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Jacqueline Hushion
Executive Director
Canadian Publishers' Council
250 Merton Street
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Dear Ms. Hushion:

RE: Legal Deposit of Publications Regulations

You have asked us to provide you with our views with respect to the validity of the *Legal Deposit of Publications Regulations* (the "Regulations") published in the September 2, 2006 issue of the *Canada Gazette*. The Regulations are enacted pursuant to the *Library and Archives of Canada Act* (the "Act") and are scheduled to come into force on January 1, 2007.

We are of the view that the Regulations are not valid because they provide for the deposit of materials not authorized by the Act and because they are of vague and uncertain scope.

Even if they were valid the Regulations contain some disturbing provisions. They purport to impose potentially very significant compliance costs on publishers. They also appear to require publishers to deposit materials that they may not own or control, potentially subjecting them to claims for breach of contract or other third party claims, or to face criminal sanctions for not complying with the Regulations.

Authority to Enact the Regulations

The Regulatory Impact Analysis Statement published with the Regulations states that the Regulations are enacted pursuant to Section 10(2) of the Act. Section 10(2) which reads as follows:

> 10(2) The Minister may make regulations for the purposes of this section, including regulations
>
> (*a*) defining "publisher";
>
> (*b*) respecting any measures that must be taken to make the publications that use a medium other than paper and their contents accessible to the Librarian and Archivist;
>
> (*c*) prescribing the classes of publications in respect of which only one copy is required to be provided; and
>
> (*d*) prescribing the classes of publications in respect of which the obligation under subsection (1) applies only on a written request from the Librarian and Archivist.

The Regulations define "publisher" to mean "a person who makes a *publication* available in Canada that the person is authorized to reproduce or over which the person controls the content. It does not include a person who only distributes a publication."

The term "publication" is defined in the Act to mean

> "any library matter that is made available in multiple copies or at multiple locations, whether without charge or otherwise, to the public generally or to qualifying members of the public by subscription or otherwise. Publications may be made available through any medium and may be in any form, including printed material, on-line items or records."

Accordingly, for an item to be a publication it must

(1) be "any library matter",

(2) be made available in multiple copies or at multiple locations,

(3) be available to the public generally or to qualifying members of the public, and

(4) may be made available through any medium such as printed material, on-line items or recordings.

Type of Works

The Regulations prescribe the type of publications to which the deposit requirements apply. It appears that many of the works to which the Regulations apply may not be publications within the meaning of the Act. [1] Pursuant to Section 3(e) of the Regulations, the Regulations apply to "online publications". That term is not further defined and could include every imaginable type of work that a person makes available online, even if they are not "library matters" or otherwise do not fall within the definition of the term "publication". Pursuant to Section 4 of the Regulations, the Librarian and Archivist may also request a publisher to deposit many items including a vast array of electronic works, including deliberations of discussion groups, listservs, bulletin boards and emails; websites including portals, personal websites, service sites, intranets and websites consisting primarily of links to other sites; and dynamic databases and raw data.

To the extent that the Regulations purport to cover subject matter that does not come within the definition of "publication", the Regulations are not valid because they are *ultra vires* the Act. The items which can be requested pursuant to Section 4(x) to 4(z) of the Regulations, including dynamic databases and raw data, are particularly troublesome in this regard. Equally problematic is Section 3(e) of the Regulations which purports to cover all "online

[1] The term "publication" in the Act replaced the term "book" as used in the *National Library Act.* The intent of the amendment was to capture electronic books and journals as well as traditional printed and bound material. See, BILL C-8: THE LIBRARY AND ARCHIVES OF CANADA ACT, Sam Banks, Monique Hébert, Law and Government Division, 18 February 2004, available at http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&source=library_prb&Parl=37&Ses=3&ls=C8#Commentary ("Banks "Bill C-8"). The term "publication" was not intended to include all forms of documentary material. See the definition in Section 2 of the Act of the separate term "record" which is defined to mean "any documentary material other than a publication, regardless of medium or form."

publications" including materials that may not be "library matters" or otherwise fall within the definition of "publication" in the Act.

Access to Works – Software Tools

Another concern is with Section 2(b) of the Regulations which requires providing the Librarian and Archivist with "a copy of software specifically created by the publisher that is necessary to access the publication" and "a copy of technical or other information necessary to access the publication, including a copy of manuals that accompany the publication".

The regulation-making power in Section 10(2) does empower the Minister to make regulations "respecting any measures that must be taken to make the publications that use a medium other than paper and their contents accessible to the Librarian and Archivist." This provision may support Section 2(a) of the Regulations which requires providing a copy of the publication in an unencrypted format and with any security systems removed or disabled. However, Section 2(b)(i) and 2(b)(ii) of the Regulations appear to go beyond what is authorized by Section 10(2)(b) of the Act, as the Act does not authorize the imposition of an obligation to deposit any materials other than publications. This would also make this aspect of the Regulations *ultra vires* the Act.

Additional Concerns

Even if otherwise valid, there are several additional concerns with Section 2 of the Regulations. The requirement to provide software and other technical information is not limited to intellectual property that is owned or controlled by the publisher. In many cases intellectual property, including software and technical information, is licensed to publishers under agreements that prevent them from providing copies to third parties. Even where intellectual property is created by a publisher, that intellectual property may not be owned by the publisher. In such cases any unauthorized reproduction of these materials would usually be both a breach of contract and an infringement or violation of third party copyrights or other intellectual property rights. Accordingly, the Regulations purport to require publishers

either to breach third party contracts and violate third party intellectual property rights, or to face criminal sanctions under the Act.

Moreover, software is frequently a proprietary confidential asset of publishers. In many cases, particularly with online publications, software used to access publications may never be distributed to the public. Even assuming a publisher could provide these materials to third parties for use as intended by the Act, in the ordinary course of business this type of software would be licensed only on a confidential basis under terms and conditions that would ensure it remains confidential, cannot be reverse engineered, and is only used for limited authorized purposes. These terms are necessary to preserve publishers' intellectual property rights including trade secret rights in their software. However, neither the Act nor the Regulations provide any legal assurances that these important customary terms will be adhered to.[2]

Access to and Disposal of Works by LAC

The requirement to provide an unencrypted copy of publications with security systems removed or disabled is of particular concern to publishers in view of the rights of the Librarian and Archivist. The Librarian and Archivist can "do anything that is conducive to the attainment of the objects of the Library and Archives of Canada, including...providing information ...or lending services, as well as any other services for the purpose of facilitating access to the documentary heritage" and organizing any activities "to make known and interpret the documentary heritage". The Librarian and Archivist also has the right to dispose of any publication under his or her control. See Sections 8(1) and 9(1) of the Act. These rights create the potential for unauthorized reproductions to be made of copies of publications that become accessible to the public. If a single unprotected work is made

[2] On other occasions Parliament has recognized the importance of preserving private sector trade secrets in legislation designed to promote access to information. For example, pursuant to Section 20 of the *Access to Information Act* R.S.C. 1985, c. A-1. the Government must to refuse to disclose any record requested under the Act that contains: (a) trade secrets of a third party; (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party that is treated consistently in a confidential manner by the third party; (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

available over the internet it could incalculably damage the ability of the publisher of that work to ever publish the work economically.

Scope of the Regulations

This brings us to our second concern about the Regulations. Given the vast amount of material available online, and the variety of material available online, the Regulations are ambiguous, vague and uncertain. Without greater clarity in the language of the Regulations, publishers run a risk of breaching the Act without knowing that they are doing so. This is of particular concern given that the contravention of the Regulations, including a failure to comply with a request of the Librarian and Archivist, has criminal consequences pursuant to Section 20(1) of the Act.

It is a long-established and long-recognized principle of law that a person should not be punished under the law unless the law is sufficiently clear and certain to enable the person to know *what* conduct is forbidden before the person does it. Similarly, no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. See *R. v. Rimmington*, [2005] UKHL 63, para. 33.

These concepts are part of Canadian constitutional law. The Supreme Court of Canada has held that legislation can be unconstitutionally invalid if it is "vague". The "void for vagueness" doctrine is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion. See, *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. The doctrine applies as well to subordinate or delegated legislation. See, *Re Hamilton Independent Variety & Confectionery Stores Inc.* (1983), 143 D.L.R. (3d) 498 (Ont. C.A.), *913719 Ont. Ltd. v. Niagara Falls*, 1997 CanLII 3857 (Ont. C.A.), *Lawrence v. Muskoka Lakes*, 2005 CanLII 16587 (O.S.C.J.).

In light of these fundamental principles of Canadian law and the penal sanctions that can be imposed if the Regulations are breached, we believe that the Regulations should be amended

before they come into force on January 1, 2007 to provide Canadian publishers with greater clarity about their obligations.

Extraterritoriality

Section 10(1) of the Act requires a publisher "who makes a publication available *in Canada*" to provide copies of the publication to the library. In the case of printed material, it is easy to decide whether the publisher has made the publication available "in Canada". This is not clear in the case of a publisher of online material. The fact that online material is "available in Canada" through the internet could mean that a publisher anywhere becomes subject to the Act as a result of the definition of publisher in the Regulations.

Parliament's power to legislate with extraterritorial effect is well settled as a matter of Canadian law. However, while Parliament has such legislative competence, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary. This presumption flows from the principal of territoriality, a tenet of international law. See, *SOCAN v. Canadian Association of Internet Providers*, 2004 SCC 45, *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077.

There is nothing in the Act to suggest that Parliament intended the Act to have extraterritorial effect. Given that the objects of the Library and Archives of Canada are to acquire and preserve the documentary heritage of Canada, it is not likely that the Act was intended to apply to the plethora of online publications that are made available in Canada over the internet without any regard to their real and substantial connection to the documentary heritage of Canada.[3] If the *Regulations* have this extraterritorial effect, the *Regulations* would not be valid because the regulation-making power does not expressly authorize regulations having that effect. In any event, the uncertainty as to whether the Regulations have extraterritorial effect, or the scope of any such effect, re-enforces our view that the Regulations are void for vagueness.

[3] "The Preamble outlines the broad objectives of the bill. It affirms the necessity of preserving Canada's documentary heritage for present and future generations." Banks Bill C-8.

Regulatory Impact Analysis Statement

We have also reviewed the Regulatory Impact Analysis Statement for the Regulations, which was published in the *Canada Gazette* with the Regulations. The Regulatory Impact Analysis Statement suggests that the Regulations "are not expected to have a serious negative impact on the cost faced by" publishers. The discussion of the cost of complying with the Regulations presupposes an understanding of their scope. Without an appreciation of the scope of the materials that have to be provided, it is impossible to assess the likely costs of compliance. In the case of material covered by S.10(1)(a) of the Act, for example, potentially vast amounts of material will have to be provided to the Librarian and Archivist every seven (7) days. This is particularly the case with "online publications" that are subject to continuous change. There may also be considerable costs in providing the materials required by Section 2 of the Regulations, assuming they can be provided at all in some cases.

We understand that publishers generally support the objects of the *Library and Archives of Canada Act*. However, publishers are very concerned about the costs, uncertain scope and potential liability associated with complying with the Regulations. Based on the foregoing analysis of the Regulations and the serious questions as to their validity, we strongly recommend that publishers ask the Minister of Canadian Heritage to rescind or revise the Regulations to take into account the views expressed above.

If you have any questions, please do not hesitate to contact us.

Yours very truly,

McCarthy Tétrault LLP

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