
**CANADIAN BROADCAST STANDARDS COUNCIL
ONTARIO REGIONAL COUNCIL**

CHUM-AM re Brian Henderson Commentary

(CBSC Decision 95/96-0008, 0060 and 0061)

Decided March 26, 1996

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THE FACTS

The chronology of events in the present matter is rather more complicated than is customarily the case. Moreover, both the broadcast in question and that which gave rise to the Council's decision in *CFTR-AM re Dick Smyth* (CBSC Decision 95/06-0062, March 26, 1996) are substantively linked, further complicating the chronology.

In the circumstances, the facts may be best understood by dividing them into two phases, the first associated with the broadcast itself and the initial reaction of CHUM-AM and the second associated with the steps taken by the broadcaster and Jewish community representatives thereafter.

The First Phase

Brian Henderson has long read the CHUM-AM 7:00 a.m. news, which he has for years followed with an editorial commentary. In his commentary at approximately 7:10 a.m. on September 14, 1995, Brian Henderson took aim at the legal community and legal aid problems in Ontario. In so doing, he used terms which several complainants found offensive. The pertinent parts of his Commentary are as follows:

Provincial Attorney General Charles Harnick may not realize it but the root cause of the crisis in the Legal Aid system is Jewish mothers. I don't ever recall my parents suggesting a career choice for me but, rightly or wrongly, Jewish mothers are infamous for advising their offspring to become doctors or dentists or lawyers, or marry a doctor or dentist or lawyer, and the result is we have too many of all three in this province ... most especially lawyers.

And even a bad lawyer can make a good living through Legal Aid....

We also have too many laws, which may actually be the real problem but for now it's more convenient to just blame the lawyers.

There's a Jewish proverb about two farmers who both claim to own the same cow. And so there they were: one farmer pulling the cow's head, the other man yanking the cow's tail, with a lawyer right in the middle -- milking the cow for all he's worth.

Something like legal aid.

I'm Brian Henderson.

The outcry was immediate. It appears that there were numerous calls to the station and that a tape of the Commentary was played on CHUM's public access telephone line for a period following the broadcast. The Director of Community Relations of the Ontario Region of the Canadian Jewish Congress (CJC) spoke with a CHUM representative and a letter was forwarded by the CJC to Allan Waters, the President of CHUM, Inc. The CJC's legal advisors forwarded a letter to the CRTC and numerous other individual complainants also wrote the Commission. In all, the CBSC received 40 letters complaining about the commentary, more than in the case of any previous program. All such letters were forwarded by the CRTC to the CBSC, although not all the initial complainants ultimately requested that the Council proceed to an adjudication. Jim Waters, President of CHUM Group Radio, issued a written apology later that day. Excerpts of some of the foregoing letters or statements follow.

One complainant who ultimately requested a ruling, whose letter included four other signatures, put her complaint in the following terms:

The anti-Semitic comments made by Brian Henderson at your station last week were unacceptable and appalling. He is entitled to think what he likes. However, he should not abuse his position and power as a public figure on the radio to spew racists [*sic*] garbage. In fact, Henderson needs a few lessons in history and sociology.

Another couple wrote the station a succinct letter, saying: "In view of your clear anti-Semitic views you should not be allowed to broadcast, i.e. your licence should be revoked."

The CBSC was also forwarded a copy of a letter from the CJC's lawyers, which alleged breaches of sub-sections 3(a), (b) and (d) of the *Radio Regulations, 1986*. The law firm characterized the issue in the following terms:

The thesis of the Commentary was that the problem with Legal Aid goes back to "Jewish mothers", who are described as "infamous" and are held responsible for encouraging their children "to become" or "to marry" doctors, dentists or lawyers. The suggestion is then made, and the unequivocal impression left, that there are "too many" Jewish doctors, dentists, and lawyers altogether, and most particularly Jewish lawyers. ... The Commentary then proceeds to analyze the province's justice system, concluding with a "Jewish" proverb, thus tying the entire piece back to the Jews.

Under the heading "Complaint", the lawyers concluded:

In our view, the Commentary is more than tasteless; it is antisemitic and has no place on the public airwaves. This Commentary expressly blamed members of the Jewish community for a serious societal problem, and it did so by invoking a litany of offensive stereotypes.

Although Congress has responded to racist and antisemitic comments aired by radio and television stations in Canada in the past, this is without doubt the most explicit incident in recent memory.

On the day of the broadcast, the President of CHUM Group Radio issued a press release, which stated:

Today, in his commentary, Brian Henderson made remarks that were interpreted as being anti-Semitic.

I must first make the point that, as far as we at CHUM are concerned, Brian Henderson is in no way anti-Semitic and has, in past commentaries, been very supportive of the Jewish community.

We at CHUM Group Radio are very concerned about any feeling that we or our employees harbour any anti-Semitic feelings. Such is just not the case.

We are deeply concerned that the remarks made on our radio station may have offended any of our listeners.

We can only ask those who were offended by the remarks to accept our most sincere apologies.

This apology was also read on air by Jim Waters and re-broadcast at 5:00 p.m. that afternoon and again at 7:00 a.m. and 5:00 p.m. the following day in lieu of Brian Henderson's Commentary. The apology was also played on the same CHUM access line which had played the original Commentary. The controversy did not disappear.

The Second Phase

Articles appeared the following day in the Toronto newspapers and another complaint was sent to the CBSC. It, too, was sent by a declared longtime listener, the third of those ultimately requesting a ruling, who labeled Henderson's Commentary "an anti-Jewish diatribe of the worst kind". He added:

What is stunning is that these comments come from a morning personality working for a high profile radio station whose morning listener audience is surely in the tens of thousands, if not hundreds of thousands.

He reacted to the CHUM press release in the following terms:

It warms my heart, however, to read your comment that Henderson has "in past commentaries, been very supportive of the Jewish community." ... If Henderson is "in no way anti-Semitic" as you say, his comments most certainly are!

The matter did not disappear from sight. The reason may, in part, have been explained in the B'nai Brith press release of September 21. (B'nai Brith Canada is an organization representing the Canadian Jewish community.) In its press release of September 21, it stated:

Rather than calming a volatile situation, however, the statement kindled new flames as listeners felt that the station was not expressing a feeling of true remorse.

Instead of condemning the remarks, the CHUM apology had declared that they were not anti-Semitic and only offered an apology to those who took offence. As one Toronto newspaper observed, "By refusing to send a clear message, he allowed the virus to spread. ..."

On September 18, CFTR-AM's commentator Dick Smyth went to the rescue of his "old friend" Brian Henderson (as he described the CHUM newscaster in his own Commentary) with some on-air comments which exacerbated the situation and are themselves the subject of a further complaint and decision of the Ontario Regional Council (*CFTR-AM re Dick Smyth*, CBSC Decision 95/96-0061, March 26, 1996).

On the 18th, CHUM Group Radio President Jim Waters and Brian Henderson met with senior representatives of B'nai Brith in Toronto and established a consensual arrangement with them which included the following elements (as described by Waters in his letters to the complainants):

1. The broadcast by Mr. Henderson of a mutually agreed upon apology.
2. An invitation to members of B'nai Brith Canada to come to the radio station to conduct a human rights educational program for the entire staff.
3. The agreement by 1050 CHUM to provide public service announcements addressing human rights issues.
4. An ongoing dialogue regarding the co-sponsorship of a program which would run in elementary and secondary schools across Canada promoting human rights.

Mr. Henderson's on-air apology was broadcast on the 21st of September following the 5:00 p.m. newscast and again on four occasions the following day. It was also aired on CHUM-AM's sister station, CITY-TV, at 6:00 p.m. on the 21st. The apology was also made available on the CHUM telephone access line from the 21st until the morning of September 25. The text of that apology follows:

On my commentary last Thursday, I made some remarks that justifiably raised the ire of both Jewish and non-Jewish members of our community.

My attempt, to preface a serious topic, with a not so subtle bit of ethnic humour, was clearly poorly conceived because it was not only misunderstood by many of our listeners but created an atmosphere of ill-will and mis-trust.

Upon noting, the somewhat heated response, CHUM Group Radio President Jim Waters immediately sought to reassure our listeners that I am not an anti-Semite nor have I ever given any indication of being one, in more than 18 years on this station.

However, the apology was not well received either. (It was taken as being self-serving and defensive.) And so we consulted with leaders in the Jewish community and basically admitted "we've really made a mistake here...could you please help us right a terrible wrong".

And, to their credit, rather than condemning our actions they were most eager to do so.

One thing that must be made perfectly clear....

I came up with the idea for that commentary...I wrote it...I read it...and so, if there's any blame to be assigned, for the pain and in some cases even fear, that my obviously misguided attempt at making light of a serious situation caused, lay it on my desk.

I can't take it back (live radio doesn't allow for that), but I can offer a sincere and heartfelt apology, for an insensitive error in judgement.

No excuses.

I did it.

I'm sorry.

And, now I hope we can get on with being friends again, working together, towards a Canada that is free of racial and ethnic bigotry.

I'm Brian Henderson

Following Henderson's on-air statement, B'nai Brith Canada issued a press release praising the apology and looking positively toward the future. Its President stated in part:

Brian Henderson has expressed his regret at being misunderstood. He realises that his attempt at humour was insensitive and ill-advised. We are convinced that Brian Henderson did not knowingly wish to advance racist and anti-Semitic views.

While there is no way to erase the damage, it is possible to begin to mend fences. B'nai Brith Canada is looking forward to this opportunity to work with CHUM not only to try to rectify this troubling situation, but to prevent such situations from occurring again.

On the following day, B'nai Brith issued a second press release in which they explained their meetings with CHUM officials and provided details of the steps taken to "make this city a fair and equitable place for all residents of Toronto."

The Broadcaster's Responses

The CHUM Radio Group President (and General Manager of CHUM-AM) sent all 40 complainants responses, copies of which ultimately arrived at the CBSC. The letters were, to all intents and purposes, identical and will, therefore, be referred to as the broadcaster's response, in the singular.

The letter began with a clear and unequivocal apology regarding the original broadcast. The General Manager expressed that repentance in the following words:

First of all, on behalf of 1050 CHUM, may I apologize for the remarks that led to your complaint. As outlined below, we have tried to respond to the situation in a constructive fashion that will, we hope, lead to increased tolerance. At the same time, I acknowledge that the remarks were insensitive and caused such pain and distress, a situation that we sincerely regret.

He then provided a background statement of Brian Henderson's history with the station and a chronology of the events leading from the broadcast of the 14th to the news releases from B'nai Brith. He concluded with the following statement:

In particular, the dialogue in which we have engaged with leaders of the Jewish community has, it is hoped, resulted in positive steps that will assist in the advancement of tolerance and racial harmony.

Once again, please accept my apologies on behalf of 1050 CHUM for the events that gave rise to your letter.

Three of the complainants were not satisfied with the broadcaster's response and requested that the Ontario Regional Council adjudicate the matter.

THE DECISION

The CBSC's Ontario Regional Council considered the complaint under the *Code of Ethics* of the Canadian Association of Broadcasters (CAB) and by reference to Section 3(b) of the *Radio Regulations, 1986*. The relevant Code and regulatory provisions read as follows:

Clause 2, *CAB Code of Ethics* (Human Rights)

Recognizing that every person has a right to full and equal recognition and to enjoy certain fundamental rights and freedoms, broadcasters shall endeavour to ensure, to the best of their ability, that their programming contains no abusive or discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, sex, marital status or physical or mental handicap.

Clause 6(3), *CAB Code of Ethics* (News, etc.)

It is recognized that the full, fair and proper presentation of news, opinion, comment and editorial is the prime and fundamental responsibility of the broadcast publisher.

The Council also considered the provisions of section 3(b) of the *Radio Regulations, 1986*. As in previous decisions, the Council felt it relevant to apply "the principles established in the *Broadcasting Act* and the *Radio Regulations* as a part of the standards by which it expects that broadcasters govern their on-air activities." (*CKTB-AM re the John Michaels Show*, CBSC Decision 92/93-170, February 15, 1994). In *CJMR-AM re the Voice of Croatia* (CBSC Decision 92/93-0205, February 15, 1994), the Ontario Regional Council used the following terms in dealing with the applicability of Section 3(e) of the *Radio Regulations*:

The Council is comfortable taking notice of a principle established in the *Radio Regulations*, since it is no more or less than a part of the standards by which it expects that broadcasters govern their daily on-air activities. While it is evident that the enforcement of the federal statute and regulations is the responsibility of the Commission, the CBSC has previously applied certain of the principles established in these public instruments in its decisions. ... Surely, the entire premise of a self-regulatory code is that those who adhere to it will first obey the law which is the cornerstone of their activities.

The text of Section 3(b) of the *Radio Regulations, 1986*, which the Council applied to this case, reads in pertinent part:

A licensee shall not broadcast

[...]

(b) abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;

The Regional Council members listened to a tape of the program in question and reviewed all of the extensive correspondence and related documentation. The members agreed that the program had breached the provisions of the Code.

This matter is, in the view of the Regional Council members, pivotal in the understanding of the CBSC's attitude toward questions of human rights and racism. In their view, it brings together many of the issues which the Council has touched upon in one way or another over the preceding three years. In *CFOX-FM re the Larry and Willie Show* (CBSC Decision 92/93-0141, October 7, 1993), the British Columbia Regional Council laid down two guiding and yet conflicting principles which this and other Regional Councils of the CBSC have weighed from time to time since then:

The CBSC is vigilant in its application of Clause 2 to all forms and levels of programming in the sectors of the industry to which the *Code* applies but it is equally conscious of the countervailing importance to the public of the fullest expression of the freedom of speech. It is not *any* reference to "race, national or ethnic origin, religion, age, sex, marital status or physical or mental handicap" but rather those which contain "abusive or discriminatory material or comment" based on the foregoing which will be sanctioned.

On that occasion and on several others since that time, the Council has, in measuring those conflictual principles, concluded that the references found offensive by listeners did not constitute "abusive or discriminatory material or comment" (see, for example, *CHTZ-FM re the Morning Show*, CBSC Decision 92/93-0148, January 27, 1994, *CKTB-AM re the John Gilbert Show*, CBSC Decision 92/93-0179, October 26, 1993, *CHOG-AM re the Jessie and Gene Show*, CBSC Decision 93/94-0242, November 15, 1994, and *CKVR-TV re "Just for Laughs"*, CBSC Decision 94/05-0005, August 23, 1995).

On the other hand, in *CKTB-AM re the John Michael Show* (CBSC Decision 92/93-0170, February 15, 1994), where the facts, but not the applicable principle, differed slightly, the Ontario Regional Council decided that

the multiplicity of inaccurate statements of the host were used by Mr. Michael to disparage or abuse the reputation of French-speaking Canadians as a group or expose them to the contempt of other listeners. Consequently, the Regional Council concluded that the statements collectively amounted to a breach of Clause 2 of the *Code of Ethics*.

Similarly, in *CKTF-FM re Voix d'Accès* (CBSC Decision 93/94-0213, December 06, 1995), the Quebec Regional Council concluded that the very crude attempt at humour at the expense of Newfoundlanders constituted a discriminatory and abusive comment in breach

of the same section of the *Code of Ethics*. In *CFRA-AM re Lowell Green* (CBSC Decision 93/94-0295, November 11, 1994), the open line host had cut the caller off the air after she had described herself as “a practising Christian”. The Ontario Regional Council concluded that this constituted a breach of the Clause.

Once she had identified herself as a Christian, she was immediately cut off, as though her religion made her unqualified to speak on the subject at hand. The Regional Council unanimously decided that the host's treatment of the caller, as well as his comments after cutting her off did, indeed, constitute a breach of clause 2 of the *CAB Code of Ethics*, regarding "...abusive or discriminatory material or comment... based on matters of religion."

In the case at hand, the newscaster and editorial commentator, Brian Henderson, was attempting to address a valid, indeed important, public concern, namely, the state of the legal aid system in the Province of Ontario. As the announcer himself admitted, his choice of example was a “clearly poorly conceived” attempt at “ethnic humour”, which had the effect of undermining the legitimacy of his commentary and, further, violated clauses 2 and 6(3) of the *CAB Code of Ethics*. To illustrate his point, he had reached for an unrelated, irrelevant and factually unsupportable claim. His original commentary was incorrect and inappropriate, a textbook case of what Canada's private broadcasters sought to avoid when they mandated in the *Code of Ethics* which they created *for themselves* that “their programming contain no abusive or discriminatory material ... based on matters of race, nation or ethnic origin [or] religion”.

The wording chosen by the private broadcasters parallels, not inadvertently, the Council believes, that used in the *Radio Regulations, 1986*. Whether intended to be humorous or serious in tone, programming, whether live or pre-recorded, which “tends or is likely to expose an individual or class of individuals to hatred or contempt on the basis of [their] race, national or ethnic origin, colour [or] religion” is not tolerable on Canadian airwaves. While each individual must determine his or her limits of tolerance *at home*, the manifestation of such intolerance on the *publicly-owned* airwaves is unacceptable. The freedom to speak or express does not include the freedom to defame.

In an era when the airwaves are transformed more readily and frequently from music and drama to talk and comment, there are, as a matter of fact, more talk and comment and more *words* on the air. Consequently, on a simple proportionate basis, there are more opportunities to err regarding the social responsibilities and community values enshrined in the *Code of Ethics*. More care is, therefore, required by broadcasters to ensure that the Code provisions are respected.

The Broadcaster's Response

Rarely has a matter which the Council has been called upon to consider raised a more focussed and instantaneous negative reaction than this broadcast. Nor was the fire put out by the initial on-air response of the broadcaster. The recognition of the dilemma was, however, swift. Within one week, CHUM had taken extraordinary steps to deal with both the short-term issue of the broadcast itself and with the longer term issue of the ease with

which such a problem might again arise and the societal steps which needed to be taken to avoid such a dilemma in the future.

In the result, the letters of response to the complainants were later in arriving than would normally be the case. There has not, in the experience of the Council, been a more evident need for such a delay. Where a broadcaster is taking such significant steps on a macro level to respond to a concern at that tier, the Council considers it entirely justifiable that the response to individuals await the resolution on the community level.

Furthermore, the delay meant that the response could be expected to be more substantive. It was. Although there were individuals who requested an adjudication, despite the steps taken by the broadcaster both in dealing with their complaints and with those of B'nai Brith Canada, representing the community, the Council considers that the broadcaster's response from September 18 on was exemplary. The Council specifically refers to the unequivocal on-air statement by Brian Henderson, the repetition of that statement on numerous occasions *both* on radio and on television, the availability of the statement on the station's telephone access line on five successive days, the proposed meeting of CHUM Radio Group representatives with community representatives at large and the establishment of an anti-racist program of activities extending beyond the Jewish community and the City of Toronto. In this respect, the CBSC considers that the station amply fulfilled its obligations of effective dialogue with its listener and the offended community.

Broadcaster Announcement of the Decision

The broadcaster is generally required to announce an unfavourable decision of the Regional Council during peak listening hours within thirty days of the publication of the decision. While the Council considers that the broadcaster's act constituted a breach of the industry's *Code of Ethics*, it has determined that the text of the announcement read the following week by the on-air host was the equivalent of what it would normally have required. In the particular circumstances of this case, as in the previous case of *CJMR-AM re the Voice of Croatia* (CBSC Decision 92/93-0205, February 15, 1994), the Council considers that the broadcaster has by anticipation fulfilled its obligations regarding an unfavourable decision.

Furthermore, with respect to the broadcaster's obligation to be responsive to its listeners, the Council found, as indicated above in some detail, that CHUM-AM had amply fulfilled its obligations of effective dialogue with its complainants and with the community at large.

This decision is a public document upon its release by the Canadian Broadcast Standards Council and may be reported, announced or read by the station against which the complaint had originally been made; however, in the case of a favourable decision or this unusual case of an unfavourable decision, the station is under no obligation to announce the result.