



Conseil de la radiodiffusion et des
télécommunications canadiennes

Canadian Radio-television and
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4 August 2004

Bernard Guérin
Director General, Legal Affairs
TQS inc.
612 St. Jacques Street, Suite 100
Montréal, Quebec
H3C 5R1

Dear Mr. Guérin:

On 4 April 2003, you wrote to the Commission seeking to appeal a Decision of the Canadian Broadcast Standards Council (CBSC) with respect to the broadcast of L'Affaire Thomas Crown (The Thomas Crown Affair). This letter sets out the Commission's determinations with respect to your request.

When asked to review a CBSC decision, the Commission looks at the complaint *de novo* and does not sit in appeal. With respect to matters that have been heard and adjudicated by the CBSC, it is the Commission's practice to consider only references from public complainants and not from broadcasters. The self-regulatory system is one that permits broadcasters, among other benefits, to avoid having complaints from the public considered by the Commission, by agreeing to their adjudication by the CBSC. To allow broadcasters, as a matter of course, to also come to the Commission for a reprieve of such adjudication would defeat this process. Members of the public have not bound themselves, as have broadcasters, to the processes of the CBSC and therefore may present their complaints to the Commission for review.

In the present case, there is no public complaint before the Commission. Nevertheless, the Commission wishes to take this opportunity to clarify its interpretation of the matters raised in your letter of 4 April 2003.

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Background – The original complaint

On 15 March 2002, the Commission received a complaint about nudity and sexual activity in the broadcast of “L’Affaire Thomas Crown” at 7:00 p.m. on TQS on 10 March 2002. The complainant stated that shortly after seeing the rating icon of 8+, there were scenes of the “2 main actors having intercourse, including scenes of the woman with top frontal view, and of the man full back view.” The viewer stated that he would not expect to see such scenes on television, especially at a time when children are still awake, and that he felt that such scenes were not acceptable viewing for an 8 year old or even a 14 year old.

As TQS is a member of the CBSC, the complaint was forwarded to the CBSC that same day.

The CBSC Decision

As per its normal procedures, the CBSC forwarded the complaint to TQS for its response. In its response to the complainant, TQS stated that it had broadcast the 8+ icon twice. It also noted that the Régie du cinéma du Québec (the Régie du cinéma) rating for that movie was actually the lower rating of Visa général. TQS further stated that “it was the decision of TQS to upgrade the rating to an 8 years and older, considering the nudity and love scene.” TQS added that it carefully selects each production and removes “scenes considered to be immoral and not complying with the ethics of our broadcasting company.”

The complainant was not satisfied with the licensee’s response and requested CBSC panel adjudication. Accordingly, on 20 December 2002, the Quebec Regional Panel of the CBSC found that TQS was in breach of Articles 4 and 5.2 of the Canadian Association of Broadcasters’ *Voluntary Code Regarding Violence in Television Programming* (the Violence Code) for various classification issues and with respect to the broadcast of viewer advisories.

With respect to the classification of the film, the CBSC examined the provisions of *Classification System for Violence in Television Programming*, Public Notice CRTC 1997-80, 18 June 1997 (Public Notice 1997-80), and determined that:

the words clearly establish that it is the rating system of the Régie du cinéma on which broadcasters are expected to rely. It is not the actual rating. That choice is the responsibility of the broadcaster, not the Régie.

The CBSC further stated that “while the categories may be the same for both the cinema and the television screen, the determination of the applicability of the category to a particular program may differ.”

In the CBSC’s view, the program, which was rated *Visa général* by the Régie du cinéma and 8+ by TQS, should have been rated 13+ for television broadcast. The CBSC therefore found that TQS had breached Article 4 of the Violence Code.

The CBSC also noted that, with respect to the broadcast of classification icons, an icon of 8+ was shown on two occasions – first for 8 seconds at the beginning of the broadcast (7:00 p.m.) and later for 9 seconds at the beginning of the second hour (8:00 p.m.). Also, there were no viewer advisories broadcast either prior to or during the broadcast.

The CBSC thus found that TQS had breached the requirements of Article 4 of the Violence Code by broadcasting the icons for less than 15 seconds as required under the Violence Code.¹

The CBSC further noted that although TQS’ failure to broadcast viewer advisories may have been as a result of its view that the film was correctly rated at 8+, the CBSC still considered this a breach of Article 5.1 of the Violence Code.

TQS Request for Appeal

On 4 April 2003, TQS wrote to the Commission seeking to appeal the CBSC decision. TQS indicated that it was concerned about the CBSC’s specific findings as well as its findings regarding the role and use of the Régie du cinéma ratings.

¹ Provisions set out in the CAB’s *Broadcaster Manual for the Canadian Program Classification System Using On-Screen Icons*, which is incorporated into the Violence Code.

TQS's specific concerns were as follows:

Role and use of the Régie du cinéma ratings

A broadcaster should be able to rely on the Régie du cinéma classification for a film and to take for granted that the Régie du cinéma's classification is suitable for the broadcast of that film on conventional television. Only in the case of serious doubt should the CBSC review the Régie du cinéma's rating.

There should not be a discrepancy between the standards of the Régie du cinéma and those of the CBSC. It is impracticable for a broadcaster to be subject to two different levels of evaluation which contradict each other.

A single system should be applied to all broadcasters. The distinction between pay and pay-per-view (PPV) on the one hand, for which the Régie du cinéma's system is the standard, and conventional services on the other hand, for which the Régie du cinéma's classification is used simply for information, can no longer be justified. In the majority of cases, all channels including conventional, specialty, pay, and PPV, are part of an ensemble of channels distributed directly by satellite or cable distributors, for which viewers must pay. The distinction between conventional channels and the other pay and PPV channels therefore becomes academic since the majority of viewers pay to see all channels, whether by cable or by satellite.

The CBSC's specific findings

The CBSC's evaluation was too severe. The Régie du cinéma's classification was *Visa général* because the scenes were unlikely to trouble anyone. TQS was careful to accord the film the stricter 8+ classification. The CBSC said the film should have been rated 13+, which was too harsh, taking into consideration that the body that specializes in the classification of films had evaluated the film as appropriate for general audiences.

Because TQS had classified the film as 8+, it wasn't necessary for it to broadcast viewer advisories which only apply when films are not recommended for children.

The Commission's analysis and determinations

In the present case, there is no public complaint before the Commission as the original complainant was satisfied with the CBSC's determination. Accordingly, the Commission has not considered the specific findings of the CBSC's decision. Nevertheless, the Commission wishes to take this opportunity to clarify broadcasters' obligations under the Commission's violence policies in general and the Violence Code in particular.

Role of provincial ratings

At issue in this case is whether French-language broadcasters can rely on the specific Régie du cinéma rating for a film or whether the broadcaster must rate the film itself for television broadcast, using the set of tools developed by the Régie du cinéma.

In Canada, there is no single system for classifying films for theatrical and video release. Instead, there are a number of provincial film classification boards across Canada that are responsible for this task. Many have developed their own classification systems to reflect the standards of their communities.

Films that are intended for release in cinemas or on video across Canada are rated by the applicable provincial film classification board using a set of classification tools to determine age-appropriate ratings. Provincial ratings, including those of the Régie du cinéma, are assigned with a theatrical audience in mind, not a television audience. The difference is that when going to a theatre, viewers make a clear, conscious decision to see the chosen film. Television, on the other hand, is much more accessible, by its very nature, and there is a possibility of children tuning in to age-inappropriate programming by accident.

Role of broadcasters

The classification systems to be used for assessing and rating violence in television programming are described in *Policy on Violence in Television Programming*, Public Notice CRTC 1996-36, 14 March 1996, (the Violence Policy) and Public Notice 1997-80. The classification systems also address nudity, sex and coarse language, in addition to violent content.

As set out in the above noted documents, the Commission has adopted the following approach, based, in part, on the recommendations of the industry and other parties:

- English-language conventional and specialty broadcasters apply the classification system developed by the Action Group on Violence on Television (AGVOT) to determine the most appropriate television rating;
- French-language conventional and specialty broadcasters apply the classification system of the Régie du cinéma in choosing the most appropriate rating for their television audiences; and
- Pay, PPV and video-on-demand (VOD) services use the classification system of the appropriate provincial ratings boards for the feature films they broadcast.

With respect to French-language broadcasters, the Commission specifically stated the following in Public Notice 1997-80:

The Commission also noted AGVOT's recommendations that pay television and pay-per-view services should continue to use the **ratings** of the provincial ratings boards and that French-language broadcasters should use the **rating system** of the Régie du cinéma in Quebec. [emphasis added]

The rationale for the different treatment of conventional and specialty services on the one hand, and pay, PPV and VOD services on the other, is based on the nature of their distribution and their accessibility to the viewing audience. Pay, PPV and VOD services are generally distributed in an encrypted format, and are only available to viewers on a fully discretionary basis. In order to receive a pay service, consumers must make a deliberate choice to pay for and receive the service in their homes. In the case of PPV or VOD, the viewer makes a conscious decision to buy and receive a feature film or other program, which is not unlike the decision to view a film from a video store or in a movie theatre. Accordingly, pay, PPV and VOD services use the ratings of the applicable provincial ratings boards for the feature films that they broadcast.

By contrast, feature films and other programs shown on conventional and specialty television services are more directly accessible to viewers, including viewers of all ages. Conventional services are available over-the-air, and generally form part of basic cable service. Many specialty services are also distributed as part of basic service or as part of a package or tier of discretionary services. In both cases, the programs that form part of the services are available to the entire family in the home without an express

decision being made by the viewer. Conventional and specialty broadcasters are therefore required to rate their programming for this broader audience, applying the appropriate English-language (AGVOT) or French-language (Régie du cinéma) classification system.

The Violence Policy makes this responsibility of the broadcasters clear. Public Notice 1996-36 states that “once a classification system is in place, the licensees of individual programming undertakings will be responsible for classifying the programs they broadcast.”

Thus, it is clear that the Commission never intended that conventional or specialty broadcasters would simply adopt the rating assigned to a film intended for theatrical release by the provincial ratings body. Rather, it is the responsibility of the broadcasters themselves to assign the most appropriate rating to their programming for their television audiences, using the system that applies to them.

Specifically, French-language conventional and specialty broadcasters must rate their programming themselves using the tools of the Régie du cinéma classification system. They cannot simply rely on the Régie du cinéma rating for a film as being suitable for television broadcast.

Accordingly, the Commission wishes to confirm that the CBSC’s interpretation of the classification provisions in the Violence Code is indeed in accordance with the Commission’s policies regarding such subject matter and the responsibilities of broadcasters in broadcasting such programming.

The dissenting opinion of Commissioner Langford is attached.

Sincerely,

Diane Rhéaume
Secretary General

Dissenting opinion of Commissioner Stuart Langford

I disagree with the majority in this matter. The decision taken and process utilized are, in my opinion, both wrong and confusing. On the one hand, the majority refuses to consider a request by TQS inc. (TQS) to review a decision by the Canadian Broadcasting Standards Council (CBSC). On the other, under the guise of clarifying the Commission's film classification policy, the majority appears to do precisely what it first declared that it would not do; that is, review the CBSC decision at issue.

Sauce for the goose

There is something troubling about an adjudication system which treats one party to a two-party process differently than the other. Yet, such a system is precisely what today's majority decision establishes as regulatory policy. Complainants to the CBSC are privileged to enjoy as of right access to two levels of decision makers, respondents only one. What is sauce for the goose is not sauce for the gander.

People with grievances against broadcasters in Canada may seek adjudication by the CBSC. If they disagree with a CBSC ruling, they may seek a second and binding opinion from the Commission. Today's majority decision stands for the proposition that broadcasters who support the CBSC share no such right of due process. If such broadcasters do not agree with a CBSC decision, that, according to the majority, is too bad. They are stuck with it. The Commission will not hear them. Or will it?

A rose by any other name

Though the majority decision states that it will not consider TQS's request for a review – "...the Commission has not considered the findings of the CBSC decision" – in fact it has done precisely that. Calling its review a clarification, the majority proceeds to weigh the merits of and reject all of TQS's claims for relief, and then to support the complainant's position as upheld by the CBSC: "Accordingly, the Commission wishes to confirm that the CBSC's interpretation of the classification provisions in the Violence Code is indeed in accordance with the Commission's policies..."

When is a clarification a de novo proceeding? Confused complainants may request a ruling. Broadcasters who underwrite the CBSC should consult their dictionaries because the Commission, according to the majority, will not hear them.

Take it or leave

The majority decision confronts broadcasters with an unpalatable choice: they may either support the CBSC thereby cutting themselves off from access to the Commission's review procedures, or they may assure themselves access to the Commission by withdrawing from the CBSC. Why any regulatory body would wish to force a group of stakeholders within its jurisdiction to make such a decision is difficult to imagine.

Equity delights in equality

There appears to exist in the majority's mind an underlying assumption that access for respondents will almost invariably result in abuse of process or that regulatory review would be tantamount to negating the CBSC's usefulness: "To allow broadcasters, as a matter of course, to also come to the Commission... would defeat this process." The whole point behind creating the CBSC, in the majority's mind at least, appears to have been to give broadcasters who support it a method of avoiding adjudication by the Commission. I guess no one explained this to TQS. Certainly, it makes no sense to me.

In my view, any system of adjudication between two parties must be scrupulously fair and balanced. Each party must be confident that it is guaranteed access to precisely the same processes as the other. "Equity," declares one of the maxims underlying our legal system, "delights in equality." I see no risk in ensuring that each party to any dispute within the Commission's jurisdiction is treated equally, but considerable risk in adopting the sort of unbalanced approach favored by the majority.

I disagree with the majority decision and would have allowed TQS to make its case to the Commission. As for the majority's clarification, I reserve comment. Decisions are one thing, gratuitous reflection quite something else. In my view it is not helpful to confuse the two.