
Canada: Supreme Court Interprets Scope of Crown Copyright

By [Katherine Lyon Dayton](#)

Keatley Surveying Ltd. v. Teranet Inc., 2019 SCC 43

Background

Section 12 of Canada's *Copyright Act* ("Where copyright belongs to Her Majesty") addresses Crown copyrights owned by the government. It provides that "where any work is, [More](#)

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Background

Section 12 of Canada's *Copyright Act* ("Where copyright belongs to Her Majesty") addresses Crown copyrights owned by the government. It provides that "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 that work will belong to the Crown, subject to any agreement with the author providing otherwise. For the first time since Section 12's enactment in 1921, the Canadian Supreme Court had occasion to review the provision, in its recent decision in *Keatley Surveying Ltd. v. Teranet Inc.*

The case at issue was a class action brought by Keatley Surveying Ltd. ("Keatley") on behalf of all land surveyors in the Province of Ontario who had registered or deposited plans of survey in Ontario's provincial land registry offices. Plans of survey are prepared by independent surveyors and are used to determine land boundaries and other property rights. The preparation and depositing of plans of survey are subject to various laws and regulations promulgated by the government. Teranet is a private company that manages Ontario's electronic land registry system, under various legislative enactments and agreements with the Province of Ontario. Keatley claimed that Teranet infringed the surveyors'

copyright in their plans of survey by digitizing, storing, and copying the plans the surveyors had deposited in the Ontario land registry system.

Procedural History

The class action was dismissed by the Ontario Superior Court on a motion for summary judgment. The court held that the copyrights in the plans of survey subsist in the Crown, and thus there was no infringement.

The Court of Appeal likewise dismissed Keatley's appeal and Teranet's cross-appeal. The Court of Appeal noted that the core concern of Canadian Supreme Court copyright jurisprudence is to strike an appropriate balance between creators' rights and users' rights, furthering the public interest. The purpose of the Crown copyright—to protect works prepared or published under the Crown's control, thus guaranteeing "authenticity, accuracy and integrity in the public interest"—makes Section 12 a uniquely appropriate vehicle for realizing this balance.

In analyzing the statute itself, the Court of Appeal agreed with the first instance judge that the plans of survey were not *prepared* by or under the control or direction of the Crown, and that the relevant inquiry was *publication* by or under the control or direction of the Crown.

The Court of Appeal took the view that, in determining whether a work was published under the direction or control of the Crown, a critical consideration is "the nature of the property rights held by the Crown at the time of publication." The Court of Appeal was persuaded that the extensive system of statutory controls over the land survey registry system indicates that the Crown had complete control over the deposited plans themselves, as well as complete control over their "publication." Various statutes govern the transfer of property rights in the plans to the Crown. The physical plans are required to be filed in a land registry office, where they remain in the custody of the Crown and become the Crown's physical property. The Examiner of Surveys is given broad and exclusive authority to review and modify the plans, and the Examiner's authorization is required to modify any plan after it has been deposited. Additionally, Ontario is required to make available to the public certified copies of the plans upon payment of a prescribed fee. Thus, a number of the rights accompanying copyright ownership (including the rights to alter the work and make copies of the work) are held by the Crown under the statutory scheme.

Supreme Court Holding

The Supreme Court agreed that the copyrights in the deposited land survey plans are held by the Crown by virtue of its direction and control over the documents' "publication" by Teranet, and thus there was no infringement. However, the judges were divided in their interpretation of the *Copyright Act*.

Majority Opinion

Four judges joined in the majority opinion. All of the judges, minority and majority, agreed that the plans of survey were created by independent land surveyors, and thus the Crown did not have control over the *preparation* of the works. The case rested on the "publication" prong of Section 12.

As for publication, the majority acknowledged that, "if interpreted expansively," the "'published' prong . . . profoundly derogates from the general scheme of the *Act* wherein the author of a work owns the copyright in it." The majority held that the "published" prong is engaged only "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 a work*" (emphasis added). Determining whether sufficient governmental direction or control was exercised requires examining the Crown's interest in the works at the time of publication.

The majority held that the extensive statutory regime governing land registration in Ontario gives the government "complete" control over the publication process resulting in the published work. Like the Court of Appeal, the majority noted it was significant that the Crown had the right to control the making of copies and also exclusive power to amend the plans' content after they had been registered or deposited. "Viewed in its entirety, the scheme demonstrates the extent of the Crown's direction or 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." Because of the "extent of this direction and control," the Crown owns the copyright when the registered or deposited plans of survey are published.

The fact that the Crown acted through Teranet to publish the plans of survey does not impact the Crown's rights. The Crown exercises the necessary direction or control over Teranet, as the latter is bound both by its agreements with the Crown and the statutory provisions governing this field of activity. As the Crown's licensee, Teranet is permitted to access, publish, and make copies of the registered or deposited plans of survey.

Further, the documents recorded under the land registry system are exactly the type of work in which the Crown copyright was intended to subsist under Section 12—that is, documents over which the Crown has a critical interest in guaranteeing “authenticity, accuracy and integrity in the public interest.”

Minority Opinion

Three judges joined in a separate minority opinion, agreeing with the holding but disagreeing with the majority’s interpretation of Section 12.

The minority interpreted the phrase “by or under the direction or control” of the Crown as relating exclusively to the act of preparation or publication of the work—not to “direction or control” over the work itself. The minority argued that their interpretation is supported by an ordinary grammatical reading of Section 12. Further, they claimed that the majority’s legal test, particularly for the “published” prong of Section 12, is a question of degree with very little practical guidance for future cases as to the “threshold” level of control required to trigger Section 12. The facts of this case, where the government exercised “complete” control over publication, are not particularly helpful for deciding a more ambiguous case. The minority offered a different test which they claimed is more factual and easier to apply, namely, whether the Crown “brought about the preparation or publication of the work, either by its own agents and servants or by exercising direction or control over a third party”—without reference to the degree of “direction or control” exercised over the work itself.

Further, the minority noted that reading Section 12 literally would lead to “an absurdity” wherein the copyright in any work whatsoever that the government decides to publish would automatically be transferred to the government upon publication. The minority argued that Section 12 was not intended to apply to “any and every work” but rather only to “government works.” Whether a work is a “government work” is determined by examining the character and purpose of the work, namely, whether it “serves a public purpose and Crown copyright furthers the fulfillment of that purpose.”

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Given the facts, this was a fairly clear-cut case in terms of the ultimate outcome. However, the judges were divided in the analytical paths they took to reach this outcome. Both the majority and minority opinions confirm, importantly, that the Crown can claim copyright not only in works that are “prepared” but also “published” by the government or its employees and agents, where a sufficient amount of control or direction is exercised over the publication process. This decision will have implications for

parties that regularly prepare and submit documents to Canadian government agencies for publication, who, like the private land surveyors, may find that they no longer own the copyright in the works they authored.

Primary Contacts

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