

DON'T ABANDON SAFEGUARDS IN THE NAME OF FREEDOM OF EXPRESSION

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Freedom of expression can be both friend and foe of the women's movement. While the ability to speak out on political, ideological, social and many other important issues is unquestionably the first imperative of a democratic society, the freedom to do so, if granted as an absolute, may pave the way to abuse. In countries where mass, commercial media is widespread, the envelope is being pushed further and further from what most people would find acceptable expression. Women are especially vulnerable to the abuses of free speech, whether it be through negative or degrading comment about women or through the perpetuation of the idea of women as sexual objects.

Thankfully, in Canada, as in Great Britain, New Zealand, Australia and other countries, freedom of expression is *not* declared as an absolute. For example, the *Canadian Charter of Rights and Freedoms* declares the existence of the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication" but makes this freedom subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹ The exercise of freedom of expression in Canada, then, must be weighed against other competing and equally important societal values, such as the protection of human rights. By not making freedom of expression an overriding societal principle, Canada and other countries, have been able to develop standards with respect to broadcasting, such as the *Sex-Role Portrayal Code*² which seeks to "advance the awareness of, and sensitivity to, the problems related to the negative or inequitable sex-role portrayal of persons."

This Code sets out quite specific guidelines for programming content. For example, the Code provides that a realistic balance should be achieved in the use of men and women in voice-overs and as experts and authorities in news and public affairs programming. It also states that women and men should be portrayed in programming in a wide range of roles and that both sexes should be portrayed as equal beneficiaries of the positive attributes of family and single-person life. Men and women should be portrayed as intellectual and emotional equals. The Code specifically prohibits negative or degrading comments based on gender.

Moreover, in addition to the *Sex-Role Portrayal Code*, other Codes and standards come into play for the protection of women's rights. For example, the *Violence Code* is sensitive to issues of violence against women and specifically prohibits the broadcast of programming "which sanctions, promotes or glamorizes any aspect of violence against women". It further states that "broadcasters shall be particularly sensitive not to perpetuate the link between women in a sexual context and women as victims of violence."

The Canadian Broadcast Standards Council (CBSC), which administers the standards referred to above for most Canadian private broadcasters, has frequently observed that freedom of expression is the *basic* rule which it applies in the rendering of its decisions;

however, the Council has always sought to balance this freedom with other values that Canadians hold dear. As has been often stated in CBSC decisions, the freedom to swing one's arm ends where it makes contact with one's neighbour's nose. The length of that arc is what the CBSC must determine from case to case.

By contrast, in the USA, the First Amendment to the *American Bill of Rights* provides that "Congress shall make no law ... abridging the freedom of speech, or of the press". Accordingly, there is no, nor can there be, any American equivalent to the standards described above.

When I spoke of the standards administered by the CBSC at the WACC Regional Conference on Communication and Gender Policy held in Kingston, Jamaica in November 1998, I was confronted by women who struggle for such basic rights as simple access to media and thus for whom my topic may have been viewed as merely academic. Permit me, however, to give a cautionary note to those who are in the midst of creating the building blocs for widespread access to the media through guarantees of freedom of speech: be careful what you wish for. While it may seem appropriate, and even necessary, to first gain an entrenchment of the right to freedom of expression before considering any exceptions to that rule, it may, in the end, lead to greater difficulty in dealing with abuses of the newly gained freedom. Freedom of expression without limits is not freedom, it is licence.

To speak of regulation of content is to embark on a very slippery slope according to some. After all, history is replete with examples of laws and regulations which, while intended to benefit a group, have actually hindered its advancement. To give a Canadian example, the anti-discrimination clause of the *Canadian Charter of Rights and Freedoms*, for which Canadian women fought so dearly for and which states "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability,"³ has actually, in its application, served to promote and protect *men's* rights more than women's.⁴

Women who are currently at the stage of fighting for access to the media may wonder, then, whether to embark on such a road is worth the risk. Some recent decisions from the CBSC regarding the gender sensitive issues have shown that it is.

The CBSC has consistently privileged women in the area of negative and degrading comments through the use of the *Sex-Role Portrayal Code*. In an early case,⁵ the Council ruled that comments by a radio talk show host on the topic of sexual harassment such as "If you allow yourself to be sexually harassed, so you can't keep your job, you deserve it" and "quit ... or take action ... and quit your whining" violated the provisions of the *Sex-Role Portrayal Code* and Clause 15 of the *CAB Code of Ethics*. The Council's decision that the host's commentary on the topic of sexual harassment violated the Codes was based on the conclusion that these comments reinforced two stereotypical images, namely, that

women who do not respond immediately to harassment deserve their situation, and that modes of dress invite comment or indicate sexual standards.

More recently, the CBSC was faced with a stark example of negative portrayal of women and a most challenging case when complaints were made concerning *The Howard Stern Show*,⁶ one of the top three talk shows in the USA. The show consists essentially of the kind of juvenile, crude, tasteless, sexist banter you might expect in a men's locker room.

The Council found that Stern consistently used terms such as "pieces of ass", "dumb broads", "fat cow", "dikes", and "sluts" to refer to women. Moreover, the Council found that the Stern show often used violent imagery involving women; in fact, the episodes reviewed by the Council contained many allusions to and fantasies of rape.

In finding that such commentary did not meet Canadian standards for broadcasting, the Council remarked that the standards in Canada and the USA are simply not the same. The Council stated:

all Canadian broadcast licencees know perfectly well that there are public rules *in Canada* to which broadcasters must adhere as well as others to which private broadcasters have *chosen* to adhere. In this latter category fall the Canadian Association of Broadcasters Codes, of which there is no equivalent in the United States. These are, however, viewed by Parliament and the CRTC as a necessary and integral component to our broadcasting system.

The Council found that Stern's treatment of women constituted abusively discriminatory comment on the basis of gender. Not only did the Council find that Stern's use of pejorative labels was in violation of the Code, it also dealt with the underlying attitude of Stern's dealings with women or gender issues. The Council noted that Stern

frequently deals with female guests on the basis of their physical attributes and sexual practices rather than, or occasionally in addition to, the skills or talents which are the reason for their common recognition. In the case of callers, he regularly avoids the subject with respect to which they have called in order to seek details of their bust size and weight as well as their sexual practices, despite the fact that this information is *utterly* irrelevant to the subject of interest.

The Council concluded that

Stern *consistently* uses degrading and irrelevant commentary in dealing either with guests or callers. The CBSC understands, by his demeanour and laughter, that *he* and, presumably, Quivers and others on his show find such comments amusing. It may well be the case that many in his audience find such comments entertaining. This sort of adolescent humour may work for some in private venues but it is thoroughly in breach of Canadian codified broadcast standards. Women in this country are entitled to the respect which their intellectual, emotional, personal and artistic qualities merit. No more than men. No less than men. But every bit as much as men.

In the end, the CBSC's decision in the Stern matter demonstrates the Council's affirmation of the principles of the *Sex-Role Portrayal Code*. The destructive and often dangerous

commentary spewed by Stern is not, nor can it be, regulated in the USA due to the absolute guaranty of freedom of speech in that country.

In another decision,⁷ this one involving the broadcast of a feature film on television, the Council found that the inclusion of a lengthy and graphic rape scene in the science-fiction movie went beyond the acceptable standards for television. The Council stated that for the television version, this scene “could have been edited without sacrificing any artistic integrity, and ought to have been edited in order to be long enough to make its point but not so long as to amount to violence for violence’s sake.” The Council further concluded that by airing this scene, the broadcaster had perpetuated the link between women in a sexual context and women as victims of violence, which is prohibited by the *Violence Code*.

A radio morning show’s contest in which a woman accepted to ride a bicycle in the nude, across a city centre in early March led to another finding of breach of the *Sex-Role Portrayal Code*.⁸ Interestingly, the Council did not find that the Lady Godiva feat in itself to be problematic with respect to the *Sex-Role Portrayal Code* since it assumed that “the offer by the station was for *anyone* who would ride a bicycle in the stated location in the nude and that [the woman in question] volunteered, although any man might have done so equally.” Accordingly, the Council stated that “there is not, in a strict sense, any problem in terms of the Code with such an ‘equal opportunity’ contest.” What the Council found, though, was that the hosts of the morning show during which the contest was held, as well as the ‘on-the-spot’ reporter, were focusing on the woman’s state of undress and making comments degrading to her as a woman. The Council acknowledged that there was a story to tell but that

The focus of the stunt ... could simply have been that someone was doing this bicycle ride, naked, at a rather inclement time of year, that people were reacting, that horns were honking, that the police had gotten involved, and so on. There was a story to tell, even one to perhaps have an on-air laugh over with respect to the extent that someone was prepared to go to have a chance to win \$10,000, but the broadcasters did not stop there. They talked about “doing her”, utterly without justification; they focussed on how she looked rather than what she was doing; they wanted her to “sit straight up on that saddle” in order, evidently, to “show her wares”. Consequently, the Council finds the station in breach of Clause 4 of the *Sex-Role Portrayal Code*.

Such treatment by the hosts and reporter was found to be demeaning and degrading to women, contrary to Clause 4 of the *Sex-Role Portrayal Code*.

As the above examples show, women have benefitted from striking a balance between freedom of expression and appropriate standards for the public airwaves. Some might argue that such standards would not be necessary if freedom of expression were allowed to reign absolute, based on the theory that anyone who felt attacked by someone’s expression could launch his or her own counter attack. There is an underlying fallacy to that theory, however, which stems from the fact that not all people have equal access to the media microphone. Radio and television stations are either owned by commercial enterprises which seek to make a profit for the airwaves, thereby creating an obstacle for access by less “interesting” individuals and the economically disadvantaged, or they are

under government control, which can raise different issues regarding access. In order to have a 'level playing field' for all members of society, protection of disadvantaged groups is necessary, as much with respect to the media as in other areas involving human rights issues.

The CBSC's self-regulatory enforcement of the standards it administers has proved very successful thus far. It, and its international counterparts, are facing a new challenge, however, stemming from new technology. The enforcement of standards has so far been successful because of the accountability of licenced broadcasters for the material that they air. This crucial component is lost with the many new forms of media emerging out of technological advancement. The proliferation of the Internet, for example, has made it possible for anyone to create a website and become a 'broadcaster' of sorts, with its content limited only by the technology available. In the end, though, while the road ahead for standards in new media broadcasting is uncertain and potentially perilous, it is hoped that the protection of disadvantaged groups will not be forsaken in the name of freedom of expression.

ENDNOTES

1. *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B, ss 1 and 2b).
2. The Code forms part of the CRTC's gender portrayal policy most currently set out in *1992 Policy on Gender Portrayal*, Public Notice CRTC 1992-58 (September 1, 1992).
3. *Canadian Charter of Rights and Freedoms, supra*, s. 15.
4. Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One step forward or two steps back?*, Canadian Advisory Council on the Status of Women, Ottawa, September 1989; Claire Young, "(In)visible Inequalities: Women, Tax and Poverty" (1995) 27 *Ottawa Law Review* 99.
5. *CFRB re Ed Needham Show (Harassment)* (CBSC Decision 92/93-0081, May 26, 1993).
6. *CHOM-FM and CILQ-FM re The Howard Stern Show* (CBSC Decision 97/98-0001 and 97/98-0015+, October 17 and 18, 1997).
7. *CHCH-TV re the movie Strange Days* (CBSC Decision 98/99-0043 and 98/969-0075, February 3, 1999)
8. *CJKR-FM re a radio contest (Nude Bicycle Riding)* (CBSC Decision 98/99-0476, November 18, 1999)