2017 ONCA 748
Ontario Court of Appeal

Keatley Surveying Ltd. v. Teranet Inc.

2017 CarswellOnt 14961, 2017 ONCA 748, 283 A.C.W.S. (3d) 394

Keatley Surveying Ltd. (Plaintiff / Appellant / Respondent by way of cross-appeal) and Teranet Inc. (Defendant / Respondent / Appellant by way of cross-appeal)

Doherty J.A., D.M. Brown J.A., B.W. Miller J.A.

Heard: January 24, 2017
Judgment: September 28, 2017
Docket: CA C62211

Proceedings: affirming *Keatley Surveying Ltd. v. Teranet Inc.* (2016), 2016 ONSC 1717, 2016 CarswellOnt 7233, 72 R.P.R. (5th) 248, 131 O.R. (3d) 703, Edward P. Belobaba J. (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Intellectual Property; Property

Headnote

Intellectual property --- Copyright — Copyright legislation — General principles

Province licensed T Inc. to manage electronic land registry system and provide public with on-line copies of registered or deposited plans of survey (plans) for fee — On behalf of land surveyors who received no fees or royalties from province, K Ltd. brought class action alleging breach of copyright and unlawful appropriation — Motion judge granted T Inc.'s motion for summary judgment and dismissed action, holding that ownership of property in plans, including copyright, was transferred to province — K Ltd. appealed — Appeal dismissed — Motion judge properly dismissed action based on provincial Crown holding copyright in plans but ownership did not flow from provincial land registration scheme but from s. 12 of Copyright Act (Act) — Province held copyright "under" and "in accordance with" Act for prescribed time period — Provincial legislation

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was relevant to determination that plans were "published by or under direction or control of Crown" when T Inc. made copies of plans available to public — Extensive property-related rights in plans bestowed on Crown by provincial legislative scheme went beyond simply authorizing Crown to impose terms on plans and gave Crown complete control over plans and their "publication", including exclusive power to alter document without author's knowledge or approval, compelling conclusion that publishing of plans by making copies available to public was done under "direction or control of Crown" — Statutory obligation to make copies available was fundamentally inconsistent with K Ltd.'s claim to right to control making of copies — Federal Act bestowed copyright on Crown while provincial legislation informed copyright inquiry mandated by s. 12.

Real property --- Registration of real property — Registration of land — Electronic registration

Province licensed T Inc. to manage electronic land registry system and provide public with on-line copies of registered or deposited plans of survey (plans) for fee — On behalf of land surveyors who received no fees or royalties from province, K Ltd. brought class action alleging breach of copyright and unlawful appropriation — Motion judge granted T Inc.'s motion for summary judgment and dismissed action, holding that ownership of property in plans, including copyright, was transferred to province — K Ltd. appealed — Appeal dismissed — Motion judge properly dismissed action based on provincial Crown holding copyright in plans but ownership did not flow from provincial land registration scheme but from s. 12 of Copyright Act (Act) — Province held copyright "under" and "in accordance with" Act for prescribed time period — Extensive property-related rights in plans bestowed on Crown by provincial legislative scheme went beyond simply authorizing Crown to impose terms on plans and gave Crown complete control over plans and their "publication", including exclusive power to alter document without author's knowledge or approval, compelling conclusion that publishing of plans by making copies available to public was done under "direction or control of Crown" — Federal Act bestowed copyright on Crown while provincial legislation informed copyright inquiry mandated by s. 12.

Table of Authorities

Cases considered by *Doherty J.A.*:

Compo Co. v. Blue Crest Music Inc. (1979), [1980] 1 S.C.R. 357, 45 C.P.R. (2d) 1, 105 D.L.R. (3d) 249, (sub nom. *Blue Crest Music Inc. v. Compo Co.)* 29 N.R. 296, 1979 CarswellNat 640, 1979 CarswellNat 640F (S.C.C.) — referred to

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Copyright Agency Ltd. v. State of New South Wales (2008), [2008] H.C.A. 35, 248 A.L.R. 590 (Australia H.C.) — referred to

Copyright Agency Ltd. v. State of New South Wales (2007), [2007] FCAFC 80, 240 A.L.R. 249 (Australia H.C.) — considered

Galerie d'art du Petit Champlain inc. c. Théberge (2002), 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307, (sub nom. *Théberge v. Galerie d'Art du Petit Champlain inc.*) 17 C.P.R. (4th) 161, (sub nom. *Théberge v. Galerie d'Art du Petit Champlain inc.*) 210 D.L.R. (4th) 385, 23 B.L.R. (3d) 1, (sub nom. *Théberge v. Galerie d'art du Petit Champlain inc.*) 285 N.R. 267, [2002] 2 S.C.R. 336, 2002 CSC 34 (S.C.C.) — considered

Glaxo Canada Inc. v. Apotex Inc. (1994), 58 C.P.R. (3d) 1, 1994 CarswellNat 1896 (Fed. T.D.) — referred to

Glaxo Canada Inc. v. Apotex Inc. (1995), 64 C.P.R. (3d) 191, 1995 CarswellNat 2788 (Fed. C.A.) — referred to

Keatley Surveying Ltd. v. Teranet Inc. (2012), 2012 ONSC 7120, 2012 CarswellOnt 15894, 107 C.P.R. (4th) 237, 31 C.P.C. (7th) 14 (Ont. S.C.J.) — referred to

Keatley Surveying Ltd. v. Teranet Inc. (2014), 2014 ONSC 1677, 2014 CarswellOnt 3792, 119 O.R. (3d) 497, 51 C.P.C. (7th) 54, 371 D.L.R. (4th) 534, 319 O.A.C. 219 (Ont. Div. Ct.) — referred to

Keatley Surveying Ltd. v. Teranet Inc. (2015), 2015 ONCA 248, 2015 CarswellOnt 5147, 66 C.P.C. (7th) 223, 384 D.L.R. (4th) 147, 125 O.R. (3d) 447, 331 O.A.C. 324 (Ont. C.A.) — considered

Reprographic Reproduction 2005-2014, Re (2013), 2013 FCA 91, 2013 CAF 91, 2013 CarswellNat 785, 2013 CarswellNat 786, 358 D.L.R. (4th) 563, (sub nom. *Manitoba v. Canadian Copyright Licensing Agency*) 444 N.R. 202, 112 C.P.R. (4th) 1, (sub nom. *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*) [2014] 4 F.C.R. 3 (F.C.A.) — referred to

Statutes considered:

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Class Proceedings Act, 1992, S.O. 1992, c. 6
Generally — referred to

Copyright Act, R.S.C. 1985, c. C-42
Generally — referred to

s. 2 "artistic work" — referred to

s. 2.2(1) "publication" (a)(i) [en. 1997, c. 24, s. 2] — considered

s. 3(1) — referred to

s. 5 — referred to

s. 12 — considered

s. 13(1) — referred to

s. 34.1 [en. 1997, c. 24, s. 20(1)] — considered

s. 89 — considered

Copyright Act, 1911 (1 & 2 Geo. 5), c. 46
s. 18 — referred to

Copyright Act 1968, No. 163, 1968
s. 176 — referred to

s. 177 — referred to

Copyright Act, 1921, S.C. 1921, c. 24
s. 12 — referred to

Electronic Land Registration Services Act, 2010, S.O. 2010, c. 1, Sched. 6
Generally — referred to

Land Titles Act, R.S.O. 1990, c. L.5
Generally — referred to

s. 14 — referred to

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s. 145(6) — referred to

s. 165(1) — referred to

s. 165(4) — referred to

Registry Act, R.S.O. 1990, c. R.20
Generally — referred to

s. 15(4) — considered

s. 18(10) — referred to

s. 50(3) — referred to

Surveyors Act, R.S.O. 1990, c. S.29
Generally — referred to

Surveys Act, R.S.O. 1990, c. S.30
Generally — referred to

Regulations considered:

Registry Act, R.S.O. 1990, c. R.20
Surveys, Plans and Descriptions of Land, O. Reg. 43/96

s. 5(1) — referred to

s. 6 — referred to

s. 7 — referred to

s. 9(1) — referred to

s. 9(1)(e) — considered

Surveyors Act, R.S.O. 1990, c. S.29
Performance Standards for the Practice of Professional Land Surveying, O. Reg. 216/10

ss. 8-27 — referred to

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APPEAL from judgment reported at *Keatley Surveying Ltd. v. Teranet Inc.* (2016), 2016 ONSC 1717, 2016 CarswellOnt 7233, 131 O.R. (3d) 703, 72 R.P.R. (5th) 248 (Ont. S.C.J.), dismissing plaintiff's class action.

***Doherty J.A.*:**

I

OVERVIEW

1 In 2007, the appellant, Keatley Surveying Ltd. ("Keatley"), brought a proposed class action on behalf of all land surveyors in Ontario who registered or deposited plans of survey in the provincial land registry offices. Keatley claimed that the respondent, Teranet Inc. ("Teranet"), who operated Ontario's electronic land registry system ("ELRS") for the Province, infringed surveyors' copyright by digitizing, storing, and copying the plans of survey created by the surveyors and registered or deposited in the ELRS.

2 The class proceeding judge declined to certify the action as a class proceeding: *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120, 31 C.P.C. (7th) 14 (Ont. S.C.J.). The Divisional Court, based on a revised list of proposed common issues, reversed that decision and certified the action as a class proceeding under the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6: *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677, 119 O.R. (3d) 497 (Ont. S.C.J.). This court affirmed the decision of the Divisional Court: 2015 ONCA 248, 125 O.R. (3d) 447 (Ont. C.A.) ("*Keatley* 2015").

3 Both Keatley and Teranet moved for summary judgment. Teranet's motion focused primarily on the question raised by Common Issue 2. That question turned on the impact of registration or deposit of plans of survey under the ELRS on Crown copyright as described in s. 12 of the *Copyright Act*.

4 The motion judge found in Teranet's favour on Common Issue 2, granted Teranet's motion, and dismissed the action. He did so on the ground that copyright in the plans of survey registered or deposited under the ELRS belonged to the Province of Ontario, and not to the surveyor who created the plan.

5 The motion judge went on to consider some, but not all, of the other issues raised on the summary judgment motions. The parties agree that Keatley's action was properly dismissed if the motion judge correctly determined Common Issue 2.

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6 Keatley appeals the dismissal of the action, arguing that the motion judge erred in holding that land surveyors do not maintain copyright in the plans of survey deposited or registered in the ELRS. Teranet supports the motion judge's determination on this issue.

7 On its appeal, Keatley also challenges the constitutionality of provincial legislation that Teranet relies on to support its position that copyright in plans of survey deposited or registered in the ELRS belongs to the Province. Keatley raises this *vires* argument despite having expressly disavowed any claim that the provincial legislation was *ultra vires* in proceedings before the motion judge. Teranet submits that Keatley should not be allowed to raise constitutional issues for the first time on appeal, and alternatively, that there is no merit to the *vires* argument. The Attorney General of Ontario intervenes and supports Teranet's position. The Attorney General for Canada did not intervene.

8 By way of cross-appeal, Teranet renews arguments made in respect of the other common issues. Teranet submits that the action is properly dismissed on those grounds. The motion judge rejected some of these issues, and did not consider others. Keatley argues that the cross-appeal should fail.

9 For the reasons that follow, I would dismiss Keatley's appeal. I agree with the motion judge that copyright in the registered or deposited plans of survey belong to the Province. On my analysis, the constitutional issues do not arise. As it is unnecessary to the resolution of the claim, I would not address the issues raised on cross-appeal.

II

BACKGROUND

10 For some 200 years under the land registration system in place in Ontario, documents registered or deposited with land registry offices ("LRO"), including plans of survey, have been accessible and copies have been available on request to anybody for a prescribed fee. No part of that fee has ever been payable to the land surveyor who prepared the plan of survey, or to the authors of any other documents registered or deposited on title.

11 Under the previous paper-based regime, anyone wanting a copy of a registered or deposited document attended at the appropriate LRO and requested a copy. The staff prepared the copy for the set fee.

12 In 1991, Teranet and the Ontario government began a joint project aimed at creating:

- an electronic land registration and administration system ("ELRS"); and
- a province-wide index map.

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13 When completed, the ELRS would allow users to remotely and electronically access the land registration system, either for the purpose of searches, or to register or deposit documents. As in the days of the paper-based system, users were entitled to obtain copies of any document (now digital copies), including plans of survey, registered or deposited in the system, for a set fee. Again, as in the days of the paper copy regime, no part of that fee went to the land surveyor.

14 The ELRS was completed in 2010. Land surveyors, working under contract with Teranet, played a key role in the creation and development of the ELRS. They are among its primary users.

15 Teranet manages the ELRS for the Province. It acts under statutory authority and pursuant to the terms of licensing agreements with the Province: *The Electronic Land Registration Services Act*, *2010*, S.O. 2010, c. 1, Sched. 6. Pursuant to those agreements, the Province retains all rights, title, and interest, including intellectual property rights, to the data used in the ELRS. The agreements between Teranet and the Province provide that Teranet has access to the data in the system pursuant to the licence granted by the Province. Teranet's role is exclusively that of a service provider retained by the Province: see *Keatley* 2015, at para. 11.

16 As the motion judge noted, Keatley's copyright complaints arose subsequent to the arrival of theELRS. He observed, at para. 11:

> [U]nder the paper-based land registration system, land surveyors understood and accepted (even if they had no direct knowledge of the statutory provisions that made this clear) that the province had the right to copy and sell the plans of survey once they were registered or deposited at the land registry office.

17 In argument before the motion judge, Keatley apparently took the position that there was no breach of copyright under the paper-based system operating before the implementation of the ELRS. As the motion judge summarized, the appellant argued that the Province's outsourcing of the operation of the ELRS to a for-profit third party, including providing copies of plans of survey, created the copyright violation: *Keatley Surveying Ltd. v. Teranet Inc.*, 2016 ONSC 1717, 131 O.R. (3d) 703 (Ont. S.C.J.) , at paras. 17-18 ("*Keatley* 2016").

18 When pressed in oral argument in this court, counsel maintained the position taken before the motion judge, but argued that providing copies of plans of survey under the old paper regime also breached land surveyors' copyright, albeit in a less egregious manner.

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19 In my view, both the change from paper to electronic copies and Teranet's role in the operation of the ELRS are irrelevant to the merits of Keatley's claim of copyright in plans of survey registered or deposited in the ELRS. The copyright rests in either the Province or the land surveyor who prepared the plan of survey. If the land surveyor has copyright, the making and distribution of paper or digital copies of the plan of survey is a breach of copyright whether done by an employee of the Province or by a third party hired by the Province to perform that function. Equally, if the Province has copyright in the registered or deposited plans of survey, the appellant has no claim for breach of copyright regardless of whether a government employee, or a third party retained by the government, makes the copy.

III

PRELIMINARY POINTS

20 Copyright is a creature of statute. The rights and remedies associated with copyright are primarily statutory in origin: *Compo Co. v. Blue Crest Music Inc.* (1979), [1980] 1 S.C.R. 357 (S.C.C.), at 372; *Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, [2002] 2 S.C.R. 336 (S.C.C.), at para. 5. The *Copyright Act*, R.S.C. 1985 c. C-42, sits at the centre of any inquiry into copyright claims.

21 Before addressing the relevant provisions of the *Copyright Act*, four non-contentious but important points should be made. First, as acknowledged by the parties and the motion judge, copyright subsists in plans of survey prepared by surveyors: *Keatley* 2016, at paras. 26-27. Plans of survey are "artistic works" as defined in s. 2 of the *Copyright Act* and attract the protection provided by s. 5: *Keatley* 2015, at para. 15.

22 Second, the land surveyor who prepares a plan of survey is the author of that "work" and, subject to the provisions in the *Copyright Act*, the first owner of the copyright: *Copyright Act*, s. 13(1).

23 Third, this case is concerned only with copyright in plans of survey that have been registered or deposited under the ELRS. The nature and extent of a surveyor's copyright in plans of survey not registered or deposited under the ELRS is not before the court.

24 Fourth, surveyors are under no obligation to deposit or register plans of survey under the ELRS. A land surveyor who does not want a plan registered or deposited can do at least three things to prevent registration or deposit. First, he or she can insert an appropriate term in the retainer with the client if the survey is prepared for a client. Second, the surveyor can refuse to sign the declaration required for the plan to be registered or deposited. Finally, and I think most clearly, the surveyor can avoid registration or deposit of the plan by placing

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on the plan a claim of copyright or any other restriction on the copying of the survey. Any indication on the plan restricting copying will assure that the plan will not be accepted for registration or deposit: O. Reg. 43/96, s. 9(1)(e), enacted pursuant to the *Registry Act*, R.S.O. 1990, c. R. 20. As land surveyors are under no obligation to register or deposit plans of survey under the ELRS, and can prevent any plan from being registered or deposited, there is no validity to Keatley's submission that on the motion judge's interpretation of the relevant statutory provisions, Teranet has expropriated the copyright of land surveyors whose plans are registered or deposited in the ELRS.

IV

THE COPYRIGHT ACT

25 Common Issue 2 asks:

> Does the copyright in the plans of survey belong to the Province of Ontario, pursuant to s. 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?

26 The motion judge recognized that the answer to Common Issue 2 depended on the interrelationship of s. 12 of the *Copyright Act* and various provincial enactments dealing with the registration and depositing of documents in the land registration system. Section 12 of the *Copyright Act* states:

> 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.

27 Section 12, unchanged in its relevant parts, has been in the *Copyright Act* for almost 100 years and is closely modeled on the *Copyright Act 1911*, c. 46, s. 18 (UK): see *Copyright Act*, S.C. 1921, c. 24, s. 12. The section applies to both the Federal and Provincial Crown: D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), at p. 92; D. Gervais and E. Judge, *Intellectual Property: The Law in Canada*, 2d ed. (Toronto: Carswell, 2011), at p. 137; *Reprographic Reproduction 2005-2014, Re*, 2013 FCA 91, 358 D.L.R. (4th) 563 (F.C.A.), at paras. 34, 48.

28 The opening phrase in s. 12, "without prejudice to any rights or privileges of the Crown", is a reference to the Crown's ancient common law copyright-like prerogative to control publication of a variety of materials, such as statutes. The exact meaning of the phrase

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appears to have been lost in history: see D. Vaver, *Copyright Law*, at pp. 93-94; D. Vaver, "Copyright and the State in Canada and the United States" (1996) 10 I.P.J. 1, at 188-192. Fortunately, it has no relevance to this case. It is not suggested that the Province gains any copyright under the opening phrase in s. 12 of the *Copyright Act*.

29 Section 12 applies to "any work" that was "prepared or published by or under the direction or control of Her Majesty." As referenced above, a plan of survey is a work within the meaning of the *Copyright Act*: s. 2.

30 The motion judge, at paras. 31-33, concluded that a registered or deposited plan of survey could not be said to have been "prepared by or under the direction or control of the Crown". I agree with him: see also *Copyright Agency Ltd. v. State of New South Wales*, [2007] FCAFC 80, 240 A.L.R. 249 (Australia H.C.), at paras. 121-126, rev'd on other grounds: [2008] H.C.A. 35, 248 A.L.R. 590 (Australia H.C.).

31 The question becomes whether the registered or deposited plans of survey are "published by or under the direction or control of the Crown." Publication is defined under the *Copyright Act* as including "making copies of a work available to the public": s. 2.2(1)(a)(i). Under the relevant statutory provisions, Teranet is obligated to provide copies of registered or deposited plans of survey to members of the public upon payment of the prescribed fee: *Registry Act*, s. 15(4); *Land Titles Act*, R.S.O. 1990, c. L.5, s. 165(4). I have no doubt that under the statutory scheme, Teranet and hence, the Crown, "publish" those plans of survey when they make copies of those plans available to the public: see *Copyright Agency Ltd.*, at para. 145.

32 Mere publication by the Crown does not, however, trigger copyright in the Crown under s. 12 of the *Copyright Act*, as the motion judge acknowledged, at para. 37 of his reasons. Again, I agree with the motion judge. The publication must be "by or under the direction or control of Her Majesty".

33 Copyright describes a variety of different rights associated with a "work", including, not surprisingly, the right to copy the work: *Copyright Act*, s. 3(1); N. Tamaro, *The 2017 Annotated Copyright Act* (Toronto: Thomson Reuters Canada Limited, 2016), at p. 260. To determine whether a work is published under the Crown's "direction or control" for the purposes of s. 12 of the *Copyright Act*, one must consider the nature of the "rights" in the property held by the Crown when the Crown publishes the property (when the Crown makes copies available). In my view, the more extensive those rights, and the more rights associated with copyright are in the Crown's hands, the stronger the inference that the publishing occurs under the "direction or control" of the Crown.

34 These rights are also informed by a series of provincial statutes dealing with land registry in Ontario: the *Registry Act*; *Land Titles Act; Surveyors Act*, R.S.O. 1990, c. S. 29; and *Surveyors Act*, R.S.O. 1990, c. S. 30. The relevant provisions transfer various property

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rights in the registered or deposited plans to the Crown. To begin with, a person registering or depositing the plan must file the physical document in the LRO: O. Reg. 43/96 to the *Registry Act*, s. 7. Subject to regulation, registered or deposited plans must be retained in the exclusive custody and possession of the Crown. They are declared to be "the property of the Crown": *Land Titles Act*, s. 165(1); *Registry Act*, ss. 18(10), 50(3).

35 Exclusive custody and control of the document on which the plan is made does not, of course, equate with holding copyright in that plan: J.S. McKeown*, Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Thomson Reuters, 2007) at pp. 19-15. However, statutory provisions giving the Crown exclusive custody and control over the registered or deposited plan must be relevant to whether the Crown's publication of that plan occurs under the Crown's "direction or control."

36 The statutory scheme also places strict controls on the form and content of the plans of survey that are submitted for registration or deposit. The statutory regime gives the Examiner of Surveys, a government official, broad authority to review plans to ensure compliance with the required form and content. The Examiner of Surveys can require surveyors to produce evidence to support any questioned aspect of the survey: see O. Reg. 43/96, to the *Registry Act*, ss. 5(1), 6, 9(1); *Land Titles Act*, s. 14; O. Reg. 216/10 to the *Surveyors Act*, c. S. 29, ss. 8-27. Changes can be required before the plan will be accepted for registration or deposit.

37 Provisions controlling the content and form of plans of survey submitted for registration or deposit do not in and of themselves constitute "direction or control" for the purposes of s. 12: *Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 N.Z.L.R. 261, at 272-273 (C.A.); *Glaxo Canada Inc. v. Apotex Inc.* (1994), 58 C.P.R. (3d) 1 (Fed. T.D.), at p. 9; rev'd (1995), 64 C.P.R. (3d) 191 (Fed. C.A.). However, mandatory provisions imposing detailed requirements on the form and content of plans of survey, coupled with the Examiner of Surveys' extensive supervisory powers, are relevant to whether subsequent publication of the registered or deposited plan occurs under the "direction or control" of the Crown.

38 The statutory regime also provides that once a plan of survey has been registered or deposited, the surveyor has no authority to change the content of the plan without the Examiner of Surveys' permission. In fact, someone other than the surveyor can apply to the Examiner for an order directing that a change be made to the registered or deposited plan: *Land Titles Act*, s. 145(6); *Registry Act*, s. 89; O'Reg. 43/96 to the *Registry Act*, s. 49. As with the other features of the statutory regime, I do not suggest that the exclusive power of a government official to change a registered or deposited plan of survey is determinative of copyright under s. 12 of the *Copyright Act*. Common sense, however, strongly suggests that an exclusive power to alter the document, even without the knowledge or approval of the author, strongly supports a claim of control over the document.

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39 The features of the relevant provincial legislation reviewed to this point provide significant support for Teranet's position. However, the provisions concerning the copying of plans of survey registered or deposited on title provide the strongest support for Teranet's position. Under both the *Land Titles Act* and the *Registry Act*, certified copies of registered or deposited plans of survey must be made available to members of the public upon payment of the prescribed fee. For example, s. 15(4) of the *Registry Act* directs that the registrar "shall" upon receiving the required fee produce for inspection any document registered or deposited on title in the LRO. The registrar must also "supply a copy of the whole or a part of any instrument or document . . . registered or deposited in the office . . . " See also *Land Titles Act*, s. 165(4).

40 As Binnie J. observed in *Théberge*, at para. 42: "Copyright law is in essence about protecting the right to multiply copies." Statutory provisions, placing an obligation on the Crown upon request to make available certified copies of plans of survey, speak loudly to the nature and extent of the Crown's control over the publication of the plans. Such a statutory obligation is fundamentally inconsistent with the claim by the document's author to a right to control the making of copies of the document. That right is integral to the existence of copyright in the registered or deposited plans.

41 The exclusive authority of the Crown to reproduce registered or deposited documents is further evinced by O. Reg. 43/96 to the *Registry Act*. Section 9(1)(e) of that regulation provides that a plan shall "not include any notes, words or symbols that indicate that the right to make or distribute copies is in any way restricted."

42 One of Keatley's witnesses on the summary judgment motion confirmed that since at least 1981, staff in the LRO have refused to accept for registration or deposit any plan of survey that has on its face any claim for copyright in the document.

43 The extensive property-related rights in the registered or deposited plans of survey bestowed on the Crown by the provincial legislative scheme must be considered as a whole when deciding whether registered or deposited plans of survey are under the "direction or control" of the Crown when they are "published" (when copies are made available to the public). The statutory scheme, considered in its entirety, goes far beyond simply authorizing the Crown to impose terms on the content and form of documents to be registered or deposited, or to copy plans of survey deposited or registered in the ELRS. The provisions oblige the Crown to maintain possession and custody of all registered plans of survey. The Crown must provide access to those plans upon request. The surveyor cannot place any marking on the plan claiming any kind of copyright. The surveyor cannot make any change to the plan once it is registered or deposited, without the permission of the Examiner of Surveys. The Examiner, on the other hand, can make changes even without the permission of

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the surveyor. Finally, of course, the Crown is statutorily obliged to provide certified copies upon request.

44 The statutory provisions give the Crown complete control over registered or deposited plans of survey and complete control over the "publication" of those plans of survey within the meaning of the *Copyright Act*. I am satisfied that certified copies of plans of survey made available to members of the public under the statutory scheme are works published under the "direction or control" of the Crown for the purposes of s. 12 of the *Copyright Act*. Pursuant to the terms of that section, copyright in registered or deposited plans of survey "belongs" to the Crown for the period of time prescribed in that section.

45 Although the motion judge and I arrive at the same conclusion, we reach that place after traveling somewhat different roads. Like the motion judge, I am satisfied that registered or deposited plans of survey are "published" by the Crown for the purposes of s. 12 of the *Copyright Act* when copies, digital or paper, are made available to, or provided to, members of the public. However, I would not describe the applicable provincial legislation as transferring "ownership" of the copyright to the Province. In my view, the provincial provisions are relevant to whether the copies of the plans are made available under the Crown's "direction or control." Considered as a whole, the provisions demonstrate that plans of survey registered or deposited in the ELRS are held and published entirely under the Crown's direction and control. Ownership of copyright does not, however, flow from the provincial land registration scheme. It is s. 12 of the *Copyright Act* that vests copyright in the Crown by virtue of the publication of those plans under the "direction or control" of the Crown.

46 Counsel thoroughly scoured the case law and texts for assistance in interpreting s. 12 of the *Copyright Act*. Most of the limited body of case law addresses the opening language of s. 12 and the scope of the Crown prerogative captured by that phrase. There is very little case law that speaks to the rest of s. 12 and in particular, the meaning of the phrase "direction or control": e.g. see*Ironside v. H.M. Attorney-General* [1988] R.P.C. 197, at 203 (Chan. Div.); *Land Transport Safety Authority of New Zealand* at 272-273; D. Vaver, "Copyright and the State in Canada and the United States", at 190-92.

47 Only one case, *Copyright Agency Ltd.*, deserves specific reference. The facts are very similar to the facts of this case. *Copyright Agency Ltd.* involved a copyright-like claim to registered plans of survey advanced on behalf of land surveyors against the Crown. The relevant land registration scheme contained provisions much like those found in the Ontario legislation. Those provisions included an obligation on the Crown to provide copies of registered plans of survey upon request.

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48 In the Australian High Court, the case turned on the interpretation of a statutory provision requiring the Crown to compensate a copyright holder if the Crown published a work "for the services of the State." There is no similar provision applicable in this case and the reasons in the High Court are not helpful for present purposes.

49 The Federal Court of Appeal below, however, did consider whether the Crown or the surveyor had copyright in the registered plans of survey. In doing so, the court considered ss. 176 and 177 of the Australian *Copyright Act 1968* (Cth). Those sections read together are similar to s. 12 of the Canadian *Copyright Act*. Section 177 addresses works published under the direction or control of the State. That section reads, in part:

> Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an . . . artistic work, <u>first published in Australia</u> if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be. [Emphasis added.]

50 After observing that the registered plans were no doubt published under the direction or control of the State when copies were made available, the court observed that s. 177 applied only to works "first published in Australia." The court went on, at para. 146, to say:

> <u>However, the question is whether that is the first publication of the Relevant Plans</u>. An artistic work is first published when it is made available to the public. Publication occurs when reproductions of the work are made available to the public. Publication occurs when the reproduction is put on offer to the public, where the person who makes the offer is prepared to supply on demand, whether or not the offer is advertised. [Emphasis added.]

51 The court rejected the submission that a registered plan of survey was a different work than an unregistered plan prepared by the surveyor. The court held that the plans were published by surveyors prior to registration of the plans either when plans were provided to the surveyor's clients, or when plans were made available to various regulatory and planning authorities. Because the plans were previously published in Australia, the Crown's publication of the plans in the context of the land registration scheme could not vest copyright in the Crown under s. 177: paras. 143-151.

52 Section 12 of the *Copyright Act* does not limit publication to "first publication" in Canada. Instead, s. 12 refers to any work that is "published" under the direction or control of the Crown and provides for a period of copyright measured from the Crown's "first publication" of the work. The question of whether the Crown has copyright under s. 12 of the *Copyright Act*, unlike its Australian counterpart, does not depend on whether the work has been previously published in Canada.

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53 In summary, I would hold that the extensive property-related rights bestowed on the Crown by the land registration scheme in Ontario compel the conclusion that the publishing of those plans, by making copies of the plans available to the public, is done under the "direction or control of Her Majesty." Section 12 of the *Copyright Act* declares that the copyright in the registered or deposited plans of survey belongs to the Crown.

54 On the interpretation that I take, there is no *vires* problem. Federal legislation, s. 12 of the *Copyright Act*, bestows copyright on the Crown. Provincial legislation informs the copyright inquiry mandated by s. 12. Specifically, provincial legislation speaks to whether the plans are "published" by the Crown and if so, whether that publication takes place under the "direction or control" of the Crown.

55 On my interpretation of the interaction of the provincial legislation with s. 12 of the *Copyright Act*, Keatley's arguments based on other provisions of the *Copyright Act* also fall quickly to the wayside. Keatley relies on s. 89 of the *Copyright Act*, which says, in part: "No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament." On my analysis, the Crown holds copyright in the registered or deposited plans "under" s. 12 of the *Copyright Act* and "in accordance with" the *Copyright Act*. Section 89 does not advance Keatley's cause.

56 Keatley also relies on s. 34.1 of the *Copyright Act*. That section creates a presumption that the author of the work is the owner of the copyright in the work "unless the contrary is proved." Teranet has established the preconditions to Crown copyright under s. 12 of the *Copyright Act*. In doing so, Teranet has rebutted any presumption that may arise under s. 34.1.

V

CONCLUSION

57 I would dismiss the appeal and affirm the order below dismissing Keatley's action. I would not address the merits of the cross-appeal and would dismiss that appeal as moot in light of my disposition of the main appeal.

58 Unless the parties can agree on costs, they should exchange and file written submissions on the costs of the appeal within 30 days of the release of the reasons. The submissions should not exceed seven pages.

***D.M. Brown J.A.*:**

I agree.

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***B.W. Miller J.A.*:**

I agree.

Appeal dismissed.

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