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TELECOMMUNICATIONS CARRIERS AND THE "DUTY TO SERVE"

*Michael H. Ryan**

Telephone companies share with other public utilities a common law duty to provide their services on demand, at a reasonable price, and without unreasonable discrimination. In Canada, this common law duty exists alongside statutory service obligations imposed on telecommunications carriers and regulatory policies promoting universal access to basic telecommunications services. Some argue that in the modern environment, where a wide range of telecommunications services is available on a near-universal basis from a profusion of suppliers, the duty to serve has become an anachronism and that carriers should now be relieved of such obligations. There are others, however, who caution that the elimination of the duty to serve might jeopardize the continuation of service to geographically remote areas and should therefore be retained. Still others advocate expanding the duty to include broadband in order to facilitate wider access to high-speed Internet services. The debates surrounding these issues reveal that there is no consensus about the scope of the duty to serve. This article seeks to clarify the parameters of the common law duty to serve and discusses how that duty interrelates with carriers' statutory service obligations and regulatory policies promoting universal service.

Les compagnies de téléphone, comme d'autres entreprises de services publics, ont une obligation en common law de fournir leurs services sur demande, à un prix raisonnable et sans discrimination déraisonnable. Au Canada, cette obligation en common law coexiste avec les obligations de service prévues par la loi imposées aux entreprises de télécommunication et les politiques réglementaires faisant la promotion d'un accès universel aux services de télécommunication de base. Certains soutiennent que dans un environnement moderne, où de façon quasi universelle une profusion de fournisseurs rend disponible une vaste gamme de services de télécommunication, l'obligation de service est devenue anachronique et que les fournisseurs devraient être libérés de cette obligation. D'autres soutiennent cependant que l'élimination de l'obligation de service menacerait l'accès aux services dans les régions isolées et qu'il faut donc la maintenir. D'autres encore réclament d'étendre cette obligation pour inclure les services à large bande, qui faciliteraient l'accès Internet haute vitesse. Les débats qui entourent ces enjeux révèlent qu'il n'y a pas de consensus sur la portée de l'obligation de service. Cet article vise d'abord à clarifier les paramètres de l'obligation de service en common law. Ensuite, nous analyserons quels sont les liens entre cette obligation et les obligations prévues par la loi pour les fournisseurs de service, ainsi qu'avec les politiques réglementaires faisant la promotion d'un accès universel.

* Member of the Ontario Bar; Partner, Arnold & Porter (UK) LLP, Solicitors, London, UK. The author filed evidence on behalf of Bell Canada on the subject of telecommunications carriers' duty to serve in the Canadian Radio-television and Telecommunications Commission's proceeding on the *Obligation to Serve and Other Matters* referred to below. The author expresses his gratitude to two anonymous reviewers for their very helpful comments on an earlier draft of this article.

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Introduction 521

I. The Origins of the Common Law Duty 522

II. The Scope of the Common Law Duty 534
A. To Which Services Does the Duty Attach? 534
B. Is There a Duty to Extend Service? 534
C. Is There a Duty to Serve Where There Are Multiple Suppliers? 537

III. The Common Law Duty to Serve and Regulation 538
A. The Regulatory Framework 538
B. Universal Service 542
C. The Impact of Competition 546

Conclusions 550

Introduction

Telephone companies share with other public utilities a common law duty to provide their services on demand, at a reasonable price, and without unreasonable discrimination. This duty to serve places public utilities on a different footing than other commercial enterprises, which are for the most part free to contract with whom they choose on terms that are freely negotiated. In the case of telecommunications carriers, the common law duty to serve exists alongside statutory service obligations imposed on carriers by the *Telecommunications Act*[1] and regulatory policies promoting universal access to basic telecommunications services articulated by the Canadian Radio-television and Telecommunications Commission (CRTC or Commission).

In Canada, basic telecommunications services are now available on a near-universal basis,[2] through a range of technologies (wireline, wireless, broadband, satellite, and cable) and from a large number of suppliers.[3] In light of the ubiquity of service and the profusion of suppliers, some now argue that the duty to serve—which evolved in an age when telecommunications was limited to basic telephone and telegraph services that were generally available only from a single supplier—is now an anachronism and should be abolished, or at least confined to situations where competition does not provide alternative sources of supply. Others, concerned that the elimination of the duty to serve might jeopardize the continuation of service to geographically remote areas, have argued that the duty should be preserved. A third group has advocated that the CRTC should expand the scope of the duty by requiring telecommunications carriers to extend their broadband networks to unserved areas to facilitate wider public access to high-speed Internet services.

The CRTC recently conducted a comprehensive review of the issues surrounding the duty to serve and the obligations telecommunications carriers bear, or should bear, to address these issues of anachronistic obligations, remote areas, and access to high-speed Internet.[4] The debate that

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1 SC 1993, c 38 [*Telecommunications Act*].

2 In 2009, 89.3% of Canadian households had a wireline telephone, 77.2% had a wireless telephone, and 99.3% had one or the other or both. Approximately 98% of Canadian households have access to broadband at a speed of 1.5 Mbps or more. See CRTC, *Communications Monitoring Report 2011* at 117, online: CRTC <http://www.crtc.gc.ca>.

3 There are over 1,000 registered telecommunications service providers in Canada, although ten large companies and their affiliates collectively account for 95% of Canadian telecommunications revenues: *ibid* at 111; CRTC, *Communications Monitoring Report 2010* at 111, online: CRTC <http://www.crtc.gc.ca>.

4 CRTC, *Proceeding to Review Access to Basic Telecommunications Services and Other Matters* (25 October 2010), Telecom Notice of Consultation CRTC 2010-43 at para 17,

took place among parties to that review made it apparent that there is no consensus about the scope of the common law duty to serve, or how common law requirements interrelate with the service obligations imposed by the *Telecommunications Act* and CRTC-mandated policies promoting universal service. Does the duty apply outside of the monopoly paradigm in which it arose and therefore continue to impose an obligation to provide service where there are multiple competing suppliers? If so, does the duty apply equally to all suppliers, or only to the traditional incumbent? Does the duty, which originally attached to basic telephone services, also embrace advanced services such as Internet access? Does it require a carrier to build facilities in locations it does not serve? The CRTC's decision did little to clarify these issues. Answers to these questions are important to an understanding of carriers' service obligations and the evolution of policy in this domain.

The purpose of this article is to consider the parameters of the duty to serve. This will involve an appraisal of the common law, statutory requirements, and the policies and decisions of the CRTC. I begin by discussing the origins of the common law duty to serve in Canadian law in Part I. This is followed by a consideration of issues related to the scope of the duty in Part II. I then review the impact of regulation in Part III, before concluding with a summary of the points that emerge from the preceding analysis.

I. The Origins of the Common Law Duty

Canadian common law has imposed a duty to serve on suppliers of water, gas, and other public-utility services from the earliest days, and, despite the paucity of case law relating to telephone services, the same duty undoubtedly extends to telephone companies.[5] The term "public utility" is

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online: CRTC <http://www.crtc.gc.ca> [*OTS Notice*]. The decision in the following proceeding is discussed below: CRTC, *Obligation to Serve and Other Matters* (3 May 2011), Telecom Regulatory Policy CRTC 2011-291, online: CRTC <http://www.crtc.gc.ca> [*OTS Decision*].

5 Telephone companies are referred to as "public utilities" in *Ingersoll Telephone v Bell Telephone Co of Canada* (1916), 53 SCR 583 at 589, 31 DLR 49; *Bell Telephone Co of Canada v Harding Communications* (1978), [1979] 1 SCR 395 at 398, 92 DLR (3d) 213; *Canada (AG) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at 754, 115 DLR (3d) 1.

While some Canadian statutes deem telephone companies to be "public utilities"—see e.g. *Public Utilities Act*, RSNS 1989, c 380, s 2(e)(iii)—the *Telecommunications Act* uses the term "telecommunications common carrier" in preference to "public utility" (*supra* note 1, s 2(1)). The use of this nomenclature creates potential for confusion where the understanding of the common law duty of telephone companies to serve is concerned because common carriers are also subject to a duty to serve; but the latter's duty to serve does not appear to depend upon the presence of monopoly, which, as I ar-

not easily defined, but the enterprises that traditionally bear this label have certain features in common: they hold themselves out to the public as suppliers of a service or commodity that is essential and that is typically provided on a monopoly or quasi-monopoly basis.[6] Another distinguishing feature is the right public utilities normally enjoy to construct their facilities along, under, or above public streets.[7]

There have been notable scholarly attempts to find the source of the public utility's duty to serve in the ancient laws of England governing "common callings", such as common carriers and innkeepers,[8] which bear similar common law service obligations. The concept of the public utility is, however, a North American invention, and the term itself dates back no more than a century.[9] In the United States and Canada, the emergence of the public utility is very closely associated with the rise of regulation. The function of controlling utilities was first exercised by the common law courts, which intervened to prevent abuses of monopoly power such as denial of access to essential public services and excessive pricing. But in the case of telecommunications services, this responsibility was trans-

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gue in this section, is the case for public utilities. The notion that telephone and telegraph companies can be regarded as common carriers of messages in the same way that, e.g., railways companies are common carriers of goods and persons was rejected in *Baxter v Dominion Telegraph* (1875), 37 UCQB 470 (available on WL Can) (concerning liability for non-delivery of a telegram). For English and American authorities to the same effect, see *Playford v United Kingdom Electric Telegraph Co, Limited* (1869), 4 LR 706 (available on Justis) (UK QB); and *Primrose v Western Union Tel* (1894), 14 US 1098 at 1100-1101 (available on WL). See also "Telephone and Telegraph Companies as Common Carriers", Note, (1901) 15:4 Harv L Rev 309.

6 Whether a public utility providing service in a competitive market retains the duty to serve is addressed later in this article.

7 Telecommunications common carriers, for example, have the right to enter and break up any highway or other public place for the purpose of constructing, maintaining, or operating their transmission lines, subject to compliance with certain procedures. See *Telecommunications Act*, *supra* note 1, s 43(2).

8 See in particular Charles K Burdick, "The Origin of the Peculiar Duties of Public Service Companies" (1911) 11:6 Colum L Rev 514, (1911) 11:7 Colum L Rev 616 & (1911) 11:8 Colum L Rev 743; Edwin C Goddard, "The Evolution and Devolution of Public Utility Law" (1934) 32:5 Mich L Rev 577; Sallyanne Payton, "The Duty of a Public Utility to Serve in the Presence of New Competition" in Werner Sichel and Thomas G Gies, eds, *Applications of Economic Principles in Public Utility Industries* (University of Michigan, 1981); Michael Taggart, "Public Utilities and Public Law" in Philip Joseph, ed, *Essays on the Constitution* (Wellington, NZ: Brookers', 1995) 214. See also the opinion filed by Barbara Cherry on behalf of consumer advocacy groups in the proceeding leading to *OTS Decision* (*supra* note 4), which takes a different view than the author's on issues related to the scope of the common law duty to serve. The opinion was filed as an attachment to *Response to Interrogatory PIAC(TELUS) 20 May10-3*, online: CRTC <http://www.crtc.gc.ca>.

9 Goddard, *supra* note 8 at 577-78.

ferred in the early nineteen hundreds to specialized regulatory agencies invested with broad public interest mandates, such as the Interstate Commerce Commission in the United States and the Board of Railway Commissioners of Canada.[10] The issues addressed in North America through regulation were addressed differently in the United Kingdom. For example, in the United Kingdom many of the services in question were taken into public ownership. This was the case for telecommunications, which became a post office monopoly in 1911.[11] As a consequence, while a coherent body of public-utility law had begun to emerge in the United States and Canada[12] by the end of the nineteenth century, England did not go through the same evolution, and there is no distinctive body of English law applicable to public utilities. The duty of public utilities to serve that has become entrenched in American and Canadian law is unknown in English law.[13]

The divergent approaches of the English common law and the Canadian common law to public utilities and their duty to serve is well illustrated by a pair of cases decided on opposite sides of the Atlantic 150 years ago. *Hoddesdon Gas and Coke Co (Limited) v. Haselwood* [14] was decided by the Court of Queen's Bench in England in 1859. Haselwood was a pro-

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[10] Both agencies, originally established to regulate railways, later had authority over telephone and telegraph services added to their mandates. The Interstate Commerce Commission was established by the *Interstate Commerce Act of 1887*, ch 104, 24 Stat 379, § 11 (codified as amended in scattered sections of 49 USC), and was given authority over telephone and telegraph rates by the *Mann-Elkins Act of 1910*, c 309, § 15, 36 Stat 552 (1910). The Board of Railway Commissioners was established by the *Railway Act* (SC 1903, c 58, s 8 [*Railway Act*]) and assumed authority over telephone and telegraph rates in 1906 and 1908 respectively: see *An Act to amend the Railway Act, 1903*, SC 1906, c 42, s 30; *An Act to amend the Railway Act with respect to Telegraphs and Telephones and the jurisdiction of the Board of Railway Commissioners*, SC 1908, c 61, s 4. This was the first legislation of general application aimed at the regulation of telecommunications rates. Prior to 1906, however, the Governor-in-Council had authority to control the rates charged by Bell Canada: see *An Act respecting the Bell Telephone Company of Canada*, SC 1892, c 67, s 3; *An Act respecting the Bell Telephone Company of Canada*, SC 1902, c 41, s 3 [*Act Respecting Bell 1902*] (both repealed by *An Act respecting The Bell Telephone Company of Canada,* SC 1967-68, c 48, s 14).

[11] For a brief history of the period leading up to the nationalization of the telephone services in the United Kingdom, see Eli Noam, *Telecommunications in Europe* (New York: Oxford University Press, 1992) at 19-22.

[12] As to American law, see Goddard, *supra* note 8 at 577-78; Payton, *supra* note 8 at 138-39. As to Canadian law, see the discussion below.

[13] English law imposes a duty to serve in some instances, but that duty does not depend on whether or not a supplier is a "public utility". See e.g. *Allnutt v Inglis* (1810), 12 East 527 at 538, 104 ER 206 [*Allnutt*]. The English cases turn instead on whether the supplier is a monopoly or benefits from some form of special privilege. See the discussion later in this Part and in Part II.C.

[14] (1859), 6 CB (NS) 239, 144 ER 447 [*Hoddesdon* cited to CB (NS)].

prietor of a school that was supplied with gas by Hoddesdon. Haselwood fell into arrears in the payment of its account, and after giving notice, Hoddesdon cut off supply to the school. Haselwood sued for damages sustained by reason of the disconnection. A jury returned a verdict in favour of the school. The gas company appealed. On appeal, counsel for the gas company took the position that the matter was governed entirely by contract and, not having received payment for its services, there was not "any duty or obligation of any kind" upon the company to continue the supply. Counsel for the school admitted that there was no express contract to supply but argued that Hoddesdon had a monopoly in the neighbourhood of the school and that "[t]he relative position of the parties and the surrounding circumstances" indicated there was an implied contract to continue the supply of gas, at least for a reasonable time. Lord Cockburn questioned whether the position of the gas company was in any way different from that "of any other tradesman—a butcher or a baker, for instance—who is at liberty at any moment to discontinue supply to a customer."[15] Lord Cockburn said:

> I am fully alive to the arguments of inconvenience which have been suggested by [counsel for the school]: but the same sort of argument would equally be applicable to an infinite variety of articles besides gas, which the comfort and convenience of life render necessary to the consumer. It is altogether a question of degree. We cannot imply a contract from the accidental circumstance of this company having a monopoly of the supply of gas to this neighbourhood. I see nothing whatever to bind either the one party to take or the other to furnish the supply any longer than their convenience, or their caprice, if you will, may induce them to take or to supply.[16]

The court found for the gas company and entered a judgment of nonsuit against the school.

Hoddesdon has been referred to in later gas cases, including a decision of the House of Lords.[17] Each of these later cases turns on whether the supplier's statutory duty to supply gas applied, as a matter of construction, in the circumstances. None of the decisions casts any doubt on the proposition that the gas company had no duty to serve apart from contract or statute.

The result in *Hoddesdon* and the reasoning that led to it are to be contrasted with the almost contemporaneous decision of the Upper Canada

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15 *Ibid* at 246.

16 *Ibid* at 248-49.

17 *Clegg, Parkinson & Co v Earby Gas*, [1896] 1 QB 592 at 594 (available on Justis); *Cannon Brewery Co, Limited v Gas Light and Coke*, [1904] AC 331 at 332, [1903-04] 20 TLR 543 (HL), rev'g [1903] 1 KB 593 (CA).

Court of Queen's Bench in *Commercial Bank of Canada v. London Gas Co.*[18] In that case, the bank had employed the gas company to illuminate its building on the occasion of the visit of the Prince of Wales to London. When the bank received the gas company's charges, it objected to the amount and refused to pay. The gas company consequently cut off the bank's gas supply. The bank brought an application for mandamus to have the supply of gas restored. Chief Justice Robinson said that, whether its charges were justified or not, the gas company was not free to withhold the supply of gas until the account was settled:

> They [i.e., the gas company] stand in that respect on the same ground as a railway company would that should refuse to carry goods for a particular party, or to carry a particular passenger. In both cases the party whom the company refuses to serve may have a clear right to sue for damages; but that would be, not for refusing to do any thing that the statute directly prescribes, for the statute may be silent on the subject, but for wrongfully refusing to discharge a duty incumbent upon them upon common law principles.[19]

The court did not refer to the *Hoddesdon* case or any other authority, and it is not clear whether the Canadian court was aware of the judgment.

The proposition that public utilities owe the public a common law duty to provide service was endorsed by the Supreme Court of Canada in 1893 in *Canada (A.G.) v. Toronto (City of)*.[20] The central issue in that case was the validity of a municipal bylaw that fixed a higher rate for the supply of water to nontaxpayers than to taxpayers. The city, which did not have the power to impose a tax on federal government lands under the provisions of the *British North America Act, 1867*, was clearly attempting to compensate for the lack of tax revenue from federal government property by imposing higher charges on nontaxpayers who used its water. The federal government took the position that the water charge amounted to an impermissible tax. Chief Justice Strong, who delivered the majority judgment, said that the water company's statutory duty to supply meant that it was not "a mere commercial vendor of a commodity but ... a public body entrusted with the management of the water for the benefit of the whole body of inhabitants," a status which "compell[ed] them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city." He went on to say that "the city ... is in a sense a trustee of the water-works, not for the body of rate-payers exclusively but for the benefit of the general public, or at least of that portion of

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18 (1860), 20 UCQB 233 (available on WL Can).

19 *Ibid* at 235.

20 (1893), [1895] 23 SCR 514 (available on WL Can) [*Toronto 1893*].

it resident in the city." He found that it would be an evasion of this duty to charge higher rates in particular cases, and that the city was bound "to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable."[21]

Toronto 1893 was applied by the Ontario Court of Appeal in 1899 in *Scottish Ontario and Manitoba Land Co. v. Toronto (City of)*.[22] The plaintiff, an operator of hydraulic elevators, alleged that water supplied by the city was not of the required quality (because it contained sand, which was damaging to its hydraulic equipment) and sued for breach of contract. The trial judge dismissed the case on the ground that the action was not maintainable as a claim for breach of contract. The case came before the court of appeal on that issue. Justice Osler delivered the majority judgment. Referring to the judgment of Chief Justice Strong in *Toronto 1893,* he concluded that the supplying of water was a municipal function or duty and not a matter of contract. He therefore dismissed the appeal.[23]

In *St. Lawrence Rendering Co. Ltd. v. Cornwall (City of)*,[24] Justice Spence, citing the two preceding cases, stated that at common law public utilities are compelled to treat all consumers alike, to charge one consumer no more than another, and to supply the utility as a duty rather than as a result of contract. He therefore restrained the City of Cornwall from interrupting the flow of water to an industrial establishment that the city apparently regarded as a nuisance and whose activities it wanted to curtail. He noted that the *Public Utilities Act* imposed a duty on the city to provide the service of public utilities upon request. In these circumstances, he concluded, the relationship between the city and consumers "is not a matter of contract but of duty and the common law," and the city was under a duty both at common law and under the *Public Utilities Act* to continue to supply water.[25] In *Chastain v. British Columbia Hydro and Power Authority*,[26] Justice McIntyre granted a declaration that a public utility (in this case, an electricity and gas company) was not entitled to demand that the plaintiffs provide a security deposit as a precondition for obtaining access to its services. The plaintiffs claimed that this require-

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21 *Ibid* at 520. The issue returned to the Supreme Court of Canada in *Hamilton Distillery Co v Hamilton (City of)* (1907), 38 SCR 239 (available on WL Can) (concerning discrimination in water rates). The Supreme Court of Canada applied its judgment in *Toronto 1893* (*supra* note 20).

22 (1899), 26 OAR 345 at 346 (available on WL Can) [*Toronto 1899*].

23 *Ibid* at 350, Lister JA concurring. Burton CJO dealt with the issue as a matter of contract and statutory duty and also dismissed the appeal.

24 [1951] OR 669, 4 DLR 790 [*Cornwall* cited to OR].

25 *Ibid* at 683-84.

26 [1973] 2 WWR 481 (BC), 32 DLR (3d) 443 [*Chastain* cited to WWR].

ment was not imposed on all customers and thus violated the obligation of the company, as a public utility, to furnish service on equal terms to all. Justice McIntyre noted that, although the company was not a public utility subject to the provisions of the *Public Utilities Act*, "[i]t partakes so much of the nature of a public utility that it must be amenable to the law governing public utilities." He continued:

> The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators. This has been true in England and in the common-law jurisdictions throughout the world.[27]

Cornwall and *Chastain* have been cited repeatedly as authority for the proposition that public utilities have a common law duty to serve.[28]

In *Chastain*, Justice McIntyre referred to the 1877 judgment of the United States Supreme Court in *Munn v. Illinois*,[29] where, he said, the historical roots of the principle he had described were examined. *Munn* concerned the constitutionality of a state law regulating grain-elevator charges, over which a small number of companies had what the court described as a "virtual monopoly". The majority concluded that such regulation did not violate the Fourteenth Amendment protection against deprivation of property without due process. In his judgment, Chief Justice Waite quoted at length from Lord Hale's seventeenth century treatise *De Portibus Maris*, including the following key passage:

> A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can

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27 *Ibid* at 491.

28 See *Herman Brothers Ltd v Regina (City of)* (1977), 81 DLR (3d) 693 at 699, [1978] 1 WWR 97(Sask CA); *Syncap Credit Corp v Consumers' Gas* (1978), 18 OR (2d) 633 at 635, 83 DLR (3d) 444; Clarkson Co Ltd v Greater Winnipeg Gas (1987), 37 DLR (4th) 344 at 353, (*sub nom K-Tel International Ltd (Receivership) v Greater Winnipeg Gas*) 46 Man R (2d) 181 (CA); *Montreal Trust Co of Canada v Nova Scotia Power* (1994), 136 NSR (2d) 212 at para 6 (CA); *Perimeter Transportation Ltd v Vancouver International Airport Authority*, 2008 BCSC 1515, 91 BCLR (4th) 143 at para 149 [*Perimeter*]; *Re Alberta Electric System Operator* (2010), [2011] AWLD 1184 at paras 191, 243 (Alta Utilities Commission) (available on WL Can); *Re Toronto Hydro-Electric System Ltd*, 2010 LNONOEB 120 at para 37 (Ont Energy Board) (available on QL).

29 94 US 113, 24 L Ed 77 (1876) [*Munn*].

> agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. ...
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> If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen ... or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a publick interest.[30]

Chief Justice Waite derived from this passage the principle that businesses "affected by a public interest ... cease to be *juris privati* only" and may therefore be regulated by the state. This proposition laid the foundation for modern American public-utility regulation for decades to follow, and despite Canada's fundamentally different approach to property rights, the case has been received here too as an important affirmation of the state's authority to regulate private business.[31]

To the authorities I have already considered, we must now add the 1918 judgment of the Judicial Committee of the Privy Council in *Minister of Justice for the Dominion of Canada v. City of Lévis*.[32] In *Lévis,* the Privy Council affirmed that suppliers of "prime necessities", such as water, have a duty to provide their services to the public that derives from the circumstances and the nature of the relationship between the parties and that exists independent of both statute and contract. The facts of the case are straightforward. The federal government had signed a contract with the city for the supply of water to one of its buildings. The city claimed that the contract covered the supply of water to the post office in that building but not to the customs and excise office in the same building and accordingly demanded a higher charge than that provided for in the contract.

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[30] Lord Chief-Justice Hale, *A Treatise Relative to the Maritime Law of England*, *Pars Secunda: De Portibus Maris* (London, 1787) at 77-78, cited in *Munn*, *supra* note 29 at 127.

[31] *Perimeter, supra* note 28 at para 172; *Videotron Telecom Ltd v OPGI Management Ltd Partnership* (2003), 2003 CanLII 38983 at para 8 (Ont Sup Ct J) (available on QL). See also *Transvision (Magog) Inc v Bell Canada*, [1975] CTC 463 at 485, where the characterization of the public utility's duty to serve adopted in *Munn* is endorsed by the Canadian Transport Commission.

[32] (1918), [1919] AC 505, 45 DLR 180 (PC) [*Lévis*] rev'g (*sub nom Doherty ès qual c Lévis (La Cité de)*) (1916), 51 CS 267 [*Doherty*].

The federal government refused to pay the higher charge, arguing that the charges for water amounted to the imposition of a tax on federal government property, which contravened the *British North America Act, 1867*. The government said that, in the absence of an agreement between the parties, its only obligation was to pay whatever sum as to the government appeared proper. The city took the position that there was no obligation to supply water under the relevant municipal law except to persons prepared to pay the relevant charge. The federal government applied for a writ of mandamus to require the city to supply water.

At first instance, the Quebec Superior Court held that the federal government was liable to pay for the service rendered on a *quantum meruit* basis, and that the sum proposed by the city was a fair one. It therefore dismissed the application for mandamus. On appeal, it was held that the charge for water was a water rate, as well as a tax, and the government could be compelled to pay that rate without violating the prohibition against taxation of federal government property. The court therefore dismissed the appeal by the federal government with a recommendation that the federal government pay the rate demanded by the city.

The federal government appealed to the Privy Council. Lord Parmoor, who delivered the judgment of the Privy Council, observed that the city was under a statutory obligation to supply water only to taxpayers and, since the federal government was not liable to taxation, it could claim no right to service under the statute. But that did not end the matter. Lord Parmoor said:

> It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation.

In a frequently quoted passage, Lord Parmoor continued as follows:

> Their Lordships are therefore of opinion that there is an implied obligation on the respondents to give a water supply to the Government building provided that, and so long as, the Government of Canada is willing, in consideration of the supply, to make a fair and reasonable payment. The case stands outside of the express provi-

> sions of the statute, and the rights and obligations of the appellant are derived from the circumstances and from the relative positions of the parties.[33]

The judgment is a remarkable one. First, the Privy Council disposed of the case on a point that was apparently not argued before it or in the courts below (where argument revolved around the city's taxing powers). Second, it did so without reference to a single authority. The decision also represents a rare instance of a case where the Privy Council has taken a different view than the English courts on a fundamental point of law. As we saw in our review of *Hoddesdon*, the English courts had declined to impose a duty to serve on a gas company despite the fact that it had a de facto monopoly on the supply of the commodity. As *Simpson v. Attorney-General*[34] illustrates, the only situations where the English courts were prepared to impose such a duty was where the supplier had a legal monopoly or benefitted from some other special privilege. In *Simpson,* which was decided some fourteen years before *Lévis,* the House of Lords ruled that the public had a right to pass through certain locks that the respondent had constructed on his own land upon payment of a reasonable charge. It was of central importance to the judgment in that case that the locks had been constructed pursuant to letters patent that conferred upon the respondent the right to make cuts or diversions in a public waterway as part of the project. The effect of sanctioning the cuts, Lord McNaughton said, was to confer on the patentee a "virtual monopoly" in regard to navigation on the river. Referring to "the doctrine of Lord Hale," he said that the locks, "although private property", had as a result become "'affected with a public interest' and ceased 'to be *juris privati* only.'" He concluded, "so long as the private owner kept the locks open and took toll all members of the public belonging to the class for which they were made were entitled to free passage on paying the regular charges."[35]

Lord McNaughton also made reference to *Allnutt v. Inglis.* In that case, customers of a warehouse brought suit against its owners over the level of charges they imposed for the storage of goods. The warehouse operated pursuant to a certificate of the Lords of the Treasury that conferred upon the owners the right to hold goods in bond. No other warehouse in the port of London had been similarly authorized. Chief Justice Ellenborough said that "if, for a particular purpose, the public have a right to resort to [an individual's] premises and make use of them, and he have a monopoly of them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it

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[33] *Lévis*, *supra* note 32 at 513.

[34] [1904] AC 476, 20 TLR 761 (HL).

[35] *Ibid* at 482-83.

on reasonable terms."[36] It was held that the owners of the warehouse could charge only a reasonable price for the use of their facility.

In *Lévis,* as the Privy Council made clear, the city had no similar legal monopoly over the supply of water.[37] By recognizing that a right of public access to essential services ("prime necessities") may exist outside of situations where a supplier has a legal monopoly or privilege, and that a duty to supply may arise whenever a supplier enjoys a "special advantage" in relation to the provision of such a service, *Lévis* represents a clear break with English precedent. The Privy Council's assertion that a duty to supply may arise "from the circumstances and from the relative positions of the parties" echoes—perhaps consciously—the words used in the argument unsuccessfully made by counsel for the school in *Hoddesdon*.[38]

Lévis has never been referred to in a reported English case and recent English case law continues to limit the duty to serve to situations where the supplier has a legal monopoly or privilege.[39] The decision of the Privy Council has had a mixed reception elsewhere: while *Lévis* and the doctrine of "prime necessity" that it articulates form part of the common law of New Zealand,[40] the reasoning underpinning the judgment has been rejected in Australia.[41] But *Lévis* has been accepted in Canada without reservation. *Lévis* is in effect an endorsement of the principles adopted by the Supreme Court of Canada in *Toronto 1893*.[42]

Tsawwassen Indian Band v. Delta[43]is an interesting application of *Lévis.* In two separate proceedings, Indian bands had sought declarations in the Supreme Court of British Columbia that the municipalities within which their respective lands lay (the city of Delta and the district of Salm-

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36 *Allnutt*, *supra* note 13 at 538.

37 *Lévis, supra* note 32 at 512.

38 *Ibid* at 513. See also *Hoddesdon*, *supra* note 14 at 246 and accompanying text.

39 See *Iveagh v Martin* (1960), [1961] 1 QB 232 at 276-77, [1960] 2 All ER 668 (QBD).

40 See *Vector Ltd v Transpower New Zealand Ltd,* [1999] 3 NZLR 646 at para 51, NZCA 167 [*Vector*]. The case has been relied upon to secure access to essential facilities and to control monopoly pricing. See also the cases cited *infra* note 57.

41 See *Bennett and Fisher Ltd v Electricity Trust of South Australia,* [1962] HCA 11, 106 CLR 492 [*Bennett and Fisher*].

42 *Toronto 1893* (*supra* note 20) was cited in the decision of the Canadian appellate court in *Doherty* (*supra* note 32 at 269)—albeit for the rather narrow proposition that one who has the use of a municipal water supply is liable to pay therefor—but we can assume that, although the Privy Council did not refer to the decision, it was cognizant of it.

43 (1997), 149 DLR (4th) 672, 37 BCLR (3d) 276 (CA) rev'g in part (1996), 139 DLR (4th) 739 (BC SC) and (*sub nom Adams Lake Indian Band v District of Salmon Arm*), 1997 CanLII 2781 (BC SC), leave to appeal to SCC refused, [1998] 2 CNLR iv [*Tsawwassen*].

on Arm) had a common law duty to continue to supply certain municipal services to residents on the bands' lands (fire protection services in the case of Delta; water, sewer, and fire protection services in the case of Salmon Arm). Negotiations to secure the provision of the services had failed in both cases. In the Salmon Arm case, the trial judge distinguished *Lévis* on the basis that *Lévis* concerned supply to one building rather than supply to several acres. The court said that the difference in size between a small parcel of land and a reserve comprising several acres brought with it the potential for alternative methods of supply, and found that the band was capable of providing its own services. The court concluded that the municipality could terminate provision of the relevant services on reasonable notice, which it fixed at fourteen months, referencing the length of time that might be required for the band to establish its own fire service. In the Delta case, the trial judge followed Salmon Arm and fixed a notice period terminating on the same date fixed in the Salmon Arm case.

The court of appeal, reversing the lower court decisions, affirmed that the relationship between the municipality and the bands gave rise to a duty to serve under the principles enunciated in *Lévis*. The municipalities did not have a legal monopoly on the supply of water, sewer, and fire protection services, but one can deduce from the facts that they were the only available suppliers. The relationship between the parties, the court said, determined not just "the nature" but also the "extent of the common law obligation" the municipalities owed the Indian bands.[44] The factors the court found relevant to its analysis were the municipalities' experience in providing public services, controlling the existing infrastructure necessary to provide the services, and collecting taxes to pay for the services. While the circumstances gave rise to a duty on the part of the municipalities to supply the relevant services, the court was also of the opinion that, given the size of the bands in question and the fact that both bands had become independent taxing authorities, the duty was terminable upon reasonable notice. The matters were remitted to the lower courts so that reasonable notice could be determined, taking into account, *inter alia*, the time that would be necessary for the bands to put their own systems into place.[45]

In *Long Lake Cottage Owners Assn. v. Thorhild (County) No. 7,* the Alberta Court of Queen's Bench, citing *Lévis* and *Tsawwassen*, recently held that residents of a hamlet have a right to continue receiving water

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[44] *Ibid* at para 48.

[45] *Ibid* at para 105.

from a municipal well faced with closure by the local municipality until a viable alternative supply could be arranged.[46]

II. The Scope of the Common Law Duty

At the beginning of this article, I posed a series of questions about the scope of the duty to serve. I will now address these from the perspective of the common law.

A. To Which Services Does the Duty Attach?

Chastain says that the duty to serve attaches to services "of fundamental importance to the public" and specifically identifies "telephone services" as within that category.[47] Other decisions use phrases such as "prime necessities", "essential services", and "necessities of modern life"[48] to describe the type of services that attract the duty to serve. No case identifies, however, any other type of telecommunications service (for instance, mobile telephone service, Internet access service, or data services) as subject to the duty.[49]

B. Is There a Duty to Extend Service?

There appears to be no foundation for imposing a common law duty on a public utility to extend service beyond its existing lines of supply. American authority on the point seems clear.[50] The *duty* to serve is limited by the utility's *capacity* to serve.[51]

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46 2011 ABQB 337, 46 Alta LR (5th) 194. In *Chastain*, McIntyre J said that the public utility's duty to serve arises wherever there is a "practical monopoly" on the supply of an essential commodity, implicitly negating the idea that the duty obtains only where there is a legal monopoly (*supra* note 26 at 491). McIntyre J referred to *Lévis* (*supra* note 32) but not on this point.

47 *Supra* note 26 at 491.

48 *Lévis, supra* note 32 at 513; *Vector*, *supra* note 40 at para 51; *Perimeter*, *supra* note 28 at para 147.

49 Although, public telegram service, now discontinued, once fell in the same category as telephone service: see *CNCP Telecommunications, Interconnection with Bell Canada* (17 May 1979), Telecom Decision CRTC 79-11 (Ottawa: CRTC, 1979) at 81-83 [Decision 79-11]. The fact that a telecommunications carrier provides telephone service as a public utility does not render all of its services public-utility services: see *Perimeter*, *supra* note 28 at para 148.

50 See e.g. *Corpus Juris Secundum*, vol 73B (Danvers, Mass: Thompson West, 2004) "Public Utilities", § 6: "While a public utility may be required to serve every applicant within the territory it professes to serve, it cannot be required to extend service outside such territory." See also Jim Rossi, "The Common Law 'Duty to Serve' and Protection of Con-

The issue arose in *Holmberg v. Public Utilities Commission of Sault Ste. Marie*,[52] but the case was decided on the basis of the applicable statute without reference to the common law. A resident of a new subdivision successfully applied to the Ontario courts for mandamus to compel a public utilities commission (the "PUC") to provide water and electrical service. The PUC had refused to do so because the developer of the lands had failed to complete installation of a water main and to install a secondary line and transformer necessary to supply the houses with electricity, in contravention of an agreement with the municipality for the development of the lands. An order directing the PUC to supply the services had been granted at first instance without written reasons. On appeal, the PUC acknowledged that it had a duty to provide service under section 55 of the *Public Utilities Act*, but argued that that did not include a duty to extend its lines of supply. Section 55 provides as follows:

> 55. (1) Where there is a sufficient supply of the public utility, the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building.[53]

The PUC said that, until the water main was tested (which involved digging down to test for possible leaks) and the secondary line and transformer were installed, no service could be demanded as of right. The court of appeal had no difficulty in concluding that the applicant's property lay along an existing water supply line and that section 55 imposed a statutory duty to supply that service. The situation relating to electricity was different, however, because the facilities required to supply power were not in place. The court concluded that the installation of the secondary line and transformer was not a prerequisite to the creation of a statutory duty to serve. That duty applied unless there was "no supply line at all" from which service could be provided.[54] Since there was a supply line, the court held that the failure of the developer to perform its agreement with the municipality to install those facilities did not defeat the PUC's statutory duty to provide service.

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sumers in an Age of Competitive Retail Public Utility Restructuring" (1998) 51:5 Vand L Rev 1233 at 1252-53: "Although the states differ in the details, the basic modern rule for the extension of service generally accepted by all fifty states is that a utility can be required by a regulatory authority to make all reasonable additions within the area to which it has dedicated its services, but that no extensions can be mandated outside of that area."

51 Payton, *supra* note 8 at 144.

52 [1966] 2 OR 675, 58 DLR (2d) 125 (CA) [*Holmberg*].

53 RSO 1960, c 335, s 55.

54 *Holmberg*, *supra* note 52 at 682.

Some authorities suggest that a duty to extend service may be implied from a franchise arrangement conferring an exclusive right to provide a service.[55] The franchise model, though familiar in other public-utility settings,[56] has not been widely adopted in Canada for telecommunications services. Canadian telecommunications carriers are generally free to define for themselves the limits of their operating territories, and none enjoys a legal monopoly within its territory. As a result, there is rarely a foundation for the implication of a duty to provide telephone service based on the exclusivity conferred by a franchise. Where exclusivity has been expressly granted by statute, a duty to serve is often linked to that exclusive right, but both right and obligation are usually for a limited term. For example, the 1888 act of the New Brunswick legislature incorporating the New Brunswick Telephone Company (now a constituent part of Bell Aliant) gave the company the exclusive right to maintain telephone communication between St. John and Fredericton, and between several other places, on the condition that "the said Company shall within two years of the passing of this Act construct, erect and equip Telephone communication between these several points or places between the same." The exclusivity was limited, however, to a period of ten years.[57] The Island Telephone Company Limited, which was incorporated by the legislature of Prince Edward Island in 1929 (also now a constituent part of Bell Aliant), enjoyed a similar period of exclusivity subject to an obligation (of indefinite duration) to "establish new exchanges wherever good telephone practice shall require."[58]

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55 See *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para 63, [2006] 1 SCR 140. According to *Burdick*, the duty to serve "probably owes its origin principally to the public franchises granted to the vast majority of modern public service companies, and has its logical basis in such grants" (*supra* note 8 at 529). See also Payton, *supra* note 8 at 138. Contrast *Bennett and Fisher, supra* note 41 at 501, Dixon CJ: "The American doctrine, which is a deduction from what is implied in the grant of an exclusive right to a public utility, has not been established in English law."

56 See e.g. *The Municipal Franchises Act*, SO 1912, c 42, s 2(c) (formerly applying to water, gas, electric and steam heating works, as well as "distributing works of every kind"); *Municipal Franchises Act*, RSO 1990, c M.55, s 1, as amended by *Municipal Act, 2001*, SO 2001, c 25, s 480(1) (currently applying only to gas). The decision of the Privy Council in *Toronto v. Bell Telephone Canada* effectively blocked any prospect of municipal regulation of the activities of federally incorporated telephone companies ([1905] AC 52, 21 TLR 45). See *Cobalt (Town of) v Temiskaming Telephone Company*, [1919] 59 SCR 62, 47 DLR 301 (discussing the statutory power of an Ontario municipality to grant a provincially incorporated telephone company a franchise to install facilities on its streets).

57 *An Act to incorporate the New Brunswick Telephone Company (Limited)*, SNB 1888, c 78, s 9.

58 *An Act to Incorporate The Island Telephone Company Limited,* SPEI 1929, c 30, ss 3, 23.

C. Is There a Duty to Serve Where There Are Multiple Suppliers?

Public-utility services have historically been provided on a monopoly (or near-monopoly) basis and it seems fair to say that the existence of a monopoly has been one of the defining features of the public utility.[59] A legal or "practical monopoly" is present in *Cornwall*, *Chastain*, and the other Canadian public-utility cases cited above in which a duty to serve has been held to arise. This is equally true of the *Lévis* line of cases, although they do not all mention the point. In *Lévis,* the supplier did not have a legal monopoly, but was found to have a position of "great and special advantage" deriving from the fact that it was the only convenient source of supply. *Tsawwassen* and *Long Lake* are also cases in which the suppliers had, in effect, a "practical monopoly" of the sort that the supplier of gas and electricity was found to have in *Chastain*.[60] In *Commercial Alcohols Inc. v. Bruce Power, L.P.*,[61] the Ontario Superior Court supports the view that the duty to serve arises only where there is a monopoly in the supply of the relevant commodity. That case concerned the interpretation of a contract for the supply of steam energy by Bruce Power. The court said that, as Bruce Power did not have a monopoly over provision of steam energy, the obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public referred to in *Chastain* did not apply.

Many of the markets previously dominated by monopolies, including telecommunications, electricity, and gas, have now become, in whole or in part, competitive. How is the traditional duty to serve imposed by the common law on the former monopolies affected by this change? This is one

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59 See James C Bonbright, *Principles of Public Utility Rates* (New York: Columbia University Press, 1966) at 8 (identifying "special public importance or necessity" and "the possession by utility plants of ... characteristics leading almost inevitably to monopoly or at least to ineffective forms of competition" as the two essential attributes of the public utility).

60 The long line of New Zealand cases which have applied *Lévis* (*supra* note 32) and the doctrine of "prime necessity" to regulate access to and pricing of utility services generally cite the existence of monopoly as the justification for judicial intervention. See *State Advances Superintendent v Auckland City Corp,* [1932] NZLR 1709 at 1715 (CA) ("[W]here a water-supply authority has a practical monopoly there lies upon it an obligation (implied where not expressed) to supply water to all those requiring it and who are prepared to pay a fair and reasonable charge."); *Auckland Electric Power Board v Electricity Corp of New Zealand Ltd*, [1994] 1 NZLR 551 at 557 (CA) (the doctrine of prime necessity imposes upon monopoly suppliers of essential services a common law duty to supply at a reasonable price); *Vector, supra* note 40 at para 51 ("the doctrine embodies a principle that monopoly suppliers of essential services must charge no more than a reasonable price"); *Pacifica Shipping Ltd v Centreport Ltd* (2002), [2003] 1 NZLR 433 at para 17 (the doctrine of prime necessity is "designed to control the prices which qualifying monopolists may impose on their customers").

61 2006 CanLII 2183 at para 152, [2006] OTC 85, aff'd 215 OAC 190, 2006 CanLII 31445.

of the issues I will examine in the next section. Where the common law is concerned, however, the situation seems clear: the existence of a monopoly or near-monopoly is critical to the existence of a duty to serve and once that condition no longer obtains the common law duty to serve no longer arises.

III. The Common Law Duty to Serve and Regulation

In Canada, the common law duty to serve exists alongside statutory service obligations imposed on telecommunications carriers by the *Telecommunications Act* and regulatory policies promoting universal access to basic telecommunications services promulgated by the CRTC.[62] In this section, I examine these other service obligations and how they interrelate with carriers' common law duties.

A. The Regulatory Framework

The *Telecommunications Act* affirms that Canadian telecommunications policy has among its objectives "to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada" (the "universal service objective").[63] The act requires that rates for telecommunications services shall be just and reasonable and specifies that no carrier shall unjustly discriminate or give an undue preference in relation to the provision of a telecommunications service.[64] The act empowers the CRTC to ensure compliance with these and other obligations and confers broad regulatory

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62 As *Cornwall* illustrates, the common law duty to serve may exist alongside a public utility's statutory service obligations. In that case, the court held that the city was compelled to supply water to consumers as "a matter ... of duty and the common law and also s. 55 of The Public Utilities Act" (*supra* note 24 at 684).

To say that a common law duty to serve may exist in parallel with statutory service obligations is not to say that the common law courts retain jurisdiction to enforce such duties where a regulatory authority, such as the CRTC, has a statutory mandate over the subject matter. Where the jurisdiction of the courts and that of a specialized tribunal overlap, the case law indicates that the courts will generally decline jurisdiction and defer to the regulator. See e.g. *Mahar v Rogers Cablesystems Ltd* ((1995), [1996] 25 OR (3d) 690, 34 Admin LR (2d) 51), and the discussion of that case and others in Michael H Ryan, *Canadian Telecommunications Law and Regulation*, loose-leaf (consulted on 25 January 2012), (Scarborough: Carswell, 1993) at s 503 (a).

63 *Supra* note 1, s 7(b).

64 *Ibid*, s 27(1)-(2). These provisions replicate the common law duty that requires carriers to charge only prices that are reasonable and not unreasonably discriminatory for their telephone services and extend those requirements to all telecommunications services.

powers on the CRTC for that purpose.[65] The act does not impose a statutory duty to serve on carriers.

Exceptionally, the *Bell Canada Act* imposes a duty on Bell Canada to provide telephone service "[w]here a telephone service is requested ... in a municipality or other territory within which a general telephone service is provided by the Company." The duty applies if the premises for which the service is requested front on "a highway, street or lane or other area along, over, under or on which the Company has a main or branch telephone service or system," but not if "the telephone on the premises would be situated more than 62 metres or such other distance as the Commission may specify from the highway, street, lane or other area."[66]

The ongoing relevance of the common law duty to serve is reflected in CRTC decisions. The CRTC was evidently referring to the common law when it stated in a 1979 decision that there was a duty on Bell Canada and CNCP Telecommunications to provide their monopoly services (public telephone service and telegram service, respectively) to "anyone seeking service in their entire operating areas irrespective of location."[67] In 1999, the Commission said that a local exchange carrier's obligation to serve means that it "must provide service to subscribers in its service territory at a reasonable price without unjust discrimination." It added that "[t]he concept of an 'obligation to serve' developed within the context of a traditional, regulated monopoly in telecommunications services."[68]

In 1985, the CRTC proposed to add a stipulation to carriers' standard terms of service expressly requiring them to supply their tariffed services

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65 Section 24, for example, provides that the offering and provision of services are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission. Section 32(g) provides that the Commission may make any order relating to the rates, tariffs, or services of carriers subject to the *Telecommunications Act* (*supra* note 1, ss 24, 32(g)).

66 *Bell Canada Act*, SC 1987, c 19, s 6 (having its origins in *Act Respecting Bell 1902*, *supra* note 10, s 2). The Commission is also empowered to shorten or lengthen the distance to which the obligation to build facilities beyond existing lines applies, but it has made no such order to date (*ibid*, s 6(2)(b)). See also the following statutes, now repealed, which imposed a duty to serve: *Telecommunications Act*, SA 1988, c T-3.5, s 42, as repealed by *Telecommunications Act Repeal Act*, SA 2007, c 42, s 1 (duty to provide telephone service imposed on city of Edmonton); *The Rural Telephone Act*, RSS 1978, c R-27, s 14, as repealed by *The Miscellaneous Statutes Repeal (Regulatory Reform) Act, 2001*, SS 2001, c 23, s 7(1) (duty to serve imposed on rural telephone systems for farm applicants); *Telephone Act*, RSO 1990, c T.4, ss 32, 94, as repealed by *Municipal Act, 2001*, SO 2001, c 25, s 484(2)27. Section 32 of the *Telephone Act* incorporated section 55 of the *Public Utilities Act*, RSO 1990, c P.52.

67 Decision 79-11, *supra* note 49 at 226-27.

68 *Telephone Service to High-Cost Serving Areas* (19 October 1999), Telecom Decision CRTC 99-16 at paras 31-32, online: CRTC <http://www.crtc.gc.ca> [Decision 99-16].

"to all who apply."[69] Possibly as a consequence of questions raised by some carriers about the Commission's power to prescribe a duty to serve,[70] the provision ultimately adopted (and that continues to apply today) stopped short of imposing an affirmative duty to serve and instead specified when the duty does *not* apply. The resulting text, article 3.1 of the *Terms of Service*, provides as follows:

> 3. Obligation to Provide Service
>
> 3.1 The Company is not required to provide service to an applicant where:
>
> a) the Company would have to incur unusual expenses which the applicant will not pay; for example, for securing rights of way or for special construction;
>
> b) the applicant owes amounts to the Company that are past due other than as a guarantor; or
>
> c) the applicant does not provide a reasonable deposit or alternative required pursuant to these Terms.[71]

Article 3.2 adds the requirement that, "[w]here the Company does not provide service on application, it must provide the applicant with a written explanation upon request."

While there is no duty to serve prescribed by the *Telecommunications Act* or the *Terms of Service*, the prohibition on unjust discrimination imposes an implicit duty to serve in some circumstances; it precludes a carrier from refusing service to a potential customer without just cause if it is providing the service to an existing customer in similar circumstances.[72]

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69 *Review of the General Regulations of the Federally Regulated Terrestrial Telecommunications Common Carriers: Phase II – Draft Revisions to the General Regulations* (6 March 1985), 1985-22, s 3.1, online: CRTC <http://www.crtc.gc.ca>.

70 See Submission by CNCP Telecommunications, 22 April 1985, at 7; Comments of British Columbia Telephone Company, 22 April 1985, at 3. Both the submission and the comments are cited in Ryan, *supra* note 62 at 3-17, n 53.

71 *Review of the General Regulations of the Federally Regulated Terrestrial Telecommunications Common Carriers: Terms of Service* (26 March 1986), Telecom Decision 86-7, App I, ss 3.1-3.2, online: CRTC <http://www.crtc.gc.ca> [*Terms of Service*]. The *Terms of Service* apply, by their terms, to any service in respect of which the Commission has approved a tariff (*ibid*, App I, s 1.1).

72 In *Lachance v Bell Telephone* ((1958), 77 CRTC 294 [*Lachance*]), the Board of Transport Commissioners was asked to order Bell to provide telephone service to the applicant, whose next-door neighbour had such service. Despite the proximity of his next-door neighbour, Bell contended that the applicant was in a territory served by another telephone company and did not, strictly construing the relevant provision of the *Bell Canada Act* (*supra* note 66), fall within the class of persons entitled to demand an extension of the company's lines to his premises. The Board was of the view that, in light of the fact that the applicant and his neighbour resided in the same area, had residences

As a general matter, the *Telecommunications Act* does not empower the CRTC to require a carrier to extend service beyond its existing lines. This gap in regulatory authority was critically commented upon by the Board of Railway Commissioners as long ago as 1910, which described the governing legislation as "lame" in contrast to the corresponding legislation respecting railways, which gave the same board ample authority to require railways to extend their lines.[73] In 1928, the board concluded for this reason that it was powerless to assist rural residents in the townships of Madoc and Elsevir, who had petitioned it for an order requiring Bell Canada to extend its lines to their area.[74]

The one circumstance in which the CRTC is empowered to order the construction of facilities is provided for in section 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.[75]

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." The 1992 decision of the Commission ordering Bell Canada and BC TEL to modify their switches to facilitate the interconnection with competitive providers of long distance services which had been mandated under section 40 of the *Telecommunications Act* provides an example of a situation where section 42

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fronting the same road, and were engaged in the same business, discrimination existed. It is clear from the decision that the Board would have granted an order compelling the telephone company to provide service on that ground; at the time, however, the non-discrimination provisions of the *Railway Act* applied only to rates and not to services and facilities provided by a carrier (see *Railway Act*, *supra* note 10, s 252). The Board held in these circumstances that it was without jurisdiction to grant the relief requested.

73 See *Tinkess v Bell Telephone* (1916), 20 CRC 249 at 254 (citing an earlier oral judgment of the chief commissioner of the Board, denying, for lack of jurisdiction, an application by the proprietors of a hotel for an order directing Bell to install telephones in rooms). See also *North Lancaster Exchange v Bell Telephone* (1917), 21 CRC 220 at 224.

74 *Residents between Queensboro and Cooper v Bell Telephone* (1928), XVIII Board of Railway Commissioners for Canada, Judgments, Orders, Regulations and Rulings 390 [*Queensboro*].

75 *Telecommunications Act*, *supra* note 1.

applied. A violation of section 27(2), which prohibits unjust discrimination by telecommunications carriers, might also serve as a trigger for a section 42 order to extend a carrier's lines, although no such order has ever been made.[76]

The Commission has said that "[t]he obligation to serve [not only] requires ILECs [i.e., incumbent local exchange carriers] to provide telephone service to existing customers, new customers requesting service where the ILEC has facilities, [but also to] *new customers requesting service beyond the limits of the ILEC's facilities*."[77] Such requests by new customers are governed by Commission-approved tariffs. These do not, however, impose an obligation on carriers to extend their facilities so much as to define a process for dealing with such requests. Bell Canada's tariff is representative. The tariff provides that "when the Company elects to provide service or facilities in territory other than that as stated in [the *Bell Canada Act*], the construction charges specified in its tariff shall apply." This includes a free allowance for the first 165 metres of construction, which is deemed to be covered by monthly rates and rentals, after which a cost-based charge applies.[78]

B. Universal Service

The CRTC's consideration of the duty to serve has taken place almost entirely within the context of discussions of its universal access policy.

A review of the decisions of federal regulatory authorities prior to 1976—the year that jurisdiction over telecommunications was transferred to the CRTC[79]—suggests that the Commission's predecessors[80] did not see the promotion of universal access to telephone service as a regulatory objective. These agencies construed their mandate narrowly: it was to ensure that rates were just and reasonable and free of unjust discrimination and undue preferences; and consideration of the telephone companies' duty to serve were addressed only within the context of disputes over indi-

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76 The possibility of an order by the Board of Railway Commissioners to construct facilities based on the prohibition against unjust discrimination was mooted in *Stoney Point Village v Bell Telephone* (1915), 18 CRC 319 at 320-21 [*Stoney Point*] (concerning the jurisdiction of the Board to order the reopening of a telephone pay station).

77 *OTS Decision*, *supra* note 4 at para 6 [emphasis added].

78 General Tariff 6176, Item 150.

79 *Canadian Radio-television and Telecommunications Commission Act,* SC 1974-75-76, c 49, s 3(1).

80 Telecommunications was regulated by the Board of Railway Commissioners from 1908 until 1938, when the Board's name was changed to the Board of Transport Commissioners. The latter had the responsibility until 1967, when it was replaced by the Canadian Transport Commission. The CTC regulated telecommunications until 1976.

vidual service issues.[81] The CRTC brought a fresh approach to regulation and a concern for broader social issues. The CRTC made the universal availability of telephone service at affordable prices, now endorsed as an objective of Canadian telecommunications policy by the *Telecommunications Act*,[82] one of its prime objectives.[83] The absence of a statutorily mandated duty to serve and a power to require the construction of extensions to facilities to implement it does not seem to have impeded the CRTC in pursuing that objective. It did so principally by incorporating consideration of accessibility to a carrier's telephone services in its assessment of the justness and reasonableness of the carrier's rates. The Commission made it clear that, where it regarded the level of availability of telephone service as unsatisfactory, it would be reluctant to authorize rate increases until the carrier could demonstrate significant progress towards improving the situation.[84] Under this regime, telephone companies were allowed to recover the costs of improved access through rate increases for other services sanctioned by regulation—and in particular long distance telephone services. By means of this "regulatory bargain", the Commission was able to drive a continued expansion of access to service over the following decades.[85] The Commission's decision in *British Columbia Telephone Company—Extension of Service to Remote Communities*[86] provides a good example of this process in action. In that case, the Commission endorsed a plan under which the company would contribute up to $10,000 per subscriber to extend or improve service to remote locations, which sum would be recoverable by the company from the general body of telephone customers. It was the "regulatory bargain", and not the prescrip-

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81 See *Stoney Point, supra* note 76; *Queensboro, supra* note 74; *Lachance*, *supra* note 72; *McKenna v Bell Telephone* (1963), [1966] 85 CRTC 157, rev'd *Metcalfe Telephones Ltd v Walter J McKenna* (1963), [1964] SCR 202, 43 DLR (2d) 415.

82 *Supra* note 1, s 7(b).

83 In 1977, the CRTC said that it "must ... ensure that all segments of the public have reasonable access to telephone service": *Bell Canada, Increase in Rates* (1 June 1977), Telecom Decision CRTC 77-7 (Ottawa: CRTC, 1977) at 9. In 1978, it described universal accessibility to basic telephone service as "a fundamental principle of regulation": *Bell Canada, Increase in Rates* (10 August 1978), Telecom Decision CRTC 78-7 (Ottawa: CRTC, 1978) at 26.

84 See e.g. *CN Telecommunications, Increase in Telephone Rates in Newfoundland – 780144200* (5 July 1978), Telecom Decision CRTC 78-5 (Ottawa: CRTC, 1978) at 18.

85 The percentage of households with telephone service rose from 96.5% in 1976 to 98.4% by 1997. The 1976 data is from Robert Pike & Vincent Mosco, "Canadian Consumers and Telephone Pricing: From Luxury to Necessity and Back Again?" (1986) 10:1 Telecomm Pol'y 17 at 22; the 1997 data is from CRTC, *Report to the Governor in Council: Status of Competition in Canadian Telecommunications Markets*, online: CRTC <http://www.crtc.gc.ca>, table 3.4. Both sources cite Statistics Canada data.

86 (6 June 1990), Telecom Decision CRTC 90-11, online: CRTC <http://www.crtc.gc.ca>.

tion or enforcement of the duty to serve, that underpinned the Commission's universal access policy and to which the success of that policy must be attributed.

The elaborate system of internal telephone company cross-subsidies that evolved during this period became so central to the Commission's universal access policy that the Commission initially resisted proposals for the introduction of competition in the provision of long distance telephone services out of concern for the threat competition might pose to the sustainability of the mechanism funding universal access.[87] These concerns were ultimately overcome through adoption of a scheme under which new entrants were required to make payments to the incumbents to preserve affordable rates for basic services.[88] An amendment to the *Telecommunications Act* in 1998 provided a statutory foundation for the creation of a new subsidy mechanism under which all carriers now pay a CRTC-prescribed percentage of their revenue into a fund to subsidize the provision of basic residential local telephone services in Commission-designated high-cost serving areas.[89]

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87 See *Interexchange Competition and Related Issues* (29 August 1985), Telecom Decision CRTC 85-19, online: CRTC <http://www.crtc.gc.ca>. In a press release issued by the CRTC on 29 August 1985 to coincide with the release of the latter decision, the Chairman of the CRTC, André Bureau, said "I want to assure Canadians that the Commission would not make decisions which would jeopardize the principle of universal accessibility to telephone service at an affordable price" (quoted in Pike & Mosco, *supra* note 85 at 31). The implications of introducing competition in the provision of telecommunications services were later the subject of a special report: see Federal-Provincial-Territorial Task Force on Telecommunications, *Competition in Public Long-Distance Telephone Service in Canada*, *Report* (Ottawa: Minister of Supply and Services Canada, 1988).

88 In *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, the CRTC authorized the introduction of long distance telephone competition ((12 June 1992), Telecom Decision CRTC 92-12, online: CRTC <http://www.crtc.gc.ca>). The decision incorporated arrangements for the payment of a per-minute charge by new entrants as a "contribution" to the costs of operating the ILECs' access networks. In *Local Competition*, the Commission created a central contribution fund and made it possible for any local exchange carrier, ILEC, or competitive local exchange carrier, to draw on the contribution fund to subsidize its local rates ((1 May 1997), Telecom Decision CRTC 97-8, online: CRTC <http://www.crtc.gc.ca> [Decision 97-8]). In *OTS Decision*, the Commission decided that only ILECs should be eligible to draw from the fund since only they have an obligation to serve (*supra* note 4 at para 140).

89 *Telecommunications Act*, *supra* note 1, s 46.5, as amended by *An Act to amend the Telecommunications Act and the Teleglobe Canada Reorganization and Divestiture Act*, SC 1998, c 8, s 6. The new contribution arrangements adopted are described in *Changes to the Contribution Regime* (30 November 2000), Telecom Decision CRTC 2000-745, online: CRTC <http://www.crtc.gc.ca>. For an overview of the scheme, see *The Canadi-*

In *Telephone Service to High-Cost Serving Areas*, the Commission for the first time defined a "basic service objective" (BSO) for ILECs. The services to which the BSO applies include:

- Individual line local service with touch-tone dialling, provided by a digital switch with capability to connect low-speed data transmission to the Internet at local rates [i.e., "Primary exchange service"];
- Enhanced calling features, including access to emergency services, Voice Message Relay Service, and privacy protection features;
- Access to operator and directory assistance services;
- Access to the long distance network; and
- A copy of a current local telephone directory.[90]

The BSO does not purport to impose a requirement on ILECs to provide the relevant services. The Commission made it clear in setting the objective that it did not expect the industry to extend and improve service to all areas immediately; the only actual obligation imposed was a requirement that all incumbents not meeting the objective submit multi-year service improvement plans designed to achieve the basic service objective in their entire service territory.[91]

The Commission has rejected proposals to impose a duty to serve on pay telephone service providers and to impose a duty on a carrier to serve as a toll carrier of last resort.[92] The Commission has also said that it would consider including an obligation to provide toll-free Internet access in the carriers' "obligation to serve" if there was evidence that no ISP was providing such service.[93]

In its recent decision in *Obligation to Serve and Other Matters*, the Commission considered whether it should play a role in improving access

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an Revenue-based Contribution Regime (8 June 2007), Telecom Decision CRTC 2007-15, online: CRTC <http://www.crtc.gc.ca>.

90 Decision 99-16, *supra* note 68 at para 24.

91 *Ibid* at paras 37-41. The Commission said that subsidies would be available to underwrite some of the costs incumbents incur in meeting the BSO (*ibid* at para 79).

92 See e.g. *Local Pay Telephone Competition* (30 June 1998), Telecom Decision CRTC 98-8, online: CRTC <http://www.crtc.gc.ca>; *O.N.Telcom - Implementation of Toll Competition and Related Matters* (13 September 2001), Telecom Decision CRTC 2001-583 at paras 76-86, online: CRTC <http://www.crtc.gc.ca>.

93 *Implementation of Price Regulation for Télébec and TELUS Québec* (31 July 2002), Telecom Decision CRTC 2002-43 at para 396, online: CRTC <http://www.crtc.gc.ca>.

to broadband Internet services and, specifically, whether it should add access to broadband Internet services to the BSO.[94] Some parties, including most ILECs and other major Internet access providers, argued that the Commission lacked the legal authority to require them to provide broadband Internet access; and other parties, including consumer groups, took the contrary view. In the end, however, the Commission decided that it would not add the provision of broadband Internet access to the BSO. The Commission noted that the rollout of broadband Internet access in Canada has been successful through a combination of market forces, targeted funding, and public-private partnerships at all levels of government, even though service gaps remain in rural and remote areas. It decided that the existing policy should continue. Instead of adopting any prescriptive measures, the Commission established target speeds (5 Mbps downstream and 1Mbps upstream) for broadband Internet access and stated that these speeds should be available to all Canadians by the end of 2015 and that it would monitor progress towards reaching these targets.[95]

C. The Impact of Competition

I have stated above that the common law duty to serve attaches only to services provided on a monopoly or near-monopoly basis. The CRTC has implicitly acknowledged this limit on the common law duty to serve.[96] It is appropriate to turn now to a consideration of how the CRTC has addressed the duty to serve in the increasingly competitive environment that has emerged since the 1990s.

Although competition in the provision of public long distance telephone services was introduced in 1992, it was not until 1997, when the Commission liberalized the provision of local exchange services, that the Commission was compelled to address the implications of competition for the duty of the incumbents to provide telephone service.[97] The subject attracted considerable comment in the proceeding that led up to the 1997 decision. Stentor, the umbrella group for the major incumbents, submitted that in a competitive environment the incumbents' obligation to serve would in effect become a "carrier of last resort" obligation under which Stentor members would be ready to serve not only their own customers, but also competitors' customers. Stentor also submitted, however, that the

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94 *OTS Decision*, *supra* note 4 at para 29.

95 See *ibid* at paras 81-84. The Commission also decided against establishment of a funding mechanism to subsidise the deployment of broadband Internet access services more generally: *ibid* at para 64.

96 See Decision 79-11, *supra* note 49 at 226-27; Decision 99-16, *supra* note 68 at para 32.

97 Decision 97-8, *supra* note 88.

case for maintaining such an obligation would disappear in a competitive marketplace after the incumbents made interconnection and other essential facilities available to new competitors. The Commission responded that it would not be appropriate, in markets characterized by effective facilities-based competition, to designate one carrier as having carrier of last resort responsibilities. It also considered it unlikely that fully effective competition would develop in all areas in the near term, and even then that it would be unlikely that market forces, on their own, would achieve the *Telecommunications Act*'s accessibility objective in all regions of Canada. The Commission concluded that the most appropriate way to reach this goal was "to maintain the incumbents' current obligation to serve," pending further investigation into an approach for serving high cost areas more suited to a fully competitive environment.

In *Telephone Service to High-Cost Serving Areas*, the 1999 decision in which it established the BSO, the Commission invited comment on how the obligation to serve might be changed where competition is present. However, it again concluded that effective local service competition would not likely occur in the short term and that, in the meantime, "*incumbent local carriers must retain their obligation to serve*."[98]

Over the following ten years, local exchange markets became increasingly competitive and ILECs and others in the industry began to call on the Commission to exercise its statutory power to forbear from regulating local exchange markets[99] where competition had taken hold, as it had in long distance and other markets in similar circumstances. The Commission initially resisted these calls for local forbearance. In 2005, however, the Commission initiated a proceeding that resulted a year later in a decision entitled *Forbearance From the Regulation of Retail Local Exchange Services*. The Commission said that it would be prepared to forbear from regulating local exchange services in a relevant market where an applicant ILEC could demonstrate that it had suffered a 25 percent market share loss in the relevant market, had met certain quality of service standards in relation to services provided to competitors, had complied with certain measures designed to facilitate competition, and could in fact demonstrate that "rivalrous behaviour" existed in the relevant market.[100]

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98 Decision 99-16, *supra* note 68 at paras 31-36 [emphasis in original].

99 The power to "forbear" is conferred by section 34 of the *Telecommunications Act* (*supra* note 1, s 34).

100 *Forbearance from the Regulation of Retail Local Exchange Services* (6 April 2006), Telecom Decision CRTC 2006-15 at para 242, online: CRTC <www.crtc.gc.ca> [Decision 2006-15]. This decision was later amended by *Order Varying Telecom Decision 2006-15*, PC 2007-532, (2007) C Gaz II, 408 [*Order Varying Decision 2006-15*]. A consolidated

The Commission declined, however, to relieve incumbents of their duty to serve. The Commission stipulated that incumbents would continue to be required to offer primary exchange service in forborne markets, reasoning that there may remain pockets of uncontested customers for whom the incumbent would remain the primary or only local exchange carrier. It also decided, "in order to ensure that residential stand-alone PES is available to all residential customers in forborne markets ... to retain in forborne markets the ILECs' obligation to serve with respect to residential stand-alone PES."[101]

Pressure for further deregulatory measures prompted the Governor-in-Council to intervene in the following months with two initiatives. First, the Governor-in-Council directed the CRTC, in exercising its powers and performing its duties under the *Telecommunications Act,* to "rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives," and "when relying on regulation, [to] use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives."[102] Second, the Governor-in-Council issued an order varying the criteria established by the Commission in its local forbearance decision by eliminating the 25 percent market-share-loss requirement and substituting a test which mandates forbearance in a local exchange where there are at least two other independent facilities-based service providers serving the same local exchange that are capable of serving at least 75 percent of the local residential lines.[103]

The variance order did not alter the CRTC's conclusions respecting continuation of the duty to serve, but in response to the Governor-in-Council's direction to "rely on market forces to the maximum extent feasible," the CRTC adopted an "action plan" for reviewing past regulatory measures, including the obligation to serve.[104] It was against this back-

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version of Decision 2006-15 that includes the variations can be found online: CRTC <http://www.crtc.gc.ca>.

101 Decision 2006-15, *supra* note 100 at paras 374-385 (especially para 381).

102 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, PC 2006-1534, (2006) C Gaz II, 2344 at 2344-2345. The Direction was issued pursuant to section 10 of the *Telecommunications Act* (*supra* note 1, s 10).

103 *Order Varying Decision 2006-15*, *supra* note 100. The power to vary CRTC decisions is conferred by s 12 of the *Telecommunications Act* (*supra* note 1, s 12).

104 *Action Plan for Reviewing Social and Other Non-economic Regulatory Measures in Light of Order in Council P.C. 2006-1534* (17 April 2008), 2008-34, online: CRTC <http://www.crtc.gc.ca>.

drop that the CRTC launched *Proceeding to Review Access to Basic Telecommunications Services and Other Matters* in 2010.[105] Examination of the obligation to serve and the BSO formed part of the agenda. The proceeding went through several phases. It is sufficient for present purposes to note that there was a diversity of views expressed about how these two issues should be addressed in the future. The large ILECs argued that the obligation to serve and the basic service objective should be eliminated in forborne exchanges and retained in regulated exchanges. These parties generally argued that market forces are sufficient in forborne exchanges to ensure that high-quality PES continues to be accessible to all subscribers. They also argued that, if the obligation to serve and the basic service objective were to be retained in forborne exchanges, ILECs should be given greater pricing flexibility by raising the price ceiling on stand-alone PES to the highest affordable level. Other parties, including consumer groups and small ILECs, submitted that the obligation to serve and the basic service objective should be retained in both regulated and forborne exchanges. They argued that reliance on market forces alone, even in forborne exchanges, would not ensure that vulnerable (e.g., low-income) and uncontested (i.e., without access to competitive wireline services) customers would continue to have access to quality voice services at affordable rates. Most of the large cable carriers submitted that the obligation to serve and the basic service objective should be eliminated wherever at least one competing alternative wireline or wireless voice service is provided within an ILEC's serving territory. "These parties argued that mobile wireless services are pervasive across the vast majority of Canada and are substitutes for wireline services."[106]

The Commission decided that ILECs should "continue to have an obligation to provide stand-alone [primary exchange service], which includes unlimited local calling at a flat monthly rate and a choice of long distance service provider,"[107] but gave the ILECs the freedom to charge higher rates for the service (subject to a price ceiling).[108] The Commission also rejected the idea that the obligation to serve and the BSO should be applied symmetrically to all carriers. In regulated exchanges, the Commission said, it would not be appropriate because "the majority of competitors

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[105] *OTS Notice*, *supra* note 4.

[106] *OTS Decision*, *supra* note 4 at para 36.

[107] *Ibid* at para 49. The Commission rejected the argument made by some parties that an obligation to serve arises only where there is a monopoly and that the Commission does not have the legal authority to impose such an obligation in forborne exchanges, where there is competition. The Commission characterized this view as "unduly narrow ... inconsistent with the broad statutory powers granted to the Commission, and ... the broad policy objectives to which the Commission must have regard" (*ibid* at para 46, n 33).

[108] *Ibid* at paras 46, 50-53.

have a minimal presence"; and in forborne exchanges, it "would be unduly duplicative and would not be a minimally intrusive means of achieving the policy objectives underlying the obligation to serve."[109]

Conclusions

The scope of carriers' service obligations is defined by an amalgam of common law duties, statutory service obligations and CRTC-mandated policies that can be summarized in the following points:

1. At common law, suppliers of services of fundamental importance to the public are required to provide their services on demand. Telephone services are included within this category, but no Canadian court has ever extended the duty to other types of telecommunications service.

2. The duty arises only in respect of the territory that the service provider professes to serve. There is no duty on the part of a service provider to extend its service beyond its existing lines of supply unless denial of service would subject a potential customer to unreasonable discrimination.

3. The duty arises only where a carrier has a monopoly (de jure or de facto) on the provision of the relevant service, or the service supplier stands in a position of special advantage and the circumstances and the relative position of the parties is such that the imposition of such a duty is warranted.

4. The common law duty to serve exists alongside statutory obligations imposed on telecommunications carriers by the *Telecommunications Act,* which requires them to charge just and reasonable rates and prohibits unjust discrimination. The act is silent, however, on the matter of the duty to serve (although, exceptionally, the *Bell Canada Act* imposes such a duty on Bell Canada).

5. In the exercise of its regulatory mandate, the CRTC has adopted policies promoting universal access to basic telecommunications services. Since 1993, it has been a statutory objective of Canadian telecommunications policy "to render reliable and affordable telecommunications services of high quality accessible to Canadians

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[109] *Ibid* at paras 42, 47. For contrasting views about whether the duty to serve should continue in the presence of competition, see Payton (*supra* note 8 at 121, 144-5) who argues in favour, and Willie A Grieve & Stanford L Levin ("Common Carriers, Public Utilities and Competition" (1996) 5:4 Indus & Corp Change 993 at 999-1000) who express concern about the sustainability of a regime that imposes a duty to serve on incumbents in the presence of competition.

in both urban and rural areas in all regions of Canada."[110] The Commission's authority to impose an obligation on carriers to extend service to unserved areas is limited, however, and, instead of imposing prescriptive measures, the Commission relied in the past on its rate-setting power to encourage the necessary investment. Using this approach, the Commission permitted carriers to recover the cost of network expansion and improvement through increased rates (and indicated that it would withhold approval of increases where service was judged inadequate). This approach has now been superseded by a scheme administered by the Commission, which provides explicit subsidies to support the provision of basic telecommunications services by ILECs in certain "high-cost areas".

6. The Commission has also defined a non-binding basic service objective for ILECs. The BSO includes the provision of individual local line service (primary exchange service). The CRTC has declined to extend the BSO to other services, such as pay phone service and toll-free access to the Internet.

7. The Commission has forborne from the regulation of ILECs' local exchange services in exchanges where competition has taken hold. The BSO no longer applies in such cases. The Commission has, however, decided that ILECs should continue to have an obligation to provide stand-alone primary exchange service throughout their territories.

8. The Commission has rejected the idea that the obligation to serve and the BSO should be applied symmetrically to all carriers.

9. The Commission has also rejected proposals that it should add the provision of broadband Internet access to the BSO. The Commission has opted instead to continue the existing policy, which relies upon a combination of market forces, targeted funding, and public-private partnerships at all levels of government, to expand the reach of broadband. The Commission has established target speeds for broadband Internet access and set a date of 2015 for achievement of those targets, which, it has said, it will monitor.

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[110] *Telecommunications Act*, *supra* note 1, s 7(b).