

Bloomberg

Canada Election Result Bloggers Face Fines Under 1938 Law

By Gary Norris - May 2, 2011

Social media and a 73-year-old law may be headed for a collision today when Canada holds a national election as tweeters and bloggers face the possibility of C\$25,000 (\$26,400) fines for posting results before the polls close in the West.

Under section 329 of the Canada Elections Act, no one is allowed to transmit early election results from one region to other areas where the polls are still open. The provision dates to 1938 - long before television and the Internet - and was intended to prevent broadcasts of results in Eastern Canada from influencing voters in the West, as much as four and a half hours behind.

The law distinguishes between transmission - broadcasting to an audience - and communication among individuals. In the modern world of instant tweets and blogs, that distinction may be blurry. Elections Canada says that section 329 applies to all transmissions, regardless of the medium.

“What we’re seeing now is the advent of what’s being commonly called social media platforms, Facebook etcetera, which are adding a new dimension to the immediacy of communication,” Elections Canada spokesman John Enright said in a phone interview from Ottawa. “That being said, 329 is still on the books.”

The penalty for a violation is a fine of not more than C\$25,000, although only one Internet-related case has been prosecuted. That reached the Supreme Court of Canada and ended with a \$1,000 fine plus legal costs.

The Supreme Court case dealt with Paul Bryan’s contention that his publication of results in the November 2000 election was protected by the constitutional Charter of Rights and Freedoms.

Equality

The high court cited the principle of “informational equality” for all voters, and its 2007 ruling said Section 329 “contributes in a positive way to the fairness and reputation of the electoral system.”

David Elder, a specialist in communications law with Stikeman Elliott LLP in Ottawa, said a key issue is to “determine where the line is between what constitutes a transmission to the public, something akin to a publication, and what is really legitimate and in fact vital discussion on political issues.”

The legislation has been perceived to be focused on mass media such as radio and TV, he said.

“In smaller circles, the lines are a lot less clear,” Elder said.

Narrows Gap

The time gap across six time zones from Newfoundland to the Pacific Coast has been reduced in recent elections with staggered polling hours, Enright said.

“The true lag between an Eastern vote and a Western vote is 1½ hours,” Enright said. Including the time taken to count ballots “realistically, the lag is probably closer to 30 to 45 minutes.”

How the issue might be further dealt with is up to Parliament, not Elections Canada, Enright added. In the meantime, the law stands.

“It is on the books, and there is provision in the act to declare an offence; whether or not anyone can be prosecuted under that is under their discretion,” lawyer Julia Kennedy said from the Ottawa office of Fasken Martineau DuMoulin LLP.

A decision on whether to prosecute would be up to the Commissioner of Elections Canada, who Enright said normally acts on the basis of complaints.

Kennedy’s advice to tweeters, bloggers and Facebook users on Election Day is: “They should be aware that it is an offence.” As for freedom of expression, “Certainly people can express opinion without contravening section 329,” she said.

To contact the reporter on this story: Gary Norris in Toronto at gnorris1@bloomberg.net

To contact the editor responsible for this story: David Scanlan at dscanlan@bloomberg.net;

©2011 BLOOMBERG L.P. ALL RIGHTS RESERVED.