
**CANADIAN BROADCAST STANDARDS COUNCIL
QUEBEC REGIONAL PANEL**

CJAD-AM re an episode of the *Tommy Schnurmacher Show* (logger tapes)

(CBSC Decision 03/04-0089)

Decided April 4, 2005

T. Rajan (Vice-Chair), R. Cohen (*ad hoc*), B. Gu erin, B. Kenemy, G. Moisan

THE FACTS

CJAD-AM (Montreal) broadcasts the open-line *Tommy Schnurmacher Show* weekdays from 9:00 am to 12:00 pm. The CBSC received a complaint dated September 25, 2003 about the comments of the host regarding the Governor-General. The listener expressed his concerns in the following terms (the full text of the correspondence can be found in the Appendix):

[translation] For approximately the last three weeks to one month, the announcer at radio station CJAD 800 in Montreal, between 9:00 am and noon. He is seriously laying into the Governor-General of Canada and her husband, as well as the group that is accompanying her overseas.

I believe in freedom of speech, but there are limits. It has got to the point where the announcer, I believe named Schurmacker [*sic*], uses language that promotes hatred and contempt and encourages the whole audience to do as he does.

This is upsetting, and I never believed I would be upset enough to write to you about this.

After inquiring, I was told that I have to put everything in writing. This is why I am asking you to listen to a few broadcasts, so that you will be aware of the disgusting language that he uses, especially that of this morning, September 25, 2003.

Rather than replying directly to the complainant in accordance with the CBSC's rules, the Vice President and General Manager of CJAD sent a brief reply to the CBSC on October 7 and requested that the CBSC forward the response to the complainant. He said in full:

I trust you will forward my response to [the complainant].

I listened to the show in question and while Mr. Schnurmacher stated his opinion on the Governor General's trip to Russia very strongly, he, in our opinion, made no comments that would require him to be censored or have his rights to freedom of expression removed.

We are in disagreement with [the complainant] and will not comment further. Should the CBSC decide to launch an inquiry into the matter we will provide you with the recordings necessary

The complainant wrote back to the CBSC on October 7 to request that it pursue the matter. He suggested that

[translation] an independent arbiter should listen to the tape in question, what I would call "ranting", and to the tone of voice, which was unequivocal in its contempt, and the continued repetition of T. Schurmacker [*sic*]. [...] Audience ratings and freedom of speech are certainly important to [CJAD] but there is a limit to everything.

In accordance with CBSC procedure, the Council requested that the broadcaster hold copies of the logger tapes for the program in question on the date that it processed the complaint, which was October 6, less than two weeks following the broadcast. On that date, CJAD confirmed that it had copies of the September 25 broadcast of the *Tommy Schnurmacher Show*. Moreover, in the correspondence sent to the broadcaster requesting that it respond to the complainant (sent on October 6) the CBSC indicated that it had received confirmation that the tapes were being held.

After receipt of a Ruling Request, the CBSC Secretariat always reviews the file to determine if a full Panel adjudication is necessary. The review of this complaint was conducted on February 12, 2004, at which time the CBSC asked CJAD to send the tapes which had been held pursuant to this complaint. When the CBSC still had not received those tapes in October 2004, it sent a second written request to CJAD. After an intervening telephone call by the CBSC Secretariat, CJAD eventually responded on December 2 with the following information:

CJAD would like to do everything possible to resolve the matter of File C03/04-0089, and we look forward to discussing this matter with either the complainant or the CBSC. However, we regret that logger tapes of the Schnurmacher Show from September 25, 2003 are no longer on the audio logger files of CJAD. We respectfully adhere to all CBSC and CRTC regulations regarding logger tape archives; however we note that the first request from CBSC dated February 2004 was already well beyond the 3-month turnover of our logger files. We remain open to any and all suggestions on resolving this matter.

After further correspondence between the CBSC and CJAD, the broadcaster indicated they "had answered the complaint as best we could in the absence of log-files."

THE DECISION

The Quebec Regional Panel reviewed the complaint on the basis of the sections of the *CBSC Manual* dealing with the responsibilities of its broadcaster members and the procedures relating to dealing with complaints:

CBSC Manual, Responsibilities of Members:

Broadcaster members which join the CBSC do so voluntarily and, by so doing, agree to:

[...]

h) co-operate fully with the CBSC by retaining the logger tape of a challenged program from the time of any request by the Secretariat until such time as the CBSC notifies the broadcaster that it is no longer necessary to hold the tape for purposes of resolution of the complaint.

CBSC Manual, Complaint Resolution

In the event that the direct approach to the broadcaster has not been successful, a complainant may always contact the CBSC. In order for such a two-step process to be effective, enabling the complainant to have a valid and useful "appeal" to the CBSC, the broadcaster must take all necessary steps to ensure that the timeliness of its reply is such that the complainant is able to access the CBSC's process within the 28 day period for retention of logger tapes or that it has set aside the logger tape for the challenged program so that it will be preserved and available to ensure the security of the process.

[...]

Provision of Tapes

The Secretariat will, at the time of receipt of the complaint, and generally before even despatching the letter to the broadcaster, contact the broadcaster to ensure that the logger tape of the challenged broadcast be set aside by the broadcaster until such time as the CBSC notifies the broadcaster that it is no longer necessary to hold the tape for purposes of resolution of the complaint. It is a fundamental membership responsibility of the broadcaster to retain the logger tape securely so that it will be available if and when the Secretariat advises that the required number of dubbed copies be made available for purposes of evaluating, adjudicating or otherwise dealing with the file.

The Panel reviewed the correspondence but, due to the absence of logger tapes or any indication of the substance of the episode of the Schnurmacher Show, it was unable to evaluate the content. The Panel did find, however, that CJAD's failure to retain and provide the CBSC with logger tapes of the program in question constitutes a breach of its obligations as a member of the CBSC.

The Requirement to Retain and Furnish Copies of Logger Tapes

The Quebec Regional Panel has recently reviewed the obligations of private broadcasters to retain logger tapes. In *TQS re Le Grand Journal (Michel Villeneuve Commentary)* (CBSC Decision 03/04-1949, February 10, 2005), this Panel said

It is a membership requirement of the CBSC (which is identical to the regulatory requirement of the CRTC on this issue) that broadcasters retain logger tapes of all programming for 28 days following the broadcast and for whatever longer period of time may be required once the CBSC requests the retention of the tapes pursuant to the receipt of a complaint.

In that decision, it reviewed past CBSC decisions addressing the retention of logger tapes by broadcasters. In one of these decisions, namely, *Crossroads Television (CITS-TV) re Nite Lite* (CBSC Decision 98/99-1129, March 22, 2000), the Ontario Regional Panel described the obligation in the following language:

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.

In the recent TQS decision, this Panel went on to observe that

the broadcaster's requirement to retain and provide logger tapes to the CBSC, when requested, is [...] well-established. Indeed, logger tapes are so critical to the effective regulation and self-regulation of the airwaves that their retention is, as also noted above, a requirement of the CRTC. [...]he retention and provision of logger tapes is an obligation of result, not of means. Best efforts to ensure the availability of logger tapes when required will not suffice. Absent the actions of a third party over whom the broadcaster has no control or for whom it has no responsibility, the failure to deliver tapes when required will constitute a breach of the broadcaster's CBSC membership obligations.

Moreover, in the matter at hand, the broadcaster has not explained why it did not retain the logger tapes. The only reason it provided was in an e-mail of December 2, 2004 from the Program Director to the CBSC Secretariat, in which he said:

We respectfully adhere to all CBSC and CRTC regulations regarding logger tape archives, however, we note that the first request from CBSC dated February 2004 was already beyond the 3-month turnover of our logger files.

The Panel does not assume any deliberate act on the part of the broadcaster to make the tape unavailable, particularly since there is every chance that the host's comments might, from a substantive point of view, have been found to be within the reasonable ambit of political commentary, had the logger tapes been reviewed. That aside, the Panel considers that the language of the *CBSC Manual* is unequivocal. It provides that the obligation of the broadcaster is to retain the logger tape of a challenged program "from the time of any request by the Secretariat *until such time as the CBSC notifies the broadcaster that it is no longer necessary to hold the tape* for purposes of resolution of the complaint." [Emphasis added] It is not for the broadcaster to determine when it is no longer necessary to hold the tape. That is the responsibility of the Secretariat. In the present matter, the tape was requested well within the Council's customary time frame for file evaluation. The "3-month" time frame raised by the CJAD representative is not pertinent to the obligations and undertakings of broadcasters operating under either the CBSC's or the CRTC's rules. The failure to retain the tapes constitutes a breach of the broadcaster's obligations of membership in the Council.

Broadcaster Responsiveness

The CBSC considers, as a part of every decision, whether the broadcaster has complied with its obligation to respond appropriately to the complainant's concerns. That dialogue is not only a part of every broadcaster's CBSC membership obligations, it also represents the public's sense of security in the process of self-regulation. While broadcasters are always involved with the reaction of their audiences to what they put on air, this dialogue with a listener is the manifestation to the complainant of that involvement. In the present file, the Quebec Panel regrets the refusal of the Vice-President and General Manager of CJAD to respond *directly* to the complainant, as all broadcasters are obliged to do as a part of their membership in the CBSC. There was certainly nothing frivolous or vexatious in the complaint, which could even have motivated the broadcaster to keep its distance from the complainant. In fact, from the Panel's perspective, there was no ostensible reason for the broadcaster to wish to avoid responding directly to the complainant, as all private broadcasters have been doing since 1994. The Panel also notes that, although there is no *obligation* to do so, responding to the complainant in the language of his or her complaint is a much appreciated courtesy, particularly in Quebec (as well as those other areas in Canada where one may expect significant listenership from the other official linguistic community).

CONTENT OF THE ANNOUNCEMENT OF THE DECISION

CJAD-AM is required to: 1) announce this decision, in the following terms, once during peak listening hours 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 *Tommy Schnurmacher Show* is broadcast; 2) within fourteen days following the broadcast of the announcements, to provide written confirmation of the airing of the statement to the complainant; 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 CJAD-AM.

The Canadian Broadcast Standards Council has found that CJAD has breached its requirements of membership in the CBSC. When requested to provide tapes of an episode of the *Tommy Schnurmacher Show* broadcast on September 25, 2003, it was unable to do so. The failure to supply a copy of the logger tape to the CBSC for purposes of its adjudication of a complaint constitutes a breach of CJAD's membership requirements in the Council.

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

ANNEXE

Décision du CCNR 03/04-0089 CJAD-AM concernant le *Tommy Schnurmacher Show* (bandes-témoins)

La plainte

La plainte suivante fût envoyée au CRTC le 25 septembre 2003 qui l'achemina au CCNR le 29 septembre selon la procédure établie :

Depuis environ trois semaines à un mois, l'animateur du poste de radio CJAD 800 à Montréal, entre 09:00hres et midi. S'en prend sérieusement à M^{me} la Gouverneure du Canada et son mari ainsi qu'au groupe qui l'accompagne outre-mer.

Je crois à la liberté de parole, mais il y a des limites. C'est rendu que l'animateur du nom Schurmacker [sic], je crois, se sert d'un langage qui incite à la haine, et au mépris et incite tous les auditeurs à faire comme lui.

C'en est bouleversant, et jamais je n'aurais cru à en être bouleversé au point où j'en viens à vous écrire à ce sujet.

Après m'être informé, on me dit que je devais mettre le tout par écrit. C'est pourquoi je vous demande d'écouter quelques enregistrements, pour vous rendre compte du langage écœrant dont il se sert, surtout celui de ce matin, 25 septembre 2003.

La réponse du radiodiffuseur

Le 6 octobre, le Vice-président et directeur général de CJAD envoya la réponse suivante au CCNR et demanda au Conseil de l'achemina au plaignant ce qu'il fit le 7 octobre :

I trust you will forward my response to [the complainant].

I listened to the show in question and while Mr. Schnurmacher stated his opinion on the Governor General's trip to Russia very strongly, he, in our opinion, made no comments that would require him to be censored or have his rights to freedom of expression removed.

We are in disagreement with [the complainant] and will not comment further. Should the CBSC decide to launch an inquiry into the matter we will provide you with the recordings necessary.

Correspondance additionnelle

Le plaignant a écrit au CCNR le 7 octobre :

Je viens juste de recevoir votre dernier msg qui contenait les commentaires de [M. B], vice-président et gérant général de CJAD, et j'en suis nullement surpris, toutefois j'insiste sur le fait qu'un arbitre indépendant devrait écouter l'enregistrement en question, que j'appelle du « ranting » et le ton de la voix, sans équivoque, qui crache le mépris, et la répétition continue de T. Schurmaker [sic]. Quelques-uns de mes connaissances sont aussi de mon avis ... donc s.v.p. avoiler [sic] quelqu'un écouter ses propos, qui duraiet depuis au moins trois semaines ne nuirait [sic] certainement pas. La cote d'écoute est certainement et la liberté de parole sont importants [sic] pour [le vice-président] mais il y a limite à tout.

Merci de votre attention à mes propos.

Le CCNR considéra ce courriel l'équivalent d'une Demande de décision et accusa réception de ce courriel le 10 octobre. Le 10 octobre, le plaignant répondit au CCNR :

Je viens d'ouvrir l'ordi et reçu votre courriel de ce jour. Je vous remercie d'avoir poussée [sic] plus loin la plainte que j'avais formulée au sujet du programme du 25 sept. dernier sur CJAD. J'en ferai part aux connaissances intéressées, comme moi. Le temps n'a pas d'importance. J'ai écouté à quelques occasions le discours de M. T. Schurmacker [sic], croyez-moi le ton a changé depuis le dépôt de ma plainte et votre suivi à ce sujet, c'est déjà signe que ça n'a pas fait de tort, loin de là.

Encore une fois merci.

Le 12 février 2004, le CCNR commanda les bandes-témoins. Lorsque le CCNR ne reçut pas les bandes, le CCNR envoya une deuxième lettre à CJAD le 26 octobre. CJAD répondit au CCNR le 2 décembre avec l'information suivante :

CJAD would like to do everything possible to resolve the matter of File C03/04-0089, and we look forward to discussing this matter with either the complainant or the CBSC. However, we regret that logger tapes of the Schnurmacher Show from September 25, 2003 are no longer on the audio logger files of CJAD. We respectfully adhere to all CBSC and CRTC regulations regarding logger tape archives; however we note that the first request from CBSC dated February 2004 was already well beyond the 3-month turnover of our logger files. We remain open to any and all suggestions on resolving this matter.