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**CANADIAN BROADCAST STANDARDS COUNCIL  
QUEBEC REGIONAL PANEL**

TVA re a report broadcast on *J.E.*

(CBSC Decision 00/01-0838)

Decided April 5, 2002

S. Gouin (Vice-Chair), S. Chamberland, R. Cohen (*ad hoc*),  
B. Guérin, T. Rajan (*ad hoc*)

Since G. Bachand, who customarily chairs this Panel, renders services to the same corporate group that owns TVA, she did not participate in this adjudication.

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## **THE FACTS**

On April 6, 2001, TVA (CFTM-TV, Montreal) broadcast a segment of *J.E.* that reported on two welfare recipients, Papa André and Tony, who, it said, were returning from a sexual holiday in the Dominican Republic. This was, in fact, a follow-up story. The initial report about the two men had been broadcast on *J.E.* on March 16 but that earlier story is not the subject of the present complaint. The April 6 report dealt with their return to Quebec and the fact that they had been met and interviewed by representatives of the Ministry of Employment and Social Assistance. They were followed and interviewed by a reporter from *J.E.* As a part of the challenged segment, the voice of Marc Lortie, the Ministry's media relations person, was heard on three separate occasions against a background which included a super identifying him as a representative of the Department.

On the first occasion, there was a brief discussion between the reporter, Pierre-Jean Séguin, and M. Lortie against a background visual of the two men during their Dominican holiday:

[Translation]

Séguin: Papa André and Tony?

Lortie: Mmm hmm?

Séguin: Are being investigated?

Lortie: Yes, that's all I can tell you. Yes.

The second occasion occurred just over two minutes later, after reporter Séguin, seen entering the Social Welfare building, explained that he had been informed by telephone

that a social welfare recipient is permitted to leave the country provided that he advises the Ministry and that the trip is of short duration:

[Translation] That's how people get gifts sometimes. For example, someone's mother or father who is on social welfare can pay for someone's trip. When that happens, we check out the nature and duration of the trip. But for two weeks for example, there is no legal impediment.

Shortly thereafter, Séguin reported that, although M. Lortie refused to say what would happen to the two social welfare recipients, one could assume that Papa André would have more difficulty obtaining social assistance in future. At that point, the voice of M. Lortie was again played, saying:

[Translation] Unfortunately, I cannot comment on individual cases regarding recipients or anyone else.

On April 17, a representative of the Ministry sent the following complaint to the CBSC (the full text of which, along with the full text of all the other correspondence, is included in the Appendix, available in French only):

[Translation] The voice of M. Marc Lortie, the Media Relations Officer for the Ministry who provided information to the reporter, Pierre-Jean Séguin, during a telephone conversation, is heard on three occasions during the April 6 report.

M. Lortie was never informed by M. Séguin that his words were being recorded and that they would be broadcast during the report. **We consider this approach to be unacceptable and we strongly denounce it.**

#### THE COMPLAINT

According to our information, the Canadian Radio-Television and Telecommunications Commission (CRTC) has a regulation (article 3[(e) of the *Radio Regulations, 1986*]) stating that "a licensee shall not broadcast any telephone interview or conversation, or any part thereof, with a person unless (i) the person's oral or written consent to the interview or conversation was obtained prior to the broadcast, or (ii) the person telephoned the station for the purpose of participating in a broadcast." Unfortunately this regulation applies only to radio.

Consequently, the complaint we are filing today relates to the *Code of Ethics* administered by the Canadian Association of Broadcasters (CAB) and the ethics and professionalism of the TVA television station and its reporter. The facts at issue are the following:

- § by recording the words of the Media Relations Officer of the Ministry of Employment and Social Assistance (MESA) during a telephone conversation and not disclosing that fact to him, TVA and the *J.E.* reporter, Pierre-Jean Séguin, demonstrated a flagrant lack of ethics;
- § not informing the MESA Media Relations Officer that the comments he made over the phone were being recorded and would be broadcast on television denotes an intolerable lack of respect.

## CONCLUSION

This is not the first time that the Ministry of Employment and Social Assistance has denounced such a practice. In our opinion, recording a telephone conversation and broadcasting excerpts of that conversation without obtaining the permission of the individuals concerned constitutes a serious breach of the *Code of (Journalistic) Ethics*. We are of the opinion that this unfortunately wide-spread practice must cease. We are therefore asking the Canadian Broadcast Standards Council to study the situation and to take appropriate action against the broadcaster.

Via its Associate Director of Public Affairs, the broadcaster responded on May 15:

[Translation] We believe it is important to recall that the program *J.E.*, which has been airing weekly since 1993, is a program in the well established tradition of investigative journalism. The purpose of this program, which has been drawing a very large audience for several years, is to broadcast public interest stories. For many, programs such as this one (or *À La facture* aired on Radio-Canada) are the last resort in obtaining an answer to a given problem. In the past, the Quebec Press Council has recognized the benefits of investigative journalism.

The *J.E.* team has consequently developed considerable expertise in investigative journalism. This team does everything in its power to respect the journalistic principles of accuracy, honesty and integrity based on the most solid research possible. The report at issue was prepared within the context of this program.

[...]

The Ministry of Employment and Social Assistance concluded that recording a telephone conversation and broadcasting excerpts of that conversation without having obtained M. Lortie's permission is a breach of the *Code of (Journalistic) Ethics*. There is no reference to any commitment on the part of the reporter not to reveal the contents of the conversation. **This is the only reproach concerning the above-mentioned report.**

In our view, the rules of journalistic ethics are shaped according to custom and the applicable legislation.

We believe it is useful to inform you of the following facts concerning the broadcasting of M. Lortie's voice. We felt there was no doubt that the subject of this report, i.e. the possibility for recipients of social welfare benefits to vacation abroad for several months and enjoy their benefits while the Ministry of Employment and Social Assistance is none the wiser, was a topic of public interest. Our reporter was informed that, after discussing our first report, the Ministry had officially identified the two (2) individuals appearing in the story and initiated an investigation process in the days following that report. A follow-up report on the steps the Ministry takes to deal with these types of situations was necessary from a public interest point of view. M. Lortie had refused to give an on-camera interview on two (2) occasions. This was a last resort method in order to inform the public of the Ministry's position on this type of issue.

With respect, we also believe that someone assigned to media relations who is questioned by a reporter on a newsworthy topic should naturally assume there is a good chance what he or she has to say is being used to substantiate a report, since his or her role is to answer media enquiries and the media in turn represent the public. Moreover, the Civil Code of Quebec

allows the use of a person=s voice for the legitimate information of the public (section 36 (5) C.C.Q.).

## The Quebec Press Council

On May 28, the Ministry representative also filed a complaint with the Québec Press Council, a copy of which was also sent to the CBSC. He said in part:

[Translation] First, we want to make it clear that we do not question the benefit of this report to the public. It is rather the approach taken, and more particularly the professional ethics of the reporter, that we believe are the issue. Presenting topics of public interest in a program like *J.E.* must not open the door to violations of the *Code of (Journalistic) Ethics* and to a lack of respect towards those who provide material for this program.

In her letter of May 4, 2001, [the Associate Director of Public Affairs] points out that the *J.E.* program does everything in its power to respect the journalistic principles of accuracy, honesty and integrity. How then are we to explain the fact that the reporter did not inform M. Lortie that the comments he made during a telephone conversation were being recorded? It is the reporter=s duty to do so and he did not do so. That is what is unacceptable.

[The Associate Director of Public Affairs] also infers that since M. Lortie had refused an on-camera interview on two occasions, broadcasting excerpts from his telephone conversation was a method of last resort to inform the public of the Ministry=s position.

She also claims that someone assigned to media relations who is questioned by a reporter on a newsworthy topic should naturally assume there is a good chance what he or she has to say is being used to substantiate a report.

First, it should be recalled that M. Lortie had given an on-camera interview during the first report aired on March 16, 2001. With respect to the second report, aired on April 6, 2001, which was a follow-up to the first report, we determined that another interview would not be relevant. And, when the Media Relations Officer replies that he is not granting an interview, that means that he does not want his voice and his comments to be broadcast. This appears self-evident to us. That being said, M. Lortie fulfilled his duty to inform the public by giving information to M. Séguin.

Secondly, it is erroneous to claim that broadcasting excerpts from a telephone conversation recorded without M. Lortie=s knowledge was a last resort attempt at informing the public of the Ministry=s position, when in fact, M. Séguin could easily have restated M. Lortie=s comments in his report.

In conclusion, we feel that the *J.E.* team must behave in a fashion that is more aware of the need to comply with the *Code of (Journalistic) Ethics* if it expects to continue to obtain the cooperation of media relations officers within the Government of Quebec and, more particularly, the cooperation of the Media Relations Officer at the Ministry of Employment and Social Assistance.

The Quebec Press Council concluded that the complaint was not founded. The reasons for its decision [<http://216.13.51.178/decisions/D2001-04-069.htm>] were as follows:

[Translation] In the present matter, the Council notes that the excerpts of a conversation between M. Lortie and the reporter, Pierre-Jean Séguin, which were broadcast on TVA were limited to comments which were in no way detrimental to the image of the Ministry of Employment and Social Assistance. Moreover, when a media relations officer of an organisation speaks with a reporter on the telephone, he or she should expect the conversation to be recorded as a matter of course. Generally speaking, the Council is nevertheless not advising reporters not to adhere to the highest standard of transparency in this regard.

The Council wishes to reiterate that clandestine recordings may constitute a legitimate practice in consumer journalism. In this case, however, the Council is of the opinion that the comments made by M. Lortie which were broadcast were not essential to the content of the report as they appeared as simple scripting components.

That being said, overall the *J.E.* program and the reporter, Pierre-Jean Séguin, met the requirements for thoroughness and fairness which are expected in every type of journalism, including investigative journalism, both from the standpoint of researching information and of presenting the facts.

Given the previous considerations, the Press Council rejects the complaint filed against *J.E.* and the reporter, Pierre-Jean Séguin.

## THE DECISION

The Quebec Regional Panel considered the program under the following provisions of the Canadian Association of Broadcasters (CAB) *Code of Ethics* and the Radio-Television News Directors Association of Canada (RTNDA) *Code of (Journalistic) Ethics*:

*CAB Code of Ethics*, Clause 6, paragraph 3:

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.

*RTNDA Code of (Journalistic) Ethics*, Article 4:

Broadcast journalists will respect the dignity, privacy and well-being of everyone with whom they deal, and will make every effort to ensure that news gathering and reporting does not unreasonably infringe privacy except when necessary in the public interest. Hidden audio and video recording devices should only be used when it is necessary to the credibility or accuracy of a story in the public interest.

The Quebec Regional Panel Adjudicators watched a tape of the challenged episode of *J.E.* and reviewed all of the correspondence. The Panel concludes that the broadcast of the voice of the Ministry representative has breached the above-cited provisions of the private broadcaster Codes.

### **The Special Wording Problem of Clause 6, Paragraph 3, of the *CAB Code of Ethics***

Whenever the Quebec Panel applies the wording of Clause 6, paragraph 3, of the version of the *CAB Code of Ethics* adopted in 1988 (but which is currently being revised), it is necessary to explain the discrepancy between the French and English versions in order to explain why the Quebec Panel applies the English wording in all such circumstances. In *TVA re Mongrain* (CBSC Decisions 93/94-0100, 93/94-0101, and 93/94-0102, December 6, 1995), this Panel explained:

The Quebec Regional Council notes that the French-language translation of Clause 6(3) differs somewhat from the English-language version in emphasis. The French-language text reads, «C'est un fait reconnu que la tâche première et fondamentale du radiodiffuseur est de présenter des nouvelles, des points de vue, des commentaires ou des textes éditoriaux avec exactitude, d'une manière *objective, complète et impartiale*. [Emphasis added.]» In particular, the Quebec Council members recognize that the words «full, fair and proper», in the English version, do not correspond exactly to «d'une manière objective, complète et impartiale» in the French translation. While the English text provides no conflict between the *necessarily* subjective presentation of «opinion, editorial and comment» and «full, fair and proper», the French text presents an impossible task to a French-language broadcaster attempting to adhere to the French-language requirements of the Clause. To provide «des points de vue, des commentaires ou des textes éditoriaux» in a «manière objective [...] et impartiale» is essentially a contradiction in terms. In the opinion of the Council, it is unreasonable to expect that «points de vue» and «textes éditoriaux» be presented in an «impartial» manner, and that, by their very nature, editorial and opinion («points de vue» and «textes éditoriaux») are *partial*, that is, they contain some element of preference or bias. It would thus be utterly unreasonable to impose such a standard on a French-language broadcaster.

Council members attribute this difference in emphasis to the particular translator(s)'s choices in the adaptation of the English text to French. This is, after all, a case in which the English text was the original text and the French version a translation of that document. In the circumstances, while the Council believes that there may be aspects of the Clause which apply similarly to the French and English broadcasters, such as the «juste» presentation «des nouvelles, des points de vue, des commentaires ou des textes éditoriaux», those aspects which cannot be so applied must be considered in the sense in which other Regional Councils have interpreted the English-language version of the Clause. It goes without saying that Canadian broadcasters cannot be held to different levels of responsibility as a function of the language in which they broadcast.

The Panel need not add anything to this explanation on this occasion.

### **The Decision of the Quebec Press Council**

While several of the points made in the decision of the Quebec Press Council are pertinent to the Quebec Regional Panel of the CBSC, it must immediately be acknowledged that the Press Council has not been called upon to render a decision relating to the private broadcaster Codes. The Quebec Press Council is unusual in that it makes decisions with respect to broadcast, as well as print, publishers; however, it does so by the application of

its own standards. The CBSC applies the broadcast Codes. It may be that the respective standards will from time to time be coincident but this will not necessarily be the case. Moreover, even where the standards may be similar, one could not necessarily assume that two different panels, employing separately developed decision bases, will arrive at the same conclusion.

### **The Use of Clandestine Recording Devices**

A distinction must be drawn between the use of undisclosed recording devices and the broadcast of the fruits of such recordings. As to the first point, the *RTNDA Code of (Journalistic) Ethics* requires that

Hidden audio and video recording devices should only be used when it is necessary to the credibility or accuracy of a story in the public interest.

In a previous file involving the same broadcaster and show, namely, *TVA re J.E. (Report on HMS 90)* (CBSC Decision 97/98-0472, August 14, 1998), this Panel dealt with a report on exaggerated claims made by some independent distributors of a food supplement known as HMS 90 which involved the use of hidden cameras to record those exaggerated claims and the response of an employee of the manufacturer regarding potential revenues associated with the sale of the product. In that matter, the Panel concluded that it had

no hesitation in concluding that the inquiry into the selling tactics associated with HMS 90 was a legitimate avenue of pursuit. The public has an interest in knowing about products which are offered as having curative values, products which may walk the fine line between food and drugs, products which may find themselves on the border between regulation and non-regulation, particularly where the public's health may be at play.

As to the second issue, the Panel stated that it believed that "the information in question would not have been comprehensively and credibly unearthed without the use of hidden recording devices." Similarly in *TVA re J.E. en direct (Alternative Medicine)* (CBSC Decision 97/98-0580, September 24, 1998), this Panel had no difficulty in concluding that the use of hidden cameras was warranted in support of an investigative report on the unorthodox practices of a particular homeopath. There, too, the Panel was

of the view that an investigation into the practice of alternative medicine by one practitioner is a matter of significant public interest, especially given the fact that such services are unregulated in Quebec.

It also concluded that the information would not otherwise have been accessible.

In the present matter, the Panel does not consider that the broadcaster's use of an unrevealed device passes the threshold test. As to the first test, namely, the public interest in the matter being investigated, the Panel readily accedes to the relevance of the report. There was, at the very least, an appearance that a Government welfare policy was either

insufficiently watertight or was being abused. The importance of doing the story was clear.

That being said, the broadcaster fails the second test. Simply stated, the information *was* available. The Ministry representative had no hesitation in providing it on the telephone. It was in fact acknowledged that he had previously done an on-camera interview on the *same* subject for the March 16 episode of *J.E.* Nor did the Ministry make any objection to the use of the *information* provided by M. Lortie. The Panel assumes that he could even have been directly quoted without objection; the Ministry's complaint related solely to the use of M. Lortie's *voice*. Consequently, the Quebec Panel finds the use of an undisclosed audio recording device and the broadcast of the recording in breach of Article 4 of the *RTNDA Code of (Journalistic) Ethics*.

It should also be noted that the broadcaster justified its use of the recording on the grounds that

M. Lortie had refused to give an on-camera interview on two (2) occasions. This was a *last resort method* in order to inform the public of the Ministry's position on this type of issue.  
[Emphasis added]

The fact that the individual refused an interview is hardly a justification for insisting on one by the use of clandestine tools. Quite the opposite. The refusal puts the broadcaster on notice that it *cannot have* what it wishes to have *unless*, as noted above, the information is in the public interest *and* not otherwise available. The broadcaster *may* have a complaint to register with the Ministry for not *requiring* its representative to tape an interview but it cannot arrogate to itself the authority to determine that it will force the event despite the lack of prior consent. Nor does the existence of Article 36 (5) in the *Quebec Civil Code* which permits the use of a person's voice *for the legitimate information of the public* protect the broadcaster vis-à-vis the requirements of the *Broadcasting Act* or the standards of the private broadcaster Codes. That provision will apply to issues of civil law relationships but they are not at issue here.

Moreover, the broadcast of the recording of M. Lortie's voice without his *prior* consent, whether oral or written, would also, if on radio, be prohibited by Section 3 of the *Radio Regulations, 1986*, which provides:

3. A licensee shall not broadcast
  - [...]
  - (e) any telephone interview or conversation, or any part thereof, with a person unless
    - (i) the person's oral or written consent to the interview or conversation was obtained prior to the broadcast, or
    - (ii) the person telephoned the station for the purpose of participating in a broadcast.

With that standard in mind, in *CJMR-AM re Voice of Croatia* (CBSC Decision 92/93-0205, February 15, 1994), the Ontario Regional Panel found that the broadcast by CJMR of a



taped call by the complainant without his consent constituted the *improper* presentation of news, opinion, comment or editorial, contrary to the terms of Clause 6, paragraph 3 of the *CAB Code of Ethics*. It is the view of the Quebec Panel that the essence of that section of the *Radio Regulations*, namely, that prior consent is required before broadcasting an undisclosed recording, would apply equally to a television taping where that taping takes place in similar circumstances. In the matter at hand, the recording took place at the other end of a telephone line, as it would in radio, and the interviewee had no way of knowing that the taping was occurring.

It should be further noted that the Panel's position is not affected by the fact that the Ministry representative was their Media Relations Officer. While it is *legal* (in terms of the Criminal Code provisions) but not necessarily proper for a broadcast journalist to record a conversation to which he or she is a party without disclosing the fact of the recording, private broadcaster standards do not, in the absence of special circumstances, permit the broadcast of that recording. The Panel does not share the view of the Québec Press Council that the media-related position of the Ministry representative provides *any* justification for such a clear breach of industry standards.

It should be noted that, although it finds a breach of both the *CAB Code of Ethics* and the *RTNDA Code of (Journalistic) Ethics*, the Panel fully acknowledges that the broadcaster did nothing to distort the facts of the story or to sully the reputation of either M. Lortie or the Ministry he represented. Even *if* a sophisticated media officer might consider that the reporter *could* be taping the conversation (which better practice would dictate *not* be done without advising the person being taped), there is no entitlement on the part of the broadcast journalist to *assume* that there was any implied permission granted to broadcast the taped comments. While the broadcaster appears to rely heavily on the fact that the Ministry did not make any reference to any commitment on the part of the reporter not to reveal the contents of the conversation,<sup>2</sup> and to conclude, in effect, that its argument must fail if its only concern is the form, rather than the substance, of the information, it is wrong.

It *is* the form that is the issue. Not only is the interviewee entitled to withhold his consent (when given the chance to do so), but the broadcaster is required to *first* obtain that consent when using a hidden or undisclosed recording device (unless the exceptional circumstances anticipated above are present).

### **Broadcaster Responsiveness**

The Panel always takes the time to consider the broadcaster's responsiveness to the complainant's concerns, which is a part of each broadcaster's CBSC membership requirements. In the present matter, the broadcaster's representative sent a long, detailed, very careful reply. While it is substantively diametrically opposed to the position of the complainant, that is frequently the reason for which matters are referred to CBSC Panels for adjudication. The care and attention brought to its drafting are to be commended.

## **ANNOUNCEMENT OF THE DECISION**

TVA 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 in the time period in which *J.E.* is broadcast; 2) within fourteen days following the broadcast of the announcements, to provide written confirmation of the airing of the announcements to the complainants who filed the Ruling Request; and 3) at that time, 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 TVA.

The Quebec Regional Panel of the Canadian Broadcast Standards Council has found that, by broadcasting the voice of a representative of the Ministère de l'Emploi et de la Solidarité sociale on the April 6, 2001 episode of *J.E.* without his permission, TVA has breached provisions relating to privacy in both the *CAB* and *RTNDA Codes of Ethics*. The refusal of the representative of the Ministry to be interviewed on two separate occasions did not entitle the TVA to broadcast a recording of his voice made without his consent. The station's failure to obtain that consent before broadcasting the audio tape constituted an improper presentation of news or opinion in breach of the *CAB Code of Ethics* and an unwarranted invasion of privacy under the *RTNDA Code of (Journalistic) Ethics*.

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