

“Freedom of Expression and Space-Age Media Ethics”

Notes for an Address

by

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What we in Canada refer to as freedom of expression is styled as free speech in the United States. It may indeed be that the root of that right in the U.S., known by its shorthand title, the First Amendment, is the best-known legislative provision in the world. It is old legislation, dating from 1792, and its Canadian equivalent, found in the *Canadian Charter of Rights and Freedoms*, dates from 1982. You might say that Canada went to school on its American statutory forebear.

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” Section 2(b) of the Canadian *Charter* is framed differently. It protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

More to the point, though, the American principle sounds and feels more absolute - “Congress *shall* make *no* law ...” while the Canadian equivalent appears far more, well, Canadian. It does not even *appear* absolute. It feels balanced. Canada’s freedom of opinion and expression is subject “to such reasonable limits ... as can be demonstrably justified in a free and democratic society.” It feels like it can and should be weighed against *something* else. It generally is, at least insofar as the Canadian Broadcast Standards Council is concerned and, it would appear, the CRTC and, to some extent at least, the Federal Court of Appeal.

The point really is that, whatever either constitutional provision sounds like, free speech is not totally free in either the United States or Canada. “Free” is in the end a relative term, reflecting the values of each country, and that is as it should be. Nor should the fact that it is not absolute be viewed as being in any way a threat to fundamental democratic principles. There are, after all, other rights to preserve and protect in a true democracy. Let’s look at some examples.

Commenting on a news story about the mistreatment of a patient in a psychiatric hospital, a radio host said the following: “Why don’t they just

pull the plug on him? He doesn't deserve to live. The guy's a freaking burden on society." A few minutes later, a worker from the treatment centre called the host and said that the wing in which the serious cases, like the one being discussed, was referred to by staff as "the zoo." After that call, the host added, "What I think they should do in the zoo is fill up the rooms, and then there'd be a switch, and once every four months, they press the button and just a little bit of gas comes out, and then you go in and pick it all up and put it in bags."

Remind you of anything in historical terms? Is our democracy improved by permitting such commentary on the airwaves? How about this?

All that aside, we're always saying how global we are and taking in foreign students in Québec at the university, especially students from North Africa. Laval University is one of the biggest universities in North Africa.

The problem is, people forget that in Africa, in Muslim countries and countries in Black Africa, the ones who are sent abroad to study are the sons of people who are disgusting, the sons of the people who own the country so that they can govern it better. They're the sons of plunderers, cannibals who control certain Third World countries and can afford to send their children to Quebec to go to school, if it's not outright corruption by companies that want to get access to natural resources in Africa and will pay to have the sons of the disgusting people who govern those countries study in Québec.

But they're still proud in Laval to accept foreign students. They forget to say that those foreign students, by definition, with some exceptions, are all children of the most disgusting political leaders in the world, people who are sucking their countries dry, people who kill to gain power and torture to keep it. People we call cannibals, people who are extremely cruel.

Any risky generalizations in there? Anything that, if it had any substance, might be reported and argued differently? Any possibility that attitudes of people in the larger community might be influenced in any way by such comments? And these comments about a weather announcer on a local television station?

There are multiple references to the size of her breasts; "her incredible set of boobs" and suggested that "the size of the brain is not directly proportional to the size of the bra" and that, "in her case, it might actually be inversely proportional." [...] The participants also referred to the complainant as [...] "a cat in heat" and [...] "an airhead; it's all well and good to have big boobs, a tiny waist and a tight ass, but it doesn't mean a thing," "there are some seriously sick people at MétéoMédia;" "the girls that are attractive and look good, are always idiots" and "an idiot could do the weather."

In fact, the comments sound precisely like those made by Howard Stern on

conventional radio in Montreal and Toronto in the fall of 1997 for a brief period of time. Apart from the very focussed direction of those comments (and others made at the time) to a named individual (for which she personally sued and won), is there any concern that such locker-room banter could have the effect of desensitizing the public, of encouraging audience members to consider that such sexist commentary was desirable? If violence is added to the mix, is the commentary more acceptable? If intended in a humorous vein, does it become justified?

Howard Stern: [Referring to Kim Basinger] Oh, I just wanna take that piece of ass body, put tape over her mouth, and do things to her. [Playing sound effects of a woman in a sexual encounter throughout the following passage.] And have her lay by my pool in a bikini and have her come out and service me. And I'm laying by my pool, in comes that nude with just a pair of heels. And then like, I reach in, I yank out her vocal chords and then she just orally satisfies me by the pool. Oh, she's totally a mute Kim. And she's totally nude. [...] Oh. And then I break her legs and position them in the back of her head so that she's sitting, and they're permanently fixed like that. We let them knit and mend.

The Muslim community is having a particularly sensitive time in Canada this week but there have admittedly been pressures on the community since September 2001. A Calgary station ran a parody "quiz" segment during which a caller was asked a few multiple choice questions which he or she *had to* answer with the *third* choice, i.e. answer "c", which was predictably the most provocative of all three possible choices. One segment went as follows:

Forbes: Okay. Muslims around the world continue to travel to Mecca on the week-end to celebrate: a) a celebration of forgiveness; b) homage to Allah; or c) just a way to build up some frequent flyer miles so you don't have to pay the next time you want to ram an airplane in the stronghold of the Western civilization.
Pat: I'll take C.
Forbes: Absolutely right there.

The question in all of the above cases is, in reality, difficult. It pits the undeniably important value of freedom of expression squarely against other societal values. It forces us to face the question of whether our democracy is better served by permitting any and all forms of expression solely because they are *expressed*. Do we as a society have the ability to distinguish between categories of speech or must they all be lumped together, attaining a level of virtue because they have been spoken?

Should there, for example, be a distinction made between Laura Schlessinger's comments characterizing the sexuality of gays and lesbians as "abnormal", "aberrant", "deviant", "disordered", "dysfunctional", "an error" or the like and dialogue between politicians on the policy of same-sex marriage? For that matter, do the comments of televangelist Jimmy Swaggart on that subject deserve protection or condemnation?

This utter, absolute, asinine, idiotic stupidity ... of men marrying men [sounds of agreement from audience]. I've never seen a man in my life I wanted to marry [Swaggart laughs; audience applauds]. And I'm gonna be blunt and plain; if one ever looks at me like that, I'm gonna kill him and tell God he died.

Now, here is where Canada and the United States really appear to part ways on the question of freedom of expression. All of the examples I have cited relate to what we might call abusive comment. All of them have been found in breach of either the *Radio Regulations, 1986* or one of the CBSC codes, of which more in a moment. None of those that ran in the U.S. or those that ran only in Canada was, or would have been, in breach of any American statute or regulation.

They, on the other hand, are immensely concerned about indecency. Bare breasts, bare butts, a 2-second glimpse of a penis contorted into a bizarre shape for its shadow effect (in the Australian minstrel show, *Puppetry of the Penis*), the f-word or its derivatives, sexual commentary, *these* are the American issues. The fleeting glimpse of Janet Jackson's right breast cost the CBS affiliates who ran the 2004 Super Bowl \$550,000 (that fine was just confirmed this week), or about \$1 for each complaint received by the FCC. In Canada, we received fewer than 200 complaints on the matter. When *NYPD Blue* first ran years ago, David Caruso's bare butt attracted American audience anger; it was the violence in that show that troubled Canadian viewers. The organized crime series, *The Sopranos*, runs only on pay cable, HBO, south of the border. In Canada, the series runs on both the Movie Network and CTV, admittedly after the Watershed.

So free speech and freedom of expression mean different things to different people. There are different limitations. And we tend to deal with the broadcast constraints in very different ways.

In Canada, we have the combination of a regulatory system (the CRTC) and a self-regulatory system (the CBSC). In the United States, there is only a regulator (the FCC) and that regulator employs heavy artillery to impose its will, namely, the substantial fines mentioned above. I think it is fair to say, by way of introduction to the Canadian system, that the broadcasters respond favourably, effectively and with less conflict here. Here's how we do it.

Basically, all complaints about content issues arising on private broadcasters are sent to the CBSC, whether directly or via the CRTC. The Commission deals with all complaints relating to public broadcasters. If, as in the unusual case of CHOI-FM, the private broadcaster is not a member of the CBSC, the CRTC will deal with those complaints. The Commission of course reserves the right to deal with any complaint that may violate the *Broadcasting Act* or any of the Regulations adopted thereunder, even where it relates to a CBSC member, but it rarely does so.

The Structure of the Council

1. Infrastructure

Structurally, the CBSC consists of five Regional Panels, representing the Atlantic Region, Quebec, Ontario, the Prairie Region, and British Columbia.

There are, when all possible appointments have been made, twelve members on each Panel, half of whom are representatives of the broadcast industry and half representatives of the public. Each Regional Panel has a Chair and a Vice-Chair, one of whom represents the industry and the other the general public.

At the national level there are also a National Chair and an Executive Director. Although there is no such requirement, both are lawyers.

We also have two National Panels, one to deal with Conventional Television programs and the other to deal with Specialty Services.

Representation on our Panels is gender-balanced and well reflective of Canada's ethnocultural make-up.

We also have an Ottawa-based Secretariat which receives complaints from the public directly or on referral from the CRTC and often from the stations themselves. In the early years, we opened about 250-260 files annually. After the arrival of Howard Stern on Toronto and Montreal radio in 1997, we began operating at a rate of about 1,200 files per year. In the past couple of years, though, that figure is just above or below 2,000 files.

2. Funding

The Council's funding, like that of most, if not all, professional associations, is provided directly by its members or indirectly by other associations on their behalf. Other than those individual broadcasters who participate on a personal basis in the adjudications of the CBSC, the corporate members of the Council and their management have no involvement of any kind in the deliberations of the CBSC.

On those occasions on which an individual Panel Adjudicator has any relationship with a station or service whose complaint is being decided, that member does not participate in the adjudication of the complaint.

3. The Codes Administered by the CBSC

The CBSC administers four industry codes of conduct: the *CAB Code of Ethics*, the *RTNDA Code of (Journalistic) Ethics*, the *Voluntary Code Regarding Violence in Television Programming*, and the *Sex-Role Portrayal Code for Television and Radio Programming*.

The *CAB Code of Ethics*, which dates originally from 1943 and was amended in the 1970s and again in 1988 and 2002, deals with an array of issues. It prohibits abusive or unduly discriminatory comments based on race, religion, national or ethnic origin, skin colour, gender, sexual orientation and so on. It prohibits unfair or unsafe contests. It requires that news be presented accurately and without bias. It prohibits unfair and improper comments, even by callers to a radio talk show, for whom broadcasters have the fullest responsibility. Needless to say, editorial comments ought to be clearly separated from any news reports. It encourages the presentation of programming on controversial subjects. It restricts the use of unduly coarse or offensive language and the discussion of unduly sexually explicit material *on the radio*. In the case of television, it extends the Watershed and advisory provisions of the *Violence Code* to other adult material. The Code also includes rules relating to advertising and the basic provision on sex-role portrayal.

The *Code of (Journalistic) Ethics*, created by the Radio and Television News Directors Association of Canada in 1970 and updated in 1986 and 2000, deals with all kinds of news gathering and reporting and public affairs issues. Among other things, it provides that reporting must not unreasonably infringe privacy except when necessary in the public interest. It insists that broadcast journalists govern themselves so as to avoid any real or apparent conflict of interest. It requires that reporting on criminal activities such as hostage-takings or terrorist acts be done in a fashion that does not knowingly endanger lives or provide vital information to the perpetrators. Interestingly, hidden recording devices are permitted when the information is necessary to the credibility or accuracy of a story in the public interest. This has been interpreted to mean that the information could not otherwise be obtained or presented. The Code also provides that errors be quickly acknowledged and corrected.

The *Sex-Role Portrayal Code* states as its *raison d'être* that it seeks to “advance the awareness of, and sensitivity to, the problems related to the negative or inequitable sex-role portrayal of persons.” The Code, which is a Condition of Licence for all broadcasters, sets out quite specific guidelines for programming content. For example, it provides that a realistic balance should be achieved in the use of men and women in voice-overs and as experts and authorities in news and public affairs programming. It requires that both sexes should be portrayed as equal beneficiaries of the positive attributes of family and single-person life. Men and women must be portrayed as intellectual and emotional equals. It goes without saying that negative or degrading comments are to be avoided. (The CRTC has already declared its interest in broader portrayal issues and this will likely lead in due course to a revamping, if not replacement, of the Code.)

The *Violence Code*, which came into force on January 1, 1994, is also formally approved by the CRTC and a Condition of Licence for all television broadcasters. Its basic tenets are:

1. There shall be **no gratuitous violence** on Canadian television at any hour;

2. There is a **Watershed hour**, 9 p.m., before which no programming showing violence intended for adult audiences, shall be aired (note the exception for programming based on the time zone of origination of the broadcast);
3. To aid viewers in making viewing choices, **viewer advisories** must be shown at the beginning of and during the first hour of any programming (even after 9:00 pm) which contains scenes of violence;
4. There are **special rules for programming for young children**, which require, among other things, that very little violence be shown, that violence shall not be the central theme of such programming, that dangerous imitation shall not be encouraged, that violence shall not be shown as the preferred method of conflict resolution and that scenes of realistic violence shall not minimize the consequences of the violent acts; and, finally,
5. A viewer-friendly **classification system** has been put in place.
6. There are also special provisions relating to the reporting of news with an element of violence in the story. Among other things, editorial judgment must be exercised in the selection of video footage to be used and particular care must be exercised in the repetition of violent video footage. There may also be differences in these editorial choices between early and late evening newscasts. The foregoing being said, there is a countervailing obligation not to sanitize the news.

In summary, there are rules to ensure that children, the most vulnerable members of society, benefit from certain protections against the exploitation, whether purposeful or accidental, of those vulnerabilities.

There are also rules to ensure that some types of violent programming which may be fine in cinemas, which we make a conscious choice to enter by leaving our homes, travelling to the movie-house and plunking down our money to enter, are not seen in programming which comes into our homes at its will, not ours.

There are also protections to ensure that programming which may be acceptable for broadcast shows up at an appropriate hour with enough information attached to it to enable persons who may not wish to see it to make their own programming decisions on the basis of knowledge.

4. Decision Procedures

It is essential to the process that it is complaints-driven. The CBSC does not initiate inquiries. The system is not one of censorship or pre-clearance. It is expected that broadcasters will shape their own programming pursuant to the industry's standards. It is only *if* a member of the public expresses a concern about broadcast

material in writing that the CBSC's involvement is triggered. It is equally true that a single complaint can trigger the CBSC's process.

When a complaint is received, either directly from the public or indirectly from the CRTC, it is relayed to the broadcaster. At the same time, the CBSC provides the audience member with a form, called a Ruling Request, which it can return to the CBSC in the event that the broadcaster fails to satisfy him or her.

In the event of dissatisfaction, the complainant returns the Ruling Request, and the adjudication procedure begins. Logger tapes of the program, which have been held by the broadcaster since the filing of the complaint, are forwarded to the CBSC. The Secretariat then considers whether the complaint concerns a subject matter frequently dealt with before or is frivolous, vexatious or harassing. In those cases, a Summary Decision will be rendered.

Otherwise, the tapes and correspondence go to the Panel Adjudicators together with a memorandum from the Secretariat. Panel members review the material and a meeting is held, and a decision is reached.

The Secretariat then drafts the decision, which is circulated to the Panel adjudicators for review, comment and the assurance that it reflects the conclusions of the meeting. When satisfactory, the decision is prepared for release.

5. Results

There are two possible results: 1. the broadcaster is in breach of one of the Codes; or 2. the broadcaster is not in breach of one of the Codes.

Where the broadcaster is not in breach, there is nothing which it or anyone is obliged to do although the decision is publicized by the CBSC. Occasionally, the challenged broadcaster will itself announce the result where the CBSC decision arose from a particularly controversial local issue, but this is not generally the practice.

Where the broadcaster is in breach, the Council may decide two things: 1. the breach is a one-time occurrence; or 2. the breach is likely to recur. If the former, the broadcaster makes two announcements of the adverse result in terms prepared by the CBSC. If the latter, the Council will require the broadcaster to take steps to ensure that the problem does not recur.

- *Mighty Morphin Power Rangers*
- *Howard Stern Show*
- *(Dr.) Laura Schlessinger*

While our regulatory tools do not *appear* to be very powerful, we have found that we do not need anything stronger. The system works because it strikes a nice balance between the needs of the public, the Government regulator and the broadcaster.

A few words about CHOI-FM and Al-Jazeera

Two CRTC decisions that appear to fall into the area of freedom of expression are those rendered in the cases of CHOI-FM and Al-Jazeera Television. Both are probably known to you and both are likely of interest.

CHOI-FM was not a member of the CAB or the CBSC back in 1997, when Genex obtained a license for CHOI-FM and CKNU-FM, also in the Quebec City area. When renewal of the CHOI license was considered in 2002, the Commission was faced with numerous problems relating to the retention of logger tapes, the percentage of French music played and spoken word content issues. Conditions of Licence were imposed, including a Code of Ethics proposed by CHOI for its future Conduct. On account of the gravity of the station's problems, the Commission also imposed a short-term license renewal. In the 2004 Hearings, the station essentially thumbed its nose at the Commission, which then had little choice but to take the stand it did or risk the destruction of the rules which regulate broadcasters but also provide a predictable framework with limitations that prevent what might otherwise be anti-competitive actions and a rapid decay of the entire system.

In any event, the bottom line is that I do not believe that the issue is a free speech issue. I consider that it relates to the orderly management of the broadcast system. So does the Federal Court of Appeal, which went further. Mr. Justice Létourneau said:

The appellant makes much of the guarantee of freedom of expression in paragraph 2(b) of the Charter and seems to want to treat it as unqualified, something that the courts have never recognized. I do not think I am mistaken in saying that freedom of expression, freedom of opinion and freedom of speech do not mean freedom of defamation, freedom of oppression and freedom of opprobrium. Nor do I think I am mistaken in saying that the right to freedom of expression under the Charter does not require that the State or the CRTC become accomplices in or promoters of defamatory language or violations of the rights to privacy, integrity, human dignity and reputation by forcing them to issue a broadcasting licence used for those purposes. To accept the appellant's proposition would mean using the Charter to make the State or its agencies an instrument of oppression or violation of the individual rights to human dignity, privacy and integrity on behalf of the commercial profitability of a business.

Some have thought that permitting Al-Jazeera access to the Canadian broadcasting system as an eligible service stood in stark contrast to the CHOI-FM decision. In fact, it was the opposite. The decision was a paragon of consistency. It imposed on a service that had given cause for content concern the obligation to respect the same rules that CHOI-FM and all other broadcasters must respect. Since, however, the Commission has no direct jurisdiction over a foreign programming entity, it creatively imposed over the distribution undertakings obligations commensurate with those appertaining to all Canadian programming undertakings. So, in a sense, Canadian

audiences will benefit, in the case of an ultimate delivery of the Al-Jazeera signal, from the same protections they have vis-à-vis other Canadian broadcasters. And the well-known legal maxim will apply - *Ubi emolumentum ibi onus*. Essentially - He who profits carries the responsibility associated with the profit.

Conclusion

In Canada the CBSC accepts the idea that freedom of expression, a cherished value, is *one* value, but not the *only* value, and that it, in broadcasting, it should be weighed against other values in society. In other words, I think it fair to conclude that, in Canada, we *respect* freedom of speech but we do not *worship* it, to the exclusion of other societal freedoms

The right to speak freely does not, for example, supersede the right of society to be free from hate speech, which, as you all know, is a *criminal* offence.

The right to speak freely does not, in the view of the CBSC, supersede the right of identifiable groups to be free from abusive or unduly discriminatory comment on the basis of, among other things, their race, their religion, the colour of their skin, their mental or physical handicap, their gender or their sexual orientation.

The right to speak freely does not supersede the right of our children to be free from television programming containing violent or other material intended for the viewing of adults.

So, while it is clear that freedom of speech is a *precious* right, it does not mean that Canadian audiences should be subject to absolutely *any* form of speech. Because the Canadian system does not permit excessive violence during children's programming, because it does not allow abusive comments on the basis of people's religion, sexual orientation or the colour of their skin, because it does not allow imbalance in the portrayal of men and women does not mean that our free speech is unduly restrained or that the Canadian social fabric is weakened.

Thank you.