



Written Opinions, Guidelines and Interpretation Notes

The Chief Electoral Officer issues guidelines and interpretation notes on the application of the *Canada Elections Act* to registered parties, registered associations, nomination contestants, candidates and leadership contestants, in accordance with section 16.1 of the *Canada Elections Act*. Before the issuance of any guideline or interpretation note, registered federal political parties and the Commissioner of Canada Elections are consulted and invited to provide comments on a draft version. Guidelines and interpretation notes provide guidance and promote consistency in the interpretation and application of the Act. However, they are for information only and do not displace the provisions of the Act.

Interpretation Note: 2014-01 (August 2015)

Definition of leadership campaign expenses and nomination campaign expenses

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 and paid.

Interpretation

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

Expenses

- (1) Leadership and nomination campaign expenses include only expenses incurred during the contest as an incidence of the contest. An expense is incurred when the campaign becomes legally obligated to pay.
- (2) Leadership and nomination campaign expenses also include property or services accepted as non-monetary contributions or transfers during the contest period.
- (3) Expenses incurred by a campaign prior to the start of the contest or after the end of the contest are not regulated, even though the property or services may be used during the contest period. Such expenses cannot be paid using campaign funds and are not subject to any reporting requirements.
- (4) In the case of nomination contestants, this means that a contestant may benefit from the use of various property and services during the nomination contest without

counting them toward the limit on nomination campaign expenses, if the expenses were incurred or the property or services were accepted as non-monetary contributions outside the contest period.

- (5) This also means that the payment of claims related to expenses that are excluded from the definition of campaign expenses because they were incurred outside the contest period is not governed by any statutory time limits and is not subject to any reporting requirements.

Contributions and loans

- (6) Monetary contributions and loans accepted by a leadership or nomination campaign are subject to the controls on contributions and loans in the CEA and must be reported, irrespective of when they were received. However, any money given or loans obtained specifically to pay for unregulated expenses incurred outside the contest period are not subject to the controls on contributions and loans in the CEA. Accordingly, such funds must not be deposited in the campaign bank account, are not reported and do not form part of the campaign surplus.

- (7) Non-monetary contributions accepted by a leadership or nomination campaign during the contest period are subject to the controls on contributions in the CEA and must be reported. However, non-monetary contributions accepted outside the contest period are not subject to the controls on contributions in the CEA and are not reported.

Transfers

- (8) Monetary transfers accepted by a leadership or nomination campaign are subject to the controls on transfers in the CEA and must be reported, irrespective of when they were received.
- (9) Non-monetary transfers accepted by a leadership or nomination campaign are subject to the controls on transfers in the CEA and can only be accepted during the contest period.

Surplus

- (10) If a campaign were to pay expenses incurred outside the contest period using campaign funds, this would constitute an improper use of campaign funds and a potential offence for failure to dispose of the campaign surplus in accordance with the requirements of the CEA.

Transition

- (11) For nomination contests that began prior to this interpretation being in effect, contestants and financial agents may, with respect to the treatment of expenses, rely on the guidance found in the *Political Financing Handbook for Nomination Contestants and Financial Agents* that preceded this interpretation and may use campaign funds to pay expenses that were not incurred during the contest period.

Background

Legal Framework

Since 2004, the CEA has regulated the financial aspects of leadership and nomination contests.¹ 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 accept a contribution or transfer, borrow funds or incur a campaign expense.
- There are limits on the amount and restrictions on the source of contributions, both monetary and non-monetary, and loans that can be made to contestants and candidates.
- Monetary contributions, loans and monetary transfers² from other entities to a campaign must be deposited in a separate bank account for the exclusive use of the campaign.
- All paid 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 contributions, loans 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. money that is subject to limits and disclosure rules) out of the campaign bank 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 disposal of the surplus, as the rules governing the calculation of the surplus do

¹ In this document, unless otherwise specified, the use of the words "contest" and "contestants" includes both leadership and nomination contests and contestants.

² 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 364(2) to (6).

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 478.

“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 476.

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. 375), irrespective of when it was incurred. For example, if a candidate buys lawn signs prior to the election for 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.³

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

Considerations

Elections Canada’s prior administration of the rules

Prior to Bill C-23,⁴ Elections Canada’s interpretation of the CEA was that any expense incurred in relation to a contest was a campaign expense, even if it 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

³ Because lawn signs used during the campaign are not only “electoral campaign expenses” (s. 375) but are also “election expenses” (s. 376), the amount of the expense incurred on the signs counts toward the statutory limit on election expenses (s. 477.49).

⁴ *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”).

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 property or services used by the campaign during the contest were counted toward the expenses limit, irrespective of when the expenses were incurred.

Elections Canada had also required contestants to report all non-monetary contributions and transfers that the campaign obtained and used 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, irrespective of when the non-monetary contribution or transfer was accepted.

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.⁵ 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, Elections Canada recommended similar amendments to provisions relating to the expenses limit for third party election advertising and the prohibition on election advertising by electoral district associations.⁶ As with contestant campaign expenses, both of these provisions had 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.

Bill C-23

In 2014, Bill C-23 introduced 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 definitions, as the Chief Electoral Officer had recommended. However, Bill C-23 did not address the same issue with the definitions of leadership and nomination campaign expenses.

During the parliamentary committee review of Bill C-23, the Chief Electoral Officer raised the absence of amendments in the bill to the definitions of leadership and nomination

⁵ 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.

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

campaign expenses as a point of concern. Subsequently, the committee rejected a proposed amendment to make those definitions more inclusive.

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. The defining moment in determining whether or not an expense is a leadership or nomination campaign expense is therefore when the expense is incurred.

Incurring expenses

An expense is incurred when the campaign becomes legally obligated to pay. The timing of this event will vary based on how the property or service is procured. In cases where a written contract is executed, such as an office lease or a loan agreement, the expense is incurred when the contract is signed. In cases where no written contract exists, the expense is incurred when a verbal agreement is reached. Generally, this will be when property or services are ordered or, in the case of retail purchases, at the point of sale.

In the case of a non-monetary contribution of property or services, the expense is incurred when the campaign accepts the contribution.

Having the campaign expense definition turn on when an expense is incurred has the effect of excluding from campaign expenses any expenses incurred outside the contest period. For example, items such as promotional materials that are ordered before the start of the contest are not campaign expenses, despite the fact that the items may be used throughout the contest period. In the case of a nomination contest, this means the limit on nomination campaign expenses only applies to expenses incurred and non-monetary contributions accepted during the contest period.

Expenses incurred after the end of the contest are not reported, are not subject to expenses limits (in the case of nomination contestants) and are not to be paid using regulated funds. For example, expenses incurred after the contest for auditing the campaign return or for raising funds to pay outstanding campaign debt would not be regulated by the CEA.

The regulatory reach of the political financing regime governing leadership and nomination campaign expenses therefore depends on (1) the start and end dates of the contest established by the registered association or the registered party, and (2) the timing of when expenses are incurred.

Campaign surplus

The surplus of a leadership or nomination campaign is defined by the CEA as the amount by which monetary contributions and other amounts received that are not repayable exceeds paid campaign expenses and monetary transfers to affiliated political entities. Nomination campaigns are required to dispose of surplus funds to the official agent of the candidate endorsed by the party in the electoral district, the registered association that held the

contest or the registered party. Leadership campaigns are required to dispose of surplus funds to the registered party or a registered association of the party.

As noted, campaign funds may only be used to pay campaign expenses and disbursements such as loan repayments and transfers to affiliated political entities. This means that using campaign funds to pay unregulated expenses (i.e. expenses incurred outside the contest period) constitutes an improper use of the funds and a potential offence for failure to dispose of the campaign surplus in accordance with the requirements of the CEA.

Contributions and loans

Monetary contributions and loans accepted by a leadership or nomination campaign, as well as contributions sent to the party and directed to a leadership contestant, are subject to the controls on contributions and loans in the CEA and must be reported, irrespective of when they were received. However, any monetary contributions given or loans obtained specifically to pay for unregulated expenses incurred outside the contest period are not subject to the controls on contributions and loans in the CEA. They are not to be deposited in the campaign bank account and are not reported.

Non-monetary contributions accepted by a leadership or nomination campaign during the contest period are subject to the controls on contributions in the CEA and must be reported. Non-monetary contributions accepted by a leadership or nomination campaign outside the contest period are not subject to the controls on contributions in the CEA and are not reported.

Transfers

Monetary transfers accepted by a leadership or nomination campaign are subject to the controls on transfers in the CEA and must be reported, irrespective of when they were received. Such funds must be deposited in the campaign bank account and can only be used to pay campaign expenses.

Non-monetary transfers can only be accepted during the contest period, are subject to the controls on transfers in the CEA and must be reported as both non-monetary transfers received and as campaign expenses at the commercial value of the transferred property or service.

Contest rules established by political parties and electoral district associations

It should also be noted that political parties and electoral district associations establish the contest period and 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.

Transition

As many nomination contests will have been conducted or will be in progress for the 2015 general election when this interpretation note is in effect, many nomination campaigns will not have administered their financial transactions as described in this interpretation note. They will have instead relied on the *Political Financing Handbook for Nomination Contestants and Financial Agents* that was published at the time. Therefore, for nomination contests that began prior to this interpretation being in effect, contestants may rely on the guidance found in that handbook with respect to the treatment of expenses and may use campaign funds to pay expenses that were not incurred during the contest period.