



The Chief Electoral Officer, on application by the chief agent of a registered party, issues a written opinion on the application of any provision of the *Canada Elections Act* to an activity or practice that the registered party or a registered association, nomination contestant, candidate or leadership contestant of the registered party proposes to engage in. Before a written opinion is issued, registered federal political parties and the Commissioner of Canada Elections are consulted and invited to provide comments on a draft version.

If all the material facts have been submitted by an applicant for an opinion and they are accurate, the opinion issued by the Chief Electoral Officer is binding on the Chief Electoral Officer and the Commissioner with respect to the activity or practice of the registered party, registered association, nomination contestant, candidate or leadership contestant in question. It remains binding for as long as the material facts on which it was based remain substantially unchanged and the activity or practice is carried out substantially as proposed.

Written Opinion: 2021-09 (Draft – January 2022)

Contributions Made Pursuant to Certain Agreements or Representations

Application Presented

The following application from the chief agent of the Marijuana Party was received in accordance with section 16.2 of the *Canada Elections Act* (CEA):

“This inquiry seeks a statement about the legality of the Participation Premium Plan, with reference to section 369, that could be used to inform individual Canadians about their rights and freedoms to legally make Participation Premium arrangements through a registered party, a registered association, or both, which also results in some net after-tax benefit to them personally. The matrix of legal political contributions potentially applies to all officers or agents of registered parties and registered associations. Since there are no limits to how many officers or agents registered parties and associations could have, these political contribution ideas potentially apply to all individual Canadians.

The party has identified five steps to registered participation transactions within a registered association (EDA):

1. Communicate consent to become an EDA Officer to the Chief Executive Officer and/or communicate consent to become an Electoral District Agent to the Financial Agent. The Chief Executive Officer or Financial Agent informs Elections Canada of the appointment.
2. Donate a gift of money to the EDA, up to the maximum allowed per year, and receive an official donation receipt valid for income tax purposes.
3. As a donor (who is also an Officer and/or Agent), claim the political tax credit against personal income taxes using the official receipt.
4. As an Officer or Agent, direct operations of the EDA and submit a bill of particulars to the EDA for the expenses, which must be documented by auditable written or electronic explanations of where the money came from and where it went.
5. Be reimbursed or paid at fair market value for things actually done as an Officer or Agent.

Although there are several minor differences in their administration through Elections Canada, the five steps to participation may be similar through the officers and agents of registered political parties. Individuals may become party officers and/or agents. They may direct how money they donated is spent, and bill and be paid for that, and claim their political contribution tax credit for themselves.”

Opinion

Based on the information provided, Elections Canada’s opinion is that the Marijuana Party’s proposed practice, taken as a whole, cannot be legally promoted or conducted under the CEA because it involves contributions given pursuant to prohibited agreements or prohibited representations, or both. The practice is designed to funnel money through the party or association for the benefit of the individual contributor by paying them a “premium” in the form of a tax credit. Sections 368 and 369 of the CEA make such practices illegal.

Subsection 368(4) – Transactions Under the Proposal Involving a Registered Party

Subsection 368(4) is breached when a registered party enters into an agreement to pay for goods or services where a term of that agreement is that a contribution will be made. As a result, the proposed practice will breach this provision if the transactions involve the registered party.

Subsection 369(1) – Transactions Under the Proposal Involving a Registered Party or Registered Association

Subsection 369(1) is breached when any person, including a registered party, registered association, their officer or their agent, makes a representation to a contributor or potential contributor that all or part of a contribution will be transferred to a person or entity other than a registered party, registered association, candidate or leadership contestant. This includes a representation that part or all of the contribution will be transferred to the individual making the contribution.

As noted in the proposed practice, individuals can receive tax credits for contributions to certain political entities. The receipt of this tax credit by a participant in the proposed practice is the “premium” described. Section 369 was included in the CEA to prevent entities from using the form of a political contribution to obtain this tax credit when the contributed funds are actually being funnelled through a party or association to a non-political entity. The proposed practice suggests precisely this situation: the contribution is made on the understanding that part or all of the amount will not actually go to the party or association, but will be passed on through payment to another entity as determined by the contributor (including possibly to the contributor themselves). The registered party or a registered association, in advertising the proposed practice to encourage participation, is representing to individuals that their contributions to a political entity can be funnelled back to them, which breaches section 369. Individual participants who accept or solicit such contributions would also be breaching section 369.

Note: Written opinions of the Chief Electoral Officer deal exclusively with how the CEA applies to a proposed practice. Questions about income tax consequences should be directed to the Canada Revenue Agency.

Legal Framework

The most relevant provisions of the CEA in this context are as follows:

- A contribution can be monetary or non-monetary. In all cases, it is not repayable. (s. 2(1))
- A person or entity cannot enter into an agreement for the provision for payment of goods or services to a registered party or a candidate if a term of that agreement is that an individual will make a contribution to a registered party, registered association, candidate, nomination contestant or leadership contestant. (s. 368(4))
- A person or entity cannot, on behalf of a registered party, registered association or candidate, solicit or accept a monetary contribution if they make a representation to the contributor or potential contributor that part or all of the contribution will be transferred to a person or entity other than the registered party or a candidate, leadership contestant or electoral district association. A person or entity cannot collude with another person or entity for the purpose of circumventing this prohibition. (s. 369)
- A registered party can appoint, as registered agents, persons who are authorized by the party to accept contributions and to incur and pay expenses on behalf of the party. (s. 396(1))
- A registered association can appoint, as electoral district agents, persons who are authorized by the association to accept contributions and to incur and pay expenses on behalf of the association. (s. 456(1))
- Appointments of registered agents and electoral district agents must be reported to Elections Canada within 30 days. (ss. 396(2), 456(2))
- Only registered agents of a registered party may accept contributions to, incur expenses for and pay expenses on behalf of a registered party. (ss. 426(1)–(3))
- Only electoral district agents of a registered association may accept contributions to, incur expenses for and pay expenses on behalf of a registered association. (ss. 475(1)–(3))

Background

Any Canadian citizen or permanent resident may make a contribution to a registered party or association, subject to the annual limits. A monetary contribution is an amount of money given that is not repayable. Monetary contributions may be eligible to be claimed as an income tax credit.

There are restrictions in the CEA on the terms under which contributions may be solicited and accepted. These help to protect the integrity of the political financing system including by ensuring that entities do not use the form of a contribution to take advantage of the political contribution tax credit for transactions that do not achieve the objectives of the tax credit regime.

All contributions to a registered party or registered association must be received by a registered agent (including the chief agent) of the party or an electoral district agent (including the financial agent) of the association, as the case may be. This gives them responsibility for ensuring that contributions are properly accepted, receipted and reported.

All expenses of a registered party or association must be incurred and paid for by registered agents or electoral district agents, as the case may be.

Analysis and Discussion

Summary of the Proposed Practice

The proposed practice on which the Marijuana Party seeks a written opinion is described in five steps in its application, though there is an additional preliminary step that is important to this analysis: communicating the plan to potential contributors. An example of how the proposal could work in practice is as follows. Robert, as an individual, reads about the proposed plan on the party's website and decides to become an electoral district agent of a registered association. The association appoints him as an agent and reports this to Elections Canada. He contributes \$100 to the association. As an agent, Robert accepts the contribution on the association's behalf and issues himself a contribution receipt for \$100. He determines that a \$100 expense that he personally incurred is for the benefit of the association (i.e. the association incurred it). The association, through Robert as its agent, then pays him \$100 for the expense he has identified as being incurred for the association. He claims a \$100 political contribution on his tax return. As a result, although Robert has not incurred any cost (he contributed \$100 and received a \$100 payment), he has received a contribution receipt potentially worth \$75.¹

There are circumstances in which each of the five steps listed in the plan may be performed legally. But collectively, and especially when coupled with communication of the plan, they breach the prohibitions in the CEA at subsections 368(4) or 369(1), or both.

Prohibited Agreements for Registered Parties

Subsection 368(4) of the CEA provides that no person or entity shall enter into an agreement for the provision for payment of goods or services to a registered party or a candidate if a term of that agreement is that an individual will make a contribution to a registered party, registered association, candidate, nomination contestant or leadership contestant.

In the proposed practice, parties or associations enter into an agreement with an individual to provide goods or services, and making a contribution is a term of that agreement. The same person may or may not be acting on behalf of both sides of this agreement in different capacities—for example, as the agent on behalf of the party and as the supplier of the goods or services. Because an agreement to provide goods or services to a registered party or a candidate cannot include a contribution as a term, if the proposed practice involves a registered party, the contributor and registered party will have breached subsection 368(4).

Prohibited Representations for Registered Parties and Registered Associations

Section 369 of the CEA provides that a person or entity cannot, on behalf of a registered party or registered association, solicit or accept a contribution if they make a representation to the contributor or potential contributor that part or all of the contribution will be transferred to a person or entity other than a political entity. It is also an offence to collude for the purpose of circumventing this provision.

Section 369 was added to the CEA to protect the political financing provisions, specifically by ensuring that transactions involving political entities were not used as a means to generate contributions that could be used to claim tax credits. Section 369 itself prohibits structuring a transaction to take the form of a contribution when, in fact, it is merely a means to funnel funds to a non-political entity while generating a tax credit receipt.

¹ Although a receipt must be issued for all contributions of more than \$20 under subsection 366(1) of the CEA, using this receipt as evidence of a contribution for the purposes of a tax credit is governed by the *Income Tax Act* and thus outside the scope of this opinion.

The proposed practice incentivizes individuals to conduct transactions in the form of contributions by describing a “premium” that they can receive if they do so. The premium is achieved by making a monetary contribution and then being “reimbursed or paid at fair market value” for an expense that they tie to their relationship with the political entity. While the proposal asserts that these would be party or association expenses, in fact, the contributions would not be made without the expectation of the premium and the representation that the individual will retain control over the disposition of the funds. The registered party or a registered association, in advertising the proposed practice to encourage participation, is representing to individuals that their contributions to a political entity can be funnelled back to them. The solicitation therefore breaches section 369.

To the extent that the proposed practice is crafted to avoid the consequences of subsection 369(1)—for example, by describing the funnelling of money back to the contributor as the payment of a party or association expense—it also breaches the prohibition in subsection 369(2) of the CEA, which prevents collusion to circumvent the prohibition under subsection 369(1).

Conclusion – Application of the CEA to the Proposed Practice

The proposed practice breaches subsection 368(4) when it involves contributions and expenses of a registered party. It breaches section 369 when it involves a representation by a registered party or a registered association. The proposed practice is therefore not permitted by the CEA.

Note About the Scope of This Opinion

Written opinions of the Chief Electoral Officer deal exclusively with how the CEA applies to a proposed practice. Although monetary contributions may lead to tax credits under the *Income Tax Act*, the administration of those tax credits is outside the scope of this opinion. Questions about income tax consequences should be directed to the Canada Revenue Agency.