

Chapter 4

The Impact of Crown Copyright on Access to Law-Related Information

On the face of it, two relatively small doctrines, Crown prerogative and Crown copyright, have determined our public policy on the publication of, and access to, legal information. These doctrines control ownership in statutes, regulations, judicial decisions and decisions of administrative boards. Ownership means controlling the publication and distribution of this information, whether in print or electronic form. It means control over access to the “law of the land.”¹

- 4.1 The History of Crown Copyright in England and Canada
- 4.2 Ownership of Government Information in the United States
- 4.3 Impact of Crown Prerogatives and Crown Copyright on Access to Information

In Canada, the federal and provincial governments own and control the printing of legislation, judicial decisions and other law-related government information. This ownership and control stems from two sources: royal prerogatives and Crown copyright. The royal prerogatives date back hundreds of year to the time when English sovereigns ruled the land and controlled such things as printing and publishing. Crown copyright stems from legislation. Under s. 12 of the *Copyright Act*,² the government owns copyright to any work prepared or published by or under the direction or control of the government:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall

¹ Marshall, *supra* Chapter 3, note 66 at 175.

² R.S.C. 1985, c. C-42.

continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

On the face of it, the language in s. 12 would not necessarily seem to include judicial decisions to the extent that judges might be seen as ordinarily *not* being under the direction or control of the government. Despite this, it is clear that the federal and most provincial governments regard judicial decisions as being caught by Crown copyright, as evidenced by their copyright notices claiming copyright in judicial decisions.³

This provision for Crown copyright – which has been described as a “legislative monstrosity”⁴ and an example of “atrocious drafting”⁵ – was modeled on the 1911 British statute⁶ as were at one point similar provisions in former colonies, including Australia⁷ and New Zealand.⁸ Not all governments in the world claim copyright in their work, however.⁹ In the United States, for example, there is no Crown copyright – government works in the United States are, as a general rule, in the public domain.

³ See the *Reproduction of Federal Law Order* and Ontario’s policy on Crown copyright discussed *infra*, notes 58 and 59 where the respective governments assert Crown copyright in judicial decisions.

⁴ Comments of counsel in argument in *Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd.* (1938), S.R.N.S.W. 195 at 258, cited by Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981) at 49.

⁵ Patent and Trademark Institute of Canada, Brief submitted to the federal government in response to: *Copyright in Canada: Proposals for a Revision of the Law*, (26 January 1978), cited by Barry Torno, *ibid.*

⁶ *Copyright Act*, 1-2 Geo. V, c. 46, s. 18.

⁷ *Copyright Act 1968* (Cth.), ss. 176-182A. In April 2005, the Copyright Law Review Committee, appointed by the Australian Attorney-General, has recommended abolition of Crown copyright in legislation, case law and other government law-related information – see: Copyright Law Review Committee, *Crown Copyright* (April 2005). Available online: <<http://www.ag.gov.au/agd/www/Clrhome.nsf>>. These recommendations will be discussed in more detail in the final conclusions section of this thesis.

⁸ *Copyright Act 1994* (N.Z.), 1994/93, s. 26, but by s. 27, legislation and judicial decisions are in the public domain.

⁹ Including the United States, France, Belgium, Italy, Finland, Austria, Denmark, Spain, Germany and Switzerland – see André Françon, “Crown Copyright in Comparative Law: the French Model, Continental Europe and the Berne Convention” (1996) 10 I.P.J. 329.

Since copyright law has the potential to restrict use of information through providing a monopoly to the copyright owner for the reproduction of the work, Crown copyright has the potential to greatly impact access to government and law-related information. In this chapter, I briefly review the history of Crown copyright in Britain and Canada, which takes us to a review of the royal prerogatives and Crown copyright. The focus here will be on the origins and purpose of the concept and the preservation or protection of prerogative rights or “privileges” given to the Crown in the statute. I follow this with a comparison of the situation of government-produced information in the United States with a discussion of how differences in policy in the United States have affected access to law-related information in America. I conclude with an analysis of the impact of Crown copyright in Canada on access to law-related information.

4.1 The History of Crown Copyright in England and Canada

To understand the extent of the current rights of the federal and provincial governments in Canada to ownership of government information, a starting point would be s. 12 of the *Copyright Act*, above. However, since section 12 of the Act preserves pre-existing Crown “rights or privileges” (in the phrase “Without prejudice to any rights or privileges of the Crown”), it is first useful to review the extent of these Crown “rights or privileges,” which arise from the royal prerogative from medieval England.

The royal prerogative

The royal prerogative has been described as the “common law powers” of the Crown, those “powers or privileges that are unique to the Crown” that have not been taken away by statute.¹⁰ Bradley and Ewing describe the royal prerogative in similar terms:

. . . the Sovereign and the Crown enjoyed certain powers, rights, immunities and privileges which were necessary to the maintenance of government and which were not shared with private citizens. The term prerogative is used as a collective description of these matters. Blackstone referred to prerogative as “that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity”.¹¹

The royal prerogatives have been described by the Supreme Court of Canada as not being personal to the sovereign but as “great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not, as it is said, ‘for the private gratification of the sovereign’ – they form part of and are generally speaking as ancient as the law itself.”¹² In *Attorney-General v. De Keyser’s Royal Hotel*,¹³ the House of Lords adopted Dicey’s definition of prerogative powers:

The prerogative is defined by a learned constitutional writer as ‘The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.’¹⁴

As mentioned, the royal prerogative in Canada (and elsewhere in Commonwealth countries) is now subject to Parliamentary laws:

¹⁰ Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 15-16. See also, Austin F. Marshall and Heidi H. Francis, “Crown” in Vol. 8 *Canadian Encyclopedic Digest* (Toronto: Carswell, 1997) §20-79.

¹¹ A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law*, 13th ed. (London: Pearson Education, 2003) at 245-46.

¹² *R v. McLeod*, [1883] 8 S.C.R. 1 at ¶22.

¹³ [1920] A.C. 508.

¹⁴ *Ibid.* at 526.

As indicated, the royal prerogative is now subservient to the wishes of Parliament. That is, Parliament may expressly abolish or restrict prerogative rights, whether or not this is coupled with a grant back to the Crown of statutory powers with respect to the same subject matter.¹⁵

Even though “it is not possible to give a complete catalogue of prerogative powers”¹⁶ that have survived to modern times, a number of them do relate to law-related information and the administration of government¹⁷:

- **Powers relating to the legislature:** In Canada, for example, the Governor-General (or provincially, the Lieutenant-Governor) officially opens Parliamentary sessions, reads the Throne speech and prorogues Parliament.
- **Powers relating to the judicial system:** There is power in the Crown to pardon convicted offenders. In addition, the Attorney-General represents the Crown as “*parens patriae*.”
- **Powers relating to foreign affairs:** The Crown has power under this aspect of royal prerogative to make of treaties and declare war, for example.
- **Powers relating to armed forces:** The sovereign is commander-in-chief of the armed forces.¹⁸
- **Appointments and honours:** “On the advice of the prime minister or other ministers, the sovereign appoints ministers, ambassadors, judges, governor generals, lieutenant governors and certain holders of public office, including the members of royal commissions.”¹⁹
- **Immunities and privileges:** This aspect of the prerogative is that statutes do not bind the Crown unless by express statement or by necessary implication.
- **Prerogative in time of emergency:** Bradley and Ewing suggest that the extent of this power is not well defined and would be usually exercised only in times of war or national emergencies; the question remains whether the Crown must compensate its subjects when this power is exercised to appropriate property, for example.²⁰

¹⁵ Torno, *supra* note 4 at 4.

¹⁶ *Supra* note 11 at 248.

¹⁷ The list provided and the descriptions are summarized from Bradley and Ewing, *ibid.* at 248-53 and use their headings or categories, as do Torno, *supra* note 4 at 4-5, and Hogg and Monahan, *supra* note 10 at 18-19.

¹⁸ *Ibid.* at 250.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 250-51.

- **Miscellaneous prerogatives:** Bradley and Ewing list a number of miscellaneous powers, including “the creation of corporations by royal charters; the right to mine precious metals; coinage; the grant of franchises, for example, markets, ferries and fisheries; the right to treasure trove; the sole right of printing or licensing others to print the Authorized version of the Bible, the Book of Common Prayer and state papers; and the guardianship of infants.”²¹ While a number of these powers likely apply to the Crown in Canada, it is unlikely that the right of printing the Bible extends to the Crown in Canada.²²

These prerogative rights for printing and publishing extends to Canada and other Commonwealth colonies that adopted the common law of England.²³

Prerogative right versus a property right

There is some debate in the case law and secondary literature regarding whether the Crown’s right to control printing is a prerogative right or is more correctly characterized as a property right.

In *R. v. Bellman*,²⁴ a case involving a prosecution for rum-running off the shores of the Bay of Fundy, one of the issues was the admissibility of Canadian hydrographic charts (to prove the accused was within Canadian waters). At trial, the accused was acquitted in part because the trial judge refused into evidence the maps proffered by the Crown. On appeal, this was found to be in error and a new trial was ordered. Because the maps were prepared under government authority, they were held to be official and hence admissible as a result. In coming to this conclusion, the court reviewed the prerogative

²¹ *Ibid.* 253.

²² See John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2003) at §18:3(b).

²³ *Ibid.* at §18:3(a).

²⁴ [1938] 3 D.L.R. 548 (N.B.C.A.).

right of the Crown over printing and concluded the printing admiralty charts were a “property” right in the Crown:

Until the question was raised in this case, I do not suppose that any one ever doubted the admissibility of an Admiralty chart in evidence, yet it is difficult to find any distinct authority upon the subject. Investigation carries us back to the invention of printing, the claim subsequently made by the Crown to a prerogative control over the exercise of that art and the licensing of printers by the ill-famed Court of Star Chamber. Constitutional changes have shattered the idea of prerogative *but there remains in the Crown the sole right of printing a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive. By the time of Lord Mansfield the idea of prerogative had pretty well disappeared and the King’s exclusive right was put on the ground of property.*²⁵
[emphasis added]

Later though the court appears to base the Crown’s powers on both a property right and a prerogative power:

If, then, at common law the King’s right did not cease upon publication as that of a subject would but for the *Statute of Anne*, the Crown must have, in its own publications, an effective copyright at common law, *whether based upon prerogative or property or both*. The reason underlying the King’s right is given in the case of *Manners, et al. v. The King’s Printers* (1828), 2 State Trials N.S. 215, 3 Bligh N.S. 391. This case raised the question of the prerogative right of the Crown in England and Scotland to grant the exclusive right to print the Bible, the Confession of Faith and the Longer and Shorter Catechisms. It was held that such right existed. In the Court of Session Lord Hermand said that it was admitted *that the King had the sole right of printing Proclamations and Acts of Parliament and that the principle upon which he enjoys this prerogative is in order that they may be preserved and published in a pure and correct state.*²⁶
[emphasis added]

Fox suggests that the purpose of the prerogative for printing was not necessarily a property right but instead was a duty to ensure that the works in question were correct²⁷ and falls within one of the duties of the chief executive officer over the acts of the legislature:

²⁵ *Ibid.* at 553.

²⁶ *Ibid.* at 555.

²⁷ Harold G. Fox, “Copyright in Relation to the Crown and Universities with Special Reference to Canada” (1947) 7 U.T.L.J. 98 at 110.

But although the power of the crown and its prerogative over the printing of public documents and acts of parliament as well as of works of religion seems never to have been seriously questioned, it has been rested by judges upon different principles. Some have based it upon property, as, e.g., in the case of the translation of the bible having been actually paid for by James I. Others have referred to the vesting of the prerogative in the king with reference to his character as head of the church. *The better opinion seems to be that it is referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the government, to superintend the publication of the acts of the legislature, and acts of state of that description, and also of those works upon which the established doctrines of our religion are founded – that is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative.*²⁸

Statutes

The exclusive privilege of the Crown to print statutes was first recognized in *The Stationers v. The Patentees about the Printing of Roll's Abridgment*.²⁹ In that case, it was held that a patent for printing “law books” was validly granted by the King due to his prerogative right to control the publishing of books. The argument was that the “King hath a general prerogative at common law” and that this prerogative over printing is “necessary as to religion, conservation of the publique peace, and necessary to preserve good understanding between King and people.”³⁰ As stated by McKeown, “[f]rom that time on, the prerogative right of the Crown to the exclusive printing of Acts of Parliament, Orders-in-Council, state papers, and other public documents appears never to have been successfully contested.”³¹

Judicial decisions

²⁸ *Ibid.* at 114.

²⁹ (1666), Cart. 89. See also McKeown, *supra* note 22 at §18:3(c).

³⁰ *Ibid.* at 90.

³¹ McKeown, *supra* note 22 at §18:3(c).

However, some debate exists whether the Crown prerogative extends to judicial decisions.³² While Vaver concedes that the Crown prerogative over judicial decisions may have existed at the time of the reign of Charles II, he refers to a number of 19th century English cases where copyright in court reports was acknowledged to be in the court reporter with there being no mention of a Crown prerogative.³³ The preferred view, he submits, would be for judicial decisions to be regarded as being in the public domain as a matter of public policy.³⁴ Other commentators, however, argue that the royal prerogative does likely extend to control over the publication of judicial decisions. Snow, for example, suggests that the nature and importance of judicial decisions are really no different than legislation and that the same public policy reasons should apply in favour of a Crown prerogative to control accuracy in the publication of official material:

If Fox was right in expressing the view that the continuing justification for the printing prerogative lies in the duty of the Crown to ensure complete accuracy in the publication of official Acts, then surely the reasons is still valid today as regards judgments as well as statutes [T]here is greater merit in the view that judgments are just as much the expression of the law as these other legislative and executive acts, and deserve as much protection if the exclusive printing prerogative is put on public policy grounds.³⁵

Snow went on to argue that if the prerogative is regarded more as a “property” right, the claim to control over the printing of law reports is weakened and could likely only rest on the weaker argument that judges are ultimately paid by the Crown and “he who pays for a service acquires ownership in the product.”³⁶ Torno also argues that the royal prerogative applies to judicial decisions.³⁷ Likewise, Fox has also suggested that since judges are

³² *Ibid.* at §18:3(d).

³³ David Vaver, “Copyright and the State in Canada and the United States” (1996) 10 I.P.J. 187 at 190, note 6.

³⁴ *Ibid.*

³⁵ Gérard Snow, “Who Owns Copyright in Law Reports?” (1982) 64 C.P.R. (2d) 49 at 64.

³⁶ *Ibid.* at 65.

³⁷ Torno, *supra* note 4 at 52.

paid by the Crown that copyright in their official pronouncements resides in the Crown, which would be a more preferable situation than copyright residing in each individual judge.³⁸ However, Fox has since softened that position based on the argument that the recent development of a strong body of cases upholding judicial independence makes it difficult to argue that judges are under the direction or control of the government.³⁹ The preferable position, I would submit, since it is important that court decisions be as widely disseminated as possible, is for judgments to be in the public domain, or, at a minimum, not to be subject to Crown copyright or Crown prerogative. This issue is discussed further in section 4.3.

Control of printing by the Crown

Whether the power of the sovereign to control printing of judicial decisions was a prerogative power or not, it is clear that in the early days of printing in England the Crown exercised very tight control over all printing, a control that amounted to censorship:

It did not take long after the invention of printing for English monarchs to exercise complete control over the printing trade. The official reasons for the interference were to protect English trade from foreign competition and to prevent the proliferation of heretical and seditious opinions, but the licensing scheme set up for this purpose was also a convenient source of profit to the ruling monarch and his favourites.⁴⁰

The first Royal Printer appeared in 1485 and “from 1518 onward came a stream of royal grants of privileges and patents for the exclusive printing of particular books or books of

³⁸ *Supra* note 27 at 116.

³⁹ *Supra* note 22 at §18:5(g).

⁴⁰ *Supra* note 35 at 61.

stated kinds.”⁴¹ It appears that “privileges became a source of considerable profit to the Crown and in time were used as an instrument of censorship by the authorities.”⁴²

In 1538, Henry VIII issued a lengthy proclamation banning the printing of books unless by license with the Crown due to the increase of “wrong teaching and naughty printed books.”⁴³ The proclamation also banned the importation of books into England upon the “pains that the offenders . . . shall not only incur and run into his grace’s most high displeasure and indignation but also shall lose and forfeet unto his majesty all his or their good and chattels and have imprisonment at his grace’s will.”⁴⁴

In the early days, this control remained quite strong and continued through to the establishment by Queen Mary of the creation of the Crown of the Stationers’ Company in 1557. Printers with the Stationers’ Company were given exclusive printing rights; they were also given enforcement rights to crack down on unlawful printing and “the Company’s strength was dependent in large part upon its alliance with the official censorship”⁴⁵:

In 1557, the desires of the booksellers and the desires of the crown coincided. The crown perceived the need to gain greater control over “the dangerous possibilities of the printed word” and so granted a royal charter to the Stationers’ Company that limited most printing to only members of the company. This charter also empowered the company to search out and destroy “unlawful” books, which gave the guild the public enforcement mechanism for its private law. If a

⁴¹ Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967) at 3.

⁴² Kevin Garnett and Gillian Davies, *Copinger & Skone James on Copyright*, 14th ed. (London: Sweet & Maxwell, 2002) at §2-9.

⁴³ Proclamation of 16 November 1538, reprinted in Paul L. Hughes and James F Larkin, *Tudor Royal Proclamations*, Vol. 1 (New Haven, Yale University Press, 1964) at 270. See Kaplan, *supra* note 39 at 3. A similar proclamation was issued 8 July 1546 by Henry VIII particularly in relation to religious material due to the spread of “sundry pernicious and detestable errors and heresies” that were being published – see Hughes and Larkin, *ibid.* at 373.

⁴⁴ Hughes and Larkin, *ibid.* at 271.

⁴⁵ Kaplan, *supra* note 41 at 37.

nonmember was printing a work that had been registered with the company by a member, the nonmember could now be stopped. It also meant that if a work which was disagreeable to the crown was being published, it too could be stopped. This arrangement provided the crown with added policemen to enforce its goal to control printed works. Censorship was born.⁴⁶

The Crown regularly enforced its relatively absolute control over printing through prosecutions in the Star Chamber:

It was the declared object of the Crown at that time to prevent the propagation of the reformed religion, and it seems to have been thought that this could be brought about most effectively by imposing the severest restrictions on the publishing trade and the press to prevent the publishing of seditious and heretical books and pamphlets. Until 1640, the Crown, using the Star Chamber as its instrument, rigorously enforced several decrees and ordinances of that Chamber regulating the manner of printing, the number of presses permitted to operate throughout the Kingdom, and prohibiting all printing against the force and meaning of any of the statutes or laws of the realm. This restrictive jurisdiction was enforced by the use of summary powers of search, confiscation and imprisonment, free of any obstruction from Parliament.⁴⁷

However, the English Revolution brought major changes to all aspect of life in England, including uprooting its legal system and lessening the monopoly by the Crown over printing:

In 1640, however, the Star Chamber was abolished; with the Cromwellian revolution, the King's authority was set at naught; all the regulations of the press, and restraints previously imposed upon unlicensed printers by proclamations, decrees of the Star Chamber and charter powers given to the Stationers' Company were deemed, and certainly were, illegal. The scandalous nature of some libellous publications induced Parliament to pass an ordinance in 1643 which prohibited printing, unless the book was first lawfully licensed and entered in the register of the Stationers' Company.⁴⁸

By 1695, however, the "system had fallen into disrepute because the power of members of the Stationers' Company to claim copyright in perpetuity had led to high prices and a

⁴⁶ Lydia Pallas Loren, "The Purpose of Copyright" (2002) 2 Open Spaces Quarterly. Available online: <<http://www.open-spaces.com/article-v2n1-loren.php>>.

⁴⁷ Garnet and Davies, *supra* note 42 at §2-10.

⁴⁸ *Ibid.* at §2-12.

lack of availability of books.”⁴⁹ The British Parliament allowed the licensing regime in effect to lapse, which greatly opened the publishing industry, so much so that the stationers lobbied Parliament for some form of statutory protection,⁵⁰ which resulted in the *Statute of Anne*,⁵¹ regarded as the first form of modern copyright legislation:

The power of censorship and press control through the Stationers’ Company copyright lasted for over 150 years. Finally, in the early 1700’s parliament refused to continue to support the monopoly that the stationers had enjoyed for centuries and the power of censorship that the crown had enjoyed along with it.⁵²

There was “no official censorship in England after that time, although there were various ways in which printers and news vendors could be harassed by fines, imprisonment, or the pillory for libels against the state.”⁵³

Although censorship by the Crown through its prerogative powers or statutorily awarded Crown copyright has largely abated, instances of censorship do exist and will be discussed in section 4.3 below.

Statutory Crown copyright

Section 12 of the *Copyright Act* legislates Crown copyright but refers to only the rights and privileges of the “Crown” and works of “Her Majesty.” By statutory definition under the *Interpretation Act*, these terms mean by extension the *federal* government and there is no specific mention whether the rights and privileges of *provincial* governments

⁴⁹ *Ibid.* at §2-13.

⁵⁰ Kaplan, *supra* note 41 at 6-7.

⁵¹ 8 Anne, c. 19 (1710).

⁵² *Supra* note 46.

⁵³ Parker, *supra*, Chapter 3, note 4 at 11.

survive the Act or whether the provisions of s. 12 bind provincial governments. Despite this potential ambiguity, it has been suggested that clearly the provisions of s. 12 also extend to provincial governments:

[I]t appears that the reference to the “Crown” in the Act refers to the Crown in the Right of Canada and the Crown in the Right of each of the provinces, depending on the circumstances. Although there are no cases specifically dealing with s. 12, there are a number of decisions of the Supreme Court of Canada which support this approach.⁵⁴

Concerns have also been expressed over the breadth in s. 12 of the phrase “where any work is, or has been, *prepared or published by or under the direction or control of Her Majesty or any government department*”: “If those ‘or’s’ are truly conjunctive, that phrase of 24 words potentially includes 24 classes of material.”⁵⁵ The words “prepared or published” would likely include unpublished materials and the words “direction or control” are quite broad and might work to the detriment of freelancers preparing reports for the government in that copyright would likely vest in the government.⁵⁶ Although s. 12 limits the length of statutory Crown copyright to 50 years in most cases, the Crown prerogative by way of comparison extends in perpetuity and is not limited by rights under the *Copyright Act*.⁵⁷

In what might be seen as a move towards a softening of the federal government’s insistence on Crown copyright over law-related information, the federal government recently proclaimed the *Reproduction of Federal Law Order*⁵⁸ which allows cases and

⁵⁴ McKeown, *supra* note 22 at §18:2(a).

⁵⁵ Vaver, *supra* note 33 at 191.

⁵⁶ Torno, *supra* note 4 at 48-52.

⁵⁷ McKeown, *supra* note 22 at §18:4(e).

⁵⁸ SI/97-5.

legislation issued under authority of the federal government to be freely used so long as any reproductions are accurate and not represented as official versions:

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

The Ontario government also has a policy on copyright of legal materials that allows any person “to reproduce the text and images contained in the statutes, regulations and judicial decisions without seeking permission and without charge” but the materials “must be reproduced accurately and the reproduction must not be represented as an official version.” A copyright notice in favour of the Queens Printer for Ontario must also be provided.⁵⁹ It is unclear to what extent litigants before the courts are placing the copyright notice on versions of cases or statutes provided to the courts.

Thus, to sum up for now, as a general statement, it can be said that the Canadian federal and provincial governments have prerogative power of the publication of legislation. Whether the Crown prerogative also extends to the control of printing of court decisions is less clear; some commentators, such as Torno, argue that the prerogative applies to judicial decisions;⁶⁰ regardless, the federal and most provincial claims claim a statutory copyright in judicial decisions in addition to statutory Crown copyright for other government-produced materials.

⁵⁹ See: Government of Ontario, “Policy on Copyright On Legal Materials.” Available online <<http://www.gov.on.ca/MBS/english/common/copypolicy.html>> (last modified: 2 December 2004).

⁶⁰ Torno, *supra* note 4 at 44-45.

4.2 Ownership of Government Information in the United States

The position in the United States, by way of contrast, is quite different from the position in Canada. The American federal government does not have copyright in judicial opinions or legislation and other products of the federal government.⁶¹ Section 105 of the U.S. *Copyright Act*⁶² has statutorily codified this position in the following terms:

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

Prior to the current statutory codification of this position, American courts historically denied copyright protection in court decisions or legislation for the federal – and state – governments.

No Copyright in Judicial Decisions (U.S.A.)

In *Wheaton v. Peters*,⁶³ for example, the United States Supreme Court were called upon to decide whether Wheaton (and his assignees) had copyright in *Wheaton's Reports*, a collection of U.S. Supreme Court decisions in circumstances when Peters “republished” these decisions in his own form of court reports, the *Condensed Reports*. In denying the plaintiff's arguments in favour of a natural right to copyright based on the common law,

⁶¹ Howard B. Abrams, *The Law of Copyright* (St. Paul, Minn.: West, 1991-) at §2:48; Raymond T. Nimmer, *Information Law* (Boston: Warren, Gorham & Lamont, 1996) at §3:28.

⁶² 17 U.S.C. 105.

⁶³ 33 US 591 at 668 (1834).

the court held that Wheaton could have no valid copyright in court decisions and that there was no infringement as a result:

[N]o reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.⁶⁴

The U.S. Supreme Court extended this holding to state judicial decisions in *Banks v. Manchester*.⁶⁵ In that case, Banks (and his brother) were appointed by state statute as the official reporters for Ohio. Under that authority, they published the *Ohio State Reports*. Suit was brought against Manchester who had copied those decisions and republished them in the *American Law Journal*. In denying the claim for infringement, the court held that the judge was not an “author” in the traditional sense of copyright law due to the nature of judicial decisions and the need for the public to be able to access judicial decisions:

In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author or their proprietor, in the sense of section 4952, so as to be able to confer any title by assignment on the state, sufficient to authorize it to take a copyright for such matter, under that section, as the assignee of the author or proprietor. Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. *The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.*⁶⁶ [emphasis added]

⁶⁴ *Ibid.*

⁶⁵ 128 U.S. 244 (1888).

⁶⁶ *Ibid.* at 253.

In coming to this conclusion, the court cited in approval the decision of *Nash v.*

Lathrop,⁶⁷ an earlier case in which the court denied the official state reporter an exclusive copyright in judicial decisions:

The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public. It is its duty to provide for promulgating them; while it has the power to pass reasonable and wholesome laws regulating the mode of promulgating them, so as to give accuracy and authority to them.⁶⁸

Two other “classic” cases in this area are the decisions of the United States Supreme Court in 1888 in *Callaghan v. Myers*,⁶⁹ and the Federal Court of Appeal in 1911 in *Banks Law Publishing Co. v. Lawyers’ Co-operative Publishing Co.*⁷⁰

In *Callaghan*, at issue was the scope of copyright in the volumes of the *Illinois Supreme Court Reports*. The copyright in volumes 1 to 31 of the reports were owned by Callaghan & Co., while the copyright in volumes 32 to 46 were owned by Myers. Callaghan wanted to publish an entire set of the reports but refused to pay Myers’ asking price for permission to use his materials. Instead, Callaghan reprinted the entire set but made minor variations in the headnotes in Myers’ volumes. In this situation, the court

⁶⁷ 142 Mass. 29, 6 N. E. Rep. 559 (1886).

⁶⁸ *Ibid.* at 35.

⁶⁹ 128 U.S. 617 (1888).

⁷⁰ 169 F. 386 (2d Cir. 1909) (per curiam), appeal dismissed per stipulation, 223 U.S. 738 (1911).

ruled that Callaghan had infringed Myer's copyright. At first blush, this would appear to contradict the holding in *Wheaton v. Peters* and *Banks v. Manchester*. However, as has been pointed out,⁷¹ the court's ruling was premised on the fact that Myers' volumes had some original content (e.g., headnotes):

Thus, while the Court had permitted in *Manchester* the copying of judicial opinions first reported by a competitor, in *Callaghan* it refused to countenance reproduction of the prior volumes themselves, where such a taking would encompass more than the public domain matter.

Unhappily for the sake of clarity, *Callaghan* also contained a fleeting observation which suggested that arrangements and pagination were copyrightable – an observation contradicted by other aspects of the Court's opinion – which obscured the decision's fundamental consistency with *Wheaton* and *Manchester*.⁷²

In the *Banks Law Publishing* decision, the defendant republished United States Supreme Court decisions from the plaintiff's volumes. Banks Law Publishing alleged that the defendant infringed the plaintiff's copyright "arising out of the arrangement of the cases, the division into volumes, the table of cases, and the numerical or star pagination to indicate where in the official reports the different cases and points decided may be found."⁷³ The court ruled that this alone was insufficient to warrant copyright protection; as a result, there was no infringement:

It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing) and paging the volumes – things essential to be done to produce the volumes – are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter. A different question would be presented if, for instance, infringement of the headnotes, or syllabuses, index

⁷¹ L. Ray Patterson and Craig Joyce, "Monopolizing The Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations" (1989) 36 U.C.L.A. L. Rev. 719 at 744-45.

⁷² *Ibid.* at 744.

⁷³ *Supra* note 70, 169 F. 386 (2d Cir. 1909).

digest, synopses of arguments or statements of the cases, or an abridgment thereof were claimed.⁷⁴

On appeal, the decision of the trial judge was affirmed:

We concur with [the trial judge] in his reasoning and conclusion that the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.⁷⁵

This exception that provides copyright protection for “valued-added” annotations to judicial decisions was used by West some 80 years later to argue that they had copyright in the organization and structure of its national reporter system, including the page numbering. West’s argument was actually upheld by the 8th Circuit Court of Appeals (in Minnesota, where West has its headquarters):

West’s arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West’s volumes reflects and expresses West’s arrangement, and that MDC’s intended use of West’s page numbers infringes West’s copyright in the arrangement.⁷⁶

However, in two more recent rulings in a dispute between Matthew Bender and West in the 2nd circuit (New York), an opposite result was reached. In *Matthew Bender & Co. v. West Publ’g Co.*,⁷⁷ it was held that the “value-added” features provided by West to the judicial decisions lacked sufficient creativity to attract copyright protection. These valued-added features included (i) the arrangement of information specifying the parties, court, and date of decision; (ii) the selection and arrangement of the attorney information; (iii) the arrangement of information relating to subsequent procedural developments such as amendments and denials of rehearing; and (iv) the selection of parallel and alternative

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 at 1233 (8th Cir. 1986).

⁷⁷ 158 F.3d 674 (2d Cir. 1998).

citations.⁷⁸ Likewise, in *Matthew Bender & Co. v. West Publ'g Co.*,⁷⁹ the court rejected West's claim for copyright in the "star pagination" system it uses in the online versions of judicial decisions (to indicate the equivalent page number in the print version of its case report, e.g. "[*78]"):

At issue here are references to West's volume and page numbers distributed through the text of plaintiffs' versions of judicial opinions. West concedes that the pagination of its volumes – i.e., the insertion of page breaks and the assignment of page numbers – is determined by an automatic computer program, and West does not seriously claim that there is anything original or creative in that process Because the internal pagination of West's case reporters does not entail even a modicum of creativity, the volume and page numbers are not original components of West's compilations and are not themselves protected by West's compilation copyright.⁸⁰

Thus, in the United States, there is no copyright in judicial decisions, but there may be copyright in valued-added features that publishers add to the text of judicial decisions.

No copyright in statutes (U.S.A.)

Likewise, in the United States, there is no copyright in legislation. In *Davidson v. Wheeler*,⁸¹ the plaintiff, as the official state reporter appointed under statute, sought an injunction to restrain the defendant from "publishing and exposing for sale" two books that contained the laws of Minnesota. In refusing the injunction, the court emphasized the public nature of the laws and that anyone, including the defendant, was free to publish them:

They obtained no exclusive right to print and publish and sell the laws of the state of Minnesota, or any number of legislative acts. The materials for such publication are open to the world. They are public records, subject to inspection

⁷⁸ *Ibid.* at 681.

⁷⁹ 158 F.3d 693 (2d Cir. 1998).

⁸⁰ *Ibid.* at 699.

⁸¹ 27 F. 61 (C.C.D. Minn. 1866).

by every one, under such rules and regulations as will secure their preservation. They may be digested or compiled by any one, and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him.⁸²

Likewise, in *Howell v. Miller*,⁸³ the court, relying in part on the holding in *Banks v. Manchester* that there is no copyright in state judicial decisions, extended the principle in that case to state statutes, which were also held to be in the public domain:

It was suggested in argument that no one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted. And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual.⁸⁴

In *Howell*, the court did acknowledge that copyright could exist in the “value-added” annotations that a publisher might make to the statutes but that anyone was free to use and copy the statutes themselves.⁸⁵

More recently, in *Deaton v. Kidd*,⁸⁶ the plaintiff sought a copy of Missouri state statutes on computer tape in ASCII format that the government otherwise sold to the highest bidder. “Sunshine laws” in that state required each public governmental body to “make available for inspection and copying by the public of that body’s public records.”⁸⁷ Taking note of the importance of having information in “electronic format,” the appeal court affirmed the decision of the trial judge and ordered the government to provide the statutes in ASCII format to the plaintiff:

⁸² *Ibid.* at 62.

⁸³ 91 F. 129 (6th Cir. 1898).

⁸⁴ *Ibid.* at 137.

⁸⁵ *Ibid.* at 139.

⁸⁶ 932 S.W. 2d 804 (Mo.App. W.D. 1996).

⁸⁷ *Ibid.* at 806.

Whether the Revised Statutes are public records is an easy question given a legal system which charges the public with having a knowledge of the law and proclaims that ignorance of the law is no excuse for its violation. As the trial court notes, “it is hard to think of a more important public record than the general laws of the state.”

This court’s analysis is not affected by the fact that the public record at issue is on computer tape. Concerning public records, the legislature has recognized the increasingly important role of computers and electronic media. Section 610.029 provides that “a public governmental body is encouraged to make information available in useable electronic formats to the greatest extent feasible.”⁸⁸

At trial,⁸⁹ the judge noted the added advantages of having this information in electronic format, advantages that include having information in an up-to-date, consolidated format and information that is searchable by keyword:

The Revised Statutes on computer disk have additional features not offered by the book form. The annual computerized version integrates previous supplements into the main body of the Revised Statutes. There is no need to compare the hardbound books with the soft cover supplements. The computerized version allows the user to search all volumes in seconds by key word, phrase or statute number. The user is no longer limited by the index or his knowledge of where to look in the Revised Statutes to find particular topics.⁹⁰

Thus, as a result of these decisions and the provisions in s. 105 of the U.S. *Copyright Act*, the American position is relatively clear – case law and legislation as produced by the courts and legislators are in the public domain and may be copied or re-published by anyone. Vaver speculates on several likely reasons for the U.S. position on making government material public domain: the government does not need the traditional “incentives” provided by copyright to generate the work; the people pay the salaries of governments and judges, so the law belongs to the people; the material is important and unique so access should be made easily available; and it avoids the risk, albeit unlikely in

⁸⁸ *Ibid.*

⁸⁹ *Deaton v. Kidd*, 1994 WL 722795 (Mo.Cir. Nov 21, 1994) (NO. CV193-1426CC).

⁹⁰ *Ibid.* at 2.

today's world, that the government would use its control as censorship or for patronage.⁹¹

Price echoes these reasons in more detail:

In summary, then, copyright in "government publications" has been denied because:

1. In a democracy where the widest possible public dissemination of materials of public interest is considered vital:
 - a. expositions of the law (statutes, judicial opinions and legislative histories) cannot be copyrighted because everyone is presumed to know the law and no one can be given a monopoly on publishing these expositions.
 - b. materials generated by government employees and initially printed by the government should be given the widest, least expensive distribution, which is possible only if no one can monopolize the publication or republication of an item.
2. The Government should frankly recognize and openly appropriate the money to cover the cost of its public documents; and the public should not have to pay twice, once through appropriations and then again through royalties.
3. Employees cannot claim property in their work because it belongs to their employer, the public at large, and should therefore be in the public domain.
4. Government employees cannot be compensated twice for material produced in the scope of their official duties. Their only source of compensation can be their employer.
5. Government facilities may not be used for private gain; any such use will result in the forfeiture of the rights to any property so produced.⁹²

However, recent decisions involving state model codes have questioned the reasoning used by American courts in the past in rulings that have stated that these materials are in the public domain. Although perhaps less of a phenomenon in Canada, there appears to be a growth in the United States on the reliance of governments to allow private bodies to develop model codes in their areas of expertise and to then officially adopt those codes as regulations. Under the foregoing principles, one might assume that,

⁹¹ Vaver, *supra* note 33 at 192-95.

⁹² Brian Price, "Copyright in Government Publications: Historical Background, Judicial Interpretation and Legislative Clarification" (1976) 74 Mil. L. Rev. 19 at 36, cited by Torno, *supra* note 4 at 44.

once enacted by the state, these regulations also form part of the public domain. However, in several U.S. decisions, courts have upheld copyright in favour of the private body that originated the model code, despite its subsequent adoption as official legislation.

Copyright in privately-developed model codes (U.S.A.)

In *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*,⁹³ for example, the court held that used car valuations in the “Red Book” that were mentioned by or used in various state insurance statutes or regulations did not mean that the data in the Red Book had entered into the public domain. In that case, MacLean Hunter, since 1991, published the Red Book, a listing of used car valuations based on the publisher’s predictions and expert judgment on the likely value of individual used cars. CCC Information Services, a database provider, had been inputting large portions of the Red Book into its database and publishing it to its own customers. CCC Information Services sought and was granted at trial a declaration that it incurred no copyright liability for its use of the data from the Red Book. On appeal, however, the Court of Appeals, 2nd circuit (Connecticut) reversed this holding and upheld the copyright of Maclean Hunter in its Red Book. In ruling the copyright valid, the court was satisfied that the Red Book met the *Feist*⁹⁴ requirement of originality in a number of ways: through dividing the national used car market into regions (because the value of used cars varied from region to region); through the selection and manner of presentation of optional features for inclusion; through its use of 5,000 mile increments to adjust values; through the use of the abstract concept of

⁹³ 44 F.3d 61 (2d Cir. 1994).

⁹⁴ *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991).

“average” vehicle in each category; and through the selection of the number of years’ models to include.⁹⁵

The court, however, rejected the argument of the database provider who had copied the Red Book that the data had entered into the public domain by reason of it being used as a standard in various state insurance statutes and regulations:

We disagree also with the district court’s ruling sustaining CCC’s affirmative defense that the Red Book has fallen into the public domain. The district court reasoned that, because the insurance statutes or regulations of several states establish Red Book values as an alternative standard, i.e., by requiring that insurance payments for total losses be at least equal either to Red Book value or to an average of Red Book and Bluebook values (unless another approved valuation method is employed), the Red Book has passed into the public domain. The argument is that the public must have free access to the content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.

...

We are not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. While there are indeed policy considerations that support CCC’s argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution. We note also that for generations, state education systems have assigned books under copyright to comply with a mandatory school curriculum. It scarcely extends CCC’s argument to require that all such assigned books lose their copyright – as one cannot comply with the legal requirements without using the copyrighted works. Yet we think it unlikely courts would reach this conclusion.⁹⁶

Likewise, in *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*,⁹⁷ the United States Court of Appeal, Ninth Circuit (California) upheld the copyright owned by the American Medical Association (“AMA”) in the Physician’s Current Procedural Terminology

⁹⁵ *Supra* note 93 at 67.

⁹⁶ *Ibid.* at 73.

⁹⁷ 121 F.3d 516 (9th Cir. 1997).

(“CPT”), a publication created in the 1960’s that identifies more than six thousand medical procedures and provides a five-digit code and a brief description for each procedure.⁹⁸ In 1977, the Health Care Financing Administration (“HCFA”) was instructed by Congress to enact a billing code system that could be used for Medicare. Rather than create its own system, HCFA contracted with the AMA to use the CPT as its code in return for HCFA’s agreement to only use the CPT as the official billing system. The CPT was subsequently enacted into regulations.⁹⁹ The plaintiff publisher, Practice Management, sought a declaration that AMA’s copyright in the CPT was invalid once it became enacted as a regulation (since it wanted to re-sell the CPT in one of its own publications and was unhappy with the price at which AMA would license it for that purpose).¹⁰⁰ Although the court held that AMA had engaged in copyright misuse in its license with HCFA in exchange for the HCFA to not use a competing system, the court did confirm the CPT did not enter the public domain when it was enacted as a regulation. In so holding, the court reasoned that the grounds in *Banks v. Manchester* for holding that judicial opinions are in the public domain did not apply in this case because the author (i.e., the AMA) was not a public official in the same way that a judge is:

Practice Management’s argument that the CPT became law and entered the public domain when HCFA by regulation required its use rests ultimately upon *Banks v. Manchester* . . . which held that judicial opinions are uncopyrightable. *Banks* in turn rests upon two grounds, neither of which would justify invalidation of the AMA’s copyright.

The first ground for the *Banks* holding that judicial opinions are not subject to copyright is that the public owns the opinions because it pays the judges’ salaries

The first ground is clearly not applicable to the CPT. The copyright system was not significant in *Banks* because judges had no proprietary interest in their

⁹⁸ *Ibid* at 517.

⁹⁹ 48 Fed.Reg. 16750, 16753 (1983); 50 Fed.Reg. 40895, 40897 (1985).

¹⁰⁰ *Supra* note 97 at 518.

opinions. The copyright system is of central importance in this case because the AMA authored, owns, and maintains the CPT and claims a copyright in it.

The copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyright holders was not at stake in *Banks* because judges' salaries provided adequate incentive to write opinions. In contrast, copyrightability of the CPT provides the economic incentive for the AMA to produce and maintain the CPT.¹⁰¹

In addition, the court rejected the publisher's argument that the CPT, as law, should be accessible to all persons and hence in the public domain:

The second consideration underlying *Banks* — the due process requirement of free access to the law — may be relevant but does not justify termination of the AMA's copyright. There is no evidence that anyone wishing to use the CPT has any difficulty obtaining access to it Practice Management is not a potential user denied access to the CPT, but a putative copier wishing to share in the AMA's statutory monopoly. Practice Management does not assert the AMA has restricted access to users or intends to do so in the future.

The AMA's right under the *Copyright Act* to limit or forgo publication of the CPT poses no realistic threat to public access. The AMA has no incentive to limit or forgo publication. If the AMA were to do so, HCFA would no doubt exercise its right to terminate its agreement with the AMA. Other remedies would also be available, including "fair use" and due process defenses for infringers¹⁰²

The court appeared to be concerned that if privately authored model codes were put into the public domain on being adopted by a government that this would create a disincentive for such organizations to invest in developing these codes:

As the AMA points out, invalidating its copyright on the ground that the CPT entered the public domain when HCFA required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation. Non-profit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency.¹⁰³

¹⁰¹ *Ibid.*

¹⁰² *Ibid.* at 519.

¹⁰³ *Ibid.* at 518-19.

However, in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*,¹⁰⁴ the United States Court of Appeals, Fifth Circuit (Texas) came to the opposite conclusion of these two decisions by holding that the building codes developed by Southern Building Code Congress International, Inc. (“SBCCI”), a non-profit organization, entered the public domain when those codes had been formally adopted by various cities throughout Texas. In that case, a member of the public – Veeck – became frustrated that the codes were not more easily accessible, and after purchasing the codes on disk from SBCCI (pursuant to a license agreement that had restrictions on copying), Veeck published the codes for these towns on his own website, making them freely available.

SBCCI had unsuccessfully tried to “bifurcate” the holding in *Banks* by arguing that the two rationales for the ruling in *Banks* – that judicial decisions are in the public domain – did not apply to it. First, SBCCI argued that the court in *Banks* held that judicial decisions did not attract copyright because judges’ salaries were paid from public funds, unlike their authors who were not paid from public funds for developing building codes. The court rejected this argument, however, as being too narrow a reading of *Banks*; instead, the court reasoned that the “judge as author” argument in *Banks* was really an argument of “judges on behalf of citizens as authors” and that the “metaphorical concept of citizen authorship” of the law, together with “the very important and practical policy that citizens must have free access to the laws which govern them” were the governing principles.¹⁰⁵ SBCCI’s second argument – that *Banks* based its ruling of no copyright in judicial decisions on the need for cases to be available to the public – was that its building codes were available to the public and that this concern in *Banks* did not apply to it. The court

¹⁰⁴ 293 F.3d 791 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003).

¹⁰⁵ *Ibid.* at 798.

also rejected this argument, recognizing the difficulty in being able to “reconcile the public’s right to know the law with the statutory right of a copyright holder to exclude his work from any publication or dissemination”¹⁰⁶:

Since a copy of the codes is available for inspection and individual copying in a public office, SBCCI contends that the obligations of due process are fulfilled.

We disagree that the question of public access can be limited to the minimum availability that SBCCI would permit. *Banks* does not use the term “due process.” There is also no suggestion that the *Banks* concept of free access to the law is a factual determination or is limited to due process, as the term is understood today. Instead, public ownership of the law means precisely that “the law” is in the “public domain” for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so. In our view, to say, as *Banks* does, that the law is “free for publication to all” is to expand, not factually limit, the extent of its availability.¹⁰⁷

As such, when “Veeck copied only ‘the law’ of Anna and Savoy, Texas, which he obtained from SBCCI’s publication, and when he reprinted only ‘the law’ of those municipalities, he did not infringe SBCCI’s copyrights in its model building codes.”¹⁰⁸

In distinguishing the decisions from the other Courts of Appeals, the court in *Veeck* reasoned that in those cases the codes and standards were adopted by reference and not by “wholesale adoption of a model code promoted by its author . . . precisely for use as legislation.”¹⁰⁹

Academic commentary on *Veeck* is divided. Deutsch, for example, argues that if the Supreme Court does revisit the issue in the future in terms of constitutional principles,

¹⁰⁶ *Ibid.* at 799.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 800.

¹⁰⁹ *Ibid.* at 804.

it is more likely to affirm the principles in *Veck* in favour of the public right to access laws.¹¹⁰ Deutsch also suggests that the court would likely not be persuaded by the arguments put forth by the non-profit organizations that without copyright protection they would lack the incentive to produce such beneficial works:

[T]he Supreme Court is less likely than the *Veck* minority to accept the unproven “horrible” paraded by SBCCI: that without the incentive of copyright protection, no model building codes would be created.

The Court has shown a healthy skepticism in copyright cases toward such dire predictions in the absence of convincing proof. It may well agree with *Veck*'s conclusion that the engineers, suppliers and contractors who draft model codes have a stronger incentive than copyright to keep producing such codes: the profit that they earn when the legal standards for building, plumbing, electrical, and other work are uniform throughout the region.¹¹¹

The decision in *Veck* has also been applauded for its view of “citizen-authorship” as a proper devolution by government for the private drafting of a model code, something which allows citizens to “reclaim the law.”¹¹² Tones argues that there are sufficient incentives – such as the benefit of clear standards for its members to apply to their professions and the ability to publish value-added materials that explain the codes or standards – separate from copyright royalties for non-profit organizations to continue to draft model codes and that the importance of access to the law justifies the ruling in *Veck*.¹¹³ By way of contrast, others have argued that the holding in *Veck* definitely creates disincentives for such private bodies to promulgate model codes.¹¹⁴ The *Veck*

¹¹⁰ Andrew L. Deutsch, “Is There Enforceable Copyright in ‘The Law’?” (2002) N.Y.L.J. 4.

¹¹¹ *Ibid.*

¹¹² Shubba Ghosh, “Copyright as Privatization: The Case of Model Codes” (2003-2004) 78 Tul. L. Rev. 653 at 723; see also Shubba Gosh, “Legal Code and the Need for a Broader Functionality Doctrine in Copyright” (2003) 50 J. Copyright Soc’y U.S.A. 71.

¹¹³ Jessica C. Tones, “Copyright Monopoly vs. Public Access – Why the Law Should Not Be in Private Hands” (2005) 55 Syracuse L. Rev. 371 at 392-94.

¹¹⁴ See, for example, Maryjane Boone Bonfield, “Can the Law be Copyrighted?” (2003) 56 S.M.U. L. Rev. 1025 and Katie M. Colendich, “Who Owns ‘The Law’? The Effect on Copyrights When Privately-Authorized Works are Adopted or Enacted into Law” (2003) 78 Wash. L. Rev. 589.

decision does not appear to have been considered in any Canadian decisions; it is also not clear how often the issue of copyright over privately-authored codes would arise in Canada since they appear to be used much less frequently here as official legislation. The website of the Canadian Commission on Building and Fire Codes (CCBFC) states that the CCBFC “develops the national model codes through a consensus-based process that relies on the voluntary contributions of public and private sector experts from across Canada” and that “seven standing committees review and develop proposed technical changes to the codes before they are submitted for public review.”¹¹⁵ The changes must then be approved by the CCBFC before publication by the National Research Council. For the model codes that do exist with the input of the private sector, it appears that the Canadian government is claiming copyright in those materials.¹¹⁶

4.3 Impact of Crown Prerogatives and Copyright on Access to Information

That a historical artifact such as Crown prerogative with is “confusing legacy”¹¹⁷ would hover over current Canadian law says something about our country’s loyalty to the homeland and our British heritage. Given changing times, many have begun to question the appropriateness or rationale of continuing to retain such an ancient doctrine:

The “legislative monstrosity” with its “atrocious drafting” sits there in its pristine glory and, in the waning years of Elizabeth II, decisions made by Charles II’s judges are still relied on by the governments of Canada and the provinces to support their claims of copyright. The smell of the crumbling pages of 17th century law reports hangs over the dancing pixels on the electronic highway.¹¹⁸

¹¹⁵ Canadian Commission on Building and Fire Codes, “Canada’s Code Development System” (undated). Available online: <http://www.nationalcodes.ca/ccbfc/ccds_e.pdf>.

¹¹⁶ National Research Council of Canada, “National Code Documents – Important Notices” (16 July 2002). Available online: <http://www.nationalcodes.ca/disclaimer_e.shtml>.

¹¹⁷ A phrase used by Torno in the title of his study on Crown copyright, *supra* note 4.

¹¹⁸ Vaver, *supra* note 33 at 192.

Traditionally, the government has not done well as a provider of law-related information, due to a number of reasons, including delays in publications:

The government does a poor job of providing access to its publication and data bases. Little effort is put into marketing. It is often difficult to know how to obtain access. There are often considerable time delays in publishing legal information. Publications and data bases are often not user friendly. There is the danger that the government may grant exclusive licenses to the private sector, in effect creating a monopoly over certain types of legal information.¹¹⁹

The obvious impact of Crown prerogatives and Crown copyright on access to information is that it creates a culture of control by the government. While there have been only a few examples of actual censorship by the government using this control, the cultural effect is broader and potentially more nefarious for creating a climate of “father (or mother) knows best” and taking the power away from people and vesting it in the government over such an important and necessary information source such as legislation and case law.

Although there are several reasons to possibly justify retaining Crown prerogatives or Crown copyright over law-related materials,¹²⁰ perhaps the strongest justification is the need to ensure the integrity and accuracy of legislation and judicial decisions.¹²¹ Given that it was suggested above that one of the reasons for the prerogative power was the duty of the monarch to ensure the laws were accurately represented, this argument perhaps has some validity. Or does it? In a jurisdiction where there is no Crown copyright, such as the United States, shouldn't there be evidence of abuses and risks of

¹¹⁹ Marshall, *supra* Chapter 3, note 66 at 176.

¹²⁰ Danielle Bouvet, “Crown Copyright: A Quest for a Peaceful Harbour” (1993) 18 Can. L. Libraries 187.

¹²¹ *Ibid.*

inaccurate legislation or case law permeating throughout the jurisdiction? However, there is no evidence that this is a problem in the United States, calling into question the concern over accuracy as justifying the policy for Crown control. Vaver also makes the point in his usual humorous fashion that there is always a risk of some inaccuracies whether it is the government providing the information or the private sector:

The reason for the Crown's having the right is said to be ensure accuracy – the same reason that justified the British Crown's claim to control publication of the authorized version of the English and Scottish Bibles. The fear was someone might publish the Ten Commandments with a few choice revisions: miss out a “not” here and there, and where would society be? (Perhaps a great deal more interesting, but certainly not the exemplar of “peace, order and good government” the British upper classes expected of others, if not of themselves.) This reason assumes the infallibility of government printers and the relative sloppiness of private sector publishers; neither charge is entirely true today.¹²²

Another, often unstated, rationale for the retention of Crown copyright over legislation and case law is the potential for licensing revenue that it generates:

More recently, governments have tried to justify their claims on straight fiscal grounds: to make money off the commercial publication of statutes. At least within the federal bureaucracy, there is a lively debate about the propriety of this between the supporters of the treasury board and those officials who believe in open government. So far, abstract democratic ideals have found it hard to grapple with a mentality favouring deficit reduction and “user pays” principles.¹²³

As recently as 1990, a federal Treasury Board management advisory document instructed federal employees to assert Crown copyright over government-produced material, including statutes, regulations, orders-in-council and judicial decisions.¹²⁴ It has been suggested by at least one critic that the goal was to “create mechanisms for regulating

¹²² David Vaver, “Copyright Inside the Law Library” (1995) 53 *The Advocate* 355 at 357.

¹²³ *Ibid.*

¹²⁴ Appendix C of *Treasury Board Manual* (Ottawa, Treasury Board Canada, 1978), cited by Ronald G. Atkey, “Crown Copyright in Primary Legal Materials: The Government's Secret Plan to Impose User Fees” (1993) 18 *Can. L. Libraries* 192.

access and charging rates to citizens.”¹²⁵ At one point, both the province of Manitoba and Saskatchewan charged a fee for anyone to access the current version of its legislation online, with the “free” version being much more out-of-date. McMahon documents this practice, noting the ridiculousness of the practice of trying to charge fees and how little revenue it actually generated:

The provinces of Saskatchewan and Manitoba, among others, charge fees for access to their statutes. Andrew Hubbertz, Head of Government Publications for the University of Saskatchewan Libraries, wrote about this issue recently. He noted that Manitoba is offering access to its statutes for an annual subscription of \$275, while Saskatchewan is charging \$95 per year. He reports that Saskatchewan has sold a total of 570 subscriptions, some of which are trial or complimentary subscriptions. Of the 570, fully one-third were purchased by Saskatchewan government agencies. Hubbertz wrote that whenever government sells information, the sales almost always follow this pattern:

- Governments never recover more than a small fraction of the cost of providing the service, often netting out at zero or less when overheads like marketing and negotiating of license agreements are factored in;
- Governments would rather sell information at a high price to a small number of “must have” users, than at a low price to many users;
- Government itself is the largest consumer of government information.

Hubbertz asks:

Given free access, the statutes and regulations could be made available online in schools and libraries throughout the province, and in every home or office with a computer and an Internet connection. Does anyone know of a cheaper or more cost-effective way to promote democracy?¹²⁶

Censorship and Control

There have been a number of instances in recent years where the government has sought to enforce its Crown prerogative or Crown copyright in law-related material or relied upon its powers in defence of its actions. In most of these cases, presented below

¹²⁵ Atkey, *ibid.* at 193.

¹²⁶ Tom McMahon, “Improving Access to the Law in Canada with Digital Media” (1999) 16 Government Information in Canada. Available online: <<http://www.usask.ca/library/gic/16/mcmahon.html>>.

chronologically, one could reasonably question whether the government actions were motivated by censorship and fear of embarrassment or from the lure of the potential revenue from the use of the information in question.

In *The Attorney-General v. Butterworth & Co. (Australia) Ltd.*,¹²⁷ the Attorney-General for New South Wales sought an injunction against the defendant publisher to stop its publication of the statutes of New South Wales in a publication entitled *The Public Acts of New South Wales*. The defendant's publication contained the laws but also had its own added-value features, including annotations, a subject index and an organization by subject, none of which existed in the government's version. The government asserted both its prerogative and statutory rights. The court, in awarding the injunction to stop the defendant's publication, reviewed the old English cases involving the Crown's prerogative right to publish statutes and determined that the Crown, in fact, did have a prerogative right to control the publication of statutes. The court specifically rejected the argument that the prior publication of the statutes by the Crown put the material into the public domain. Furthermore, the court held that sections in domestic legislation that gave the public the right to inspect the statutes and make copies of them did not extend to give a person the right to publish the legislation in competition with the government:

It seems to me that the extent of the interest which a member of the public has in inspecting the Statutes enrolled and recorded in the office of the Registrar-General is to inform himself of the state of the law with a view to knowing his right and liabilities, or of being in a position to advise others, and to make such copy or copies as will suffice to keep himself so informed; it cannot, in my view, extend to allowing him to deprive the Crown of its proprietary rights in the nature of copyright, or to affect them except to that limited extent.¹²⁸

¹²⁷ *Supra* note 4.

¹²⁸ *Ibid.* at 257.

The court went on, in *obiter*, to rule that the Crown's statutory copyright also applied (in addition to a prerogative power) and would have supported an injunction to restrain the defendant from publishing its material:

I can see no reason . . . why the right in question should not be regarded as vested in the one, indivisible and ubiquitous Crown in right of the State; nor why, if not so vested, such right might not be asserted by [the Attorney-General]; but . . . it is not necessary to express a final opinion on this point, although my view is that, if the [Attorney-General] had not succeeded on the prerogative, he would have been entitled to succeed, although to a limited extent, on the Statute.¹²⁹

One can reasonably assume that as a result of this decision, Butterworths (and other legal publishers) were forced into entering licenses with the government to be able to include statutes (and possibly case law) in their publications (and it appears that licensing of government information continues in Canada today).¹³⁰ This Australian case does not appear to have been considered in any Canadian decisions. Compare this to the situation in the United States. On cases with almost identical facts discussed above – *Davidson v. Wheeler* and *Howell v. Miller* – the publishers were free to use the text of the official state statutes and re-publish them with added features, all without the need for permission or royalty payment. The U.S. position is clearly preferable. However, given the wording of s. 12 of the *Copyright Act* and the historical impact of Crown prerogative, it is unlikely that a Canadian court would judicially override the legislation and historical convention to rule that statutes and case law are in the public domain.¹³¹ As such, legislated reform

¹²⁹ *Ibid.* at 259.

¹³⁰ The Ontario government, for example, charges royalties of 15% to 40% on information it produces for publishers who want to reprint it – see Jim Middlemiss, “Government’s Jump to CD-ROM Raises Publisher’s Ire” *The Financial Post* (25 April 1995).

¹³¹ Although see the discussion of *CCH Canadian Ltd. v. Law Society of Upper Canada*, *infra*, note 148, where the Supreme Court of Canada strongly endorsed users’ rights in relation to law-related materials and maybe left the door open for an argument to be made that case law, at least, is in the public domain.

may be needed to abolish Crown copyright and prerogative in legislation and case law in Canada, which would be both a theoretical/symbolic gesture indicating the importance of such information to a free and democratic society in addition to creating incentives for Canadian publishers to provide value-added information incorporating such information. Patterson and Joyce note, for example, that, after the decision in *Wheaton v. Peters*, publishers scrambled to publish case law reporters once the monopoly over reporting had been removed; this resulted in more publications being available to the public at a lower cost.¹³² Marshall makes a similar point, that “having legal information in the public domain would encourage vendors to ‘add value,’ enhance competition, market the information to a larger audience and allow publishers to target special groups (e.g., educational users).”¹³³ Vaver points out that the government in fact benefits by providing free access to the publishers:

Full availability of government works may provide incentives to the private sector to add value by summarizing, interpreting, synthesizing, and criticizing the material and making this new product publicly available. This may benefit the government by making programs more comprehensible and accessible, without additional cost on public funds, to those members of the public particularly interested in the programs.

An idea like this, while not motivating the original policy of public domain, does describe one present effect of it. The presence of government copyright would marginally discourage this type of desirable private sector cooperation and so lessen the effectiveness of some programs.¹³⁴

Vaver notes three relatively recent cases in which each of the Australian, Ontario and British governments have used their Crown copyright to suppress the publication by others of information that might be seen to be critical of government.¹³⁵ In *Australia v.*

¹³² *Supra* note 71 at 734; see also Vaver, *supra* note 33 at 196.

¹³³ Marshall, *supra* Chapter 3, note 66 at 177.

¹³⁴ Vaver, *supra* note 33 at 195.

¹³⁵ *Ibid.*, note 18.

John Fairfax & Sons Ltd.,¹³⁶ for example, the Australian government sought and obtained an injunction against a publisher who had published and who was proposing to continue to publish books that detailed Australian government foreign policy, especially as it related to the East Timor crisis of 1975-76. The books contained and referred to government documents, much of which the government claimed was confidential or cabinet-related. The court acknowledged the conflict between allowing free expression and the need to protect matters of state when public security is at issue:

It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.¹³⁷

Despite this and the importance of the matter to public debate on the issues, the court ruled that the Crown's copyright in the documents entitled it to a continued injunction and that the publishers had no fair dealing defence nor was there a public interest exemption to allow use of the documents.

Similar results were reached in *A.-G. (Ont.) v. Gowling & Henderson*¹³⁸ regarding the government's attempt to block use of cabinet documents and prison manuals that prison guards and inmates were attempting to use to show that prison conditions violated the *Charter*. In granting the injunction in favour of the government, the court relied on

¹³⁶ (1980) 32 A.L.R. 485 (Aust. H.C.).

¹³⁷ *Ibid.* at 492-93.

¹³⁸ (1984), 12 D.L.R. (4th) 623 (Ont. H.C.J.).

the decision in *Secretary of State for Defence v. Guardian Newspapers Ltd.*¹³⁹ in which the British government obtained an order for the return of defence ministry documents (relating to the government's decision to allow American cruise missiles to be housed on British soil) on the grounds that copyright in the documents vested in the Crown.

Although not a case involving Crown copyright, the decision in *Tolmie v. Canada (Attorney General)*¹⁴⁰ reflects the frustration that Canadians sometimes face in requesting information from the government that our American counterparts are able to take for granted in most circumstances. In *Tolmie*, the applicant applied under the *Access to Information Act* for a copy of the *Revised Statutes of Canada* in electronic form. In his request, he stated that “the preferred format is the existing WordPerfect 5.1 format that is presently used within Justice Canada for creating the Statutes. However, alternative formats such as the Folio format used on the CD-ROM produced for this purpose would be acceptable.”¹⁴¹ Initially, in a letter to the applicant, the government resisted production of the machine readable version of the statutes on economic grounds: “The Department recognizes there are a number of businesses in Canada that specialize in providing access to databases of a legal nature. *Providing your company now with a copy of the Revised Statutes would jeopardize departmental plans to sell the information*”¹⁴² [emphasis added]. At the hearing before the Information Commissioner, the government also argued that it was exempt from disclosing the information under s. 68(a) of the *Access to Information Act* on the basis that the information was already publicly available in print. On its facts, this case is almost identical to the *Deaton v. Kidd* decision above from

¹³⁹ [1984] Ch. 156 (C.A.), aff'd on other grounds [1985] A.C. 339 (H.L.).

¹⁴⁰ [1997] 3 F.C. 893, 137 F.T.R. 309.

¹⁴¹ *Ibid.* ¶ 2.

¹⁴² *Ibid.* ¶ 3.

Missouri. However, unlike *Deaton*, the Canadian Federal Court denied the application on the basis that, under s. 68(a) of the Act, the Act did not apply since the material requested was already published material available for purchase by the public.

In *LawPost v. New Brunswick*,¹⁴³ the appellants, Lawpost and S. Bryant Smith, must be given credit for at least trying in their claim. They alleged that the government of New Brunswick violated their rights to freedom of the press, s. 2(b), and to life, liberty and security of the person, s. 7 under the *Charter* due to the governments use of Crown copyright to control the publication and distribution of legislation and case law. They sued a number of provincial government defendants, including the Province of New Brunswick, the Legislative Assembly of New Brunswick and its members as represented by the Speaker of the Legislative Assembly, the Court of Appeal of New Brunswick as represented by the Chief Justice of the Province, the Court of Queen's Bench of New Brunswick as represented by the Chief Justice of that Court, and the Provincial Court as represented by its Chief Judge. At trial, the pleadings were struck out against all of the defendants but the Province as disclosing no cause of action. This ruling was essentially upheld on appeal with the Court of Appeal ruling that the statement of claim did not disclose causes of actions against the defendants except for the province, and even with that claim, the court seems somewhat impatient by suggesting that the applicants "get on with their claim":

[I]n my opinion, it still does not disclose a cause of action against the Legislative Assembly or the three courts as defendants. The amendments attempt to create liability by claiming that the defendants acquiesced in the government's assertion of Crown copyright.

Further, Lawpost and Mr. Smith assert that the courts are obligated to be proactive in protecting the interests of the public on whose behalf the publishers purport to act. Judges are immune from suit for acts done in the performance of

¹⁴³ (1999), 182 D.L.R. (4th) 167 (N.B.C.A.).

their judicial duties. The sources of the immunity are the common law and by statute. The ephemeral notion advanced by Lawpost and Mr. Smith is that the courts have a duty to act against the government claim of Crown copyright in order to protect the independence of the judiciary. The argument with respect to immunity from suit need not be pursued further; the claims simply do not disclose a cause of action. Moreover, the courts are not represented by the persons alleged, nor are the courts subject to suit.

...

The proper party for Lawpost and Mr. Smith to pursue is the Province of New Brunswick. The appellants have included the Province in their lawsuit. They should get on with their claim.¹⁴⁴

More recently, we are starting to see some change in the attitude of government and the courts towards these issues. In *Wilson & Lafleur ltée c. Société québécoise d'information juridique*,¹⁴⁵ the publisher Wilson & Lafleur sued SOQUIJ for its failure to provide it copies of all Quebec court decisions at cost instead of the selected cases that SOQUIJ made available at a flat rate of \$2.00 per page, which Wilson & Lafleur thought restrictive and excessive. This was, in other words, an instance of a government agency attempting to place restrictions on access to the law. Although the complaint was dismissed at trial, the Quebec Court of Appeal ruled in favour of Wilson & Lafleur, emphasizing the importance of access to the law for all persons:

In a state of law, where each individual is subject to and governed by statutes, regulations and, it must be admitted, precedent, it is essential that citizens be able to discuss and criticize these rules freely. Since the establishment of a true democracy requires that citizens be able to express their opinions and freely criticize the institutions governing them, and thereby participate in their evolution, it seems to us obvious that such discussion and criticism must also apply to the products of these institutions. In this case, this clearly refers to judicial decisions.¹⁴⁶

¹⁴⁴ Ibid. ¶8-9, 11.

¹⁴⁵ [2000] R.J.Q. 1086 (C.A.).

¹⁴⁶ Ibid. ¶ 25. Translated text from Daniel Poulin, "CanLII: How Law Societies and Academia Can Make Free Access to the Law a Reality" (2004) JILT. Available online: <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/poulin/>.

Stating the necessity of accessing court decisions, the court ruled that SOQUIJ must provide Wilson & Lafleur access to all the judgments given by the judicial courts of Québec to which it has itself access (¶ 36) and ordered that his access be given on the basis of the actual costs incurred by SOQUIJ and not an artificially inflated price (¶ 41). Poulin describes the positive effect this has had on access to Québec case law:

This Court of Appeal decision brought about major consequences regarding the conditions for access to judicial decisions in Quebec. In the following year, Quebec went from a place where free publication of law had made painfully little progress to eventually become the Canadian jurisdiction where case law is most accessible. More specifically, the Quebec government adopted a new policy and mandated that the Société québécoise d'information juridique set up a Web site offering free basic access to all decisions rendered by courts and tribunals in Quebec.¹⁴⁷

Finally, and most recently, in *CCH Canadian Ltd. v. Law Society of Upper Canada*,¹⁴⁸ the Supreme Court of Canada addressed the issue of copyright in judicial decisions. Although the decision did not directly involve Crown copyright, the court's analysis of copyright in judicial decisions is useful for the present analysis. At issue in that lawsuit was whether the photocopying service provided by the Law Society's law library infringed the copyright of the plaintiff legal publishers in various legal publications, including their case law reporters.¹⁴⁹ In looking at the exercise of "skill and judgment" needed to compile reported judicial decisions, the Court concluded that the compilation of the headnotes, case summaries, topical index and reported judicial decisions in issue met this test and that the legal materials in this case were "original"

¹⁴⁷ Poulin, *ibid.*

¹⁴⁸ 2004 SCC 13, rev'g [2002] 4 F.C. 213, 224 F.T.R. 111, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161, 2002 FCA 187 (C.A.), rev'g [2000] 2 F.C. 451, (1999) 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139 (T.D.).

¹⁴⁹ For a detailed analysis of the decision, see Ted Tjaden, *supra*, Chapter 1, note 2 at 21-24. See also Daniel J. Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 I.P.J. 131.

works covered by copyright.¹⁵⁰ However, although the court ruled that copyright existed in the publishers' works due to the value-added material and the skill and judgment used, the copying done by the Great Library was fair dealing with the publishers' works. From a researcher's point of view, the court's ruling that fair dealing must not be interpreted restrictively (¶ 48) is welcome news, as is the ruling that the meaning of "research" must be given "a large and liberal interpretation" in order to ensure that users' rights are not unduly constrained, even where the research is "for profit" (as in the practice of law).¹⁵¹ As part of its analysis, the court made the following comments which would seem to adopt the U.S. position of there being no copyright in the judicial reasons themselves:

*This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation – namely the headnote – are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.*¹⁵²

However, it is not entirely clear that the court was going as far as adopting the U.S. position on this point. The analysis in this decision was as between the rights of the publishers (in their value-added features) and the rights of users (to copy the entire reasons, including the value-added features). The analysis was not as between publishers and the state or the judges as to who owns the text in the judicial reasons themselves. Thus, in the statement "it would not be copyright infringement for someone to reproduce

¹⁵⁰ *Supra* note 148 ¶ 29-36.

¹⁵¹ *Ibid.* ¶ 53.

¹⁵² *Ibid.* ¶ 35.

only the judicial reasons” it is not clear if the reason for this is because such reproduction would be fair dealing or whether because the reasons are in the public domain. Given that the thrust of the decision dealt with fair dealing, it is likely that the Court’s reasoning is that reproduction of only a judge’s decision (without a publisher’s value-added commentary) would constitute fair dealing. At the same time, however, it could be open to interpretation that given the role of judges in society and the fact that they are not likely under the “direction or control” of the government for the purpose of s. 12 of the *Copyright Act*, the Court meant that the decisions are in the public domain. Because of the uncertainty, it may therefore be left for later decisions to determine this exact point. Regardless, the decision is a welcome trend towards user rights in relation to the use of law-related materials for the research purposes.

Conclusions

Crown prerogative and Crown copyright have a long history in England and Canada. And although these doctrines remain dormant most of the time, they still influence access to law-related information in a number of ways. The American position, by way of contrast, is much more open and does not appear to have resulted in a plethora of inaccurate law-related information being circulated in the marketplace. Even though recent issues involving the Canadian government, such as the Gomery Commission¹⁵³ or the Arar Inquiry,¹⁵⁴ do not directly raise issues of Crown copyright, they do relate in a broader sense to the degree of control that the government should necessarily have over

¹⁵³ Commission of Inquiry into the Sponsorship Program and Advertising Activities, “Home Page.” Available online: <<http://www.gomery.ca>>.

¹⁵⁴ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “Home Page.” Available online: <<http://www.ararcommission.ca/eng/index.htm>>.

information which affects its citizens and which may cast the government or its officials in a negative light. To the extent that Crown copyright or prerogative reserves to the government the potential for excessive control or censorship over law-related information that is in its possession, this is an unacceptable situation. Governments currently have a large number of exceptions in access to information legislation that can legitimately protect the disclosure of sensitive information. For government produced information that is law-related and needed by citizens to enforce or discover their legal rights, the added control provided by Crown copyright and prerogative is anachronous and can potentially lead to censorship. As such, Crown copyright and prerogative in legislation and case law and closely-related materials should be abolished, a position discussed in more detail in the Recommendations section in the final conclusions to this thesis. But first a look in the next chapter at another potentially retarding effect on access to law-related information – the commodification of information and the privatization of public goods that is an offshoot of the “shrinking” public domain in cyberspace.