

# THE CANADIAN BROADCAST STANDARDS COUNCIL: WHAT, WHY AND HOW

by

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I spent the first week of April in California. Too bad. The weather was better here. In any event, the people with whom I spent three very interesting dinners before my wife and I got down to serious holidaying in the Napa and Sonoma Valleys were primarily American. As would be expected, we discussed our professional backgrounds and occupations. There were a few lawyers among them, to be sure. There were also municipal government, music and film business representatives, general businesspersons, a University of California Regent, a retired military type and two leading restaurateurs. I mention this diversity only to say that, when the subject of broadcast standards and the Broadcast Standards Council's current principal source of complaints, Howard Stern, came up, the Americans' reactions were pretty uniform.

First, everyone was familiar with him although none of my dinner companions *admitted* to listening to his show with even intermittent regularity. (But someone is: American radio statistics from this past month<sup>1</sup> show that Stern's audience numbers are second only to those of Dr. Laura Schlessinger, both hosts having advanced beyond the intrepid representative of the political right wing, Rush Limbaugh. The psychologist is, however, present in some 445 markets while Stern is only in 44.<sup>2</sup>)

Second, while my dinner partners avowed that his show was essentially trashy and exploitative, they nearly uniformly defended the right of American broadcasters to air the show as a manifestation of the principle of free speech, as espoused in the First Amendment.

That being said, they were very interested in how and why Canadians have established a different mechanism to deal with controversial programming. While they themselves knew little about the *details* of the Canadian legal and political environment, they did realize that the presence of broadcast standards which could, on some basis, be

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<sup>1</sup> In *Talkers* magazine, the trade journal of the talk-radio industry, as reported in the *Los Angeles Times*, March 26, 1998, at pp. 30-1.

<sup>2</sup> Limbaugh is actually on 559 stations. Audience figures were 18 million for Schlessinger, 17.5 million for Stern and 17.25 million for Limbaugh.

said to restrict freedom of expression on Canadian airwaves did not lead inexorably to the conclusion that Canada was either a repressed or tyrannical society. They even allowed that a political environment which permitted a federal party advocating the division of the country to function as Her Majesty's Loyal Opposition and its provincial counterpart to form the Government of a province could not be *all that repressed*.

My one-sentence articulation of the difference between the approaches of our two countries, which seemed to clarify the matter for my American friends, is that, in Canada, we *respect* freedom of speech but we do not *worship* it.

While this is not a panel which is limited to the Howard Stern Show, there can be no denying that the program puts the klieg lights on *so many* of the issues which are involved in self-regulation and controversial programming (and this in the most current possible way) that perhaps some attention to this particular show may be permitted. Let me first, therefore, summarize the two Stern decisions, in the briefest and sketchiest way, by stating that:

1. There were two CBSC decisions, the first of October 17-18, 1997, released November 11 (relating to CHOM-FM in Montreal and CILQ-FM in Toronto), and the second of February 20, 1998 (relating only to the Toronto station), released March 23.<sup>3</sup>

2. The first decision dealt with issues relating to bad taste (with which the CBSC does not deal), the well-publicized anti-French comments (examples of racist remarks in violation of the *Code of Ethics*), political commentary relating to Quebec, France and Canada (with which the CBSC took no issue), abusive comments related to other identifiable groups (further breaches of the *Code of Ethics*), sexist comments (breaches of that Code and the *Sex-Role Portrayal Code*), the suitability of explicit sexual subject matter for children who could be expected to be listening at the time of day when the Stern Show is broadcast (violation of the *Code of Ethics*), and the applicability of the comedic defence (Stern's statement that he was only "goofing" was not considered a defence to the foregoing breaches).

3. The second decision focussed primarily on the more recent abusive and sexist remarks relating to women (a breach), advocating violence against women (also a breach), racist and abusive comments directed at identifiable groups (also a breach), the description of sexual acts involving young children (a breach of the *Sex-Role Portrayal Code*), and the suitability of explicit sexual subject matter for children who could be expected to be listening at the time of day when the Stern Show is broadcast (a breach, as before). This decision also dealt in more depth with the comedic defence

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<sup>3</sup> The texts of both decisions are annexed to this paper and form a part of the Conference materials. I have not, however, included the lengthy Appendices to the two decisions, which provide excerpts from the Stern Shows reviewed by the Regional Councils. These can be found on the CBSC web site.

and at length with the consequences of a second breach, in this case only by the Toronto broadcaster.

With that very brief background relating to the Howard Stern Show decisions, permit me to take a step *back* and tell you something about the Canadian Broadcast Standards Council, which has become the first entity in North America to succeed in requiring a broadcaster to edit that show. (More about the editing issue below.)

## **What Is the CBSC?**

### **1. Infrastructure**

Structurally, the CBSC consists of five Regional Councils, representing the Atlantic Region, Quebec, Ontario, the Prairie Region, and British Columbia. There are six members on each Council, three representatives of the broadcast industry and three public representatives. Each Regional Council has a Chair and 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.

The Regional Councils can boast of balanced representativeness. Of the 30 Regional Council Members, 16 are women. There is at least one member from every province. Members do currently include, or have recently included, former municipal, provincial and federal politicians and Cabinet Ministers, as well as retired CRTC Commissioners, lawyers, a past President of the Consumers Association of Canada, the former Executive Director of MediaWatch, two former Law Deans, university professors from other disciplines, one of the co-authors of the Juneau Report on the CBC, the recently retired long-time head of the Eel Creek Band, an advertising executive, the Chairperson of the Nova Scotia Provincial Advisory Committee for Race Relations, the Executive Director of the Rick Hansen Fellowship Programme, Canada's first Inuit law graduate, General Managers, Program Directors, News Directors and other radio and television broadcast executives and on-air personalities, as well as representatives of the Radio and Television News Directors Association of Canada (RTNDA). The CBSC is never short of intelligent, insightful, and dedicated Regional Council Members.

As an aside, what I find particularly extraordinary is that the 70 or so decisions rendered since I became the National Chair in July 1993 (of which roughly 75% have favoured the broadcasters and 25% have not) have, with one exception, been unanimous. And, in that one case, one of the broadcast members dissented in a matter in which his five colleagues supported the television station.

### **2. The Codes**

When the CBSC came into being, it was mandated to administer three CAB<sup>4</sup> codes: the *Code of Ethics*,<sup>5</sup> the *Violence Code of 1987*, and the *Sex-Role Portrayal Code for Television and Radio Programming*.<sup>6</sup> The *CAB Code of Ethics* is currently being revised and the *Violence Code of 1987* was replaced by the *Voluntary Code regarding Violence in Television Programming*, which came into effect on January 1, 1994.<sup>7</sup> On October 28, 1993, the CBSC also announced that it would, from that date, be administering the *RTNDA Code of (Journalistic) Ethics*, which the Radio and Television News Directors had created in 1970 and amended in 1986 but which had served as an unenforced set of standards for nearly 25 years until the CBSC, with the acknowledgment of the CRTC, undertook that task.

I will not describe these in any greater detail at this time. Suffice it to say that the McCarthy Tétrault *Canadian Broadcast and Cable Regulatory Handbook* includes the full text of the four Codes with our annotated references to all of the CBSC decisions through December 31, 1997. The Council also sells a set of Annotated CBSC-Administered Codes in larger type but without all of the other crucial regulatory material which Peter Grant assembles biennially. We also keep the digest of decisions electronically up-to-date on our web site.<sup>8</sup>

### 3. Complaints and Decisions

Through its Ottawa-based Secretariat and under the direction of the Executive Director, the CBSC receives complaints from the public directly or on referral from the CRTC and often from the stations themselves. While we respond daily to telephone queries, *formal* complaints must be submitted in writing, whether by snail mail, fax or e-mail. (The CBSC web site has an electronic template which is very user-friendly.) There are generally about 250-260 files opened in a typical fiscal year;<sup>9</sup> however, the arrival of the Stern Show has led to complaints from about 1200 individuals to date (some of these having been sent in petition form) relating to that program alone, and the opening of nearly

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<sup>4</sup> The Canadian Association of Broadcasters, the lobby organization for Canada's private radio and television broadcasters and a portion of the specialty services.

<sup>5</sup> A general code, which deals with a broad spectrum of issues, including human rights, news, advertising, contests, controversial programming, sex-role portrayal, among others.

<sup>6</sup> Which was approved by the CRTC in *Industry Guidelines for Sex-Role Portrayal*, Public Notice CRTC 1990-99, October 26, 1990.

<sup>7</sup> It was approved by the CRTC in *Voluntary Code Regarding Violence in Television Programming*, Public Notice CRTC 1993-149, October 28, 1993.

<sup>8</sup> At [www.cbsc.ca](http://www.cbsc.ca).

<sup>9</sup> Detailed breakdowns of the source, nature, medium, language group and category of these complaints are prepared annually and can be found in tabular form the CBSC's Annual Reports, the last three of which (for the 1994-95, 1995-96 and 1996-97 fiscal years) are posted on our web site.

700 files with less than two-thirds of the year elapsed. Last year alone, 33 decisions were released, the same number as the Council generated during the *three* previous fiscal years together and indications are that we will release about 60 decisions in the current fiscal year.

### **Why a CBSC? Its Origins and Purposes**

First suggested by the CAB in 1986 and encouraged by the CRTC, which favoured the development of *industry-generated* guidelines, the CBSC was formally created in 1991. In the words of the CRTC in the Public Notice supporting the creation of the CBSC,<sup>10</sup>

The purpose of this public notice is to advise licensees and the public that the Commission fully supports the objective of the Canadian Broadcast Standards Council (the CBSC), which is to encourage high standards of professional conduct on the part of private radio and television broadcasters by ensuring that social concerns and values are reflected in their programming decisions. The Council administers specific codes of broadcast conduct and provides a means of recourse for members of the public regarding the application of these standards.

The words chosen by the private broadcasters in the Introduction to the *CBSC Manual* were substantially similar but it is worthy of noting the recognition of the broadcasters themselves (*and this is the key to understanding the role of the CBSC*) that the admitted restrictions of the Codes constitute no disrespect of the principles established in the *Canadian Charter of Rights and Freedoms*.

The purpose of the Council is to provide a mechanism for self-regulation by broadcasters in accordance with specific industry codes and standards. It demonstrates the commitment of broadcasters to responsible practices and attempts to ensure that the programming they produce and broadcast reflects the values of the communities in which it is heard and seen, while respecting the basic principles contained in the Canadian Charter of Rights and Freedoms. *By promoting self-regulation and nurturing high broadcast standards, the Council furthers freedom of expression and serves the public interest.* [Emphasis added.]

What is very easy to forget is that broadcasters, like any other group of professionals, including lawyers, have an interest in ensuring that their members honour the high standards which the profession has established in order that they reflect well on their profession. If one wished to adopt a different perspective on the exercise, one might also conclude that any professional group's wish is that no one member procure an undue advantage on his colleagues by predatory or egregious tactics designed to attract

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<sup>10</sup> *The Canadian Broadcast Standards Council*, P.N. CRTC 1991-90.

business, clients, or audience. As I wrote in the *Ottawa Citizen*<sup>11</sup> in response to a column by Andrew Coyne,<sup>12</sup>

It is not immediately apparent why Coyne should single out broadcasters as being *disentitled* to have their own standards and to have these rigorously administered by their own self-regulatory body, in pretty much the same way as any other group of professionals in this country. The Canadian Medical Association has its own Code of Ethics, the Law Societies theirs. So, too, the Architects and so on. The last time I checked, but please don't tell Mr. Coyne, even Canadian newspapers face Press Councils in nine of the provinces.

Consider the terms of reference of the Ontario Press Council. Although the O.P.C. administers a canon of practice and understanding, rather than a code or series of codes, it espouses a series of goals not dissimilar from those of the private broadcasters. To quote from its constitutional preamble, it

exists because newspapers recognize that a democratic society has a legitimate and fundamental interest in the quality of the information it receives. Through it, readers can call Ontario newspapers to account for unfair conduct such as invading privacy without justification, condemning people by innuendo or hearsay, ignoring commonly-accepted ethical standards, reporting conjecture as fact, distorting accounts of events, or failing to acknowledge error.

The bottom line is that we in Canada have chosen to approach the question of free speech differently. Free speech is a fundamental freedom here, as it is in the United States, but the CBSC, exercising the mandate it has received from the broadcasters and approved by the CRTC, believes that free speech must be weighed with other societal freedoms, values and concerns. As Jeffrey Simpson said in his column on the decision,<sup>13</sup>

Now you may prefer the U.S. approach, which amounts essentially to anything goes. But that's not what Canadian constitutional or broadcasting law necessarily allows. The two countries approach what we might call borderline free-speech issues differently, and it would be tortured reasoning to assert that because Canada has not followed the line of the U.S. Constitution's First Amendment that Canadian democracy and society are somehow less robust.

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<sup>11</sup> "Why We Need Broadcast Standards", *Ottawa Citizen*, November 22, 1997, at p. B-7.

<sup>12</sup> "Broadcast Standards Council, not Stern, is really offensive", *Ottawa Citizen*, November 13, 1997, at p. A-19.

<sup>13</sup> "Canada has different ways of dealing with Howard Stern's show", *Globe & Mail*, November 28, 1997, at p. A-22.

In setting up the CBSC, broadcasters wished to be no less responsive to the public they serve. Like newspaper publishers, broadcast publishers make decisions behind closed doors about what they will and will not publish. When the *New York Times* says, at the top of page one, "All the News that's Fit to Print", the editor is not delegating that responsibility to the public. The choices are made *inside* and what is not published is not disclosed. Station managers make those choices, too, but the private broadcasters have gone beyond that step. They have, by common election, chosen to create an outside entity to *represent* them and ensure that the choices which they make behind closed doors reflect their common standards. That is why the CBSC exists.

### **How the CBSC Does Its Job: Its Sanctions**

*Real* power in the broadcast area relates to the ability to award or take away licences, determine their duration and establish the conditions associated with those licences. The CBSC has none of those sanctions. They vest only in the CRTC. In some other jurisdictions, there are also powers to fine and to remove commercial advertising revenues for periods of time. The CBSC has none of those sanctions either. One might be entitled to surmise that standards without *some* enforcement prospect amount to little more than wallpaper. The question then is whether the CBSC falls into such a category; does it have *sufficient* authority to fulfill its mandate? To the extent that the proof of the pudding is in the eating, I feel comfortable in asserting that the Council has been succeeding day by day in ensuring that Canadian content reflects Canadian standards. Our controls may be modest but they appear to be sufficient. Let me explain.

### **CBSC Sanctions, in General**

The Council is neither a quasi-judicial body nor a censorship body. Our goal is to promote *voluntary* action by members to achieve "the highest possible standard of radio and television broadcasting." Our power is essentially the power to publicize and educate; the goal to bring broadcasters and the public *together* to improve the quality of broadcasting in Canada. When I spoke at the LSUC Conference four years ago, I said the following regarding the weight of the CBSC's sanctions when it finds against a broadcaster:

Ultimately, our club is of medium weight. We cannot separate the broadcaster from its licence or shorten the duration of the licence. We can only require the broadcaster against whom we find to read our "verdict" *once* in prime time on television or during peak listening hours on radio.

In the four years which have elapsed since then, there have been changes in our policies and practices. In *CIII-TV re Mighty Morphin Power Rangers*,<sup>14</sup> the Council was called upon to deal with a series for the first time. To cope with the problem of a formulaic approach to material which would, in the Council's view, continue to breach a Code (in this case, the then new *Violence Code*), the CBSC concluded

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<sup>14</sup> CBSC Decision 93/94-0270 and 0277, October 24, 1994.

that their observations entitle them to take the generalized position that the approach of the entire series is such that it would likely be in breach of those articles of the *Violence Code* in the same manner as the episodes which the Council members viewed in order to render this decision.

More recently, in *CHOM-FM and CILQ-FM re the Howard Stern Show*,<sup>15</sup> the CBSC similarly decided that

while the subject matter of the daily Howard Stern Show episodes of course varies from day to day, the presentation of the content which is the principal subject matter of this decision remains systematically similar in approach from one day to the next. As in the case of *CIII-TV re Mighty Morphin Power Rangers*, the two weeks of episodes reviewed will be a fair reflection of the type of approach and attitude which the show could be expected to reflect on an ongoing basis.

The relevance of such a conclusion is related to the only other sanction which the CBSC possesses, namely, the power of ejection from CBSC membership. What, you might ask, can the consequences of ejection be?

While membership in the Council is voluntary, there are incentives to remaining a member. Apart from the members' belief in the standards established by the Codes and other "motherhood" issues, the concrete benefits include:

1. The agreement of the CRTC that complaints regarding a CBSC member will not form a part of the broadcaster's public file at the Commission and will not, therefore, be raised at licence renewal time, in ordinary circumstances; and
2. The *Sex-Role Portrayal Code* and the *Violence Code*, which are Conditions of Licence for all Canadian broadcasters, will generally be suspended during the broadcaster's membership in the CBSC.

It follows that broadcasters who are not members or who might cease to be members have their complaints dealt with directly by the Commission. This is not always an onerous matter with which to cope (after all, not all complaints are justified and not all justified complaints are very serious matters). Nonetheless, in one recent case, it seems that non-membership of an eligible broadcaster may have contributed to a particularly short licence renewal in respect of a matter which, in the CBSC's hands, might not otherwise have even become a part of the licensee's public file.<sup>16</sup>

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<sup>15</sup> CBSC Decision 97/98-0001+ and 0015+, October 17 and 18, 1997.

<sup>16</sup> See *Licence renewal for CFRB*, Decision CRTC 97-372, August 7, 1997, in which Canada's largest AM station received a two-year renewal.

It also follows that an ejected, *i.e.* a non-member, broadcaster would again be subject to the Conditions of Licence which had hitherto been suspended. This could, for example, be a matter of great concern if a CBSC member were ejected for violating the very Code which constituted the C.O.L.

What this would, in effect, mean is that a matter which could be dealt with on a voluntary basis, via the CBSC's self-regulatory process, would now have to be dealt with at the CRTC level. Each complaint then would be deposited on the licensee's public file and become a matter of public record for consideration at the time of licence renewal. In circumstances in which complaints raise a question about a Condition of Licence, the Commission is also entitled *proprio motu* to call the licensee to a hearing prior to the licence renewal date. There is always the risk of non-renewal of a licence (which has not yet occurred), the risk of renewal of a licence for an uncomfortably short term (rather than the 5-7 years generally expected) with the additional financial burden of more frequent renewal applications, or the risk of imposition of additional Conditions of Licence to be met and dealt with during the licence period and reported on at the next renewal hearing.

In what circumstances could ejection occur? Basically, such a result would flow from a member's non-compliance with the CBSC's rules, essentially a perceived flouting of the standards which the member agrees to uphold by joining. The CBSC recently outlined its thinking in this regard in its decision in *CILQ-FM re the Howard Stern Show*.<sup>17</sup>

As the CBSC Members Manual provides, under the heading "Criteria of Membership", "To become a member of the Council, a broadcaster ... must agree to carry out the responsibilities of membership outlined in the following" and, under the immediately following heading "Responsibilities of Membership", it is provided:

Stations voluntarily becoming members of the Council agree to:

- (a) Abide by, and agree to be judged by, the broadcasting codes of the CAB administered by the Council.
- (b) Encourage, educate and assist managers, programmers, producers, journalists and performers to understand, and conduct themselves in accordance with these standards.

Thereafter, as a part of "Compliance", the rules of membership provide:

If a member broadcaster fails to comply with a decision of the Council, by not broadcasting a Council decision in favour of the complainant or by refusing to adhere to an approved standard, the broadcaster's membership in the Council will be revoked.

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<sup>17</sup> CBSC Decision 97/98-0487, 0488, 504 and 535, February 20, 1988.

The consequence of not adhering to the “approved standards”, which were the creation of the private broadcasters themselves, would be the removal of the member from the *voluntary* authority of the CBSC.

This has not occurred in the history of the Council but we have been, and remain, on the threshold of this eventuality in connection with the broadcast of the Howard Stern Show.

### **The Results of the CBSC’s Sanctions in the Case of the Howard Stern Show**

Following the CBSC’s first Stern-related decision, the Montreal and Toronto broadcasters were required to announce the CBSC decision once in the days immediately following the November 11 release. (They did so on multiple occasions.) They were also required to explain the steps they would take to avoid the recurrence of the breaches of the *Code of Ethics* and the *Sex-Role Portrayal Code* since, as I noted earlier, the Council had forecast that the Stern Show would continue to be in violation of one or the other of the Codes. It was, of course, clear that the first Stern decision could do no more than *anticipate* that the show would continue to violate the *Code of Ethics* and the *Sex-Role Portrayal Code*. The CBSC could not *conclude* that such breaches would occur. The point was, though, that, by anticipating that the Stern Show would do so, the CBSC was putting the broadcasters on notice that the continued airing of the Show *in that form* would likely place them in ongoing violation of the Codes, a situation which would be incompatible with their continued membership in the Canadian Broadcast Standards Council.

Without recounting in great detail the back and forth press releases and meetings between CHOM-FM and the CBSC, and CILQ-FM and the CBSC, it may suffice for our purposes to lump together the steps which CHOM-FM took immediately in mid-December and which CILQ-FM announced they were implementing immediately but which did not come into effect until mid-February.

First, both stations declared their unequivocal intention to continue to play by the rules of the self-regulatory process.

Second, both stations took a major stride beyond the traditional method of dealing with talk content programs, namely, utilizing a seven second delay and a technical operator/producer to monitor the content. They added to their infrastructure by hiring a second producer, whose purpose is best described by quoting from the letter from WIC Radio’s President and CEO to the CBSC cited in the second decision:

[His] sole function is to monitor/edit the show to ensure compliance with Canadian broadcast codes and regulations. This producer has been fully versed in these issues by our legal counsel and provides a daily log of edits to our management and legal counsel. This log consists of the number of edits made, the time of the edits and the content removed. The technical producer also monitors the original feed as a back up and double check on content.

Third, both stations added digital equipment which permitted them to extend by a *considerable* factor the seven-second delay in order to facilitate the editing of the show on the fly. Again, in the words of the President of WIC Radio:

We have also installed a digital time shift recorder that enables us to expand the original time delay period from two minutes to eight minutes. This unit is not only state of the art, but needed to be custom built to meet our needs which also added to our delay in implementation. ... It is now installed and allows us the full buffer period of eight minutes. This new equipment allows us the opportunity to seamlessly remove any offending material in its entirety without interrupting the show for our audiences.

This was, in the view of the Council, a *significant* acknowledgment since the Stern Show had had a “take it or leave it” reputation; it was indicated that it could *not* be tampered with, revised, edited or altered in any way. As Stern himself described the situation in the first show broadcast in Canada on September 2, 1997:

**Caller Darrell:** ... what they’re doing here in Toronto is putting you on a sixty second delay.

**Howard Stern:** That’s all right.

**Caller Darrell:** Is that okay?

**Howard Stern:** I don’t care.

**Robin Quivers:** Usually it’s a seventy.<sup>18</sup>

**Howard Stern:** Yeah, usually seventy. They’re actually daredevils out in Toronto. The reason they do that, by the way let me clear that up, is not for censorship reasons.

**Caller Darrell:** Well, that’s what they’re saying here, though.

**Howard Stern:** The reason they do that is they need time to in our commercial breaks link up with us to know when our last commercial is. That’s all that is.

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<sup>18</sup> The traditional purpose of the seven-second delay is to provide the time for the host to bleep a word or two or to have sufficient advance warning to actually cut a caller off. On the other hand, the 60 or 70 second delay referred to in this segment has, as its purpose, the provision of sufficient warning to any local market to co-ordinate the insertion of their commercial break or news package with the time when Stern, in his flexible and unscheduled style, suddenly decides in his New York studio to go to a commercial break.

**Howard Stern:** Yeah, we control the sixty second delay in Toronto which would allow us to block content should we deem - you know what this is for, the sixty second delay, by the way, they're not contractually not even allowed to hit it, the only time they use it is so that they can -

**Robin Quivers:** Link up with commercials.

**Howard Stern:** Yes. Don't worry about that. They had to put that out so the press wouldn't be all over their ass.

This bold tone of September 2 changed significantly following the release of the first CBSC decision November 11, after which even Stern appears to have recognized the entitlement of Canada to deal with his show differently. The following brief tonally revised exchange took place on the January 28, 1998 show:

**Toronto Caller:** I got another point for you, you know the station in Toronto, I'm in Canada right now, that, uh, your affiliate station, Q107, they've actually hired a guy to monitor your show.

**Howard Stern:** Good.

**Toronto Caller:** His whole job is to sit there and listen to your show.

**Howard Stern:** Well, yeah, because otherwise we would have been off the air. They did the smart thing.

You might be curious about the effect of the decision to edit. Since CILQ-FM has provided the CBSC with editing logs for the Stern Show since the acquisition of the digital time shift recorder, we can look at concrete results. The logs indicate that the station implemented approximately 77 individual edits between February 23 and March 20, 1998 (on 17 of the 20 shows in that time period). The cuts have been from a few words in length to entire segments of the show, two of those edits running as long as 20 minutes. (While the show can build a delay of as long as 8 minutes in the *stored* material, the use of stop-sets can extend the length of a cut almost indefinitely. Stop-sets, which consist of other station-generated content such as news, information, commercials and so on, can be introduced until the point when one begins to *use* the stored digitized program content.)

### **Conclusion**

This is perhaps the point at which to observe that, until the broadcast of the Stern Show in Canada, the self-regulatory process has worked effectively. As was the intention of the private broadcasters and the Commission, the CBSC and the self-regulatory Codes have come to be better and better known. The Council's decisions have also received more and more attention from its broadcast members, as well as the media and the public. This is important to the Council for its interpretations of the Codes provide the necessary flesh on the self-regulatory skeleton. The jurisprudence gives both broadcasters and the public a sense of what can, and *ought to*, be expected from radio and television stations. Moreover, there is every indication that broadcasters continue to buy into the process,

even when decisions run against them. This was even true in the case of the Mighty Morphin Power Rangers, the most successful commercial children's program in the history of television. Although, regrettably, the CRTC did not take the steps to ensure that the *Violence Code* program standards which they insisted on for conventional television broadcasters would extend to *cable*-delivered American channels, the fact is that even that commercially successful show is not aired by *any* Canadian programming undertaking. I do not believe that it is unfair or unreasonable to conclude that, until now, the self-regulatory process has clearly achieved, if not surpassed, the goals set out for it in 1991.

Even the broadcast of the Stern Show has not upset that apple-cart. It has tilted it, to be sure, but the apples are certainly not rolling around on the ground. Canada is the *only* place where the Stern Show is edited and, as noted above, we are not talking about single-word bleeps. The process *has* worked.

This is not, however, the end of the matter. As I noted above, we remain on the threshold of the use of the ultimate CBSC sanction, namely, the ejection of a member from the Council. As we stated in the last decision:

While the CBSC applauds the efforts and financial commitment of the broadcasters to respect the Codes, it remains the broadcasters' obligation to *succeed* in their attempts. It is the measure of that success which is the subject of the remainder of this decision.

The bottom line is this. Canadian stations which choose to air this show know that it cannot be broadcast *unedited* without, in all likelihood, being in breach of one or another of the CAB Codes. This would entail the consequences described above and the need to deal with listener complaints at the level of the CRTC both during the licence term and at the time of renewal. The two stations which were the subject of the initial decision have taken *significant* technological and personnel strides to attempt to tailor the program to meet Canadian standards. Would they have taken on the show knowing that these infrastructural additions would be required? Who on the outside can know? In our view, the two station groups *ought* to have known that the show would breach broadcaster Codes since the Stern Show's content gives rise to many concerns already treated in the CBSC's jurisprudential record. In any event, that is now history, insofar as CHUM and WIC are concerned. They *did* take the show on. They have had to make the changes. They alone know the costs and the benefits, but only to date. It remains uncertain that they will be able to implement all the editing choices which will keep them as members of the CBSC for, if they are not, the CRTC will be called upon to deal with the issue in the regulatory arena.

Now that the CBSC's threshold requirements are clear, will any other stations step forward in new Canadian markets to take on the show? That is also hard to tell. While they are able to understand the implications described above, the *final* chapter has yet to be written. Stay tuned.