December 19, 2014

Guideline / Interpretation note: 2014-01

Definition of leadership campaign expenses and nomination campaign expenses[1]

Issue

The definitions of leadership and nomination campaign expenses under the *Canada Elections Act* ("CEA") do not capture certain expenses related to the campaign. This raises questions as to how expenses not captured by the definition are to be treated.

Guideline/Interpretation

The interpretation and approach of Elections Canada to leadership and nomination campaign expenses is as follows:

(1) Leadership and nomination campaign expenses, as defined in the CEA, only include expenses incurred during the contest as an incidence of the contest. An expense is incurred when the campaign becomes liable to pay.

(2) Expenses incurred by the campaign prior to the start of the contest or after the end of the contest are not expressly regulated, despite the fact that the related property or services may be used during the contest period.

(3) In the case of a nomination contestant, this means that a contestant may benefit from the use of various property and services during the nomination contest period without them counting towards the limit on nomination campaign expenses.

(4) This also means that the repayment of claims related to expenses that are not within the definition of campaign expenses because they were incurred outside the contest period are not governed by any statutory time limits.

[1] In this document, references to provisions of the *Canada Elections Act* refer to the current numbering. The numbering will be adjusted after December 19, 2014, to reflect the changes brought about by Bill C-23 that will come into force at that time.

(5) However, all contributions received by a leadership or nomination campaign in relation to the contest are subject to the controls on contributions in the CEA and must be reported, irrespective of when they were received.

(6) As a result of the above, any expenses incurred in relation to a leadership or nomination campaign, including those incurred before or after the contest period, must either be paid using regulated campaign funds or accepted as non-monetary contributions (or transfers) to the contestant's campaign. A person who pays for an expense in relation to a leadership or nomination campaign is making a non-monetary contribution to the campaign that is subject to the controls on contributions in the CEA.

(7) Expenses incurred in relation to a leadership or nomination campaign before or after the contest period are not subject to the mandatory reporting requirements for campaign expenses. However, expenses incurred before or after the contest period should nevertheless be reported as "other" expenses. Otherwise, there would be on the face of the return no explanation for the variance with the surplus calculated using the relevant provisions of the CEA. To the extent that the campaign bank account was used exclusively for contest-related expenses, Elections Canada would treat contestants as "substantially compliant."

(8) Finally, the definition of leadership and nomination campaign expenses does not include non-monetary contributions or transfers used by the campaign. In this regard, it differs from the definition of election expenses for candidates and parties. Accordingly, when reporting non-monetary contributions or transfers, contestants should include them as "other" expenses, but not as campaign expenses.

Background

Legal framework

Since 2004, the CEA has regulated the financial aspects of leadership and nomination contests.[2] The basic regulatory structure for these contests is similar to that which governs candidate finances, in that:

- Contestants (and candidates) are deemed to have been contestants (or candidates) from the time that they first received a contribution or incurred a campaign expense.
- There are limits on the amount and restrictions on the source of contributions, both monetary and non-monetary, that can be made to contestants and candidates.
- All monetary contributions and monetary transfers[3] from other entities to the campaigns must be deposited in a separate bank account for the exclusive use of the campaign.

[2] In this document, unless otherwise specified, the use of the words "contest" and "contestants" includes both leadership and nomination contests and contestants.

- All campaign expenses of contestants, like candidates, must be paid using regulated funds from the campaign's bank account.
- After all campaign expenses have been paid, the difference between the total monetary contributions and monetary transfers received by the campaign and the total paid campaign expenses is considered to be surplus and must be disposed of in accordance with certain rules.
- There are disclosure rules on all contributions and transfers as well as campaign expenses.

There are important differences between the rules that apply to leadership contestants, nomination contestants and candidates. The restrictions on contributions and transfers are not identical. Candidates and nomination contestants are subject to different expenses limits, while leadership contestants are not subject to any. However, the above regulatory structure is common to all.

It flows from this regulatory structure that any expenses that are not properly campaign expenses are not to be paid using regulated money (i.e. subject to limits and disclosure rules) out of the campaign account and are not subject to disclosure.

To give a very simple example, if a candidate were to use campaign funds to pay for renovations to his kitchen, this would (1) be inconsistent with the requirement to have a separate bank account for the exclusive use of the campaign and (2) create problems with regard to the disposition of the surplus, as the rules governing the calculation of the surplus do not take into account outflows that are unrelated to the campaign. In order to function properly, the regulatory system governing political financing for both contestants and candidates must apply to all campaign expenses and only to campaign expenses.

Definition of leadership and nomination campaign expenses

When Parliament enacted rules governing the financial aspects of leadership and nomination campaigns in 2004, it provided in section 2 of the CEA definitions of what constitute leadership and nomination campaign expenses. The definitions are identical (emphasis added):

> "leadership campaign expense" means an expense *reasonably incurred* by or on behalf of a leadership contestant *during a leadership contest* as an incidence of the contest, including a personal expense as defined in section 435.03.
>
> "nomination campaign expense" means an expense *reasonably incurred* by or on behalf of a nomination contestant *during a nomination contest* as an incidence of the contest, including a personal expense as defined in section 478.01.

These definitions are strikingly different from the definition of an "electoral campaign expense" for candidates, which captures any "expense reasonably incurred as an incidence of the election" (s. 406), irrespective of when it was incurred. For example, if a candidate buys lawn signs prior to the election for

[3] The CEA allows for the "transfer" of funds as well as for the provision of goods and services between various regulated political entities. Such transfers must be reported but are not subject to the limits on contributions. See subsections 404.2(2), (2.1) , (2.2) and (3). In this document, unless the context indicates otherwise, the reference to non-monetary and monetary contributions includes transfers.

use during the election, such an expense is regulated as a campaign expense and is subject to all of the applicable regulatory controls: it must be paid out of the campaign bank account using regulated money and is subject to disclosure requirements.[4]

In the case of contest expenses, in order to fall within the definition, they must not only be incurred as an incidence of the contest, but the expenses must also have been incurred during the contest and not before or after it.

Literally applied, this would exclude, for example, all advertising purchased prior to the beginning of the contest, even if it is used during the contest. It would also exclude expenses incurred subsequently, such as the fees of an auditor for the contestant's return. Excluded expenses do not have to be reported, are not subject to spending limits (in the case of nomination contestants) and, arguably, are not to be paid using regulated money. A campaign could therefore avoid all financial controls by ensuring that its expenses are incurred outside the contest period. In this regard, given that the official contest period is entirely determined by the registered party or registered electoral district association that organizes it, the campaign period could be set in such a way as to facilitate avoidance.[5]

Another important difference is that, while the definition of an election expense applicable to political parties and candidates (s. 407) includes non-monetary contributions and transfers, this is not the case in the definitions of nomination and leadership campaign expense. The inclusion of non-monetary contributions and non-monetary transfers as election expenses is important in order to capture all of the resources used by the candidate or party for the purpose of the expenses limit. In the absence of such an inclusion, the expenses limit becomes largely ineffective, since resources required by the campaign can be obtained by way of non-monetary contributions outside of the expenses limit (instead of being purchased with regulated funds by the campaign and caught by the expenses limit).

[4] Because lawn signs used during the campaign are not only "electoral campaign expenses" (s. 406) but are also "election expenses" (s. 407), the amount of the expense incurred on the signs counts towards the statutory limit on election expenses (s. 440).

[5] In the case of a nomination contest, the period is set out in the notice issued to the Chief Electoral Officer *after* the selection date (s. 478.02).

Considerations

Elections Canada's prior administration of the rules

Until relatively recently, Elections Canada's interpretation of the CEA was that any expense incurred in relation to a contest is a campaign expense, even if was not incurred during the contest period. In this regard, the words "incurred … during a nomination contest" and "incurred … during a leadership contest" were treated as drafting errors, on the assumption that the regime for contestants was intended to be similar in logic to that for candidates and that all expenses incurred by the campaign in relation to a contest were subject to the regulatory framework. On that basis, contestants were asked to report all expenses incurred in relation to a contest and to pay such expenses using regulated funds. Whether posters used for the contest were purchased prior to or during the contest period was irrelevant. In the case of nomination contestants, all expenses related to goods or services used by the campaign during the contest were counted towards the expenses limit, irrespective of when the expenses were incurred.

Elections Canada has also required contestants to report all non-monetary contributions and transfers obtained and used by the campaign to promote the contestant as either a leadership or nomination campaign expense. As a result, in the case of a nomination contestant, the commercial value of the contribution or transfer was also captured for the purpose of expenses limits.

Recommendations from the Chief Electoral Officer

In previous recommendations to Parliament (2010), the Chief Electoral Officer identified problems with the leadership and nomination campaign expense definitions.[6] Recommendations were made with the goal of providing a comprehensive and coherent framework governing the political financing activities of leadership and nomination contestants.

At the time, similar recommendations were made regarding amendments to provisions relating to the expenses limit for third party election advertising and the prohibition on election advertising applicable to electoral district associations[7]. Both of these provisions of the CEA also only restricted expenses incurred during the election period and were therefore ineffective: one could easily avoid the limit on third party election advertising or the prohibition on election advertising by electoral district associations by simply incurring the related expenses in advance of the call of the election and transmitting the advertising during the event.

[6] See the letter from Marc Mayrand to Joe Preston, MP, Chair of the Standing Committee on Procedure and House Affairs, September 22, 2010, at www.elections.ca/content.aspx?section=res&dir=rep/off/sta_2010b&document=index&lang=e.

[7] *Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election*, June 10, 2010, Recommendation II.6 at: http://www.elections.ca/content.aspx?section=res&dir=rep/off/r40&document=index&lang=e.

Bill C-23

In 2014, Bill C-23[8] included amendments to the provisions defining the limit on third party election advertising and the prohibition on election advertising by electoral district associations in order to remedy the problems with the under-inclusive definition, as the Chief Electoral Officer had recommended.[9] However, Bill C-23 did not address the same issue with the definitions of leadership and nomination campaign expenses.

During the committee review of Bill C-23, the fact that amendments to the leadership and nomination campaign expense definitions were not included in the bill was raised as a point of concern by the Chief Electoral Officer. Subsequently, a proposed amendment to the bill to make the leadership and nomination campaign expense definitions more inclusive was rejected in parliamentary committee.

Analysis and Discussion

It appears clear from the text of the provision and recent legislative history that Parliament did not intend to include in the definitions of leadership and nomination campaign expenses all expenses incurred in relation to the campaign, but only those that were incurred during the contest period.

There are two possible approaches that may flow from this.

First approach

According to a first approach, which reflects the unity of the basic regulatory framework explained at the outset, any expense that is not within the definition is basically outside the regulatory reach of the CEA, both in terms of how it is incurred and how it is paid. This means that expenses incurred outside the contest period do not need to be reported and may be paid using unregulated funds altogether. As a

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[8] *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts*, S.C. 2014, c. 12 (hereinafter "Bill C-23").

[9] Prior to the passage of Bill C-23, subsection 350(1) of the CEA defined the limit on third party election advertising as follows:

> "A third party shall not incur election advertising expenses of a total amount of more than $150,000 *during an election period* in relation to a general election."

Bill C-23 amended this definition by deleting the text "*during an election period,*" thereby making the limit apply to all election advertising incurred in relation to a general election. A corresponding amendment was made for election advertising incurred in relation to a by-election.

Similarly, prior to the passage of Bill C-23, section 403.04 of the CEA defined the prohibition on election advertising by electoral district associations as follows:

> "No electoral district association of a registered party shall, *during an election period, incur expenses* for election advertising, as defined in section 319."

Bill C-23 amended this definition (now section 450) as follows:

> "No electoral district association of a registered party shall, during an election period, incur expenses for – *or transmit or cause to be transmitted* – election advertising as defined in section 319."

The prohibition is now applicable to all election advertising transmitted during an election period, regardless of when the expense was incurred.

practical matter, this would make rules governing the financial aspects of the contest optional for participants, who could organize their affairs in such a way as to be able to avoid all financial controls.

Pushed to its logical conclusion, it also means that using the campaign bank account to pay for these unregulated expenses would be improper and that, in calculating the surplus, one should ignore all outflows that relate to the payment of expenses that do not meet the definition. This would result in notices of surplus being issued (in accordance with specific legal provisions) even where there are no actual surplus funds, and potential offences for failure to dispose of the surplus in accordance with the requirements of the CEA.

To avoid such situations, Elections Canada could in practice ask (although it would not be mandatory) that all expenses incurred in relation to the contest, but outside the contest period, be reported as "other" expenses. While there would technically be a surplus on application of the CEA provisions governing the calculation of the surplus, the report would effectively allow everyone to see how the money was in fact used and why it is no longer in the bank account. To the extent that the account was used for contest-related expenses, Elections Canada could treat the contestants as "substantially compliant."

Such an approach would not, however, address problems tied to the contribution side of the regime: any expense incurred outside the definition could be paid with unregulated money, outside the bank account. Similarly, goods or services provided to the campaign as non-monetary contributions or transfers would also not be treated as contributions, even if the goods or services were to be used during the contest. This seems to fly in the face of what appears to have been Parliament's intent when it limited contributions in 2004 and 2006 in order to restrict the influence of large contributors.

Second approach

In order to preserve the effectiveness of the limits on contributions to contestants, a second approach would be to look at the contribution side and not interpret "contribution," which is not defined in the CEA,[10] in a manner that is tied to the definition of campaign expenses. On that basis, any amount of money given, or a good or service provided, in relation to the contest is a contribution. This is so even if the money is given expressly in relation to an expense incurred outside the contest period (or if the good or service was given and accepted outside the period).

Under this approach, the unity between the expense side and the contribution side in the regulatory framework is broken: there may be a regulated contribution in relation to an unregulated expense. However, all financial activities related to the campaign are effectively reported.

[10] Section 2 provides that a contribution includes monetary and non-monetary contributions. It goes on to say that a monetary contribution is an amount of money provided that is not repayable. It also defines how a non-monetary contribution is evaluated. However, this clearly falls short of defining what it is. For example, if a party sells an asset (e.g. a building) at market value, the money it receives is surely not a contribution, even though it is not repayable. Similarly, a birthday gift given to a person who is or will be a candidate is not a contribution, not because of anything in section 2 of the CEA, but because of the ordinary meaning of the word "contribution" in the electoral context.

On the one hand, all monetary contributions (understood as any amount given to the campaign for the contest in the broad sense) would have to be placed in the bank account and reported.[11] As such, when the money is used, this will have to be reported if the payment is related to a campaign expense (as narrowly defined by the CEA) and could be optionally reported if used for an "other" expense related to the contest but incurred outside the contest period. As indicated earlier, even if the provisions dealing with the calculation of the surplus only take into account "campaign expenses," Elections Canada would treat contestants as "substantially compliant" to the extent that all expenses have been accounted for.

On the other hand, resources (e.g. signs) received as non-monetary contributions or transfers would be reported as such. While they would not be reported as campaign expenses, given the statutory definition, they should be reported as "other" expenses.[12] As such, they would not be subject to the expenses limit for nomination contestants.

Elections Canada believes that this second approach better reflects the intent of Parliament as it preserves the controls on contributions to leadership and nomination contestants. Nevertheless, like the first approach, this second approach still leaves a number of situations unregulated.

For one thing, nomination contestants can avoid limits on expenses, either by relying on non-monetary contributions or transfers or by incurring expenses outside the contest period so as to fall outside the narrow statutory definition of campaign expenses.

Similarly, contestants could avoid the statutory time limit for the payment of claims for those expenses incurred outside the contest period and not captured within the definition of campaign expenses.

In concluding, it should also be noted that political parties and electoral district associations usually set their own rules, in addition to those in the CEA, for holding nomination and leadership contests. In some cases, they provide additional restrictions on political financing aspects of the contest, which they administer themselves (e.g. expenses limits for leadership contestants). As long as they do not conflict with the requirements of the CEA, this is not problematic.

[11] See subsections 435.21(3) and 478.12(3).

[12] Elections Canada's electronic filing systems automatically records non-monetary contributions as expenses. For candidates and political parties, this reflects a legal requirement in section 407. Contestants are not legally bound to report non-monetary contributions as expenses. Doing so, however, provides a more accurate picture of the resources used by the campaign.