Is The Crown Bound By The Copyright Act? An Encore

By Will O'Hara and Stephen Thiele

In 2010 we examined the question about whether the Crown is bound by the federal *Copyright Act*.[1] The issue arose from a presentation that one of us[2] gave at the 2010 Annual General Meeting of the Association of Ontario Land Surveyors about copyright in plans of surveys, in particular plans that had been registered in the provincial Land Titles and Registry Offices. Some members wanted to know if the Crown could copy plans in its possession, or license others to do so, without paying royalties to the surveyor who holds the copyright in the survey. One member who was present at the time said that federal and provincial Interpretation statutes provided the answer. According to these statutes, only those Acts that expressly state that the Crown is bound will bind the Crown. And since the *Copyright Act* does not say that the Crown was bound, the Crown is not bound by the *Copyright Act*. "Case closed", said that member.

But was the case really closed? Could the Crown take the benefits of the *Copyright Act*, on one hand, and then ignore the *Act* when it suited its purposes under the guise that it was not bound by the *Act*? We expressed the view in our 2010 article that the law was not quite that simple. We argued that the Crown was bound by the *Act* and must respect copyrights belonging to others. It was our view at the time that "the Crown has no legal right to flaunt the law of copyright." (It is important to note that the federal Crown had always taken the position that it was not bound by the *Act*, but it 'voluntarily' complied with the *Act* by seeking authorization from copyright holders where necessary and paying royalties that were appropriate, at least in the view of the Crown.)

We argued that the long-recognized 'benefit-burden' exception to Crown immunity from a statute meant that the Crown couldn't take the benefits of the *Act* without taking the burdens as well. The Crown couldn't have it both ways. It was our view that public policy in Canada required the Crown to be part of the efforts to protect intellectual property and promote investments, research and economic growth. Our closing words were "The case is not closed – it is wide open and in need of resolution."

Three years after we expressed those views in the pages of the *Ontario Professional Surveyor* the courts answered this important question.

On April 3, 2013 the Federal Court of Appeal released its decision in *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*[3], in which it dispelled any doubt about the Crown's obligation to comply with the *Copyright Act*. The Crown is bound.

The case involved a dispute among Access Copyright (on behalf of the copyright owners) and various provincial governments about the reproduction of copyrighted works by employees of the governments. Access Copyright is a not-for-profit organization set up by authors and publishers to license copyrighted works and collect royalties on behalf of its members. Although the dispute was about the *amount* of the tariffs to be charged, the provincial governments said they weren't obligated to pay anything, as they were immune from the *Copyright Act*. They asked for a declaration that they were immune from the *Act* as a whole, not just the proposed tariffs.

The dispute was heard first by the Copyright Board of Canada, which concluded that the *Act* was intended to bind the Crown. The Board rejected the claims of Crown immunity.

The Federal Court of Appeal examined the decision of the Board and unanimously agreed with its findings. The Federal Court of Appeal used the federal *Interpretation Act* as a starting point, noting again that the *Copyright Act* did not expressly say that the Crown was bound, but then moved on to examine whether "through a purposive and contextual statutory analysis, it could discern a clear parliamentary intention to bind the Crown."

The court first considered the objectives of the *Act* – "encouraging creativity and providing reasonable access to the fruits of the creative endeavour" – and then reviewed the specific wording of s. 12 of the Act, which deals with Crown copyright, giving that provision a very limited interpretation.

The Federal Court of Appeal examined the many exceptions to copyright included in the *Act* that favour the Crown and its agents, including some educational institutions, libraries, archives, museums, and pointed out that the exceptions in favour of the Crown would not be necessary if the Crown were immune from the *Act* as a whole. The Federal Court of Appeal summarized its conclusions in this way:

> In my view, the references in the *Act* to very strict conditions, to tariffs fixed by the Board, to the consent of the copyright owners, and to the power of the court

[1] *Is the Crown Bound by the Copyright Act?*, published in the *Ontario Professional Surveyor*, Volume 53, No.1, Winter 2010
[2] Will O'Hara
[3] 2013 FCA 91

> when the defendant is an "educational institution", including a federal or provincial government department, all point to only one logical and plausible conclusion as to the intent of Parliament: the Crown is bound.[4]

On the effect of the *Interpretation Act* raised by the AOLS member in 2010, the Federal Court of Appeal made this finding:

> I have considered that the *Act*, unlike other statutes such as the *Patent Act*, R.S.C., 1985, c. P-4, s.2.1, does not contain an "expressly binding" clause at the beginning, as was recommended in the 1985 report entitled *A Charter of Rights for Creators*. I am still irresistibly drawn to the conclusion that Parliament clearly intended to bind the federal and provincial Crowns by the express language of the *Act* and through logical inference.[5]

In view of this decision, there can no longer be any argument about the Crown being immune from the provisions of the *Copyright Act*. The Crown is bound by the *Act*, like any person or other legal entity and it must comply with the *Act* in all respects. Subject to limited users' rights such as fair dealing (which are generally non-commercial uses), it cannot reproduce copyrighted plans of survey in its possession without the consent of the copyright owner, or license others to do what it can't do.

In our respectful view, the Federal Court of Appeal reached the only acceptable conclusion in the *Manitoba* case. The question we asked in 2010 has now been answered definitively and the decision was not appealed. *Now the case is closed.*

Members of the land surveying profession are considering the implications of this decision. Among the questions raised is this: If the Crown is bound by the *Act*, like everyone else, how can it license other privately held corporations to sell copies of registered or deposited plans of survey for a profit without paying a royalty to the land surveyor who prepared the plans – something no one else can do?

In our view, this case is of critical importance to members of the land surveying profession. Crown immunity from copyright is a thing of the past. The Crown has no legal right to flaunt the law of copyright.

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[4] at paragraph 47 [5] at paragraph 49