

# Goodmans<sup>LLP</sup> Update

## SCC Clarifies Scope of Crown Copyright

The decision of the Supreme Court of Canada (the “**Court**”) in *Keatley Surveying Ltd. v. Teranet Inc.* represents the Court’s first opportunity to examine the scope and application of section 12 of the *Copyright Act* (the “**Act**”), vesting copyright in the Crown, enacted in 1921.

The Court affirmed the Ontario Court of Appeal’s finding that to determine whether copyright in a work has vested in the Crown under section 12, a court must consider whether the Crown exercised sufficient direction or control in bringing about the creation or dissemination of the work.

### Background

In an effort to streamline land registry, surveyors and other users of the system requested that the government provide remote access to the documents registered or deposited in land registry offices. In 1991, the Ontario government entered into a public-private partnership to automate and convert the paper-based registry system into an electronic land title system. This partnership was eventually incorporated as Teranet Inc. Today, when a plan of survey is deposited at a physical land registry office, Teranet scans the plan and adds the information to its database. Teranet then provides access to electronic copies of the plan of survey to the public for a statutorily prescribed fee, which it collects on behalf of Ontario.

In 2007, Keatley Surveying Ltd. brought a motion to certify a class action on behalf of all land surveyors in Ontario who registered or deposited plans of survey in provincial land registry offices. Keatley claimed that Teranet infringed surveyors’ copyright in plans of survey by digitizing, storing and copying plans registered or deposited in the land registry system.

### Crown Copyright

Section 12 of the Act provides for copyright in works to vest in the Crown under certain specified circumstances. Section 12 reads:

#### Where copyright belongs to Her Majesty

12 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. [Emphasis added]

### The Court’s Decision

The majority of the Court found that the purpose of Crown copyright is to protect works prepared or published under the control of the Crown where such protection is necessary to guarantee authenticity, accuracy and integrity in the public interest. Recognizing Crown copyright cannot be so expansive as to allow for creators’ copyright in works to be routinely expropriated, the majority emphasized the Crown must have exercised sufficient direction or control over the preparation or the publication process of a work for Crown copyright to subsist within the meaning of section 12.

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The Court considered a work to be “prepared” by the Crown when an agent of the Crown brings the work into existence on behalf of the Crown in the course of their employment. Similarly, the Court found that a work will be prepared “under the Crown’s direction or control” within the meaning of section 12 when the Crown principally determines whether and how a work will be made. Finally, the Court held that a work will only be considered to be “published” by or under the direction or control of the Crown 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 of the work.

The Court also highlighted several relevant indicia of whether a work was published “by” the Crown for the purposes of section 12. These indicia included the presence of a statutory scheme transferring property rights in the works to the Crown; a statutory scheme which places strict controls on the form and content of the works; whether the Crown physically possesses the works; whether exclusive control is given to the government to modify the works; the opt-in nature of the statutory scheme; and the necessity of the Crown making the works available to the public.

The Court agreed with the courts below that plans of survey are not prepared by or under the direction of the Crown. Accordingly, the Court considered whether registered and deposited plans of survey are published by or under the direction or control of the Crown.

The Court concluded that the Crown has complete control over the process of publication of plans of survey that are registered or deposited in land registry offices and accordingly the copyright in such plans vest in the Crown by operation of section 12. The Court noted that the Crown holds proprietary rights in the plans; the statutory scheme ensures that the Crown controls the format and content of registered plans, and such control subsists after registration or deposit; the Crown has the exclusive right to alter the content of the plans and the final form of the work; and, finally, the Crown has the exclusive authority to make copies of registered or deposited plans of survey. Additionally, as Teranet is not at liberty to act outside of its agreements with the Crown or the provisions of the statutory regime, any publication of the plans by Teranet is also done under the Crown’s “direction and control”. However, the Court was careful to note that only the plans of survey that are registered or deposited in the land registry are under the Crown’s direction and control; if a plan is not registered or deposited, section 12 is not engaged and the Crown holds no copyright in that plan. The majority of the Court ultimately dismissed Keatley’s appeal.

A minority of the justices agreed with the majority’s result but on a different interpretation. The minority adopted an interpretation whereby copyright in a work would only vest in the Crown where the work is “prepared or published by or under the direction or control” of the Crown, and where the work is a government work.

Rather than considering the degree of governmental direction or control over the work, the minority would ask whether the Crown brought about the preparation or publication of the work, either by its own agents and employees or by exercising direction or control over a third party. Further, the minority would confine the operation of section 12 to “government works”, meaning works that serve a public purpose, and where Crown copyright would further the fulfillment of that purpose. “Government works” would be works in which the government has an important interest concerning the accuracy, integrity, and dissemination of the work.

## Concluding Remarks

The Court’s decision in *Keatley* provides some insight into how a court would determine whether Crown copyright has vested in a particular work and adds some clarity around the scope of Crown copyright.

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