
CANADIAN BROADCAST STANDARDS COUNCIL

QUEBEC REGIONAL PANEL

CJMF-FM re a promotion (Win a Hands-Free Cellphone)

(CBSC Decision 08/09-0211)

Decided March 17, 2009

D. Meloul (Chair), G. Moisan (Vice-Chair), Y. Bombardier, R. Cohen (*ad hoc*), M. Ille, J. Pennefather (*ad hoc*)

THE FACTS

In October 2008, radio station CJMF-FM (93.3FM, Quebec) was running a promotional contest pursuant to which listeners were eligible to win a rebate on a Bluetooth hands-free cellular telephone accessory if they were spotted driving while using their cell phone, an act which had recently become illegal in the province of Quebec. At a second stage in the contest, the host announced the names of those people who had already won the rebate; if they telephoned the station within a set amount of time, they would win the hands-free device at no cost at all.

A promotion for the contest aired on October 11 at approximately 7:30 am by Jeff Labrie, a CJMF-FM personality known as “Le gardien de nuit” (“The Night Watchman”) who hosted a program of the same name. The promotion was as follows:

[translation]

Hi, it's Jeff, the Night Watchman. So, now that the police fine you if you drive with your cell phone in hand, at 93.3 we're going to use the other method. So, if I ever catch you in the act, I'll give you a 50% rebate from Mégastat so you can buy your Bluetooth. That's the softer method and that's not all. If you're ever the wrongdoer and I name you on the same day on Gilles' *Le Retour*, you have nine minutes to call us and you win your Bluetooth. So make sure I catch you before the police do. A collaboration between Communications Mégastat and 93.3.

The CBSC received a complaint dated October 11 from a listener who was concerned that the radio station was promoting an illegal act, namely, driving while holding and using a cellular telephone. The listener outlined his concerns, in pertinent part as follows (the full text of all correspondence can be found in the Appendix, available in French only):

[translation]

The Night Watchman (host) is encouraging people to break the law relating to the use of cell phones while driving. If he sees someone talking on a cellular telephone while driving a car (which has been prohibited by law since May '08 in Quebec) [*sic*, the offence is talking on a *handheld* cell phone while driving], he'll give them a 50% rebate on the purchase of an electronic device. All winners are also eligible for the chance to win their device if they telephone within the 9 minutes where they are named.

In short, 93.3 is using the public airwaves to incite listeners to commit misdemeanours and rewards them if they do. This is a violation of the regulations that must be severely sanctioned.

The station responded to the complainant on November 3 with their explanation of the promotion:

[translation]

As you know, any use of a cell phone while holding it in one's hand, without a *hands-free* function, is now prohibited. After a *grace period* of three months, during which drivers stopped for this type of infraction receive only a warning, a fine of \$115 plus the loss of three demerit points will then be imposed beginning July 1, 2008. The SAAQ also clarifies that if you absolutely must use your telephone, you must do so in a safe location, that is to say, in a parking lot, a service station or on the side of a road where the maximum speed is less than 70km/h.

That is what we attempted to do during the course of this promotion, that is to say, promote the safe use of cell phones. Jeff Labrie was addressing people who were still using their cell phones in a dangerous manner to encourage them to acquire a hands-free system. Clearly, the advertisement for this promotion caused some confusion and we will ensure that, in the future, this type of message is clearer in order to convey the actual objectives.

The complainant filed his Ruling Request on November 10 and added, [translation] "Clearly, the broadcaster does not understand the impact of its own promotions and advertisements. This was clearly an incitation to violate the law with the goal of winning a prize."

THE DECISION

The Quebec Regional Panel examined the complaint under the following provision of the Canadian Association of Broadcasters' (CAB) *Code of Ethics*:

Clause 12 – Contests and Promotions

All on-air contests and promotions shall be conceived and conducted fairly and legitimately and particular care shall be taken to ensure that they are not misleading, potentially dangerous or likely to give rise to a public inconvenience or disturbance and that any prizes offered or promises made are what they are represented to be.

The Panel Adjudicators read all of the correspondence and listened to the promotional message. The Panel concludes that the promotion did not violate Clause 12.

Promoting Irresponsible Behaviour?

This decision turns on the interpretation by this Panel of the words “potentially dangerous or likely to give rise to a public disturbance.” In order to arrive at its conclusion, the Panel has little useful precedent. Its closest guidance can be found in the BC Regional Panel decision in *CHMJ-AM re Tom Leykis Show (Drunk Driving)* (CBSC Decision 02/03-0423, July 22, 2003). In the broadcast giving rise to that decision, the host suggested that many people consume alcohol at holiday events and then get in their vehicles to drive home. He invited listeners “who were driving drunk at that very moment” to call in to the show. His words were: “You’ve been boozin’ and now you’re cruisin’. So if you’ve been drinking and now you are driving, I mean right now, now is the time to call us and tell us about it.” A number of listeners called in, one of whom said he was actually drinking *while* driving. As in the matter at hand, the complainant characterized the show as “unacceptable radio programming urging young people to drink and drive.” The BC Panel concluded that the broadcast was acceptable fare in the following terms:

The Panel considers that this broadcast sought to criticize “societal ambivalence” on the issue of drinking and driving. That preambular point was made in concrete language by the host himself at an early point in the show. Following the first commercial break, the host stated that the purpose of the show was, to some extent, to prove the futility of the system and the hypocrisy of public attitudes regarding drinking and driving, particularly at the festive time of year. He said, in part:

We do it to prove that despite all of the public service announcements and all of the warnings about driving drunk and all of the claims that they’ve increased enforcement, that many of you are still doing it right now.

He then agreed that law enforcement representatives are doing the *right* thing. The problem, he said, is public equivocation on the issue.

This is no fault of cops, highway patrol people or anybody like that. Uh, believe me, these boys do the right thing. You know the problem is that we are ambivalent in our society about punishing drunk driving. On the one hand, we talk tough and say “oh yeah, yeah, throw the book at him.”

On the other hand, I think we're all worried that we're the ones who're gonna get caught.

He returned to that point in concluding his introductory remarks:

But we keep saying that we're doin' something about this and we don't.
Bottom line.

The Panel concluded that "there was clearly no advocacy or promotion of drinking and driving by the Leykis show itself." It elaborated on that conclusion in the following language:

The Panel understands that the complainant does not believe that the broadcast of Leykis' method of dealing with the issue of drinking and driving was the correct approach to solving the problem. In any event, in attempting to assess the realistic significance of the complainant's concern with "the ensuing carnage on the roads" resulting from this broadcast, the Panel notes that there is no way to be certain that the callers had actually *drunk* anything before calling in or that they were actually *driving* while impaired. While it is, of course, possible that some or all of them had been drinking, it is equally possible that, consistent with the complainant's observation that the more "outrageous" callers were likelier to get on the air, the most outlandish concoctions of "facts" would win the day with the producers, whether or not they were accurate.

In the end, therefore, the critical issue is the impression left by that annual episode of the Leykis show. The CHMJ broadcast was a legitimate way of treating the issue and within the boundaries supported by the principle of freedom of expression.

In the matter at hand, there are some distinct differences. In the first place, the promotion was, as the term implies, commercial in nature. It did not espouse a principle, to which callers could react. It did not invite discussion or comment. During the Leykis program, callers could *state* that they were drunk while driving, but there was no way to establish whether their statements were true. As noted above, they could have been "outlandish concoctions of 'fact'". During the challenged promotion, participants would only be recognized by the station in the event that they had been *witnessed* in breach of the newly enacted legislation. Their eligibility for the Bluetooth prize was unrelated to what they *said* they were doing; it was measured by their holding a cell phone while driving.

The foregoing being said, the Quebec Panel recognizes that the broadcaster has explained that its attempt was to *encourage* drivers to do the right thing, namely, to use a hands-free device if talking on a cell phone while driving. The Panel fully appreciates that the complainant takes the contrary position, namely, that people will be enticed to *break the law* in order to win half, or all, the cost of a Bluetooth device. Of these two views, the Panel considers that the broadcaster's perspective is more realistic. The Panel doubts very much that people would begin driving while *holding* their cell phones *in order to* win a prize of inconsiderable value. To choose an extreme example, if the station had proposed awarding a new car to persons violating the recently amended *Highway Safety Code*, it would be more inclined to view the promotion as a serious

incentive. That was not the nature of the promotional outcome in this case. In any case, though, the Panel does agree with the broadcaster that “the advertisement for this promotion caused some confusion.” The Panel does believe that the broadcaster *ought* to have chosen another way to move listeners into the recently legalized ambit of the *Highway Safety Code*. That it did not do so does not, for the reasons stated, move it into the area of a Code breach. Moreover, it acknowledges CJMF-FM’s assurance “that, in the future, this type of message [will be] clearer in order to convey the actual objectives.” The Panel’s bottom line is that it does not view the promotion as providing drivers with a material incentive to break the law, and that, consequently, it was not “potentially dangerous or likely to give rise to a public disturbance.” It finds no breach of Clause 12 of the *CAB Code of Ethics*.

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. The Panel considers that, in this respect, the broadcaster’s letter, while not lengthy, was sufficiently long to reply to the issue raised by the complainant. Moreover, it acknowledged that it could, and would, do better in future. No further action was required. The Panel concludes that the broadcaster has met its membership requirement in respect of broadcaster responsiveness on this occasion.

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

ANNEXE

Décision du CCNR 08/09-0211 CJMF-FM concernant une promotion (Gagnez un téléphone cellulaire mains libres)

La plainte

Un auditeur a envoyé la plainte suivante au CRTC le 11 octobre 2008 qui l'a acheminée au CCNR :

Plainte visant le 93,3 (Québec). Diffusion, samedi, 11 octobre, 7h30. Promotion sur utilisation de cellulaire.

Le Gardien de nuit (animateur) encourage les gens à contrevenir à la Loi portant sur l'utilisation de cellulaire au volant. S'il voit quelqu'un parler au téléphone cellulaire au volant de sa voiture (ce qui est interdit, par Loi, depuis le mois de mai '08, au Québec), il donne 50 % de rabais sur l'achat d'un appareil électronique. Tous les gagnants courent également la chance de gagner leur appareil s'ils téléphonent dans les 9 minutes où ils sont nommés.

Bref, le 93,3 utilise les ondes publiques pour inciter les auditeurs à commettre des délits et les récompenses s'ils le font. Il s'agit d'une infraction à la réglementation qui devrait être sévèrement sanctionner.

La réponse du radiodiffuseur

Le radiodiffuseur a répondu le 3 novembre :

Monsieur,

Nous avons bien reçu votre plainte le 21 octobre 2008 par l'entremise du CCNR. Nous vous remercions d'avoir pris le temps de signaler vos préoccupations, car il nous importe d'offrir un service de qualité dans le respect de nos auditeurs et des normes applicables au sein de notre industrie.

Nous avons retracé et examiné l'extrait pertinent, qui fait l'objet de votre plainte et qui a été diffusé le 11 octobre dernier.

Comme vous le savez, toute utilisation du cellulaire tenu en main, sans la fonction *mains libres*, est désormais interdite. Après un *délai de grâce* de trois mois, pendant lequel les automobilistes interceptés pour ce type d'infraction ne recevaient qu'un avertissement, c'est bien une amende de 115 \$ qu'ils se voient désormais imposer depuis le 1er juillet 2008, en plus de l'inscription de trois points d'inaptitude à leur dossier. La SAAQ précise aussi que s'il vous faut absolument utiliser votre téléphone, vous devez le faire en lieu sûr, c'est-à-dire dans un stationnement, une aire de service ou sur le bord d'une route où la vitesse maximale est de moins de 70 km/h.

C'est ce que nous avons tenté de faire au cours de cette promotion, c'est-à-dire faire campagne pour l'utilisation sécuritaire du cellulaire. Jeff Labrie abordait donc des gens qui utilisaient encore leur cellulaire de la mauvaise façon pour les inciter à faire l'acquisition d'un système mains libres. Visiblement, le message publicitaire véhiculant cette promotion portait à confusion et nous allons nous assurer dans l'avenir que ce type de message soit plus clair afin de rejoindre les véritables objectifs.

Veuillez agréer, Monsieur, l'expression de notre meilleure considération.

Correspondance additionnelle

Le plaignant a soumis sa Demande de décision le 10 novembre :

Je désire que ce dossier soit soumis pour décision.

Visiblement, le radiodiffuseur ne comprend pas la portée de ses propres promotions et messages publicitaires. Il s'agissait clairement d'une incitation à enfreindre la Loi dans le but de gagner un prix.

J'attendrai copie de votre décision avec impatience.