# Navigating Copyright for Crown-Published Works: A Code of Best Practices for Libraries

May 2024

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### Acknowledgements

This Code of Best Practices drew on decades of experience gathered from a wide range of stakeholders, including government information librarians, government employees, and copyright experts. The authors would like to thank those who contributed to the legal and peer review process, including Emeritus Professor David Vaver, Adrian Sheppard, and Dr. Jean Dryden. We benefited from having staff at the Government of Canada Publications Directorate, Public Services and Procurement Canada contribute as observers to the writing process and acknowledge the support and input of CARL and CFLA, including the CARL Policy Committee and the CFLA Copyright Committee's Crown Copyright Working Group.

# Contents

# Introduction

Information prepared or published by government departments and other units informs both current and future residents and citizens, and ongoing access to government information is a foundational pillar of a working democracy.

Libraries have assumed responsibility for the stewardship of this critical part of Canada's culture and knowledge, which includes preserving and maintaining public access to this information. However, to do this work, libraries must first navigate Crown copyright protections that can, and often do, hamper these efforts.

This document is intended to support libraries engaged in navigating copyright issues related to reproducing and sharing Canadian government publications for stewardship purposes. Specifically, this document provides guidance to libraries for digitizing and making available legacy print government publications, as well as collecting, preserving, and providing ongoing access to born-digital content from government websites.

This code of best practices provides background information alongside a legal framework for these activities. It also shares some illustrative examples that document current practices in use within the library community and the current consensus around related best practices. **While this document has undergone a legal and peer review process, it is not intended to be a substitute for legal advice.**

# Background

The *Copyright Act* provides rights holders with the exclusive legal right, among other things, to reproduce, publish, and distribute a work that is subject to copyright protection. Historically, these rights or their predecessors were applied to government works in order to ensure that works created on behalf of the

government (or monarch) of the day were printed only by the Royal Printer.[1]

The current legal provision related to Crown copyright in Canada is found in Section 12 of the *Copyright Act.*[2] It is extremely comprehensive in scope, granting the Crown copyright to any work that has been "prepared or published by or under the direction or control of [His] Majesty or any government department."[3] It also preserves the ancient royal prerogative or privilege that predates copyright law[4] and it is silent about term length for unpublished works, leading to the assumption that these works are protected by copyright in perpetuity.[5] These anomalies provide governments with expansive rights that could be used to withhold, censor, or control government information to the detriment of the public good. Today, in a more democratic era of governance, there is less obvious need for Crown copyright.[6]

Section 12 also sets out the duration of copyright controls for government works it covers. For published government works, the duration of the term of copyright is 50 years after the year of publication. In addition, and by virtue of Subsection 13(3) of the *Copyright Act*, the Crown, like any employer, owns copyright in original work

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[1] For information about the origin of Crown copyright, see Elizabeth F. Judge, "Crown Copyright and Copyright Reform in Canada," in *In the Public Interest: The Future of Canadian Copyright Law*, ed. Michael Geist (Toronto: Irwin Law, 2005); and David Vaver, "Copyright and the State in Canada and the United States," 1995.

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

[3] *Ibid*. One exception to this scope might be the output of Crown Corporations, as noted in Hugues G. Richard and Laurent Carrière, *Canadian Copyright Act Annotated* (Carswell, 1993), although the corporation may own copyright in their employees' work under Subsection 13(3) of the Act.

[4] See Judge, "Crown Copyright," 557-558.

[5] See Jean Dryden, "Rethinking Crown Copyright Law," *Policy Options*, September 22, 2017; David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks* (Toronto: Irwin Law, 2011), 147-148; and University of Alberta, "Canadian Copyright Term and Public Domain Flowchart," 2023.

[6] For example, legislation in the United States dating back to 1895 has made it clear that copyright is not available, by default, to federal government works in that country. The US Congress reviewed and chose to retain this approach in 1976. For more information see Judge, "Crown Copyright;" and Vaver, "Copyright and the State." For another perspective, consult the Centre for Intellectual Property Policy and Ariel's Katz intervention in Keatley Surveying Ltd. v. Teranet Inc., in which the intervenors make the case that the scope of Crown Copyright is much narrower than is commonly understood, as many "documents" produced by governments do not meet statutory thresholds for originality and authorship such that they are not in fact "original literary, dramatic, musical, and artistic work[s]," and are in fact something more akin to judicial decisions, which the Supreme Court of Canada ruled in *CCH* to be "not covered by copyright" (para 35). This view was neither endorsed or rejected by the Court.

authored by its employees in the course of their employment. This copyright lasts until the end of the 70th year after the year of death of the author.

Both Sections 12 and 13(3) may be modified by agreement, but such agreements are relatively rare. Both apply to all works of the federal, provincial, and territorial governments and neither provides for compulsory licensing.

At the time of publication, it is not always made explicit which section of the *Copyright Act* is intended to apply to the work. In practice, government works are generally assumed to be protected by Crown copyright, except in rare cases where a personal author is named in the copyright statement or when there is no indication of Crown copyright in the statement (e.g., no "© Government of Canada") and there's reason to believe that the personal author might hold the rights.

Once its copyright term expires, the publication is part of the public domain (not to be confused with public access or availability) and is no longer subject to the *Copyright Act*.[7] As with all provisions of the *Act* that relate to the legal rights of rights holders, the rights of users are exercised under the threat of infringement, which could result in legal action against good faith users of those works, such as libraries, students, journalists, etc.

Confusion about the appropriate interpretation of the *Act*, and its hampering impact on the efforts of libraries attempting to serve as stewards of government works, was described in numerous submissions and testimonies presented to the Parliamentary Committee responsible for the *Copyright Act* review of 2018/2019, summarized by librarian Amanda Wakaruk[8] and described in the Committee's final report.[9] Put briefly, this confusion, compounded by copyright anxiety and related legal chill,[10] has

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[7] The phrase 'public domain' refers to the absence of copyright protection, not the availability of the work to the public.

[8] Amanda Wakaruk, "Copyright Act Review 2018/19," Crown Copyright in Canada, 2019

[9] Canada, Parliament, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act (Report 16)*, 42nd Parl, 1st Sess (June 2019), 43-46.

[10] Copyright anxiety refers to negative emotions that individuals experience as they navigate copyright considerations. Such anxieties might result in copyright chill, a situation in which a legitimate use of copyright-protected materials is discouraged or inhibited by the threat of legal action, real or perceived. See Amanda Wakaruk, Céline Gareau-Brennan, and Matthew Pietrosanu, "Introducing the Copyright Anxiety Scale," *Journal of Copyright in Education & Librarianship* 5, no. 1 (2021).

impeded the stewardship work of libraries, which has resulted in the loss of innumerable government works, including both born digital files and legacy print materials.[11]

In its only decision pertaining to Crown copyright, the Supreme Court of Canada quoted an earlier government report that described Section 12 as a "legislative monstrosity."[12]

Its inconsistent interpretation and implementation, by all levels of government and over more than half a century, has been criticized by many individuals and associations, including government employees, librarians, archivists, academics, members of parliament,[13] and now the Supreme Court of Canada. Canada is the only Commonwealth country to retain legislative language in this area that is virtually unchanged from the *British Copyright Act* of 1911[14] without any clarifying regulation or comprehensive government policy to inform users of their rights related to the reuse of government works.[15]

At the time of writing, the Government of Canada has yet to address the concerns of those who participated in the most recent legislative review of the *Act* or the near-continuous requests for review and reform made by Canadian library associations and the Canadian Association of University Teachers.[16] Nor has it addressed the

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[11] See Amanda Wakaruk, "Presentations" and "Publications," Crown Copyright in Canada, 2019. For example, "Heavy is the Head that Wears the Crown (Copyright)" (PowerPoint presentation, ABC Copyright Conference, Kingston, ON, June 29, 2017).

[12] *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 at para 55, [2019] 3 SCR 418.

[13] For example, Bill C-440, which sought to abolish Crown copyright, was introduced in Parliament by an opposition party member in 2019 and again in 2020 (as Bill C-209) but did not pass. A similar bill, C-442, was introduced by a former Solicitor General of Canada in 1993, while he was serving as an opposition member.

[14] *Copyright Act 1911* [United Kingdom], c. 46 at Section 18.

[15] See Judge, "Crown Copyright."

[16] Some of the work completed in this area can be found on the websites of the Canadian Federation of Library Associations (http://cfla-fcab.ca/en/copyright/), the Canadian Association of Research Libraries (https://www.carl-abrc.ca/influencing-policy/copyright/), and the Canadian Association of University Teachers (https://copyright.caut.ca/resources).

comments of the Supreme Court of Canada, that Section 12 be revisited by Parliament.[17]

In the meantime, libraries must continue to collect, preserve, and provide access to government works. The *Copyright Act* includes statutory exceptions to infringement, such as fair dealing, that may support this work. This best practices code was written to support libraries as they navigate copyright risks associated with these tasks.

**Section 12 of the *Copyright Act* outlines the current legal provision related to Crown Copyright. Canada's Crown copyright provision dates back to a time of more government control and less transparency about government works, and is widely held to be unduly restrictive. The duration of copyright protection for Crown works is 50 years after the year of publication. If a named author is considered to hold copyright, the term of copyright protection is 70 years after the year of death of the author.**

## Risk Assessments

Users' rights established by the *Copyright Act*, including exceptions to infringement, do not provide Canadians with a "bright line" legal test. Instead, the courts will ultimately decide whether uses of copyright-protected works under the fair dealing provision, for example, would provide a benefit to society that is greater than any economic or moral harms realized by the rights holder. This legal test is a balance that weighs a number of factors to determine whether a particular dealing is fair. While this structure is appropriately flexible, it provides users with less certainty ahead of time about whether their actions might be found to infringe copyright.

This uncertainty has created a level of copyright anxiety and legal chill around the use of government publications great enough to necessitate the creation of this code of best practices. While a lawsuit against a Canadian library by a government agency has never occurred and seems highly unlikely, the risk of such a lawsuit is not zero.

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[17] *Keatley Surveying Ltd. v. Teranet Inc.* at para 90.

**A copyright risk assessment for a specific use scenario explores the potential risk of litigation and the likelihood that the library would prevail in such a lawsuit.** Once those risks have been identified and assessed, mitigation strategies can be applied to reduce those risks.

## Copyright Term

**The first step of a copyright risk assessment is to determine whether the publications in question are protected by copyright at all. If the term of copyright protection has expired, then those works are in the public domain.**

There is no copyright risk associated with the use of public domain works, and they can be reproduced and shared with confidence and without restriction related to copyright concerns.

In Canada, Section 12 of the *Copyright Act* provides copyright protections for government publications until 50 years after the year of their publication. If, however, the work in question is not deemed to have been "prepared or published under the direction or control of [His] Majesty or any government department," but rather to be an original work authored by a government employee on the job, then it is protected for the author's life to the end of the 70th year after their death.[18]

While there is some concern about third party content within government publications (e.g., photographs taken by someone outside the government), unless those works have clear and explicit rights statements in the publication they should be assumed to be covered by the same term of copyright when the entire work is reproduced as a whole.[19]

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[18] *Copyright Act*, s 6. The term was extended from 50 to 70 years as from January 1 2023; works whose copyright had expired by December 31 2022 stay in the public domain. Where the author is anonymous, copyright lasts for 75 years from when the work was made; but if published during that time, 75 years after first publication to a maximum of 100 years from date of making.

[19] According to Ariel Katz in his article, Digital Exhaustion: North American Observations, the outcome of Allen v. Toronto Star Newspapers Ltd., (1997 CanLII 16254 (ON SC), 78 C.P.R. (3d) 115 (1997) (Can. Ont. Ct. of Justice)) provides some basis for the belief that the reproduction rights in third-party content, lawfully included within works published by the Crown, are exhausted, especially when the reproduction is for non-commercial purposes.

## Moral and Economic Rights

The second step of a copyright risk assessment only concerns those publications that remain under copyright protection.

Moral rights established in the *Copyright Act* provide an author with the right to be associated with the protected work as its author and also to prevent changes to the work that prejudice the author's honour or reputation.[20] **Stewardship activities undertaken by libraries do not make changes to the original work and always provide attribution. Therefore, these activities are unlikely to trigger a moral rights infringement claim.** Digitizing a legacy print government publication, for example, is merely a reformatting.[21]

Economic rights established in the *Copyright Act* provide rights holders with the sole right to produce, reproduce, perform in public, and publish their protected works. It is these economic rights that may give rise (however unlikely) to any infringement claims related to typical library stewardship activities.

**The non-commercial nature of libraries should provide significant protection against statutory damages in the unlikely event that a dispute with a government agency proceeds to an action in court.** The *Copyright Act* limits statutory damages for copyright infringement to $5,000 for all works when the use is for non-commercial purposes.[22] In the case of unknowing infringement, the court can limit the award to less than $500.[23]

In addition, there is considerable case law from Canada's highest court pertaining to the users' right of fair dealing to guide institutional decision making in this area in support of libraries' typical activities.

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[20] *Copyright Act*, ss 14.1, 14.2, 28.1, 28.2.

[21] For more information about technological neutrality in copyright law, see Christina De Castell et al., "Controlled Digital Lending of Library Books in Canada," *Partnership: The Canadian Journal of Library and Information Practice and Research* 17, no. 2 (December 2022).

[22] *Copyright Act*, s 38.1(b).

[23] *Ibid.*, s 38.1(2).

A legal framework for such a potential defence is provided later in this document, followed by best practices intended to mitigate any risks. However, when it comes to Crown copyright, it is first worth considering whether the rights holder, i.e., the government, has already provided the necessary permissions for libraries to undertake stewardship activities.

## Current Rights Holder (Government) Policies

While some current government policies pertaining to the use of government publications clearly present Canadians with broad permissions, these permissions are presented in an inconsistent and confusing patchwork.[24] For example, the *Reproduction of Federal Law Order* makes it clear that "it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law." However, the Order only applies to the *reproduction* of *federal* laws and federally-constituted court decisions and is silent about how those reproductions might then be distributed.[25] Other policies vary between federal departments and other units and from province to province. **This lack of consistency forces users to assess risk of jurisdiction and publishing unit.** Furthermore, it is unclear if Section 12 applies to publications produced by municipalities or regional governments.[26] Inconsistency between jurisdictions was noted during the last review of the *Copyright Act*.

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[24] This was noted by scholars and educators, including practicing librarians and archivists, during the last comprehensive review of the *Copyright Act*, 2017-2019. A list of related submissions and testimony can be found at Amanda Wakaruk, Crown Copyright in Canada, 2019.

[25] *Reproduction of Federal Law Order*, SI/97-5.

[26] There is very little commentary on the application of Crown copyright to municipal works, However, Andrew Hubbertz claims that, "Crown copyright applies to governments that govern in the name of the Crown, that is, the federal and provincial governments. It does not apply to municipalities and local governments, which are generally established under provincial statute." Andrew Hubbertz, "Crown Copyright and Privatization of Government Information in Canada, with Comparisons to the United States Experience," *Government Publications Review* 17, no. 2 (March-April 1990): 164, note 2.

> "Witnesses also highlighted a lack of consistency in the administration of Crown copyright, which further obfuscates how Canadians can use different materials. Indeed, each federal, provincial, and territorial government administers its own copyrighted content, and practices may vary. At the federal level, the administration of copyrighted content further varies between departments."[27]

In many cases, the only information about terms of use on a publication is the copyright statement in the government's name, implying that "all rights are reserved."

As part of a commitment to Open Government, multiple Canadian governments have developed their own Open Government Licences (OGL).[28] These licences provide a way for government departments and other units to publish information that users are, subject to any other licence terms, free to "copy, modify, publish, translate, adapt, distribute or otherwise use … in any medium, mode or format for any lawful purpose."[29] While this signals an important shift in policy and permissiveness, the reality is that relatively few publications have been assigned such licences and a general understanding of what a "lawful purpose" might be requires an uncommon level of copyright literacy. Thus, **it is necessary to confirm both that a publication was assigned an OGL and that the proposed use is lawful before relying on these relatively permissive terms of use.**

In some cases, language similar to an OGL can be found (or linked to) at the bottom of a government webpage or, more rarely, within the first few pages of a fixed-format publication. If the activities of the library are consistent with the stated terms of use for a publication then no further permission is required.

In practice, such pre-authorization is often found to apply only to a subset of government web content. With digitization projects, it is more likely that no pre-authorizing statements can be found permitting the reproduction of legacy printed

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[27] Canada, Statutory Review of the Copyright Act, 44.

[28] It was not until 2013 that the OGL developed through a collaboration between the Canadian federal government and the governments of Ontario, British Columbia, and Alberta was released (https://www.misa-asim.ca/news/134738/Nanaimo-Grande-Prairie-Adopt-Canadian-Open-Government-Licence.htm).

[29] See, for example, the Open Government licenses of Canada, Ontario, British Columbia, Alberta, and other provinces and territories.

government publications. In both scenarios, seeking permission from originating departments and agencies can be challenging, depending on the jurisdiction, and at times may be impossible, especially when the publishing unit no longer exists. This is a common problem, given that government departments and other units are often reorganized following an election.

**Where terms of use are clearly stated by the originating department, agency, or other government authority, they should be relied upon. After such terms have been documented and recorded for future reference, they should be used with confidence.**

The legal framework that follows could be used as a guide to making decisions about the use and stewardship of much larger collections of government publications that fall outside of such permissions.

# Legal Framework for Libraries as Users of Canadian Government Publications

## Case Law

Legal precedent is established by judicial decisions. **There is very little case law elaborating on the application of Section 12 of the *Copyright Act,* and none that directly addresses library stewardship activities.** In 1984, the Federal Court of Appeal decided in favour of the federal government when an abridged version of a government report was published and sold for profit. The defendant's claim of fair dealing for the purpose of review was dismissed, as condensing the work did not amount to enough of a dealing to be considered a review.[30] More than three decades later, in 2019, the Supreme Court of Canada decision in *Keatley Surveying Ltd. v Teranet Inc.*[31] found that Crown copyright applies to plans of survey when they are

[30] *The Queen v. James Lorimer & Co. Ltd.*, (1983) [1984] 1 FC 1065, 77 CPR (2d) 262 at p. 272.

[31] *Keatley Surveying Ltd. v. Teranet Inc.*

deposited with the Ontario land registry system. The Court noted that this case was the first time it had addressed Section 12.[32]

## Fair Dealing Overview

**Fair dealing is a key exception to infringement in the *Copyright Act*. It is available to anyone using a substantial part of a copyright-protected work for any of the eight specific purposes listed in Sections 29, 29.1, and 29.2 of the *Act*** (research, private study, education, parody, satire, criticism, review, or news reporting), provided that the use is "fair" and, when the purpose is criticism, review, or news reporting, that the source is attributed.[33] Extensive case law has confirmed that fair dealing is "more properly understood as an integral part of the *Copyright Act* than simply a defence"[34] and that fair dealing is an "emblematic" component of copyright "as it presents a clear snapshot of the general approach to copyright law in Canada - an approach which balances the rights of creators of works and their users."[35] These approaches to fair dealing by the courts underline the purpose of copyright law, which is "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."[36] Library uses of government publications described in this code are highly likely to fall under one or more of the fair dealing purposes (e.g., research, private study, education) in many if not all cases.

The factors to be considered when assessing a use for fairness were established by the Supreme Court of Canada in the landmark 2004 case *CCH Canadian Ltd. v Law Society of Upper Canada* (*CCH*) and they have been reaffirmed in subsequent cases, as referenced later in this section. The six factors are: the purpose of the dealing; the character of the dealing; the amount of the dealing; alternatives to the dealing; the

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[32] Supreme Court of Canada, Case in Brief: Keatley Surveying Ltd. v. Teranet Inc. (September 26, 2019).

[33] *Copyright Act*, s 29.

[34] *CCH Canadian Ltd. v. Law Society of Upper Canada* [*CCH*], 2004 SCC 13 at para 48, [2004] 1 SCR 339.

[35] *Keatley Surveying Ltd. v. Teranet Inc.* at para 46.

[36] *CCH* at para 23.

nature of the work; and the effect of the dealing on the work.[37] The court noted that individual factors "may be more or less relevant" in a given situation, and that additional factors may need to be considered.[38] The analysis of all factors is to be considered on balance, meaning that, even if one or more factors do not tend towards fairness the dealing overall could still be fair.[39]

## Fair Dealing Assessment for Library Use of Government Publications

A general assessment of the fair dealing factors in the context of libraries reproducing government publications for preservation and access appears to support fair dealing as the main legal basis for these actions. The Supreme Court of Canada stated in *CCH* that both individuals and institutions can rely on Section 29 and that "'[d]ealing' connotes not individual acts, but a practice or system."[40] This code aims to provide the rationale for applying fair dealing to the stewarding of government publications as a common practice across libraries.

***The purpose of the dealing:*** This factor takes a closer look at the purpose of the copying, reproducing, or other uses, beyond whether it meets one of the enumerated purposes. For example, under this factor an analysis can consider whether the use is commercial in nature. Libraries' undertakings are typically non-commercial and their purpose is clearly to educate or enable the research efforts of end users. The Supreme Court of Canada has clarified that the end user's purpose is the one that should be considered here.[41] It is reasonable to assume that in most cases, users of government publications made available through libraries will be accessing these works for the purpose of research, education, or private study. Digitizing, reproducing, and making

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[37] *Ibid.*, at paras 52-60.

[38] *Ibid.*, at para 60.

[39] *Warman v. Fournier*, 2012 FC 803 at para 34. See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 at para 150.

[40] *CCH* at para 63.

[41] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 at para 23, [2012] 2 SCR 345. See also *CCH* at para 54; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 at para 30, [2012] 2 SCR 326; *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32 at para 102.

available government publications by libraries fulfills these purposes and likely tends towards fairness.

***The character of the dealing:*** This factor considers how the work has been used, for example how many copies were made and how widely they were distributed. Making government publications publicly available online tend less towards fairness under this factor.

***The amount of the dealing:*** This factor considers how much of a work is being used (e.g., the extensiveness of an excerpt). When a library aims to preserve government publications, entire works are likely to be copied. For many statutory purposes, including research, education, private study, criticism, and review, access to entire works is often required and can be dealt with fairly.[42] This factor may be neutral or may not tend towards fairness.

***Alternatives to the dealing:*** This factor considers whether the use is really necessary to meet the purpose, or whether there may be other (e.g., non-copyright-protected or openly licensed) works that could be reasonably used instead. For many of the statutorily allowed purposes, including research and education, primary sources are often unique; therefore there may be no alternatives. Requesting permission can be extremely difficult and time-consuming,[43] particularly to reproduce older documents, especially when government agencies and their portfolios have changed or merged.[44] Digitizing and web archiving at-risk government publications and content and then making the digital copies available likely tends towards fairness under this factor.

***The nature of the work:*** This factor considers whether the original work was already published, and whether its further distribution serves the public interest. Government publications are those which are created by government departments or other units, or by employees of these organizations, in the course of governing and in the service of citizens and residents. These activities are supported by taxpayers and these

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[42] Vaver, cited in *CCH* at para 56.

[43] See, e.g., Dryden, "Rethinking Crown Copyright Law."

[44] Emily Benton, "Abolishing Canadian Crown Copyright: Why Government Documents Should Not be Subject to Copyright," *Master of Studies in Law Research Papers Repository* 7 (2019), 5-6.

publications are intended to be widely distributed. A democratic government must be accountable to its citizens; how better to keep account than through the public availability of publications the government has issued to inform the populace about how decisions were made on citizens' behalf? Making government publications accessible to the public furthers their original purpose and tends towards fairness.

***The effect of the dealing on the work:*** This factor considers the potential competition to or impact on the market for the original work. Given the difficulties noted above with permissions for government publications, and given the fact that the Government of Canada supports an Open Government commitment,[45] it is unlikely that there is a real or potential market for many government publications, though a small number are sold on a cost-recovery basis. Reproducing and sharing works that have been distributed openly is less likely to have an effect on the market than reproducing and sharing works that are available for purchase. This factor is likely to tend towards fairness in most cases, especially when those works have already been made freely available to the public.

**Considering the public interest mandate of libraries to steward and provide access to information, along with the requirement of a democratic society to provide its citizens and residents with access to government information, the actions of libraries to preserve and make available government publications seems likely to be a fair dealing.**

## Other Potential Copyright Exceptions to Infringement

There are other exceptions to infringement that lack guidance from case law and thus remain subject to speculation about their relevance for the type of activities addressed in this code of best practices. For example, Section 30.1 of the *Copyright Act* allows for "Libraries, Archives and Museums" (LAMs) to make a copy of a work if it is "deteriorating, damaged or lost" or at risk of becoming so, to be used for "on-site consultation" if the original is too fragile to be used; or for internal, insurance, or restoration purposes.[46] However, this exception cannot be relied upon if a copy of the

[45] Canada, "About Open Government," September 28, 2022.

[46] *Copyright Act*, s 30.1(1).

work is commercially available in a relevant medium and quality.[47] Section 30.2 allows LAMs acting on behalf of any person to use the fair dealing exception (except for the purpose of news reporting) on that person's behalf.[48] LAMs can do the same on behalf of a patron of another LAM,[49] though there are restrictions on how digital copies can be created and shared with these external patrons.[50]

In addition, Section 29.4 allows an educational institution or someone under its authority to copy a work in order to display it for the purpose of education or training[51] or for use in a test or exam,[52] unless the work is commercially available in the appropriate medium.[53] Merely displaying a work in the classroom, rather than allowing students, instructors, or researchers to engage with it on their own, and for the more limited purposes of "education or training," may not be directly relevant to the uses contemplated in this code, given that the mandate of publicly-funded libraries is to serve the public at large.

Finally, Section 32 allows an individual or non-profit organization to reproduce works in "a format specially designed for persons with a perceptual disability" for the benefit of an individual who requires an accessible version of a work,[54] provided the work is not already commercially available in the format they require.[55]

These exceptions are worth noting, but due to their limited nature they may not be very useful in supporting the copying and general making available of broad ranges of government publications. Additionally, **the Supreme Court in *CCH* clarified that**

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[47] *Ibid.*, s 30.1(2).

[48] *Ibid.*, s 30.2(1).

[49] *Ibid.*, s 30.2(5).

[50] *Ibid.*, s 30.2(5.02).

[51] *Ibid.*, s 29.4(1).

[52] *Ibid.*, s 29.4(2).

[53] *Ibid.*, s 29.4(3).

[54] *Ibid.*, s 32(1).

[55] *Ibid.*, s 32(2).

**libraries can rely on fair dealing where applicable, before considering Section 30.2(1).**[56] This does not mean that the factors will be ignored when considering fair dealing, but overall, a fair dealing assessment is likely to be the more relevant course of action.

[56] *CCH* at para 49.

# Case Studies

A number of libraries have reproduced and disseminated copyright-protected government publications without first seeking permission from the rights holders to do so, and elements of this Code are based on decisions made in the course of those projects. These case studies are found in Appendix A and represent common, essential, library practices related to the stewardship of government information, specifically:

1) **Digitizing and providing widespread access to legacy print publications so that they receive wider readership in a digital era; and**
2) **Collecting, preserving, and making available born-digital, web-based content so that it remains available in perpetuity.**

To be clear, the academic libraries that led and continue to maintain these projects are engaged in non-commercial stewardship activities.[57] In addition, the uses described are largely consistent with the common terms of use found on many federal and provincial government websites. At the time of writing, the authors are not aware of any related claims of infringement or inquiries of concern from the rights holders. In some cases, the copyright-protected publications that have been reproduced have been openly available online via the Internet Archive (IA) for more than a decade. It is expected that all the publications described in these projects will be added to that organization's nascent Democracy's Library portal, at https://archive.org/details/democracys-library.

**Considering the Supreme Court of Canada's decisions related to fair dealing, discussed earlier in this code, it seems reasonable to assume that the public good provided through the libraries' dealings would outweigh any potential harm that might befall the rights holder. It is unclear what actionable harms could befall a government department or other unit in these scenarios.**

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[57] See the *Registry of Canadian Government Information Digitization Projects* for a longer list of projects, most of which achieved copyright compliance by waiting for the copyright terms to expire or, less often, by seeking permission for each title individually, a time consuming and thus financially onerous undertaking: https://govreg.library.utoronto.ca/.

# Best Practices

The preservation of and provision of access to government information has been a core function of academic libraries and other cultural stewardship organizations in Canada for generations. Based on the case studies noted above and described in Appendix A, this section provides a common set of principles, best practices, and limitations to help inform the efforts of libraries moving forward with this work.

## Principles:

- **There is a strong argument that fair dealing applies to reproducing and providing access to publications produced and disseminated by a government department or other unit for any of the purposes listed in Section 29, 29.1, and 29.2 of the *Copyright Act*,** especially if the Best Practices and Limitations below are followed. This includes but is not limited to publications that are at risk of deterioration, deletion, or otherwise removed from public access.
- Libraries have a societal duty to act as stewards of government information, arms-length from the government of the day. **Fair dealing provides a predictable framework for libraries to assess their users' rights and to weigh any legal risks associated with copyright.**
- **Libraries and other public service organizations have a duty to provide access to works in alternative formats required by individuals with disabilities,** and specifically to enable their equitable access to government publications (e.g., digitizing print publications so that text enlargement is possible).
- The case studies found in Appendix A not only respect the balance of copyright law in Canada, they also help realize the intended purpose of the legislation as a mechanism for access to information and knowledge. In addition, they also promote freedom of expression, which enables democratic accountability.

## Best Practices:

- **Moral rights should be respected.** This includes providing full attribution for all publications, where known, and avoiding modification of the publications beyond any required reformatting for the purposes of preservation and/or access.

- **Economic rights in government works, while difficult to justify in a liberal democracy, should also be respected when they exist as statutory provisions.** As discussed earlier, the fair dealing assessment for library dealings in this regard is strong: the purpose, nature, and effect of dealings on the work are all highly supportive and established factors. It is also reasonable to weigh these factors more heavily than other factors, given the public service provided by publicly-funded libraries.
- **Cultural stewards, including libraries, should ensure that rights holders can easily find information about the steps taken to apply these best practices and also about how to contact the library if such activities raise any questions or concerns.**

## Limitations:

- **Wherever possible, unfettered access to accessible copies of government publications should be the default in all library dealings.** In exceptional cases where ethical, legal, or contractual circumstances warrant it, access can be restricted using a controlled digital lending[58] platform or similar approach.
- As publishers, government departments and other units are responsible for acquiring rights related to any third-party content they disseminate as part of their government publishing activities. **When content is indicated as belonging to a third party, additional screening for permission to reproduce and distribute third party content should be completed when warranted and reasonable.**

[58] For more information about controlled digital lending and its legal framework in Canada, see De Castell et al., "Controlled Digital Lending of Library Books in Canada."

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# Appendix A: Case Studies

## 1. Digitization of Government of Canada and Government of Ontario Publications (University of Toronto Libraries (UTL))

In 2021, UTL began to digitize its print collection of Government of Canada and Government of Ontario publications. This collection is one of the libraries' collections of distinction and consists of more than 50,000 volumes, including publications dating back to around the time of the University's founding. Many of these materials were beginning to deteriorate, and in some cases were one of a very limited number of extant copies. UTL engaged with its long-time digitization partner the Internet Archive (IA) for this project, with the resulting digital files being made openly available at https://archive.org/details/uoftgovpubs.

This project was the focus of a presentation in 2023,[59] and it was announced that the collection, which then included roughly 24,000 items, would continue to be publicly available. Additionally, UTL stated that the following principles had guided their decision:

1) The purpose of this collection is to facilitate the preservation of and access to Canadian government information for all Canadians.
2) UTL is working with Library and Archives Canada (LAC) to provide them a copy of all material digitized in order to assist them in meeting their mandate to make government information and publications discoverable and accessible.
3) If making any of this material accessible in digital format presents a problem, the holder of Crown copyright or the publisher should contact UTL. In such scenarios, UTL and IA will consider removing select material, on a case by case scenario.

[59] The conference session abstract for *Democracy's Library: Partnering for Sustainable Digital Access to Canadian Government Publications* is here: https://pheedloop.com/OLA23/site/sessions/?id=SESUDU1NMZ9G41URQ.

## 2. Canadian Government Web Archiving (Canadian Government Information Preservation Network (CGI DPN))

Founded in 2013, the CGI DPN initially consisted of a collection of government publications in PDF, acquired through the federal Depository Services Program. Federal government web content deemed to be at risk of deletion was added a few months later. In the decade that has followed, the collection has grown to more than 340,000 items from all levels of government in Canada, most of it protected by Crown copyright. This collection is openly available at https://archive-it.org/organizations/700 (via https://osf.io/vpnrc/).

This collection was created following what has been described as a national crisis in access to government information in Canada.[60] In 2012, the Government of Canada launched a Web Renewal Initiative, whereby the Treasury Board Secretariat sought to "aggressively remove web content" by aspiring to reduce the government's websites from roughly 1500 down to five. Academic course materials were literally disappearing from the web, usually without a copy available through IA or LAC.[61] Canadians had experienced this type of loss before, following the implementation of a "Common Look and Feel" web protocol deployed by the federal government in 2007 and again after accessibility web protocols required by the Federal Court of Canada[62] were implemented without a procedure in place to preserve removed web content. In addition, and also starting in 2012, many federal government libraries were being closed and their collections discarded. Furthermore, LAC was struggling with structural budget cuts and staff losses associated with the Harper Government's Deficit Reduction Action Plan.[63] In response, academic government information

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[60] Amanda Wakaruk and Steve Marks, "The Canadian Government Information Digital Preservation Network: A Collective Response to a National Crisis," in *Government Information in Canada: Access and Stewardship*, eds. Amanda Wakaruk and Sam-chin Li (University of Alberta Press, 2019).

[61] Michael B. McNally, Amanda Wakaruk, and Danoosh Davoodi, "A Link is a Promise: Methodological Considerations for Examining the Removal of Redundant, Outdated and Trivial (ROT) Content from Government of Canada Websites" (Presentation, 35th Annual Conference of the Canadian Communication Association, Ottawa, ON, June 5, 2015); Michael B. McNally, Amanda Wakaruk, and Danoosh Davoodi, "Rotten by Design: Shortened Expiry Dates for Government of Canada Web Content," *Proceedings of the Annual Conference of CAIS* (2016).

[62] See *Jodhan v. Canada (Attorney General)*, 2010 FC 1197.

[63] Amanda Wakaruk, "What the Heck is Happening Up North? Canadian Government Information Circa 2014," *DttP: Documents to the People* 42, no. 1 (Spring 2014).

librarians across Canada worked together to establish the CGI DPN, a digital preservation network using the IA's web crawling service Archive-IT as a public access point to the collection. The initial setup of this service was based on the University of Alberta's early adoption of web archiving technologies and relationship with IA but the network's founding members represented academic libraries from across Canada.[64] From the start, this system respected the digital preservation best practice of replicating content across multiple servers, via a Private LOCKSS Network (PLN). It should be noted that this initiative exists separately and has no connection to the Library and Archive Canada Government of Canada Web Archive, sections of which were opened to the public after many years of delays and a change in government (https://webarchiveweb.bac-lac.canada.ca/).

## 3. Digitization of Government of Alberta Publications (University of Alberta Library (UAL))

Subsequent to the cuts implemented by LAC in 2012 (described above), Canada's national library stopped acquiring provincial and territorial government publications and offered duplicate copies of previously acquired provincial publications to legislative and academic libraries across Canada. Through this degradation and dispersal of LAC collections, UAL received more than 17,000 Government of Alberta publications and started digitizing and making them available on the IA platform in November 2013. The vast majority of these titles were published after 1980 and remain protected by Crown copyright. This collection is openly available at https://archive.org/details/albertagovernmentpublications?tab=collection

## 4. Government of Alberta Web Archiving (University of Alberta Library (UAL))

Governments change after each election and it is common for the incoming leadership and its bureaucracy to remove and update web content published by the previous government(s). The 2012 general election in Alberta was the first time that web archiving technology was available to capture, preserve, and provide access to at-risk web content before it was removed. In anticipation of such losses, the

[64] Wakaruk and Marks, "The Canadian Government Information Digital Preservation Network."

University of Alberta started archiving Government of Alberta web sites in late 2011. This content continues to be added to, includes municipal web sites, and is mostly, if not all, protected by Crown copyright. This collection is openly available at https://archive-it.org/collections/2901