

December 19, 2014

Guideline / Interpretation note: 2014-02

The use of Member of Parliament resources outside of an election period

Issue

Whether and to what extent the *Canada Elections Act* (“CEA”) may regulate the use, outside of an election period, of the resources provided to a Member of Parliament (“MP resources”).

Interpretation

The interpretation and approach of Elections Canada to the use of MP resources outside of an election period is as follows:

- (1) As a general rule, the use of MP resources outside of an election period does not constitute a regulated contribution or expense for the purposes of the CEA.
- (2) In certain limited circumstances, where MP resources are being used not for a person’s role as MP but for other purposes related to the electoral process, the use of the resources may constitute a regulated transaction subject to the CEA. In those circumstances, the rules in the CEA on contributions or expenses may apply, as described below.
- (3) One circumstance where the rules will apply is where resources are simply given to a regulated political entity distinct from the MP. (For example, an MP gives a computer or photocopier from the MP’s parliamentary office to a registered party to use at party headquarters.)
- (4) A second circumstance where the rules may apply is where an MP retains control over the resources but uses them for “non-parliamentary” purposes, for activities that fall under the regulatory purview of the CEA. (For example, an MP uses staff in his or her parliamentary office, during their paid time, to work on a fundraiser for the registered association of the MP’s electoral district.)

(5) While the list of regulated activities should not be closed, the application of the CEA to the use of MP resources is restricted to situations where it is clear that the activity cannot reasonably be related to a parliamentary function. The simple fact that a resource is used in a partisan manner or to advance partisan interests is not sufficient to make it subject to the CEA.

The consequences of a finding that one of these non-parliamentary activities is regulated under the CEA include the following (depending on the particular facts):

- The value represented by the activity or resource may be treated as a non-monetary contribution from the MP to the recipient entity (party, association, nomination contestant or leadership contestant). A contribution is subject to the rules on individual contribution limits for the contributor, and to the rules on excessive contributions and reporting for the recipient entity.
- The value of the activity or resource may also be viewed as an expense that is regulated under the CEA. Political entities regulated under the CEA must report expenses. For some entities, the expenses are subject to limits.
- If an MP's use of parliamentary resources in another electoral district where a by-election is underway clearly benefits a regulated entity, is not related to a parliamentary function and is not clearly accepted or received by the benefiting entity, it may be treated as third party election advertising. Third party election advertising is subject to financial limits, and to registration and reporting requirements.
- In its role of administering the CEA and assessing compliance during audits, Elections Canada may ask political entities questions or request information from them if one of these scenarios comes to its attention. Where appropriate, the Chief Electoral Officer may request that a return be amended or updated to reflect the relevant contribution or expense.

Background

Elections Canada has received several inquiries recently on the use of resources provided by law to MPs. In particular, there have been questions about whether the use of MP resources in specific situations **outside of an election period** is regulated under the CEA. The questions in each case were whether the activity was "parliamentary," whether it might constitute a contribution under the CEA, and what the implications might be of such a finding.

Legal Framework

The CEA deals with various activities related to the electoral process. The purpose of the CEA is distinct from that of the *Parliament of Canada Act* and the *Members By-law* under that Act.

Two concepts in the CEA are key to the discussion in this note. Those are “contribution” and “expense.” Contributions are linked to both limits and reporting requirements. The notion of an “expense” breaks down into further categories, depending on which political entity or activity is in question. For example, a larger category of expense, for a candidate, is “electoral campaign expense.” Expenses are subject to various types of reporting requirements and may be subject to limits as well. Some of these terms have legal definitions. Interpreting and applying these concepts is important.

Under the CEA:

- Only an individual may make a contribution.
- A contribution is monetary or non-monetary. A monetary contribution is an amount of money provided that is not repayable. A non-monetary contribution is the commercial value of a service, other than volunteer labour, or of property or of the use of property or money to the extent that they are provided without charge or at less than their commercial value. The term “commercial value” has a legal definition.
- There are controls on who may receive a contribution for the recipient entity.
- There are limits on the amounts that may be contributed, which vary depending on the entity and time period.
- Ineligible or excessive contributions that are received must be either returned or paid to the Receiver General, as specified in the CEA.
- Contributions must be reported to Elections Canada.
- There are limits on the amounts that candidates and registered parties may incur in election expenses, and limits on nomination contestants’ campaign expenses.
- There are limits on the amounts that a third party may incur in election advertising expenses.
- Expenses regulated under the CEA must be reported to Elections Canada. Reporting requirements apply to election expenses and electoral campaign expenses of a candidate, election expenses of a registered party, campaign expenses of leadership and nomination contestants, election advertising expenses of a registered third party, and annual financial statements (which include expenses) of a registered party or electoral district association.

Non-compliance in any of these areas may, on the Chief Electoral Officer’s instruction, be the subject of audit and administrative action by Elections Canada or of a referral to the Commissioner of Canada Elections.

Considerations

a. Elections Canada has dealt with similar issues related to MP resources used during an election period

Elections Canada has addressed similar issues in relation to householders and other advertising transmitted by MPs during an election period. Over time and with the benefit of different fact situations, it was possible to establish criteria to guide the application of the CEA in those situations. The discussion below illustrates the difficulties in arriving at an overall approach, and the overlap between parliamentary and electoral activities.

MPs are permitted by the terms of the *Members By-law* to print up to four “householders” per year using their MP office budget. One privilege that the *Canada Post Corporation Act* (not the By-law) provides to MPs is a free postage benefit allowing a Member of the House of Commons to send up to four mailings of printed matter without further address than “householder,” “boxholder,” “occupant” or “resident.” These are commonly called householders.

Under the *Canada Post Corporation Act*, these privileges for MPs begin on the day that the Chief Electoral Officer gives notice of their election and end 10 days after the day they cease to be MPs.

Elections Canada has considered the question of how the exercise of these privileges may raise questions of application of the CEA. Prior to 2000, the agency reviewed proposed householders that MPs intended to send out after the issue of the writs. This review was intended to determine if the householder would “directly promote” the MP, and thus be an election expense. In 2000, Elections Canada informed the House of Commons that it would no longer be engaging in this review. Instead, the agency adopted its present position on householders sent out during the election period. That position is stated in the current *Political Financing Handbook for Candidates and Official Agents* (March 2014):

A Member of Parliament who is running as a candidate in an election might issue a householder during the election period. This is an election expense and if not paid by the campaign a non-monetary contribution from the elected Member.

If a householder is in transit on the day the election is called and the candidate does not have the ability to stop the delivery, it will not be considered an election expense even though the actual delivery will take place during the election period. (40)

For a fixed-date election, any householder distributed in the 36 days before election day will be considered an election expense.

The basis for this position is that a document sent out by an MP during an election period is inevitably going to be promotional. As a result, a householder sent out during an election will always be a contribution or election expense. The action of the MP (candidate) in causing it to be sent is sufficient to find that the contribution has been received for the campaign. This position persists despite the 10-day period mentioned in the *Canada Post Corporation Act*.

The Board of Internal Economy of the House of Commons has established a position complementary to that of Elections Canada. If an MP's householder will be sent out during an election period and the timing is such that it could be stopped, the MP is asked to sign a form expressly directing that the printing and mailing proceed.

Elections Canada's approach effectively treats the householder that is intentionally sent during an election period in the same way as other mailed campaign advertising that is an election expense. It also has the consequence that the MP (now candidate) may become the contributor of a non-monetary contribution to his or her campaign of the value represented by the householder, since the MP had control of the resources used to conduct the mailing. This would be subject to the candidate's individual contribution limit. Alternatively, Elections Canada has accepted that if the cost associated with the householder is paid from campaign funds, it is an election expense but not a contribution from the candidate.

The House of Commons has provided direction for MPs on their use of resources during an election in the *Members' Allowances and Services Manual*, in the chapter "Dissolution of Parliament."

Elections Canada has taken similar positions on other resources given to MPs that are used or that continue in place during an election period. For example, some or all of the costs related to MP websites, billboards, advertising and greeting cards that are paid from an MP's office budget constitute election expenses if used or continued during the election period. Elections Canada acknowledges that it is not always the full cost or value of continued MP communication that will become an election expense for the candidate during an election. The agency has accepted that the total cost of a permanent billboard designed to last for the MP's term is not the appropriate measure of the election expense where that billboard remains in place during an election as election advertising. It has accepted as reasonable the value of a "functionally equivalent" but temporary sign, in keeping with the short election period.

b. Materials used outside of an election period do not usually raise issues under the *Canada Elections Act*

Over the years, Elections Canada has received many complaints about material such as householders, perceived to be partisan advertising, sent outside of the election period. Complainants generally see this as campaigning outside of an election and say it should be prohibited. In responding, the agency has explained that such communications are not election advertising or election expenses, as a key element of both concepts is activity that occurs during an election period. (See the definitions of "election expense" at section 407 and "election advertising" at section 319.) Therefore, Elections Canada has informed the complainants that such mailings are not regulated under the CEA.

A different but related question is whether householders sent outside of the election period might constitute an "electoral campaign expense" – that is, an "expense reasonably incurred as an incidence of the election" – and a concomitant contribution. This wider category of expense includes more than "election expenses" and is not limited to goods or services used during the election period. An "electoral campaign expense" that is not an "election expense" is not subject to a limit.

Elections Canada's view is that the expenses for these householders were incurred not as an incidence of any election, but as an incidence of the MP's functions. A person who owns a shoe store and promotes his or her business, then subsequently becomes a candidate, has not been incurring electoral campaign expenses from the shoe store promotion. By the same token, a person who is an MP is not incurring an electoral campaign expense in performing his or her job as MP.

c. Democratic values must be considered: the role of an MP, neutrality of Elections Canada and role of Parliament

There are several reasons to be wary of attempting to broadly apply the CEA to the use of MP resources outside of an election period.

Elections Canada acknowledges that much of what MPs do as MPs, and for which they receive resources, overlaps with what candidates do to promote themselves before and during the election period. The CEA should not be interpreted in a manner that interferes with parliamentary functions, even if those functions are performed in a partisan manner. Outside of an election period, the agency has been, and will continue to be, very wary of bringing MP resources within the scope of the CEA or being seen as interfering in matters internal to Parliament.

In law, it will be difficult to make the argument that the MP is using the resources as an incidence of a campaign rather than as an incidence of his or her duties as an MP. Given that MP duties are not fully defined, an MP will likely almost always be able to make a convincing argument that the use of resources outside of an election period is for a reason other than a campaign.

The actions of an elected MP in communicating with electors are at the heart of Canada's democracy, and at the heart of parliamentary privilege. An interpretation of the CEA that infringes on the capacity of MPs to perform their role as they see fit, and that treats these parliamentary activities as an offence, is at odds with the country's parliamentary tradition. It would draw Elections Canada into difficult, if not impossible, attempts to distinguish acceptable MP conduct that is not subject to the CEA from partisan activity that is.

The House of Commons, through the Board of Internal Economy, regulates and controls the use of resources provided to MPs under the *Members By-law*, made pursuant to the *Parliament of Canada Act*. The By-law contains restrictions on the use of the "funds, goods, services and premises provided by the House of Commons to a Member under the *Parliament of Canada Act*." These resources are listed in Part 2 of the By-law. They include a parliamentary and a constituency office, office furniture and equipment, printing services (except specified items related to partisan or election activities), administration of the free mailing privileges, and computer and telecommunications services and support. The By-law also deals with the office budget; it lists the expenditures for which it may be used, including paying employees and purchasing office supplies. The By-law states that MP resources provided under the *Parliament of Canada Act* may be used for parliamentary functions, which are expressly defined as including certain "partisan" activities. However, other "partisan" activities are not permitted.

The Board's rules are useful as information, and provide guidance on what is "parliamentary" and what is not, but they must be used with caution. They assist with Elections Canada's interpretation, but should not guide it. They do signal that there are a forum and a statute, distinct from Elections Canada and the CEA, that govern the use of MP resources.

d. The *Canada Elections Act* should apply to the use of some parliamentary resources outside of an election period

There may be some exceptional cases where the CEA will apply to the use of MP resources outside of an election period. This is so where it is clear that the activity cannot reasonably be related to a parliamentary function.

The first general situation is where an MP simply gives or donates his or her parliamentary resources to an entity that is regulated by the CEA, such as a registered party or registered electoral district association. This will be most evident when it is an entity to which the MP, in his or her role as MP, does not have a direct business or administrative connection (e.g. the registered party, or another candidate's campaign). For example, an MP gives a computer or photocopier from the MP's parliamentary office to a registered party to use at party headquarters. In this situation, the MP may be making a contribution by giving control over the resources to the other entity, assuming there is evidence that the other entity has accepted the contribution.

The second general situation is where an MP uses his or her parliamentary resources to benefit a regulated entity (including himself or herself as a candidate, nomination contestant or leadership contestant). In this situation, the MP is directing that the parliamentary resources be used for a purpose that is essentially electoral or contest-related only, and that has no connection to his or her duties as MP. For example, an MP uses staff in his or her parliamentary office, during their paid time, to work on a fundraiser for the registered association of the MP's electoral district.

In both situations, the determination will be largely fact-specific. However, the second situation requires an intermediate analysis: When is an MP's use of resources considered to be for purposes unrelated to the functions of an MP, but instead for purposes that fall under the CEA?

In Elections Canada's interpretation, an MP may be making a contribution to a campaign or other regulated entity, assuming there is evidence of the contribution being accepted, where the MP uses or provides parliamentary resources to conduct the following types of activity:

- (1) The solicitation of membership in a registered party or association
- (2) The solicitation of contributions for an entity regulated under the CEA
- (3) The organization of a meeting for the purposes of the entity or campaign (e.g. organization of an association's executive meeting, a party convention, or a campaign team meeting for an election or a nomination or leadership contest)

- (4) Get-out-the-vote activities (e.g. in a nomination contest or a by-election in an electoral district different from the one the MP represents)
- (5) Certain direct promotion conducted using the MP's budget or the MP's employees that cannot be linked to MP duties.

How such activity would be regulated under the *Canada Elections Act*

The consequences of a finding that one of these non-parliamentary activities is regulated under the CEA include the following:

- The value represented by the activity or resource may be treated as a non-monetary contribution from the MP to the recipient entity (party, association, nomination contestant or leadership contestant). A contribution is subject to the rules on individual contribution limits for the contributor, and to the rules on excessive contributions and reporting for the recipient entity.
- The value of the activity or resource may also be viewed as an expense that is regulated under the CEA. Political entities regulated under the CEA must report expenses. For some entities, the expenses are subject to limits.
- If an MP's use of parliamentary resources in another electoral district where a by-election is underway clearly benefits a regulated entity, is not related to a parliamentary function and is not clearly accepted or received by the benefiting entity, it may be treated as third party election advertising. Third party election advertising is subject to financial limits, and to registration and reporting requirements.
- In its role of administering the CEA and assessing compliance during audits, Elections Canada may ask political entities questions or request information from them if one of these scenarios comes to its attention. Where appropriate, the Chief Electoral Officer may request that a return be amended or updated to reflect the relevant contribution or expense.