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Abolishing Canadian Crown Copyright: Why Government Documents Should Not be Subject to Copyright

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ABSTRACT

Section 12 of the Canadian *Copyright Act*, which assigns the government copyright ownership over all documents produced by the federal government for a period of fifty years, has remained virtually unchanged since being introduced into Canada's copyright legislation in 1921. This provision is known as Crown copyright, and its continued existence serves as a barrier to the reuse of public sector information by the public, despite the fact that said documents were produced by government employees whose salaries are paid for by the taxpayers. This paper looks at Crown copyright through a global and *Charter* lens, evaluating how s.12 fits in with the way in which other countries treat copyright over government documents, but also how s.12 might stand up to a *Charter* challenge. Given the current environment of balance within Canada's copyright philosophy, the influence of the Open Government trend throughout the world, and the complicated situation the government would be placed in were they actually required to argue the constitutionality of s.12, it is clear that Crown copyright should be abolished from Canada's copyright legislation.

KEYWORDS

Copyright, Crown copyright, Government documents, Public sector information, reuse, open government, open licence, copyright philosophies, freedom of information, Charter of Rights and Freedoms

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LIST OF ABBREVIATIONS

PSI.....Public Sector Information

OGP.....Open Government Partnership

OGL Open Government License

CRTACode des relations entre le public et l'administration

UDHRUniversal Declaration of Human Rights

ICCPR..... International Covenant on Civil and Political Rights

CHAPTER 1

1 The Problem of Crown Copyright

1.1. Introduction

Government documents are a byproduct of governing. Governments cannot govern without producing documents. Though these documents might not often be considered to have any great artistic or literary value, they are still considered intellectual property, as fixed, original expressions of ideas, and are therefore subject to copyright. But if these documents are produced by government employees, then who owns the copyright: the government, the people who work for it, or no one at all? This very question has created a large body of scholarly research, most notably because the answer is not consistent from one country to another and because opinions vary on what that answer should be. Considering that copyright generally sets out to establish who has the right to produce, reproduce, perform and publish a substantial part or the whole of an original work, then it is clear that copyright law is laying out the rights of reuse of works more than anything else. Owning the copyright over a work gives a copyright owner the right to exclude potential users of their work.

Unlike other types of intellectual works however, government documents, also known as public sector information (PSI) have the unique distinction of being produced by elected officials and government employees, whose salaries are paid for by taxpayers. This fact makes the idea of ownership in these documents even more complicated. If the people's taxes paid for the production of these documents, then how could anyone but the people own the documents? This perspective things however, is not without its flaws.

Without government, the documents would not exist at all, so is it fair to say the government should have no right to the works at all? Likewise, it is the government employees who put their own intellectual work into the creation of the documents and without their work, the documents could not be produced? Is it therefore fair to say they too should have no right to the works?

To give the issues more context consider, for example, a parliamentary report produced by the House of Commons Standing Committee on Citizenship and Immigration in 2009, entitled *Recognizing Success: A Report on Improving Foreign Credential Recognition*.¹ This document was created as a result of a study conducted by the committee on the topic. The document was physically written by two analysts, as part of their employment at the Library of Parliament, whose salaries are paid for by taxes collected from the public. It is the government who owns the copyright over this document through Crown copyright, which gives it the exclusive right to exclude others from its use. The two analysts had no say in who may or may not be excluded from the use of the work, nor did the public who paid their salaries.

It is also worth considering the rewards involved for each party. Creation of these documents allows the government to maintain organization, set out laws and policies and continue administration over a state. Employees are rewarded with salaries for their work. For the public, however, the reward depends on what the government does with these documents. Citizens of a well-governed society can benefit from the stability the documents help to produce, while those in a less stable country might see little benefit to

¹ House of Commons, Standing Committee on Citizenship and Immigration, *Recognizing Success: A Report on Improving Foreign Credential Recognition* (November 2009) (Chair: David Tilson).

their actual lives from these documents. Of course, the level to which government documents are released, published and made accessible to the public can affect any visible benefits the public might gain from their existence. “Access to government information is a basic requirement for a democratic society,”² and when governments fail to release their documents, they are denying the public the right to participate in their democracy and to hold the government accountable. This point is further supported by the fact that the right to receive information is often closely tied with the right to freedom of expression in many international human rights agreements.³ Furthermore, as pointed out by the Open Government Partnership, “[g]overnments that do not adapt and embrace the prevailing trend of more openness risk being voted out or even overthrown.”⁴

In fact, a current trend towards open government encourages not only expanding access, but removing barriers, such as copyright, to the reuse of government documents. It is therefore in a government’s best interest to not only make large amounts of their documents accessible to the public, but also to make those documents reusable by the public. This is where copyright over public sector information (PSI) can become a hinderance to the democratic process and to the human right to receive information,

² Sam-chin Li, “The vanishing act of government documents – and what to do about it” (24 April, 2016), online (blog): *ORK: Our Right to Know* <ourrighttoknow.ca/the-vanishing-act-of-government-documents-and-what-to-do-about-it/> [Li].

³ See, for example: *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Sup No 13, UN Doc A/810 art 19 (1948) 71 [UDRH]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 19 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 10 (entered into force 3 September 1953) [ECHR]; *American Convention on Human Rights, "Pact of San Jose, Costa Rica"*, 22 November 1969, art 13 (entered into force 18 July 1978) [ACHR].

⁴ Open Government Partnership “Four-year Strategy 2014-2018” (2014) at 6, online (pdf): *OPG* <www.opengovpartnership.org/sites/default/files/attachments/OGP%204-year%20Strategy%20FINAL%20ONLINE.pdf>.

which explains why a discussion on the right of ownership of PSI has generated so much dialogue.⁵

This tension of ownership over PSI between the government, its employees and the public however reflect the tension that has long existed in any discussion involving copyright: the tension between the creator/owner and the user. The great majority of states around the world have had to determine on which side of this tension they choose to fall. Will their copyright laws favour the author/owner or the user, or, will they attempt to find a balance in between? These opposing views emerged long ago as two differing philosophies/systems of copyright. On one side of the debate is the Continental European system, known as the *Droit d'auteur* system, traditionally followed by Civil Law countries, which posits that “the author’s creation naturally belongs to him and protection is justified simply as a matter of justice.”⁶ The *Droit d'auteur* system privileges author’s rights above all others. On the other side of the debate is the Anglo-Saxon or Anglo-American “Copyright system,” traditionally followed by countries using the Common Law, which emphasizes “creation and its dissemination to the public” above authors’ rights.⁷

Though these contrasting views can be helpful to a point, they do not address the myriad of factors that affect the actual practice of copyright in a particular country, nor do they account for the various external forces that might influence copyright owned by a

⁵ See for example: Mireille van Eechoud and Lucie Guibault, “International Copyright Reform in Support of Open Legal Information” (2016) Institution for Information Law, University of Amsterdam, Working Paper; Carys Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56 UTLJ 75 [Craig].

⁶ Silke von Lewinski, *International Copyright Law and Policy* (Oxford: Oxford University Press, 2008 at 33 [von Lewinski].

⁷ *Ibid.*

government, as opposed to copyright that is privately owned. Once a government document is released to the public, if that document is protected by a government-owned copyright, then that copyright can establish barriers to the public's ability to reuse the document. Government-owned copyright creates somewhat of a paradox of ownership. Government documents are publicly owned, in the sense that the government, representing the public, owns them, but this ownership allows the government to determine how and when the actual public makes use of these documents to express themselves.

For example, two librarians from Canadian academic institutions point to a CD-ROM of a collection of research reports and transcripts submitted to the Royal Commission on Aboriginal People, called *For Seven Generations*, which was published by Libraxus in 1997.⁸ Because the documents were only published in a now-obsolete format, and, there was confusion over copyright, librarians were prevented from making copies of the documents, which resulted in said documents being inaccessible for several years.⁹ Government information is forever changing, being updated or simply disappearing, thanks to the ease of making changes to born-digital documents. Therefore, if copyright prevents librarians, researchers and other members of the public from making copies of these documents, then it increased the risk of access being lost. It is likewise easy to see how copyright might prevent access to those documents that exist uniquely in print. During the Harper administration, several government libraries were

⁸ Amanda Wakaruk and Sam-chin Li, "Introduction: The Evolution of Government Information Services and Stewardship in Canada" in *Government Information in Canada: Access and Stewardship* (Edmonton: University of Alberta Press, 2019) at XVIII [Wakaruk 1].

⁹ *Ibid.*

closed down and their contents discarded.¹⁰ Among those items removed from the Department of Fisheries and Oceans regional libraries were several items that existed only in that library.¹¹ Copyright over these documents may have prevented copies being made by outside individuals, for the sake of preservation or simply for access. Had such documents been free of copyright, the barrier to reproducing and distributing them would have been removed, which would have prevented a loss of access.

That loss of access can then impact the right to information and freedom of expression. If government documents are lost or difficult to access due to the restriction of government-owned copyright, then users are prevented from both accessing that information and using that information to express themselves.

It is the state of copyright over PSI around the world, and specifically in Canada (known as Crown copyright) that is the focus of this paper. Section 12 of the Canadian *Copyright Act* provides the following:

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 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.¹²

What this provision means is that all works created by the federal government shall be protected under a Crown-owned copyright, for a period of fifty years after publication.

Works produced in the process of governing, such as departmental reports, decrees,

¹⁰ John Lehmann, “Purge of Canada’s Fisheries Libraries a ‘Historic’ Loss, Scientists Say”, *Globe and Mail* (January 7 2014) online: <www.theglobeandmail.com/news/politics/purge-of-canadas-fisheries-libraries-a-historic-loss-scientists-say/article16237051/>.

¹¹ *Ibid.*

¹² *Copyright Act*, RSC 1985 c C-42, s 12 [*Copyright Act*].

administrative orders, legislation and much more, are therefore protected under copyright, with the federal government, on behalf of the Queen, as the owner.

Section 12 of the *Copyright Act* has been the target of much criticism recently¹³ and not so recently,¹⁴ with calls for its abolishment most recently inspiring the introduction of a Private Member's Bill that, should it pass into law, removes copyright protection from all government documents.¹⁵ In full agreement with the aim of Bill C-440, this paper examines how Canadian Crown copyright exists within a global context, and how the unique position of government documents in relations to copyright, helps support the need for its abolition.

First, Crown copyright does not reflect the current Canadian copyright philosophy of balance between user and author interests. This is true in many countries, demonstrating that PSI are not treated like other intellectual works and should not be subjected to copyright in the same way. Secondly, Canada's continued use of Crown copyright is contrary to a global trend towards open government. In response to certain outside influences, many countries are making policy changes to provide for a freedom of reuse of PSI, in lieu of removing the existing legislative barriers, and in that regard, Canada is no exception. But while Canada holds on to Crown copyright, the country is by no means fully embracing the open government trend. Finally, Crown copyright infringes

¹³ See, for example: "Fix Crown Copyright" (last visited 10 June 2019), online: *Amanda Wakaruk* <sites.google.com/a/ualberta.ca/wakaruk/fixcrowncopyright> [Wakaruk 2]; Elizabeth Judge, "Enabling Access and Reuse of Public Sector Information in Canada: Crown Commons Licenses, Copyright, and Public Sector Information" in Michael Geist, ed, *Canadian Copyright and the Digital Agenda: From Radical Extremism to Balanced Copyright* (Toronto: Irwin Law, 2010) 598.

¹⁴ Consumer and Corporate Affairs Canada, *Crown Copyright in Canada: A Legacy of Confusion*, 1981, by Barry Torno, Catalogue No RG44-1/6E (Ottawa: Consumer and Corporate Affairs Canada, 1981).

¹⁵ Bill C-440, *An Act to amend the Copyright Act (Crown copyright)*, 1st Sess, 42 Parl, 2019 (first reading 9 April 2019) [C-440].

on the *Charter* right, as well as the human right, to freedom of expression. While this may also be true of copyright in general, in a case of infringement of Crown copyright, the government might run into unique conflict while having to act as both the owner of an infringed works and the defender of the constitutionality of that ownership.

1.2 Organizational plan

This paper will include four parts, with the first part consisting of the introduction, research methods, scope and background on the topic, in order to give the reader an overall context of Crown copyright in Canada. Chapter 2 will address the issue of the two differing copyright philosophies found around the world and how those philosophies impact the way a country treats the copyright for PSI. A detailed look at the history of Canada's current copyright philosophy will be followed by an introduction to the history of the two main copyright philosophies prevalent around the world and how these two philosophies have spread globally. Knowing more about these two philosophies will further explain how Canada has come to embrace its current philosophy.

Furthermore, an analysis of the copyright laws for PSI of a selection of fourteen countries will be compared with each country's chosen philosophy, in order to explore whether a relation between copyright philosophies and treatment of copyright over PSI exists.

Chapter 3 will examine the current global trend towards open government and how Canada stands within this context. This examination will require an analysis of the various external pressures that have impacted how countries address the reuse of PSI, such as the Open Government Partnership and certain multilateral obligations. The chapter will then look at how certain countries have responded to these pressures, not by modifying or repealing existing copyright legislation, but by adopting either alternative

legislation or non-legislative policies. Finally, Chapter 4 will look at how Canadian Crown copyright infringes on the right to freedom of expression. First, there will be an exploration of how past studies have approached this issue, followed by a look at the international context to the right of freedom of expression. Then, using an imagined scenario of Crown copyright infringement, this paper will approach the constitutionality of Crown copyright by exploring whether a case of infringement would first be considered “expression,” if the purpose or effect of Crown copyright could be considered to violate freedom of expression rights and then whether Crown copyright would succeed in passing the *Oakes* test. This analysis will address the paradoxical issues of fair dealing being used to justify the constitutionality of Crown copyright, while also weakening any infringement cases the government might pursue. Finally, conclusions and recommendations will be provided at the end of Chapter 4.

1.3 Scope

Besides Canada, this paper will focus primarily on Europe, the United States and Oceania, with reference to some African and Asian countries. Moreover, only copyright legislation and policies that apply to documents at the federal level will be discussed, as the legislation and policies for subnational documents in some countries differ from that of their federal counterparts.

The term “government documents” will be referred to as public sector information, or PSI. Unsurprisingly, many countries define what they consider to be PSI differently. This is reflective of the various governing systems around the world, which will no doubt produce different types of documents. For the sake of clarity, this paper

will use the definition provided in “Using Copyright to Promote Access to Public Sector Information: A Comparative Survey,” which was commissioned by the World Intellectual Property Organisation (WIPO).¹⁶ Public Sector Information (PSI) is here defined as “information produced, held, collected, commissioned by public entities or government-controlled entities.”¹⁷

This paper sets out to explore the extent to which government publications have been restricted by copyright in various countries and is less focused on the specifics of access to this sort of information. Though, as has already been demonstrated by examples in the introduction, copyright over PSI can impact access to these documents, the question of whether a document is freely available to the public is separate from whether a document may be reused freely or not. States have access to information and privacy legislation to help determine which PSI is appropriate to be released to the public. This paper is concerned with how copyright over PSI affects the public’s ability to make use of those documents.

Finally, in accordance with the legislation of many countries, a copyright owner might be a creator/author, another individual, a company or the government itself. This can become especially unclear when discussing the European *Droit d’auteur* copyright system, where the philosophy points to the author’s rights being more important than those of the users. Author/creator will therefore occasionally be used interchangeably.

¹⁶ WIPO, in turn, takes the definition from a publication from: Access Info, “Beyond Access: Open Government and the ‘Right to Re(use)’” (2011), online (pdf): <www.access-info.org>.

¹⁷ Catherine Jasserand & P Bernt Hugenholtz, “Using Copyright to Promote Access to Public Sector Information: A Comparative Survey” (2012) at 5, online (pdf): *Institution for Information Law* <www.ivir.nl/> [Jasserand].

1.4 Research Methodology

For Chapters 2 and 3 of this paper doctrinal research is employed in order to conduct a comparative legislative and policy analysis of various countries. A sample of legislation from certain countries was chosen based on what information could be found in English or French from authoritative sources, in cases where a professional English translation of those countries' legislation could not be found. Furthermore, the decision to analyze a somewhat small sample of countries in the comparative analysis is based on the fact that, as a result of colonization, a certain amount of homogeneity in copyright legislation exists among those countries that use a Common or Civil Law system. Countries practicing other forms of law are out of the scope of this paper. Common and Civil Law countries are assumed to follow the Copyright and *Droit d'auteur* philosophies respectively and are grouped together into these two categories to demonstrate any trends that may exist in each system or philosophy's treatment of copyright over PSI. Doctrinal research also helps to inform a historical and international law perspective on the origins and spread of the two copyright philosophies throughout the world.

For Chapter 4, doctrinal research helps inform a deeper analysis of s.12's effect on the concept of freedom of expression through a human rights and *Charter* lens. The research strategy for this chapter focuses primarily on articles providing the Canadian perspective of human rights in comparison with a more global perspective.

1.5 Canadian Crown Copyright in Context

Before further exploring copyright over PSI, it is important to understand how Crown copyright emerged in Canada and how it has been treated in recent years. The

Crown copyright provision first appeared in Canada in the *Copyright Act* of 1921, which used almost identical language to s.18 of the United Kingdom *Copyright Act, 1911*.¹⁸ Though Crown copyright had been established in England for a long time, the 1911 Act was the first statute to include an explicit provision on Crown copyright.¹⁹ Since 1921, s.12 of the Canadian *Copyright Act* has remained virtually unchanged. From then until now, despite the provision's continued existence, the federal government has rarely pursued infringement claims²⁰ and there have been no landmark judicial decisions relating to Crown copyright. Regardless, the presence of s.12 has no doubt scared away potential users of PSI, especially when faced with copyright notices like "Reproduction or use outside this permission or without authorization may be treated as copyright infringement in accordance with the Copyright Act."²¹

For at least 35 years, there have been calls to abolish Crown copyright, going back as early as a government white paper in 1984.²² In 2010, the federal government published a news release stating that "for non-commercial purposes, 'permission to reproduce Government of Canada works was no longer required.'"²³ This news release however quietly disappeared and in 2013, the following notice was provided:

¹⁸ Alain Freeman, "Government Should Do the Right Thing and End Crown Copyright" *iPolitics* (26 April 2019), online: <ipolitics.ca/2019/04/26/government-should-do-the-right-thing-and-end-crown-copyright/>.

¹⁹ Mark Perry, "Acts of Parliament: Privatization, Promulgation and Crown Copyright – Is There a Need for a Royal Royalty?" (1998) *Law Publications*, paper 10, at 10 [Perry].

²⁰ "E-1116 (Copyright)" *House of Commons Petition*, 42-1 (26 May 2017) (Initiated by Amanda Wakaruk), online: <petitions.ourcommons.ca/en/Petition/Details?Petition=e-1116> [Petition].

²¹ Though many recent digital publications allow for non-commercial reuse, a large amount still provide strong language like that above when it comes to commercial use. What's more, earlier, print documents still contain strict language against reuse. House of Commons, *Protecting Canada and Canadians, Welcoming the World: A Modern Visa System to Help Canada Seize the Moment: Report of the Standing Committee on Citizenship and Immigration* (March 2014) (Chair: David Tilson).

²² Consumer and Corporate Affairs Canada, *From Gutenberg to Telidon: A White Paper on Copyright: Proposal for the Revision of the Canadian Copyright Act* (Ottawa: CCAC, 1984) at 75-77 [Telidon].

²³ Li, *supra* note 2.

As of November 18, 2013, Publishing and Depository Services no longer administers Crown Copyright and Licensing on behalf of Government of Canada departments and agencies. Should you be seeking copyright clearance for Government of Canada information, please contact the department or agency that created the information.²⁴

This statement not only made it unclear whether copyright permission was actually, it also announced the decentralization of copyright permissions. Having to consult the department involved in one's request is a daunting prospect if one considers how often federal departments change names. A user might want to seek permission for a publication from the Department of Manpower and Immigration, when no such department with that name exists and its responsibilities today lie with two separate departments.

Later, in an exchange on Twitter, University of Ottawa Professor, Michael Geist, questioned then President of the Treasury Board, Tony Clement, on the status of non-commercial permissions for Crown copyright, to which Mr. Clement replied, "The Crown Copyright non-com policy still remains in effect for all depts. I'm posting a notice to that effect."²⁵ However no notice was ever posted. Beyond this government flip-flop, submissions were made during the 2012 copyright review, calling for the abolition of Crown copyright, with no result.²⁶

At the time of the writing of this paper, there are three events in motion that have the potential to make changes to Crown copyright. First, there is the previously mentioned Private-Member's Bill, C-440, which received its first reading in April of

²⁴ Michael Geist, "Government of Canada Quietly Changes Its Approach to Crown Copyright" (25 November 2013), online (blog): *Michael Geist* <www.michaelgeist.ca/2013/11/crown-copyright-change/>.

²⁵ Li, *supra* note 2.

²⁶ Wakaruk 2, *supra* note 13.

2019.²⁷ The chances of this bill passing into law before the next election however are rather slim. Second, the government has just completed and released its latest copyright review, conducted by the House of Commons Standing Committee on Industry, Science and Technology, which received several submissions related to Crown copyright, none of which supporting the continuation of s.12 in its current form.²⁸ Though the report states that “The rationale under which Canadian governments would exercise copyright over publicly funded works they prepare and publish in the public interest is questionable at best,”²⁹ the review falls short of recommending for the abolition of Crown copyright. Instead, the review recommends that the government adopt broader open licensing practices for government documents.³⁰ Besides this recommendation being somewhat toothless (to be discussed further in Chapter 3), it remains unclear to what extent the review’s recommendations will be taken into account, again thanks to the upcoming federal election. Finally, there is currently a case before the Supreme Court, which will require the court to rule on interpretation of s.12 of the *Copyright Act*. In *Keatley Surveying Ltd. v. Teranet Inc.* the company, Teranet Inc., which runs Ontario’s electronic land registry system through a partnership with the Ontario government, is being accused of “reaping substantial profits at the expense of the land surveyors.”³¹ At issue is whether land surveys, once deposited in the provincial registry then become the property of the Crown or not.³² In a hearing held in March 2019, the court heard arguments concerning

²⁷ C-440, *supra* note 15.

²⁸ House of Commons, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* (June 2019) (Chair: Dan Ruimy) at 43 [*Copyright Review*].

²⁹ *Ibid* at 45.

³⁰ *Ibid* at 46.

³¹ “37863: Keatley Surveying Ltd. v. Teranet Inc.” (last modified 2 May 2016), online: *Supreme Court of Canada* <scc-csc.gc.ca/case-dossier/info/sum-som-eng.aspx?cas=37863>.

³² *Ibid*.

the meaning of this particular passage of s.12 “prepared or published by or under the direction or control of.”³³ Though the Supreme Court’s decision in *Keatley* will certainly have an effect on future interpretations of s.12,³⁴ it is unlikely to lead to the abolishment of Crown copyright. For the moment, the shadow of Crown copyright continues to loom over users of government documents in Canada.

³³ Anita Balakrishnan, “SCC Hears Case on Crown Copyright in Land Registry Case” *Canadian Lawyer* (29 March 2019), online: <www.canadianlawyermag.com/author/anita-balakrishnan/scc-hears-case-on-crown-copyright-in-land-registry-case-17055/>.

³⁴ The leave to appeal for this case was accepted by the Supreme Court of Canada in June of 2018, hearings took place in March of 2019. A decision, as of August 2019, is still forthcoming.

CHAPTER 2

2 Comparing Copyright Philosophies with the Treatment of Public Sector Information Copyright Around the World

2.1 Canada's Copyright Philosophy

The two ruling copyright philosophies in the world, the Copyright system and the *Droit d'auteur* system, generally align themselves with Common Law and Civil Law countries respectively. Much like Common Law and Civil Law, a colonized country's copyright systems generally became the same as whichever European power colonizing it. Countries like Australia, New Zealand or South Africa, being part of the Commonwealth, adopted the Copyright system, while most of South America and countries colonized by Continental European powers adopted *Droit d'auteur* systems.³⁵ Canada, being predominantly a Common Law country, has assumedly developed its copyright practices as incentives to creators for the public good, in line with the Copyright philosophy. In other words, it might be expected that Canada favour the user over the author. Canada is not wholly a Common Law country however and the influence of the Civil Law from Quebec has unsurprisingly led Canada to take "elements of traditional Anglo-American economic rights and continental *Droit d'auteur* moral rights, but choos[e] neither's justification definitively."³⁶ Jurisprudentially, as recently as 1997, Canadian copyright decisions had taken a more author-centric view.³⁷ It was not until the 2002 Supreme Court decision *Théberge v Galerie d'Art du Petit Champlain Inc.*,

³⁵ Lewinski, *supra* note 6 at 36.

³⁶ Jordan Fine, "Negotiating with Ghosts: The Arbitrariness of Copyright Terms" (2017) 29:2 IPJ 333 at 336 [Fine].

³⁷ See *Cie générale des établissements Michelin - Michelin & Cie v. CAW - Canada*, [1997] 2 CF 306, 124 FTR 192 at 85 [*Michelin*].

followed by *CCH Canadian Ltd. v. Law Society of Upper Canada* in 2004, that Canada's copyright philosophy shifted towards resolving some of the tension between copyright user and creator in favour of a balance between the two. Both *Théberge* and *CCH* argued that "the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator"³⁸ and subsequent copyright decisions continued to push the country in a similar direction.³⁹ Looking at the legislation however, from an originalist perspective, since Canadian copyright is derived from British copyright law, one might surmise that the Canadian *Copyright Act* leans more in favour of the user.

With all of this in mind, the continuation of Crown copyright in the s.12 provision seems out of place. Section 12 is broad in its coverage of those documents protected by Crown copyright. It covers any work that "is or has been, prepared or published by or under the direction or control of Her Majesty or any government department,"⁴⁰ which encompasses virtually all government documents, keeping them out of the public domain for a period of 50 years. The provision itself provides little leeway beyond what might arise from "any agreement with [an] author,"⁴¹ especially when compared to the legislation of many other countries. Section 12, on its own, leans much more towards the author side of the argument and therefore seems to be in direct contrast with the "public good" spirit embraced by the Copyright system, as well as the more balanced approach

³⁸ *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, 2004] 1 SCR 339 at para 23 [*CCH*].

³⁹ Barry Sookman, "The Supreme Court Rules on Copyright in a Pentology of Cases" (12 July 2012), online (blog): Barry Sookman <barrysookman.com/2012/07/12/the-supreme-court-rules-on-copyright/>.

⁴⁰ *Copyright Act*, *supra* note 12.

⁴¹ *Ibid.*

recent Canadian jurisprudence has taken. Crown copyright is therefore contrary to the current Canadian copyright philosophy.

Put in a global context however, besides comparing the broadness of coverage s.12 provides to copyright over PSI with the legislation of other countries, one could ask, to what extent the assumed copyright philosophy of a country plays a role in how that country legislates and treats copyright over PSI and what that treatment says about PSI overall.

2.2 The Founding of the Two Copyright Philosophies and PSI

Since the Copyright system finds its origins in Britain and the United States and the *Droit d'auteur* system finds its origins in France, it makes sense to begin with these three countries and how they have historically treated and currently treat copyright over PSI as each system developed.

The Anglo-American system finds its origins in the *Statute of Anne* of 1710, which set out copyright law as “an incentive to authors to create so that the public may have access to and be enriched by their work.”⁴² When it comes to PSI however, England has historically acted somewhat contrary to this first mission of copyright. The *Statute of Anne* makes no mention of government or parliamentary publications and Crown copyright did not actually appear in British legislation until the 1911 Act. The spirit of the provision, however, has existed as far back as the time of Henry VIII, when the Crown had control of all works published through a licensing system.⁴³ For centuries, the

⁴² Jane C Ginsburg, “Tale of Two Copyrights: Literary Property in Revolutionary France and America” (1989) Tul L Rev 991 at 998 [Ginsburg].

⁴³ Perry, *supra* at 10.

concept of the Crown deserving control over all published content continued, and though the monopoly over all publications eventually came to an end,⁴⁴ the Crown's ownership over government documents continued. In the 1769 decision *Millar v. Taylor*, for example, Lord Mansfield stated, "Acts of Parliament are the works of the Legislature: and the publication of them has always belonged to the King, as the executive part, and as the head and sovereign."⁴⁵ Crown prerogative was the reason for the right to this control, and amounted to "a property right of the Crown recognized at common law in much the same way as authors' rights."⁴⁶ As the Crown prerogative over government documents was not legislated until 1911, no term limit existed for this property right. Therefore, in the midst of creating and spreading a copyright system that purported to provide temporary copyright ownership as an incentive towards the public good, England did not extend the spirit of that system to its own government documents.

Today, at least from a legislative perspective, the United Kingdom's *Copyright, Designs and Patents Act 1988* still holds provisions giving ownership of government works to the Crown and includes term limits for this ownership.⁴⁷ Further complicating matters, the 1988 Act also added a separate provision for Parliamentary copyright, where the UK Parliament is the first owner of works produced under the instruction or control of the Houses of Parliament.⁴⁸ Prior to 1988, parliamentary documents were covered under Crown copyright.⁴⁹ Suddenly there were three potential government bodies one

⁴⁴ *Ibid* at 11.

⁴⁵ *Millar v Taylor* (1769) 4 Burr 2303 at 2404.

⁴⁶ Perry, *supra* note 43 at 23.

⁴⁷ *Copyright, Designs and Patents Act 1988* (UK), s 163 [*Copyright, Design and Patent Act*].

⁴⁸ *Ibid*, s 165.

⁴⁹ JAL Sterling, "Crown Copyright in the United Kingdom and Other Commonwealth Countries" online: <lexum.com/conf/dac/en/sterling/sterling.html>.

would need to seek permission from to use PSI: the Crown, the House of Commons and the House of Lords. Locking down ownership of these documents might not always prohibit access in today's technological world, but it can prohibit the public's ability to effectively make use of that which their taxes have paid. Both the current UK Crown and Parliamentary copyright provisions therefore seem to directly contradict the very spirit of the Anglo-American Copyright system that England founded. If people are allowed access to these documents, but are not allowed to reuse them without permission or a licence, then the possibility of said documents providing a public good is limited.

The United States, itself an early adopter of the Copyright system along with the UK,⁵⁰ has approached government copyright in a completely different manner and in a way much more in line with the spirit of the Copyright system. As early as 1895, the U.S. *Printing Law* contained a provision for the sale of "duplicate stereotype or electrotype plates from which any Government publication is printed," with the condition "that no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted."⁵¹ When the U.S. *Copyright Act* was adopted in 1909, article 7 reiterated the exemption of government documents from copyright, stating that "no copyright shall subsist in the original text of any work which is in the public domain... or in any publication of the United States Government, or any reprint, in whole or in part, thereof."⁵² Today, section 105 of the *Copyright Law of the United States* continues to maintain that government documents are not protected by copyright.⁵³

⁵⁰ von Lewinski, *supra* note 6 at 38.

⁵¹ *Printing Act of 1896* (USA), 28 Stat. 601, s.52.

⁵² *Copyright Act* 17 USC § 7 (1909).

⁵³ *Copyright Act of the United States*, 17 USC § 105 (2016).

The United States' consistency in exempting government documents from copyright is in contrast to the UK's continued Crown Copyright policy, but also much more in line with the "public good" motivations of the Copyright system. The public, whose tax dollars have paid for the creation of these works continue to have access to these documents, unencumbered by intellectual property laws, giving them the right to use them as they please. Allowing the people to use government documents however they like demonstrates that the U.S. treats these documents as being jointly owned by the people. The people have paid for the creation of these documents and they were created in the process of running the country; therefore, the people are the owners of said documents. This idea is confirmed in the recent decision, *Code Revision Commissioner v. Public.Resource.Org, Inc*, an 11th Circuit decision concerning whether the annotations of the Georgia State Code could be protected by copyright or not. In this decision, the court stated:

For purposes of the Copyright Act, ...the People are the constructive authors of those official legal promulgations of government that represent an exercise of sovereign authority. And because they are the authors, the People are the owners of these works, meaning that the works are intrinsically public domain material and, therefore, uncopyrightable.⁵⁴

There is a drastic difference here to Lord Mansfield's statement in *Millar v. Taylor* that legislation "has always belonged to the King." In a way, it is not as if there is no copyright on government works in the U.S., but that the copyright belongs collectively to everyone. This mentality falls right in line with the Copyright system's goal of

⁵⁴ *Code Revision Commissioner v Public.Resource.Org*, D.C. Docket No. 1:15-cv-02594-RWS (11th Cir 2018) at 3 [*Georgia Code*].

dissemination of works for the public good. If the public is seen as author, then these works can be disseminated to the public for its own good.

Looking at PSI alone, it is interesting to notice that though these two countries gave form to the Copyright system, they take an opposite approach when it comes to PSI, with the UK legislation providing full restriction to government documents and the U.S. taking away all restrictions. Of course, this difference might be easily explained by the presence of a monarch in one country and the absence of one in the other. The head of the U.S. government is elected by the people, while the head of the UK government is technically still the monarchy. This rationale however does not work as well when we consider the current existence of Parliamentary copyright in the UK. The House of Commons in the UK, at least, is likewise elected by the people, yet this body is still assigned the copyright ownership over any documents it produces. Regardless, saying that the two countries follow the same copyright system clearly does not indicate that they will both adhere to the spirit of that system in the same way.

France, meanwhile, is said to have originated the other copyright system, referred to as *Droit d'auteur*, which follows the idea that “the author’s creation naturally belongs to him and the protection [copyright] is justified simply as a matter of justice.”⁵⁵ A British concept of Crown copyright might fit neatly into this idea, where the Crown (or simply, the government) is the corporate author of a work and that work is simply being held with the “author” (the Crown or government) as is their natural right. In reality, works that are subject to Crown copyright are actually being produced by either a group

⁵⁵ von Lewinski, *supra* note 6 at 38.

of people (such as in the creation of a law) or by a single individual, as in the case of a government report written by a public servant.

The current and past French copyright legislation has never been as straightforward about the state of its government publications as the UK, U.S, or Canada., though various non-legislative statements have created certain policies over time.⁵⁶ In the current *Code de la propriété intellectuelle* however, a convoluted series of rights are assigned to and removed from public servants in the process of creating PSI. First, the *Code* makes a point of stating that public servants keep the rights to their works,⁵⁷ except in the case of software.⁵⁸ However, provisions later in the *Code* make it clear that the economic rights for PSI are assigned to the state in any case where the work is created as part of the employment of a public servant and that, in cases of commercial exploitation, the author will keep a right of preference, except in cases of works of scientific or technological research.⁵⁹ Furthermore, the *Code* maintains that public servants hold on to their moral rights to their works, but that they cannot oppose any modifications to their work, provided the modification does not damage their honour or reputation, if those modifications are in the interest of the government.⁶⁰ Finally, public servants maintain a right to withdraw their work, but only if their supervisors agree to the withdrawal.⁶¹

What this series of provisions indicate is a very French way of removing rights from the original author and assigning them to the state. Though provided through several

⁵⁶ See André Françon, “Le Modèle Français, Les Pays Continentaux et la Convention de Berne” (1996) 30 RJT 191.

⁵⁷ L111-1 CPI.

⁵⁸ *Ibid* at L113-9.

⁵⁹ *Ibid*, at L131-3-1.

⁶⁰ *Ibid*, at L127-7-1.

⁶¹ *Ibid*.

different provisions, the effect is similar to what is found in the UK and Canadian Crown copyright legislation, in that the government generally ends up owning the copyright to PSI. In keeping with the spirit of the *Droit d'auteur* philosophy of seeing a work as an extension of the author the *Code* supports this idea right away in L.111-1-1 by declaring the public servant as author keeps the rights to their work. However, further provisions slowly take away many of these rights by adding obvious conditions. Yes, the public servant keeps their rights to the work, but not if it is a work done as part of their job, which obviously would include any government document. And yes, the public servant maintains their moral rights, but only a version somewhat limited by the authority of their supervisors.

Still, the way France approaches PSI copyright is very much in line with the characteristics of the *Droit d'auteur* system. While the Copyright system countries discussed so far in this paper, approach PSI copyright by focusing on what type of documents there are, and who will own them, the French legislation begins with what are the rights of the author of PSI and what conditions there will be on those rights. In terms of approach, at least, the UK, the U.S. and France seem to be holding to the copyright philosophies they created when it comes to PSI. In terms of actual effect, however, the same cannot be said. Certainly, the effect of the U.S. law on PSI fits into the notion of what the Copyright system should prioritize (i.e. the public good). However, the effect of the UK's legislation, as the other founding country of the Copyright system is to restrict access and reuse of PSI by the public through Crown copyright, thereby working against the public good. And while the French legislation may focus on the author, and the broad effect is indeed that the copyright for PSI is owned by *someone*, for a country whose

Droit d'auteur philosophy reveres the author, the direct effect is still to take away rights from the author.

2.3 PSI Copyright Across Other Copyright and *Droit D'auteur*

Countries

Looking at the legislation of other countries purported to follow a Copyright and *Droit d'auteur* system, the inconsistency across systems is more prevalent and certain trends emerge in contrast to the characteristics of each system. It is significant to mention that the Berne Convention does not impose any sort of requirement on signatory countries regarding public sector documents, with article 2(4) stating, “It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.”⁶² This article allows individual countries to choose the extent of copyright protection on legislation, administrative and legal texts, and though another article gives the same freedom to countries regarding political and legal speeches,⁶³ the convention is silent on all other forms of government publications. Despite the lack of clear guidance in the Berne Convention, there does seem to be a degree of consistency among many countries, regardless of their copyright philosophies.

Figure 1 breaks down the exceptions applicable to PSI found in the legislation of various countries in the two copyright systems.

⁶² *Berne Convention for the Protection of Literary and Artistic Works*, 28 September 1979, TRT/BERNE/001 at 2(4) (entered into force 19 November 1984).

⁶³ *Ibid* at 2bis(1).

Figure 1: PSI Copyright Legislative Exceptions

Copyright Countries		
Country	PSI Legislative Exemptions	Legislative Section
U.S.A.	Copyright not available for government works	§105
New Zealand	Bills, acts, regulations, bylaws, debates, reports, jurisprudence	s. 27
Uganda	Legislation, judgements, reports	s.7
Australia	One copy of legislation and judgements permitted	s.182a
India	None	s.17(d)
United Kingdom	None	s.163
Canada	None	s.12
Droit d'auteur Countries		
Norway	Legislation, judgements, statements that concern the public exercise of authority, made by a public authority or published by the public authorities	s.14
Poland	Official documents, materials, symbols and logos	s.4
Czech Republic	Official work or draft of the government, works of "public interest"	s.3(a)
Germany	Acts, ordinances, official decrees, official notices, decisions	s.5
Denmark	Acts, administrative orders, legal decisions and similar official documents	s.9
Mozambique	Official texts of a legislative, administrative or judicial nature	s.5
France	No legislative exceptions – Copyright belongs to the government with some rights reserved to the author	Art L-111-1-1, L-121-7-1, L-131-3-1

Among other Common Law/Copyright system countries, the concept of "Crown" copyright, such that it assigns ownership of PSI to the Crown, only seems to continue in certain former British colonies, other than Canada. Australia and New Zealand still maintain Crown copyright provisions, but in both cases, some allowances are made for legislative and legal documents.⁶⁴ India, another former British colony, provides no legislative exceptions for its government works. India matches the strictness of Canada

⁶⁴ *Copyright Act 1968* (Austl), 1968/63, s 177 [Austl].; *Copyright Act 1994* (NZ), 1994/143, s 26 [NZ].

and the UK towards PSI copyright, only without assigning ownership to the British Crown.

Though Australia and New Zealand do assign ownership to the British Crown, Australian law provides very limited flexibility, by allowing for *one* copy of statutory instruments and judgements to be made,⁶⁵ while New Zealand is probably the most liberal with its government documents of the five Copyright system countries mentioned so far, its legislation contains a provision exempting bills, acts, regulations, bylaws, parliamentary debates, reports and judgements from copyright protection.⁶⁶ Despite these exception provisions, the persistence of Crown copyright provisions in Australia and New Zealand, as in Canada and the UK, and the lack of exemptions in the Indian legislation similarly does not speak to the spirit of the “public good” of the Copyright system these countries purport to follow.

Still, New Zealand’s practice of exempting certain documents from copyright protection seems to be a common legislative practice across both Copyright and *Droit d’auteur* countries. Some former British colonies in Africa, such as Uganda, follow a somewhat similar trend of exempting certain government works, with Uganda exempting a list somewhat narrower than New Zealand’s.⁶⁷ There is a similar trend in many *Droit d’auteur* countries. Germany, Denmark and Mozambique, to name a few, all contain provisions exempting certain PSI from copyright.⁶⁸ Usually, at a minimum, these

⁶⁵ *Ibid Austl*, s 182a.

⁶⁶ *NZ*, *supra* note 64, s 27.

⁶⁷ *Copyright and Neighbouring Rights Act, 2006* (Uganda), s 7.

⁶⁸ Cristiana Sappa et al, “Legal Aspects of Public Sector Information: Best Practices in Intellectual Property” (2014) 8 *Masaryk U J L & Tech* 233 at p 238 [Sappa]; *Copyright Law* (Mozambique), 4/2001, s 5.

exemption provisions cover statutes and judicial decisions. Not all legislation examined for this paper was as expansive in its exemptions as the New Zealand legislation. These examples demonstrate that PSI protection under copyright and the exclusion of certain types of documents from copyright is not exclusive to one copyright system or another. Countries in both systems legislate copyright of PSI and countries in both systems provide for exceptions of certain PSI under legislation.

What is more striking when evaluating the legislative treatment of PSI in various countries however, is that the only countries evaluated for this paper (other than the United States) that have extremely broad exemptions from copyright for PSI, are *Droit d'auteur* countries. Norway, for example, besides exempting the usual statutes and judicial decisions, goes even further in its legislation to exempt “proposals, reports and other statements which concern the public exercise of authority, and which are made by a public authority, a publicly appointed council or committee, or published by the public authorities.”⁶⁹ Poland broadly exempts “official documents, materials, symbols and logos” from copyright,⁷⁰ while the Czech Republic exempts any official work or draft by the government and “other such works where there is public interest in their exclusion from copyright protection.”⁷¹ The language used here, where the Czech Republic, a *Droit d'auteur* country, refers to government works having a “public interest” is very much in line with the justification of the “general well-being of society” when describing the

⁶⁹ *Copyright Act* (Norway), 2018, s 14.

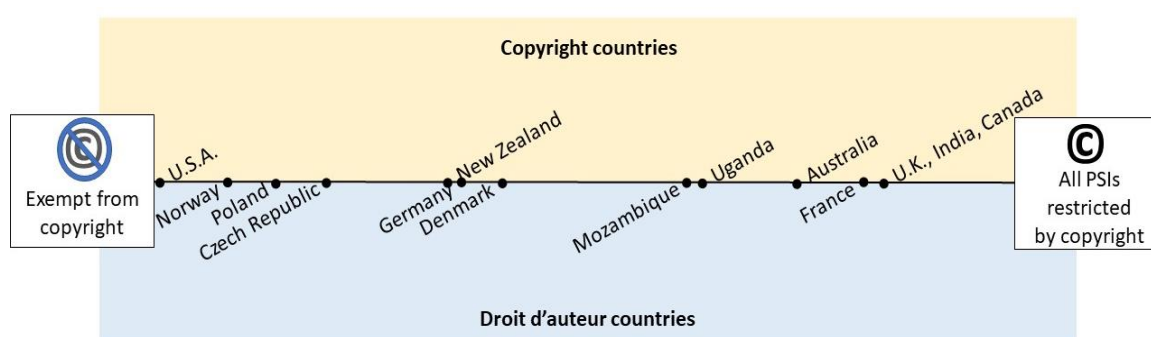
⁷⁰ Sappa, *supra*, note 68, at 237.

⁷¹ *Copyright Act* (Czech Republic), No 121/2000, s 3(a).

Copyright system.⁷² Yet here the language from one system bleeds into the legislation of a country following the other system.

Figure 2 provides a graphic representation of the extent to which each country veers toward complete restriction of PSI by copyright or total exemption of PSI by copyright.

Figure 2: PSI Copyright Exception by Degree



Several conclusions can be drawn from the above analysis. First, there is a general inconsistency across systems in how they approach copyright over PSI. Secondly, and especially in the U.S. and UK comparison, just because two countries follow the same copyright system does not mean that they will approach PSI copyright in the same way. Third, especially when comparing the U.K. and France, a country's copyright philosophy does not necessarily provide a clear indication of how it will approach copyright over PSI. Finally, and perhaps most importantly, it is clear that these systems generally have no effect on PSI copyright because PSI is not like other documents. A *Droit d'auteur* country may decide that its legislation of copyright over intellectual works should favour the author, yet, when it comes to PSI it will ensure exceptions to certain documents are

⁷² von Lewinski, *supra* note 6 at 38.

included or that a broader potential for reuse is possible. Similarly, a Copyright country might gear their copyright legislation to allow for broad exceptions of intellectual works, and then turn around and lock down copyright over PSI. The fact that Canada's overall copyright philosophy has changed while its legislative approach to PSI remains the same is yet another example of PSI not being considered in the same light as other intellectual works. Therefore, if PSI is not being treated the same way as other intellectual works when it comes to copyright, then it maybe stands to reason that it should not be subjected to copyright at all.

CHAPTER 3

3 Open Government and the Problem of Public Sector Information

Copyright

3.1 Open Government's Interaction with Copyright

Copyright protection over public sector information is further complicated by a global trend towards open government, and though Canada is participating, the continued existence of the Crown copyright provision in the *Copyright Act* has served to hinder what progress is being made on this front. The concept of open government maintains that people have the right to access government documents, including government data, in order for governments to be more transparent and more accountable.⁷³ Open government does not stop with access to information however. Among the “8 Principles of Open Government Data”⁷⁴ and the “Ten Principles for Opening up Government Information”⁷⁵ is a requirement for eliminating or lessening restrictions on ownership and

⁷³ Daniel Lathrop & Laurel Ruma, eds, *Open Government: Transparency, Collaboration and Participation in Practice* (Sebastopol, CA: O'Reilly Media, 2010) at 11.

⁷⁴ “The Annotated 8 Principles of Open Government Data” (2007), online: *The Annotated 8 Principles of Open Government Data* <opengovdata.org/> at 8.

⁷⁵ “Ten Principles for Opening Up Government Information” (last visited 5 July 2019), online: *Sunlight Foundation* <sunlightfoundation.com/policy/documents/ten-open-data-principles/> at 8.

reuse of PSI. Therefore, for a government to be considered “open,” barriers to the reuse of that information, most notably copyright, should be removed or made less restrictive.

As will be further discussed in this chapter, amid the global trend towards open government, more and more countries are seeking to remove these barriers, though interestingly, they are generally not doing so by amending the legislative restrictions that create these barriers. While Chapter 2 may have illustrated that most countries provide some degree of copyright protection over PSI within their copyright legislation, this legislation often does not tell the whole story about the extent to which it is enforced. In lieu of adopting or repealing legislation that could put PSI in the public domain, as the U.S. has done, many countries have opted instead to adopt policies or introduce alternative legislation which provides for a greater freedom of reuse of PSI than their legislation might indicate. Furthermore, in some cases, there is a general understanding that this legislation does not apply to certain types of government documents. For instance, though France, assigns copyright ownership over PSI to either the original author or to the government itself, in actual practice, it is “generally admitted that official acts such as laws, case law and decrees are exempted from copyright protection.”⁷⁶ The reason for this practice is simple: any obstacle to disseminating a law would thwart that law’s purpose entirely.⁷⁷ In other words, to restrict reuse, or rather, the reproduction of French law would be to restrict the ability of French citizens to know the law of the country. Legislation and case law therefore must be open, or rather, not subject to the existing copyright legislation in France for other PSI.

⁷⁶ Jasserand, *supra* note 17 at 10.

⁷⁷ André Lucas, et al, *Traité de la propriété littéraire et artistique*, 5th ed (Paris : LexisNexis, 2017) at 118.

3.2 Canada and the Open Government Partnership

Further driving the push towards open government are certain partnerships and unions which seek to harmonize how the reuse of PSI is addressed, if not how it is legislated. One such partnership is the Open Government Partnership (OGP). The OGP began in 2011, with eight countries committing “to make their governments more open and accountable.”⁷⁸ To date, many of the 79 countries and 20 subnational governments who have since joined the partnership are adopting some form of open licensing to assist in removing certain restrictions for reuse, whether that country maintains copyright over all PSI or not. The conditions of an open licence can vary, but generally works released under an open licence, at the very least, require attribution, “but otherwise lets people use the content in any way, including commercially.”⁷⁹

Canada, upon joining the OGP in 2012, declared among its first commitments to the partnership, that it would “issue a new universal Open Government Licence in Year 1 of [its] Action Plan with the goal of removing restrictions on the reuse of published Government of Canada information.”⁸⁰ This Open Government Licence is not to be confused with the non-commercial blanket permission announced back in 2010 by the federal government,⁸¹ which pre-dated Canada’s participation in the OGP. That non-commercial licence continues to exist to some degree, though not in its former centralized

⁷⁸ “What is the Open Government Partnership?” (last visited 25 June 2019), online: *Open Government Partnership* <www.opengovpartnership.org/about/about-ogp>.

⁷⁹ “Open License” (last modified 23 February 2010), online: *CC* <wiki.creativecommons.org/wiki/Open_license>.

⁸⁰ “Open Government Licence: Adopt Open Government Licence (CA0004)” (last visited 5 July 2019), online: *Open Government Partnership* <www.opengovpartnership.org/members/canada/commitments/CA0004/>.

⁸¹ Li, *supra* note 2

form. Indeed, a large amount of federal government websites link to the same “Terms and Conditions” for reuse, which indicates that the content of those websites may be reproduced without permission for non-commercial purposes, while permission must still be requested for commercial purposes.⁸² Statistics Canada is an exception, providing its own open licence, which allows for both commercial and non-commercial use.⁸³

Canada’s Open Government Licence (OGL), similarly allows for both commercial and non-commercial use, but though it was implemented in 2013,⁸⁴ to date it does not apply to all federal Canadian documents online. At the federal level, any document found on the Open Government Portal is licensed under the OGL,⁸⁵ but by no means are all government documents and datasets available on this site. In fact, the number of PSI found on the Open Government Portal has fluctuated greatly over time, where at one point in 2016, over 170 000 federal government publications were removed from the portal with Crown copyright being cited as a reason for their removal.⁸⁶ In 2018, there were a mere 278 publications available through the portal.⁸⁷ Today the site boasts a “collection of more than 80,000 open data and information assets.”⁸⁸ While greater than

⁸² “Terms and Conditions” (last modified 24 October 2018), online: *Government of Canada* <www.canada.ca/en/transparency/terms.html>.

⁸³ “Ownership and usage of content provided on this site” (last modified 5 April 2019), online: *Statistics Canada* <www.statcan.gc.ca/eng/reference/copyright> [Ownership and Usage].

⁸⁴ “Digital Government Strategies: Good Practices - Canada: Open Government Licence (Open Data Canada)” (last visited 5 July 2019) at 3, online (pdf): *OECD* <www.oecd.org/gov/canada-OD-licence.pdf>.

⁸⁵ “Open Government” (last modified 5 March 2019), online: *Government of Canada* <open.canada.ca/en> [Open Government].

⁸⁶ Amanda Wakaruk, “Personal submission, Copyright Act review” (14 June 2018) at 4, online (pdf): *House of Commons Standing Committee on Industry, Science and Technology* <www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9998912/br-external/WakarukAmanda-e.pdf>.

⁸⁷ *Ibid.*

⁸⁸ Open Government, *supra* note 85.

the amount available in 2018, it is still nowhere near the amount of government documents that actually exist in Canada.

While Canada is clearly participating in the open government trend, the fact that numerous documents were removed from the federal government's open licence portal because of the continued existence of Crown copyright shows that its existence continues to impeded Canada's ability to fully participate in the trend. Furthermore, an unknown number of documents continues to not be available under the licence. For example, the most recent version of the Canada's Food Guide is not available under the Open Government Licence and is subject to the strictness of Crown copyright.⁸⁹ This document is a clear example of the problems associated with Crown copyright. The Food Guide is an informational document for the public. If people cannot freely reproduce or distribute it, then the government's ability to deliver necessary information is certainly going to be impeded.

Even where there is an open licence, strong language may further impact the confidence of users in applying or even interpreting it. The Statistics Canada Open Licence begins with "The material on this site is covered by the provisions of the Copyright Act, by Canadian laws, policies, regulations, and international agreements."⁹⁰ This statement invokes Crown copyright; the user is being reminded, up front, that, though they may be allowed to use material under this licence in certain ways, the

⁸⁹ Amanda Wakaruk, "I was about to use the Food Guide PDF in a class tomorrow (to discuss rights with images from multiple sources) but see that it's "all rights reserved"... going to use the Australian Govt's CC BY food guide instead #copyrightreview <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/food-nutrition/educational-poster/26-18-2158-Poster-ENG-web-final.pdf> ..." (22 January 2019 at 10:06), online: *Twitter* <twitter.com/awakaruk/status/1087773417414090753>.

⁹⁰ Ownership and Usage, *supra* note 83.

material is still under the control of the government. The licence goes on to explain, “Statistics Canada may modify this licence at any time, and such modifications shall be effective immediately upon posting of the modified licence on the Statistics Canada website.”⁹¹ Though this paragraph goes on to assure users that its terms of use will be governed by the licence that was in force when they made use of the information, the warning that one might be able to use these documents freely today, but may not be able to do so tomorrow is yet a further invocation of the looming shadow of Crown copyright.

Furthermore, while the Statistics Canada Open Licence clearly states that it applies to the “non-confidential results from any Statistics Canada activities... for which Statistics Canada is the owner,”⁹² this information would not be apparent to someone opening up a Statistics Canada document from the 1970s to find a copyright statement on the back of the title page. It also remains unclear whether the OGL more generally would apply to any documents not yet digitized. The government can extend open licences to government documents as much as it likes, but as long as Crown copyright exists, and until the majority of government documents are digitized and available on the Open Government Portal, Canada can hardly say that Crown copyright is not continuing to hinder reuse.

3.3 The UK and Open Government Licencing

It is helpful to understand to what extent Canada is falling short of truly embracing the open government trend encouraged by the OGP by comparing its efforts

⁹¹ “Statistics Canada Open Licence” (last modified 4 April 2019), online: *Statistics Canada* <www.statcan.gc.ca/eng/reference/licence>.

⁹² *Ibid.*

with those of another country with similarly restrictive Crown copyright provisions in its legislation. The UK, as previously mentioned, still maintains Crown copyright over PSI for a period of 125 year from creation, or if the PSI is published commercially within 75 years of its creation, for a period of 50 years from the date of that publication.⁹³ With longer terms, the UK version of Crown copyright might seem more overbearing than its Canadian counterpart, but the UK also embraces open government making this provision of its copyright law far less burdensome.

In 2001, long before the creation of the OGP, the UK had implemented something called a “Click-use Licence,” which allowed for the reuse of government information with some restrictions, including a requirement for the user to register.⁹⁴ In 2010, however, the UK adopted the Open Government Licence, the current version of which allows for the reuse of accessible PSI for commercial or non-commercial purposes, provided attribution is given and, when possible, a link is provided.⁹⁵ The licence is perpetual, worldwide and royalty free.⁹⁶ A similar Open Parliament Licence has been adopted for works protected by Parliamentary copyright following the same parameters.⁹⁷ Canada actually based its OGL on the UK’s licence,⁹⁸ and certainly, according to some measurements, like the Open Data Barometer, Canada and the UK are tied as leaders of

⁹³ *Copyright, Design and Patent Act*, *supra* note 47 at 163(3).

⁹⁴ Cabinet Office, Press Release, “Government removes barrier to public data use” (30 September 2010), online: <www.gov.uk/government/news/government-removes-barrier-to-public-data-use>.

⁹⁵ “Open Government Licence for Public Sector Information, Version 3” (last visited 25 October 2018), online: *The National Archives* <www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>.

⁹⁶ Jasserand, *supra* note 17 at 22.

⁹⁷ “Open Parliament Licence” (last visited 21 December 2018), online: www.parliament.uk <www.parliament.uk/site-information/copyright-parliament/open-parliament-licence/>.

⁹⁸ Teresa Scassa, “Canada’s New Draft Open Government Licence” (6 December 2012), online (blog): *Teresa Scassa* <www.teresascassa.ca/index.php?option=com_k2&view=item&id=113:canadas-new-draft-open-government-licence&Itemid=83>.

open data.⁹⁹ This assessment is not universal across other indexes however. In 2016, the Global Open Data Index ranked the UK as a global leader in open data, second to Taiwan.¹⁰⁰ Canada was not far behind, tied for fifth place with Finland and Norway¹⁰¹ even though Canada provide far fewer open licences for government-owned datasets than the UK.¹⁰² Canada’s OGL, however, applies to an unknown amount of PSI, while the UK’s licence is the default licence for most Crown copyright-protected works.¹⁰³ In fact, the language used in each licence further exemplifies the broad commitment of the latter and the casual commitment of the former. While the UK licence states that “Government policy is that public sector information *should* be licensed for use and re-use free of charge under the Open Government Licence (OGL) with only a few exceptions,”¹⁰⁴ the *Canadian Open Government Licence Implementation Guidelines* explain that the licence “*can* be used by any public body in Canada” and that it is available for “public bodies who *want* to use the licence” [emphasis added].¹⁰⁵ Where the UK’s language indicates an expectation of PSI being licenced under its Open Government Licence, Canada’s language indicates that their OGL is more of a suggestion than a requirement.

⁹⁹ “Open Data Barometer” (last visited 5 July 2019), online: *World Wide Web Foundation* <opendatabarometer.org/?_year=2017&indicator=ODB>.

¹⁰⁰ Marc Ambasca-Jones, “What does Brexit mean for open data in the UK?”, *The Guardian* (21 July 2016), online <www.theguardian.com/media-network/2016/jul/21/what-does-brexit-mean-open-data-uk>.

¹⁰¹ “Place Overview” (last visited 5 July 2019), online: *Global Open Data Index* <index.okfn.org/place/>.

¹⁰² “Compare Countries: UK v Canada” (last visited 5 July 2019), online: *World Wide Web Foundation* <opendatabarometer.org/compare-countries/?_year=2017&indicator=ODB&open=GBR&comparew=CAN>.

¹⁰³ “Copyright Assignments” (last visited 5 July 2019), online: *The National Archives* <www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/uk-government-licensing-framework/crown-copyright/copyright-assignments/>.

¹⁰⁴ “Exceptions to OGL” (last visited 5 July 2019), online: *The National Archives* <www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/uk-government-licensing-framework/open-government-licence/exceptions-to-ogl/>.

¹⁰⁵ “Open Government Licence Implementation Guidelines” (last modified 23 January 2018), online: *Government of Canada* <open.canada.ca/en/open-government-licence-implementation-guidelines>.

3.4 The EU Directive on the Re-Use of Public Sector Information

In the push towards open government, there are still further outside influences which have pushed multiple countries to adopt policies, rather than legislative changes to their copyright over PSI. New legislation has been adopted in certain cases, but that legislation often makes no changes to the actual copyright provision for PSI. Canada itself adopted subordinate legislation in 1997 that lessened some of the power of the Crown copyright provision without actually modifying or abolishing Crown copyright. The *Reproduction of Federal Law Order* allows for the reproduction of federal laws and decisions without needing to seek permission,¹⁰⁶ while all other PSI continue to be protected by copyright through the *Copyright Act*. This is similar to the understanding in France that its laws and decisions are not protected by copyright, despite what the law might say, and the motivations are likely the same.¹⁰⁷

Other countries that have participated in a similar mix of supplementary reuse legislation and policy have to contend with other outside influences beyond the Open Government Partnership, which may have contributed to these countries developing more flexible reuse practices than Canada.

The UK, again as an example, falls into this category, as its progress towards open government might just as likely be explained by the influence of the EU Directive on the re-use of public sector information (which first came into force in 2003¹⁰⁸ and was

¹⁰⁶ *Reproduction of Federal Law Order*, SI/97-5.

¹⁰⁷ See note 76 and 77.

¹⁰⁸ EC, *Commission Directive 2003/98/EC of 17 November 2003 on the re-use of public sector information*, [2003] OJ L 345/90.

later updated in 2013)¹⁰⁹ as from the OGP. Being part of the European Union,¹¹⁰ the UK has been subject to this directive, as much as any other EU country. The directive was meant to encourage “Member States to make as much information available for re-use as possible.”¹¹¹ Among the provisions in the directive is Article 26 of the 2013 amendment, which states:

Any licences for the re-use of public sector information should in any event place as few restrictions on re-use as possible, for example limiting them to an indication of source [...] Member States should encourage the use of open licences that should eventually become common practice across the Union.¹¹²

This provision not only sets out to make reuse of PSI more possible, but clearly states a goal of having open licences become a standard across member states. The provision however does fall short of requiring the adoption of open licensing. As an EU Directive, member states are still required to implement its contents into their legislation and policies, despite whatever the copyright law for PSI might be in each country.

Prior to the adoption of its Open Government Licence and prior to its involvement with the Open Government Partnership, the UK adopted the *Re-Use of Public Sector Information Regulation* in 2005, and later replaced the regulation in 2015, as a legislative response to the 2003 and 2013 EU Directive. Neither of these regulations make legislative changes to Crown copyright and the 2015 regulation only goes so far as to say that a licence *may* be used to impose conditions on reuse and that those conditions must

¹⁰⁹ EC Commission Directive 2013/37/EU of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, [2013] OJ L 175/1.

¹¹⁰ At the time of writing, BREXIT has still not taken place and the UK is still part of the European Union.

¹¹¹ “European legislation on the re-use of public sector information” (last visited 25 October 2018), online: European Commission <ec.europa.eu/digital-single-market/en/european-legislation-reuse-public-sector-information>.

¹¹² *Supra*, note 109, s 26.

not unnecessarily restrict the reuse.¹¹³ This is no more than what the EU Directive recommends. However, in the accompanying guidelines to the regulation, it is emphasized that the default licence for British PSI should be the Open Government Licence. Though the EU Directive encourages member states to adopt open licences, the presence of this information in the guidelines and not the regulation itself solidly makes the Open Government Licence a piece of policy, not legislation. This divide suggests a reluctance or unwillingness on the part of the British government to take the step of amending or abolishing Crown copyright as a means of addressing the EU Directive or the open government trend in general. Regardless, while the regulation provides no more than was required of the UK, the policy of making the open licence a default for PSI takes the UK beyond the Directive's requirements and effectively weakens the Crown copyright provision in a large amount of cases.

France, as another EU country, and one that, though it does not have Crown copyright, does legislate copyright over PSI as usually belonging to either the state or public servant, has followed a similar trajectory over the past two decades. In 2005, France amended the existing law n°78-753, which concerned access to public documents, by adding sections on reuse in order to conform with the EU Directive. In 2015, this law was codified into the *Code des relations entre le public et l'administration* (or Code on the relations between the public and the administration). Like we saw with the UK, this Code also refrains from making legislative changes to French copyright law over PSI, but does legislate the allowance of the administration to establish open licences for the reuse

¹¹³ *The Re-use of Public Sector Information Regulations 2015* (UK), SI 2015/1415 at s12.

of government information.¹¹⁴ These licences, similar to the UK Open Government Licence, requires only that a user provide the source and the update date.¹¹⁵ Furthermore, France has adopted an open licence for legal data,¹¹⁶ and all information from its main government website, *gouvernement.fr*, is reusable under a Creative Commons licence.¹¹⁷

Similar to the UK, however, France's adoption of open and Creative Commons licensing, and its incorporation of the EU Directive into separate legislation again take some of the power out of the existing copyright laws for PSI, without actually removing or amending those laws. The *Code de la propriété intellectuelle* restricts the use of PSI, but the *Code des relations entre le public et l'administration (CRPA)* opens up these restrictions. Furthermore, of the seven European countries listed in Figure 1 of this paper, all have responded to the EU Directive by implementing laws or regulations that neither amend nor remove what restrictions already exist in their copyright laws for PSI.¹¹⁸

The real trend in open government seems to be to use policy and legislative workarounds instead of actually addressing the legislation that is causing the barrier to the open reuse of PSI. In this regard, Canada does seem to be following the global trend. The UK, France and other European countries may implement any amount of open licences in response to the EU Directive and/or the Open Government Partnership, but

¹¹⁴ art D323-2-1 *Code des relations entre le public et l'administration* [CRPA].

¹¹⁵ An example of this licence (in English) can be found on the *Répertoire des informations Publiques du Ministère de la Justice* website at:

www.rip.justice.fr/conditions_of_the_reuse_of_public_information_that_is_freely_reusable.

¹¹⁶ All of these documents are covered under the open licence 2.0 <https://www.dila.premier-ministre.gouv.fr/repertoire-des-informations-publiques/les-donnees-juridiques>

¹¹⁷ At the bottom of all *gouvernement.fr* pages is the following statement: “Unless otherwise indicated, texts of this website are under Creative Commons licence”

¹¹⁸ “Implementation of the Public Sector Information Directive” (last visited 5 July 2019), online: *European Commission* <ec.europa.eu.proxy.bib.uottawa.ca/digital-single-market/en/implementation-public-sector-information-directive-member-states>; Note that Norway, though not a member of the EU, is subject to EU directives as a member of the European Economic Agreement.

users may encounter the same problem in those countries as in Canada. As long as copyright legislation that provides ownership to certain PSI remains in place, confusion may continue over non-digitized print documents with copyright notices or over all or only certain PSI covered by these open licences. Though it is clear that certain countries are removing barriers to the reuse of PSI with these workarounds, some with a larger degree of success than Canada, until the actual legislative barriers are being directly addressed, PSI cannot be called truly “open.”

CHAPTER 4

4 Is Crown Copyright a Limit on Freedom of Expression?

4.1 How Criticism of Copyright's Effect on Freedom of Expression Fails to Address the Unique Situation of Crown Copyright

Copyright's relation to the right to freedom of expression and how it might infringe on that right is something that has been discussed by numerous scholars, in various countries, including Canada.¹¹⁹ These arguments vary from country to country, usually depending on the degree to which that copyright conflicts with the constitution or convention of that country. In the U.S. for instance, arguments often revolve around the conflict in the constitution between an article assuring Congress will not make laws that will abridge freedom of speech¹²⁰ and one giving power to Congress to make copyright laws.¹²¹ Similarly, in Europe, arguments are made about conflicts between the copyright laws of individual countries and article 10 of the *European Convention on Human Rights* (which guarantees freedom of expression).¹²² In Canada, scholars often focus on whether the *Copyright Act* infringes on section 2(b) of the *Charter of Rights and Freedoms*, which

¹¹⁹ See for example: Craig, *supra* note 5; Danny Titolo, "Canadian Copyright Law and the *Charter of Rights and Freedoms*: Statutory Property Rights Trump Constitutionally Guaranteed Expression" (2017) 12:1 JIPLP 30 [Titolo]; Graham Reynolds, "Moving Past Michelin: Towards Judicial Reconsideration of the Intersection of Copyright and the Charter Right to Freedom of Expression" (2017) 30 IPJ 25 [Reynolds].

¹²⁰ U.S. CONST. amend. I.

¹²¹ U.S. CONST. art. I § 8 cl. 8

¹²² Sunimal Mendis, "An Overview of the Conflict in the US and Europe" in *Copyright, the Freedom of Expression and the Right to Information: Exploring a Potential Public Interest Exception to Copyright in Europe* (Baden-Baden, Germany: Munich Intellectual Property Law Center, 2011) at 29.

states “Everyone has the following fundamental freedoms... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹²³ These arguments tend to address copyright in general however, and do not take into account how arguments might be affected by the copyright over a particular type of work. Government documents, as has already been discussed in this paper, are unique in their status as copyrighted works, since as public documents, they are still owned by the government on behalf of the public and that ownership can then restrict the public’s use of those public documents.

As “the most explicit decision on the conflict between copyright protection and freedom of expression as guaranteed by the Charter”¹²⁴ in Canada to date, many scholars have focused their arguments on criticism of the 1997 Federal Court decision in *Cie générale des établissements Michelin - Michelin & Cie v. CAW – Canada [Michelin]*.¹²⁵ Among other things, *Michelin* concludes that copyrighted works are the equivalent to private property and that “[t]he Charter does not confer the right to use private property — the Plaintiff’s copyright — in the service of freedom of expression.”¹²⁶ In other words, this decision concludes that if an expression takes place on private property, or in this case, by using copyrighted (privately owned) works, there is no government action involved and therefore copyright is not subject to the right to freedom of expression under the *Charter*.

¹²³ *Canadian Charter of Rights and Freedoms*, s 2(b), Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹²⁴ Ysolde Gendreau, 'Copyright and Freedom of Expression in Canada' in Paul Torremans, ed, *Copyright and Human Rights* (The Hague: Kluwer Law International, 2004) 33, cited in Craig, *supra* note 5 at 86.

¹²⁵ *Michelin*, *supra* note 37 at 85; *supra* note 119.

¹²⁶ *Michelin*, *ibid.*

Many scholars have criticized this decision, arguing that copyright should indeed be subject to the *Charter*, by focusing on the problem of equating copyrighted works with private property. Carys Craig, for instance, argues that “conceptualizing copyright as a private property right ‘recast[s] copyright] . . . as a system for the protection of private individuals’ rights against the world, its primary purpose being the protection of copyright owners’ property.”¹²⁷ Graham Reynolds expands on this by concluding that “Teitelbaum J.’s characterization of copyright as a private property right flows from his adoption of the author-centric approach to copyright.”¹²⁸

Neither argument, however, takes into account the fact that *Michelin*’s reasoning as to why copyright is not subject to the right to freedom of expression does not apply in the context of government documents. If copyrighted works are the equivalent of private property, then it would follow that copyright over government works in this analogy would be the equivalent of *public* property, i.e. property owned by the government. Interestingly, *Michelin* bases much of its argument on *Committee for the Commonwealth of Canada v. Canada*, a decision which concludes that expressing oneself on *public* property can possibly limit the scope of protection under s.2(b) of the *Charter*.¹²⁹ Though it is clear that *Commonwealth* acknowledges that the *Charter* can be invoked in that particular case, *Micheline* uses *Commonwealth* to rationalize defining copyright as private property¹³⁰ in order to argue that said private property cannot be subject to the *Charter* without government action. This rationalization ignores Crown copyright. Any

¹²⁷ Craig cited in Reynolds, *supra* note 119 at 47.

¹²⁸ Reynolds, *supra* note 119 at 45.

¹²⁹ *Michelin*, *supra* note 37 at 94.

¹³⁰ *Ibid.*

infringement case involving Crown copyright will always involve government action since the government would be the copyright owner in such a case. Therefore, Crown copyright, whether one accepts the point of view of *Michelin* regarding the property/copyright analogy or not, must always be subject to the *Charter* since the government will always be involved. Any criticism of *Michelin* may have been further strengthened by pointing out this flaw. Furthermore, this example serves to illustrate the fact that PSI copyright in relation to freedom of expression cannot necessarily be lumped in neatly with copyright over other types of documents.

4.2 Freedom of Expression in International Instruments

Since any case of Crown copyright infringement must require government action and can therefore be subject to a *Charter* challenge, it can then be explored as to whether Crown copyright would indeed be found to be compliant with the 2(b) right to freedom of expression in the *Charter* or not. There is a global context to the right to freedom of expression that further associates that right with the need for the removal of barriers to the reuse of PSI. Freedom of expression clauses can be found in many international instruments, including the *Universal Declaration of Human Rights (UDHR)* and the *International Covenant on Civil and Political Rights (ICCPR)*. Article 19 of both the *UDHR* and the *ICCPR* are similar, if not identical, and both further elaborate on what is entailed in the right to freedom of expression, adding that it includes the right to “seek, receive and impart information and ideas... regardless of frontiers.”¹³¹ The use of the terms “seek” and “receive” invokes access to information as an aspect of the freedom of

¹³¹ *UDRH* and *ICCPR*, *supra* note 3.

expression right. The use of the term “impart” however more closely aligns with the concept of reuse of information. That people should have the right to access to that information and then to “impart” or rather distribute that information is therefore part of the right to freedom of expression. Copyright might be said to infringe on this right by creating a barrier to one’s ability to distribute (or impart) accessed information.

The *UDRH* is not a treaty, but a UN General Assembly resolution, and so technically imposes no legal obligations on UN member countries, like Canada, though it is considered by some as part of customary international law.¹³² The *ICCPR* however is a treaty, which Canada acceded to in 1976,¹³³ and therefore does come with legal obligations.¹³⁴ The UN Human Rights Committee, which monitors how the rights of the *ICCPR* are being implemented by member states, released a general comment in 2011 on article 19, and within this general comment the committee stated, among other things, that “To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest.”¹³⁵ Though general comments are not binding, but are usually considered authoritative thanks to the expert composition of the Committee,¹³⁶ it is interesting to note that a treaty to which Canada is a member singles out government documents and suggest a lack of copyright over them as a means of ensuring the right to freedom of information. This is particularly significant given that the *ICCPR* as well as the *UDHR* were influences in the drafting of the

¹³² June M Ross, “Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms” (1984) 6 Hum Rts Q 180 at 197 [Ross].

¹³³ “International Covenant on Civil and Political Rights” (last modified 21 July 2019), online: *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en>.

¹³⁴ John Currie, *Public International Law*, (Toronto: Irving Law, 2008) at 423 [Currie].

¹³⁵ UNHRC, General Comment No 34, 102nd Sess, CCPR/C/GC/34 para 19 (12 September 2011).

¹³⁶ Currie, *supra* note 134 at 429.

Charter.¹³⁷ Though section 2(b) of the *Charter* provides only for a fundamental freedom of expression, considering the influence of these international documents, it could be assumed that a right to access and impart information is included as part of s.2(b). Consideration should then likewise be put towards making government documents part of the public domain in order to further this right.

4.3 Crown Copyright and the *Charter* Right to Freedom of Expression

In Canada, the rights found in the *Charter* are not without limitations. Section 1 specifies that *Charter* rights are subject to reasonable limits that are “demonstrably justified.”¹³⁸ As such, in order to explore whether Crown copyright is *Charter* compliant, there are steps to follow, notably whether Crown copyright is violating the right to freedom of expression, and if so, is the violation of that right justified. The Supreme Court of Canada, in the decision *Irwin Toy Ltd. v. Quebec (A.G.)*, a landmark case concerning freedom of expression and the *Charter*, held that in order to establish whether a breach of s.2(b) has occurred, it must first be determined whether the activity in question was a non-violent attempted to convey meaning¹³⁹ and then whether “the effect or purpose of the legislation was to restrict freedom of expression.”¹⁴⁰ These steps come out of the landmark case *R. v. Oakes*, with the second step generally referred to as the *Oakes* test.¹⁴¹

¹³⁷ Ross, *supra* note 132 at 182.

¹³⁸ *Charter*, *supra* note 123, s1.

¹³⁹ *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577, 989 CarswellQue 115 at paras 41-3 [*Irwin Toy*].

¹⁴⁰ *Ibid* at para 48.

¹⁴¹ *Michelin*, *supra* note 37 at 115.

In an effort to provide some context, it may serve at this point to establish a hypothetical scenario to establish to what extent a case involving infringement of Crown copyright might interact with s.2(b) of the *Charter*. Hereafter referred to as “the scenario,” suppose that a researcher is writing a book, which will include the reproduction of a portion of a print report published by Health Canada in the late 1970s. This document has not been released in digital format by the federal government, nor is it covered under any current Open Government Licence and is still covered by Crown copyright. Since the researcher is publishing and selling the book, the reproduction of the information from the Health Canada report would likewise not be covered under any non-commercial licence. Since the researcher did not acquiring permission from the copyright holder (i.e. the government) before including the information in her book, the researcher is then taken to court by the federal government for infringement of Crown copyright.

It should be clear that expression is taking place in this activity, especially considering the use of “impart” in the *UDHR* and *ICCPR* articles on freedom of expression. Freedom of expression includes “imparting” information, which is what the researcher is doing when reproducing part of the Health Canada report in the context of her book. *Irwin Toy* also provides its own clarification on the meaning of “expression,” explaining that “expression... has a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning.”¹⁴² This concept was employed in *Michelin*, but Craig argues that the form/content divide is out of place in the area of copyright. “Copyright attaches to expression,” she argues.¹⁴³ If the researcher’s

¹⁴² *Irwin Toy*, *supra* note 139 at para 42.

¹⁴³ Craig, *supra* note 5 at 98.

own work, which includes portions of the Health Canada report, is eligible to be copyrighted itself, then it should be considered expression. Since removing the report would alter the content of the researcher's expression, the use of this work is therefore part of the researcher's expression.

A *Charter* challenge would then need to determine whether this *Charter* right to freedom of expression is being infringed by Crown copyright. *Irwin Toy* maintains that if the purpose or the effect of the law (in this case of Crown copyright) is "to restrict attempts to convey a meaning, [only then has] there has been a limitation of s.2(b)."¹⁴⁴

4.4 Purpose of Crown Copyright

In *Michelin*, the court declared the objective of copyright, in general, to be the "protection of authors and ensuring that they are recompensed for their creative energies,"¹⁴⁵ a decidedly author-centric view. However, as has already been discussed, the copyright philosophy of Canada has since changed to a more balanced approach. Furthermore, this paper has also already discussed the historic purpose of copyright in Canada, when discussing the history of the Anglo-American Copyright system. Being derived from that British system, an originalist interpretation would suggest that Canada's purpose in its copyright laws is much more to provide an incentive to authors to create works towards a public good, which is closer to a user-centric view of copyright. This overall purpose, of course, does not necessarily function when applied to PSI, since PSI is created in the process of governing and therefore no incentive is needed for its

¹⁴⁴ *Irwin Toy*, *supra* note 139 at para 48.

¹⁴⁵ *Michelin*, *supra* note 37 at 115.

creation. This only furthers the notion that the connection between PSI and copyright is unique in comparison with other types of works.

The Crown copyright provision of the *Copyright Act*, however, has its own specific purpose historically, beyond the generalities of copyright. Though no stated purpose could be found in the Hansard at the time of the 1911 British enactment, nor the 1921 Canadian enactment, various white papers and green papers from both the United Kingdom and Canada have stated in recent years that the purpose of Crown copyright is to ensure integrity, accuracy and authority of government information.¹⁴⁶ In the early days of the printing press and publishing, such a purpose would be necessary since the only way to ensure that official laws and other official government information were being accurately communicated to the public was to maintain a monopoly over the production and distribution of these documents.

Interestingly, this rationale of ensuring accuracy, but also the integrity and authority of the documents reflects what one might find in a provision on moral rights. Section 14.1 of the *Copyright Act* defines moral rights in a work to include “the right to the integrity of the work and... the right...to be associated”¹⁴⁷ (the authority of the work). Since the Canadian law is derived from the UK law and they both maintain the same purpose for the existence of Crown copyright, it is interesting to note that the UK section

¹⁴⁶ See Consumer and Corporate Affairs Canada, *From Gutenberg to Telidon: A White Paper on Copyright: Proposal for the Revision of the Canadian Copyright Act* (Ottawa: CCAC, 1984) at 75–76; UK, Lord Chancellor’s Department, *Crown Copyright in the Information Age* (Green Paper) (January 1998), online: <<http://www.opsi.gov.uk/advice/crown-copyright/crown-copyright-in-the-information-age.pdf>> at 12; UK, Minister for the Cabinet Office, *Future Management of Crown Copyright* (Green Paper), CM 4300 (London: Her Majesty’s Stationer’s Office, 1999) <<http://www.opsi.gov.uk/advice/crown-copyright/future-management-of-crown-copyright.pdf>> at para 5.1.

¹⁴⁷ *Copyright Act*, *supra* note 12 at s 14.1.

on moral rights in the *Copyright, Design and Patent Act of 1988* includes the right to be identified as author¹⁴⁸ (the authority of the work) and the right to object to derogatory treatment of a work¹⁴⁹ (the integrity and accuracy of the work). Whether moral rights can be extended to a corporation is a matter of debate,¹⁵⁰ but should Canada and the UK choose to abolish Crown copyright, the purpose of Crown copyright might be maintained with the moral rights provision that already exists within the act, or else with the addition of a moral rights-like provisions specific to government documents.

As a manner of comparison, it is interesting to note that in the *Code Revision Commissioner* case in the U.S., the test described for determining whether something is a government document, and therefore *not* subject to copyright in the United States, is very similar to the described purpose of Crown copyright in Canada and the UK. The court, in *Code Revision Commissioner*, stated:

[In] inquir[ing]... whether a work is authored by the People... we rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created... Where all three point in the direction that a work was made in the exercise of sovereign power... it follows that the work [is] therefore uncopyrightable.¹⁵¹

Considering U.S. copyright legislation has yet to adopt moral rights to the same standard as other Berne signatories,¹⁵² it seems somewhat fitting that the same aspects Canada and

¹⁴⁸ *Copyright, Design and Patent Act*, *supra* note 47 at s 77.

¹⁴⁹ *Ibid* at s 80.

¹⁵⁰ See for example Emir Aly Crowne Mohammed, "Moral rights and mortal rights in Canada" (2009) 4:4 *JIPLP* 261.

¹⁵¹ *Georgia Code*, *supra* note 54 at 4.

¹⁵² Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford, CA: Stanford University Press, 2010) at 38.

the UK are trying to ensure continue in government works with the use of Crown copyright are the very reasons the U.S. chose not to copyright government works.

However, the purpose associated with Crown copyright's continued existence in Canadian copyright law does not outwardly seek to infringe on the public's right to freedom of expression. The motivation of Crown copyright tends to lean more towards control. To ensure the accuracy, integrity and authority of the content of government documents, the government has to have control over how those documents are allowed to be used by others, which they achieve through ownership. Control however does not directly equal stopping expression, and therefore the purpose of s.12 is not directly to infringe on the right to freedom of expression. The effect of the law however does infringe on that rights, even if the purpose does not.

4.5 Effect of Crown Copyright

As mentioned earlier, *Irwin Toy* states that when determining the constitutionality of legislation, "both the purpose and the effect are relevant."¹⁵³ As the purpose of Crown copyright, is not actually to infringe on freedom of expression, the next step is to look at the effect. Returning to the scenario described earlier, should the government choose to enforce its rights under s.12 of the *Copyright Act*, then the effect would indeed to be to block the researcher from expressing herself in the manner of her choosing, since the researcher is being prevented from expressing herself with the use of a government document. It might be argued that the researcher could then choose to use a different work to express herself, perhaps one that is part of the public domain, one already under

¹⁵³ *Irwin Toy*, *supra* note 139 at para 48.

some sort of open licence, or one where permission from the copyright owner was obtained. These solutions however are not always available, and it is possible that the government might be the only source of information on a subject, or perhaps the only authoritative source on the subject.

It should also be noted that the effect of copyright in general might be the same, whether the work in use be government-owned or not. Any time a copyright holder invokes their ownership over a work to deny permission for the use of the work, the effect may be the infringement on someone's ability to express themselves with the use of that work. The difference between the effect of general copyright and Crown copyright, however, is that the government is the party preventing the use.

The important part in this scenario, of course, is that the government *chooses* to enforce Crown copyright and its actions can trigger a *Charter* challenge. Why the government might choose to pursue such a case would presumably lead back to the purpose. Perhaps the researcher is using the Health Canada report in her book in a way the government feels affects the integrity, accuracy or authority of the report. Considering how rarely the federal government has pursued a Crown copyright infringement claim,¹⁵⁴ one might wonder if the reason for this has been a lack of concern or of instances where the government's works have had their integrity, accuracy or authority threatened through reuse. Nevertheless, in an assumed scenario, where the government chooses to bring a copyright infringement case against the researcher, the effect continues to be a barrier to the researcher's right to express herself freely.

¹⁵⁴ *Petition, supra* note 20.

4.6 Crown Copyright and the *Oakes* Test

Assuming the purpose or effect of Crown copyright has successfully been shown to infringe upon the right to freedom of expression of the researcher, “the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation”¹⁵⁵ (in this case, the federal government). This is the *Oakes* test referred to earlier and its steps consist of (a) asking whether “the objective sought to be achieved by the impugned legislation relates to concerns which are ‘pressing and substantial in a free and democratic society,’”¹⁵⁶ and (b) determining whether the means chosen by the government are proportional to the objective of the law.¹⁵⁷ This second step involves looking at (i) whether the limiting measure is rationally connected to the objective, (ii) whether the limit minimally impairs the right as little as possible¹⁵⁸ and (iii) whether there is a disproportionate effect between the measures used to limit the right and the objective of the law.¹⁵⁹

It is often argued¹⁶⁰ that today, after *CCH* and the 2012 *Copyright Modernization Act*, with the expansion of fair dealing, and considering the fair dealing is not meant to be interpreted restrictively,¹⁶¹ the “necessary safeguards are already in place without the necessity of further Charter intervention.”¹⁶² In other words, with a broad interpretation

¹⁵⁵ *Irwin Toy*, *supra* note 139 at para 70.

¹⁵⁶ *Ibid* at para 71.

¹⁵⁷ *Ibid* at para 76.

¹⁵⁸ *Ibid* at 77.

¹⁵⁹ Patrick Macklem & Carol Rogerson, eds, *Canadian Constitutional Law*, 5th ed (Toronto: Emond, 2017) at 787 [Macklem].

¹⁶⁰ See for example: Titolo, *supra* note 119.

¹⁶¹ *CCH*, *supra* note 38 at para 48.

¹⁶² Myra J Tawfik, “Copyright and Freedom of Expression in Canada” in Paul LC Torremans, ed, *Intellectual Property and Human Right*, (Fredrick, MD: Wolters Kluwer Law & Business, 2015) 257 at 277 [Tawfik].

of the fair dealing provision, any *Charter* challenge to copyright would pass the *Oakes* test.

Back in the time of *Michelin*, fair dealing was not quite so expansive since it was later decisions like *Théberge* and *CCH* that established the need for a balance between authors' and users' rights.¹⁶³ In fact, fair dealing was not so comprehensive since it was not until *CCH* that the six factors for determining if the dealing is fair were affirmed.¹⁶⁴ Furthermore, the *Copyright Modernization Act* in 2012 expanded the list of purposes under fair dealing to include education, parody and satire.¹⁶⁵ Considering s.1 challenges rarely fail on the first step of the *Oakes* test (the pressing and substantial purpose step),¹⁶⁶ we must consider how Crown copyright would pass the overall proportionality step.

Does limiting a user's ability to reuse government documents rationally advance the purpose of Crown copyright? If the purpose of Crown copyright is about control to ensure the accuracy, integrity and authority of the work, thus providing the government with ownership over that work, then Crown copyright might rationally provide that control. The Crown copyright provision does not provide any sort of ban on the reuse of government documents, only a requirement to acquire permission before making use of them. A user's expression would not be limited unless they requested and were denied permission from the government. The ownership of these documents by the government

¹⁶³ *CCH*, *supra* note 38 at para 23.

¹⁶⁴ *Ibid* at 53. The six factors are as follows: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

¹⁶⁵ *Copyright Modernization Act*, SC 2012, c 20, s21.

¹⁶⁶ Macklem, *supra* note 159 at 786.

only ensures that the government has a say over how said documents are being used by others, which rationally connects to s.12's purpose of control.

At the minimum impairment stage, the task is to ask “whether there are less harmful means of achieving the legislative goal...”¹⁶⁷ Here, it might be considered that a broad interpretation of fair dealing would open up more situations where PSI might be used under one of the recognized purposes, creating less of an “impairment” than if fair dealing were more narrowly interpreted.

Furthermore, the term limit mentioned within s.12 of the *Copyright Act* should be considered. Crown copyright is to last for a period of 50 years after the publication of the PSI. The government may be able to successfully argue that since a limit exists on protection that a minimum impairment has been demonstrated. Certainly, the US case *Eldred v. Ashcroft* from 2003, which dealt with the constitutionality of copyright terms, provides some insight into how copyright terms might be treated here. The question in this case was whether it was unconstitutional for the United States to extend its copyright terms from 50 to 70 years. The U.S. Supreme Court concluded that since the U.S. Constitution states only that Congress needed to add *limits* to the length of copyright and that adding another twenty years did not mean forever, it was not unconstitutional to do so.¹⁶⁸

Fair dealing may also serve to help Crown copyright pass the “disproportionate effect” stage of the *Oakes* test. “[T]here must be a proportionality between the effects of the measures which are responsible for the limiting the Charter right of freedom [of

¹⁶⁷ *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331 at para 102.

¹⁶⁸ *Eldred v Ashcroft*, 537 US 186 (2003).

expression], and the objective which has been identified as of ‘sufficient importance.’”¹⁶⁹ For the sake of the specific scenario created in this paper, the objective of Crown copyright, being control, in order to maintain integrity, authority and accuracy aligns strongly with the author’s rights side of copyright. The author (i.e. the government) wants to maintain control over the work. The effect however, which has been established in this scenario as infringing on the user’s ability to use the work, is affecting the user’s rights. *CCH* emphasizes that fair dealing, “in order to maintain the proper balance between the rights of a copyright owner and users’ interests... must not be interpreted restrictively,”¹⁷⁰ which suggests that fair dealing is meant to provide the balance between the two competing rights.

4.7 The Problem with Relying on Fair Dealing

Fair dealing would seem to be a possible benefit for both parties in our scenario. Where the researcher might use fair dealing and the right to freedom of expression as a defence against the charge that she infringed on the government’s copyright, the government might then use fair dealing as a defence against Crown copyright infringing the right to freedom of expression. The researcher may argue her use of the report falls under one of the recognized purposes, especially since fair dealing purposes “should not be given a restrictive interpretation”¹⁷¹ In reference to the six factors to consider when determining if the dealing is fair, there may be some issue with the purpose since the use is for a commercial publication. Given that government documents are not being

¹⁶⁹ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 71, para 70.

¹⁷⁰ *CCH*, *supra* note 38 at para 48.

¹⁷¹ *Ibid* at 54.

produced with the purpose to make money themselves, but only as a by-product of governing, the researcher would have fair chance of arguing the dealing was fair in this context. Likewise, there might be a hurdle considering the amount of the dealing, depending on how much of the report is reproduced in the researcher's book. In education, the general guideline is that 10 percent or one chapter of a work can be reproduced without permission,¹⁷² but this amount has not been legislated or defined in case law and so the amount too might be argued to be fair.

The government's position in this case however is tenuous. On the one hand, it would want to argue for a narrower interpretation of fair dealing in order to prove its infringement case against the researcher. If the researcher's use of the Health Canada report was not considered fair, then the government would have succeeded in arguing against the researcher's defence and proved its copyright had been infringed upon. However, if a broad interpretation of fair dealing is what makes Canadian copyright (including Crown copyright) *Charter* compliant (i.e. able to pass the *Oakes* test), then arguing for a narrow interpretation of fair dealing only weakens the government's ability to argue that Crown copyright is not infringing on the right to freedom of expression. The government is therefore stuck on a narrow ledge. If they go in one direction, they weaken the researcher's defence of fair dealing, but strengthen their defence of violation of freedom of expression. If it goes in the other direction, it is strengthening the researcher's defence of fair dealing, but weakening its defence against the violation of freedom of expression. This situation would only be possible with Crown copyright, since Crown

¹⁷² "Fair dealing policy for universities" (last modified 9 October 2012), online: *Universities Canada* <<https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>>.

copyright is the only situation where the government serves as both the owner of the copyrighted material and the creator of the legislation, giving itself that ownership. Crown copyright is therefore a provision in the *Copyright Act* that cannot necessarily be strongly upheld and be constitutional at the same time.

Conclusions and Recommendations

Public sector information remains unique among copyrighted works. They are works that are not created for artistic value or financial gain, but merely as a by-product of governing. Even corporate documents, which are created in the process of running a corporation can be said to be produced with the goal of financial gain or of keeping the corporation running. PSI however is created by the government on behalf of the public and for the public, which only serves to illustrate a lack of necessity for s.12 of the *Copyright act*. PSI will continue to exist and will continue to be created whether the government has ownership over it or not. As was seen in Chapter 4, a purpose of assuring the integrity, accuracy and authority of these documents lies behind Crown copyright, but this purpose might not be upheld in the face of a *Charter* challenge.

Furthermore, in the face of the open government movement, Crown copyright in Canada stands as a barrier to the reuse of PSI. Yes, Canada has participated in opening up PSI with open and non-commercial licences, but its efforts pale in comparison with certain other countries that still maintain Crown copyright legislation. In addition, though there does seem to be a global trend of countries participating in open government through open licensing while continuing to maintain certain levels of copyright protection over PSI, Canada is part of this trend of using open licences as a distraction

from removing the actual legislative barriers that exist. Certainly, Canada and many other countries' efforts towards open government pale in comparison with countries like the United States where all PSI is in the public domain.

Finally, the legislative treatment of PSI around the world varies a great deal, with a country's copyright philosophy not necessarily being any indication of how that country's copyright legislation will handle PSI. As Canada has moved towards a more balanced approach to copyright in the past several years, shifting away from an author-centric philosophy, Crown copyright continues to exist in the legislation, despite being a fairly author-centric provision. If Canada indeed wanted to continue to move away from the author-centric model, then removing the existence of Crown copyright from its legislation would be a first step.

The simplest solution to all the complications surrounding s.12 of the *Copyright Act* outlined in this paper is to abolish the provision altogether. Indeed, every witness who testified about Crown copyright at the most recent *Copyright Act* Review recommended that it be discontinued in its current form, with many agreeing that it should be outright abolished.¹⁷³ It might be reasonable to wait until the outcome of the *Keatley* case at the Supreme Court is decided, as one witness at the Review mentioned¹⁷⁴ since it will be the first time the Supreme Court will have the opportunity to rule on anything to do with Crown copyright. The INDU Committee however has recommended in its review to maintain Crown copyright, but develop more open licensing,¹⁷⁵ which, though in line with what other countries are doing, is simply ignoring the problem by creating policies

¹⁷³ *Copyright Review*, *supra* note 28.

¹⁷⁴ *Ibid* at 44.

¹⁷⁵ *Ibid* at 46.

to work around it. The current Private Member's Bill to abolish Crown copyright will likely do no more than call attention to the issue. Between the government's *Copyright Act* review and Bill C-440, government movement on this front seems comparable to 1984, when a white paper suggested the abolition of Crown copyright.¹⁷⁶ For real change to happen, the government needs to pass a government-sponsored bill that takes all of these recommendations more seriously and include the abolition of Crown copyright. To continue to address the need to ensure the integrity, authority and accuracy of PSI, the government might also consider including legislation that assigns some form of moral rights to PSI. Such a measure would ensure the government still had some say in how its works were being used but would remove the main overarching copyright barrier to the reuse of PSI.

¹⁷⁶ *Telidon*, *supra* note 17 at 22.

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