



## 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: 2020-07 (Draft – November 2020)

## *Irregular Transfers Between Affiliated Political Entities*

### Issue

Transfers of funds, property or services are a way for political entities within the same registered party to share resources outside the controls on contributions in the *Canada Elections Act* (“CEA”). The CEA sets restrictions on the types of transfers that different political entities can send or accept at different times.

Where a transfer is permitted by law, the CEA is explicit that the transaction is not a contribution. The question arises as to whether a non-permitted transfer (an “irregular transfer”) is, by extension, always a contribution. Elections Canada has sometimes declined to treat irregular transfers as contributions, based on the facts of the situation, and has dealt with them according to other provisions in the CEA.

This note seeks to clarify how irregular transfers are treated and why. It considers the objectives of the transfers and contributions regimes and the penalties in place to promote compliance with them.<sup>1</sup>

### Interpretation

- (1) The funds, property or services at the centre of an irregular transfer are generally cleared through the contributions regime when they first enter the political system. As a result, in most but not all cases, the objectives of the regime are met without treating irregular transfers as illegal contributions.
- (2) Certain irregular transfers are tied to specific transfer offences in the CEA—such as a registered party or association sending a monetary transfer to a nomination or leadership contestant (other than a directed contribution)—and enforcement can proceed on that basis. They are not contributions.
- (3) Where there is no specific transfer offence, notably for some irregular transfers to candidates and contestants, an irregular transfer is an illegal contribution only when it threatens the objectives of the law. A key question, examined below, is whether the transaction could have been accomplished legally if it had been structured in another way.

<sup>1</sup> This interpretation note does not apply to transfers made by deregistered political parties or electoral district associations after the effective date of deregistration, except for a six-month transition period when an association is deregistered because its electoral district was redrawn or because its party merged with another.

*Transfers to a candidate from another candidate, a nomination contestant or a leadership contestant*

- (4) Irregular transfers to a candidate from another candidate, a nomination contestant in another electoral district or a leadership contestant could have been accomplished legally by using the registered party or a registered association as an intermediary. These are not contributions. However, as they are also not reasonable expenditures of the campaign that made the transfer, the transaction results in an improper disposal of surplus.

*Transfers to a nomination contestant or a leadership contestant from a candidate or other contestant*

- (5) Irregular transfers to a nomination contestant or a leadership contestant from a candidate or other contestant could not have been accomplished legally through the registered party or a registered association. If such transactions were allowed, it would permit registered parties or associations to get resources to a favoured contestant in a nomination or leadership race. These are illegal contributions on the basis that the campaign, as an entity rather than an individual, is an ineligible contributor. An exception, rare in practice, would be a non-monetary transfer from a candidate that is offered equally to all contestants.

*Non-monetary transfers from a nomination or leadership contestant to a candidate, registered association or registered party*

- (6) Non-monetary transfers from a nomination or leadership contestant to a candidate, registered association or registered party could have been accomplished legally if the property had been liquidated first and, in some cases, transferred through the registered party or a registered association as an intermediary. These are not contributions. However, if the property is a capital asset, the transaction results in an improper disposal of surplus.

## Legal Framework

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

- A monetary contribution is an amount of money provided that is not repayable. (s. 2(1))
- 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. (s. 2(1))
- Only individuals who are Canadian citizens or permanent residents can make political contributions to a registered party, registered association, candidate, nomination contestant or leadership contestant. Corporations, groups and other entities cannot make contributions. (s. 363(1))
- A political entity that accepts an ineligible contribution must, within 30 days of becoming aware of the contravention, return the contribution unused to the contributor or, if that is not possible, remit the amount or commercial value of the contribution to the Receiver General for Canada. (s. 372)
- There are offences for making various types of ineligible contributions and for failing to return or remit ineligible contributions. (s. 497(1)-(2))
- Transfers of funds, property or services between affiliated political entities are permitted and are explicitly not contributions in a variety of situations. The following table, reproduced from the 2020 political financing handbooks, shows the allowable monetary and non-monetary transfers between affiliated entities. (ss. 364(2)-(5), 365)

## Transfers—types and rules

		TO									
		Nomination Contestant		Leadership Contestant		Candidate		Registered Electoral District Association		Registered Party	
		Monetary	Non-monetary	Monetary	Non-monetary	Monetary	Non-monetary	Monetary	Non-monetary	Monetary	Non-monetary
FROM	Nomination Contestant	No	No	No	No	Yes <sup>1</sup>	No	Yes <sup>2</sup>	No	Yes	No
	Leadership Contestant	No	No	No	No	No	No	Yes	No	Yes	No
	Candidate	Yes <sup>3</sup>	Yes <sup>3</sup>	No	No	No <sup>4</sup>	No <sup>4</sup>	Yes	Yes	Yes	Yes
	Registered Electoral District Association	No	Yes <sup>5</sup>	No	Yes <sup>5</sup>	Yes <sup>6</sup>	Yes	Yes	Yes	Yes	Yes
	Registered Party	No	Yes <sup>5</sup>	No <sup>7</sup>	Yes <sup>5</sup>	Yes <sup>6</sup>	Yes	Yes <sup>8</sup>	Yes <sup>8</sup>	n/a	n/a

<sup>1</sup> A nomination contestant may transfer funds (but not property or services) to a candidate of the same party in the electoral district in which the nomination contest was held. After election day, monetary transfers are allowed only to pay claims and loans related to the candidate's campaign.

<sup>2</sup> A nomination contestant can only transfer funds to the registered electoral district association that held the nomination contest.

<sup>3</sup> Candidates may transfer property, services and funds to their own nomination contestant campaign for the same election.

<sup>4</sup> Candidates in a superseded by-election may transfer property, services and funds to their campaign for the general election.

<sup>5</sup> Non-monetary transfers must be offered equally to all contestants.

<sup>6</sup> Monetary transfers other than trust funds are allowed. After election day, monetary transfers are allowed only to pay claims and loans related to the candidate's campaign.

<sup>7</sup> Directed contributions are the only exception: they may be transferred to the leadership contestant.

<sup>8</sup> Registered parties may transfer property, services and funds to electoral district associations, whether registered or not.

**Note:** Independent candidates may not send or accept transfers of funds, property or services to or from other political entities.

- Certain irregular transfers have offences directly related to them:
  - a registered party or registered association sends a monetary transfer to a contestant or sends a non-monetary transfer that is not offered equally to all contestants (ss. 497(1)(c), 497(2)(b), 497.3(2)(e), 497.5(2)(h))
  - a registered party, registered association or nomination contestant sends a monetary transfer to a candidate after election day, other than to pay expenses (ss. 497.4(1)(r), 497.4(2)(t))
- An electoral campaign expense, nomination campaign expense or leadership campaign expense must be reasonably incurred as an incidence of the election or contest. (ss. 374.1(1), 375(1), 379.1(1))
- After an election, a candidate's campaign must either transfer its capital assets to specified political entities or sell them at fair market value as part of the surplus disposal. After a contest, a nomination or leadership contestant's campaign must sell its capital assets at fair market value as part of the surplus disposal. (ss. 476.91(2), 477.8(2), 478.94(2))
- A capital asset is any property with a commercial value of more than \$200 that is normally used outside an election period or contest period other than for the purposes of an election or contest. (s. 2)
- A candidate's or contestant's surplus is the amount by which the campaign's revenues exceed its reasonably incurred campaign expenses and legally permitted outgoing transfers. Campaigns must dispose of their surplus only to specified political entities. (ss. 476.93, 477.82, 478.96)
- There are a variety of offences for an improper disposal of surplus:
  - a nomination contestant's financial agent fails to dispose of the surplus to the candidate who won, the registered party or a registered association of the party (ss. 497.3(1)(t), 497.3(2)(t))
  - a candidate's official agent fails to dispose of the surplus to the registered party or a registered association of the party (ss. 497.4(1)(q), 497.4(2)(s))
  - a leadership contestant's financial agent fails to dispose of the surplus to the registered party or an association of the party (ss. 497.5(1)(t), 497.5(2)(v))

## Analysis and Discussion

### Contributions: Rules and Objectives

To determine whether an irregular transfer should be treated as an ineligible contribution, it is necessary to look at the rules and objectives of the contributions regime.

The contributions regime was introduced in 2003 and amended in 2006 to limit the undue influence of money in politics. It covers both monetary and non-monetary contributions. There are restrictions on who may make contributions (individuals who are Canadian citizens and permanent residents) and in what amount. Contributions over \$200 must be publicly reported.

The objectives of the contributions regime can be seen as:

- limiting who may exercise influence over the political process
- creating transparency around the exercise of influence
- allowing for broader participation of political entities, beyond those who have access to large contributions
- allowing for broader participation of individuals, beyond those who can make large contributions
- preventing a political entity from benefitting from an illegal contribution

The objectives of the regime are secured by prohibiting illegal contributions or efforts to avoid the contributions regime. Such transactions are subject to criminal penalties and alternative compliance tools, including administrative monetary penalties. In addition, when an illegal contribution is received, it must be returned to the contributor or remitted to the Receiver General for Canada, depending on the circumstances. This administrative sanction, applied in addition to the usual enforcement mechanisms, reflects the importance Parliament places on the need to ensure that illegal contributions are not used to affect elections or contests. It is also a significant and severe penalty that must be applied without any discretion.

The contributions regime operates alongside, and sometimes interacts with, the transfers regime described below.

### Transfers: Rules and Objectives

The transfers regime in the CEA makes it possible for affiliated political entities to share funds, property and services under certain conditions without being subject to the controls on contributions in the CEA. It allows ongoing political entities (registered parties and registered associations) that collect contributions year-round to support event-based political entities that operate for a limited time. It also keeps resources in the political system by having event-based entities transfer their remaining resources to an ongoing political entity at the end of a campaign.

Allowing such transfers to flow freely without the restrictions of the contributions regime shows that Parliament was satisfied that once funds, property and services were within “the system,” the objectives of the CEA would not generally be threatened by subsequent transfers between affiliated entities.

However, Parliament chose to exclude some transactions between affiliated entities from the transfers regime. Non-permitted transfers may be explicitly or implicitly prohibited. Some prohibited transfers, particularly those conducted by registered parties and associations, have specific offences attached to them. An example of such a prohibited transfer would be a registered party or association sending a monetary transfer to a nomination contestant or leadership contestant, other than a directed contribution transferred by the party to a leadership contestant. Tables listing all irregular transfers can be found later in this note.

In general, the objectives of the transfers regime can be seen as:

- keeping public funds, which entered the political system through reimbursements, subsidies and tax credits, within the political system
- keeping funds donated to a political entity of a registered party within that party
- preventing favouritism in a registered party's internal leadership and nomination contests
- allowing resources that have entered the political system fairly to move freely between affiliated political entities, as long as that movement does not defeat other objectives of the regime

### **Difficulty in Treating an Irregular Transfer as an Illegal Contribution**

The CEA states explicitly that permitted transfers between political entities are not contributions. This has led Elections Canada to generally treat irregular transfers between political entities as illegal contributions, though it has sometimes declined to do so based on all the facts of a situation, particularly when the result of doing so would lead to a consequence out of all proportion to the error involved. For example, when a candidate with no unpaid claims receives a monetary transfer from a registered party or association after election day, Elections Canada treats the transaction as a potential transfer offence but not an illegal contribution.

The hesitation to sometimes treat an irregular transfer as an illegal contribution is primarily related to the additional consequence that applies to illegal contributions. As noted, an illegal contribution must be returned to the contributor or, if used, remitted to the Receiver General for Canada. This applies to contributions from an ineligible source, over-contributions, contributions received through a prohibited agreement, contributions given from another's funds that were provided for that purpose and cash contributions of more than \$20. Anonymous contributions over \$20 must also be remitted to the Receiver General. There is the potential for criminal liability of the sender and the person who fails to send it back, based on an investigation by the Commissioner of Canada Elections.

For example, if a candidate's campaign transferred its surplus funds from one election directly to the same candidate's campaign for a subsequent election, this would be an irregular transfer. As well, if a candidate who is endorsed by a party resigns in the weeks before the election and is replaced by another candidate of that party, the direct transfer of funds from one campaign to the other would be an irregular transfer.

Should these transfers be treated as illegal contributions? If they are, offences or the possibility of administrative monetary penalties would attach. In addition, the funds would either need to be returned to the sender or, if used by the receiving campaign, the contribution amount would need to be remitted to the Receiver General for Canada. Because of a somewhat technical error, the entire amount of the transfer would need to be returned or forwarded to the Receiver General.

This consequence, which is automatic and cannot be varied at the discretion of the Chief Electoral Officer, would occur despite the fact that in these cases none of the objectives of the contributions regime would be threatened by the transfers. The money that made up the transfers would have already been subject to contribution restrictions and reporting when it first entered the political system.

There is precedence for considering the objectives of the regime over the mechanics of a transfer in determining how the transaction should be treated. In 2008, *Rae v. Canada* dealt with the case of a registered party that received \$50,000 transfers from all its leadership contestants and decided to refund them after the contest. When consulted, the chief electoral officer of that time said the refund would be a prohibited transfer. On judicial review, the court ruled that such a "retransfer" would be permitted since there was no attempt to favour any particular contestant or attempt to circumvent contribution limits. It

said that while a plain reading of the CEA would suggest the transaction was a prohibited transfer and thus an illegal contribution, such a reading would be “a victory of form over substance” and not aligned with Parliament’s intent.<sup>2</sup> Effectively, the court’s reading of the CEA prioritized the objectives of the regime over the mechanics of the transaction in determining how it should be treated.

It is also important to note that, as was the case in *Rae*, the majority of irregular transfers that are not linked to an offence would in fact have been legal if they had taken a different route.

For example, consider the case of a candidate transferring funds to their next campaign. The candidate, after their first election, has a surplus of \$10,000. Before the bank account is closed, another election is launched. The official agent transfers the \$10,000 from the first campaign to the second. If this irregular transfer is treated as an illegal contribution, and the second campaign has used part of the funds, then the official agent must remit the full \$10,000 to the Receiver General for Canada. However, the candidate could have legally received the \$10,000 if the official agent had transferred it from the first campaign to the registered association, and the association had then transferred it to the second campaign.

As another example, consider a nomination contestant who, at the end of a contest, transfers office equipment valued at \$5,000 to the association that ran the contest. A nomination contestant is not permitted to transfer capital assets. If this irregular transfer is treated as an illegal contribution, and the association used the computers before realizing the transfer was not allowed, the association cannot return the equipment to the contestant. It must instead remit \$5,000 to the Receiver General for Canada. However, if the contestant had liquidated the computers, they could have transferred the proceeds to the association. In addition, if the sender had been a candidate rather than a contestant, liquidating the asset would not have been necessary at all.

These irregular transfers do not threaten the objectives of the law. An interpretation in which penalties are so disconnected from the severity of the violation does not reflect Parliament’s intent in drafting the legislation. This is not to say that irregular transfers that could have been otherwise accomplished legally will go unenforced. An irregular transfer by a candidate or contestant, even if it could have taken a legal route, is illegal and needs to be reversed on the basis that it is an improper disposal of surplus.

Irregular transfers that could not have been otherwise accomplished legally—namely, transfers to contestants—are another matter. They threaten the objective of the CEA to have political entities within a registered party act neutrally in their financial dealings with contestants.<sup>3</sup> Where there is no specific transfer offence, it may be appropriate to treat the irregular transfer as an illegal contribution (because the sender is an ineligible contributor or because the contribution is otherwise illegal) and require its return or remittance.

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<sup>2</sup> *Rae v. Canada*, 2008 FC 246, paras. 31 and 36.

<sup>3</sup> Where a registered party or association sends an irregular transfer to a contestant, there is a specific offence that can be enforced, but there is no equivalent offence for the same transfer from a candidate or other contestant.

## Summary of Treatment of Irregular Transfers

### *Transfers with Specific Offence Provisions*

Where an irregular transfer between affiliated entities is tied to a specific offence in the CEA—which includes all irregular transfers by registered parties and associations—Parliament intends for enforcement to proceed on the basis of those offences. There is always an offence for the sender, though not always for the recipient. These transactions are not contributions.

Where there is no specific offence in the CEA, given the considerations outlined in the discussion above, there are two possible approaches to the treatment of irregular transfers.

### *Transfers with No Specific Offence Provision—Option 1*

As a first option, Elections Canada could treat all irregular transfers from candidates and contestants where there is no specific offence provision, whether or not the transfer could have been otherwise accomplished legally, as an improper disposal of surplus.

This argument would rest on the basis that an irregular transfer of funds, property or services from the candidate's or contestant's campaign is not a reasonable expenditure. For example, if a candidate sends campaign funds to an affiliated candidate in another electoral district, the payment is neither a permitted transfer nor a valid electoral campaign expense. This creates an imbalance in the candidate's bank account between their inflows and their permitted outflows, which amounts to an improper disposal of surplus. There are strict liability and intentional offences for a financial agent or official agent who fails to properly dispose of a surplus, and Elections Canada would refer these cases to the Commissioner for enforcement on that basis.

Under this reading of the CEA, there would be no consequence for the recipient. This means that where a leadership contestant, for example, accepted an irregular monetary transfer from another leadership contestant, they would not be legally required to return the transfer.

### *Transfers with No Specific Offence Provision—Option 2*

As a second option, Elections Canada could treat irregular transfers with no specific offence provision and which could have been otherwise accomplished legally (for example, a transfer from a candidate to another candidate) as an improper disposal of surplus, while irregular transfers that could not be otherwise accomplished legally would be treated as illegal contributions (for example, a transfer from a nomination contestant to a leadership contestant).

Under this approach, the requirement for the recipient to return the amount of an illegal contribution to the sender unused or, if used, to remit it to the Receiver General for Canada, would provide a short-term remedy that helps to uphold the fairness of the contest. There would be the potential for enforcement action on the sender for making the contribution, on the basis that the campaign is not an eligible contributor, and also on the recipient if the contribution is not returned or remitted.

### *Preference for Option 2*

While Parliament gave registered parties and associations the flexibility to run internal contests, it also chose to regulate some aspects of contests, including financial fairness through the contributions and transfers regimes. For the reasons outlined in this note, Elections Canada believes Option 2 is better aligned with this goal.

Based on Elections Canada's interpretation, the consequences for irregular transfers are those set out in the tables below. Note that permitted transfers are not mentioned in the tables.

## Irregular Transfers and Consequences

**Table 1: Irregular Transfers to Candidates**

From	To	Transfer type	Consequence
Nomination contestant	Candidate in same electoral district	Monetary, after election day other than to pay claims	Prohibited transfer with offence for sender; not a contribution
Nomination contestant	Candidate in other electoral district	Monetary	Improper surplus disposal with offence for sender; not a contribution
Leadership contestant	Candidate	Monetary	Improper surplus disposal with offence for sender; not a contribution
Nomination contestant Leadership contestant	Candidate	Non-monetary	If capital asset, improper surplus disposal with offence for sender; not a contribution <sup>1</sup>
Candidate	Candidate, other than to own campaign for superseded election	Monetary Non-monetary, until election day	Improper surplus disposal with offence for sender; not a contribution
Candidate	Candidate, other than to own campaign for superseded election	Non-monetary, after election day	If capital asset, improper surplus disposal with offence for sender; not a contribution <sup>1</sup>

<sup>1</sup> Remaining non-capital assets or services can be provided to the candidate, but they must either be sold to the campaign or contributed by the contestant or other candidate as a personal non-monetary contribution.



**Table 2: Irregular Transfers to Nomination Contestants**

From	To	Transfer type	Consequence
Nomination contestant Leadership contestant	Nomination contestant	Any	Illegal contribution <sup>1</sup>
Candidate	Nomination contestant, other than to own campaign for same election	Any	Illegal contribution <sup>1, 2</sup>
Registered association Registered party	Nomination contestant	Monetary	Prohibited transfer with offences for sender and recipient; not a contribution
Registered association Registered party	Nomination contestant	Non-monetary, not offered equally to all contestants	Prohibited transfer with offence for sender; not a contribution

<sup>1</sup> Under Option 1, this would be an improper surplus disposal rather than a contribution.

<sup>2</sup> Under Option 2, if the transfer is non-monetary and the candidate offered it equally to all contestants, it is not a contribution. It may be an improper surplus disposal.

**Table 3: Irregular Transfers to Leadership Contestants**

From	To	Transfer type	Consequence
Nomination contestant Leadership contestant	Leadership contestant	Any	Illegal contribution <sup>1</sup>
Candidate	Leadership contestant	Any	Illegal contribution <sup>1, 2</sup>
Registered association	Leadership contestant	Monetary	Prohibited transfer with offences for sender and recipient; not a contribution
Registered party	Leadership contestant (other than directed contribution)	Monetary	Prohibited transfer with offences for sender and recipient; not a contribution
Registered association Registered party	Leadership contestant	Non-monetary, not offered equally to all contestants	Prohibited transfer with offence for sender; not a contribution

<sup>1</sup> Under Option 1, this would be an improper surplus disposal rather than a contribution.

<sup>2</sup> Under Option 2, if the transfer is non-monetary and the candidate offered it equally to all contestants, it is not a contribution. It may be an improper surplus disposal.

**Table 4: Irregular Transfers to Registered Parties**

From	To	Transfer type	Consequence
Nomination contestant Leadership contestant	Registered party	Non-monetary	If capital asset, improper surplus disposal with offence for sender; not a contribution <sup>1</sup>

<sup>1</sup> Remaining non-capital assets or services can be provided to the party, but they must either be sold to the party or contributed by the contestant as a personal non-monetary contribution.

**Table 5: Irregular Transfers to Registered Associations**

From	To	Transfer type	Consequence
Nomination contestant	Registered association that did not hold contest	Any	Improper surplus disposal with offence for sender; not a contribution
Nomination contestant	Registered association that held contest	Non-monetary	If capital asset, improper surplus disposal with offence for sender; not a contribution <sup>1</sup>
Leadership contestant	Registered association	Non-monetary	If capital asset, improper surplus disposal with offence for sender; not a contribution <sup>1</sup>

<sup>1</sup> Remaining non-capital assets or services can be provided to the association, but they must either be sold to the association or contributed by the contestant as a personal non-monetary contribution.

## Conclusion

Elections Canada believes that the objectives of the contributions regime are met in most cases without treating irregular transfers as illegal contributions. Where irregular transfers are tied to specific offences in the CEA, these offences are an adequate basis for enforcement that can promote future compliance with the transfer rules.

Where there is no specific offence in the CEA, notably for some irregular transfers by candidates and contestants, Elections Canada's categorization of the transfer will depend on whether it could have been otherwise accomplished legally. This may include an irregular transfer being treated as an illegal contribution that would have to be returned.