

# APPLICATION FOR RECONSIDERATION OF BROADCASTING DECISION CRTC 2006-193

This application constitutes a request under §28(1) of the Broadcasting Act. The Governor in Council is petitioned to **refer** Broadcasting Decision CRTC 2006-193 to the Canadian Radio-television and Telecommunications Commission for **reconsideration**. However, unlike other such applications, the grounds for this appeal have nothing to do with money or competitive advantage and everything to do with the Charter and other legal rights of people with disabilities.

## SUMMARY

The licence decision authorizes the broadcaster to engage in illegal discrimination against people with disabilities. Only a certain limited portion of programming needs to be accessible to persons with disabilities. An absence of accessibility features has been shown to be a violation of the Canadian Human Rights Act and, it is submitted, additionally violates §15 of the Charter.

## SCENARIO FOR COMPARISON

Would it be just and proper, let alone legal, for the Hon. Steven Fletcher to have access to only 71% of the House of Commons? (Or less than 2%?) Of course not – but that scenario exactly parallels the broadcasting decision under petition here.

## DEFINITIONS

- *Captioning* is a transcription of dialogue and sound effects. It makes programming accessible to deaf and hard-of-hearing people. Captioning is not subtitling (a *translation* of limited portions of the original language).
- *Audio description* is an added narration track that explains whatever takes place onscreen that cannot be understood from the main audio alone. It makes programming accessible to blind and visually-impaired people.

## BACKGROUND

The author of this application is Joe Clark, Toronto. I do not hold a broadcast licence and am in no way a competitor to any applicant in the Commission's proceedings. I do not stand to gain materially from this application.

I am a journalist, author, and accessibility consultant whose interest in accessibility for people with disabilities dates back over 25 years. Among my nearly 400 magazine and newspaper articles are a dozen on accessibility issues. I wrote the book *Building Accessible Websites*, on accessible Web development. The *Atlantic Monthly* called me "the king of closed captions."

I run a small consulting business that helps clients improve media accessibility, chiefly through captioning, audio description, and Web-site accessibility. Neither the broadcaster in question, any of the other applicants, the Commission, nor the Government of Canada is a client.

I have significant research interests. I have a large project in development to research, test, and publish standards for captioning, audio description, subtitling, and dubbing.

## ISSUE

The licence decision in question actively authorizes the broadcaster to engage in illegal discrimination against viewers with disabilities.

## THE DECISION

Broadcasting Decision CRTC 2006-193 awarded a licence to operate a national pay-TV movie network to Allarco Entertainment Inc. I intervened in the application process and argued that, while a new pay-TV movie network is not needed, any successful licensee should be required to provide captioning for deaf and hard-of-hearing viewers on its entire broadcast day and audio description for blind and visually-impaired viewers on a substantial portion of its programming, if not all of it.

The Commission's decision (at ¶97) orders Allarco – without elaboration – “to provide closed captioning for not less than 90% of all programs aired during the broadcast year. The Commission is also imposing a condition of licence requiring Allarco to broadcast two hours per week of described video programming as of the second year of operations, three hours per week of [audio-described] programming as of the fourth year of operations, and four hours per week of [audio-described] programming in the sixth year of operations.”

## DEFICIENCIES

For captioning:

- **90% IS NOT 100%:** While 90% of programming sounds like a lot, it means that 36½ days of programming per year can be broadcast without captions.

By comparison, allowing a month of uncaptioned programming is like permitting wheelchair users to enter a building only 11 months of the year.

- **90% ISN'T EVEN 90%:** But under CRTC rules, the overnight period (typically from midnight or 0100 hours to 0600 hours) is unregulated. That means a regulated broadcast day is at most 19 hours long. Even if a broadcaster captioned all of that time, the result is 79% captioning.

But that isn't all: Since the broadcaster in question has to caption only 90% of programming, the actual net percentage of programming captioned is 71¼%.

To draw the same analogy, a ruling like this is equivalent to prohibiting a person in a wheelchair from entering a building for more than three months a year.

For audio description:

- **NOTHING IN YEAR 1:** The Commission authorized the broadcaster to provide *no accessibility whatsoever* in the first year.
- **ALMOST NOTHING IN REMAINING YEARS:** The Commission's decision authorizes the broadcaster to provide almost no description.
  - In Year 2, 1½% of the 19-hour CRTC broadcast day and a mere 1.1% of the 24-hour clock day must be described.
  - By Year 6, those numbers leap to a full 3% of the CRTC broadcast day and 2.2% of the clock day.

In all practical terms, numbers these low amount to no accessibility at all.

## INACCESSIBILITY IS ILLEGAL

It is a matter of settled legal fact that a failure to provide accessible programming is a violation of the Canadian Human Rights Act.

First, though, a word about the Broadcasting Act, which is less than helpful in upholding the legal rights of people with disabilities. §3(1)(p) states that “programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose.” In practice, this means “You can get around to making your broadcasts accessible whenever it won't eat into your profits.” The Commission has been quite effective in its decades-long efforts to limit the amount of accessible programming available to Canadians, using, in part, that section of the Broadcasting Act.

Nonetheless, the Canadian Human Rights Act trumps the Broadcasting Act. The case of *Vlug v. CBC* (T557/1500, 2000) established unequivocally that a failure to provide captioning is a discriminatory practice under the §3 of the Act. That case resulted in an order requiring CBC Television and Newsworld to caption every second of their entire broadcast day from signon to signoff – programming, promos, commercials, the lot. Extensive published data uncontested by CBC show that CBC is in clear noncompliance with the ruling; nonetheless, the ruling is on the books.

And it isn't the only one. Two more complaints under the Act are relevant. The cases of *Vlug v. Global* and *Vlug v. CTV*, though unpublished, resulted in settlements requiring 100% captioning of programming (but not incidentals).

It is a matter of uncontested human-rights law that anything short of 100% captioning amounts to illegal discrimination. On that basis, every licence

decision from the Commission since 2000 that permits a lower level of captioning amounts to an inducement of illegal behaviour. The decision under application is the first significant *new* licence issued in that time.

Note that no human-rights cases have been known to have been filed, let alone settled, concerning audio description of programming for the blind. The results of any well-attested claim would likely mirror those of the *Vlug* cases.

Note further that the Charter of Rights and Freedoms, at §15, guarantees equality of everyone in Canada on numerous grounds, including disability. Even without the settled precedent of human-rights law, the Commission's licence decision would fail a test under §15.

Persons with disabilities should not be expected to undertake the punishingly expensive, time-consuming, and gruelling process of a Charter challenge in order to enjoy their legally protected rights. It is submitted that the Governor in Council has an obligation to uphold existing legal precedent and the principles of the Charter at the highest level, hence this petition for referral.

## CONSUMER CONCERNS

It has been established that inaccessible programming is discriminatory under the Canadian Human Rights Act and the Charter. That remains the case irrespective of the manner of transmission. A requirement to provide accessibility applies to free over-the-air broadcasters (e.g., CBC, Global, and CTV), cable- and satellite-only broadcasters (e.g., Newsworld), and pay-TV networks.

It is instructive to view this issue from the standpoint of the consumer.

- Consumers watching over-the-air broadcasts have already invested in a television and other equipment. They have a right to receive programming they can actually understand – that is, programming with accessibility features like captioning and audio description.
- Consumers watching cable or satellite broadcasts are paying for that service. Yet without full accessibility, consumers with disabilities pay a cost penalty compared to nondisabled people. It's equivalent to charging wheelchair users to enter a building while letting in nondisabled people for free.

- But – one level on top of that – a pay-TV broadcaster is a service for which consumers must pay a fee over and above their cable or satellite fees. Consumers explicitly opt for the pay-TV broadcaster and are paying for the privilege of receiving the programming. In this case, anything other than full accessibility amounts to charging disabled consumers *twice* for *less* programming than nondisabled people receive.

An appeal under §28(1) of the Broadcasting Act requires the Governor in Council to be satisfied that a “decision derogates from the attainment of the objectives of... broadcasting policy,” including the provision of programming accessible by disabled persons at §3(1)(p). That section speaks of providing such programming “as resources become available for the purpose.” Even without considering the human-rights or constitutional arguments, a pay-TV service surely has sufficient “resources available for the purpose” of meeting the policy objectives set out under the Broadcasting Act. (If a broadcaster that consumers pay extra to receive doesn't have those resources, who does?)

## COMPETITION ISSUES

One of the incumbent pay-TV services – the Movie Network channels – already has a 100% captioning requirement (for programming only) in light of the discretionary nature of the service. Yet the Commission licensed a competitor with a 90% captioning requirement.

(The Movie Network does not have a requirement for audio description and airs no known described programming. On that minor count, the broadcaster in question has a stronger requirement even though it does not meet the existing legal standard.)

## STANDARDS

It should be noted that there are no standards for captioning and audio description in Canada that have been researched in an open process, field-tested, and published for wide use. It is possible that the broadcaster could use the cheapest (i.e., worst) available captioning and description to meet its requirements. Quality of captioning and description has been consistently understudied by the Commission and broadcasters.

## **REMEDY**

The Governor in Council is petitioned to refer Broadcasting Decision CRTC 2006-193 back to the Canadian Radio-television and Telecommunications Commission for reconsideration. Only ¶97 of that decision requires reconsideration, which shall take into account:

1. The existing settled jurisprudence in human-rights law
2. The application of Charter equality principles
3. Consumer and competitive issues
4. Application of open, tested standards for accessibility

– 2006.07.02  
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