



Crowning Copyright – When Copyright Works are Deemed to Belong to the Government

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For the first time, the Supreme Court of Canada has addressed Crown copyright (i.e. when copyright will be deemed to belong to the Canadian government), and in particular, when the preparation or publication of works may be subject to enough direction or control by a government body for copyright to vest with the Crown. The decision in *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43 has important ramifications, particularly as governments increasingly shift to and rely on public-private partnerships to operate and provide services. Practically, those that work with or for Canadian government bodies, or otherwise create or publish works with government involvement, would be well advised to seek legal advice to help them understand Crown copyright. For example, when might copyright in works published at the hands of government be considered “expropriated” by government through the operation of section 12 of the *Copyright Act*, and are there options to preserve private ownership or retain a license to use and exploit the works? Likewise, the decision has important ramifications for digitization projects at the direction and control of government. It is therefore also important for companies engaged in private-public digitization projects to be familiar with the decision and consider when the digitized works may and may not be subject to Crown copyright. (While beyond the scope of this article, the decision is also noteworthy as part of a trend of class actions and so-called reverse class actions in copyright matters.)

Crown copyright is controversial in Canada, and the impact of the Supreme Court’s decision remains to be seen. It will be interesting to see whether legislative change follows the Supreme Court’s decision. Crown copyright was among the issues considered during the recent statutory review of the *Copyright Act*, with several calls for reform, ranging from completely abolishing Crown copyright to establishing a complementary open licensing regime. While no witness supported the continuation of Crown copyright in its current form, with the upcoming election, it will likely be some time before we see legislative change.

A discussion of the decision follows.

Discussion

In *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43, a seven judge panel of the Court unanimously held that the copyright ownership of plans of survey registered or deposited in Ontario’s provincial land registry and thereafter published, by virtue of that publication, vested in the Crown (i.e., the government) under section 12 of the *Copyright Act*, RSC 1985 c C-42. Section 12 of that Act provides that copyright in any work “prepared or published by or under the direction or control” of the government belongs to the government, subject to any agreement with the author. While agreeing in result, by a margin of 4-3, the judges disagreed exactly how a work may be so “prepared or published by or under the direction or control” of the Crown. The majority, led by Justice Abella, focused on the degree of direction or control exercised by the Crown in the preparation or publication of the work. The minority, led by Chief Justice Wagner, preferred an analysis that considered whether the nature of work was a “government work”—i.e., something that serves a public purpose, and in which vesting copyright in the Crown further such purpose.

Background



The decision in *Keatley* stems from a class action lawsuit proposed by land surveyors in Ontario against Teranet, an Ontario corporation who manages the Ontario electronic land registry system as part of a “public-private” partnership with the province. Ontario claims ownership in the data included in its electronic land registry system, and licenses Teranet to access registry documents to facilitate that system, including plans of survey. Under this license, Teranet provides electronic copies of land surveys to the public for a fee without paying royalties to the surveyors. These land surveys are typically created in hard copy, before being deposited and registered with the land registry office, at which point, they are scanned and uploaded to the electronic system by Teranet. Keatley, the proposed lead plaintiff for the class, claimed this digitization, storage, and copying of plans infringed land surveyors’ copyright.

Ontario claimed control or ownership of the surveys under section 12 of the *Copyright Act*. The deposit and registration of plans of survey are governed by various provincial statutes, including the *Registry Act* and the *Land Titles Act*. This latter statute provides that all plans submitted for deposit and registration become Crown property. Both statutes prohibit registration of plans containing any copyright mark. Once deposited, the surveyor who created the plan is prohibited from amending its content without permission from the Examiner of Surveys, who is appointed by the Crown.

In 2007, Keatley brought a motion to certify the copyright infringement class proceeding. Initially, certification was denied in 2012; however, upon revising the list of common issues, the Ontario Divisional Court certified the action in 2014. Teranet appealed to the Ontario Court of Appeal, and lost. The case proceeded with a list of seven issues to be decided, including what became the central issue in the Supreme Court’s decision—whether copyright in the plans of survey “belong to the Province of Ontario pursuant to section 12 of the *Copyright Act* as a result of the registration and/or deposit of those Plans of Survey in the Ontario Land Registry Office”.

In 2016, Teranet moved for summary judgement.

Lower Court Decisions

At first instance (2016 ONSC 1717) the Ontario Superior Court expressed doubt that section 12 of the *Copyright Act* applied to determine ownership *per se* of the plans. The Court interpreted section 12 as contemplating two actions that could give rise to Crown copyright—“preparation” and “publication”. The Court concluded there was no “preparation” by the Crown, since it was the surveyors who drafted the plans for clients, and also expressed doubt whether digitization and publication of registered or deposited plans could suffice as a “publication”. Instead, the Court concluded that provisions of the Ontario *Registry Act* and *Land Titles Act* resulted in the property in surveys, including copyright, being transferred to the province once the surveys were registered and deposited with the Ontario Land Registry System. Once that occurred, the further publication of the plans became “by the direction or control of the government”, which gave rise to Crown copyright under section 12. The finding that the Crown, and not the surveyors, owned copyright was determinative of the dispute.

On appeal, the Ontario Court of Appeal came to the same conclusion that copyright in the surveys was owned by the Crown (2017 ONCA 748), but differed in its reasoning, and found section 12 alone brought the survey under provincial ownership. The Appeal Court acknowledged the surveyors were the “author” and first copyright owner of the surveys they created, and had the right to retain copyright (by not registering or depositing their plans), so the plans were not “prepared” by the Crown. The inquiry therefore focused on “publication”. The Appeal Court held that because Teranet “makes copies of the plans available” to the public, and because the Ontario *Registry Act* and *Land Titles Act* proscribes a transfer of property in the physical plans once deposited, the form and content of acceptable plans, and that the plans must be made available to the public, the statutory scheme showed the Crown had complete control over the publication of the plans. The Court of Appeal dismissed the appeal.

Keatley sought leave to further appeal to the Supreme Court of Canada, which was granted.

Supreme Court Decision

This is the first time the Supreme Court has ever interpreted section 12 of the *Copyright Act*.

Writing for the **majority**, Justice Abella confirmed the Supreme Court’s attitude toward interpreting the *Copyright Act* as one that has “sought to calibrate the appropriate balance between creators’ rights and users’ rights”. Following a discussion



about the genesis and purpose of the Crown's publishing prerogative (which has historically helped ensure the preservation, authenticity, accuracy and reliability of certain documents), she concluded that section 12's preamble—"[w]ithout prejudice to any rights or privileges of the Crown"—confirmed this publishing prerogative continued, and that the remainder of the section provided a *statutory* basis through which the Crown could assert copyright ownership over works prepared and published by it. However, she cautioned not to conflate the two. The risk being that through publication, the Crown could expropriate any work, and negatively impact the public interest in accessing information.

To strike the appropriate owner-user balance, the majority set out the following test to determine if Crown copyright arises under section 12: *has the Crown exercised sufficient direction or control, consistent with the purposes of Crown copyright, that it can be said that Crown copyright subsist* (Para 63). To assess this, examination was required of the level of the Crown's control over both (1) the person preparing or publishing the work; and (2) the work itself. The majority agreed with the lower courts' interpretations that either "preparation" or "publication" could give rise to Crown copyright. However, each action required a slightly different analysis.

A work "prepared" by the Crown could fall into two categories. The first is relatively straightforward—an agent or servant of the Crown brings the work into existence for and on behalf of the Crown (i.e., an agent or employee). The second, is "works produced by independent contractors who complete Crown commissions in which the Crown exercises the direction or control over the creation of the work". (Para 65). While the Supreme Court was careful to note the "direction or control" needed to go beyond simply laying down formal requirements for how a work should be made, they agreed that if the production of the work was the principle object, then Crown copyright would arise and that it extended to "independent contractors". This second category could thus have significant ramifications, particularly for artists or other creators, who compete for or accept government commissions.

On the "publication" side—which was the issue relevant to the appeal—the majority noted the "direction and control" by the Crown needed to be something more than simply "making the work available" to the public to mitigate the risk of overly broad application of section 12. They set out the standard, that Crown copyright will arise "when it can be said that the Crown exercises direction or control over the publication process, including both the person publishing the work and the nature, form and content of the final, published version". (Para 67). The majority then proceeded to set out indicia of when a work could be said to be published "by" the Crown, including a statutory scheme that may transfer property rights in the works to the Crown and/or that places strict control on the form and content of the work; physical possession of the work; the opt-in nature of the statutory scheme; power of modification; and necessity of the Crown making the work available. Similar indicia apply where a third party publishes the work. In that case, the degree of direction or control exercised by the Crown over that third party would also need to be considered.

With respect to the plans of survey at issue in *Keatley*, the majority essentially agreed with the Ontario Court of Appeal—the surveys were "published" under the direction or control of the Crown within the meaning of section 12 of the *Copyright Act*. They agreed the statutory scheme over the content and form, amendment, ownership, registration, and publication of survey plans in Ontario showed the Crown possessed "complete control" over the publication process:

"The rights normally given to the creator of the work, including the right to amend the work and make copies are instead given to the Crown. The Crown directs and controls every aspect of the publication of the registered and deposited plans of survey." (Para 79).

However, the majority was careful to note that section 12 only so applied to plans of survey actually deposited with the land registry system—a surveyor could prevent Crown copyright from arising by withholding registration or deposit. Also, importantly, the majority disagreed with *Keatley* that there was a difference between paper copies and electronic copies of the survey plans. The principle of technological neutrality—which the majority again confirmed as a "fundamental tenet of copyright law"—"demands" that there be no difference. (Paras 86–87).

The three judge **minority**, led by Chief Justice Wagner, concurred in result, but disagreed with the majority's interpretive approach. Instead of considering section 12 from a purely "owners-users rights balance" perspective, the minority followed the ordinary principles of statutory interpretation—that is looking to the statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's schemes and objects. They rejected a literal reading of section 12, finding it could lead to absurd results, namely enabling the Crown to effectively expropriate others' copyright through publication. Instead, to properly respect the balance between the language of section 12, the purposes of Crown copyright, and the balance Parliament struck by enacting the *Copyright Act*, the minority proposed to read into section 12 a



requirement that the work at issue be a “government work”. Any work that has “a public character because of its public purpose” and “where, due to that public purpose, the government has an interest in ensuring accuracy, integrity, and dissemination” will be a “government work”. (Para 137). For the minority, not only would this reading avoid subjecting works “prepared” or “published” by the Crown to different standards, but it would also respect the purpose of the Crown’s publishing prerogative preserved in the preamble.

For the plans of survey in *Keatley*, the minority agreed they were a “government work” that was “published” under the conditions in section 12—the plans had a clear public character (defining the legal boundaries of land plots) and contained information of the “highest public importance” (clarifying land ownership). Also, the Crown would have a strong interest in the accuracy of the work, since it would impact the integrity of the land registry system. Therefore, once published by the government or their agent (in this case, Teranet), section 12 would apply.

Final Thoughts

While the majority was sure to note that the “section 12 test is a stringent one” (para 81), the decision nevertheless may open the door to a wider application of Crown copyright in Canada. The majority’s interpretation of section 12 will no doubt lead to a reconsideration by government bodies of what copyrights they own, and what copyright they could claim over works created or published with government involvement to produce and publish works beyond simply the creative industries.

The *Keatley* decision therefore suggests particularly important ramifications for artists and others in the creative industries who work closely with government bodies to produce and disseminate their work. The majority’s decision confirms that, unlike other areas of copyright in Canada, an independent contractor may not own exclusive copyright in the work they produce, even if they are the author, if the creation or publication of that work is subject to a requisite level of “direction or control” by a government body. Moreover, the term of protection for a work covered by Crown copyright could be significantly shorter, namely 50 years from the end of the year in which the work was first published, instead of 50 years from the end of the year in which the author died. It could also be significantly longer in the case of unpublished works prepared under the direction or control of government, since the term of Crown copyright starts with first publication. Compounding these potential issues, *Keatley* also does not squarely address nuances of how Crown copyright may be impacted by agreements. Section 12 refers to Crown copyright being “subject to any agreement with *the author*”, rather than an agreement with the “owner”. Moreover, Section 12 *deems* Crown copyright—it states copyright “belongs” to the Crown, rather than being “assigned” or otherwise “transferred”. This raises interesting issues.

As mentioned, Crown copyright was among the issues raised during the Statutory Review of the Copyright Act, and it will be interesting to see if legislative change follows, for example, to address concerns flagged by Justice Abella in her decision and prevent the government from being entitled to expropriate works by way of publication. Until then, going forward, closer attention is likely to be paid to government agreements, regulations and terms that may suggest Crown copyright, and this may coincide with additional IP assurances being sought in relation to public-private partnerships and digitization projects. Government bodies will now likely undertake reviews of what copyrights they own, and what copyright they could claim over works in which they are involved in creating or publishing. Finally, it is worth remembering that even if a work is subject to Crown copyright, unless the commissioning government body obtained a moral rights waiver, the author may still be able to advance moral rights claims.

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