



## Broadcasting Decision CRTC 2022-175

PDF version

Ottawa, 29 June 2022

**Société Radio-Canada**  
Montréal, Quebec

### Complaint against Société Radio-Canada on the use of an offensive word on air

#### Cautionary note

This decision contains words or statements that may be offensive to some people, particularly members of the Black community and racialized people.

#### Summary

In response to a request for reconsideration of the findings of the Société Radio-Canada's (SRC) French Services Ombudsman, the Commission finds that the content broadcast during a segment of the SRC program *Le 15-18* goes against the Canadian broadcasting policy objectives and values set out in paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) of the *Broadcasting Act* (the Act). Specifically, the Commission considers that the use and repetition of the “N-word” on this program was inconsistent with these objectives of the Act and that the SRC did not implement all the necessary measures to mitigate the impact of the “N-word” on its audience, particularly in the current social context and given its national public broadcaster status.

Accordingly, the Commission requires the SRC to provide a public written apology to the complainant.

In addition, the Commission requires the SRC to report to the Commission, by no later than **27 September 2022**, on internal measures and programming best practices that it will put in place to ensure that it better addresses similar issues in the future. This report shall be made available to the public.

Given that the segment at issue in this decision is still available online and via catch-up on the SRC's Web platform, the Commission requires that the SRC indicate how it intends to mitigate the impact of the “N-word” in this segment of the program by no later than **29 July 2022**.

Dissenting opinions by Caroline J. Simard, Vice-Chair, Broadcasting, and Commissioner Joanne T. Levy are attached.

## Background

1. On 17 August 2020, in a segment called *Actualité avec Simon Jodoin : Certaines idées deviennent-elles taboues?* presented during the radio program *Le 15-18* on ICI Radio-Canada Première, commentator Simon Jodoin and host Annie Desrochers discussed the launch of a petition to demand the dismissal of a Concordia University professor who quoted the title of Pierre Vallières's book, *Nègres blancs d'Amérique*, in class. The commentator shared his opinion on the acceptability of naming the title of the book and, more specifically, the consequences stemming from the controversy surrounding its mention, claiming that it obscures the content of the work and the author's thoughts. During the discussion, the host and the commentator used the "N-word" four times, three times in French and one time in English, in a segment of 6 minutes 27 seconds.
2. On 28 August 2020, an individual filed a complaint with the Commission and the SRC French Services Ombudsman regarding the broadcast of the "N-word" during the aforementioned segment of the program. The complaint was initially forwarded to the program's first head of content for response. In his complaint, the complainant condemned, among other things, the fact that the program's commentator had mentioned the full title of the book and, consequently, the "N-word," on a number of occasions on air, without providing any warning or explanation of the baggage associated with that word. He added that a person historically affected by the term should have been invited to the discussion to talk about the impact of the use of the word.
3. In her response to the complaint dated 2 September 2020, the first head of content for the program *Le 15-18* argued that the term was used strictly to quote a work and she did not consider the use of the term abusive or inconsiderate. She noted that the commentator's mandate was to present a personal analysis of current issues and that the format did not lend itself to debate by, for example, inviting other speakers to respond directly to him. However, she added that the SRC was sensitive to the debate surrounding the use of offensive words and was open to exercising greater caution and parsimony should the use of that word again become necessary in current affairs.
4. Dissatisfied with the SRC's response, the complainant turned to the SRC's French Services Ombudsman to review the file. In his review dated 26 October 2020, the Ombudsman agreed that the "N-word" is an inaccurate and dehumanizing slur and that it should not be used on the airwaves to describe a Black person. However, he does not consider that the SRC should ban the use of the term in all contexts, but rather that it should be used appropriately and responsibly, such as in cases where the requirement for clarity justifies its use. The Ombudsman added that the SRC's journalistic standards and practices state that the SRC must exercise sensitivity and restraint in avoiding censorship, portraying the reality of the world and contributing to the understanding of issues of public interest. Finally, the Ombudsman concluded that the SRC did not contravene its journalistic standards and practices in the context of the segment aired on *Le 15-18*.

## **Request for reconsideration by the Commission**

5. On 26 November 2020, the same individual filed an official complaint with the Commission requesting that the Commission reconsider the Ombudsman's determination in order to "render a decision that will better reflect the 2020 Canadian multicultural and multiracial society's values and social, cultural and intellectual standards. [translation]"
6. In its response to the complainant's letter dated 25 February 2021, the SRC reiterated that the references to the full title of Pierre Vallières's book on the segment of the program were justified in the context of the segment. It agreed with the Ombudsman's findings and maintained that it complied with its regulatory framework.
7. In an email dated 22 March 2021, the complainant blamed the SRC for referring in its response to a project he was conducting with youth in the SRC studios in which a lack of ethics on the part of a SRC staff member had been brought to the attention of SRC management.

## **Commission's analysis and decision**

8. The Commission is charged with the supervision and regulation of the Canadian broadcasting system in order to implement the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* (the Act). Subparagraphs 3(1)(d)(i), 3(1)(d)(ii) and 3(1)(d)(iii) of the Act specify that the Canadian broadcasting system should safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada. They also indicate that the system should encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view. These subparagraphs also specify that the system should, through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society.
9. Further, paragraph 3(1)(g) of the Act indicates that the programming originated by broadcasting undertakings should be of high standard. Finally, in accordance with subparagraph 3(1)(m)(viii) of the Act, the programming provided by the Corporation should reflect the multicultural and multiracial nature of Canada.
10. The Commission reviewed the complaint in light of the issues raised by the complainant regarding the on-air content, the SRC's responses, the Ombudsman's submissions, and its own analysis of the content broadcast. It considers that the fundamental issue before it is whether the content broadcast by the SRC is consistent with the objective of the Act set out in paragraph 3(1)(g), which states that the programming originated by broadcasting undertakings should be of high standard, and with the social objectives set out in paragraphs 3(1)(d) and 3(1)(m)(viii) of the Act, which indicate that programming should

contribute to the strengthening of the cultural and social fabric and the reflection of the multicultural and multiracial nature of Canada.

11. In determining what constitutes high-standard programming within the meaning of paragraph 3(1)(g) of the Act, the Commission considered the context in which the comments were made and whether all the necessary measures to mitigate the impact of the “N-word” on its audience were put in place.

### **Social context**

12. The social context related to racial issues is changing. The rise of the Black Lives Matter movement and the wave of global protests following the death of George Floyd in May 2020 represent an axis of societal change that propelled public reflection on issues related to racism and systemic racism. Consequently, following these events, the use of the term has evolved, in both French- and English-language contexts, and the Commission must take this into account in its analysis of the complaint.
13. In light of these social changes, the Commission considers that the social responsibilities of broadcasters surrounding the use of the “N-word” have increased. Broadcasters need to take a more sensitive look at the use of language that is potentially offensive to certain communities when carrying out their role of informing citizens and fueling public interest debates.
14. While the “N-word” is a discriminatory term that should not be used to refer to Black people, the Commission acknowledges that the word was not used in a discriminatory manner in the context of the segment, but rather to quote the title of a book that was central to a current issue. However, the Commission acknowledges the current social context related to racial issues and recognizes the need for broadcasters to be very vigilant in dealing with potentially offensive language. Therefore, broadcasters are responsible for ensuring that all necessary measures are in place to mitigate the impact of a statement that may be perceived as offensive by its audience.
15. The Commission also recognizes that the “N-word” may have evolved differently in different communities. However, it is clearly offensive to many groups of people. The Commission also notes that the content broadcast by the SRC is made available to all Canadians through its Web platform. Thus, this content can be accessed by people across Canada with different cultural sensitivities. The Commission considers that, as a national public broadcaster serving all of Canada, the SRC must take into account the existing standards in the Canadian community as a whole.

### **High standard programming**

16. The airwaves are a public good. Licensees are responsible for broadcasting programs that meet the standards set by society at all times. In this regard, as a public broadcaster, the SRC has a duty to be exemplary in its broadcast content.

17. With respect to the use of the word and its frequency of use, the Commission recognizes that a short form of the word is not yet very common in the French language, but other words could have been used to avoid repetition of the word in question, especially given the baggage associated with the word, which is even greater in the current social context. Both the host and the commentator used other wording to refer to it during the segment. The Commission considers that, by repeatedly mentioning the term, the SRC did not show sufficient respect and sensitivity to the communities affected by the term.
18. Moreover, in terms of the vigilance required of the SRC, the Commission considers that the provision of a clear audience advisory at the beginning of the segment of the program regarding the use of the potentially offensive term would have been appropriate and would have reflected the sensitivity that a broadcaster must show in dealing with a topic related to this loaded word. Audience advisories are intended to help listeners make their program choices. The Commission considers that a disclaimer could have mitigated the impact of the word on the audience.
19. Therefore, the Commission is dissatisfied with the way the subject matter was treated in this segment. It considers that the SRC should have taken all necessary steps to mitigate the impact of the word on the audience, including not repeating it and providing a clear warning at the beginning of the segment. In the Commission's view, the SRC did not exercise sufficient caution and vigilance in its treatment of the subject matter, which may have had a harmful effect on its audience, particularly the Black community. This does not meet the high programming standard set out in the Act.
20. In light of the above, and for the reasons set out in the preceding paragraph, the Commission also finds that the broadcast of the segment of *Le 15-18* did not contribute to the strengthening of the cultural and social fabric and the reflection of the multicultural and multiracial nature of Canada provided for in paragraph 3(1)(d) and subparagraph 3(1)(m)(viii) of the Act.
21. The Commission notes the openness that the SRC demonstrated in its responses to the complaint, including its willingness to exercise greater caution should the word be used again in the news. Indeed, the Commission expects the SRC to continue to reflect on the use of offensive language and to treat topics that may be offensive to its audience with greater sensitivity.

## **Conclusion**

22. In light of all of the above, the Commission finds that the content broadcast during a segment of the SRC program *Le 15-18* goes against the Canadian broadcasting policy objectives and values set out in paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) of the Act. The Commission considers that the SRC did not implement all the necessary measures to mitigate the impact of the "N-word" on its audience, particularly in the current social context and given its national public broadcaster status. For these reasons, the broadcast of that program segment did not provide high-standard programming and did not contribute to the strengthening of the cultural and social fabric and the reflection of the multicultural and multiracial nature of Canada.

23. Accordingly, the Commission requires the SRC to provide a public written apology to the complainant.
24. In addition, the Commission requires the SRC to report to the Commission, by no later than **27 September 2022**, on internal measures and programming best practices, including guidelines to on-air hosts, commentators and guests, that it will implement to ensure that it better addresses similar issues in the future, if they come up in the news. This report shall be made accessible to the public.
25. Given that the segment at issue in this decision is still available online and via catch-up on the SRC's Web platform, the Commission requires that the SRC indicate how it intends to mitigate the impact of the "N-word" in this segment of the program by no later than **29 July 2022**.
26. The Commission expects that in the future, the SRC will put in place all necessary reasonable measures to mitigate the impact of the broadcast of content that could be offensive, including explicit warnings.

Secretary General

# Dissenting Opinion by Caroline J. Simard, Vice-Chair, Broadcasting

## Summary

The broadcast of a book title on the radio by the Société Radio-Canada (Radio-Canada) to discuss a current issue led to serious and unintended consequences in the majority decision. The majority decision is based on the premise that the use of the word “nègre” (the “mot ‘n’”), as used in this book title, has evolved in the French-speaking world in such a way that it deserves the same treatment that the “N-word” receives in the rest of the country in the English language. Without evidence on the record or consultation with Canadians, including a critical mass of representatives of the Black French-speaking community who have publicly advocated for a respectful treatment of language and cultural specificities for the “mot ‘n’” in French, especially when used in the title of a book, the majority decision has taken a step I cannot take.

The majority agreed that the “mot ‘n’” was not used in a discriminatory manner in this broadcast. Yet in my view, the majority decision ignored the applicable law and fell back on public policy objectives to uphold the complaint filed on 26 November 2020 with the Commission (the Complaint). Without legal foundation, the majority also imposed restrictive measures on Radio-Canada. In this case, neither the *Canadian Charter of Rights and Freedoms* (the Canadian Charter) nor the applicable broadcasting provisions protect the complainant’s right to **not** be offended. In my view, the applicable law supported dismissing the Complaint. Therefore, I am of the view that the majority has erred on the legal issues central to the assessment of the Complaint.

A public consultation could have been held by the Canadian Radio-television and Telecommunications Commission (the Commission) to engage stakeholders in a dialogue about the evolving sensitivities related to the use of the “mot ‘n’” on radio and television, the challenges of equivalency between the “mot ‘n’” in French and the “N-word” in English, and solutions for the future within the applicable legal framework. From an operational perspective, these consultations would have provided insight into what constitutes adequate safeguards, for example, with regard to explicit warnings on the radio when the context requires it.

## Preliminary considerations

As pointed out in the majority decision, the expression “N-word,” already widespread in the English language, did not have its equivalent in the French language at the time of the broadcast in August 2020 of the segment *Actualité avec Simon Jodoin: Certaines idées deviennent-elles taboues?* ([translation] *Current Affairs with Simon Jodoin: Are Some Ideas Becoming Taboo?*) (the Segment). The Radio-Canada Ombudsman clarified that the term “mot **en** ‘n’” as used in the majority decision is inadequate in French and should be said or written as “racial insult starting with the letter ‘n’” [translation] in French. For conciseness in the English and French versions, I will use the expression used in the Complaint “mot ‘n’” which I find to be more appropriate in the French language than the expression “mot **en** ‘n’” used in the French version of the majority decision.

Paragraphs 1 through 7 of the majority decision describe the factual and historical background of the Complaint. However, these paragraphs fail to mention that the program *Le 15-18*, broadcast

by CBF-FM Montréal and its transmitters, is broadcast by a Radio-Canada ICI Première station, which operates pursuant to the broadcasting licence issued in Broadcasting Decision 2013-263.<sup>1</sup> Although the program is available online and in catch-up mode on Radio-Canada’s web platform, the Complaint must be assessed in light of the target audience in the market served by this licence, namely Greater Montréal, in order to respect the legislative and regulatory framework currently in force.<sup>2</sup>

Manitoba and Saskatchewan Commissioner Joanne Levy also issued a dissenting opinion in response to the Complaint. I concur with the conclusions of Commissioner Levy’s dissenting opinion.

### **Context of the book title’s broadcast on the radio**

For purposes of this dissenting opinion, the Complaint to the Commission referred to is that described in paragraphs 5 through 7 of the majority decision. It is also important to consider the facts described below.

On the Monday following the publication of an article in the Montréal daily *La Presse* over the weekend, commentator Simon Jodoin was asked, on a Radio-Canada public affairs program, to comment on a controversy at Concordia University described in the article.<sup>3</sup> A film studies professor had been the subject of a petition asking the administration to sanction her for using the full title of Pierre Vallières’s book, *Nègres blancs d’Amérique*, in October 2019 while providing classroom instruction on the author. In the Radio-Canada Segment, Simon Jodoin defended the use of titles of works containing loaded words, such as the “mot ‘n’” in a public forum. According to Simon Jodoin, banning this would have the consequence of eradicating the underlying ideas and, in the specific case of the work cited, the ideas necessary to understand the evolution of Quebec society. For example, Pierre Vallières’s book, although controversial for some, is an essential read for understanding the historical, political and social context of the 1970 October Crisis in Quebec, the 50th anniversary of which was marked during the same period as that of this broadcast.<sup>4</sup>

The Complaint filed with the Commission sought to ban a broadcasting licensee from airing offensive material that, when taken in context, is likely to expose a person to hatred or contempt on the basis of race, ethnic origin or colour pursuant to the Commission’s regulations.<sup>5</sup> The Complaint also identifies the Canadian broadcasting policy objectives set out in paragraphs

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<sup>1</sup> *Canadian Broadcasting Corporation – Licence renewals*, Broadcasting Decision CRTC 2013-263, 28 May 2013.

<sup>2</sup> Viewing of the program *Le 15-18* by listeners via live or recorded Internet is subject to *Amendments to the Exemption order for new media broadcasting undertakings (now known as Exemption order for digital media broadcasting undertakings)*, Broadcasting Order CRTC 2012-409–, 26 July 2012.

<sup>3</sup> Isabelle Hachey, “Mots tabous,” *La Presse*, 15 August 2020.

<sup>4</sup> [BAnQ chez moi, 50th anniversary of the October Crisis](#), 5 October 2020 (Pierre Vallières’ book is included).

<sup>5</sup> The Complaint identified paragraph 5(1)(b) of the *Television Broadcasting Regulations, 1987* as the applicable provision in this case, and the majority decision is silent on this issue. Since this is a broadcast by a radio station and not a television station, paragraph 5(1)(b) of the *Television Broadcasting Regulations, 1987* (SOR/87-49) is not applicable in the circumstances. The Complaint and the majority decision do not identify subsection 3(b) of the *Radio Regulations, 1986*, SOR/86-982 as the legal basis; however, it is indeed the applicable regulatory provision.

3(1)(d), 3(1)(g) and 3(1)(m) of the *Broadcasting Act* (the Act). These provisions state that programming should be of high quality and should serve to safeguard, enrich and strengthen the cultural and social fabric and reflect the multicultural and multiracial character of Canadian society.

The summary of the majority decision refers to a use and repetition of the “mot ‘n’” but fails to make several crucial clarifications, including that the repeated “mot ‘n’” was used **in the title of a book**, in this case the book *Nègres blancs d’Amérique* by Pierre Vallières, published in 1968. It also fails to mention the purpose of each of these on-air uses and that the “mot ‘n’” was also used once to explain the expression that came into use in Quebec in the last century, “nègres blancs.”<sup>6</sup> This is in contrast to the use of the “mot ‘n’” in other contexts where the “mot ‘n’” is used more broadly, such as in discussions **about** the “mot ‘n’” or when referring to a person or making hateful comments.<sup>7</sup>

The majority decision emphasizes Radio-Canada’s status as a national public broadcaster. Its mission and powers are defined in the Act. Although Radio-Canada/the Canadian Broadcasting Corporation (CBC) has only one board of directors and only one position for the chair of the organization, the majority decision fails to mention that Radio-Canada operates in the Canadian French-speaking market and that, under the Act and its conditions of licence, Radio-Canada must respect that market’s specificities.

Moreover, as the majority points out, Radio-Canada must demonstrate exemplary behaviour with regard to the content it broadcasts. Its public affairs programming in French-speaking and Francophile communities across the country is an important pillar of Canada’s free, democratic and pluralistic society. Its best practices have an impact on the Canadian broadcasting ecosystem.

*Le 15-18* is a daily, live, late-afternoon radio program broadcast in the Greater Montréal area since the fall of 2015. Commentators and guests offering different points of view discuss current cultural, economic, sports, political or social issues from different angles. This enables listeners to form their own opinions on these issues. In addition to being familiar with the format of the program, listeners know the host, Annie Desrochers, who has been at the helm since the beginning, as well as Simon Jodoin, a regular commentator on the program.

The majority decision cites the social movement to defend the rights of Black people, Black Lives Matter, which began in the United States with the death of George Floyd in May 2020, a few weeks before the Segment aired, and which has spread beyond U.S. borders, including to

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<sup>6</sup> The expression was introduced in Quebec in the early 20th century to describe a situation where the working class and proletarian lower-class of Quebec considered themselves to be oppressed by the Anglo-Saxon elite. Pierre Vallières used this expression in his book *Nègres blancs d’Amérique* to draw a parallel between the situation that, according to him, prevailed in the 1960s for French-speaking Quebecers and African-Americans when he was incarcerated in the United States after having participated in demonstrations for civil rights for African-Americans in the United States.

<sup>7</sup> To illustrate, an example of a discussion **about** the “mot ‘n’” is the segment “La ministre McCann va-t-elle réussir à encadrer la liberté d’expression à l’université?” broadcast on 98.5FM, Paul Arcand (host), *Puisqu’il faut se lever*, 9 February 2021, at 8:58 a.m., duration 10 minutes 22 seconds. An example of a person being referred to by this word on air is during the 2008 television program *Bye Bye*: the American president Obama was referred to as such.

Canada. This movement has instigated several initiatives to defend these rights and to fight against racism and systemic racism.<sup>8</sup>

In the context of this movement, that petition was circulated at Concordia University in the summer of 2020, and other similar situations have occurred in Canada. For example, reference to the title of Pierre Vallières' book in the CBC workplace, in a work meeting, led to the suspension of journalist Wendy Mesley in June 2020 and, in the classroom, to the suspension of a University of Ottawa art history and theory professor in October 2020.

In this social context, the majority decision recognizes that the evolution of the “N-word” and the “mot ‘n’” has been different in English-speaking and French-speaking spaces. However, the majority concluded, without any evidence on the record or public consultation by the Commission on this issue, that Radio-Canada must now meet the social standards for the use of the “N-word” in the Canadian community as a whole, not those specifically applicable to the target audience in the market served by CBF-FM.

But what are these social norms for the use of the “N-word” and the “mot ‘n’” that are uniformly applicable across all of Canada? A critical mass of people from the Black community who are socially engaged and recognized by their peers and moreover directly concerned by the subject has spoken out publicly to criticize and qualify the approach taken by the University of Ottawa of sanctioning its professor. Subject to several nuances, these individuals advocated an open exchange of ideas. Among them are Max Stanley Bazin, President of the Black Coalition of Quebec; Dany Laferrière, member of the Académie française; Dominique Anglade, Leader of the Opposition in the National Assembly of Québec; Maka Kotto, former minister of Culture and Communications; and Mirlande Pierre, Vice-President of the Commission des droits de la personne et des droits de la jeunesse. The list includes other Black people involved in Quebec media, such as Boucar Diouf, Normand Brathwaite and Philippe Fehmiu.<sup>9</sup> Given the complexity

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<sup>8</sup>See paragraph 12 of the majority decision.

<sup>9</sup> For example, see articles describing these various positions: Marie-Andrée Chouinard, “Le gros bon sens,” *Le Devoir*, 13 November 2020; Odile Tremblay, “Sur les traces d’un mot,” *Le Devoir*, 31 October 2020; T’Cha Dunlevy, “‘N-word’ debate: Black comedian changing white minds, one at a time,” *Montreal Gazette*, 29 October 2020; Maka Kotto, “Vous avez dit ‘Nègre?’” *Journal de Montréal*, 26 October 2020; Sophie Durocher, “Radio-Canada et le non-débat,” *Journal de Montréal*, 26 October 2020; Franco Nuovo (host), “Dany Laferrière sur le ‘mot en n’ : un tel mot va plus loin que la douleur individuelle,” *Dessine-moi un dimanche*, Ohdio, Radio-Canada, 25 October 2020, 38 minutes and 29 seconds; Guy A. Lepage (host), “Le ‘mot en n’: L’arbre qui cache la forêt,” *Tout le monde en parle*, 25 October 2020; Boucar Diouf, “Une sagesse qui rejoint la vision déjà annoncée par Dany Laferrière et Normand Brathwaite il y a quelques jours,” *La Presse*, 24 October 2020; Stéphane Baillargeon, “Silence à CBC, prudence à Radio-Canada,” *Le Devoir*, 22 October 2020; Marco Bélair-Cirino, “La vice-présidente de la CDPDJ préconise une utilisation parsimonieuse,” *Le Devoir*, 22 October 2020; “Utilisation du mot « n » : Concordia a opté pour une autre approche,” *ici.radio-canada.ca*, 22 October 2020; Hélène Buzzetti, “Clivage entre Québec et Ottawa à propos du ‘mot en N,’” *Le Devoir*, 21 October 2020; Marissa Groguhé, “Alors, qui a le droit de prononcer le mot?” *La Presse*, 21 October 2020; Marie-Josée R. Roy, “Normand Brathwaite choqué par le choix de l’Université d’Ottawa,” *Journal de Montréal*, 21 October 2020; Lina Dib et Jessica Beauplat, “Trudeau choisit de dénoncer le racisme,” *La Presse*, 21 October 2020; Émilie Dubreuil, “Nous assistons à une dérive : la cheffe du PLQ dénonce la censure à l’université,” *Radio-Canada.ca*, 20 October 2020; Steve E. Fortin, “Le mot ‘nègre’, il va dans n’importe quelle bouche,” *Journal de Québec*, 18 October 2020; Hugo Pilon-Larose, “Une majorité de professeurs pratiquent l’autocensure,” *La Presse*, 29 September 2021; Isabelle Hachey, “Faut-il une loi pour protéger la liberté universitaire?” *La Presse*, 31 August 2021; Joseph Facal, “Concordia ou la lâcheté déguisée en vertu,” *Journal de Montréal*, 27 August 2020; Marie-Louise Arsenault (host), “Analyse du mot ‘nègre’ avec Donald Cuccioletta et

of the subject and especially given the different points of view expressed on the issue of guidelines, I refer, for the purposes of this dissenting opinion, to the words of Max Stanley Bazin, which summarize the common denominator described by these individuals when they spoke on this issue:

We must not be afraid of words [...and we must consider that the] “context surrounding” the use of the [“mot ‘n’”] “is important”. “If [University of Ottawa professor] Lieutenant-Duval’s purpose was to point out the existence of systemic racism and to teach historical concepts, it can’t be seen as wrong,” he suggested. “However, when someone uses a term in a derogatory sense, that’s when you have to react and condemn; but not teaching the realities of history is indirectly allowing or encouraging systemic discrimination,” he stressed.<sup>10</sup> [translation]

On the Sunday following the broadcast of the Segment, Radio-Canada invited four people from the Black community, including the complainant, on the prime-time program *Tout le monde en parle*.<sup>11</sup> As a counterbalance to this open use of the “mot ‘n’” in French in Quebec, they made the audience aware of the fact that the “mot ‘n’” causes harm simply by being said, regardless of the origin of the Black person. When asked whether the censorship of Pierre Vallières’s book (or, in the words of the host, its “blacklisting”) was necessary because of its title, Webster, a hip-hop artist and lecturer, said “[leave the title] as is. The weight of the word enables us to understand Vallières’s error. Allows us to understand a [bungling] surge of solidarity” [translation]. Webster defended the same open approach to the book’s title on the literary talk show *Plus on est de fous, plus on lit*, also on Radio-Canada’s ICI Première, the day after the Segment was broadcast. According to Webster, the historical context allows for its use for the following reasons:

I think we should be able to use [the title] in historical context. I think we should be able to refer to the work by its name: *Nègres blancs d’Amérique*. It’s part of history, and the fact that it is called what it’s called, if we decided to rename it *Noirs blancs d’Amérique* [*White Black People of America*], we would lose an entire piece of history. The analysis is lost if we change the title. [translation]<sup>12</sup>

## Issues in dispute

The issues in dispute are the following:

1. Is what was said and broadcast in the Segment protected by subsection 2(b) of the *Canadian Charter of Rights and Freedoms* concerning the right to freedom of expression, given that subsection 2(3) of the *Broadcasting Act* specifies that the *Broadcasting Act*

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Webster,” *Plus on est de fous, plus on lit*, 18 August 2020, 22 minutes 32 seconds; Isabelle Hachey, “Mots tabous,” *op. cit.*, note 5.

<sup>10</sup> *Idem*, Lina Dib and Jessica Beauplat.

<sup>11</sup> Guy A. Lepage (host), *op. cit.*, note 9, (the guests were Vanessa Destin , Ricardo Lamour,  milie Nicolas and Webster).

<sup>12</sup> [Radio-Canada website](#), 18 August 2020

shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings?

2. Which provisions of the legislative and regulatory framework apply in this case? Did what was said and broadcast in the Segment contravene these provisions?

1. **Is what was said and broadcast in the Segment protected by subsection 2(b) of the *Canadian Charter of Rights and Freedoms* concerning the right to freedom of expression, given that subsection 2(3) of the *Broadcasting Act* specifies that the *Broadcasting Act* shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings?**

In my view, the majority decision departs from fundamental principles affirmed by the Supreme Court of Canada. Administrative decision-makers have a duty to consider the Canadian Charter when making their decisions. Once they have decided that an activity is protected, such as freedom of expression, they must consider the relevant legislative objectives and ask how best to protect the value(s) at stake enshrined in the Canadian Charter. However, the majority did not take into account freedom of expression as a value protected by the Canadian Charter and enshrined in the Act, nor did it assess this protection of freedom of expression in light of **the full range** of values and objectives enshrined in the Act and applicable to this case. The majority decision departs from another Supreme Court of Canada pronouncement that states that there is no right to **not** be offended.

- (a) **The *Canadian Charter of Rights and Freedom* does not protect the right to NOT be offended**

Freedom of expression includes more than the right to express beliefs and opinions; it protects both the speaker and the listener.<sup>13</sup> Listeners have the right to receive, without obstruction, the information, ideas or opinions broadcast on the public airwaves. Without freedom of expression protection, it would be perilous for Radio-Canada news anchors, hosts, commentators, and even their guests, who are often members of the public, to convey difficult and sensitive messages on air within the applicable legal boundaries. In return, listeners can say that they are offended and disagree with what was said and, if necessary, take action as the complainant did.

The Supreme Court of Canada has described the values underlying the right to freedom of expression as “individual self-fulfillment, the pursuit of truth through the open exchange of ideas, and the political discourse fundamental to democracy”. Therefore, it is necessary to consider the relationship between the message conveyed, on the one hand, and the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing, on the other.<sup>14</sup> A clear connection exists between what was said in the Segment and the pursuit of truth, the participation in the community, or the individual self-fulfilment and human flourishing of the listeners of the program *Le 15-18*.

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<sup>13</sup> *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712, p. 767.

<sup>14</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

The Court also reiterated the following:

Freedom of expression was entrenched in our Constitution [...] so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of [the Canadian Charter], “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.<sup>15</sup>

In a recent Supreme Court of Canada case,<sup>16</sup> in which a comedian’s freedom of expression conflicted with the dignity and equality rights of a person with a disability, the Court gave precedence to freedom of expression. In that case, the Court once again defined the standards applicable to freedom of expression when controversial statements are made in public and concern an equality right set out in section 15 of the Canadian Charter.

In an earlier decision—the *Whatcott* case—released prior to the filing of the Complaint, the Supreme Court of Canada specified that this balancing act **must not be focused either on the repugnant or offensive nature of the expression or on the emotional harm caused to the person**. The laws do, of course, prohibit hate speech, which is carefully defined, but they are not intended to discourage the expression of repugnant or offensive ideas. Moreover, **the apprehended harm is meant to be collective and social in nature. The prohibited harm is therefore social and not mental, collective and not individual.**<sup>17</sup> Thus, the Supreme Court of Canada confirmed that not all offensive speech is discriminatory, and that therefore offensive speech is protected by the Canadian Charter, even if it is based on a ground of discrimination and causes personal harm to the victim.<sup>18</sup>

In my view, the Commission’s intervention, as described in the majority decision, is not consistent with recent Supreme Court of Canada decisions confirming that freedom of expression is not about protecting the right to **not** be offended.<sup>19</sup>

In November 2021, a final report of the Committee on Academic Freedom, chaired by former Supreme Court of Canada Justice, the Honourable Michel Bastarache (CC, QC), was released. Following public consultations with the academic community, it found against the exclusion of words, works or ideas in the context of respectful academic presentations or discussions with an educational goal of disseminating of knowledge.<sup>20</sup> This report was released just a few days after

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<sup>15</sup> *Ibid.*, p. 968.

<sup>16</sup> *Ward v. Quebec*, (*Commission des droits de la personne et des droits de la jeunesse*), 2021 SCC 43.

<sup>17</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, paras. 50-51, 58 and 82. See also, *idem*, *Ward v. Quebec*.

<sup>18</sup> *Ibid.*, *Ward v. Quebec*.

<sup>19</sup> *Ibid.*, para. 82. Moreover, this approach bears several similarities with the one adopted recently by another communications regulator in September 2021. Following consultation with the public in the United Kingdom, Ofcom recalled that there is no right not to be offended by what we see on television or hear on the radio. Ofcom, “Our research into offensive language on TV and radio – why we do it and why it matters”, <https://www.ofcom.org.uk/news-centre/2021/why-offensive-language-research-matters>, September 2021.

<sup>20</sup> *Report of the Committee on Academic Freedom*, University of Ottawa, 4 November 2021, [https://www.uottawa.ca/sites/www.uottawa.ca/files/report\\_committee\\_academic\\_freedom\\_en\\_final\\_v9.pdf](https://www.uottawa.ca/sites/www.uottawa.ca/files/report_committee_academic_freedom_en_final_v9.pdf).

the Supreme Court of Canada's decision in the *Ward* case, which recalled this absence of a right to **not** be offended in Canadian society.<sup>21</sup>

In summary, as acknowledged by the majority, the “mot ‘n’” was not used in a discriminatory manner during the Segment.<sup>22</sup> The Complaint stated that the complainant, as a listener of the Segment, was offended by the repeated on-air use of the title of Pierre Vallières's book. Freedom of expression must be interpreted in light of Supreme Court of Canada decisions confirming that there is no protection in Canada of a right to **not** be offended in a free, pluralistic and democratic society. In my opinion, this reason alone justified the dismissal of the Complaint.

**(b) The Commission's duty to take into account the *Canadian Charter of Rights and Freedoms***

In exercising the discretionary powers conferred on it under the Act, the Commission has the power, and indeed the duty, to consider the fundamental values enshrined in the Canadian Charter within its scope of expertise.<sup>23</sup> In my view, the omission of this in the majority decision constitutes an error in law sufficiently significant to invalidate the conclusions as well.

Freedom of expression is a fundamental value that applies to everyone to ensure a free, democratic and pluralistic society. Subsection 2(b) of the Canadian Charter<sup>24</sup> must be analyzed using a three-part criterion to determine whether the Segment, as well as Radio-Canada programming that will be directly affected by the findings of the majority decision described in paragraphs 22 to 26 of the majority decision, enjoy freedom of expression protection:

- i) Does the activity in question have expressive content, thereby bringing it, prima facie, within subsection 2(b) protection?
- ii) Is the activity excluded from that protection as a result of either the location or the method of expression? and
- iii) If the activity is protected by subsection 2(b), does an infringement of the protected right result from either the purpose or the effect of the government action?<sup>25</sup>

According to my analysis, there is no doubt that the Segment and Radio-Canada's programming that is subject to the findings in paragraphs 22 to 26 of the majority decision, enjoy freedom of expression protection:

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<sup>21</sup> The *Ward* case recalls the pronouncements made in the *Whatcott* case. *Ward v. Quebec*, op. cit., note 16, para. 82; see also *Saskatchewan (Human Rights Commission) v. Whatcott*, op.cit., note 17, paras. 50 and 90.

<sup>22</sup> Paragraph 14 of the majority decision.

<sup>23</sup> *Doré v. Barreau du Québec*, [2012] 1 SCR 395.

<sup>24</sup> The right to freedom of expression is provided for in subsection 2(b). Subsection 2(b) states that “everyone has the following fundamental freedoms: [...] (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

<sup>25</sup> *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 SCR 19, para. 38; *Montreal (City) v. 2952-1366 Québec Inc.*, [2005] 3 SCR 141; and *Irwin Toy Ltd. v. Quebec (Attorney General)*, op. cit., note 14.

- i) The Segment broadcast as part of the Radio-Canada program *Le 15-18* has the expressive content required for bringing it within subsection 2(b) protection;
- ii) Protection is removed neither by location nor mode of dissemination; and
- iii) The findings of the majority decision, as described in paragraphs 22 to 26 of the majority decision, infringe upon the right to freedom of expression in both purpose and effect.

For ease of reading, I have summarized paragraphs 22 to 26 of the majority decision:

- (par. 22) states that, by repeating the “mot ‘n’” as a result of repeating the title of a book that includes the “mot ‘n’,” which was the content broadcast in the Segment, Radio-Canada went contrary to the objectives and values of the Canadian broadcasting policy described in paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) of the Act;
- (par. 22) states that Radio-Canada has not put in place all reasonable measures to mitigate the impact of the “mot ‘n’” on its audience;
- (par. 23) requires Radio-Canada to provide a public written apology to the complainant;
- (par. 24) requires Radio-Canada to report to the Commission, no later than 90 days from the decision date, on the internal measures and programming best practices, including guidelines for on-air hosts, commentators and guests, that it will put in place to ensure that it better addresses similar issues in the future, should they reappear in the news. This report shall be made available to the public;
- (par. 25) requires Radio-Canada to indicate to the Commission, no later than 30 days from the decision date, how it intends to mitigate the impact of the “mot ‘n’,” given that the segment at issue is still available online and via catch-up on Radio-Canada’s web platform; and
- (par. 26) expects that, in the future, Radio-Canada will put in place all reasonable measures necessary to mitigate the impact of airing potentially offensive material, including explicit viewer advisories.

Because the Commission required Radio-Canada to put in place all reasonable and necessary corrective measures with regard to the use of “any potentially offensive material,” Radio-Canada will be restricted in its use of words, expressions and book titles on-air. This restriction is in fact not limited to the “mot ‘n’” in a book title, which, in my opinion, already violates the freedom of expression in itself.

The scope of the impact of this infringement on the freedom of expression by the majority decision can be assessed at other levels. The restrictive measures apply to all of Canada, and not to the market served by the broadcasting licence issued to CBF-FM. These measures have the potential to apply to all Canadians, including on-air hosts, commentators and even on-air guests (which include members of the public) as well as, of course, the listeners of these programs. All

broadcasting activities are subject to these measures, which include not only activities related to the program *Le 15-18* or to radio, but also those that are broadcast on television, online and via catch-up on Radio-Canada's web platform.

Finally, in addition to directly or indirectly restricting the content broadcast on radio and television services, the conclusions of the majority decision (paragraphs 22 to 26) carry the risk of self-censorship. It is reasonable to anticipate that, in an ecosystem like that of broadcasting, this risk extends to other broadcasters in the country (both public and private, regardless of broadcast language). I also have serious concerns about how these findings will complicate the practice of journalism, which is already facing a variety of other major challenges at the same time.

Ultimately, the majority decision did not consider whether what was said and broadcast by Radio-Canada were protected by subsection 2(b) of the Canadian Charter, namely by the right to freedom of expression. In my view, this reason alone constitutes an error in law that vitiates the majority's findings and is significant enough that I do not concur in the majority's decision. The majority decision also departs from other Supreme Court of Canada pronouncements by directly and indirectly restricting the content of expression and content-related forms of expression on radio and television.<sup>26</sup>

(c) **The freedom of expression and journalistic, creative and programming independence, as enshrined in the *Broadcasting Act*, protected the on-air broadcast of the book title**

Once the majority decided that the on-air remarks that are the subject of the Complaint enjoy freedom of expression protection under subsection 2(b), by applying the *Doré* ruling, it should have, in my opinion, considered the relevant legislative objectives and asked itself how best to protect the value(s) at stake enshrined in the Canadian Charter in light of these objectives.

There are many different values at stake and protected by the law. The majority was required to consider all of the applicable Canadian broadcasting policy objectives and weigh them to reach its decision. I note that instead the majority decision took into account only carefully selected Canadian broadcasting policy objectives by limiting its analysis to the values of high quality programming, the reflection of Canada's multicultural and multiracial nature, and the enrichment and strengthening of social and cultural fabric.

These values must certainly be considered in determining whether to uphold or dismiss the Complaint. However, to be complete, the analysis requires consideration of the other values applicable in this case, starting with the freedom of expression and journalistic, creative and programming independence enjoyed by Radio-Canada.

Subsection 2(3) of the Act states that “the Act shall be construed and applied **in a manner that is consistent with the freedom of expression and the journalistic, creative and programming independence enjoyed by broadcasting undertakings.**” [my use of bold]

Moreover, the importance attributed to freedom of expression in the Canadian broadcasting system is enshrined not only in subsection 2(3) of the Act, but also in several other provisions

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<sup>26</sup> *Idem.*, *Irwin Toy Ltd. v. Quebec*, p. 976.

applicable to Radio-Canada. To that end, I believe that the following legislative provisions should have been considered in the majority decision:

- The interpretation in subsection 35(2) of the Act applicable to Radio-Canada, which states that “this Part shall be interpreted and applied **so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and the exercise of its powers.**” [my use of bold]
- Subsection 46(5) of the Act, which specifies that the Radio-Canada “shall, **in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence.**” [my use of bold]
- Finally, even where financial provisions are concerned, the legislator felt it important to reiterate in subsection 52(1) of the Act that “nothing in sections 53 to 70 **shall be interpreted so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by** [Radio-Canada] in the pursuit of its objects and in the exercise of its powers.” [my use of bold]

The Federal Court of Appeal explained that these provisions are intended to protect the journalistic integrity and independence of Radio-Canada’s programming, free as far as possible from interference, in these terms:

This statutory scheme, I find, **has as its object to safeguard the journalistic integrity and programming independence of the CBC.** Absent cogent evidence of mischief calculated to subvert the democratic process and absent evidence of statutory breach, this Court should not enter the broadcasting arena and usurp the functions of broadcast media. The political agenda is best left to politicians and the electorate; television programming is best left to the independent judgement of broadcasters and producers.<sup>27</sup> [my use of bold] [translation]

In this spirit, I believe that the majority should have shown restraint by not interfering in Radio-Canada programming in this way and, in my opinion, should have protected the journalistic integrity and independence of Radio-Canada’s programming. The majority decision failed to consider subsection 2(3) of the Act and, if it had considered it, would have had no choice, in my view, but to refrain from finding that Radio-Canada contravened the Act and imposing the restrictive measures set out in paragraphs 22 to 26 of the majority decision. This omission is determinative and constitutes an error of law that vitiates the findings of the majority.

Along with the value and purpose of freedom of expression and the journalistic, creative and programming independence enjoyed by Radio-Canada, other objectives were excluded from the majority’s analysis. While the three objectives identified by the majority (i.e.,

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<sup>27</sup> *National Party of Canada v. Canadian Broadcasting Corporation*, 1993 CanLII 7151 (ABQB), para. 27.

reflecting Canada’s multicultural and multiracial nature, enriching and strengthening the social and cultural fabric, and high-standard programming) are important and form part of the analysis, the majority decision was required to consider and weigh all of the other applicable Canadian broadcasting policy objectives.

**(d) The conditions under which Radio-Canada operates in French are obscured in the majority decision**

The majority decision ignores the provisions of the Act that protect linguistic duality and, at the same time, bases its conclusions on the premise that “as a national public broadcaster serving all of Canada, the SRC [Radio-Canada] must take into account the existing standards in the Canadian community as a whole.”<sup>28</sup> In my view, forcing this homogeneity is contrary to the Act and, for this other reason, the conclusions of the majority decision are erroneous.<sup>29</sup>

Paragraph 3(1)(c) and subparagraph 3(1)(m)(iv) of the Act confirm that the programming of the national public broadcaster reflects the specific situation and needs of both official language communities. Paragraph 5(2)(a) of the Act holds that the Commission be readily adaptable to the specificities when monitoring and regulating the different operating conditions to which Radio-Canada and the CBC are subject in each of these language markets. For further analysis, provisions 3(1)(m)(ii) and 5(2)(b) of the Act, in turn, specify the importance of Radio-Canada and the Commission, in their respective roles, taking into account and responding to regional needs and concerns.

However, the serious and regrettable consequence of the majority’s decision is that it does not take into account “French-speaking specificity”, including that of Black French-speakers.<sup>30</sup> Recall their demands to distinguish the approach applicable to French in Quebec by referring to the Césaire-Senghor movement in the Francophonie, or the problems of equivalence that exist between the French and English terms, as explained by the Ombudsman in its report and the Canadian Broadcast Standards Council (CBSC).<sup>31</sup> Even if there does not appear to be a consensus on the use of the “mot ‘n’” in French, its use as part of a book title undoubtedly respects the view publicly expressed by the majority of the target audience, including by individuals from the Black community.

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<sup>28</sup> Paragraph 15 of the majority decision.

<sup>29</sup> It should be noted that the requirement for CBC/Radio-Canada to ensure national unity in the previous legislation was removed, in part because it posed a risk of infringing on freedom of expression. See Marcel Masse, Standing Committee [on Canadian Heritage] of 31 January 1990, at 2:11: quoted in P. Grant and G. Buchanan, *Canadian Broadcasting Regulatory Handbook*, 4th edition, 2017, p. 23.

<sup>30</sup> This position is a departure from the approach taken in the past by the Commission and the Canadian Broadcast Standards Council (CBSC). For example, the established practice of the CBSC ensures compliance with these provisions by having separate adjudicating panels for the regional languages and culture covered by the programming. This model led to the conclusion that, because the use of the word “fuck” in French does not have the same vulgar connotation as in English, the word “fuck” was acceptable on the air in French but should be avoided in English. *CKOI-FM re comments made on Les poids lourds du retour* and Radio P-Y, CBSC Decision 1617-1283, 2017 CBSC 12, 7 November 2017.

<sup>31</sup> *CHMP-FM (98.5 fm) re Puisqu’il faut se lever*, CBSC 20.2021-1007, 10 June 2021, pp. 2-3; *Rapport de l’Ombudsman des Services français de Radio-Canada*, 26 October 2020, p. 11.

While the majority recognizes that the “mot ‘n’” may evolve differently in different communities, the conclusions of the majority decision do not take into account the operating conditions to which Radio-Canada is subject when it reflects the specific situation and particular needs of its French-speaking audience. By adopting a pan-Canadian approach without taking into account the language and cultural specificities of French-speaking communities as required by the Act and without defining the said social norms that would be applicable to the whole country, the majority decision, in my view, contravenes the Act.

At the same time, it certainly has the potential to create regulatory uncertainty that would be harmful to the Canadian broadcasting system. How will Radio-Canada and other French-language broadcasters appreciate the context of broadcasts when the social norm being debated in the public sphere appears to have important nuances omitted by the majority decision? Does this decision have the potential to raise questions from individuals from the English-speaking Black community about the use of offensive words in the title of works on air? Given the significance of the subject and of the potential consequences for a population group directly affected by the majority decision, I believe that, instead of the imposition of these measures that rely on referents that belong to another language and other regional cultures, a dialogue as part of a public consultation was necessary to better understand the language and local culture subtleties.

**(e) The broadcast of the book title on air was of high standard**

The majority decision rightly considers three public policy objectives applicable in this case (set out in paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) of the Act), including the provision of high-standard programming. In my opinion, the majority decision points in the right direction of explicit warnings, which are already issued by Radio-Canada radio hosts. However, the majority makes several significant omissions and makes several errors that alone taint its conclusions. I will limit myself to a few of them.

First, the majority decision rejects the objective that stipulates that the programming provided by the Canadian broadcasting system should provide the opportunity for the public to be exposed to the expression of differing views on matters of public concern.<sup>32</sup> This objective is perfectly aligned with the sections of the Act that protect freedom of expression and journalistic independence. Accordingly, the goal of high-standard programming is not to prevent controversy on matters of public opinion.

In the same vein of public policy objectives that underwrite freedom of expression, the majority decision contains no analysis or consideration of paragraph 3(1)(l) of the Act, which holds that Radio-Canada, as the national public broadcaster, should provide radio and television services that include a wide range of programming that informs, enlightens and entertains. The Segment, on a topical issue, met this criterion, which is interpreted in conjunction with high-standard programming.

Moreover, the assessment of the high-standard criterion in the majority decision seems to be confined to a pointed assessment of the facts that considers the ratio of the number of times the “mot ‘n’” was said on air to the number of minutes of the segment, without even assessing the

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<sup>32</sup> Subparagraph 3(1)(i)(iv) of the Act.

purpose of such uses and while disregarding the professional tone with which the host and the commentator dealt with this sensitive issue. By proceeding with a mathematical approach without regard to purpose, the majority decision has the unintended effect of allowing the regulator to breach the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasters.

Indeed, I believe that the suggested and imposed safeguards in the majority decision (such as not repeating the “mot ‘n’”) would have prevented the Segment from being broadcast. An attentive listener to the Segment raises questions about the practical aspects of the majority decision’s conclusions:

- Not mentioning the title of the book at the beginning of the interview? The listeners would not have known what it was about.
- A substitution of the “mot ‘n’” with “Black people” as in *White Black people of America*? This would have resulted in the loss of a historical element.
- Replace the term “nègres blancs”? With what?
- Failure to specify the translation used in English at an English-speaking university? This clarification served to confirm to the audience which of the possible translation options had been said in the classroom.<sup>33</sup>
- Not mentioning the title of the book when the commentator takes over the exchange? This use is up for debate in terms of “extreme necessity,” but it certainly does not respect the standard practices in radio broadcast. Before concluding that there was an irregularity, one should also consider the remarkable feat performed by the host and the commentator, live on the radio, of using about a dozen substitutes for the title of the book to avoid repeating it.

In assessing such complaints in the past, the Commission has kept in mind that “[the Commission] is not a board of censors, it does not regulate taste, and it does not have the authority either to tell broadcasters what they can broadcast or to act pre-emptively before a broadcaster airs a program.”<sup>34</sup> In a world of live radio, I consider that Radio-Canada succeeded here in finding a balance between, on the one hand, using the title and the term that includes the “mot ‘n’” with restraint and, on the other hand, using about a dozen other formulations and synonyms to mitigate the undesirable impact on its listeners.

From an overall perspective, the majority decision does not consider the notion of balance, which is an important component in examining the high standard of programming, particularly on

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<sup>33</sup> For example, two works by Dany Laferrière were translated using two different words. The English translation of *Comment faire l’amour avec un nègre sans se fatiguer ?* published in 2010, is *How to Make Love to a Negro Without Getting Tired?*, and the translation of *Cette grenade dans la main du jeune nègre est-elle une arme ou un fruit ?* published in 2014, is *Why Must a Black Writer Write about Sex?* In comparison, the translation of *Nègres blancs d’Amérique*, published in 1971, used the word known as the “N-word.”

<sup>34</sup> *Review of a Commission staff determination on a complaint relating to the airing of a song on CKUT-FM Montréal during the programming segment Space Bop*, Broadcasting Decision CRTC 2007-135, 14 May 2007, para. 16.

programs that set out to discuss public affairs.<sup>35</sup> The notion of balance on issues of public concern must be considered with a holistic view of a broadcaster's entire programming, not just one program segment. The majority decision failed to consider that Radio-Canada developed programs to ensure a balanced and diverse treatment of the current affair that is the subject of the Complaint. Within a reasonable period, Radio-Canada allocated considerable airtime to other radio and television programs that discussed the use of the “mot ‘n’”.<sup>36</sup>

**(f) Public consultation**

Incidentally, I believe that a public consultation could have enlightened the Commission as to the applicable and publicly known social standards for the target audience of Radio-Canada's CBF-FM station **at the time of the broadcast of the Segment**, before the majority decision imposed such restrictive measures. I believe that the pertinence of such a consultation would have been best recognized when the time came to determine whether the legal framework that currently applies to all broadcasters across the country required amendment on matters concerning equitable portrayal on radio and television. If so, the Commission could have taken steps to ensure that such amendments were adopted and came into force.

**2. Which provisions of the legislative and regulatory framework apply in this case? Did what was said during the Segment contravene these provisions?**

**(a) Section 3 of the *Radio Regulations, 1986* applies**

In its analysis of the Complaint, the majority also failed to consider whether the comments broadcast and referred to in the Complaint violate subsection 3(b) of the *Radio Regulations, 1986* under which “[a] licensee shall not broadcast any abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.”

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<sup>35</sup> The Act protects a balanced offering by broadcasters. Specifically for Radio-Canada, paragraph 3(1)(l) states that “the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating **a wide range of programming that informs, enlightens and entertains.**” In addition, subparagraph 3(1)(d)(ii) states that “the Canadian broadcasting system should: [...] encourage the development of Canadian expression **by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values** and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.” Subparagraph 3(1)(i)(i) of the Act holds that “the programming provided by the Canadian broadcasting system should [...] **be varied and comprehensive providing a balance of information, enlightenment and entertainment** for men, women and children of all ages, interests and tastes.” [my use of bold]

<sup>36</sup> Among these, I note that Radio-Canada provided its listeners and viewers with the opportunity to hear opinions, comments and ideas on this very issue from different angles, on at least three other occasions. Indeed, the day after the Segment, on the radio program *Plus on est de fous, plus on lit* on ICI Première, historian Donald Cuccioletta, and rapper and lecturer Webster discussed the historical weight of the word, its share of controversies, its evolution and its use in different contexts for over 20 minutes. On 25 October 2020, on the radio program *Dessine-moi un dimanche* on ICI Première, a member of l'Académie Française, Dany Laferrière, spoke about the use of the “mot ‘n’” in an interview lasting over 30 minutes. Finally, on the same day, Radio-Canada also provided other perspectives on the subject on the television program *Tout le monde en parle* for over 18 minutes. Marie-Louise Arsenault (host), Franco Nuovo (host), Guy A. Lepage (host), op. cit. note 8.

In my opinion, this omission is an error that vitiates the determinations and conclusions of the majority position. This omission is significant because the majority used Canadian broadcasting policy objectives in rendering its decision rather than subsection 3(b) of the *Radio Regulations, 1986*.

Had the majority decision considered subsection 3(b) of the *Radio Regulations, 1986*, it should have concluded that there was no broadcast of abusive language that, when taken in context, threatened to expose a person to hatred or contempt on the basis of race, ethnic origin or colour at the time that the Segment was broadcast in August 2020.

**(b) The intellectual treatment exception of subsection 10(c) of the *Equitable Portrayal Code* applies**

The majority decision also failed to consider whether the specific facts of the Complaint qualified within the meaning of section 9 of the *Equitable Portrayal Code*, and if so, whether the intellectual treatment exception in subsection 10(c) of that code applied.

In my opinion, this omission is an error that vitiates the conclusions and determinations of the majority position. This omission is significant because the majority used Canadian broadcasting policy objectives in making its decision, rather than the provisions of the *Equitable Portrayal Code*, which were specifically enacted to ensure the equitable portrayal of all individuals in television and radio programming, and which are imposed on Radio-Canada as a condition of licence.<sup>37</sup> This code was developed through consultation with 36 stakeholder organizations representing ethnocultural and Indigenous groups, and persons with disabilities in both the English- and French-language markets.

The CBSC, which regularly applies this code, rendered a decision recently, in June 2021, on the use of the “mot ‘n’” on the radio to in discussions **about** the “mot ‘n’” (which is a broader use of the “mot ‘n’” than when it is said as part of a title of a book, as in this case). In that decision, the CBSC decided that the “mot ‘n’” could be said in French on the radio in a context of discussion **about** that word. As part of this decision, it was decided that there are still differences between the “mot ‘n’” in French and English and that its use was permitted in French in the context of that case. As a second basis, the intellectual treatment exception applied and also justified the dismissal of the complaint.<sup>38</sup>

The majority decision is a departure from recent CBSC jurisprudence. As such, the majority decision should, in my view, have considered the impact of such a conclusion on the condition of licence applicable to Radio-Canada. Condition of licence 7 in Appendix 4 to Broadcasting Decision 2013-263 sets out that Radio-Canada must comply with the *Equitable Portrayal Code*, **as amended from time to time and approved by the Commission**. [my use of bold]

Does this mean that the majority decision constitutes a successive amendment to the *Equitable Portrayal Code*? The majority decision is silent on this question. A public consultation would have answered this question and defined the parameters of any such amendments.

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<sup>37</sup> Condition of licence 7, set out in Appendix 4 of Broadcasting Decision CRTC 2013-263, *op.cit.*, note 1.

<sup>38</sup> *CHMP-FM (98.5 fm) re Puisqu’il faut se lever*, CBSC 20.2021-1007, 10 June 2021.

I am of the view that, in such a scenario, the majority should have applied the intellectual treatment exception set out in subsection 10(c) of the Code and concluded that Radio-Canada's use of a book title and a time-honoured phrase that includes the "mot 'n,'" as presented and broadcast in the Segment, does not violate the Code. In addition to including what I consider to be errors of law, the majority decision runs the risk of affecting the regulatory certainty that Radio-Canada and other broadcasting licensees in Canada are in a position to expect on the issue of equitable portrayal on radio and television in Canada.

**(c) The public policy objectives set out in paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) are not the provisions that establish authority to make a decision regarding the Complaint and to impose restrictive measures on Radio-Canada**

The majority decision relies on the Canadian broadcasting policy objectives set out in paragraphs 3(1)(d), 3(1)(g), and 3(1)(m) of the Act in making its decision and imposing measures on Radio-Canada.

In making its decision on the merits of the Complaint, the Commission must respect the legal framework to which it is subject. In addition to the Canadian Charter and the Act, the *Radio Regulations, 1986*, the *Equitable Portrayal Code* and Radio-Canada's conditions of licence apply in this case. The current legal framework invites diversity of commentary into Canadian public spaces.

The Commission enacted section 3 of the *Radio Regulations, 1986* by exercising its regulatory powers under paragraph 10(1)(c) of the Act. This provision sets out that the Commission may, by regulation, establish programming standards. To require compliance with the *Equitable Portrayal Code*, the Commission imposed condition of licence #7 on Radio-Canada. This condition of licence was imposed through paragraph 9(1)(b) of the Act, which defines the scope of the Commission's powers when it imposes conditions of licence on broadcasting licensees.<sup>39</sup>

In paragraph 8 of the majority decision, the Commission states that "the Commission is charged with the supervision and regulation of the Canadian broadcasting system in order to implement the broadcasting policy for Canada." However, the majority decision does not cite the applicable statutory provision. It is subsection 5(1) of the Act that provides the Commission with broad regulatory and licensing powers in the exercise of its mandate to regulate and supervise all aspects of the Canadian broadcasting system in order to implement Canadian broadcasting policy.

As the Supreme Court of Canada reiterated in 2012, the objectives of the Act are not attributive of jurisdiction and cannot be used to expand an agency's powers into areas not specified by the

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<sup>39</sup> Paragraph 10(1)(c) of the Act states that "[t]he Commission may, in furtherance of its objects, make regulations [...] (c) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1)." Paragraph 9(1)(b) states that "[s]ubject to this Part, the Commission may, in furtherance of its objects, [...] (b) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee (i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and (ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the programming contemplated by paragraphs 3(1)(l) and (m)."

legislator. The scope of this general power “must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.”<sup>40</sup>

In *Genex Communications Inc.* case, the Federal Court of Appeal reiterated that the Commission could impose sanctions authorized by the legislator.<sup>41</sup> In light of the above, I cannot agree with nor support the majority’s decision to rely on the objectives of Canadian broadcasting policy, and implicitly on section 5 of the Act, to uphold the Complaint and impose restrictive measures on Radio-Canada. I believe that such measures, the purpose and effect of which is to restrict freedom of expression without regard to context, cannot stem from either the Canadian broadcasting policy objectives set out in section 3 of the Act or the Commission’s mandate under section 5 of the Act.

From my perspective, neither paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) of the Act (nor section 5 thereof) are the provisions that establish the authority to make a decision on the Complaint. The majority exceeded the powers granted to the Commission when it determined that the content broadcast by Radio-Canada was contrary to the objectives and values of the Canadian broadcasting policy and imposed the restrictive measures described in paragraphs 22 to 26 of the majority decision. The majority decision circumvented existing statutory and regulatory provisions that were specific and applicable to this case.

In my view, the findings of the majority decision in paragraphs 22 to 26 are contrary to the intent of the legislator. These conclusions of the Commission are reminiscent of the Super Bowl simultaneous substitution regime case,<sup>42</sup> in which the Supreme Court of Canada reiterated that the scope of the Commission’s authority must be determined by interpreting the provisions in question in accordance with the modern approach to statutory interpretation. In my view, the conclusions of the majority decision could have the effect of creating an erroneous precedent as to the scope of the Commission’s discretion.

Ultimately, I am of the view that, to answer the questions, “What provisions of the legislative and regulatory framework are applicable in this case? Did what was said in the Segment contravene these provisions?” the majority decision had to consider section 3 of the *Radio Regulations, 1986* and provisions 9 and 10(c) of the *Equitable Portrayal Code*. Pursuant to these provisions, the complaint should have been dismissed. A public consultation would have enabled the Commission to determine whether any amendments are required to these legal provisions in the future.

### **Conclusion of the dissenting opinion**

In my view, the majority decision failed in its obligation to consider the Canadian Charter and, on this basis, is wrong. It also set aside the provisions applicable in this case and fell back on public policy objectives to impose measures on Radio-Canada, which I believe is another error in law.

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<sup>40</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012, paragraphs 23 and 27. See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476.

<sup>41</sup> *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 (CanLII).

<sup>42</sup> *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66.

Moreover, in the absence of discriminatory comments by the host and commentator, the majority decision failed, in my view, to apply the existing law developed by the Supreme Court of Canada to the effect that there is no right to **not** be offended under the right to freedom of expression protected by the Canadian Charter and the Act. Section 3 of the *Radio Regulations, 1986* and section 10(c) of the *Equitable Portrayal Code*, which apply in this case, provide a structure for analysis that is consistent with this approach. In my view, a substantive analysis by the majority would have led to the dismissal of the Complaint and to the conclusion that the restrictive measures imposed in paragraphs 22 to 26 of the majority decision violate freedom of expression.

While the majority recognizes that the “mot ‘n’” may evolve differently in different communities, the conclusions of the majority decision do not take into account, as required by the Act, the specificity and needs of the French-speaking community served by Radio-Canada’s radio station CBF-FM. At the time of the Segment’s broadcast, powerful voices from the French-speaking Black community, which was part of the target audience of the program *Le 15-18*, defended an inclusive, contemporary vision of Francophone specificity. The conclusions of the majority decision ignore those voices and depart from recent CBSC jurisprudence regarding the use of the “mot ‘n’” on air in a radio program intended for the same target audience as the one in the current case.

It would have been better, in my opinion, to seize this opportunity to make strides toward equity, diversity, inclusion and anti-racism. A public consultation would have formed part of a dialogue to better understand the ins and outs of the lack of consensus in Canada on this issue. From an operational perspective, these discussions would have provided a better understanding of, for example, Radio-Canada’s current use of explicit warnings on the radio as a means of mitigating the use of the “mot ‘n’”. In practical terms, if lessons are to be learned about the limitations of the applicable legal framework, changes would have to be made in a transparent, predictable and fair manner.

# Dissenting opinion by Commissioner Joanne T. Levy

## Summary of dissent

In my view, the majority decision (Decision) is deeply flawed on several grounds.

- The Decision ignores the overriding right to freedom of the press enshrined in the *Canadian Charter of Rights and Freedoms*, protected by the *Broadcasting Act* and recognized by the Supreme Court of Canada.
- Justification for the majority Decision relies on the provision of the *Broadcasting Act* calling for programming of high quality. This is a subjective test that defies transparency, fairness and predictability.
- The changing social context is an insufficient ground for ignoring context, tone and previous CRTC decisions.
- The Decision will have unintended consequences leading to journalistic chill, silencing discussion and encouraging censorship.

Recommended remedy – In my view Radio-Canada and its Ombudsman adequately addressed the complaint.

I concur with the dissent lodged by Commissioner Caroline Simard, Vice-Chair, Broadcasting.

### Background

The facts of the case are as follows. In October of 2019, a film professor at Concordia University showed her class a documentary about the Québécois journalist and writer, Pierre Vallières. He is considered an intellectual leader of the Front de libération du Québec which was at the centre of the 1970 October Crisis, a seminal event in modern Canadian history. Several students took offense at the professor's use of the full title of the book, *Nègres blancs d'Amérique* in English, namely *White N\*ggers of America*. Nine months later the university received a 200 name petition to have the film professor's course cancelled.

The story was carried by *La Presse* and subsequently SRC/Radio-Canada invited a freelance journalist to analyse the question of whether taboo words are becoming taboo ideas. The host of the program introduced the segment without an advisory about the language that would arise. The discussion lasted about six and half minutes. The commentator advanced his thesis that the risk in prohibiting the use of offensive words, even when they are violent and repugnant, is that it limits the meaningful exchange and discussion of ideas. The title was mentioned four times – three in French and once in English. As a result of hearing the “n-word” on the broadcast, one listener felt discomfort sufficient to lodge a formal written complaint with Radio-Canada.

Radio-Canada management at all stages, took his complaint seriously and responded in a thoughtful, respectful and timely manner. Unsatisfied with the response, the complainant raised his objections with Radio-Canada's Ombudsman. The resulting Ombudsman's report is a thorough examination of the Journalistic Policy implications. Again, the complainant was dissatisfied and exercised his right to bring his grievance to the Commission.

## Objective of the dissent

This dissent is not disputing the total and complete repugnancy of the “n-word” (most certainly in English) nor is it dismissing or minimizing the harm that its use causes. Words are powerful. The words we choose to use – or not use – matter. Instead, the purpose of this dissent is to express the view that it is imperative to our free and democratic society that journalists have the freedom to discuss/express ideas or subjects that are difficult, controversial, and even offensive without fear of reprisal or interference from the regulator. Otherwise, important and meaningful exchanges will be missed.

## Freedom of the press

In my opinion, the majority Decision errs by ignoring the fundamental right and freedom enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and protected by the provisions of the *Broadcasting Act*.

Subsection 2(b) of the *Charter* provides that:

2. Everyone has the following fundamental freedoms:
  - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The *Broadcasting Act*, which gives the Commission its power to regulate all aspects of the Canadian broadcasting system, also cites this important fundamental right:

- 2(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

Recent jurisprudence makes clear that this freedom takes precedence over personal offence and emotional harm. In the recent case of *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, a majority on the Supreme Court of Canada ruled in favour of a stand-up comedian who had ridiculed a young, disabled man who had a public profile as a singer. As stated in this decision, freedom of expression was deemed to take precedence over the safeguard of dignity:

The exercise of freedom of expression, for its part, presupposes, at the same time that it fosters, society’s tolerance of expression that is unpopular, offensive or repugnant. Limits on freedom of expression are justified where, in a given context, there are serious reasons to fear harm that is sufficiently specific and cannot be prevented by the discernment and critical judgment of the audience.

*Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at page 7.

The majority Decision is silent on these protections and the *Radio Regulations, 1986*. It is also silent on Radio-Canada's compliance with the Canadian Association of Broadcasters's Equitable Portrayal Code which is a condition of Radio-Canada's broadcast licence (Appendix 4 of Decision 2013-263). Instead, the Decision relies on the broadcasting system requirements listed in the *Broadcasting Act*:

- 3 (1)(d)(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
- 3 (1)(g) the programming originated by broadcast undertakings should be of high standard;

and a provision specific to the Canadian Broadcasting Corporation that states;

- 3(1)(m) the programming provided by the Corporation should
  - (viii) reflect the multicultural and multiracial nature of Canada;

These provisions require no objective test to determine their application. The majority Decision omits even the most basic test of the reasonable person. Would the reasonable person, aware of the context and circumstances, find that the content of the programming was not of a high standard consistent with the policy objectives and values set out in the *Broadcasting Act*? Would the reasonable person, listening to the program, find that the citation of the book by its title, in the context of a discussion relating to the controversy of a professor citing the book by its title, expose an individual or a group or class of individuals to hatred or contempt? As we balance rights and responsibilities, is the response to certain words so strong that we leave no room to discuss the ideas behind them? In this case, if we prohibit the reference to the book's title, are we saying that there can be no public discussion regarding a foundational Quebec political text? What are we losing if we adopt this practice? Surely, this type of discussion – whether we are for or against it – has merit and is worth having. If journalists and professors are challenged for simply raising the issue, how can these ideas be fleshed out?

The Commission has ruled many times on instances where freedom of expression had to be balanced with the rights of an individual or group to be protected from abusive comments that could expose them to contempt or hatred. The approach was described in Broadcasting Decision CRTC 2009-548:

...it [the Commission] is only prepared to conclude that the limits to freedom of expression have been exceeded in cases of the most flagrant excess; where it is not obvious that regulatory requirements have been breached, the Commission will rule in favour of freedom of expression.

The majority Decision departs from this approach.

## Social context

So why has the majority decided to set aside objective tests and past practice in this case?

The majority Decision cites the Black Lives Matter demonstrations, particularly the protests of the 2020 death of George Floyd in Minnesota, as an example of the evolution of social response to discrimination and a rationale for the heightened sensitivity to systemic racism. The majority assesses that these events have shifted Canadian standards such that use of the “n-word” has now passed a tipping point of acceptability. Canada has its own history of racism and injustice that informs our society’s responses. As a quasi-judicial body with responsibility for Canadian broadcasting, we have to take a measured and dispassionate approach that balances our laws, regulations and practices with the changes necessary to keep in step with the evolving nature of our society. (We are not bound by our precedents, but they should be recognized as valuable for predictability.)

However, in my experience, the “n-word”, particularly the English word, has not just suddenly become unacceptable. It was not acceptable in casual speech in the late 1960s when Pierre Vallières’s book landed on the syllabus of my Canadian political science course at the University of Saskatchewan. As the American civil rights movement dominated the news, the title was just as offensive and purposefully sensational as it is today. The “n-word” was not acceptable a few years later when I started a decades-long career as a journalist and documentary producer. All this to say, the shift in social context has not been so great so as to suddenly render the use of the word unacceptable. Its significance has always been one of oppression, hate, and violence. What has changed are the structured methods for audience members to raise complaints and have them dealt with seriously. What has also changed are coverage in mainstream media of the shocking recent events that, understandably, evoke sympathy. But sympathy, indeed outrage, is not a solid foundation for a quasi-judicial Decision with broad and consequential implications.

In the majority Decision, much has been made of the number of repetitions of the “n-word” in the segment on *Le 15-18*. However, in the course of a feature radio segment it’s necessary to ensure listeners know what’s being discussed at whatever point they might join the broadcast. There’s no flip back feature on a live radio broadcast. The majority Decision can be read as suggesting that even one mention was too many, in which case the entire discussion would have made no sense. (Paragraph 19) As a regulator, we should not stray into micro-management of broadcast journalism.

I consider that the broad brush of the majority Decision does disservice to the very community we are supposing to protect. From writers to rap stars, the Black community has taken ownership of the “n-word”. What is to be done about discussions of their books, songs, films and other artworks on Canadian radio and television? The Commission mandates more diversity in staffing and leadership at broadcast outlets, but all are subject to this Decision when context and tone are no longer considerations.

The implications of the majority Decision go beyond CBC/Radio-Canada to affect all Canadian broadcasting (Paragraph 13). Private broadcasters take guidance from the Canadian Association of Broadcasters’s Equitable Portrayal Code administered by the Canadian Broadcast Standards Council. It has adjudicated many complaints with the Commission as the final arbiter. At the

same time the Radio-Canada case was on its way to the Commission, the CBSC ruled on a complaint regarding use of the “n-word” in its decision of 10 June 2021 “CHMP-FM (98.5 fm) concernant *Puisqu’il faut se lever.*” In that case, guests on a radio talk show used the “mot n” in French during discussion about a University of Ottawa professor who was suspended for using the “mot n” in a class. A listener complained that the usage was racist and showed lack of respect and empathy for the Black community. The CBSC reviewed its codes and precedents and decided that context and tone mitigated any perceived harm. Same “social context,” different decision!

The majority Decision cites Radio-Canada’s position as a national public broadcaster and declares it “has a duty to be exemplary in its broadcast content.” Of course, this is a laudable goal, but Canadians are not well-served if exemplary becomes equivalent to cautious and self-censoring. Journalism that is bold, enterprising and courageous is also exemplary. It will often offend, that is the reason for a complaint system and public apologies when it makes mistakes.

### **The sanctions**

I do not intend to discuss the measures imposed in the majority Decision except to underline that the Code of Ethics for television regulations demands advisories but there is no such provision specifically included for radio programming. My concern about the requirement for an apology and a report as to how Radio-Canada will mitigate the impact of offensive language/ideas in the future relates to their impact on the expression of ideas and the effect this may have on the free exchange of ideas in society.

### **Unintended consequences**

#### **Journalistic chill**

Broadcast journalists are part of an industry under tremendous strain for credibility, resources, relevance and personnel. Radio reporters and producers without legal support and leadership might, understandably, avoid stories and analysis of books, music, arts and current events that could invite controversy.

#### **Silencing discussion**

There are and will be ideas and the expression of ideas that, in a democratic society, bear discussion in a respectful and serious manner. They may be raised and created by the very diverse voices that have been muted – voices that either reference history or contemporary art forms. (Lawrence Hill’s, *The Book of Negroes* and its TV mini-series come to mind). This Decision risks making those conversations more difficult.

#### **Censorship**

The majority approach could lead to the censorship of expression regarding current events, books, songs, films and TV titles. The risk-averse in today’s newsrooms will avoid difficult discussions and self-censor. In his commentary on *Le 15-18*, Simon Jodoin argues that when we erase words, we erase ideas too. As society evolves, how will this response suppress expression?

What other words and ideas will be seen as problematic? Simply because a word or idea is offensive, does that render the discussion of the word or idea to be of a quality inconsistent with the high standard for programming mandated by the *Broadcasting Act*?

## **Conclusion**

In my judgement, the content broadcast on the Le 15-18 is protected by the *Charter*, the *Broadcasting Act* and the *Radio Regulations, 1986*, and the Equitable Portrayal Code. The discussion of Pierre Vallières's book did, indeed, meet the standard of high quality programming. It was pertinent, informative, and clear. No one has suggested that it was not a valid discussion, well-worth having especially on the 50<sup>th</sup> anniversary of the October Crisis. The tone of the discussion at no time strayed into disrespect or offensive stereo-typing. The utterance of the "n-word" four times, and always in the context of the book's title, has been enough to trigger the majority Decision.

The appropriate remedy, in my view, was met with the report of Radio-Canada's Ombudsman. It need not have gone farther. The majority Decision is not balanced and fails the tests for transparency, fairness and predictability. If the Commission wishes to use current social context to override freedom of expression, it should consider a public consultation process.

The majority Decision, ignores freedom of the press, and in my view, will stifle it. Instead of bold, current, relevant journalism we risk having analysis of the news and issues of the day become punchlines for stand-up comedians, whose freedom of expression would appear to be better protected.