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## CANADIAN BROADCAST STANDARDS COUNCIL

### ATLANTIC REGIONAL PANEL

#### CJLS-FM re a PC Party advertisement about the NDP

(CBSC Decision 08/09-1787)

Decided January 12, 2010

R. Cohen (*ad hoc*), K. Hicks, B. MacEachern, R. McKeen

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### THE FACTS

A provincial election was called in Nova Scotia on May 5, 2009 and Election Day was set for June 9. During the campaign, certain donations that the New Democratic Party (NDP) had received from union representatives were questioned in light of the new election financing rules, which, among other things, prohibit the donation of more than \$5,000, directly or indirectly, by a single organization to a recognized political party in any calendar year. The one official complaint about those donations (those referred to were said to amount to \$45,000 in all and were alleged by the complainant to have been made via the intermediary of several union locals but beneficially solely by the Mainland Nova Scotia Building and Construction Trades Council) was sent to the Chief Electoral Officer of Nova Scotia by the Campaign Director of the Progressive Conservative (PC) Party of Nova Scotia on June 2, 2009. Then, on June 9, the same individual filed a formal complaint under the appropriate section of the governing provincial statute, namely, the *Members and Public Employees Disclosure Act (MPEDA)*. Although the provincial statute is not a part of this adjudication by the Atlantic Regional Panel, in order to better understand the issues, the relevant *MPEDA* provisions are as follows:

#### Identification of actual contributor

13. No individual shall contribute to any recognized party, electoral district association or candidate funds not beneficially belonging to the individual or funds that have been given or furnished to that individual by another individual for the purpose of contributing those

funds unless the individual to whom the funds beneficially belong is identified as the contributor or unless the individual contributing the funds is the spouse of the person to whom the funds beneficially belong.

### **Restriction on contributions**

14A(1) No person may make a contribution to a candidate, electoral district association or recognized party or to an official agent or a trust for a candidate, electoral district association or recognized party except as permitted by this Act [which, among other things, places limitations on the amounts that may be given].

(2) No candidate, electoral district association or recognized party and no official agent or a trust for a candidate, electoral district association or recognized party shall accept a contribution except as permitted by this Act [which, among other things, places limitations on the amounts that may be accepted].

The complaint alleged that the Nova Scotia New Democratic Party (NDP) was in possession of “illegal campaign contributions” and in violation of the foregoing section of the *MPEDA*. In response to the allegations in the official complaint, the NDP, which argued that it had done nothing in violation of the *MPEDA*, nonetheless indicated its intention to return the money. The report of the Chief Electoral Officer, about which more is said below, was made public on February 25, 2010.

During the electoral campaign, CJLS-FM (Yarmouth) aired a paid advertisement by the Progressive Conservative Party that targeted the funding practices of the NDP. The advertisement, which aired on June 6 at approximately 9:35 am (and apparently also at other times that were not mentioned in the complaint that led to this decision), read as follows:

Female voice: Early in this election, the NDP accepted forty-five thousand dollars in illegal campaign contributions from union bosses. Only after the NDP was caught, weeks later, they gave it back. Why? They said it was because of the optics. Forty-five thousand dollars in illegal money, from union bosses. Ask yourself, can we afford union bosses to be on both sides of the bargaining table? The NDP: a risk we can't afford.

Male voice: Authorized by the official agent for the PC Party of Nova Scotia.

The CBSC received a complaint about the advertisement on that same day. The complainant outlined his concerns as follows (the full text of all correspondence can be found in the Appendix):

The radio station is playing defamatory ads implying the NDP conducted illegal activity. I have personally heard the ad minutes ago. This is not compliant with the broadcast standards code, Clause 14 Advertising (Details). The station is aware of the libellous nature of the ads as excerpted in this newspaper interview:

Chris Perry, vice-president of Radio CJLS Ltd. in Yarmouth, said his station is running the ads, but didn't get a letter. He said Operations and Sales Manager Dave Hall took a call from a New Democrat who just asked if the ad was running.

"They didn't ask us to pull it nor did they ask us to offer an apology, nor did they state it was defamatory," Mr. Perry said. "(Dave) said if there was a problem, contact the agency that booked the ads."

Mr. Perry said as far as he knows it's a legitimate ad and there's no plan to pull it." --- <http://thechronicleherald.ca/Front/1125844.html>

They are aware of the nature of the ads and continue to run them.

The station responded to the complainant on June 11, in pertinent part as follows (the full text of all correspondence can be found in the Appendix to this decision):

As you are aware, CJLS Radio and numerous other radio broadcasters in Nova Scotia aired a "paid political announcement" on behalf of the PC Party of Nova Scotia.

I assure you, at no time during the specific ad campaign did anyone contact CJLS Radio and ask us to remove it from the air and broadcast an apology. Further, we did not receive any letter or correspondence by other means to identify a problem with a particular ad and that it might be defamatory in nature.

Again, I want to be clear that we were not contacted by anyone at any time asking for the removal of the political ad in question. We were contacted by an individual stating he was with the NDP and asked if we were running the ad in question to which we replied, yes. That was the scope of the brief conversation. There was no request for removal of the ad from the air nor were we asked to run an apology.

The complainant wrote back to the station on the same day, citing Clause 14(a) of the Canadian Association of Broadcasters' (CAB) *Code of Ethics* and emphasizing his concerns with the advertisement:

You were aware of the nature of the ad through extensive media accounts and would have had the ability to review the position of the injured party with regard to the ad and its acceptability within the narrow confines of Clause 14(a). It would be inappropriate to hide under the "But no one contacted us directly" as the matter of the acceptability of the ads were part of your news broadcast and public record of this last election. Hiding one's head in the sand is not a suitable defence.

I do apologize for having to use your award-winning community-based organization in view to having the offending ad reviewed by the CBSC. This ad went over the line of what would be considered an acceptable attack ad, which I recognize as being an appropriate political tool.

The complainant then filed his Ruling Request with the CBSC on June 19, using similar language to that used in his response to the station.

## THE DECISION

The Atlantic Regional Panel examined the complaint under the following two provisions of the *CAB Code of Ethics*, both of which relate to advertising.

### Clause 13 – Advertising (General Principles)

- a) Recognizing the service that commercial sponsors render to listeners and viewers in making known to them the goods and services available in their communities and realizing that the story of such goods and services goes into the intimacy of the home, it shall be the responsibility of broadcasters and their sales representatives to work with advertisers and agencies in improving the technique of telling the advertising story so that these shall be simple, truthful and believable, and shall not offend prevailing community standards of tolerability.
- b) Advertising is to be made most effective not only by the use of an appropriate selling message but by earning the most favourable reaction of the public to the sponsor by providing the best possible programming. Nothing in the foregoing shall prevent the dramatization of the use, value or attractiveness of products and services. While appropriate legislation protects the public from false and exaggerated claims for drugs, proprietary medicines and foods, it shall be the responsibility of broadcasters and their sales representatives to work with the advertisers of these products and the advertising agencies to ensure that their value and use are told in words that are not offensive. Recognizing also that advertising appeals or commentaries by any advertiser that cast reflection upon the operation of a competitor or other industry or business are destructive of public confidence, it shall be the responsibility of broadcasters, so far as it lies within their power to do so, to prevent such advertising appeals or commentaries from being broadcast.

### Clause 14 – Advertising (Details)

- a) Broadcasters recognize that they are responsible for the acceptability of advertising material they broadcast. All commercials must conform to applicable laws and regulations.

The Panel Adjudicators read all of the correspondence and reviewed the broadcast of June 6 with the challenged paid advertisement. The Panel concludes that CJLS-FM violated Clauses 13 and 14 of the *CAB Code of Ethics*.

### **A Preliminary Observation concerning the Broadcaster’s Responsibility**

It is well-established in the jurisprudence of the CBSC that broadcasters are responsible for everything they air. In one of the more recent Panel decisions affirming this point, namely, *TQS re Call TV (version 1, round 1)* (CBSC Decision 08/09-1834 & -1856, August 11, 2009), the Quebec Regional Panel explained the issue in the following terms:

The private broadcasters’ own *Code of Ethics* provides, in the Background section, “Each broadcaster is responsible for the programming of the licensed station, network or service.” Moreover, this is entirely consistent with the statutory obligation of all licensed broadcasters under Section 3(1)(h) of the *Broadcasting Act*, which establishes broadcast licensee responsibility for everything each broadcaster airs.

This was true in the case of *CKVR-TV re “Just for Laughs”* (CBSC Decision 94/05-0005, August 23, 1995), in which private broadcaster CKVR-TV ran content created by CBC, Canada’s principal public broadcaster, *CFMT-TV re an episode of “The Simpsons”* (CBSC Decision 94/95-0082, August 18, 1995), in which CFMT-TV ran an American television program, and in numerous other instances. In other words, from the point of view of the Codes, what matters is the content that the broadcaster has aired, not who created it. At the end of the day, a broadcaster may have an issue to take up with the syndicator, the producer, the distributor or the advertiser that was at the source of the problematic content. That is *its issue*, not the complainant’s issue. As established by the *Broadcasting Act* and the *CAB Code of Ethics*, the broadcaster carries the full responsibility for what it airs. The fact that, as CJLS-FM’s Vice President observed, “at no time during the specific ad campaign did anyone contact CJLS Radio and ask us to remove it [the paid political announcement] from the air and broadcast an apology”, is not relevant. If the content was in breach of a codified standard, the responsibility lay with the broadcaster to determine that before it decided to air the content, or, having already aired it, whether to remove it from future scheduled broadcasts. Those decisions were the station’s sole responsibility, whether or not the problem had been brought to its attention by any third party.

### **The Import of the Allegation of Illegality**

The word “illegal” has a range of applications, generally reflecting a violation of a law or regulation, a statute, code, by-law, ordinance, or official set of rules. These may be, as the foregoing breadth of applications suggests, more or less pardonable. If, for example, one observes that a pass in a hockey game crosses the offensive blue line after an offensive player has crossed that line, it will be proper to refer to it as an illegal pass (according to the official rules of the sport). If one parks a car in a no-parking zone, so established by municipal authorities, it will be proper to refer to that act as illegal (according to the municipal by-laws or ordinances). Neither of the foregoing examples leaves a sense of particularly morally problematic behaviour on the part of the “perpetrator”. There is, after all, wrong-doing and *wrong-doing*.

Where, however, the word “illegal” is used to describe the breach of a public law or statute, or a code such as the *Criminal Code*, the effect of the term is notched up significantly. In such circumstances, the use of the word may become particularly harsh, pejorative, and more consequential. In effect, one may observe that the use of the word may *criminalize* the behaviour and that, in the view of the Panel, is another kettle of fish.

It follows that any use of the word “illegal” must be measured by a CBSC Panel in order to determine the level of care that the term deserves in the case of any challenged

broadcast. Where the use is of the higher, riskier level noted in the previous paragraph, the Panel must then determine whether the broadcaster has been sufficiently prudent in its application to avoid a breach of the applicable code provision.

### **The Application of the Foregoing Principle to the Matter at Hand**

The Atlantic Regional Panel considers that it was the intention of the advertiser to make a serious allegation regarding the behaviour of the NDP in the challenged election advertisement. The Panel considers that the assertion of the advertiser was that the NDP had violated a provincial statute and that that violation was serious. The implication of the paid political announcement criminalized (in provincial terms) the actions of the NDP. The 70-word advertisement made it clear that *the NDP* accepted “illegal campaign contributions”, *the NDP* “was caught”, and *the NDP* was “a risk we can’t afford.” There was an additional reference to “illegal money”. And, as discussed above, by running the paid political announcement, CJLS-FM bore full responsibility for its content.

The Panel is aware of the *Report and Disposition of Complaint dated June 9, 2009 against the Nova Scotia New Democratic Party* of February 25, 2010 of the Chief Electoral Officer of Nova Scotia. It is, however, important, for purposes of this decision to measure the challenged paid political announcement against information *available at the time of the broadcast*. The Panel has already determined that the advertiser (and hence the broadcaster) had asserted NDP responsibility for “\$45,000 in *illegal* campaign contributions”, that is, responsibility for accepting the said amount and getting *caught*, impliedly red-handed. At that time, that is to say, June 6, 2009, there had been no finding of any authority that the NDP had acted illegally in any way. Indeed, until February 25, 2010, *no* provincial authority had reached *any* conclusion regarding the aforesaid contributions. In the circumstances, the Panel considers that it was not truthful to use the word “illegal” in the paid political announcement, based on the information available at the time of the broadcast. The Panel considers it an inescapable conclusion of that finding that such an inaccuracy in the advertising would “offend prevailing community standards of tolerability”, to use the words of Clause 13.

The Panel has also taken note of the only previous CBSC decision that has dealt with the term, in that case in its adverbial form, “illegally”. That occurred in a joint decision of the National Conventional Television Panel and the British Columbia Regional Panel in *Global re a report on Global National (“Deportation Delayed”) and CIVT-TV (CTV British Columbia) re a report on CTV News at Six* (CBSC Decisions 07/08-1136 & -1135, August 7 & 19, 2008), in which the Panels concluded that “illegally” was correctly used by the two broadcasters. In that case, a group identifying itself as Media Watch argued that using the word “illegally” was an inaccurate characterization of the entry of one

Laibar Singh into Canada because many refugees travel with false documents out of necessity. The group argued that, because the use of such documents “cannot be held against him” under Canadian law, Laibar Singh had been in Canada “legally” for the entire duration of his stay.” The Panels concluded that the reports were accurate under the Codes. The Panels pointed out that the reports were “thorough, balanced and reasonably sympathetic to the plight of the failed disabled refugee claimant,” including such details as the fact that Singh had: arrived with false documents, been denied refugee status, suffered a stroke, and been ordered to leave the country. The reports also contained interviews with individuals who supported both sides of the debate. With respect to the use of the word “illegally”, the Panels made the following comments:

It is instructive to consider that document [the United Nations *Convention relating to the Status of Refugees* mentioned by the complainants]’s clear references to the issue of illegality. The Convention deals with the central principle that the complainants correctly underscore, namely, the frequent, anticipated need for refugees to escape their terrible predicament by fleeing with false or forged documentation in Article 31(1), under the heading “Refugees *Unlawfully* in the Country of Refugee”. The Article itself also uses the term “illegal” twice. [...] Canada’s *Immigration and Refugee Protection Act* provides in Sec. 122(1) that the use of false documents to enter Canada is an indictable offence, punishable in the relevant circumstances by imprisonment for up to fourteen years. Thereafter, in order to take into account the particular case of refugees and in recognition of the international *Convention relating to the Status of Refugees* cited above, the Act provides, in Sec. 133, a *deferral* of prosecution under Sec. 122 “in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.” In other words, there is no change in the *illegality* of the original possession or use of false documents, but only a protection from prosecution for a refugee claimant. Moreover, it should be noted that, in the event that refugee protection is *not* ultimately conferred, the illegal nature of the entry into Canada remains while the shelter from prosecution disappears.

The Atlantic Panel is conscious of the proper use of the word “illegal” in the foregoing decision. It finds that the circumstances of the matter they are considering are entirely different. It concludes that the broadcast of the word “illegal” in the matter at hand was unjustified, and neither truthful nor accurate on the basis of the information then available to the broadcaster, and was, consequently, in breach of Clauses 13 and 14 of the *CAB Code of Ethics*.

### **An Afterword: The Decision of the Chief Electoral Officer**

As it happens, the decision of the Chief Electoral Officer of February 25, 2010 (released *following* the adjudication of this matter by the Atlantic Regional Panel, but prior to the drafting of the decision text) supports the conclusions of the Panel; her findings with respect to the issue of the illegality of any acts on the part of the NDP are as follows:

The NDP did not accept contributions from [the Unions] when it knew or should have known that the contributions were being made with funds that had been given or

furnished to the respective contributors by the Trades Council in contravention of Section 13 of *MPEDA*.

There is no evidence on which to conclude that the Official Agent of the NDP knew or should have known, at the time the contributions were accepted, that the contributions made by the Trade Unions were made with funds that did not beneficially belong to them. The contributions from the Trade Unions were made to the NDP on or about April 28, 2009 and deposited by the NDP between April 28, 2009 and May 12, 2009. However, it was not until May 30, 2009 that the NDP Campaign Director and the Official Agent of the NDP first became aware that “there was talk at the Trades Council meeting [held on April 9, 2009] on whether the Trades Council would reimburse the Trade Unions for the donations that were to be made to the NDP”. Accordingly, this alleged violation has not been established.

The Panel notes that there were other findings of the Chief Electoral Officer in her decision that are not relevant to the paid political announcement. For that reason, they are not cited here.

### **Broadcaster Responsiveness**

In all CBSC decisions, the Council’s Panels assess the broadcaster’s responsiveness to the complainant. In the present instance, the Panel finds that the response of CJLS-FM’s Vice President was short and focussed primarily on the fact that the station had not had any complaints about any problems with the paid political announcement or any requests that they remove it from the air. The responsibility for the content is, however, that of the broadcaster, and the lack of communication from the public regarding any problematic content does not alleviate that responsibility. The letter itself did not address the concerns of the complainant and was, therefore, on the edge of acceptability in terms of the broadcaster’s obligation of responsiveness. Should there be another occasion when a response to a complaint from a member of the public is required, the Panel expects that CJLS-FM would be more focussed and thoughtful.

### **ANNOUNCEMENT OF THE DECISION**

CJLS-FM is required to: 1) announce the decision, in the following terms, once during peak listening hours within three days following the release of this decision and once more within seven days following the release of this decision during the time period in which the advertisement was broadcast, but not on the same day as the first mandated announcement; 2) within the fourteen days following the broadcasts of the announcements, to provide written confirmation of the airing of the statement to the complainant who filed the Ruling Request; and 3) at that time, to provide the CBSC with a copy of that written confirmation and with air check copies of the broadcasts of the two announcements which must be made by CJLS-FM.



The Canadian Broadcast Standards Council has found that CJLS-FM breached Clauses 13 and 14 of the *CAB Code of Ethics* in its broadcast of a paid political announcement on June 6, 2009. That commercial accused the NDP of responsibility for \$45,000 in illegal campaign contributions; however, the CBSC has determined that the broadcast of the word “illegal” in the matter at hand was unjustified, and was neither truthful nor accurate on the basis of the information then available to the broadcaster and was, consequently, in breach of Clauses 13 and 14 of the *CAB Code of Ethics*.

*This decision is a public document upon its release by the Canadian Broadcast Standards Council.*

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## APPENDIX

### CBSC Decision 08/09-1787 CJLS-FM re a PC Party advertisement about the NDP

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#### The Complaint

The CBSC received the following complaint via its webform on June 6, 2009:

station: CJLS

program: Advertising

date: June 6, 2009

time: 9:40 am

concern: The radio station is playing defamatory ads implying the NDP conducted illegal activity. I have personally heard the ad minutes ago. This is not compliant with the broadcast standards code, Clause 14 Advertising (Details). The station is aware of the libelous nature of the ads as excerpted in this newspaper interview:

Chris Perry, vice-president of Radio CJLS Ltd. in Yarmouth, said his station is running the ads, but didn't get a letter. He said operations and sales manager Dave Hall took a call from a New Democrat who just asked if the ad was running.

"They didn't ask us to pull it nor did they ask us to offer an apology, nor did they state it was defamatory," Mr. Perry said. "(Dave) said if there was a problem, contact the agency that booked the ads."

Mr. Perry said as far as he knows it's a legitimate ad and there's no plan to pull it." --- <http://thechronicleherald.ca/Front/1125844.html>

They are aware of the nature of the ads and continue to run them.

#### Broadcaster Response

The station responded to the complainant on June 11:

This letter is in response to your complaint to the CBSC of which CJLS Radio is a member.

As you are aware, CJLS Radio and numerous other radio broadcasters in Nova Scotia aired a "paid political announcement" on behalf of the PC Party of Nova Scotia.

I assure you, at no time during the specific ad campaign did anyone contact CJLS Radio and ask us to remove it from the air and broadcast an apology. Further, we did not receive any letter or correspondence by other means to identify a problem with a particular ad and that it might be defamatory in nature.

Again, I want to be clear that we were not contacted by anyone at any time asking for the removal of the political ad in question. We were contacted by an individual stating he was with the NDP and asked if we were running the ad in question to which we replied, yes. That was the scope of the brief conversation. There was no request for removal of the ad from the air nor were we asked to run an apology.

I hope this letter explains our position.

## **Additional Correspondence**

The complainant wrote back to the station on June 11:

I attempted to phone Saturday morning but was unable to reach anyone. My understanding of Clause 14 is the broadcaster is responsible to review [sic] the suitability of all advertising. Clause 14 reads:

Clause 14 - Advertising (Details)

(a) Broadcasters recognize that they are responsible for the acceptability of advertising material they broadcast. All commercials must conform to applicable laws and regulations.

You were aware of the nature of the ad through extensive media accounts and would have had the ability to review the position of the injured party with regard to the ad and its acceptability within the narrow confines of Clause 14 (a). It would be inappropriate to hide under the "But no one contacted us directly" as the matter of the acceptability of the ads were part of your news broadcast and public record of this last election. Hiding one's head in the sand is not a suitable defence.

I do apologize for having to use your award-winning community-based organization in view to having the offending ad reviewed by the CBSC. This ad went over the line of what would be considered an acceptable attack ad, which I recognize as being an appropriate political tool. I'm sure you're aware of the loss of credibility that occurred by the actions of the *Live at 5* crew from the Stéphane Dion interview last federal election, the CBSC decision being released recently.

The complainant also filed his Ruling Request on June 19:

My understanding of Clause 14 is the broadcaster is responsible to review [sic] the suitability of all advertising. Clause 14 reads:

Clause 14 - Advertising (Details)

(a) Broadcasters recognize that they are responsible for the acceptability of advertising material they broadcast. All commercials must conform to applicable laws and regulations.

You were aware of the nature of the ad through extensive media accounts and would have had the ability to review the position of the injured party with regard to the ad and its acceptability within the narrow confines of Clause 14 (a). It would be inappropriate to hide under the "But no one contacted us directly" as the matter of the acceptability of the ads were

part of your news broadcast and public record of this last election. Hiding one's head in the sand is not a suitable defence.