CALL ACBD CANADIAN ASSOCIATION OF LAW LIBRARIES ASSOCIATION CANADIENNE DES BIBLIOTHÈQUES DE DROIT

10 December 2018

Mr Dan Ruimy, MP
Chair, Standing Committee on Industry, Science, and Technology

Submitted via webform

Dear Mr Ruimy and Committee Members:

Re: Statutory review of the Copyright Act Brief 2: Primary law

This is the second of two briefs by The Canadian Association of Law Libraries/L'Association Canadienne des Bibliothèques de Droit (CALL/ACBD) to assist the Committee's review of the *Copyright Act*. In this brief we submit that the *Act* clarify or expressly confirm that copyright does not subsist in statutes, regulations, by-laws, orders, proclamations, judgments, case law and awards of courts and tribunals, which CALL/ACBD characterizes as "primary law."

About CALL/ACBD and our relationship to the *Copyright Act* review

CALL/ACBD is a non-profit body corporate continued under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 whose objects include promoting access to legal information and to develop and increase the usefulness of Canadian law libraries. Our association has 370 legal information professional members representing 210 organizations from various legal environment sectors. About 25% of our membership work in law firms; 22% are in courthouse and law society libraries; 21% are in the academic sector; 10% work in government libraries; publishers represent about 5%; and 12% indicate other affiliations. Many of our members are also authors. CALL/ACBD members work daily with material protected by copyright law, with licensed copyright-protected material, and with primary law.

Some decades ago CALL/ACBD established a standing Copyright Committee to address copyright issues, including statutory reviews of the *Copyright Act*.

Summary of recommendations relating to primary law

- The *Act* must clarify that Crown or other copyright does not subsist in primary law. Copyright in primary law is antiquated and hinders access to justice and to innovation. To the extent the royal prerogative continues to be a source of copyright in Canada, the *Act* must state it does not cover primary law.

- Options to legislatively achieve this outcome include these:
  - a provision confirming that primary laws are not "works" within the meaning of the *Act*;
  - a provision confirming that copyright does not subsist in primary law;
  - an explicit statement that primary law is not prepared or published by or under the direction or control of Her Majesty or any government department and is not captured by the royal prerogative; or
  - an explicit statement that primary law is in the public domain.

- USMCA ratification is as an opportunity to clarify explicitly that Crown or other copyright does not subsist in primary law.

The *Act* must clarify that copyright, whether Crown copyright or otherwise, does not subsist in primary law

The Crown and the law

Public access to the law is central to access to justice, and knowledge of the law is central to exercise of rights, satisfaction of obligations, and functioning of an informed democracy. The law consists of statutes, regulations, by-laws, orders, proclamations, judgments, case law and awards of courts and tribunals. CALL/ACBD uses the term "primary law" to denote these materials.[1]

Our study of section 12, Crown copyright, the royal prerogative, and the origins of the *Copyright Act* advances a purposive, and modern interpretation of Canadian law that neither Her Majesty nor anyone else holds copyright in primary law.

CALL/ACBD has consistently asserted[2] that primary law *should not* fall within s 12 or any other provision of the *Copyright Act*; a modern interpretation indicates the law *is not* subject to

[1] Primary law may also include Indigenous laws or certain Indigenous knowledge, addressed in the first of the two CALL/ACBD briefs.

[2] See CALL/ACBD Copyright Committee summary and resources.

copyright.[3] Copyright is a statutory creature; no other source of copyright[4] exists in Canadian law. Nowhere does the *Act* affirm copyright is within the royal prerogative. Nowhere does the *Act* state it applies to primary law.

CALL/ACBD believes the correct interpretation of Canadian law is that primary law is not a proper subject matter of copyright.[5]

Law is not a work prepared or published by or under the direction or control of Her Majesty

Section 12 is often cited to establish the Crown's ownership of the law. This curious section derives from a 1911 UK provision[6] which has since been amended there and in other Commonwealth jurisdictions. For instance, New Zealand's *Copyright Act 1994* separated primary law from government works, making Crown copyright inapplicable to the former.[7]

One part of section 12 indicates copyright belongs to the Crown where a work "is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department." This grants the Crown copyright in materials the government prepares.[8]

To assert that Her Majesty directs or controls the preparation of the law is anathema to the notions of an independent judiciary and the work of elected and accountable legislators in a representative democracy.[9] To apply the term of copyright protection set out in s 12 is unworkable and inappropriate for communication of the law.

The notion of the royal prerogative and Crown ownership of the law is antiquated

The other purported source of copyright by s 12 is the royal prerogative, said to be referenced in the words, "without prejudice to any rights or privileges of the Crown."

Our study of the royal prerogative, its origins, and its purpose indicates that copyright in the Crown on its basis is antiquated. The modern connection between those words and perpetual ownership by Her Majesty of the law governing the people is tenuous and contrary to representative democracy.

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[3] CALL/ACBD received leave to intervene in a matter before the Supreme Court of Canada to address the language of s 12.

[4] Copyright Act, s 89.

[5] The Supreme Court of Canada wrote to this effect about case law in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para 35.

[6] *Copyright Act 1911*, 1911 c 46 (UK) s 18.

[7] See *Copyright Act 1994*, Public Act 1994 No 143 (New Zealand), ss 26, 27.

[8] This brief does not address modernization of Crown copyright ownership in materials prepared by the government. See the brief of Amanda Wakaruk for well-considered evaluation of this.

[9] See State of Georgia v Public.Resource.Org, Inc, USCA 11th Cir, No 17-11589 (October 19, 2018) at pp 20-28. We believe the reasoning in this US case is equally applicable in Canada.

The privilege was reserved to the Crown to ensure authenticity and accuracy of the law, when printing technologies became widely available.[10] This seems the traditional justification for Crown copyright.[11] Authenticity and accuracy are now achievable by methods such digital signatures and encryption. The potential for wide availability of authenticated law sources also minimizes risk of false presentations making their way to the people.

Open law, law as data, and encouragement of innovation
This review began with the Ministers' observation that a well-functioning copyright framework should "contribute to a marketplace and environment where users have access to world-class content," "inspire follow-on creation and innovation," and be "well adapted to the digital environment." The review asks how the *Act* can foster innovation, how the copyright framework can function with constant change in technology and business possibilities, and how it can position Canadian innovators to compete on the global stage.[12]

The promotion of Canadian creativity and innovation with legal information will benefit from clarity that law is free of copyright. Public domain law would enable innovators to work with legal materials as data to produce widely available sources of accurate law. People would be unhindered in creating tools and resources to enable Canadians to access our law. Creators can build tools that employ artificial intelligence to work with the data in primary law to advance legal information solutions and further access to justice.

An example from the US, where primary law is expressly within the public domain[13], is Harvard Law School's Library Innovation Lab's recent digitization of the entirety of published U.S. case law, (minus proprietary content from the source books). The Library Innovation Lab made the caselaw freely available and recently released the data[14] to enable researchers to explore content and work with this legal information.

Currently, such work is done under by blanket license or individual permissions, sometimes for a fee. An even field requires a framework that enables innovators, whether deep- or shallow-pocketed, to create resources to assist stakeholders and the public to work productively with primary law. Existing legal information providers, emerging legal technology entrepreneurs, academic researchers, and the public will have equitable opportunities to develop digitization projects, build applications using component data, and create learning resources.[15]

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[10] See, e.g., *New South Wales (AG) v Butterworth & Co* (1938), 38 SR (NSW) 195.
[11] See, e.g. C. Tapper, "The Law of Databases and Databases of the Law" in *Essays in Honour of Sir Brian Neill: The Quintessential Judge*, pp 77-115 and D. Vaver, "Copyright and the State in the United States and Canada" 10 IPJ 187 (May 1996).
[12] Letter to Mr Dan Ruimy, MP from Hon. Navdeep Bains, MP and Hon. Mélanie Joly, MP.
[13] Primary law is expressly within the public domain in numerous countries, both with droit d'auteur copyright and with English copyright origins. For a 1996 overview, see JAL Sterling, "Crown copyright in the UK and Other Commonwealth Countries" 10 IPJ 157 (May 1996).
[14] See Library Innovation Lab, Caselaw Access Project (CAP) Launches API and Bulk Data Service, https://perma.cc/9JZC-6RN6.
[15] CALL/ACBD has read and supports the brief filed on behalf of the Canadian Legal Information Institute (CanLII) on this point.

Finally, CALL/ACBD members regularly copy primary law in our work. People reproduce primary law to file in court. Courts reproduce it in their work. Educators and students reproduce law for legal education. Clarity that primary law is free of copyright will allow this work to continue unhindered by infringement concerns or license fees.

Solutions are straightforward

It is time the *Act* confirm that copyright does not subsist in primary law. CALL/ACBD suggests a number of options to achieve this:

- a provision confirming that primary laws are not "works" within the meaning of the *Act*[16];
- a provision confirming that copyright does not subsist in primary law[17];
- an explicit statement that primary law is not prepared or published by or under the direction or control of Her Majesty or any government department and is not within the scope of the royal prerogative[18]; or
- an explicit statement that primary law is in the public domain.

USMCA-required amendments can facilitate a modern Copyright Act

We have undertaken a preliminary study of the United States–Mexico–Canada Agreement (USMCA) and its intellectual property chapter.[19]

Canada's commitments are accompanied by resolutions including Canada's inherent right to set legislative and regulatory priorities consistent with our legitimate public welfare objectives, fostering creativity and innovation.[20] Specific USMCA objectives relating to intellectual property include contribution to promotion of technological innovation to the mutual advantage of creators and users, and to a balance of rights and obligations.[21] To borrow language from the agreement, Canada should take full advantage of its negotiated right, in formulating or amending laws, to adopt measures necessary to promote the public interest in sectors important to our socio-economic and technological development and to adopt measures that will prevent abuse of copyright by rights holders.[22]

With ratification of USCMA, the bargain will support CALL/ACBD's recommendation for primary law. The legal environment in Canada—in courts, legal education, legal practice, and access to

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[16] With reference to ss 2, 3, and 12.
[17] With reference to s 5.
[18] New Zealand's *Copyright Act 1994*, ss 26 and 27 are a good illustration.
[19] United States–Mexico–Canada Agreement (USMCA), Chapter 20, Intellectual Property Rights, Article 20.H.7
[20] USMCA, Preamble
[21] USMCA, Article 20.A.2. Objectives
[22] USMCA, Article 20.A.3. Principles

justice efforts—is in the midst of rapid technological advancement. Tools that build on public domain primary law can advance access to justice initiatives.

Canada can take the opportunity of USMCA ratification to express in the *Act* that copyright does not subsist in primary law. This will be consistent with the conception of primary law in both of our USMCA partners, Mexico and the US.

Respectfully submitted,

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