

Interpretation Note: 2017-06

Contributions and Commercial Transactions

Comments made during formal consultation period of May 1 to May 15, 2017

Comments received from the Conservative Party of Canada	Elections Canada response to the Conservative Party of Canada
<p>The Conservative Party of Canada seeks clarification on two (related) questions listed below.</p> <p>As context to our questions:</p> <p>“For the sale of branded goods, such as pens or t-shirts with the party logo, the <i>Fundraising</i> note states that any amount the purchaser pays in excess of the item’s cost to the political entity is a contribution.”</p> <p>“If a transaction takes place outside a political context, so that it is purely commercial and the political entity is equivalent to any participant in the market, then no contribution is made unless the purchaser pays the political entity more than the fair market value of the transaction.”</p> <p>“Most funds are received as contributions from individuals, transfers from related political entities and, in some cases, reimbursements from public funds. But all entities may receive funds outside these categories.”</p> <p>1. Why this distinction between “cost” and “fair market value” for, in essence, the same willing buyer willing seller scenario?</p>	<p>It is Elections Canada’s position that, outside a political context, fair market value may be higher or lower than the amount the political entity paid a commercial provider for the property or service.</p> <p>With respect to sales that occur in the context of fundraising, Elections Canada generally interprets fair market value to mean cost—that is, the amount the political entity paid a commercial provider for the property or service.</p> <p>The distinction is made in the context of fundraising because the amount paid by the political entity is an objective way to determine fair market value when the value of a brand, such as a party brand, cannot be determined based on an open market.</p> <p>A definition of fair market value is now included in the note.</p>
<p>2. This seems to confirm that any commercial transaction which takes place outside a political context, where the purchaser pays the political entity fair market value, by nature, may result in the political entity making a “commercial profit”.</p> <p>Is this the intention? Could political entities now begin commercially buying (at fair market value) and selling (at fair market value) merchandise of any kind (unbranded) for a “fair market/commercial” profit, which would ultimately be used to build a war chest?</p>	<p>There is nothing in the <i>Canada Elections Act</i> (“CEA”) that prohibits a political entity from making a profit on its commercial transactions if those transactions are purely commercial, as defined in the note (i.e. they take place outside a political context).</p> <p>Note, however, that the guidelines and interpretation notes issued under section 16.1 of the CEA are intended to provide general direction and are for information purposes. Specific factual situations would be better addressed using the written opinion process in section 16.2.</p>

Comments received from the Liberal Party of Canada	Elections Canada response to the Liberal Party of Canada
<p>We believe one of the intended areas this OGI was to address, analyze and discuss more fully is advertising at a party convention, a registered association meeting or a candidate's fundraiser. In the third point made on page 1 in the Interpretation section of the OGI, the view is "If a transaction takes place in a political context, then the transaction will generally result in a contribution". This statement is made without reference to a section or subsection in the <i>Canada Elections Act</i>.</p> <p>On page 4 of the OGI, in the Sponsorship and Advertising section, reference is made to a previously released political financing handbook. Given the purpose of this OGI is to clarify commercial transactions, it is not appropriate or fair to cite a previously released handbook statement when such content had been contested and assurance was provided by Elections Canada that commercial transactions would be dealt with in a separate OGI. This OGI should address the logic for categorizing sponsorship and advertising as being subject to contribution rules, and incorporate our previously provided comments for OGI 2016-06, <i>Charging for Trade Show or Exhibit Facilities and Setup at a Party Convention</i>.</p> <p>In our comments for OGI 2016-06 we stated, "With respect to trade show and exhibit facilities at a party convention, the meeting and convention industry in North America has a well-established basis for booth pricing based on the size of the convention, target audience and other demographics. Companies such as GES (http://www.gesexpo.ca/about/show-services) can be engaged to provide sales kit support, providing convention organizers with a tool kit, including pricing, that allows for the marketing of trade show space. Consequently, a fair market value for the sale of trade show space at a convention can be established, and hence, based on this being a commercial transaction, we would put forward that it is not regulated under the Act."</p> <p>In our view, the above comment provided in OGI 2016-06 clearly shows there is a fair market commercial value for trade show sponsorship and advertising. Sponsorship and advertising to any group is a way of making the sponsor/advertiser's product better known to the delegates, whether it be a certain brand of toothpaste, coffee shop or car rental agency service. How are such activities in a political environment any different than in the association or commercial trade show marketplace?</p> <p>In 2008, Elections Canada circulated a draft Interpretation Sheet (attached) outlining acceptable forms of sponsorship and advertising. Presumably this interpretation still has some merit, although we acknowledge the Interpretation was never released in final form. It is difficult to understand what has changed between 2008 and now that would cause a reversal of direction in this matter.</p>	<p>Based on the broad definition of a monetary contribution in the CEA, any inflow of money to a political entity that is not repayable is a contribution. However, Elections Canada has carved out narrow exceptions for purely commercial transactions to allow political entities to engage in certain business activities outside a political context.</p> <p>As we reiterate in the present OGI, "If a person or entity that is not permitted to make contributions ... were able to provide money to a political entity by sponsoring a party convention or buying an object at an 'auction' for an enormous sum, the purposes of the contribution limits would be defeated. This is because such transactions are indistinguishable in purpose and effect from contributions."</p> <p>The basis for our position on sponsorship and advertising is laid out in OGIs 2016-01 and 2016-06, including the applicable sections of the CEA and the intention behind them.</p> <p>Our position differs when it comes to charging for trade show and exhibit facilities because the party is recouping only the actual incremental costs related to the trade show. That is not the case when the party wishes to sell sponsorship or advertising space during a political event.</p> <p>Sponsorship or advertising at a political event cannot be adequately compared to the same activity in a regular market because, in the former case, the transaction ultimately results in the purchase of political goodwill.</p> <p>We recognize the party's disagreement on this subject. While Elections Canada considered a different interpretation in a 2008 draft document, it was never adopted. We believe our final position is well founded and protects the goals of the political financing regime.</p>

<p>Page 3 – Transactions where the political entity is the seller – Pure commercial transactions – For example: In the third example, there is a very brief discussion of a sublease. While general guidance in an OGI is useful, individuals often look to the guidance for examples. For commercial leases, a significant element is the inducements in a commercial lease, including a period of free rent and leasehold improvement allowances. Given the guidance previously sought from Elections Canada on this matter, it would be useful to expand the third example or create another example to mention these points.</p>	<p>The interpretation note aims to provide basic examples and general direction since there will be many variations in factual situations.</p> <p>With regard to the case you raise, the party could offer commercial incentives to attract tenants as there is no minimum amount that must be charged and no contribution will result from the party receiving less than fair market value. In addition, the lease may still be at fair market value if those terms are common in the market in which the party is operating.</p> <p>Note, however, that specific factual situations would be better addressed using the written opinion process in section 16.2 of the CEA.</p>
<p>Page 4 – Conventions – Handbook reference: The reference at the end of the text seems to have a 36 which may not have been intended.</p>	<p>The number 36 is a page reference (formatted as per <i>The Canadian Style</i>).</p>
<p>Page 4 – Sponsorship and advertising: See our comments in the introductory section.</p>	<p>Please see our response in the introductory section.</p>
<p>Page 4 – Draws, auctions and the sale of branded goods – last paragraph: In response to comments we raised on Interpretation Note 2016-01, <i>Fundraising</i>, Elections Canada referenced subsection 366(1) of the <i>Canada Elections Act</i> and the guidance around \$20 and the sale of multiple merchandising items. Since this reference and guidance is not incorporated into any final wording in an OGI, it should be incorporated here for ease of reference.</p>	<p>This guidance will be included in the 2017 political financing handbooks.</p>

Comments received from the Marxist-Leninist Party of Canada	Elections Canada response to the Marxist-Leninist Party of Canada
<p>The Marxist-Leninist Party of Canada has studied Interpretation Note: 2017-06 – Draft (March 2017) on commercial transactions and their relation to political contribution restrictions in the <i>Canada Elections Act</i>.</p> <p>We find the interpretation note to be useful in its affirmation of the right of registered political parties to engage in commercial transactions and bring in monies not subject to contribution limits and contributor exclusions.</p> <p>In this regard, Elections Canada states that "where money flows to a political entity from another individual or group, the inflow of money is a contribution unless the political entity can show that it is not."</p> <p>We think it would be useful for the document to provide examples of the conditions that Elections Canada would consider satisfactory proof that a commercial transaction is not a contribution.</p> <p>We acknowledge the examples provided in the draft, such as subletting an office or selling excess office equipment. These are very straightforward. Other transactions might be more complex.</p> <p>From what is provided in the document, it seems that so long as transactions take place in a situation where the political entity can show that the sale of (a) good(s) or service(s) was based on fair market value price and the political entity can show that the transactions made the political entity "equivalent to any participant in the market," the funds from the transaction would not be considered a contribution. This would seem to be the case even if the transaction involves the purchaser visiting the political entity's website and even if it involves an individual who is a supporter of the political entity.</p>	<p>The interpretation note aims to provide basic examples and general direction since there will be many variations in factual situations.</p> <p>It is important to note that transactions must take place outside a political context to be purely commercial. As the party website is a political medium, the sale of property or services above cost on the website would result in contributions from the purchasers.</p> <p>Note, however, that specific factual situations would be better addressed using the written opinion process in section 16.2 of the CEA.</p>

Comments received from the New Democratic Party	Elections Canada response to the New Democratic Party
<p>As part of Elections Canada’s consultation process with political parties regarding forthcoming Interpretation Notes, please find below questions and comments regarding Interpretation Note: 2017-06 – Draft (March 2017).</p> <p>While the note deals with some very specific use cases regarding the disposal of property, there is a large unanswered question regarding the potential sale or the provision of services on an ongoing basis by a registered political party and the definition of Fair Market Value. As part of their ongoing work, parties often develop intellectual property, systems and processes that lend themselves to commercialization.</p> <p>While current practice is to determine the commercial value of any such services when dealing with a related party (e.g. an electoral district association or a candidate’s campaign), there remains some ambiguity as to how this would be handled when dealing with an arm’s-length customer.</p> <p>The interpretation note states in its conclusion that:</p> <p style="padding-left: 40px;">If a transaction takes place outside the context of a political activity, so that it is purely commercial and the political entity is equivalent to any participant in the market, then no contribution is made unless the purchaser pays the political entity more than the fair market value of the transaction.</p> <p>Our reading is that it is Elections Canada’s position that registered political parties can engage in commercial activity in any manner so long as the price paid by the customer meets the Fair Market Value test?</p> <p>If so, it would be useful to have a definition of “Fair Market Value” for the purposes of this Interpretation Note as there is a lack of clarity, in terms of the Act, the CRA and other interpretation notes and Elections Canada manuals. In some instances, Fair Market Value appears to be (almost) equivalent to Commercial Value; in other instances, it appears to have a meaning closer to reasonable price for a product or service when compared to the marketplace. Interpretation Note: 2016-01 (September 2016) states:</p> <p style="padding-left: 40px;">Determining the value of a benefit received in exchange for making a contribution</p> <p style="padding-left: 40px;">In most situations, the fair market value of a benefit provided to a contributor is the amount the political entity paid a commercial provider for the property or service (generally the retail price).</p>	<p>A definition of fair market value is now included in the note.</p> <p>It is Elections Canada’s position that, outside a political context, fair market value may be higher or lower than the amount the political entity paid a commercial provider for the property or service.</p> <p>With respect to sales that occur in the context of fundraising, Elections Canada generally interprets fair market value to mean cost—that is, the amount the political entity paid a commercial provider for the property or service.</p>

<p>However, this is not a workable definition when dealing with products or services that a Party has created as there is no commercial provider that has been paid for the underlying product or service. Political parties selling products or services clearly fall outside of the “situations” contemplated by the above quoted section, which comes at the definition from a situation where an individual’s primary interest is to make a contribution to the Party, and not to purchase a product or service.</p>	
<p>In the absence of (or even in addition to) a concrete definition of Fair Market Value, and in an effort to simplify the issue, could a Party simply transfer its intellectual property, products and services to a not-for-profit or for-profit corporation, co-operative or other legal entity which then could sell these services back to the Party as well as other customers?</p> <p>This would ensure that any transactions undertaken by the entity would be at Fair Market Value, whether it be between the entity and the Party, the entity and the EDA or candidate’s campaign, or between the entity and an arm’s-length customer. This approach would have a further benefit of removing the Party from any sales transaction (other than transferring assets to the entity) and would remove the ability for interested (or even ineligible) contributors to overpay for a product or service in an attempt to make an ineligible contribution (as the sales are not made, nor monies received, by the Party).</p> <p>This raises the question as to whether the Act, or any other legislation or regulation, prohibits the Party from taking such an approach, and if there are any restrictions from Elections Canada’s standpoint as to what role the Party could play with respect to such an entity. Specifically:</p> <ul style="list-style-type: none"> • Can a Party/Chief Agent be the sole member of a not-for-profit corporation which sells services or products to the Party (which, therefore, would be at fair market value), and which may also provide services or products to other customers? • Can a Party/Chief Agent be a member of a not-for-profit corporation which sells services or products to the Party (which, therefore, would be at fair market value), and which may also provide services or products to the not-for-profit corporation’s other members and to other customers? • Can a Party/Chief Agent be the sole shareholder of a for-profit corporation which sells services or products to the Party (which, therefore, would be at fair market value), and which may also sell services or products to other customers? • Can a Party/Chief Agent be a shareholder of a for-profit corporation which sells services or products to the Party (which, therefore, would be at fair market value), and which may also sell services or products to other customers? 	<p>Elections Canada believes a party can engage in purely commercial transactions outside a political context and at fair market value in its own right.</p> <p>Please note that even if the party were to transfer its property or assets to a separate legal entity, the transactions of that separate entity would not automatically be deemed to be at fair market value. Buying and selling entities have to be acting independently in an open market for the transaction to be at fair market value (see Canada Revenue Agency definition).</p> <p>Note that the guidelines and interpretation notes issued under section 16.1 of the CEA are intended to provide general direction and are for information purposes. Specific factual situations would be better addressed using the written opinion process in section 16.2.</p>

- Would there be any restrictions, from Elections Canada’s standpoint, on who else could be a member (not-for-profit) or shareholder (for-profit) of the corporation?
- Would there be any restrictions, from Elections Canada’s standpoint, on who could be a director or employee of such a corporation?
- Would there be any restrictions, from Elections Canada’s standpoint, prohibiting a Party/Chief Agent from transferring assets to such a corporation?
- In the case of a for-profit corporation, would there be any restrictions prohibiting the Party from selling its shares or receiving a dividend from the corporation, from Elections Canada’s standpoint?
- In the case of a not-for-profit corporation, would there be any restrictions prohibiting the Party from receiving its pro-rata share of the corporation’s assets upon dissolution, from Elections Canada’s standpoint?

Our reading of the Act is that there would be nothing prohibiting a Party from taking one of these approaches. Furthermore, it would clearly establish the Fair Market Value of the transaction of the related entity and its customers (including the Party itself as a customer), and would remove the ability for Parties to receive payments in excess of the Fair Market Value of the products or services in question.

If you require any further clarity regarding our questions and comments, please do not hesitate to contact us. We look forward to the issues raised here being clarified.

Comments received from the Commissioner of Canada Elections	Elections Canada response to the Commissioner of Canada Elections
<p>“Interpretation”, p. 1, paragraph (1)</p> <p>It would probably be useful to reflect the fact that the position taken stems from the very broad definition that Parliament has given to the expression “monetary contribution” in the Act. To do so, the paragraph could be reworded, for example, by adding the following passage in italics:</p> <p style="padding-left: 40px;"><i>As a general rule, given the very broad scope of the definition of “monetary contribution” in the Act, Elections Canada considers the inflow of money to a political entity from another individual or group to be a contribution unless the political entity can show that it is not. Whether a transaction involving the inflow of money to a political entity results in a contribution will depend on the facts of the transaction.</i></p>	<p>The text has been modified based on your suggestion.</p>
<p>“Analysis and Discussion”, p. 2</p> <p>In the second sentence of the second paragraph of the English version, the word “people” should be replaced with “persons,” which includes both individuals and corporations.</p> <p>Furthermore, in both versions, it would be advisable to change the fifth paragraph to specify that the very broad definition of the phrase “monetary contribution” in the Act should be understood in accordance with the plain meaning of the word “contribution.” The paragraph could, for example, read as follows:</p> <p style="padding-left: 40px;"><i>To fully understand the meaning of a monetary contribution, it is necessary to take into account the plain meaning of the word “contribution,” in light of the relevant provisions of the Act and the purposes behind regulating contributions.</i></p>	<p>The text has been modified as suggested.</p>
<p>“Transactions where the political entity is the buyer”, p. 3</p> <p>In both versions, in the third paragraph, to be more precise and consistent with the definition of the phrase “monetary contribution” in the Act, it would be preferable to add the following words in italics:</p> <p style="padding-left: 40px;">A general rule, then, is that a transaction between a political entity and a seller is not a contribution if the political entity pays, <i>at minimum</i>, the commercial value for the property or service. The question is whether the same holds true when the political entity is the seller.</p>	<p>The text has been modified as suggested.</p>

<p>Indeed, if the political entity pays a price higher than the commercial value of the property or service it received, there is no monetary contribution. However, the actual cost incurred by the political entity in acquiring the property or service constitutes an expense, which must be declared in full if it constitutes an electoral campaign expense of the political entity concerned.</p>	
<p>“Transactions where the political entity is the seller”, pp. 3 and 4</p> <p>In both versions, in the example found in the first bullet, it is stated that an association has not received a contribution if it earns interest on its bank account balance <i>and the association receives the market rate</i>. The condition should instead read, “assuming the association receives <i>a rate that does not exceed the market rate</i>.” There would be no contribution if the association earns interest at the market rate or at a rate lower than the market rate.</p>	<p>The text has been modified as suggested.</p>
<p>“Parliament’s intent: reducing undue influence and creating a level playing field”, p. 5</p> <p>In both the English and French versions, it would be very helpful to give the legal basis for the interpretation by stating the definition of “monetary contribution” as well as the necessity of restricting its scope by taking into account, among other things, the plain meaning of the word “contribution.” Moreover, this interpretation based on the language of the Act is supported by Parliament’s intent in enacting rules on contributions, as indicated in the draft interpretation note. The following passage could therefore be added before the first paragraph:</p> <p style="padding-left: 40px;">As mentioned above, the expression “monetary contribution” is very broadly defined in the Act as “an amount of money provided that is not repayable.” Despite the very broad scope of this definition, it is important to note that the plain meaning of the word “contribution” does not include valuable consideration resulting from a transaction entered into by a political entity on a purely commercial basis.</p>	<p>The following text has been added based on your suggestion:</p> <p>“As mentioned above, ‘monetary contribution’ is very broadly defined in the CEA as ‘an amount of money provided that is not repayable.’ Despite this broad definition, it is important to note that the plain meaning of the word ‘contribution’ does not include the value of the tangible benefit received by persons entering into a transaction with a political entity on a purely commercial basis.”</p>

The following parties did not submit comments to Elections Canada regarding OGI 2017-06:

- Alliance of the North
- Animal Protection Party of Canada
- Bloc Québécois
- Christian Heritage Party of Canada
- Communist Party of Canada
- Green Party of Canada
- Libertarian Party of Canada
- Marijuana Party
- National Advancement Party of Canada
- Pirate Party of Canada
- Progressive Canadian Party
- Rhinoceros Party