CanLII

The Canadian Legal Information Institute
L'Institut canadien d'information juridique

Dear Committee members,

My name is Xavier Beauchamp-Tremblay. I am the President and CEO of the Canadian Legal Information Institute (**CanLII**).

CanLII is a not-for-profit that has been publishing legal information on the Internet since 2001. Our technology supplier and subsidiary, Lexum, has been publishing the law online since 1993. CanLII's databases available on the www.canlii.org website contain current and historical primary law, including legislation and court and tribunal decisions, from all the provinces and territories in Canada. Research has shown that CanLII is used by roughly 9 out of 10 legal professionals in the course of their practice.

Legal publishers and innovators in the legal sphere are directly impacted by the interpretation of the Crown copyright provision (section 12) and the scope of the pre-statutory royal prerogative that is preserved at s. 12 of the *Copyright Act* (the **Act**). As such, we are interested in the current review process, especially as it seems Crown copyright is being given more attention than in previous reviews.

We believe Crown copyright should be abolished in certain materials produced by the judicial, legislative, and executive arms of government, including:

- bills, statutes, regulations, ordinances, by-laws and proclamations, and explanatory memoranda or explanatory statements relating to those materials;
- judgments, orders, and awards of any court or tribunal;
- official records of parliamentary debates and reports of parliament, including reports of parliamentary committees;
- reports of commissions of inquiry, including royal commissions and ministerial and statutory inquiries.

Here are the reasons we support this position:

**Lack of predictability and transparency**

In a 2005 paper, Professor Elizabeth Judge stated: "[w]hat exactly Crown copyright covers is unfortunately murky."[1] Several other authors have noted the confusing nature of Crown copyright.[2]

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[1] Elizabeth F Judge, "Crown Copyright and Copyright Reform in Canada" in Michael Geist, ed, In The Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law, 2005) 550 at page 555 (https://www.irwinlaw.com/sites/default/files/attached/Three_05_Judge.pdf)

[2] See for instance: Luanne Freund and Elissa How, "The Quagmire of Crown Copyright: Implications for Reuse of Government Information", Canadian Law Library Review, 2015 40-4, 2015 CanLIIDocs 291 (http://www.canlii.org/t/27sg)

This is particularly true with respect to legal materials, since they are often considered to fall under the royal prerogative rather than actual statutory Crown copyright. The existence, in copyright law at least, of the royal prerogative is based entirely on the ten word introductory clause “without prejudice to any rights or privileges of the Crown” at the start of s. 12 of the Act. The Act doesn’t say what types of works are covered, what is the scope of those rights and privileges of the Crown, or what duration they may have.

The situation is not significantly better under the statutory Crown copyright (the rest of the language at s. 12). For instance, as Professor Judge notes:

> A further uncertainty is the scope of the “Crown” in Crown copyright. Does Crown copyright extend only to the Federal government (the Crown in right of Canada) or does it include the provinces and territories (for example the Crown in right of Ontario)? Within the Federal government, which entities are part of the Crown? And, does the Crown include only the executive branch of the government or does it also include the legislative and judicial arms?[3]

This lack of predictability and transparency makes it difficult for people seeking to have access to materials authored by governments, legislatures, and courts to ascertain if they can claim they are allowed to have access to certain materials. It makes it difficult for them to deal with a branch of government that behaves like primary law is proprietary content, of which there are several, in different jurisdictions. This is a barrier to innovation in the legal sphere when it is most needed.

**Crown Copyright is a barrier to innovation, especially in the legal sphere**

A subtitle to the Government of Canada news release announcing the launch of the current *Copyright Act* review process was subtitled “Copyright framework supports creativity and innovation; review will ensure it remains current in fast-paced digital world”.[4]

In the legal sphere, different actors are more dependent on materials generated by the activity of the State, such as legislation, and decisions, than is common in other domains. In our field of activity, Crown copyright is a direct obstacle to creativity and innovation.

Using new technologies, especially machine learning and new software libraries that provide more organizations with the capacity to create dynamic systems than before, innovators can accomplish many things such as:

- Help members of the public better understand the law, with tools like chatbots;
- Help self-represented litigants exercise their rights, for instance with automated systems for filing court proceedings using plain language forms;

[3] Id., p. 557
[4] https://www.canada.ca/en/innovation-science-economic-development/news/2017/12/parliament_to_undertakereviewofthecopyrightact.html

- Help businesses navigate the complexities of law and regulations with software-based compliance tools and mitigate the sometimes chilling effect of regulation on business activity;
- Help foreign investors and multinational businesses operating in Canada to understand and comply with Canadian law by integrating it with international compliance systems.

CanLII has direct knowledge that several Canadian startups interested in developing such solutions were discouraged due to the lack of access to data and have abandoned the legal sphere altogether. Crown copyright is a barrier to widespread access to this important data and has therefore impeded innovation in the legal field. It is important to overcome this obstacle to allow for more innovation at a time when delays and costs are impeding access to justice, and where it is generally accepted that “as much as 70%-90% of legal needs in society go unmet”.[5]

Currently, several governments and municipalities in Canada have embraced “open data” and “open government” initiatives. Crown copyright continues to stand in the way of these initiatives in the legal field and to delay progress that brings broader access to legal information.

More generally, maximising access to publicly funded legal materials promotes justice and the rule of law. There might be good reasons, such as privacy, in certain limited and clearly defined circumstances to impose restrictions on the dissemination of legal materials, but an obsolete and overly broad concept like Crown copyright is not the right vehicle to address these concerns. The use of Crown copyright as a means to control access for policy reasons leads to opaque, arbitrary, geographically variable, and potentially discriminatory decision-making with respect to who is given access to this content.

**Traditional justifications for Crown copyright are no longer valid**

Lastly, the reasons that were traditionally invoked for maintaining Crown copyright in legal texts, such as authenticity and cost recovery, are no longer relevant. In the combined CanLII and Lexum experience :

- Crown copyright is not required, nor even useful, to ensure the authenticity of legal documents. First, instances when a bad actor decides to alter the content of legal documents are extremely rare and invoking Crown copyright as a tool to prevent such bad behavior is disproportionate to the risks. Second, in the very rare cases when a bad actor is determined to circulate inauthentic legal documents or use them in court, Crown copyright will have no deterrent effect. Third, technological means to ensure authenticity, including encryption technology and digital signatures, are increasingly widespread and understood, and they would be better tools to ensure authenticity than Crown copyright if ensuring authenticity continues to be a concern.

[5] Action Committee on Access to Justice in Civil and Family Matters, Access to Civil & Family Justice: A Roadmap for Change (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at page 4 (http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)

- The modest revenue generating activity from the licensing of legal texts is too small to justify the larger societal costs of closed access to these materials. Moreover, publicly-funded legal texts are currently created and disseminated electronically, thereby reducing any need to recuperate printing and shipping costs.

In conclusion, the Committee has a new opportunity to recommend the elimination of an outdated concept that brings no real benefit to the legal information environment and hinders the development of tools that could help Canadians navigate the complexities of the law. We encourage the Committee to take that step forward and recommend the abolition of Crown copyright in materials produced by the judicial, legislative, and executive arms of government as listed above.

We would be happy to discuss this brief further if requested.

Very cordially,

Xavier Beauchamp-Tremblay
President and CEO, CanLII