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**CANADIAN BROADCAST STANDARDS COUNCIL  
PRAIRIE REGIONAL PANEL**

CKX-FM re Announcer Comments

(CBSC Decision 00/01-0423)

Decided August 20, 2001

D. Braun (Chair), D. Ish (Vice-Chair), D. Dobbie, R. Gallagher, S. Hall

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**THE FACTS**

On December 6, 2000, between 7:30 and 9:00 a.m., the CKX-FM (Winnipeg) morning show hosts, Joe Leary and Bob Bruce, were bantering and made some jokes regarding the “psychologically challenged” which offended a listener. The jokes were apparently taken from a daily bulletin, “The Bull Sheet”, and, as would be expected in such a context, the hosts built on the skeletal material originally provided. As will be noted in greater detail below, the broadcaster lost the logger tapes, which has eliminated the possibility for the CBSC to include a transcript of that dialogue here, as the Council customarily does in the rendering of its decisions.

**The Initial Correspondence**

On December 7<sup>th</sup>, 2000 a listener sent the following letter to the CRTC, which forwarded the matter to the CBSC in due course:

On Wednesday, December 6<sup>th</sup>, 2000, between 7:30 am and 9 am an on air “bit” between Joe Leary and Bob Bruce was about the “psychologically challenged”. It included songs that these people would be singing over Christmas, songs like Elvis’ “I’ll have a blue, blue Christmas for certain”. The “bit” went on to make fun of people with split personalities and other psychological problems. I find this highly offensive and want something done about this cruel joke being played on people who can’t help their condition. This isn’t the first time that this “on-air personality” has done offensive bits, but I felt that this one was the worst I have ever heard on the air.

The Program Director of CKX-FM responded to the complainant’s letter on January 19, 2001 with the following (the full text of this response can be found in the Appendix):

I agree with your concern. I actually was listening along with you that morning, and found the piece in bad taste, as well. And I spoke to Joe Leary about it that morning. We talk almost every day about the show, and the kind of material that is suitable, and the kind that is not. Thankfully, the discussions are mostly about the things he does right. But he is a new talent, and does make mistakes. The good thing is that he always tries.

Joe is the kind of guy that [*sic*] is continually looking for different things to entertain the audience. He subscribes to different "announcer preparation" services that provide him with topical material, and the occasional "joke" bit. I deliberately put the word joke in quotations because more often than not, the "joke" is inappropriate - as we both heard on the morning of December 6.

When Joe and I discussed the "bit", he understood completely why it wasn't suitable for air. Why he decided to run it in the first place can only be attributed to a blinding desire to entertain - he saw a "bit" that was humour on the surface, and didn't look past it to see the unfavourable light it casts on the mentally challenged. He just wanted to do a "funny bit". Joe is a really talented individual, but above that, a great guy. Believe me when I say he would never intentionally do anything to hurt anybody. But he will make mistakes. All talented people do. It's a part of their drive and ambition - to always be pushing the envelope, and finding new ways to reach people. And, while sometimes challenging, it is exciting to work with people like this.

Again, thank you for your comments. I hope that this satisfies your concern. I appreciate the effort you've made in trying to make our station better. Our business is all about communication, and communication cannot work if it is only one way.

### **Additional Correspondence**

In response to the broadcaster's letter, the complainant sent the following e-mail to CKX on January 30:

I have been considering your letter and after reading it several times I can find no mention of an apology to those who should be most offended. I do not consider your letter to be addressing the problem and I am therefore requesting that Mr. Leary read an on-air apology during his morning spot at about the same time which he did the first spot and that a word for word copy of the apology be sent to the appropriate Canadian Mental Health organization. I would also like you to consider running a few PSA's about Mental Health. I don't feel that this is asking too much and that it may cause Mr. Leary to consider what he is going to say on-air.

In response, CKX-FM sent the following e-mail to the complainant on February 1:

Thank you for your response to my letter. You are correct, there was no apology to anyone other than you simply because you were who complained and the response was to you only. We have a very good relationship with many levels of the Mental Health community sponsoring such events as the 24 hour Relay raising funds for the Association for Community Living. We have been a long time corporation sponsor of the Special Olympics. In fact, Joe Leary had his head shaved to raise money for this organization. Last year during McHappy Day at McDonald's, Joe Leary worked at the restaurant to raise money and the owner made a point of calling us to let us know how Joe went out of his way to talk to a mentally challenged child and gave him a "Leary in the Morning" t-shirt that totally thrilled the child.

This is not to say that Joe was not out of bounds with the comments he made on Dec. 6. I acknowledge that in my response to you. Any complaints we receive are always dealt with immediately and confidentially. As I am sure you can understand, if we are in correspondence with the CMA, that must remain confidential.

Again, thank you for your concern. The matter has been dealt with and Mr. Leary will not make this mistake again.

Finally, on May 21, the complainant notified the CBSC of his growing dissatisfaction with the broadcaster's response:

After several letters between us I haven't received the appropriate response from CKX. I want an on air apology for the conduct of Mr. Leary. This isn't forthcoming. ... I am not going away without a ruling.

### **Correspondence from the Broadcaster to the CBSC**

In the ordinary course, the CBSC ordered tapes of the program in question from the broadcaster (on February 21). Although the CBSC had, in customary fashion, requested that the station hold the logger tapes on December 18 (at which time the station confirmed that the tapes were available), they had apparently disappeared. The Program Director's letter of explanation follows:

As discussed in our conversation last Thursday (February 22), unfortunately the logger tapes containing the subject of the complaint is no longer available. Again, I apologize for the mistake.

I did however, get the >script' for the segment in question. As I had mentioned in an e-mail to the complainant, the >bit' originated from an announcer >prep' service, in this case, the >Bull Sheet".

I have enclosed eight copies of the text of the segment for adjudication.

### **THE DECISION**

Although the complainant expressed concern over the discriminatory nature of the comments made, due to the broadcaster's failure to provide the logger tapes, the Panel had no factual basis upon which to consider the substantive nature of the complaint. It is perfectly clear in this case that by failing to provide the logger tapes the broadcaster is in breach of its undertakings as a member of the CBSC. The CBSC's Prairie Regional Panel considered the complaint under the CBSC's *General Principles* which contains the following statement on the loss of logger tapes:

Broadcasters are required by Regulation to retain logger tapes of their programming for 28 days, and, by virtue of their membership in the CBSC, they are required, when advised by the CBSC Secretariat, to safeguard the relevant logger tapes and to provide the required number of dubbed copies of these tapes to the CBSC when requested pursuant to a complaint.

## Retention of Logger Tapes

Regrettably, this is not the first occasion on which a broadcaster has lost or mislaid the logger tapes for a program being reviewed. Fortunately, though, given the number of tapes which are requested annually by the CBSC, it is an infrequent occurrence. Some of the CBSC jurisprudence on this issue follows.

In *CJSB-AM re The Wendy Daniels Show* (CBSC Decision 92/93-0219, February 15, 1994), the logger tapes had been ordered to be retained by the CBSC but, for unexplained reasons, were not available for the use of the Regional Council in its adjudication. It found the station in breach of its responsibilities as a CBSC member under the *Manual*.

It is clear that the standard of the CBSC in this regard is in no more or less stringent than that to which the broadcaster must adhere as a part of his responsibility under the *Broadcasting Act* and *Regulations*. There was no justifiable explanation proffered by the broadcaster for the loss of the tapes, whose retention ought to have been viewed as a matter of considerable responsibility for it.

In *CJCL-AM re Stormin' Norman* (CBSC Decision 93/94-0073, June 22, 1994), the station lost the logger tapes which it had been obliged to retain for purposes of the CBSC adjudication. Its only explanation was that it must have inadvertently recycled them.

The loss of tapes was, in this case, without justification and tape retention should have been viewed by the broadcaster as a normal broadcaster responsibility. The loss of tapes of a program under Regional Council consideration is, in the view of the CBSC, a serious breach of standards inherent in the conditions of CBSC membership.

The obligation to retain logger tapes was further emphasized in *Crossroads Television (CITS-TV) re Nite Lite* (CBSC Decision 98/99-1129, March 29, 2000). The Ontario Regional Panel stated that:

In this case, the broadcaster *thought* it had retained the July 13 and 14 tapes and was sending these to the CBSC when they were requested. As noted above, the programming on the tapes was that of a totally different date. The CBSC has no reason to believe that this was a purposeful act; however, the Council wishes to underscore that inadvertence, innocent mistake or the acts of third parties which interfere with the preservation of requested logger tapes are not and cannot be accepted as excuses for the non-availability of the correct tapes in reviewable condition at the time at which they are needed by the Council. Although the program itself may not have been in breach of any of the broadcast Codes (something which the Council is unable to determine in this case), the broadcaster *is* in breach for the failure to comply with this essential requirement of membership in the CBSC and of licence holding in the Canadian broadcasting system.

In the *Crossroads* decision, the Ontario Regional Panel also reviewed the importance of the obligation to retain logger tapes for the CRTC, which has not over time been immune to

corresponding situations. The Panel explained the regulator's situation in the following terms.

Under all of the CRTC's Regulations pertaining to radio and television, every licensee is *obliged* to "retain a clear and intelligible audio-visual recording of all of its programming" for a period of four weeks from the broadcast and, then, for longer periods when complaints are received and programs are under investigation. The Commission's insistence on the importance of this requirement has been made amply clear in its decisions. For example, in *Licence renewal for CKDX-FM* (Decision CRTC 2000-44, February 17, 2000), the Commission pointed out that, as a part of its preparations for the Hearing, it had asked for the tapes for the period from May 4-10, 1997, and that "tapes for the entire week were unintelligible." It pointed out that it had received the assurance that "The licensee has installed an additional VHS logger unit that runs simultaneously with the original reel-to-reel logger system." In the circumstances, it provided a short licence renewal (just over three years), to ensure that it could verify compliance with this and the other two matters of concern in that renewal. See also, as recent examples of CRTC decisions in which the retention and delivery of logger tapes was a material issue in a licence renewal: *Licence renewal for VOAR* (Decision CRTC 99-540, December 13, 1999), *Licence renewal for VOWR* (Decision CRTC 99-539, December 13, 1999) and *Licence renewal for CFNI* (Decision CRTC 99-497, November 17, 1999). In the case of *Short-term Licence renewal for CKCU-FM; Issuance of a Mandatory Order* (Decision CRTC 98-124, April 17, 1998), the Commission went considerably further (ordering a two-year licence renewal), despite the fact that

In a letter dated 8 January 1997, the licensee advised that *human error* had "resulted in one of the two logger tapes being *inadvertently* recorded over". Accordingly, the licensee was unable to provide complete logger tapes as requested by the Commission. [Emphasis added.]

The Commission elaborated:

At the hearing, the Commission reminded the licensee that the availability of a complete, clear and intelligible logger tape is particularly important as it allows the Commission, not only to initiate its own monitoring of programming, but also to act on complaints from the general public concerning programming matters.

The Panel then explained the relationship of the CBSC and the CRTC policies in this regard.

The requirements of membership in the CBSC merely parallel the regulator's exigencies. There should be no doubt that the retention of logger tapes by broadcasters is a *cornerstone* of the self-regulatory process. Because the CBSC is not an evidence-gathering body, it relies *solely* on the program tapes as the "evidence" of what was said or shown on the airwaves. It is these tapes alone which are the measure of the broadcaster's compliance with the Codes to which all CBSC members adhere. The self-regulatory process relies on the availability of these tapes and the *serious* respect by broadcasters of any request by the CBSC Secretariat to retain these *for as long as necessary* while a file remains open. The members of the public who file complaints with the CBSC or which are referred to the CBSC by the Commission *must* have the sense of security that the broadcaster will comply with this requirement in order for them to retain faith in the process.

When the situation arose again, in *CKNW-AM re the Peter Warren Show (Logger Tapes)* (CBSC Decision 98/99-0643, May 9, 2000), the B.C. Regional Panel added that

its expectation is one of *result*, not of best efforts. Barring a natural catastrophe of the nature of a fire, broadcasters *must* retain and provide the tapes which are the essence of the self-regulatory, and regulatory, investigations. The failure to comply constitutes a breach of one of the broadcaster's fundamental obligations as a member of the CBSC.

In the present instance, the broadcaster has not proffered a single reason for the disappearance of the tapes. It has tried to offer a compromise, namely, the excerpt from "The Bull Sheet" on which the banter was based. That compromise, however, makes it clear how *critically important* the original tapes are to both the regulatory and the self-regulatory processes. The written comments are missing precisely the dialogue that might permit the CBSC to evaluate whether the host's comments did or did not breach the broadcaster Codes.

In the circumstances, namely, the absence of that essential evidence of what was broadcast, the Panel finds itself in a situation in which it appears unfair to the complainant to simply decide that it can make *no* decision. If, on the face of the complaint, it does appear that the complainant's concerns could reasonably result in a finding of breach on the substantive issue, in addition to the obvious breach of broadcaster standards by reason of the failure to retain the tapes themselves, the Panel will find against the broadcaster on these grounds as well. While not on all levels a satisfactory resolution of the problem of lost logger tapes, it seems unreasonable to deny the complainant's allegations by the unilateral mishandling of the material which the broadcaster is *obliged* to retain and which, ironically, might work to its own advantage in defending its broadcasting choices.

In the present matter, therefore, the Prairie Regional Panel considers that the comments of the host regarding persons of diminished mental abilities may, as the complainant has alleged, have been such as to constitute abusively or unduly discriminatory comment on the basis of mental disability.

### **Broadcaster Responsiveness**

In addition to assessing the relevance of the Codes to the complaint, the CBSC always assesses the *responsiveness* of the broadcaster to the substance of the complaint. In this case, the Council considers that the broadcaster's response was, in fact, excellent. It was thoughtful and forthcoming regarding the Program Director's own response to the challenged remarks. It also tried to provide an alternative to the missing tapes. While the Panel is clearly dissatisfied with other issues, it considers the station's correspondence of very high quality in the broadcaster dialogue context.

## **CONTENT OF THE ANNOUNCEMENT OF THE DECISION**

CKX-FM is required to: 1) announce this decision, in the following terms, once during prime time within three days following the release of this decision and once more within seven days following the release of this decision during the time period in which the Joe Leary morning show was broadcast; 2) within the fourteen days following the broadcast of the announcements, to provide written confirmation of the airing of the statement to the complainant who filed the Ruling Request; and 3) to provide the CBSC with that written confirmation and with air check copies of the broadcasts of the two announcements which must be made by CKX-FM.

The Canadian Broadcast Standards Council has found that CKX-FM has breached its requirements of membership in the CBSC. When requested to furnish tapes of announcer comments made on-air on December 6, 2000, it was unable to do so despite the requirement under both the CBSC's terms of membership and the corresponding requirements of the CRTC. In addition to this, the CBSC assumes that the complaint made by a member of the public relating to the December 6<sup>th</sup> announcer comments constituted a breach of the requirement of the human rights provision of the *CAB Code of Ethics* that no abusively or unduly discriminatory comments be made regarding persons identifiable on the basis of their mental disability.

*This decision is a public document upon its release by the Canadian Broadcast Standards Council.*

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## Appendix B

to CBSC Decision 00/01-0423

### ***CKX-FM re Announcer Comments***

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#### **I. The Complaint**

The following complaint dated December 7<sup>th</sup>, 2000 was sent to the CRTC and forwarded to the CBSC in due course:

I am writing to complain about a piece of entertainment done by the morning DJ for CKX 96 here in Brandon, Manitoba. On Wednesday, December 6<sup>th</sup>, 2000, between 7:30 am and 9 am an on air "bit" between Joe Leary and Bob Bruce was about the "psychologically challenged". It included songs that these people would be singing over Christmas, songs like Elvis' "I'll have a blue, blue Christmas for certain". The "bit" went on to make fun of people with split personalities and other psychological problems. I find this highly offensive and want something done about this cruel joke being played on people who can't help their condition. This isn't the first time that this "on-air personality" has done offensive bits, but I felt that this one was the worst I have ever heard on the air.

#### **II. The Broadcaster's Response**

The Program Director of CKX-FM responded to the complainant's letter on January 19, 2001 with the following:

RE: Canadian Broadcast Standards Council complaint

First of all, thank you for your concern regarding our programming. Most people, when confronted with something that they do not like, would simply turn off the radio. To go that extraordinary step, and attempt change means that the matter is important to you. And with good reason.

I agree with your concern. I actually was listening along with you that morning, and found the piece in bad taste, as well. And I spoke to Joe Leary about it that morning. We talk almost every day about the show, and the kind of material that is suitable, and the kind that is not. Thankfully, the discussions are mostly about the things he does right. But he is a new talent, and does make mistakes. The good thing is that he always tries.

Joe is the kind of guy that is continually looking for different things to entertain the audience. He subscribes to different "announcer preparation" services that provide him with topical material, and the occasional "joke" bit. I deliberately put the word joke in quotations because more often than not, the "joke" is inappropriate – as we both heard on the morning of December 6.

When Joe and I discussed the "bit", he understood completely why it wasn't suitable for air.



Why he decided to run it in the first place can only be attributed to a blinding desire to entertain – he saw a “bit” that was humour on the surface, and didn’t look past it to see the unfavourable light it casts on the mentally challenged. He just wanted to do a “funny bit”. Joe is a really talented individual, but above that, a great guy. Believe me when I say he would never intentionally do anything to hurt anybody. But he will make mistakes. All talented people do. It’s a part of their drive and ambition – to always be pushing the envelope, and finding new ways to reach people. And, while sometimes challenging, it is exciting to work with people like this.

Again, thank you for your comments. I hope that this satisfies your concern. I appreciate the effort you’ve made in trying to make our station better. Our business is all about communication, and communication cannot work if it is only one way.

Please feel free to call me to discuss this or any other concerns you have with either KX96 or HOT 101.

### **III. Additional Correspondence**

In response to the broadcaster’s letter, the complainant sent the following email to CKX with a carbon copy to the CBSC on January 30:

I have been considering your letter and after reading it several times I can find no mention of an apology to those who should be most offended. I do not consider your letter to be addressing the problem and I am therefore requesting that Mr. Leary read an on-air apology during his morning spot at about the same time which he did the first spot and that a word for word copy of the apology be sent to the appropriate Canadian Mental Health organization. I would also like you to consider running a few PSA’s about Mental Health. I don’t feel that this is asking too much and that it may cause Mr. Leary to consider what he is going to say on-air.

In response, CKX-FM sent the following email correspondence to the complainant with a carbon copy to the CBSC dated February 1:

Thank you for your response to my letter. You are correct, there was no apology to anyone other than you simply because you were who complained and the response was to you only. We have a very good relationship with many levels of the Mental Health community sponsoring such events as the 24 hour Relay raising funds for the Association for Community Living. We have been a long time corporation sponsor of the Special Olympics. In fact, Joe Leary had his head shaved to raise money for this organization. Last year during McHappy Day at McDonald’s, Joe Leary worked at the restaurant to raise money and the owner made a point of calling us to let us know how Joe went out of his way to talk to a mentally challenged child and gave him a “Leary in the Morning” t-shirt that totally thrilled the child.

This is not to say that Joe was not out of bounds with the comments he made on Dec. 6. I acknowledge that in my response to you. Any complaints we receive are always dealt with immediately and confidentially. As I am sure you can understand, if we are in correspondence with the CMA, that must remain confidential.

Again, thank you for your concern. The matter has been dealt with and Mr. Leary will not

make this mistake again.

Finally, on May 21, the complainant notified the CBSC of his growing dissatisfaction with the broadcaster's response:

After several letters between us I haven't received the appropriate response from CKX. I want an on air apology for the conduct of Mr. Leary. This isn't forthcoming.

You seemed to have swept this under the rug. If your group has no teeth to act then what good are you as a consumer watchdog. Please reply to this ASAP. This is the first time I have taken the time to complain about the "antics" of Joe Leary on the radio. Don't ignore my request. I am not going away without a ruling.

The CBSC ordered 8 tapes from the broadcaster on February 21, 2001. The CBSC had requested that the station hold the logger tapes on December 18 at which time, the station confirmed that the tapes were available. However, the request for 8 tapes prompted the following letter from the broadcaster, dated February 26:

Re: File # 00/01-423 Complaint against CKX-FM Brandon, MB

As discussed in our conversation last Thursday (February 22), unfortunately the logger tapes containing the subject of the complaint is no longer available. Again, I apologize for the mistake.

I did however, get the 'script' for the segment in question. As I had mentioned in an e-mail to the complainant, the 'bit' originated from an announcer 'prep' service, in this case, the 'Bull Sheet'.

I have enclosed eight copies of the text of the segment for adjudication.

Sincerely,

Operations Manager  
KX96/HOT 101  
Brandon, MB

Bull Sheet

Carols for the Psychologically Challenged:

- Schizophrenia – "Do you Hear What I Hear?"
- Dementia – "I Think I'll Be Home for Christmas"
- Narcissistic – "Hark the Herald Angels Sing About Me"
- Paranoid – "Santa Claus is Coming to Get Me"
- Personality Disorder – "Thoughts of Roasting on an Open Fire"
- Depression – "I'll Have a Blue Christmas for Certain"
- Multiple Personality Disorder – "We Three Queens Disoriented Are"