

Canadian Human Rights Tribunal

**Tribunal canadien des droits de la
personne**

BETWEEN:

HENRY VLUG

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN BROADCASTING CORPORATION

Respondent

REASONS FOR DECISION

T.D. 6 /00

2000/11/15

PANEL: Anne L. Mactavish

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I. INTRODUCTION

[1] Like many people, Henry Vlug enjoys watching television. Unlike the majority of Canadians, however, Mr. Vlug cannot hear the audio portion of television programming as he is Deaf.⁽¹⁾ At issue in this case is whether the *Canadian Human Rights Act* requires that the Canadian Broadcasting Corporation make all of its English language network and Newsworld television programming accessible to the deaf and hard of hearing.

II. EVIDENCE

A. Background

[2] Mr. Vlug is a former teacher who now practices law in Vancouver. He is a husband, a father and a grandfather. Mr. Vlug is active in the deaf and hard of hearing community, and has long been involved in advocacy efforts on its behalf.

[3] When he is not busy in his practice or with his many other commitments, Mr. Vlug enjoys watching television. His taste in television is eclectic. Mr. Vlug particularly enjoys news programs, movies, dramatic series (particularly those with a legal theme) and sports. He prefers watching programs that are captioned,⁽²⁾ and will rarely watch anything that is not captioned.

[4] According to Mr. Vlug, not all shows are captioned. Some shows are intended to be captioned, but may have portions of the captions missing. Sometimes the quality of the captioning is so poor that the programs may as well not be captioned at all. Captions may cover portions of the television screen containing relevant information - the identity of a speaker in a news show, or the score in sports broadcast.

[5] Mr. Vlug states that television commercials often are not captioned at all. While acknowledging that many people would be pleased not to be subjected to an endless stream of

advertising, he resents the fact that others make the decision to exclude him from being able to fully absorb commercials. He also notes the prominent role that advertising plays in popular culture - a culture from which he and other deaf and hard of hearing people are excluded.

B. Mr. Vlug's Complaints Regarding CBC Programming

[6] Mr. Vlug's complaint alleges that the CBC has a continuing policy or practice of not captioning its broadcasts. The parties are in agreement that Mr. Vlug's complaint is limited to the CBC's English language network, including local affiliate stations, and Newsworld.

[7] Mr. Vlug testified that he does not watch CBC television very often, because of its poor record on the captioning issue. He did, however, refer to a number of specific examples of problems that he has encountered with respect to CBC programs.

[8] The first example cited by Mr. Vlug related to the fifth game of the Division Round of the Major League Baseball playoffs, broadcast by the CBC English language network on October 8, 1995. This was a game between the Seattle Mariners and the New York Yankees. Mr. Vlug was following the playoffs closely, having watched the first four games of the series, all of which had been captioned. He was looking forward to the game, and was dismayed to discover that it was not captioned. Mr. Vlug described his anger and frustration, explaining that it was like reading a novel, only to find the last chapter missing.

[9] On March 30 and 31, 1996 the CBC English language network broadcast the finals of the World Curling Championships, which broadcast was not captioned or otherwise made accessible to deaf and hard of hearing viewers. According to Mr. Vlug, all of the games leading up to the finals had been broadcast on TSN, complete with captioning of the commentary. Mr. Vlug testified that he himself is a curler, and that curling is very popular in the deaf community. Some four years later, he still feels the anger caused by the CBC's failure to caption this program.

[10] The May 28, 1998 National news included an item about Indonesian Prime Minister Suharto. According to Mr. Vlug, neither the Suharto item, nor the remainder of the news broadcast was captioned.

[11] Mr. Vlug also testified that the lead news stories on the National news program on August 23, 1999, June 1, 2000 and July 3, 2000 were not captioned. The June 1 and July 3, 2000 stories both raised matters of concern to public safety: the earlier story dealing with an incident at Laval University involving the spiking of vending machine drinks, and the later with the death of an Olympic athlete following an attack by a bear.

[12] While waiting for a show to start on August 17, 2000, Mr. Vlug watched part of a program featuring David Suzuki. The captions on the program disappeared, leaving the last few minutes of the show uncaptioned.

[13] Mr. Vlug also mentioned seeing a story regarding the recent outbreak of E. coli infections in Walkerton, Ontario, that was not captioned. He did not provide a date for this incident. Similarly, he mentioned a broadcast with respect to an incident involving Vietnamese hostages, but did not

provide a date for the broadcast. In his cross-examination of a CBC witness, Mr. Vlug mentioned seeing a clip from the Sydney Olympics on Newsworld that had not been captioned. This occurred in the early morning of September 18, 2000.⁽³⁾

[14] According to Mr. Vlug, CBC advertisements for upcoming shows ('promos') are never captioned. He also complains that CBC frequently fails to caption hockey games, and states that when games are captioned, much of the play-by-play is left out.

[15] In addition to concerns that arise from the denial of access to news and information relating to public safety, Mr. Vlug eloquently summed up the marginalizing effect that the lack of television captioning for entertainment programming has had on him and other members of the deaf and hard of hearing community. He referred to significant events in popular culture such as the appearance of The Beatles on the Ed Sullivan Show in the 1960's, and the creation of the Archie Bunker character on All in the Family some years later, as events that form part of a common cultural history, a history not shared by members of the deaf and hard of hearing communities, who did not have access to these programs. Mr. Vlug summed the situation up by saying that television captioning not only gives him access to entertainment, but lets him be included as part of his community.

[16] In response to the suggestion that some types of programming are not suited to captioning, in Mr. Vlug's view, all television programming, including music programming and children's shows, should be delivered in a form accessible to the deaf and hard of hearing. With respect to music programming, Mr. Vlug testified that there are members of the deaf community who are interested in music - one need only consider the example of Ludwig Von Beethoven as evidence of that. At a minimum, Mr. Vlug states that there should be some indication on the screen that music is being played. He also notes that live operatic performances are often captioned in theatres, and that there is no reason that could not be done in television broadcasts as well.

[17] As far as pre-school children's programs are concerned, Mr. Vlug testified that his young granddaughter loves a program called 'Blues Clues', and that he enjoys watching the show (which is captioned) with her. It is important to him to be able to share with her an experience important to her. He also notes that it is important that deaf and hard of hearing parents be able to monitor what it is that their pre-school aged children are watching on television.

C. Television Programming and the Deaf Community

[18] James Roots testified on behalf of the Canadian Human Rights Commission. Mr. Roots has been the Executive Director of the Canadian Association of the Deaf for the last 14 years. The mandate of the CAD is to protect and promote the rights of profoundly deaf Canadians. According to Mr. Roots, there are approximately 300,000 Canadians who are profoundly deaf, and 2½ million more who have some degree of hearing loss.

[19] Mr. Roots explained the important role that television plays in the lives of many members of the deaf community, both as a source of information and of entertainment. According to Mr. Roots, the average literacy level within the deaf community is at the grade five level. English or French is a second language for many deaf people, Sign Language being their first

language. Newspapers are generally written to a grade seven level, and as a consequence, many deaf people miss a lot when reading the newspaper. Television programs are generally written at the Grade three or four level, and television captions are thus more readily understood by the deaf.

[20] Mr. Roots' evidence as to the significant role that television plays in the lives of the deaf and hard of hearing is confirmed by a recent Angus Reid poll that discloses that 40% of the members of the Canadian Hard of Hearing Association watch in excess of 21 hours of television a week, whereas just 17% of the general population watch this much television.

[21] CAD research discloses that approximately 80% of the deaf community is either unemployed or under-employed. As a result, many in the deaf community cannot afford computers or Internet access. Radio programming is obviously not accessible to the deaf. Movies in theatres are not captioned, and only a third of movie videos are captioned. As a consequence, for many members of the deaf community, captioned television represents the only way in which they are able to get information about the world.

[22] Mr. Roots described the isolating effect that lack of access to information regarding current events can have on the deaf, and on their ability to participate in daily social discourse. He also identified safety concerns that can arise when the deaf are unable to access information relating to weather warnings or other public safety information.

[23] As part of his responsibilities with the CAD, Mr. Roots has been actively involved in lobbying efforts in an attempt to increase the degree to which television programming is made accessible to the deaf. To this end, Mr. Roots has contributed to CAD interventions before the Canadian Radio-television and Telecommunications Commission. In Mr. Roots' view, the technology exists to caption all television programming. He also notes that the costs associated with captioning have decreased significantly over time. The position of the CAD before the CRTC has been that 100% of CBC programming should be made accessible to the deaf. Mr. Roots expressed considerable frustration at the incremental approach to the issue taken by the CRTC.

D. The Regulatory History

[24] The CBC is licenced and regulated by the Canadian Radio-television and Telecommunications Commission. In understanding the history of licencing requirements for the CBC, as they relate to the issue of closed captioning, the Tribunal was assisted by the evidence of Mr. Nicholas Ketchum, the Director of Radio and Television Policy at the CRTC.

[25] Under Section 5(1) of the *Broadcasting Act*,⁽⁴⁾ the mandate of the CRTC is to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1) of the *Act*. Section 3(1) of the *Broadcasting Act* lists a series of elements comprising Canada's broadcast policy, including the need for Canadian ownership of the broadcasting system, the use of French and English, and provisions relating to Canadian content in programming. Section 3(1)(p) of the *Broadcasting Act* declares as part of Canada's broadcasting policy that: 'programming accessible by disabled persons should be

provided within the Canadian broadcasting system as resources become available for the purpose'.

[26] According to Mr. Ketchum, the issue of captioning has been raised at every major licence renewal hearing involving major broadcasters since at least 1986. The CRTC has taken an incremental approach to the issue, imposing increasingly onerous obligations on broadcasters as technology improves and costs come down.

[27] As far as the CBC English language network is concerned, in 1987 the CRTC established a long-term goal of full captioning of the complete program schedule. This goal was set having regard to the CBC's obligation to make its services available to all Canadians. The CRTC also indicated its expectation that captioning increase to a minimum of 15 hours per week.⁽⁵⁾

[28] In 1994, the CRTC noted that the CBC had exceeded licence expectations, the English network having offered 63½ hours of closed captioned programming per week in the 1993-94 broadcast year.⁽⁶⁾ This amounted to 58% of the full schedule, with 92% of the prime-time schedule being captioned. Reiterating the long-term goal of full captioning, the CRTC stated its expectation⁽⁷⁾ that for the next licence term, the CBC should, at a minimum, maintain the 1993-94 captioning levels.⁽⁸⁾

[29] CBC stations may be licenced separately from the networks. In 1989, the CRTC renewed the licence of CBUT, the Vancouver CBC station. The renewal decision expressed the expectation that CBUT acquire, as quickly as possible, the necessary equipment to caption, at a minimum, headlines and appropriate scripted portions of its early evening newscasts during the new licence term.⁽⁹⁾ In a 1995 decision, the CRTC noted that this expectation had not been met, and expressed its concern that such a lengthy period had passed without implementation. The CRTC then imposed, as a condition of CBUT's licence, that CBUT caption all local/regional news, including live segments, using either real-time captioning or another method capable of captioning live programming, by the end of the licence term.⁽¹⁰⁾ A similar condition was imposed on all CBC stations. According to Mr. Ketchum, this was the first time that the CRTC ever imposed a condition on a broadcaster with respect to captioning. The only other occasion when this has occurred was when the condition was reimposed on CBC stations in a subsequent licence renewal.

[30] The licences of both the networks and CBC stations were renewed in January of this year. In its decision, the CRTC commended the CBC for significantly exceeding the expected levels of captioning. Ninety-seven percent of the CBC's English language peak-time programming distributed to national audiences was being captioned, as was 74% of the programming over the broadcast day. In renewing the English language network's licence, the CRTC indicated that it expected the CBC to maintain its existing levels of captioning, and required that at least 90% of nationally distributed programming be captioned. The CRTC reimposed the earlier condition relating to locally-produced news programming, and indicated its expectation that the CBC fulfill its commitment to caption 100% of all programming produced and broadcast by CBC owned and operated television stations. It was a condition of the renewal of CBC stations' licences that all local/regional news, including live segments, be captioned, using either real-time captioning or another method capable of captioning live programming.

E. Effect of CRTC Decisions

[31] Ms. Noonan, counsel for the CBC, says that the provisions of the *Broadcasting Act* and the jurisdiction of the CRTC do not oust the jurisdiction of the Canadian Human Rights Tribunal, but that the Tribunal should give careful consideration and significant weight to the decisions of the CRTC and the rationale for those decisions. In Ms. Noonan's submission, these decisions address the question of what constitutes reasonable accommodation of the deaf and hard of hearing.

[32] In my view, the decisions of the CRTC as they relate to the extent to which the CBC should caption programs are helpful, but are not determinative of the issue before me. A review of the provisions of the *Broadcasting Act*, in particular, paragraph 3 (1) (p) thereof, as well as the decisions themselves, makes it clear that the CRTC applies a different test⁽¹¹⁾ in the determination of the extent to which captioning must be provided from that applied by this Tribunal in dealing with a human rights complaint. In my view, however, the findings of the CRTC on technical issues, such as the CRTC's assessment of the availability of suitable captioning technology, and any limitations that may exist with respect to the use of that technology, are highly persuasive. These are matters within the special expertise of the CRTC, and outside the expertise of this Tribunal. As a consequence, while the decisions of the CRTC on technical questions may not be binding upon me, I am prepared to give considerable weight to the findings of the CRTC in this regard.

F. Types of Captioning

[33] Marc Landry testified with respect to the technical aspects of captioning. Mr. Landry is a Supervising Technician in Program Broadcast Services for CBC's English language network. Program Broadcast Services is responsible for the distribution of programming for the network. Mr. Landry describes himself as a 'trouble-shooter', supervising other technicians and assisting them in resolving technical problems, including problems with captioning.

[34] According to Mr. Landry, captioning can be done in advance - a method known as 'pre-packaged' captioning. Captioning may also be done at the time of broadcast - described as 'live' or 'real-time' captioning.

[35] Pre-packaged captioning can be done with pre-recorded programming. A video copy of the program is provided to a captionist, who watches the tape, and inserts the captions. The tape can be stopped and replayed if the captionist misses something, and the spellings of names can be verified. The position of the captions can also be varied, so as not to interfere with the action on the screen. Once the captions have been prepared, they are saved on a disk and forwarded to an editing suite, along with the video. The captions are then synchronized to the action by the use of time codes, and inserted into the signal. This type of captioning is the most expensive, and ensures the greatest accuracy in the finished product. We heard that the cost of providing pre-packaged captioning is about \$1,000 to caption a one hour program.

[36] Real-time captioning occurs when captions are inserted as the program goes to air. Captions are generated as the action unfolds on the screen, by a captionist using a stenographer's

keyboard. The captionist will often be at another location, and will forward the captions to the studio by electronic means. The advantages of this type of captioning include the ability to caption live broadcasts such as news and sporting events, as well as the fact that it is less expensive than pre-packaged captioning. We heard that both the English language network and Newsworld pay \$145 an hour for real-time captioning. The principal disadvantages of this method are the frequency of spelling mistakes, and the possible loss of content as the action on the screen outpaces the speed of the captionist. In addition, any technical problems that may arise may be difficult to fix in a timely fashion.

[37] Both Mr. Landry and Mr. Ketchum confirmed that the technology currently exists to caption everything broadcast on television. Mr. Landry suggests however that there may be logistical problems in so doing, and that errors will inevitably occur.

G. Mandate of the CBC

[38] The CBC is created under the provisions of Part III of the *Broadcasting Act*. It occupies a unique place in Canadian society, and serves as an instrument of social policy.⁻⁽¹²⁾ As the national public broadcaster, the mandate of the CBC includes providing a wide range of television services that inform, enlighten and entertain.⁻⁽¹³⁾ The *Broadcasting Act* also requires that programming provided by the CBC be predominantly and distinctively Canadian, and that consideration be given to cultural, regional and linguistic factors.⁻⁽¹⁴⁾ One of the tasks specifically assigned to the CBC is to 'contribute to a shared national consciousness and identity'.⁻⁽¹⁵⁾

H. Captioning at the CBC

i. English Language Network

[39] Sheelagh Strang is the Business Manager of Program Broadcast Services at CBC. As such, she is the CBC employee responsible for the implementation of captioning for the English language network, including regional programming. She described the incremental approach that the CBC English language network has taken to captioning, increasing the percentage of captioned programming as resources permit.

[40] Ms. Strang testified that in 1997-98, the CBC English language network captioned 81.1 hours of programming each week, which corresponded to 62% of the broadcast day. In 1998-99, this increased to 91.4 hours or 68.1% of the broadcast day. For 1999-00, 102.5 hours of programming were captioned, which was 76.8% of the broadcast day. These figures refer to the captioning of television shows themselves, and do not include advertising time. In other words, a one hour captioned television program was counted as an hour of captioned programming, notwithstanding that up to 12 minutes or 20% of the hour may have been taken up with advertising. Ms. Strang testified that advertisements are not routinely captioned, although some advertisers provide captioned advertisements. She was unable to provide any information as to the percentage of advertisements that come already captioned.

[41] The CBC's own advertisements for upcoming shows - referred to as 'promos' - are also not normally captioned. Ms. Strang explained that the frequency with which the promos are changed

makes it difficult to caption them. When asked how many promos the CBC would run on the English language network in a day, Ms. Strang estimated that it would be somewhere between 50 and 100, but was frank to acknowledge that she was guessing.

[42] Although the CBC has previously taken the position that some types of programming, including those directed at pre-school age children were not suitable for captioning,⁽¹⁶⁾ as of the start of the new television season on October 2, 2000, the CBC English language network will be captioning all of its pre-school programming. All television shows broadcast between six in the morning (8 a.m. on Saturday and Sunday) and 11:30 at night will now be captioned. On Saturday nights, captioned programming will continue to the end of the second game on Hockey Night in Canada, at 1 a.m. In other words, all CBC English language network television shows, with the exception of late night programs, will be captioned. Late night shows are primarily movies, and some of them may, in fact, be captioned. Commercials and promos will still not be routinely captioned. Before the October 2 changes, the CBC English language network will be captioning 117.5 hours of programming, or 89.9% of the broadcast schedule, calculated in the same manner as in the preceding paragraph. With the increase in captioning on October 2, Ms. Strang estimates that the percentage of captioned shows will rise to somewhere in the 93-95% range. Ms. Strang testified that the October 2 changes have been in the works for a year and a half. Ms. Strang was, however, unable to quantify what the cost of the October 2 increase in captioning will be, and could only hazard a guess in this regard.⁽¹⁷⁾

[43] Local programming accounts for 30 minutes of the broadcast day, and represents local news. Occasionally, there may be other local programming such as regional election coverage.

[44] Ms. Strang has been responsible for captioning at the CBC English language network since 1997. Throughout her tenure, the annual budget for captioning at the CBC has remained constant at \$400,000. Ms. Strang explained that there were a number of reasons that the network was able to increase the amount of captioning while its budget remained constant. Ms. Strang states that she has attempted to make her co-workers sensitive to the issue of captioning, and to consider the issue in production and purchasing decisions. Costs of captioning have decreased over time. Finally, there has been a concerted effort to promote sponsorship of captioning by advertisers, and sponsorship revenues have increased over the last couple of years. According to Ms. Strang, the English language network actually spent \$1.3 million on captioning in the last fiscal year.

[45] Because of the requirement that the CBC use Canadian programming, the English language network broadcasts more original productions than other broadcasters. This obliges the CBC to caption its own productions. Other Canadian broadcasters purchase American programming, much of which comes already captioned. This has an impact on the CBC's competitive position.

[46] Ms. Strang's estimates of the cost to the CBC English language network to caption the remaining portion of the broadcast schedule, not currently subject to captioning, varied between \$1.2 and \$1.7 million per annum, although the figure most commonly mentioned was \$1.2 million.⁽¹⁸⁾ These estimates assume that the proportions of real-time and pre-packaged captioning to be done by the CBC versus programming purchased already captioned all remain constant.

[47] According to Ms. Strang, in order to ensure that *everything* that the CBC broadcasts is captioned, it would be necessary to have real-time captionists on duty, from sign-on to sign-off (19 hours a day), at each of the 14 local stations. At a rate of \$145 an hour, this would bring the cost to the CBC to \$14,078,050 a year. Quite apart from the financial burden that this would impose on the CBC, Ms. Strang states that there are simply not enough captionists available to provide this level of service. When Mr. Vlug asked Ms. Strang in cross-examination if this was the only way that 100% captioning could be achieved, she stated: 'I would have to do some investigation. But to my knowledge, at this point in time yes, I believe that this is the only way'.
[\(19\)](#)

[48] Michael Harris is the Executive Director, Regulatory Policy at the CBC English language network. As such, he has responsibility for both the English language network and Newsworld licence renewals, and for industry relations. By virtue of his position, Mr. Harris is intimately acquainted with costing and English language television.

[49] Mr. Harris testified with respect to the fiscal history of the CBC. According to Mr. Harris, the CBC is very dependent on government appropriations, which have been steadily reduced over many years, and which he describes as 'unstable'. This has resulted in significant lay-offs and cuts to programming. Mr. Harris described the CBC as an organization under considerable stress. Notwithstanding these cuts, he says that the CBC has increased the budgetary allocation for captioning [\(20\)](#) and has increased the amount of captioned programming. The goal of the CBC is to do as much as is reasonable, given everything else that the CBC is trying to do. This involves a balancing of competing priorities.

[50] Mr. Harris stated that the figure cited by Ms. Strang as being the cost of captioning the remaining uncaptioned television shows on the English language network was calculated exclusive of overhead. The CBC has not determined the fully allocated cost of captioning. Mr. Harris assumes that if these overhead costs were allocated, they would come to an additional \$1.3 million. Mr. Harris also made passing reference to additional, indirect costs that accrue to the CBC through fees paid to the Canadian Television Fund, although these fees were not quantified nor were they explained in any detail. Mr. Harris stated that although he 'does not have the number at hand', he expects that the total cost of captioning would be in excess of \$3 million. According to Mr. Harris, this equals the cost to the network of 60 employees. Laying-off 60 employees would affect the operations of the network. In this context, Mr. Harris noted that as a result of the financial constraints under which the CBC must operate, 'Nobody does anything at the CBC without knowing exactly how much it costs'.
[\(21\)](#)

[51] In cross-examination, Mr. Harris acknowledged that as of October 2, 2000, there will be approximately 10 hours of television shows each week that will not be captioned. This comes to 520 hours a year. At \$1,000 an hour to caption the programs using the pre-packaged method, the total cost of captioning television shows would be \$520,000. The cost would be reduced if the live captioning method was used.
[\(22\)](#)

[52] Mr. Harris states that he understood that the cost to the English language network to caption everything broadcast on the network, including commercials and promos, would be about \$10 million, or the equivalent of the value of 200 employees.

[53] The annual budget of the English language network for 1998-99 was \$417 million, according to Mr. Harris. No information was provided with respect to the budget for the current fiscal year. The overall budget of the CBC is \$1.2 billion. This includes French language television, Northern Services, Radio, the English language network and Newsworld, as well as corporate operations. Mr. Harris stated that the CBC gets somewhere between \$800-900 million from the federal government on an annual basis. The CBC has not approached the government for additional funding to cover the cost of captioning.

[54] Mr. Harris testified that the Vice-President of the CBC has a discretionary budget that could be accessed if it were necessary to allow the network to continue to caption at the level believed to be appropriate. Mr. Harris has never asked the Vice-President for additional funds, as he claims that thus far the CBC has been able to exceed the CRTC requirements for captioning.

[55] With respect to sponsorships, Mr. Harris testified that the CBC hired a full-time employee in 1997 with responsibility for obtaining sponsorships for captioning. Revenues generated by captioning popular shows like 'The National' and 'Hockey Night in Canada' are reinvested to subsidize the costs of captioning less popular programming.

ii. Commercials and Promos

[56] Although the vast majority of the English language network's program content is broadcast nationally, Mr. Landry explained that advertising may be either national or regional. By way of example, a broadcast of 'Hockey Night in Canada' may be seen across the country, with different commercials being seen in different locations. Commercials come pre-recorded, and may be inserted into the programming either in Toronto or by the local station, depending upon whether the commercial is to be broadcast nationally or locally. Mr. Landry stated that there is no technical reason why commercials could not be captioned. According to Mr. Landry, it is more a matter of logistics involving time, money and scheduling.

[57] Mr. Harris explained that under the current arrangement between the CBC and its advertisers, the CBC does not have the right to alter the creative content in commercials, and thus is not in a position to insert captioning. Mr. Harris noted that more and more commercials were being delivered already captioned. In Mr. Harris' view it is 'ridiculous' that all commercials are not captioned. Advertisers typically spend between \$10,000 and \$100,000 on national advertisements. Mr. Harris testified that: 'For the extra \$500 or \$1,000, it is crazy that they are not captioned'.⁽²³⁾

[58] Despite these sentiments, Mr. Harris testified that the CBC was not in a competitive position to insist that advertisers caption all commercials broadcast by the CBC, and that doing so would put tens of millions of dollars worth of advertising revenue at risk. According to Mr. Harris, the CBC is particularly vulnerable in this area. The network has to compete for advertising revenue against private broadcasters, who can offer advertising time on major American television shows simulcast in Canada, whereas the CBC focuses on Canadian programming that may have less commercial appeal to advertisers. Mr. Harris stated that the CBC would be proud to lead an industry-wide initiative to urge advertisers to caption their commercials, but could not do it on its

own. Although he participates in various fora where he could raise the subject, to date Mr. Harris has not had any discussions with members of the industry with respect to this issue.

[59] In cross-examination, Mr. Harris acknowledged that he has not done any analysis with respect to the cost to advertisers if the CBC were to demand that all commercials be captioned, nor has it attempted to quantify the commercial disadvantage that would result. Mr. Harris states that one never knows what it is that causes an advertiser to go somewhere else, and that he would not know how to measure the risk. His view that requiring advertisers to caption commercials would result in a competitive disadvantage is based upon a discussion that he had with the CBC Sales Department. The Sales Department has not done any kind of study to determine what the impact would be if the CBC were to demand that all commercials broadcast by the CBC be captioned. Mr. Harris cannot say if the CBC has done anything to encourage advertisers to caption commercials.

[60] Mr. Harris testified that he did not know if the CBC would be able to acquire the rights from advertisers to allow it to caption commercials. He also acknowledged that the CBC has never asked its advertisers if they would have any objection to the CBC captioning their commercials.

[61] The CBC does have policies dealing with gender portrayal, violence against children, advertising in children's programming and so on. Commercials violating these policies are not accepted for broadcast by the CBC.

[62] Mr. Harris stated that each station has its own menu of promos, and that the captioning of promos was not high on the CBC's list of priorities. The information contained in promos is simple, and is largely communicated in graphic form in the promo itself. Specifically the name of the show and the time that it is on will typically be displayed in written form on the screen.

iii. Newsworld

[63] Brian McArthur is a Senior Financial Analyst at Newsworld. Part of his responsibilities involve monitoring the progress of Newsworld as it relates to the provision of captioning.

[64] According to Mr. McArthur, Newsworld is the national English language news and information speciality channel operated by the CBC. Newsworld is financially self-contained, and has no access to CBC's government appropriation. It has an annual budget of \$62 million. Of that, \$775,000 is set aside annually for captioning.

[65] Over the last several years, Newsworld has been increasing the percentage of its programming that is either signed or captioned. At the time of the hearing, approximately 90% of Newsworld programming was captioned, which put Newsworld two years ahead of the target date established by the CRTC to reach the 90% mark.

[66] Approximately 80% of Newsworld's programming during the week is broadcast live. On week-ends, live programming accounts for approximately 50% of the broadcast day.⁽²⁴⁾ Newsworld programming is captioned using the real-time method, which enables it to caption breaking news. Newsworld pays \$145 an hour for this service. In addition, Newsworld has an

arrangement with captioning providers to have adequate staff on stand-by throughout the entire broadcast day, in order that unscheduled live events may be captioned. These individuals are only paid if called on.

[67] Newsworld concentrates its captioning efforts on programming in peak viewing hours and on programs that are broadcast more than once. Much of the programming that is not currently captioned is broadcast late at night, and much of it is pre-recorded. Newsworld broadcasts a ten-minute newscast at the top of each hour through the night. It was not clear from the evidence whether the ten minute newscasts are broadcast live, are pre-recorded, or some combination of the two.

[68] Mr. McArthur estimates that it would cost approximately \$1.3 million to caption 100% of the broadcast day, including the \$775,000 already being spent on captioning, for a net increased expenditure of \$525,000. This increase represents 0.85% of Newsworld's annual budget. Mr. McArthur did not provide any breakdown as to how the \$1.3 million figure was arrived at. He did say that, because of the risk that scheduled programming could be interrupted at any time for a live event, Newsworld would have to have captionists on staff 24 hours a day.

[69] In 1998, Newsworld began seeking sponsorships for captioning. In its first year of effort, Newsworld obtained \$8,000 in sponsorship revenues. In 1999, \$173,000 was raised through sponsorships. According to Mr. McArthur, sponsorship revenue, like advertising revenue, is speculative in nature, and cannot be depended on. As a consequence, sponsorship revenues are included with general advertising revenues for budget purposes, but are not put back into captioning. Newsworld staff only has access to the \$775,000 allocated for captioning, and must stay within that budget.

iv. CBC Response to Specific Examples Cited by Mr. Vlug

[70] With respect to the October, 1995 baseball example cited by Mr. Vlug, Ms. Strang acknowledged that the game was not captioned. According to Ms. Strang, the CBC was unable to pick up the ABC network feed. She described it as a 'technical situation'. Ms. Strang states that sports events broadcast in peak viewing hours are now captioned. Mr. Landry speculated about a number of possible technical explanations for the inability to obtain the captioned feed, but had no actual knowledge of what went on in this particular situation.

[71] Ms. Strang confirms that the finals of the World Curling Championships were not captioned. In 1996, the CBC was not captioning all sporting events. Mr. Harris testified that at the time, curling was not a priority for the CBC, whereas news and dramatic programs were. All such events are now being captioned, as long as they are broadcast before midnight.

[72] With respect to Mr. Vlug's complaint as to the manner in which hockey games are captioned, Ms. Strang stated that there will inevitably be delays between the action on the screen and the point at which the individual at home sees the captioning on the screen. The major elements of the play-by-play are captioned, although some of the spoken words may be left out. Captions are displayed at the top of the screen so that they do not inhibit the view of the puck.

Ms. Strang states that this process for captioning represents the industry standard, and that she has not previously had any complaints about the manner in which it was being done.

[73] Ms. Strang explained that The National news program has, until now, been captioned in advance of the broadcast, with the captions prepared from a script. This is done in the interests of accuracy. At some point in the future, The National will begin using real-time captioning on the understanding that it is better to caption all of the content, with possible spelling mistakes, than to risk missing content. No date has been set for this conversion, nor have any cost estimates been prepared in this regard. Mr. Harris testified that implementing real-time captioning for The National involves technological change, lay-offs and bumping - industrial relations issues that involve hearings and take several months to complete. Mr. Harris stated that the CBC is investigating the appropriate procedures for making the change, and that he anticipated that real-time captioning of The National will be implemented in the near future.

[74] According to Ms. Strang, the news story regarding President Suharto broadcast on May 28, 1998 was 'breaking news'. Where it is anticipated that a story might change at the last minute, arrangements are made to have real-time captionists available. In this case, the evolution of the story was unexpected, and no real-time captionists were available. In addition, an uncaptioned feed of the news program was sent to the local station in Vancouver. Here again Mr. Landry offered a number of possible technical explanations for the loss of captions, but had no actual knowledge of what went on in this particular situation.

[75] As to the other three examples of uncaptioned news programming cited by Mr. Vlug, Ms. Strang testified that the CBC has not been able to identify any problems with the captioning of the show on the dates specified by Mr. Vlug. Ms. Strang notes that there can be problems with the distribution of the signal by cable companies, as well as with the operation of the decoder devices of individual television sets, both of which can interfere with the receipt of captioning.

[76] Ms. Strang stated that the David Suzuki show that Mr. Vlug referred to appears to be an episode of the program 'The Nature of Things', a program that is ordinarily captioned. The CBC did not broadcast the show on August 17, 2000. The program is evidently sold to other broadcasters.

[77] Mr. McArthur testified with respect to the Newsworld broadcast of a clip from the Sydney Olympics. He confirmed that the item was part of an overnight news broadcast. There are no captionists on duty overnight, and as a result, news segments are not captioned.

III. LEGAL PRINCIPLES

A. The Analytical Framework

[78] Mr. Vlug's complaint was filed on August 22, 1997, and alleges a continuing discriminatory policy or practice on the part of the CBC. The parties are in agreement that, insofar as Mr. Vlug's

complaint refers to incidents occurring before June 30, 1998, the complaint is governed by the old *Canadian Human Rights Act*. To the extent that the complaint deals with incidents occurring after June 30, 1998, it is common ground that the Bill S-5 amendments⁽²⁵⁾ to the *Canadian Human Rights Act* govern.

[79] A review of s. 2 of the *Canadian Human Rights Act* reveals that the purpose of the *Act*, both before and after the 1998 amendments, is expressed in the language of equal opportunity. In *Andrews v. Law Society of British Columbia*⁽²⁶⁾, the Supreme Court of Canada noted that:

"Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access... [I]t is the failure to make reasonable accommodation, to fine tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."

[80] This complaint is made pursuant to s. 5 of the *Canadian Human Rights Act*. Section 5 makes it a discriminatory practice in the provision of services customarily available to the general public to deny access to any such service to any individual, or to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

[81] Section 3 of the *Act* makes disability a prohibited ground of discrimination.

[82] Pursuant to s. 15(1)(g)⁽²⁷⁾ of the *Act*, it is not a discriminatory practice to deny access to a service to an individual where there is a *bona fide* justification for that denial.

[83] As of June 30, 1998, s. 15(2) of the *Canadian Human Rights Act* states that, in order to establish a *bona fide* justification under s. 15(1)(g) of the *Act*, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on those who would have to accommodate those needs, considering health, safety and cost.

[84] The Supreme Court of Canada has recently had occasion to revisit the approach to be taken in cases such as this in its decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*⁽²⁸⁾ ('*Meiorin*') and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*⁽²⁹⁾ ('*Grismer*'). The historic distinction between direct and indirect discrimination has now been replaced by a unified approach to the adjudication of human rights complaints. Under this unified approach, the initial onus is still on a complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.⁽³⁰⁾

[85] Once a *prima facie* case of discrimination has been established, the onus shifts to the respondent to prove, on a balance of probabilities, that the discriminatory standard or policy has a *bona fide* justification. In order to establish such a justification, however, the respondent must now prove that:

- i) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- ii) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
- iii) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.

[86] Although both *Meiorin* and *Grismer* were decided under the British Columbia *Human Rights Code*, for the reasons set out in *Entrop v. Imperial Oil Ltd.*,⁽³¹⁾ I am satisfied that both cases apply to claims of discrimination under the *Canadian Human Rights Act*. The decision in *Meiorin* contemplates its general application to complaints of discrimination, unless precluded by the wording of the specific statute in issue. Insofar as this case involves consideration of the unamended *Canadian Human Rights Act*, there is nothing in the old *Act* that is inconsistent with the decision in *Meiorin*. Indeed, the now discredited bifurcated analytical approach was largely a creature of the jurisprudence.⁽³²⁾ With respect to the amended *Act*, in *Meiorin*, McLaughlin J. specifically referred to the recent amendments to the *Canadian Human Rights Act* as being reflective of the unified approach.

[87] Where the application of *Meiorin* and *Grismer* to claims under the amended *Canadian Human Rights Act* may be limited is in relation to the factors that may be considered in determining whether a respondent has accommodated a complainant to the point of undue hardship. *Meiorin* refers to the earlier decisions of the Supreme Court of Canada in cases such as *Central Alberta Dairy Pool* which dealt with the types of factors that may be considered in an undue hardship analysis. These factors include considerations such as disruption to a collective agreement and interference with the rights of other employees. The Supreme Court noted that the list of factors is not entrenched, except to the extent that certain factors may be expressly included or excluded by statute. Section 15(2) of the *Canadian Human Rights Act* refers only to considerations of health, safety and cost. It is not necessary to decide this issue here, however, as I am satisfied that all of the considerations put forward by the CBC in its efforts to establish that further accommodation of the deaf and hard of hearing would constitute an undue hardship can be classified as essentially cost-related.

B. Accommodation to the Point of Undue Hardship

[88] The focus of much of this inquiry was on the issue of whether the CBC had accommodated Mr. Vlug to the point of undue hardship, and thus it is helpful to review principles applicable to the determination of whether or not an undue hardship defence has been made out:

1. The use of the word 'undue' implies that some hardship is acceptable - it is only 'undue' hardship that will satisfy the test.⁽³³⁾

2. In order to prove that a standard is reasonably necessary, a respondent always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. ⁽³⁴⁾
3. It is incumbent on the respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. ⁽³⁵⁾
4. In some cases, excessive cost may justify a refusal to accommodate those with disabilities. However, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. ⁽³⁶⁾
5. The adoption of the respondent's standard has to be supported by convincing evidence. Impressionistic evidence of increased cost will not generally suffice. ⁽³⁷⁾
6. Where cost is in issue, the respondent must examine ways to reduce costs. ⁽³⁸⁾
7. Factors such as the financial cost of methods of accommodation should be applied with common sense and flexibility in the context of the factual situation under consideration. ⁽³⁹⁾

IV. ANALYSIS

A. What is the Standard?

[89] Both *Meiorin* and *Grismer* contemplate barriers to employment or services in the form of fitness standards. This case contemplates a different type of barrier: that is, the inaccessibility to deaf and hard of hearing people of the audio portion of television programming. However, there is no reason why the same sort of accommodation analysis should not apply here. ⁽⁴⁰⁾

[90] Mr. Vlug and the Commission have suggested that the standard in issue here is a policy or practice on the part of the CBC not to caption all of its programming. Ms. Noonan contends that the standard is the CBC policy to actively incorporate captioning into peak time programming, and as much other programming as possible, while trying to maintain and balance their other goals.

[91] In my view, the description of the standard in issue suggested by the CBC more accurately reflects the evidence adduced in the course of this hearing. In applying the *Meiorin/Grismer* analytical framework to the facts of this case, I have concluded that the standard in issue here is the CBC policy to use an incremental approach to captioning, with the result that some, but not all, of its English language network and Newsworld television broadcasts are captioned.

B. Is There a *Prima Facie* Case?

[92] Ms. Noonan argues that, based upon Mr. Vlug's description of his television viewing habits, he has failed to establish a *prima facie* case of discrimination. According to Ms. Noonan, all CBC programming during Mr. Vlug's regular viewing hours that is within the CBC's power to caption is now captioned. Therefore, she says, there cannot be a finding of *prima facie* discrimination.

[93] Assuming, for the moment, that the CBC is now captioning everything in its power during the times that Mr. Vlug normally watches television, there are, in my view, a number of problems with this argument:

[94] First of all, Mr. Vlug's description was of his *usual* viewing habits. The evidence does not establish that these are the *only* times that he watches television. For example, Mr. Vlug's reference to the Olympics clip on Newsworld related to an item broadcast late at night.

[95] Secondly, Mr. Vlug's testimony with respect to the baseball and curling broadcasts illustrates that, in the past, he has not been able to fully access CBC programming by reason of his disability. The fact that these types of shows may now be captioned is something that may be relevant to the question of remedy, but does not, in my view, operate to relieve the CBC of liability in the absence of a defence having been made out.

[96] Finally, there is an element of circularity to an argument based on Mr. Vlug's viewing habits, given his testimony that he has a strong preference for captioned television, and would only rarely watch something that was not captioned.

[97] Mr. Vlug's evidence establishes that some CBC English Language Network and Newsworld broadcasts, services customarily available to the public, were not accessible to him by reason of his disability. In my view, this is sufficient to establish a *prima facie* case of discrimination, thus shifting the onus to the CBC to establish that it had a *bona fide* justification for its failure to provide fully accessible programming.

C. Has CBC Discharged its Burden?

i. Rational Connection

[98] Using the *Meiorin/Grismer* approach, in order to establish the existence of a *bona fide* justification for the standard in issue, the CBC must firstly establish that it adopted the standard for a purpose or goal that is rationally connected to the function being performed. The focus at this stage is not on the validity of the standard in issue, but rather on the validity of its more general purpose.⁽⁴¹⁾

[99] I am satisfied that the existence of such a rational connection has been established here: the CBC has adopted its policy of incrementally increasing the level of captioning in an effort to balance its obligation to make its programming accessible to the deaf and hard of hearing with its other statutory and licencing requirements, all in the context of its current financial constraints.

ii. Good Faith

[100] The second element that must be established by the CBC using the *Meiorin/Grismer* test is that it adopted the standard in issue in good faith, in the belief that it is necessary for the fulfilment of its purpose or goal. Although Mr. Vlug disputes the good faith of the CBC with respect to this issue, on all of the evidence, I am satisfied that the CBC's incremental approach to captioning was adopted in good faith. Considerable resources have been devoted to captioning, and significant inroads have been made in the area over the last decade. Indeed, the CBC has, at least for the last number of years, met or exceeded the levels of captioning required by the CRTC.

iii. Accommodation

[101] Finally, in order to establish the existence of a *bona fide* justification, the onus is on the CBC to establish that the standard is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainant, without incurring undue hardship.

[102] The evidence of Mr. Landry and Mr. Ketchum establishes that the technology currently exists to caption everything broadcast by the CBC. What remains in issue is whether the cost of captioning everything broadcast by the CBC English language network and Newsworld would create an undue hardship for the CBC. In addition, logistical concerns and concerns with respect to the availability of sufficient captionists to provide the service have also been raised with respect to the captioning of ads, promos and breaking news. These arguments will be examined in the context of each type of programming.

a) CBC English Language Network - Television Programs

[103] Ms. Strang estimated that it would cost the CBC English language network an additional \$1.2 million annually to caption the remaining portion of the network television shows that are not currently being captioned, exclusive of overhead. Mr. Harris assumes that overhead costs associated with the increased level of captioning would come to an additional \$1.3 million per annum, for a total cost of \$2.5 million annually. When other costs were factored in, Mr. Harris testified that the fully allocated cost to the CBC of captioning all television shows would be in the vicinity of \$3 million per annum. The annual budget for the English language network is \$417 million. Thus, on the figures put forward by the CBC, the cost of captioning the remaining television shows on the English language network would come to somewhere between 0.60 % and 0.72% of the network's annual budget.

[104] I am not, however, persuaded that the cost figures provided by the CBC are reliable. Ms. Strang offered the \$1.2 million figure as an estimate, but did not provide a breakdown of how the figure was arrived at. Further, this estimate must be approached with caution, in light of Ms. Strang's earlier testimony that no attempt has been made to calculate the cost of captioning late night television shows.⁽⁴²⁾

[105] Further, the CBC provided the same cost estimate to the Canadian Human Rights Commission some time before May of 1999.⁽⁴³⁾ We have been told that the cost of captioning has decreased over time. Since the time that the initial cost estimate was provided, the English language network has decided to implement the captioning of pre-school shows, at what Ms. Strang has estimated to be a cost of somewhere between \$3-500,000 per annum, leaving fewer shows still to be captioned. It does not appear that any adjustment to the cost estimate has been made to take into account the increased level of captioning that will commence on October 2, 2000.

[106] Ms. Strang also testified that she based her estimate of \$1.2 million to caption the remaining portion of the broadcast day on the assumption that none of the programs in non-peak hours were currently captioned. She acknowledged, however, that she did not know which late night shows were and were not already captioned. We were told that movies make up much of late night program schedules. Mr. Vlug pointed out that many movies have already been captioned. Ms. Strang also conceded that at least one non-movie late night show may already be sub-titled, and thus would not require captioning. Thus it appears that, in attempting to calculate the cost of captioning programs in non-peak hours, no effort has been made to identify exactly what percentage of the late night schedule would, in fact, actually have to be captioned.

[107] I have similar concerns with respect to the reliability of Mr. Harris' estimate of the overhead costs associated with captioning the remaining television shows. Mr. Harris stated he *assumes* that the fully allocated cost of captioning would be in excess of \$3 million, but that he did not 'have the number at hand'. It does not appear that any kind of meaningful attempt has been made to assess the increase in the overhead that would be properly attributable to captioning late night programming. This must be considered in the light of Mr. Harris' testimony that no one does anything at the CBC without knowing *exactly* what it costs.

[108] Further, it appears that the cost to the CBC of captioning its late night broadcast schedule could be reduced if the captioning of programs was factored into the network's purchasing decisions. There is no evidence before me to suggest that it costs the network more to purchase a pre-captioned movie than to purchase a non-captioned one. By purchasing pre-captioned programming, the network would be relieved of the cost of providing the captioning itself. It does not appear, however, from the evidence before me that the CBC currently gives preference to pre-captioned programs in making its purchasing choices.⁽⁴⁴⁾

[109] I am also not persuaded that the English language network has yet maximized its potential revenues from the sale of captioning sponsorships. This is a relatively new endeavour for the network - having first hired someone to sell captioning sponsorships in 1997. According to Ms. Strang, sponsorship revenues have increased over the last couple of years, although she could not say by how much. Mr. Harris confirmed that sponsorship revenues have increased rapidly since 1997, but stated that in his view, he did not think sponsorship revenues would increase much any more. Mr. Harris did not, however, offer any basis for his opinion, and in the absence of any evidence to support it, I am not prepared to accept it.

[110] The burden in establishing accommodation to the point of undue hardship is on the CBC. As the Supreme Court noted in *Grismer*, while excessive cost may justify a refusal to

accommodate those with disabilities, the adoption of a respondent's standard must be supported by convincing evidence. Impressionistic evidence of increased cost will not generally suffice. For the foregoing reasons, I am not persuaded that the CBC has satisfied the burden on it to establish that the costs associated with captioning the remaining television shows in its broadcast schedule would constitute an undue hardship.

b) CBC English Language Network - Non-Show Content

[111] In addition to captioning the remaining portions of the CBC broadcast schedule, Mr. Vlug has also asked that the CBC be required to caption everything broadcast by the CBC English language network throughout the broadcast day, including commercials, promos and unscheduled news flashes. According to Ms. Strang, the cost of captioning this additional broadcast content would be \$14 million per annum. This is predicated upon the assumption that it would be necessary to have real-time captionists on duty, from sign-on to sign-off, at each of the 14 local stations. Mr. Harris estimated the cost of providing this level of captioning at \$10 million per annum, although he seemed prepared to defer to Ms. Strang on the issue.

[112] In addition to the significant financial burden that this would place on the network, Ms. Strang stated that there are simply not enough captionists available to provide this degree of service. Mr. Landry also referred to logistical concerns that would arise if the network were compelled to caption commercials and promos.

[113] For the reasons set out below, I do not accept the cost estimates put forward by the CBC in this regard.

1) Commercials

[114] Dealing first with the captioning of commercials, both Ms. Strang and Mr. Landry acknowledged that the technology exists to caption television commercials. Indeed, many commercials come already captioned - according to Mr. Harris, somewhere between 70-75% of commercials broadcast nationally come already captioned by the advertisers. We do not, however, know what percentage of local versus national advertising may be broadcast on each station, nor do we have any information with respect to the percentage of local advertising that comes already captioned.

[115] It appears that the \$14 million figure put forward by the CBC is predicated, in part, on the assumption that it would fall to the English language network to caption commercials broadcast on the network. In any event, the CBC contends that under the terms of its arrangements with advertisers, it does not have the right to tamper with the creative content in television commercials.

[116] CBC contends that it cannot insist that advertisers seeking to purchase air time on the English language network provide their commercials in captioned form, because of the competitive disadvantage that would result. In my view, I have to approach Mr. Harris' evidence with respect to this potential competitive disadvantage with some caution. Mr. Harris' evidence in this regard is largely impressionistic, based as it is upon a conversation with the CBC Sales

Department. No study of any sort has been done in an attempt to quantify the economic consequences to the network that would accrue if it were to insist that all commercials be provided in captioned format. Further, no attempt has been made even to discuss the matter with any advertisers in an effort to determine whether such an initiative would in fact be met with resistance, or whether, with education, advertisers might not be persuaded to 'buy-in' to the concept. Indeed, Mr. Harris himself testified that the economics of commercial production are such that it was 'silly' for advertisers not to pay a little more to caption their product, particularly given the additional audience that they would be able to reach with minimal additional investment.

[117] It is noteworthy, in my view, that the CBC already places restrictions on commercial content as it relates to matters such as gender portrayal, violence and racism.

[118] According to Mr. Harris, any attempt to require advertisers to caption commercials could only work if it were done on an industry-wide basis. Although Mr. Harris has access to industry meetings where the subject could be raised, and although he expressed his willingness to do so during the course of the hearing, there is no evidence of any effort in this regard having yet been made by the CBC.

[119] In order to satisfy the third element of the *Meiorin/Grismer* test, the CBC has to establish that it has fully explored all viable forms of accommodation. On the basis of the evidence adduced by the CBC with respect to the captioning of commercials, I am not persuaded that the CBC has satisfied the onus on it in this regard.

[120] In the course of argument I raised the issue of the nature and sufficiency of the CBC's evidence as it related to the captioning of advertisements and the effect that requiring advertisers to provide pre-captioned commercials would have on the CBC's competitive position. Ms. Noonan argues that the nature of Mr. Vlug's complaint changed constantly over time, and that the CBC was not fully aware of the case that it was expected to meet, specifically as it related to his demand that commercials be captioned, until Mr. Vlug testified at the hearing. Ms. Noonan characterized this as an 'honest mistake' on the part of the respondent. According to Ms. Noonan, when the CBC became aware that commercials and promos were something that they would have to address in the hearing, inquiries were made, and Mr. Harris' evidence on the issue was the best available in the circumstances.

[121] For a number of reasons, I do not accept that procedural fairness considerations operate here to lighten the evidentiary burden on the CBC with respect to the captioning of commercials:

- 1) The \$14 million figure that the CBC relied upon as its estimate of the cost of captioning everything on the CBC, including advertising, was prepared on July 27, 2000, some three and a half weeks *before* the hearing started, and nearly eight weeks before the CBC had to respond on the issue. It is evident from the testimony of Ms. Strang regarding the preparation of this cost estimate that CBC clearly understood Mr. Vlug was asking that *everything* broadcast by the CBC English language network be captioned, and that advertising was, therefore, in issue in this case;

2) Mr. Vlug's evidence with respect to the lack of captioning of television commercials went in without any objection on the part of Ms. Noonan, although she was quick to object on other occasions when she felt that evidence was being led that exceeded the parameters of the complaint;

3) At the close of the Commission's and Mr. Vlug's case, a motion was brought to narrow the scope of the complaint to the CBC English language network, including Regional programming, and Newsworld. The basis for the motion was concerns relating to the lack of notice afforded to the CBC with respect to any of its other television services. No similar motion was brought with respect to CBC advertising;

4) At no time did the CBC ask for an adjournment in order to allow it to properly investigate and respond to what it now maintains were entirely unanticipated allegations; and

5) The CBC's written submission dealing with the captioning of commercials makes no mention of any concern with respect to the adequacy of the notice regarding the matter.

2) Promos

[122] With respect to the captioning of CBC's own advertising spots or 'promos', it appears that some, but not all of the content of promos may be represented in graphic form. There is information in promos, particularly the audio portion of the clip from the program in question, that will not be accessible to the deaf and hard of hearing.

[123] The evidence adduced by the CBC to support its contention that obliging it to caption promos would constitute an undue hardship is similarly unsatisfactory. For example, in terms of the frequency with which promos are broadcast, all we have is Ms. Strang's 'guesstimate' that promos are broadcast by the English language network somewhere between 50-100 times a day. It is also not clear how many promos may be broadcast on a repeat basis.

[124] Both Ms. Strang and Mr. Harris testified that the captioning of promos was simply not a priority for the network, in light of its other obligations. Ms. Strang also explained that the frequency with which promos are changed makes them difficult to caption.

[125] Promos are pre-recorded. Ms. Strang's contention that it would be necessary to have captionists on duty at each of the 14 local stations on a 24-hour a day basis simply does not apply when what we are considering is pre-recorded material. We do not have any satisfactory evidence with respect to the additional cost that would accrue to the English language network if it were obliged to caption all of its promos.

[126] Once again, the burden falls to the CBC to establish that its standard should be adopted, and to do so on the basis of convincing evidence. In my view, it has not met its burden in this regard.

3) **Unscheduled News Flashes**

[127] The CRTC has already stipulated that all local and regional news programming, including live segments, must now be captioned. According to Mr. Harris, this is happening. What is in issue here is the captioning of breaking news or 'news flashes' that are broadcast outside of regularly scheduled news shows.

[128] Unscheduled news flashes are a particularly significant form of television programming. By their very nature, news flashes contain important information - information considered to be of such significance that the network (or local station) interrupts its regularly scheduled programming to tell viewers about it. As we heard from Mr. Roots, unscheduled news flashes may take the form of weather warnings, and may raise serious issues of safety, which require immediate notice to the public.

[129] As I understand the evidence of Ms. Strang, her \$14 million estimate for the cost of captioning everything broadcast by the English language network is predicated on the assumption that it would fall to the CBC to caption all national and local advertising as well as promos. This raises significant concerns with respect to volume. A second basis for the estimate is the need to have captionists available 24 hours a day, so as to be able to caption any unscheduled news flashes on a real-time basis.

[130] I have already addressed the issues of captioning local and national advertising and promos. The 'logistical nightmare' described by Mr. Landry, that he says would result from a centralized captioning system, is premised on the understanding that the network would be required to caption both national and local advertising as well as promos from a central location. By requiring advertisers to provide commercials already captioned, the volume of captioning that would fall to the network would be greatly reduced. Promos are pre-recorded, and do not require 24 hour a day captioning capability.

[131] This leaves the question of captioning unscheduled news flashes. News flashes can only be captioned using the real-time method. We know from the evidence of Mr. Landry that real-time captioning can be done by captionists who are located somewhere other than the broadcasting station. Given that news flashes occur on an exceptional basis, I do not accept Ms. Strang's evidence that it would be necessary to have real-time captionists in each of the 14 regional stations on a 24 hour a day basis so as to be prepared to provide captioning in the eventuality that there may be a news flash at any given time. It is clear that the technology exists to provide this service from a central location, on an as-needed basis.

[132] Although there is no evidence directly on point as to what it would cost to provide real-time captioning on a centralized basis, 24 hours a day, seven days a week, one could surmise it might be somewhere in the area of 1/14 of the \$14 million estimate previously provided, or \$1 million per annum. It is by no means clear, however, that the captionists would even have to be paid by the English language network around the clock, regardless of whether or not they were needed. According to documentation filed with respect to Newsworld, Newsworld has real-time captionists on stand-by 24 hours a day in order to be able to caption unscheduled live events. These individuals are only paid if called on to provide services. While this evidence was adduced

in relation to Newsworld, it does indicate that stand-by coverage is available at limited cost. It also appears that there are sufficient captionists available to provide this service to Newsworld.

c) Newsworld

[133] Much of the evidence in this hearing relating to the situation at Newsworld came from Mr. McArthur. Interestingly, while Mr. McArthur did tell us what Newsworld was spending on captioning, no evidence was led by the CBC as to what it would cost Newsworld to caption the remaining, uncaptioned portions of its broadcast day. What information there is before me in this regard was largely elicited through cross-examination.

[134] According to Mr. McArthur, it would cost Newsworld a total of \$1.3 million per annum to caption the entire Newsworld broadcast schedule. As noted earlier, Mr. McArthur did not provide any breakdown as to how the \$1.3 million figure was arrived at. Newsworld already spends \$775,000 annually on captioning, and thus would require an additional \$525,000 each year to provide round the clock captioning.

[135] Mr. McArthur testified that, because of the risk that scheduled programming could be interrupted at any time for a live event, Newsworld would have to have captionists on staff 24 hours a day. However, based upon the documentation filed by the CBC, it appears that Newsworld already has a system in place to allow it to caption unscheduled live events on a 24-hour a day basis. Mr. McArthur did not provide a satisfactory explanation as to why additional costs would thus be incurred, or how these costs are calculated.

[136] With respect to the potential recovery of more of Newsworld's costs of captioning through increases in the sale of sponsorships, Mr. McArthur did not suggest that Newsworld had already realized all of the potential revenues from this source. Indeed, Mr. McArthur testified that it was because Newsworld had only just started selling sponsorships that it was able to increase its sponsorship revenues so dramatically, from \$8,000 in 1998 to \$173,000 in 1999.

[137] Mr. Harris was of the opinion that all the potential sponsorship revenues may have already been realized. For the same reasons cited earlier, I am not persuaded that this is an accurate assessment of the situation.

[138] In my view, the evidence adduced by the CBC with respect to Newsworld does not meet the standard required by the jurisprudence to establish that Newsworld has accommodated deaf and hard of hearing individuals such as Mr. Vlug to the point of undue hardship.

d) Conclusion on Liability

[139] Counsel for the CBC argues that I must consider the minimal additional benefit that would be derived by Mr. Vlug if the entire broadcast schedules for the CBC English language network and Newsworld were captioned, given the hours that he usually watches television. This, she suggests, has to be weighed against the disadvantage that would be suffered by the CBC - in particular the loss of many jobs - that would inevitably result. While the disadvantage to be suffered by the CBC is certainly something that I must consider very carefully, as I have already

noted, I do not accept that the consequences of full captioning to the CBC would be as severe as has been suggested.

[140] I should also note that the reference to the minimal additional benefit to be derived by Mr. Vlug, in my view, trivializes the essential nature of Mr. Vlug's complaint. Firstly, I do not accept that the additional benefit to be derived by Mr. Vlug is minimal. The inability to access late breaking news stories - or weather warnings - can hardly be characterized as insignificant. Even access to television commercials cannot, in my view, be characterized as trivial: whether we like it or not, advertising has a significant place in the fabric of popular culture. Further, one must not confuse an argument as to the potential triviality of the service with the importance of the right in issue, in this case, Mr. Vlug's right to be free from discrimination on the basis of disability.⁽⁴⁵⁾

[141] There is no doubt that the CBC is an organization under significant stress as a result of recent financial cuts. It may well be that, as a result of these pressures, the CBC did not fully turn its mind to the question of access to the deaf and hard of hearing. It may not have felt the need to do so, as, at least in recent years, the CBC has met the targets set for it by the CRTC. However, after considering all of the evidence adduced by the CBC in this case, I was left with the overwhelming impression that, although significant improvements to the level of captioning have been implemented in recent years, with a little corporate will and imagination, a good deal more could be done with respect to captioning without imposing an undue hardship on the CBC than has thus far taken place.

[142] For all of these reasons, Mr. Vlug's complaint is sustained.

V. REMEDY

[143] Having found liability on the part of the CBC, it remains to be determined what, if any, remedy should properly be provided to Mr. Vlug. In fashioning a remedy, the Tribunal's jurisdiction is governed by Section 53 of both the old and new *Acts*.

A. Captioning

[144] The CBC's English language network and Newsworld shall caption all of their television programming, including television shows, commercials, promos and unscheduled news flashes, from sign on until sign off. As required by Section 53(2)(b) of the *Canadian Human Rights Act*, this must occur on the first reasonable occasion.

[145] In making this order, I am mindful of the evidence before me that there is a process that must be followed before real-time captioning can be implemented on The National. This issue is addressed by the requirement that full captioning, which would include the captioning of breaking news on The National, be implemented on the first reasonable occasion.

[146] I am also alive to the concerns raised with respect to the technical problems and human errors that occur from time to time. I note that the evidence establishes that these errors also occur with respect to the audio and visual portions of television broadcasts. As in any human endeavour, there will inevitably be glitches with respect to the delivery of captioning. As is the case with both audio and visual transmissions, these should be the exceptions. The rule should be full captioning.

B. Consultation with the Deaf and Hard of Hearing Community

[147] There was evidence as to various ways that different types of broadcasts may be captioned, and differences of opinion that may exist within the deaf and hard of hearing community as to how certain types of programming should be captioned. In an effort to ensure that captioning is delivered in a way that best benefits the deaf and hard of hearing community, I would strongly encourage the CBC to consult with representatives of the deaf and hard of hearing community on an ongoing basis with respect to the delivery of captioning services.

C. Lost Income

[148] Mr. Vlug has asked that he be awarded the sum of \$2,000, representing the money he lost as a result of his attendance at the hearing in this matter. We know that Mr. Vlug practices law on a part-time basis. While it may be reasonable to assume that he derives some income from this endeavour, there is insufficient evidence before the Tribunal with respect to the extent of Mr. Vlug's losses to support his claim. In the absence of such evidence, I decline to make any order in this regard.

D. Pain and Suffering

[149] As noted earlier, the parties are in agreement that, insofar as Mr. Vlug's complaint refers to incidents occurring before June 30, 1998, the complaint is governed by the old *Canadian Human Rights Act*. To the extent that the complaint deals with incidents occurring after June 30, 1998, it is common ground that the Bill S-5 amendments to the *Canadian Human Rights Act* govern. Under the former *Act*, awards for injuries to feelings or self-respect were limited to a maximum of \$5,000. The new *Act* allows for awards of up to \$20,000 for pain and suffering. It is evident from the testimony of Mr. Vlug that the actions of the CBC have affected him deeply. Mr. Vlug was eloquent in his description of the sense of exclusion and marginalization that he felt as a result of his inability to fully access CBC programming. Considering all of the circumstances, I order the CBC to pay to Mr. Vlug the sum of \$10,000 with respect to his claims in this regard.

E. Payment for Reckless and Wilful Conduct

[150] Having concluded that the CBC acted in good faith in its approach to captioning, and met most of the targets for captioning established by the CRTC, I am not prepared to make any award under this head.

F. Interest

[151] Interest shall be paid on the monies awarded pursuant to this decision, at the rate specified in Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest shall run from the date of this decision until the date on which the payment is made to Mr. Vlug.

VI. ORDER

[152] For the foregoing reasons, this Tribunal declares that Mr. Vlug's rights under the *Canadian Human Rights Act* have been contravened by the CBC, and orders that:

- 1) The CBC's English language network and Newsworld shall caption all of their television programming, including television shows, commercials, promos and unscheduled news flashes, from sign on until sign off. This must occur on the first reasonable occasion.
- 2) The CBC shall pay to Mr. Vlug the sum of \$10,000.
- 3) Interest shall be paid on the monies awarded pursuant to this decision, in accordance with Rule 9 (12) of the Canadian Human Rights Tribunal Interim Rules of Procedure. Interest shall run from the date of this decision until the date on which payment is made to Mr. Vlug.

Anne L. Mactavish

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T557/1500

STYLE OF CAUSE: Henry Vlug v. Canadian Broadcasting Corporation

PLACE OF HEARING: Ottawa, Ontario

August 21 24, September 18 - 20 and 21, 2000

DECISION OF THE TRIBUNAL DATED: November 15, 2000

APPEARANCES:

Henry Vlug On his own behalf

René Duval and Philippe Dufresne For the Canadian Human Rights Commission

Joy Noonan and Gary Bennett For the (Canadian Broadcasting Corporation)

1. ¹ Mr. Vlug describes himself as 'Deaf', having lost his hearing in childhood; according to Mr. Vlug, people who have lost their hearing later in life are 'deaf'. Those with a partial hearing loss are properly described as 'hard of hearing'. Collectively, they may be referred to as the deaf and hard of hearing. This terminology will be used throughout this decision.

2. ² Television captioning may be 'open' - that is accessible to all viewers, or 'closed' - accessible only to those using televisions equipped with decoder chips. Programming may also be made accessible through the use of sign language interpreters, a method favoured by CPAC, the Parliamentary and public affairs channel. The various methods of providing access to the deaf and hard of hearing will be discussed in greater detail further on in this decision. For ease of reference, the various methods of making television programming accessible to the deaf and hard of hearing will be referred to collectively as 'captioning'.

3. ³ Mr. Vlug did not mention this incident during his formal testimony, the clip having been broadcast after he had testified. I am, however, prepared to consider this as an additional example of a CBC broadcast that was not fully accessible to Mr. Vlug. The Tribunal is not bound by the strict rules of evidence. Although the CBC did not have the opportunity to cross-examine Mr. Vlug with respect to this particular broadcast, the incident was fully addressed in the evidence, and Mr. McArthur admitted that the Olympic clip was not captioned. As a consequence, it does not appear that there is any prejudice to the CBC as a result of the manner in which the issue was raised.

4. ⁴ S.C. 1991, c.11.

5. ⁵ Decision CRTC 1987-140

6. ⁶ A 'broadcast year' runs from September 1 to August 31.

7. ⁷ According to Mr. Ketchum, an 'expectation' of the CRTC is an expression of the Commission's will. It clearly directs the licensee as to what it is that the CRTC wants the licensee to do, and lets the licensee know that it will be called to account for its performance in the area at the next round of licence hearings. An expectation is not an order of the CRTC, and may not be enforced by legal means. The CRTC may also impose 'conditions' on licensees. According to Mr. Ketchum, a condition is a 'heavy tool': failure to comply with a licencing condition may result in a loss of licence for private broadcasters, or a CRTC report to Cabinet, in the case of the CBC. The CRTC may also impose a 'requirement' on a licensee. Mr. Ketchum describes a requirement as being somewhere between an expectation and a condition. A requirement is a mandatory order of the CRTC, and may be made an order of the Federal Court and enforced as such.

8. ⁸ Decision CRTC 1994-437

9. ⁹ Decision CRTC 89-104

10. ¹⁰ Decision CRTC 95-514

11. ¹¹ A review of the *Broadcasting Act* reveals that the CRTC is required to regulate the Canadian broadcasting system in accordance with specified broadcast policy. The policy sets out approximately 20 elements that must be considered and balanced, of which access by the disabled is but one.

12. ¹² Decision CRTC 1987-140, at p. 7

13. ¹³ Section 3 (1) (l) of the *Broadcasting Act*

14. ¹⁴ Section 3 (1) (m) of the *Broadcasting Act*

15. ¹⁵ Section 3 (1) (m) (vi) of the *Broadcasting Act*

16. ¹⁶ Decision CRTC 95-514, at p. 7

17. ¹⁷ Ms. Strang's 'quick best guess' was that the October 2 addition of pre-school programming to programs that are regularly captioned would cost the network somewhere between \$3-500,000 annually.

18. ¹⁸ These figures refer only to captioning television shows, and do not include the cost of captioning advertisements, promos or unscheduled news flashes.

19. ¹⁹ Transcript, p. 630.

20. ²⁰ Mr. Harris' evidence in this regard must be contrasted with that of Ms. Strang, who testified that the budget allocation for captioning at the English language network has remained constant for the last several years.

21. ²¹ Transcript, p. 906.

22. ²² Based upon the costing information provided to the Tribunal, captioning 520 hours of programming, using the real-time method, at a rate of \$145 per hour, would cost the network \$75,400 per annum.

23. ²³ Transcript, p. 845.

24. ²⁴ Mr. McArthur testified that Newsworld has a 24 hour broadcast day.

25. ²⁵ See *An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c. 9

26. ²⁶ [1989] 1 S.C.R. 143, at p. 169, cited with approval in *Eldridge et al. v. British Columbia (Attorney General) et al.*, (1997) 218 N.R. 161 at p. 217

27. ²⁷ Section 15(g) of the unamended *Act*

28. ²⁸ [1999] 3 S.C.R. 3

29. ²⁹ [1999] 3 S.C.R. 868

30. ³⁰ *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558

31. ³¹ [2000] O.J. 2689, at paras. 77-81

32. ³² See, for example, *O'Malley*, supra, note 17, *Ontario (Human Rights Commission) v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

33. ³³ In this regard the decision in *Meiorin* adopts the decision in *Central Okanagan School District v. Renaud*, [1992] 2 S.C.R. 984.

34. ³⁴ *Grismer*, supra., at para. 32

35. ³⁵ *Grismer*, supra., at para. 42

36. ³⁶ *Grismer*, supra., at para. 41

37. ³⁷ *Grismer*, supra., at paras 41 and 42

38. ³⁸ *Grismer*, supra., at para. 41

39. ³⁹ *Meiorin*, supra., at para. 63. See also *Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at p. 546

40. ⁴⁰ Tarnopolsky and Pentney, *Discrimination and the Law*, (1994), at p. 7A-70

41. ⁴¹ *Meiorin*, at para. 59

42. ⁴² Transcript, p. 533. Ms. Strang explained that she had not attempted to calculate these costs, because the costs would vary, and she was having problems paying for what was already being captioned.

43. ⁴³ This cost estimate was included in the Commission's Investigation Report dated May 28, 1999.

44. ⁴⁴ Ms. Strang did say that she had tried to make her co-workers sensitive to the issue of captioning and to include captioning in discussions of program productions or purchases. This does not, however, establish that the CBC actually does give preference to the purchase of captioned material over non-captioned programming.

45. ⁴⁵ *Smith v. 599449 Ontario* (1991), 15 C.H.R.R. D/324 at p. D/327