



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 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: 2019-10 (December 2019)

Candidate and Leader Debates

Note: This is a technical reissue of OGI 2015-03, *Candidate and Leader Debates*, updated to reflect amendments to the Act. The overall analysis and interpretation are unchanged. For registered party and Commissioner comments on the original OGI, please consult the Archives section of the Registry at elections.ca.

Issue

Whether or not providing a public forum for candidate or leader debates constitutes a contribution to the participating candidates or parties as well as an election expense under the *Canada Elections Act* (“CEA”).

Interpretation

The interpretation and approach of Elections Canada to candidate and leader debates is as follows:

- (1) Providing a public forum for candidate or leader debates with two or more participants does not constitute a non-monetary contribution from the entity providing the forum. It is also not an election expense of the participating candidates or, in the case of leader debates, of the participating parties.
- (2) The expenses incurred by the entity holding the debate do not qualify as non-monetary contributions to or election expenses of participating candidates or parties.
- (3) The exclusion of one or more candidates or parties from a debate does not change the fact that the provision of a public forum for candidate or leader debates is not a non-monetary contribution to the participating candidates or parties.
- (4) There may be situations in which a debate is not a true debate, but rather a disguised contribution. This could be the case if a debate was conducted in a partisan manner to promote or oppose a particular candidate or party, or if the debate organizer gave control over the event to a particular candidate or party. In such cases, the totality of the circumstances would need to be examined to determine whether or not the debate was a true debate or a disguised contribution.

Background

Candidate and leader debates are not always open to all candidates and parties. Questions have been raised about whether or not the exclusion of some candidates or parties from debates means that the candidates or parties who participate are receiving potentially ineligible non-monetary contributions.

The holding of debates is, and has consistently been, an important means through which electors receive information about the positions of the various candidates and parties. This information can be crucial in helping electors decide for whom to vote. In light of the importance of such debates to the democratic process, the Chief Electoral Officer's interpretation of the political financing rules had long been that expenses incurred to organize a forum for debate that allows the public to hear and question candidates did not constitute a contribution to any candidate, provided that:

- The forum was open to the public.
- The debate was conducted in an impartial manner.
- All candidates were invited to participate. If all candidates were not invited to participate, there had to be a reasonable basis for the exclusion.

In 2010, the Chief Electoral Officer articulated the above position in his recommendations to Parliament. He recommended that candidate debates be specifically addressed in the CEA in order to stipulate (i) under what circumstances expenses incurred to organize candidate debates would constitute a non-monetary contribution to the participating candidates as well as an election expense of the candidates, and (ii) under what circumstances expenses incurred to organize a debate among party leaders would constitute a non-monetary contribution to participating registered parties as well as an election expense of the parties.¹

The parliamentary committee that examined the recommendations report rejected the recommendation.² No change was made to the CEA with respect to debates.³ This confirms the approach that debates may be held; however, the legislation still does not specify when or if providing a forum for a debate would be a non-monetary contribution to the participating candidates or parties.

Legal Framework

The basic regulatory structure for political contributions and election expenses is as follows:

- Only individuals who are Canadian citizens or permanent residents can make political contributions.
- Both monetary and non-monetary contributions are subject to the contribution limits.
- A non-monetary contribution is defined in the CEA as 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.

¹ *Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election, 2010, Recommendation II.7* at www.elections.ca/content.aspx?section=res&document=index&dir=rep/off/r40&lang=e.

² Standing Committee on Procedure and House Affairs, *Response to the Chief Electoral Officer's Recommendations for Legislative Reforms Following the 40th General Election*, February 2012, Response II.7 at www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5339250&File=81#21.

³ While no change was made to the CEA, the government established the Leaders' Debates Commission in late 2018 to organize debates for the 2019 federal election.

- An election expense is defined in the CEA as including any cost incurred, or non-monetary contribution received, by a registered party or a candidate, to the extent that the property or service that the cost was incurred for or that was received as a non-monetary contribution is used to directly promote or oppose a registered party, its leader or a candidate during an election period.
- Election expenses of parties and candidates are subject to the election expenses limits.

Analysis and Discussion

Non-monetary Contributions and Election Expenses

A non-monetary contribution is made when property or a service is provided, or the use of property or money is provided, to a political entity at less than commercial value.

During a debate, candidates are able to express and debate their political views in a public forum. While debates represent an opportunity for participating candidates, the primary recipient of the service being provided in a debate is the electorate, rather than a particular candidate or party, much like the situation of a media interview or news article concerning a candidate or party.

In either case, the expenses related to holding the debate or interview are those of the media outlets or third parties organizing the event, not expenses of the party or candidate. Candidates or parties may be able to exert some degree of influence over how the debate is organized or facilitated (as is the case in a media interview), but this does not mean the debate should be treated as an expense of their campaigns.⁴

Debates are traditionally held by media outlets or community associations. If providing a forum for a debate were to be considered a non-monetary contribution to participating candidates or parties, such entities would be making illegal political contributions, regardless of how many candidates or parties were invited to participate. Forums for debate could then only be provided by individuals who are Canadian citizens or permanent residents, and the cost of the debate would be limited by the individual's contribution limit. This would effectively eliminate debates from the democratic process.

Elections Canada is of the opinion that this was not Parliament's intent when it adopted the rules on political financing, since candidate and leader debates have a long history and play a very important role in Canadian democracy.⁵

Whether a Debate Is a True Debate and the Exclusion of Candidates

Elections Canada had previously taken the position that providing a forum for a debate did not constitute a contribution, provided that:

- The forum was open to the public.
- The debate was conducted in an impartial manner.
- All candidates were invited to participate. If all candidates were not invited to participate, there had to be a reasonable basis for the exclusion.

⁴ Occasionally, candidates jointly organize and pay for the holding of a debate (or may accept to share a portion of the costs of an event hosted by a local community organization). In such a situation, the amount paid by the candidate's campaign would be an election expense of the campaign.

⁵ Subsection 2(1) explicitly provides, under paragraph (a) of the definition of "election advertising", that "the transmission to the public of ... a debate" is not election advertising. This is an indication that Parliament intended for debates to be permissible.

The reason for these requirements was to try to distinguish between true debates (which are permitted and not considered to involve any contribution) and events that would merely have the appearance of a debate, but in reality constitute a staged partisan event organized on behalf of a particular campaign.

However, Elections Canada recognizes that the above criteria are indicators, rather than strict legal requirements. For instance, a debate may still be a true debate even though it is not open to the general public but only to members of a group like a community association. Similarly, the exclusion of one or more candidates does not, in and of itself, mean that an event is not a true debate.

A similar concept applies to a candidate or a party leader who is the subject of a news article or a television interview. The fact that other candidates may not receive the same coverage does not mean the media outlet is providing a contribution to the candidate who received the coverage. The expenses incurred by the media outlet in producing and distributing the article or interview are similarly not election expenses of the candidate or party.

Accordingly, the better approach is to examine the totality of the circumstances in order to determine whether the debate was a true debate or a disguised contribution. Any potential contribution to a candidate or party would need to have been made to, and accepted by, the candidate or party that received preferential treatment.

The following are relevant, but non-exhaustive, considerations:

- The manner in which the event is conducted
- The degree of control a candidate or party exercises in the organization of the event
- How candidates or parties are selected to participate
- The audience

Ultimately, the question to be answered is whether the event was of such a partisan nature as to not be considered a true debate, but rather an expense of a party or candidate, as well as a non-monetary contribution.