably and proportionally in doing so.[10] It must also do so within the context of a specific enumerated power set out in the Act.[11] CIPPIC notes, however, that the policy mandate provided by ss. 7 and 47(a) of the Act is far broader and more holistic in application than that found in most other comparable Canadian regulatory statutes.[12] More on this point below.

(ii) Relevant Enumerated Powers

9. There are a number of enumerated powers in the Act.[13] To begin with, s. 24 of the Act states that "any" provision of a telecommunications service is subject to "any conditions imposed by the Commission *or* included in a tariff approved by the Commission."[14] In addition, s. 32(g) grants the CRTC the power to "determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers" in the absence of any applicable provision.[15] In light of these broad powers and the policy objectives, and with the very specific requirements in subsections 7(a) and (b) in mind, these provisions alone appear to grant the CRTC ample power to impose reasonable measures aimed at ensuring universal broadband access at reasonable rates and quality of service.

10. While it may be true that, to date, the Commission refrained from a) imposing basic service obligations onto competitors,[16] or from b) including broadband within existing incumbent BSOs,[17] it is equally true that the Act is explicitly written with sufficient flexibility

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[10] *Bell*, *supra* note 5 at paras. 75-77.
[11] *Bell, supra* note 5 at paras. 53-53.
[12] *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291 (F.C.A.) at paras. 51-56. See also *Calgary (City) v. Alberta (Energy and Utilities Board)*, [2010] 318 D.L.R. (4th) 615, 2010 ABCA 132, (Alta. C.A.), per Côté, J.A., concurring but dissenting on this point, at paras. 206-212.
[13] *Telecommunications Act, supra* note 4.
[14] *Telecommunications Act, supra* note 4, my emphasis.
[15] *Telecommunications Act, supra* note 4.
[16] M.H. Ryan, *Canadian Telecommunications Law and Regulation*, looseleaf, 2010—release 1, (Toronto: Thomson Reuters Canada Limited, 2005-), at §305.
[17] Telecom Decision CRTC 99-16, *Telephone Service to High-cost Serving Areas*, October 19, 1999, online at: <http://www.crtc.gc.ca/eng/archive/1999/dt99-16.htm>:

> 27. The Commission considers that the benefits of upgrading the local network must be balanced against the subscribers' ability to pay for these upgrades. For a higher level of basic service, subscribers would have to pay more and costs to provide the service in remote areas would increase. These costs could, in turn, affect subsidy rates levied on profitable markets, which would distort the competitive nature of those markets.
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> 28. The Commission expects that, over time, competitive pressures and improvements in network technology will permit basic service to include faster transmission speeds.

to allow the application of new and innovative regulatory techniques. As noted by the Sharlow, J.A., with respect to the CRTC's rating jurisdiction:

> Because of the combined operation of section 46 and section 7…[it] is not limited to considerations that have traditionally been considered relevant to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunications services.[18]

11. While it is CIPPIC's position that this provides sufficient jurisdiction to impose universal service obligations in a variety of forms, the CRTC has additional statutory tools at its disposal to do so. Basic services are explicitly mentioned in s. 46.5(1), which states that:

> The Commission may require any telecommunications service provider to contribute, subject to any conditions that the Commission may set, to a fund to support continuing access by Canadians to basic telecommunications services.[19]

While enacted at a time when the basic service requirement did not include broadband, in enacting this provision Parliament would have been cognizant that:

> the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service."[20]

Yet in spite of this, Parliament decided to include the term 'basic *telecommunications* services' as opposed to the more telephone-specific language contained in other sections of the Act.[21] It appears clear that this provision can be extended to subsidization of any obligation to make broadband services available at reasonable rates, particularly if in high cost areas.[22]

12. In addition, the Act includes section 42.1 which provides the CRTC with very specific authorization to mandate building of facilities and to distribute any resulting costs:

> 42. (1) Subject to any contrary provision in any Act other than this Act or any special Act, the Commission may, by order, in the exercise of its powers under this Act or any special Act, require or permit any telecommunications facilities to be provided, constructed, installed, altered, moved, operated, used, repaired or maintained or any property to be acquired or any system or method to be adopted, by any person interested in or affected by the order, and at or within such time, subject to such conditions as to compensation or otherwise and under such supervision as the Commission determines to be just and expedient.

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[18] *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [*Bell v. CRTC*], 2008 FCA 91, at para. 35, cited with approval in *Bell, supra* note 5 at para. 43.
[19] *Telecommunications Act, supra* note 4.
[20] Telecom Decision CRTC 94-19, *Review of Regulatory Framework*, September 16, 1994, online at: <http://www.crtc.gc.ca/eng/archive/1994/DT94-19.htm>, adopted in *Bell, supra* note 5 at para. 46. The Porter Opinion, *supra* note 1 at para. 30 that section 46.5(1) appears limited to support of continuing services as opposed to the establishment of new services.
[21] Compare s. 46.1(a) to 46.1(b). See also *Bell, supra* note 4 at paras. 32.
[22] See the Porter Opinion, *supra* note 1 at para. 30, arguing that section 46.5(1) appears limited to support of continuing services as opposed to the establishment of new services.

(2) The Commission may specify by whom, in what proportion and at or within what time the cost of doing anything required or permitted to be done under subsection (1) shall be paid.[23]

While s. 42(1) appears to be a free-standing order making power,[24] when read in conjunction with very specific policy objectives in ss. 7(a) and (b) and the general powers in ss. 24 and 32(g), these sections 'fully support by unambiguous statutory language' the authority of the Commission to mandate the provision of broadband services where such orders are reasonable in light of its policy objectives.[25] CIPPIC notes that the express power to build is not limited to basic services, as is s. 46.5(1), but in fact is far broader. Balancing the competing interests implicated by universal and reasonably priced access to telecommunications services is a core CRTC competency, at the heart of its expertise.[26] For this reason, the above noted sections should be sufficient for the CRTC to mandate universal broadband access through various means, including an obligation to build or contribution accounts or various combinations thereof, should it so choose to do.

13. However, as noted in the Porter Opinion, there are additional, rate-based powers under which the commission may potentially impose universal service obligations.[27]

14. Sub-section 27(1) states that "[e]very rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable", while s. 27(2) prevents unjust discrimination or undue preference in the provision of a telecommunications service or charging thereof.[28]

15. The Porter Opinion focuses on s. 27(2) and the obligation to build, characterizing this section as traditionally focused on regulating "a carrier's dealings with customers and

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[23] *Telecommunications Act, supra* note 4, my emphasis. In addition, note that in *Bell, supra* note 5 at para. 48 Abella, J., held that s.47 and the policy objectives obligate the Commission to consider a broader set of interests in exercising its powers than those *directly* interested or affected by an order. Note as well the language in (2), which is even broader in application than that in (1).

[24] Contrast *Wheatland, supra* note 12 at para. 27: "Subsection 42(1) sets out the broad powers of the CRTC to grant permission for, among other things, the construction, installation, operation and maintenance of transmission lines, and to impose such conditions as the Commission determines to be just and expedient."; and *Bell, supra* note 5 at para. 32: "The CRTC has broad powers… to require communications facilities to be provided or constructed (s.42(1))"; with the Porter Opinion, *supra* note 1 at para. 23: "This power is not 'free-standing.' In order to trigger the power to order the construction of facilities, the Commission must be acting "in the exercise of its powers under the Act or any special Act." As s. 42(1) appears to grant the CRTC order-making powers in and of itself, it appears that the reference to 'its powers under the Act' refer to the policy objectives while 'its powers under…any special Act' refers to any mandate granted under a special statute.

[25] *Bell, supra* note 5 at para. 50. Nor is the Commission relying on the "free-floating discretion to consider the public interest" that the Supreme Court of Canada warned against in *Bell* at para. 53. All CRTC powers are strictly grounded in its obligation to "balance the interests of carriers, consumers and competitors in the broader context of the Canadian telecommunications industry" (*ibid*.).

[26] *Wheatland, supra* note 12 at paras. 50-57; *Bell, supra* note 5 at para. 46.

[27] Porter Opinion, *supra* note 1 at para. 19 *et. seq.*

[28] *Telecommunications Act, supra* note 4.

groups of customers…that are similarly situated" and generally incapable of extending a "*general* requirement on carriers to build broadband facilities in areas where they do not presently provide broadband service".[29] It argues in essence that the term 'discrimination' can only apply with respect to different individuals within an established service area while different treatment of individuals in vastly different situations cannot be classified as 'unjust'.[30] Arguments relating to codification of the common law are addressed below.[31]

16. The Porter position is difficult to reconcile with the *Bell* decision where our Supreme Court recently considered the scope of the Commission's rate making powers as well as the general structure of the Act. In *Bell*, the Supreme Court held that the Act imposes on the Commission a "duty to take a more comprehensive approach" in that it creates a "comprehensive regulatory scheme."[32] Under this scheme, the Commission is entitled, and even mandated, to "tak[e] into account a variety of different constituencies and interests referred to in s. 7, not simply those it had previously considered…"[33] To properly give effect to the holistic regulatory approach envisioned by the Act and, more specifically, to ss. 7 (a) and (b), the Commission may well be required to interpret what rates are 'just and reasonable' with the access needs of all Canadians in mind. Under this comprehensive regulatory scheme, it maybe unjust discrimination to refuse service to an individual outside a given service area where the Commission is capable of bringing about such services while allowing global industry rates that are just and reasonable, particularly with its s. 42(1) powers in mind.[34] Indeed, CIPPIC sees no purpose for categorically excluding s. 42(1) from s. 27(2) in particular, and notes that the Commission has already envisioned network investment as a remedy for unjust discrimination.[35]

(iii) Effect of Competition and Forbearance

17. The Commission has a duty to forbear from the exercise of its powers in the presence of a competitive market capable of meeting its policy objectives. In deciding whether to forbear, the Commission must consider the level of competitiveness and the effectiveness of market forces in achieving policy objectives. The CRTC's forbearance powers are as broad and discretionary as its other powers enumerated above:

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[29] Porter Opinion, *supra* note 1 at paras. 24-26.
[30] *Ibid*.
[31] *Ibid*.
[32] *Bell, supra* note 5 at para. 47.
[33] *Bell, supra* note 5 at para. 48. Contrast to Porter Opinion, *supra* note 1 at para. 20 (my emphasis), which states, in setting out the basis for its characterization of these sections: "Sections 27(1) and (2) (*and their predecessors*)…"
[34] *Bell, supra* note 5 at paras. 38, 72 and 77.
[35] See Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet Traffic Management Practices of Internet service Providers*, October 21, 2009, online: <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm> at para. 43.

> 34. (2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services.
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> (3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services. [36]

While addressing the issue of competition, these provisions, when read with ss. 47(a) and 7, empower the Commission to forbear only where *and to the extent that* other policy objectives aimed at 'protecting the interests of users' can be achieved in the absence of regulation. Subsection 3 clearly envisions that, in deciding whether to forbear, the Commission consider not only the continuance of a competitive market, but additionally the establishment of a new competitive market.

18. Competition factors in under s. 7(c) as well. Arguaby, an obligation to serve broadband at higher cost may impact on the competitiveness of telecommunications services. On the other hand, universal access will enhance the efficiency and competitiveness of "Canadian telecommunications", not merely 'telecommunications services', at both the national and international levels. Regardless, the Commission must consider competition not only in the context of forbearance, but also when weighing competing interests and deciding whether and to what extent it should regulate to provide broadband access.[37] The Policy Direction, while placing added emphasis on market forces and minimally impairing regulatory mechanisms *as the preferable means of achieving policy objectives*, does not alter this basic statutory fact: that the Commission must use its powers to act where it deems that the balance between competing policy objectives calls for a regulatory action.

19. With respect to basic service obligations, the Commission has rightly noted in the past that the presence of a competitive environment is no answer to this obligation:

> Even with a fuller realization of local competition, the Commission considers it likely that market forces will not, on their own, achieve the Act's accessibility objective in all regions of Canada. In establishing the rules to foster competition in all market segments, the Commission must therefore ensure it has regulatory tools through which to ensure the continued achievement of this objective.[38]

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[36] *Telecommunications Act*, *supra* note 4.
[37] *Bell, supra* note 5 at paras. 75-77.
[38] Telecom Decision CRTC 97-8, *Local Competition*, May 1, 1997, online: <http://www.crtc.gc.ca/eng/archive/1997/DT97-8.htm>, at para. 146.

The basic service obligation reflects a minimal level of service and the minimal rate necessary to achieve the Commission's accessibility obligations. While, in *setting* the BSO, the Commission must balance accessibility needs against any impact such an obligation may have on competitiveness of carriers. But the obligation itself is not likely to be met by market forces except where such forces lead to *lower* universal prices than the minimal deemed necessary to achieve the Act's accessibility objective – at which point the obligation itself will no longer be an issue at all.

20. In sum, while the Commission must weigh competition as a factor, both in making forbearance decisions and in balancing competing interests under s. 7, this is not an all or nothing activity. The Commission must consider all policy objectives in exercising its forbearance powers, including its accessibility obligations.[39] Where a service or class of services is deemed sufficiently competitive to justify forbearance in general, but not sufficiently so to ensure adequate and affordable access, forbearance will be conditioned with access requirements.[40] Therefore, while the Act and the Policy Direction impose on the Commission the duty to consider competition and market forces, these are by no means a bar to imposing regulatory measures aimed at achieving universal affordable broadband access where existing forces are failing to meet such accessibility requirements.

B. The Common Law Obligation to Serve

21. We turn now to the Common Law obligation to serve. As we find the Cherry Opinion adequately states the nature of the common law obligation and, further, do not attribute to the common law the same interpretive impact that the Porter Opinion does, we do not dwell on this aspect over long. We note in support of Dr. Cherry's Opinion that the common law obligation is not as closely predicated upon the presence of a monopoly as is at times mistakenly assumed.[41] While monopolistic conditions and competition have historically been a factor for the common law to consider in deciding the presence and extent of the obligation to serve, it is by no means a necessary element of that duty.

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[39] *Bell, supra* note 5.

[40] In Telecom Decision CRTC 97-20, *Stentor Resource Centre Inc. – Forbearance from regulation of interexchange private line services*, December 18, 1997, online: <http://www.crtc.gc.ca/eng/archive/1997/DT97-20.htm> at para. 67, the Commission affirmed it has the authority to forbear selectively by region, citing s. 34(2) of the Act which states the CRTC "shall forbear 'to the extent that it considers appropriate', predicated on there being sufficient competition." A more recent example can be found in Telecom Regulatory Policy CRTC 2009-424, *Revised regulatory requirements for management of customer accounts*, July 17, 2009, online <http://www.crtc.gc.ca/eng/archive/2009/2009-424.htm>.

[41] Cherry Opinion, *supra* note 2 at pp. 10-13. Cherry points out that the U.S. Supreme Court dismissed the 'monopoly' requirement from its list of elements that must supersede the regulation of a public utility: *Nebbia v. New York*, 291 U.S. 502 (1934) (U.S. S.C.).

22. As noted in the Porter Opinion, the obligation to serve arises from "the nature of the service in question and the special relationship which subsists between the service provider and the public."[42] The animating principle that underscores the obligation to serve is the need to ensure that all those who seek services characterized as "of fundamental importance to the public" can receive these.[43] However, while the case law is replete with references to monopolistic conditions accompanying the imposition of the common law obligation, the monopoly criterion is not essential to the analysis. The frequent presence of this factor is merely indicative of the fact that it is in such conditions that readily attributable scarcity of fundamental public resources is most likely to occur. Indeed, far from being essential to the obligation to serve, the presence of a monopoly is not even the primary factor, as held by a Nova Scotia appellate court after surveying Canadian case law:

> …certain characteristics of a public utility as opposed to a private utility are evident. The primary characteristic is that the public utility is impressed with a public interest. This may arise, for example, because the utility has obtained a monopoly or near monopoly of a necessity of modern life, such as food, energy, transport or communication facilities, and it then becomes in the public interest to impose a duty on the utility to supply the public generally, in its appropriate area, with reasonable efficiency under reasonable charges and without discrimination. The acceptance by the utility of public franchises or calling to its aid the police power of the state obviously involves a public interest, and this is notably the situation in the case of railways and some ferries, as well as in the aviation field. All such utilities are under public regulation, although not normally by the general public utilities commissions, as such. Again, a business may require to be regulated in the public interest for social or political reasons.[44]

23. As noted in another case, *Perimeter Transportation v. Vancouver*, "a public utility generally provides 'a necessity of modern life' on 'a monopoly or near monopoly' basis.[45] Yet neither one or the other of these factors are essential to the common law obligation.[46] The obligation is often applied in the presence of a monopoly because it is under monopolistic conditions that individuals are most likely to be deprived of necessities of life or other ubiquitous and essential services without recourse to any other source. This is perhaps most evident where two monopolies intersect. Thus, for example, in *Metcalfe Telephones v. McKenna*, the Supreme Court of Canada held there was no obligation on Bell to build new lines in order to service a customer that *already had access* to services through

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[42] Porter Opinion, *supra* note 1 at para. 13.
[43] *Chastain v. British Columbia Hydro & Power Authority,* [1972] 32 D.L.R. (3d) 443 (B.C. S.C.) at para. 23.
[44] *R. v. Roberts*, [1980] 42 N.S.R. (2d) 390 (N.S. Co. Ct.) at para. 7. Cited more recently in *Perimeter Transportation Ltd. v. Vancouver International Airport Authority*, [2008] 91 B.C.L.R. (4th) 143 (B.C. S.C.) at paras. 143-144.
[45] *Ibid*., at para. 147.
[46] In *Roberts, supra* note 44, for example, the court found that the obligation would attach to Shaw cablesystems even though cable television was not a 'necessity of life', but instead held its "monopolistic nature" and the "widespread demand" for cable as sufficient to "invite regulation".

a different provider.[47] The underlying access objective was accomplished in *Metcalfe*, yet it is unlikely the same result would have been reached had the second service provider refused to serve the customer. The Court held that a "customer…cannot elect by which utility he will be served"; it did *not* hold that a customer is not entitled to service.[48] In such a situation it would matter little, it seems, whether each neighbouring company was viewed as a monopoly or if they were viewed holistically as a duopoly. The presence of competition and the necessity of the service are both factors relevant to the common law obligation to serve, but neither is exclusive. As noted by one commentator:

> It has been observed in a number of cases, that the fact of such companies having the monopoly of supplying certain localities, was the prime reason why they should be compelled to accept indiscriminate patronage, but the question may well be asked, Should not the same rule apply when several companies supply the same community?
>
> It would seem so, within reasonable bounds, for as has been heretofore noted…[49]

24. The emphasis on access as opposed to monopoly as the overriding factor in the common law rule is especially evident in *Tsawwassen v. Delta*, where the B.C. Court of Appeal, in examining the obligation to serve applicable to municipalities, held:

> 42. In other words, the common law, as taken from the Levis decision, can be viewed as a continuum where the extent of the obligation owed depends upon the nature of the relationship between the parties. For example, if in a given situation an individual property owner asked a municipality to continue to provide services even though the owner was not or would not be obligated to continue to pay taxes, it is arguable that the common law would impose upon the municipality a duty to supply this single property owner with services indefinitely, subject only to reasonable compensation being paid for the services. On the other hand, if the relationship involved two independent taxing authorities of roughly equal size, both with the ability to put in place the necessary infrastructure, it is arguable that the common law would allow one of the parties to terminate the provision of services to the other with a relatively short period of reasonable notice.
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> 43. As indicated by the foregoing examples, there are several criteria which are helpful in assessing the relationship between given parties and determining the exact nature and extent of the common law obligation which may or may not be owed. Without attempting to set out an exhaustive list, some of the more important factors include: the relative size of the parties; the resources available to each of the parties including the ability to raise revenue; the ability to implement or maintain new and existing infrastructure; the experience each party may already have in providing the

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[47] *Metcalfe Telephones Ltd. v. McKenna*, [1964] S.C.R. 202 (S.C.C.). Indeed, in *Metcalfe*, Bell had signed a non-compete agreement with the second service provider, which it would have had to break before servicing the customer (*ibid.*). Further, this decision reviewed powers under the Railroad Act which are far more narrowly defined than those currently in the *Telecommunications Act*. See *Bell, supra* note 5.

[48] *Ibid*.

[49] S.D. Wilson, "Gas and Water Companies: Their Relations with Consumers", (1888) 36(5) *American L. Register* 277, online at: <http://www.jstor.org/stable/3304846>.

services in question; and the length of time over which the service has already been provided by one of the parties.[50]

This not only envisions a multi-faceted approach to the application of an obligation to serve, but it squarely puts the emphasis on the user's ability to gain access to the essential service in question, not on the monopolistic nature of the entit(ies) providing it, or their service area. The *Tsawwassen* factors indicate in a more nuanced manner some of the underlying reasons for the general inclusion of the 'monopoly' factor, including the ability to receive reasonable compensation and the ability to supply the service, and whether there are more reasonable alternatives to getting the service.

C. Codification: How the Common Law interacts with the Act

25. The Porter Opinion claims that Parliament codified the common law obligation to serve wholly and exclusively in ss. 27(1) and (2) of the Act.[51] In other words, those two provisions encompass the entire scope of regulatory powers allotted to the CRTC by Parliament with respect to access to telecommunications services. Moreover, these two sections and their predecessors fully encode the common law obligation and "[do] not add or subtract anything from the content of the obligation to serve."[52]

26. With respect, CIPPIC finds this position difficult to reconcile with the Act and specifically with the policy objectives. To the extent that Parliament decided to 'codify' the common law obligation to serve in the Act, it choose to do so in a broad-based and holistic manner by placing enacting ss. 7(a) and (b), by providing the Commission with broad powers to act as it sees fit (ss. 24, 32(g)), by giving it specific, itemized powers to order construction of new facilities as it saw fit and to create contribution funds in order to diffuse any costs emerging from the continuing provision of basic services or the construction of ordered facilities (ss. 42 (1), (2), and 46.5(1)), and, finally, by mandating it to consider its access-centric policy objectives in all its regulatory actions (s. 47(a)). In providing the CRTC with a broadly framed policy objective to ensure access, as well as numerous powers in addition to ss. 27(1) & (2) to carry out these objectives, Parliament intended to provide the Commission with a great level of discretion in how to carry out its codified obligation to ensure service in Canada. In giving it a varied toolset to accomplish this, Parliament intended, quite simply, the CRTC has the flexibility to carry out its access objectives in a number of ways, including, where appropriate, contribution accounts to ensure the impact of high cost, low revenue services are distributed broadly throughout the entire industry, or

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[50] *Tsawwassen Indian Band v. Delta (Corporation)*, [1997] 149 D.L.R. (4th) 672 (B.C. C.A.), leave to appeal ref'd, [1997] S.C.C.A. No. 539 (S.C.C.).
[51] Porter Opinion, *supra* note 1 at para. 20 *et. seq.*, emphasis in original.
[52] *Ibid*.

obligation to build powers that can put the onus on a single service provider or, again, diffuse it more broadly through subsection 42(2).

27. The *Telecommunications Act* is an attempt by Parliament to put in place a "comprehensive national telecommunications [regulatory] framework."[53] It grants the Commission broad powers and policy objectives in order to provide it with flexibility in carrying out its powers in light of its recognized expertise. While some of the common law principles underlying the obligation to serve may carry forward, to apply the common law rule without regard to the broad, holistic regulatory framework embodied in the Act would not only unduly hamper the CRTC in its capacity to carry out its legislative mandate, but it ignores the legislative history of the Act. As noted by the Commission and cited recently by Madam Justice Abella (emphasis is hers):

> The Act ... provides the tools necessary to allow the Commission to alter the traditional manner in which it regulates [...]
>
> In brief, telecommunications today transcends traditional boundaries and simple definition. It is an industry, a market and a means of doing business that [page787] encompasses a constantly evolving range of voice, data and video products and services [...]
>
> In this context, the Commission notes that the Act contemplates the evolution of basic service by setting out as an objective the provision of reliable and affordable telecommunications, rather than merely affordable telephone service.[54]

28. The underlying principles of the Common Law rule are embodied in the Act. That aspect of the common law which is focused on ensuring users have access to 'necessities of life' and other ubiquitous services is encoded in the access-specific policy objectives and in the broad CRTC powers to order construction of facilities, contribution funds, etc. The underlying rationale for the presence of a monopoly factor in the common law appears in part to be focused on ensuring fairness to the utility in question. That is, in a non-monopoly setting, the utility will find it more difficult to redistribute any losses attributable to serving an additional high cost individual or area,[55] the non-monopoly may be put at a competitive disadvantage if it alone is saddled with additional costs while its competitors are not, and, finally, in a competitive environment it is less likely that an individual or area will not be able to find someone else willing to provide a basic level of service.[56] *All* of these underlying principles are codified in the statute, not through an all or nothing 'monopoly or not' rule,

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[53] *Bell, supra* note 5 at paras. 47 and 72.
[54] Telecom Decision CRTC 94-19, *Review of Regulatory Framework*, September 16, 1994, online: <www.crtc.gc.ca/eng/archive/1994/DT94-19.htm>, cited in *Bell, supra* note 5 at para. 46.
[55] *Tsawwassen, supra* note 50.
[56] *Ibid.*, and *Metcalfe, supra* note 47.

but by giving the Commission broad powers and the mandate to consider each factor in setting its holistic industry wide regulatory framework.

29. Thus, s. 42(2) permits the CRTC to distribute the cost of building new facilities as it sees fit, and s. 46.5(1) permits the Commission to distribute the costs of ongoing basic services through a contribution fund. It can additionally achieve cost distribution through its tariff powers.[57] Section 27(1) permits the Commission to set just and reasonable rates at an industry-wide level, taking into account the need for reasonable fees for consumers, reasonable fee recovery for service providers, in *addition* to the need to ensure basic services are made available to all at reasonable rates of affordability. Through policy objective s. 7(c), the Commission must also consider the competitive environment in reaching its decision, although, with respect to this factor, greater access to telecommunications services increases competition in other areas as well. Because, under the Act, the obligation to serve all at reasonable rates is made an *industry wide* requirement, the Commission is mandated to consider these competing factors on an industry wide basis. Because of the "importance of the telecommunications industry to the country as a whole", Parliament has given the CRTC the mandate to consider additional factors, beyond those raised in principle by the common law rules.[58] It would not be capable of carrying out its broad-based regulatory mandate otherwise.

D. Conclusion

30. In conclusion, in setting the policy objectives and enacting s. 47(a) of the Act, Parliament intended to mandate the CRTC with adopting industry wide regulatory solutions to what were once pure common law problems. While the common law duties of public utilities and carriers survive and continue to apply, the nature of the Act and the CRTC's mandate and powers to ensure access to services are different in nature. In some instances, the common law rule may impose more onerous and specific obligations on individual service providers while in others the Commission might find innovative industry wide solutions to any access problems that must be addressed.

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[57] See Telecom Decision CRTC 97-8, *Local Competition*, *supra* note 38, at para. 148:

> With respect to Stentor's request for compensation for this obligation, the Commission notes Stentor's acknowledgement that Phase II costs include costs associated with the obligation to serve. The Commission further notes that unrecovered costs associated with the extension of service on an applicant's request are anticipated to be minimal. Moreover, should the Commission review extension of service to a given area, it would also consider issues related to the recovery of the associated costs at that time.

[58] *Bell, supra* note 5 at para. 47 and 72. See additionally, s. 7 of the Act: "It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives."

31. For example, a contribution fund solution to access problems such as that found in s. 46.5(1) could not be imposed as a remedy at common law. Neither could re-distribution of funds from rate-setting deferral accounts be applied to potentially important projects such as those that will emerge from the deferral accounts decision,[59] nor could industry investment in more creative and effective solutions to cost and access issues such as community hotspots or library-based broadband access.[60]

32. The Commission is *not* given a free hand to do as it pleases in carrying out this mandate. Its decision must be reasonable. It could be unreasonable, for example, to order a small competitor operating in a portion of Ontario to expand its service lines to Nunavut. It could be equally unreasonable to obligate Bell Canada to provide FTTH access at current rates to every home in Ontario. However, where universal broadband requirements at basic levels and affordable pricing are becoming an international standard, it would be equally unreasonable to place no access requirement on the industry at all.[61]

33. Finally, in making its decisions, it must consider all of its policy objectives and the specific powers allotted to it in the Act. It must balance the competing interests of Canadians who require access, of the service providers able to provide that access, of competitors who may be required to subsidize the provision of that access through various mechanisms, and of existing customers of those service providers and competitors to ensure the costs of service provision do not impact onerously on these. This is the complex and comprehensive regulatory task that Parliament has given to the CRTC.[62]

34. It follows from our analysis that our answer to the questions posed by the Commission in its letter of July 25, 2010 as follows:

Does the Commission have the statutory jurisdiction to:

(a) mandate the provision of new services, including access to broadband services, where facilities exist or where new facilities would need to be built; and
(b) require telecommunications service providers to contribute to a fund to support access to new services, including access to broadband services;

Can the Commission order competitors to provide:

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[59] *Bell, supra* note 5, generally.
[60] U.S. Federal Communications Commission (FCC), "Broadband Adoption in Low-Income Communities", Social Science Research Council, March 2010, online: <http://webarchive.ssrc.org/pdfs/Broadband_Adoption_v1.1.pdf>, which highlights the extent to which cost is an obstacle in broadband adoption and proposes practical and cost-effective solutions to the problem.
[61] Standing Senate Committee on Transport and Communications, "Plan for A Digital Canada", June 2010, online: <http://www.planpouruncanadanumerique.com/images/stories/pdf/report.pdf> at p. 15
[62] *Bell, supra* note 5 at para. 72.

(a) new services, including broadband access services, where they currently have facilities or where new facilities would need to be built; and
(b) services throughout the relevant incumbent's serving territory, including existing services such as primary exchange service, if that incumbent were to leave the market and, if so, whether it would be appropriate to do so.

Our answer to these various questions is that the Act provides the Commission a very broad legislative mandate and equally broad regulatory tools to accomplish its purposes. Its mandate therefore includes not only the capacity to order these activities, but in some cases the obligation to do so. This mandate must be carried out in a reasonable manner, however, and must take into account the interests of all stakeholders involved. Generally speaking, the Act makes it an industry wide obligation to ensure a basic level of connectivity. It is to the Commission to determine, based on evidence presented in Telecom Notice of Consultation CRTC 2010-43, the level of connectivity required and how best and most reasonably to achieve that objective.