



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: 2019-08 (Draft – May 2019)

Posting and Displaying Partisan Material at Polling Places

Issue

The *Canada Elections Act* (“CEA”) prohibits the posting and displaying of partisan election material “in, or on the exterior surface of, a polling place” under the English version of paragraph 166(1)(a). In French, the wording is “à l’intérieur d’une salle de scrutin ou sur les aires extérieures de celle-ci.” As currently drafted, it is unclear where the prohibition applies: whether to the entire building in which voting takes place or to a specific room or area within it, and whether to the walls and doors outside the polling place or to a certain periphery around it.

This note clarifies where posting and displaying partisan material is allowed in and around polling places, and when material may be removed by election officers.

Interpretation

- (1) Paragraph 166(1)(a) aims to create a neutral area around the polls to promote the impartial administration of elections and maintain trust in the electoral process. This important objective must be balanced against freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*.
- (2) Given the diversity of polling locations across Canada, how the prohibition on partisan material must be applied to meet the objective of a neutral area around the polls cannot be set out in a definitive rule.
- (3) The following principles guide where partisan material is allowed, and will be applied by returning officers and other election officers in deciding whether or not to remove material:
 - Partisan material cannot be posted or displayed in the room where voting takes place.
 - In most cases, partisan material cannot be posted or displayed anywhere in the building where voting takes place.

- In most cases, the prohibition on partisan material extends to the entire property on which the building is located, including the parking lot.
- In some cases, it may be reasonable in balancing neutrality and freedom of expression to permit partisan material in areas of the building or property that are far removed from the room where voting takes place, or in private areas of the building or property.
- Where it is not reasonable to remove partisan material from the entire building or property, priority will be given to removing material from the main pathways used by voters to enter the polling location.

Legal Framework

The most directly relevant provision of the CEA in the context of this interpretation note is as follows:

<p>166 (1) No person shall</p> <p>(a) post or display in, or on the exterior surface of, a polling place any campaign literature or other material that could be taken as an indication of support for or opposition to a political party that is listed on the ballot under the name of a candidate or the election of a candidate;</p>	<p>166 (1) Il est interdit :</p> <p>a) d'afficher ou d'exhiber à l'intérieur d'une salle de scrutin ou sur les aires extérieures de celle-ci du matériel de propagande qui pourrait être tenu comme favorisant un parti politique mentionné sur le bulletin de vote sous le nom d'un candidat ou l'élection d'un candidat, ou s'opposant à un tel parti ou à l'élection d'un candidat;</p>
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That provision is to be read jointly with subsection 479(7), which allows returning officers and other election officers to remove material that contravenes paragraph 166(1)(a):

<p>479 (7) If a returning officer or other election officer believes on reasonable grounds that a person has contravened paragraph 166(1)(a) or (b), the officer may cause any material that they believe on reasonable grounds was used in contravention of that paragraph to be removed from, in the case of a returning officer, his or her office or, in the case of any other election officer, the polling station.</p>	<p>479 (7) Dans les cas où ils ont des motifs raisonnables de croire qu'une personne a contrevenu aux alinéas 166(1)a) ou b), les directeurs du scrutin ainsi que les scrutateurs, les superviseurs de centres de scrutin et les responsables du maintien de l'ordre nommés en vertu de l'alinéa 124(1)b) peuvent faire enlever de leur bureau, dans le cas des directeurs du scrutin ou, dans le cas des autres, du lieu où se déroule le scrutin tout objet dont ils ont des motifs raisonnables de croire qu'il a été utilisé en contravention de ces alinéas.</p>
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A prohibition similar to the current version of paragraph 166(1)(a) was first introduced in 1983.¹ It read as follows:

<p>50(4) No person shall</p> <p>(a) post or display on or in a polling station or in a hall, window or door of a polling station any campaign literature, emblem, ensign, badge, label, ribbon, flag, banner, card, bill, poster or device that could be taken as an indication of support for or opposition to a candidate or a registered party;</p>	<p>50 (4) Nul ne doit :</p> <p>a) afficher ni exhiber en aucun endroit à l'intérieur ou à l'extérieur d'un bureau de scrutin aucun matériel électoral, emblème, enseigne, insigne, étiquette, ruban, drapeau, bannière, carte, affiche ou autre qui pourrait être tenu comme favorisant ou contrecarrant un parti enregistré ou l'élection d'un candidat;</p>
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In 2000, the provision was amended by Bill C-2 to its current wording.

¹ Prior to this, the prohibition was limited to furnishing, supplying or using loud speakers, ensigns, banners, etc., on polling day, and to furnishing, supplying or wearing flags, ribbons or favours on polling day, with no reference to the polling place. (RSC 1970, c. 14, s. 50)

Background

Recommendation to Parliament

In 2010, following the 40th general election, the Chief Electoral Officer recommended that the CEA be amended to clarify the scope of paragraph 166(1)(a). The amendment he proposed was to prohibit posting and displaying partisan material within 100 metres of premises in which a polling site or office of a returning officer was located.² The House of Commons Standing Committee on Procedure and House Affairs did not agree with the proposed approach, feeling the restriction was “excessive and difficult to define.” The Committee instead proposed that the prohibition apply to material posted “on the exterior surface of the unit or room leased for use as a polling place.” In the French version of the provision, the term “aires” would be replaced by the word “surface.”³ However, no such amendment was ever made.

Comparison with provincial legislation

In most provinces and territories, election legislation prohibits displaying partisan material within a certain distance of a polling place. The distance varies from 50 feet in Saskatchewan to 100 metres in British Columbia and Newfoundland and Labrador. Ontario is the only province with no clear prohibition, as neither the *Election Act* nor the *Election Finances Act* address where signs can or cannot be posted.⁴

Election legislation for Nunavut and Yukon make no mention of a specific distance; instead, they use language similar to that found in the CEA. Alberta’s *Election Act*⁵ applies the prohibition to both the inside and outside of the building used for a polling place, as well as “within the boundaries of the land on which the building is located.” There is an exception for a polling place located in “a building containing a complex of interlocking offices, stores or other facilities.”⁶

Quebec has legislated the most restrictive regime. Under the *Election Act*,⁷ a returning officer can cause any partisan material to be removed from the premises of a polling station, which is defined as the “building in which the polling station is located and any neighbouring place where the sign or partisan publicity may be seen or heard.” This means that signs may be removed not only from the property on which the building sits, but also across the street from it.

² Chief Electoral Officer, *Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election*, 2010, part I.19.

³ Standing Committee on Procedure and House Affairs, *Report 15: Response to the Chief Electoral Officer’s Recommendations for Legislative Reforms Following the 40th General Election*, 41st Parliament, 1st Session, February 2012.

⁴ Elections Ontario, *CFO Handbook for Political Parties 2018*, p. 75: “Sign placement: The *Election Finances Act* does not address where signs can or cannot be placed. When placing signs on public property, consult the local municipality to see what local by-laws allow or, when placing signs near a highway, consult the Ministry of Transportation.”

⁵ RSA 2000, c. E-1, s. 135.

⁶ In this type of building, the prohibition applies only to the office, store or facility comprising the area designated as a polling place.

⁷ CQLR, c. E-3.3, s. 352.

Previous interpretations by Elections Canada

In recent elections, the uncertainty surrounding the scope of the prohibition, including the meaning of the words “on the exterior surface [of] a polling place,” has given rise to complaints and questions from citizens and political entities. As noted in the 2010 recommendations report:

Some individuals interpret that expression broadly, extending the prohibition to the entire site on which a polling place is located. Others interpret it quite strictly, limiting the prohibition to the exterior walls of a polling site. ... These different interpretations lead to the inconsistent application of the provision throughout the country.⁸

In the *Returning Officer's Manual* for the 41st general election, Elections Canada instructed returning officers that the polling place, for purposes of this provision, encompassed the entire property (including the parking lot) on which a polling station was established, up to the sidewalk. For the 42nd general election, the manual was less specific and only stated that “partisan material in, or on the exterior of, a polling place is prohibited.” It did not specify whether the polling station encompassed the whole building or simply the portion leased for voting purposes.

The *Central Poll Supervisor Guidebook* for the 42nd general election was clearer, instructing the election officer to scan outside and confirm that there was “no partisan material on the exterior surface of the building.” The *Guidelines for Candidates' Representatives* for the 42nd general election included the following in the list of do's and don'ts: “As a candidate's representative, you MAY NOT: ... display partisan symbols or material inside or near a polling place, which may include the parking lot, grounds and sidewalk.”

In the leases signed by returning officers on behalf of the Chief Electoral Officer, clauses address partisan material and the authority of election officers (i.e. the tenant) to remove such material. For example, in the most recent lease template for polling places, the following wording is included:

11. The Landlord acknowledges and agrees that the Tenant, acting reasonably, may remove from the Premises or the building in which the Premises are located any material of a partisan political nature. The Tenant shall not be liable for any damages, however caused, resulting from such removal.

Analysis and Discussion

Purpose of the prohibition and *Charter* considerations

Elections Canada understands the prohibition at paragraph 166(1)(a) to have the purpose of maintaining the neutrality of the polling place, and of election administration more generally. At a polling location, the presence of partisan signs, posters or campaign vehicles could lead voters to question the neutrality of the polling place. This would have a negative impact on trust and the legitimacy of election results.

However, the right to post or display partisan material during an election period is protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*. Information that relates to the electoral process has been described by the Supreme Court of Canada in *Thomson Newspapers* as being “at the core of expression guaranteed by the *Charter*.”⁹ The importance of this right is also reflected in the CEA, which makes it an offence under section 325 to “prevent or impair the transmission to the public of an election advertising message.”

⁸ Chief Electoral Officer, *Responding to Changing Needs*.

⁹ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877.

Therefore, an interpretation of paragraph 166(1)(a) must reflect the delicate balance between protecting freedom of expression and ensuring the neutrality of the polling place, and of election administration in general. To impose a greater zone of neutrality is to detract from free political expression, and vice versa. As ensuring neutrality infringes on freedom of expression, the limitation on posting and displaying partisan material should only be as broad as it needs to be to prevent the harm identified.

Interpreting “polling place” and “exterior surface”

The difficulty in interpreting paragraph 166(1)(a) comes, first and foremost, from the fact that the French and English wording of the provision do not support a common meaning. This makes the scope of its application unclear. First, the term “polling place” in English (“salle de scrutin” in French) is not defined in the CEA. It could be interpreted as meaning either the room where the polling station is located or the entire building. Second, the English wording refers to “the exterior surface” of the polling place, while the French refers to “les aires extérieures,” which is potentially broader. Although both clearly include the actual surface of the building (walls, windows and doors), the question is whether they also include the area surrounding the building.

Polling place

Interpreting “polling place” to mean only the specific room where voting takes place within a building would render the words “or to the exterior surface” of a polling place largely meaningless. All that would be covered by such a narrow interpretation would be the outside of the door of the voting room, and the outside walls of that room (which would be the inside walls of neighbouring rooms).

This would mean that partisan material could be placed in front of the building where a polling station is located, on the door of the building, and all along the hallway leading to voting room. Such a narrow interpretation would clearly defeat the purpose of the provision, which is to maintain the neutrality of the polls. The interpretation must be broader.

In most cases, to protect the neutrality of the polls, partisan material must be prohibited from being displayed or posted anywhere in the building where voting takes place. In some cases, however, it may be unreasonable for the notion of a “polling place” to extend to the entire building. For example, polling stations may be located in university student centres, where activities of a political nature are regularly carried out (since student clubs or partisan associations often have offices in these buildings). In such cases, respect for freedom of expression may require allowing partisan material to be present in one part of a building, even though a polling station is located in another part of the building.

Exterior surface

Adopting a narrow interpretation of “exterior surface” would also defeat the purpose of the provision. It would prohibit the posting of partisan material on the exterior wall of the building, but it would allow the same material to be displayed on the grounds one inch from the wall. This cannot have been the intention of Parliament in adopting this provision, as it would do little to protect the neutrality of polling places.

A broader interpretation, which is suggested by the French wording “aires extérieures” and is generally reflected in provincial and territorial legislation, would have the effect of creating a neutral area around the polling location. It is an approach that is familiar to voters and political entities. A broader reading of exterior surface means that signs should generally not be posted or displayed on the property around the polling location, including in the parking lot or along the pathway that voters would use to get into the building from the parking lot or sidewalk.

In rare cases, it may be necessary to leave partisan material posted close to the polling location. For example, polling stations are sometimes located on the first floor of apartment buildings, and residents may wish to have partisan material in the windows of their apartments. Election officers are not authorized under paragraph 166(1)(a) to remove partisan material from private dwellings. In such cases, the “exterior surface” of the location would be considered to include only the front lawn, public walkway to the building, the interior lobby and any other common areas on the pathway to the polling station.

Conclusion

In previous elections, Elections Canada adopted a broad interpretation of paragraph 166(1)(a) that allowed election officers to remove signage not only in the room where voting takes place, but also more generally from the building and exterior grounds. In almost all instances, candidates and political parties complied with election officers’ requests to remove signage. This suggests that political entities also appreciate the need for neutrality around the polls and recognize that it is what voters expect.

How the prohibition must be applied to result in a neutral area around the polls cannot be set out as a definitive rule because of the diversity of polling locations across Canada. They include schools, churches and community centres, but also large shopping centres, private residential buildings, and college and university campuses. Voters may have access to the entire building or to only a very limited area for the purpose of voting.

Returning officers and other election officers are expected to act on a reasonable basis under subsection 479(7) to protect the neutrality of the polls without unduly interfering with freedom of expression. The following principles guide where partisan material is allowed, and will be applied by returning officers and other election officers in deciding whether to remove material:

- Partisan material cannot be posted or displayed in the room where voting takes place.
- In most cases, partisan material cannot be posted or displayed anywhere in the building where voting takes place.
- In most cases, the prohibition on partisan material extends to the entire property on which the building is located, including the parking lot.
- In some cases, it may be reasonable in balancing neutrality and freedom of expression to permit partisan material in areas of the building or property that are far removed from the room where voting takes place, or in private areas of the building or property.
- Where it is not reasonable to remove partisan material from the entire building or property, priority will be given to removing material from the main pathways used by voters to enter the polling location.