



SUPREME COURT OF CANADA

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

APPEAL HEARD: March 29, 2019
JUDGMENT RENDERED: September 26, 2019
DOCKET: 37863

BETWEEN:

Keatley Surveying Ltd.
Appellant / Respondent on cross-appeal

and

Teranet Inc.
Respondent / Appellant on cross-appeal

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of
British Columbia, Attorney General of Saskatchewan, Canadian Association of
Law Libraries, Canadian Legal Information Institute, Federation of Law
Societies of Canada, Samuelson-Glushko Canadian Internet Policy and Public
Interest Clinic, Land Title and Survey Authority of British Columbia, Centre for
Intellectual Property Policy, Ariel Katz and Canadian Standards Association**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and
Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 91)

Abella J. (Moldaver, Karakatsanis and Martin JJ.
concurring)

JOINT CONCURRING REASONS:
(paras. 92 to 147)

Côté and Brown JJ. (Wagner C.J. concurring)

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KEATLEY SURVEYING LTD. v. TERANET INC.

Keatley Surveying Ltd.

Appellant/Respondent on cross-appeal

v.

Teranet Inc.

Respondent/Appellant on cross-appeal

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Association of Law Libraries,
Canadian Legal Information Institute,
Federation of Law Societies of Canada,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Land Title and Survey Authority of British Columbia,
Centre for Intellectual Property Policy, Ariel Katz and
Canadian Standards Association**

Interveners

Indexed as: Keatley Surveying Ltd. v. Teranet Inc.

2019 SCC 43

File No.: 37863.

2019: March 29; 2019: September 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Intellectual property — Copyright — Crown copyright — Plans of survey — Land surveyor bringing class action on behalf of land surveyors in Ontario who registered or deposited plans of survey in provincial land survey offices — Land surveyor alleging that surveyors' copyright infringed when plans of survey digitized, stored and copied by province's service provider — Action dismissed on basis that copyright in plans of survey belongs to province — Whether copyright in plans of survey vests in Crown pursuant to s. 12 of Copyright Act — Whether plans of survey prepared or published by or under direction or control of province — Copyright Act, R.S.C. 1985, c. C-42, s. 12.

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 the provincial land registry offices. It claimed that Teranet Inc., which manages Ontario's electronic land registry system as a service provider to the government pursuant to statutory authority and in accordance with the terms of implementation and licensing agreements with the province, infringed surveyors' copyright by digitizing, storing and copying the plans of survey created by the surveyors and registered or deposited in the electronic land registry system. When plans of survey are registered and deposited at a physical land registry office in Ontario, Teranet

scans the plans of survey and adds this electronic information to its databases. Teranet operates two service portals, Teraview and GeoWarehouse, through which licensed users can access Ontario's land registry documents, including plans of survey, for a statutorily prescribed fee.

Seven common issues were certified in Keatley's proposed class action. In 2016, Keatley and Teranet moved for summary judgment. Determination of the motion turned on the second common issue, which asked whether the copyright in the plans of survey belongs to Ontario pursuant to s. 12 of the *Copyright Act* as a result of the registration or deposit of those plans in the Ontario land registry office. Section 12 of the *Copyright Act* provides that the copyright in any work prepared or published by or under the direction or control of Her Majesty or any government department belongs to Her Majesty. The motions judge found that the copyright belonged to the Crown and therefore that there was no copyright infringement. Since the answer to the second common issue was dispositive of Keatley's claim, the motions judge allowed Teranet's motion for summary judgment and dismissed Keatley's class action. The Court of Appeal dismissed Keatley's appeal. Keatley appeals to the Court, and Teranet cross-appeals in order to preserve its rights in relation to the remaining common issues.

Held: The appeal should be dismissed. It is unnecessary to deal with the cross-appeal.

Per Abella, Moldaver, Karakatsanis and Martin JJ.: The interpretation of s. 12 of the *Copyright Act* is informed both by the words of the provision and the general purposes and objectives of the *Copyright Act* as the Court has come to understand them in the century since s. 12 came into being. Together these interpretive tools yield a narrow scope for Crown copyright. This case is the Court's first opportunity to examine the scope and application of s. 12 of the *Copyright Act*, enacted in 1921.

The opening language of s. 12 — “without prejudice to any rights or privileges of the Crown” — reflects the historical Crown prerogative over publishing. The remainder of s. 12 provides a *statutory* basis for Crown copyright, which will subsist in any work “prepared or published by or under the direction or control of Her Majesty”. The purpose of statutory Crown copyright is to protect works prepared or published under the control of the Crown where it is necessary to guarantee the authenticity, accuracy and integrity of the works in the public interest. But Crown copyright cannot be so expansive in scope that it allows for the routine expropriation of creators' copyright in their works or that it impedes the public interest in accessing information.

The notion of direction or control is critical to the assessment of whether Crown copyright exists. The goal of the s. 12 inquiry in its entirety is to determine whether the degree of the Crown's direction and control over the preparation or publication of the work is sufficient to vest copyright in the Crown.

A work will be prepared by the Crown when its agent or employee brings the work into existence for and on behalf of the Crown in the course of his or her employment or when the Crown essentially determines whether and how a work will be made, even if the work is produced by an independent contractor. In these two circumstances, the Crown exercises direction and control over both the person preparing the work and the work that is ultimately prepared.

The evaluation of the Crown's direction or control takes on heightened importance in determining whether a work is *published* by the Crown within the meaning of s. 12. Merely making someone else's work available to the public is insufficient. A work will only 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 over both the person publishing the work and the nature, form and content of the final, published version of a work.

Determining whether a work was published with sufficient governmental direction or control to comply with s. 12 necessitates an inquiry into the Crown's interest in the works at the time of publication. Relevant indicia of governmental direction or control may include 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 crux of this appeal is publication, namely whether the registered and deposited plans of survey were published by or under the direction or control of the Crown. The nature and extent of the Crown's direction and control are informed by a comprehensive statutory regime governing land registration in Ontario which gives the Crown complete control over the process of publication. The Crown has proprietary rights in the plan and custody and control over the physical plans. The statutory scheme ensures that the Crown directs and controls the format and content of registered plans. This control subsists after registration or deposit. It is only the Crown who is able to alter the content of the plans and it is the Crown that has ongoing control over and responsibility for the publishing process, including the final form of the work. Likewise, it is the Crown who — through validly enacted legislation — has the exclusive authority to make copies of the registered or deposited plans of survey.

When either the Crown *or* Teranet publishes the registered or deposited plans of survey, copyright vests in the Crown because the Crown exercises direction or control over the publication process. This conclusion furthers the underlying purposes of Crown copyright because registered and deposited plans of survey in the land registry system are intended to be relied upon by members of the public to determine property rights and obligations.

In accordance with the principle of technological neutrality, Ontario's reliance on new technologies post-digitization does not change the assessment of whether the Crown has copyright by virtue of s. 12 of the *Copyright Act*. There is no practical difference between obtaining a copy of a registered or deposited plan of survey from a physical land registry office or electronically. Because the Crown has copyright in the works pursuant to s. 12 of the *Act*, there is no infringement under the electronic registry system.

Per Wagner C.J. and **Côté** and **Brown JJ.**: There is agreement with the majority that the appeal should be dismissed since copyright in plans of survey registered or deposited in the land registry office belongs to Ontario under s. 12 of the *Copyright Act*. There is disagreement, however, with the majority's interpretation of s. 12.

Statutory interpretation entails discerning Parliament's intention by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects. On its face, it would appear that the ordinary and grammatical sense of the text of s. 12 is clear: copyright in "any work" vests in the Crown where the Crown prepares or publishes the work, or a third party prepares or publishes the work under the Crown's direction or control. However, the legislature does not intend to produce absurd consequences, and a literal reading of s. 12 would result in an overly broad Crown copyright which sweeps aside the careful balance that Parliament struck between creators' and users' rights. A

literal reading would effectively empower the Crown to expropriate copyright from independent creators in any copyrightable work merely by publishing the work itself or causing a third party to publish the work. Although the courts below and the majority recognized the absurdity worked by a literal reading of s. 12, their solution — requiring that the Crown have sufficient “direction or control” in the publishing process, including the work itself — reads out part of s. 12 and distorts what is left.

“Prepared or published by or under the direction or control” of the Crown should be interpreted according to its ordinary meaning: the act of preparing or publishing the work must be done either by the Crown itself or under the Crown’s direction or control. In each case, inquiries must be made into the person preparing or publishing the work, and into that person’s relationship to the Crown. A requirement that both the “prepared” prong and the “published” prong entail inquiring into whether the Crown has sufficient direction or control in the work itself should not be imported into the statute. The question to ask is simply 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.

A work is prepared by or under the direction or control of the Crown where the Crown is in a position to determine whether or not a work will be made. It is not sufficient for the purposes of the “prepared” prong for the Crown to determine that, if the work is to be made, it will be made a particular way. A work is prepared by the Crown where an agent or servant of the Crown brings the work into existence

in the course of his or her duties. A work is prepared under the direction or control of the Crown where the Crown determines that a third party shall make the work. A work is published by the Crown where the Crown itself publishes the work, and a work is published under the direction or control of the Crown where a third party, such as an independent contractor, publishes the work at the Crown's behest. Neither prong requires an inquiry into whether the Crown exercises direction and control over the person preparing the work and the work that is ultimately prepared. The only inquiry is into the identity of the author and the relationship of that author to the Crown.

However, the fact that a work is published "by or under the direction or control" of the Crown is not the end of the s. 12 analysis. Once a court is satisfied that a work was "prepared or published by or under the direction or control" of the Crown, it must then consider whether, at the time of preparation or publication, the work is a "government work". A government work is a work that serves a public purpose and in which vesting copyright in the Crown furthers that purpose. These will be works in which the government has an important interest concerning their accuracy, integrity, and dissemination — the mere fact that the government has a work prepared or published is not itself conclusive that the work serves a public purpose.

The plans of survey in the instant case are made available to the public and are therefore both "published by" Ontario and published by Teranet under Ontario's direction or control, since Ontario makes the plans available in the land

registry office, and Teranet makes the plans available to subscribers of its platforms. Furthermore, the plans of survey at issue in this case are clearly government works. They have a clear public character, as they define and illustrate the legal boundaries of land within Ontario, clarifying land ownership, and allowing landowners and users to govern their affairs accordingly. People rely on the accuracy of survey plans for determining their interest in property and facilitating land transactions. By holding copyright in the plans, the Crown can restrict the ability of a surveyor or other private party to make alterations to the plans and then sell or distribute them privately. By asserting Crown copyright, the government can ensure that survey plans obtained from the land registry office or from Teranet are accurate. As well, because survey plans are so widely relied upon, it is important to ensure wide public availability so that whomever requires access to them can obtain it. As the registered and deposited plans of survey are government works when they are “published by or under the direction or control” of Ontario, copyright in them is vested in the Crown under s. 12, and not in the original surveyors.

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By Abella J.

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(Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37, [2012] 2 S.C.R. 345; *R. v. Bellman*, [1938] 3 D.L.R. 548; *Attorney-General (N.S.W.) v. Butterworth & Co. (Australia) Ltd.*, [1938] 38 S.R. (N.S.W.) 195; *Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 N.Z.L.R. 261; *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615.

By Côté and Brown JJ.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Copyright Agency Limited v. State of New South Wales*, [2007] FCAFC 80, 159 F.C.R. 213; *Copyright Agency Limited v. State of New South Wales*, [2008] HCA 35, 233 C.L.R. 279; *Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 N.Z.L.R. 261; *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222, 161 C.P.R. (4th) 243; *R. v. Bellman*, [1938] 3 D.L.R. 548.

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O. Reg. 43/96, ss. 5(1), 7, 9(1)(e), 49(2).

O. Reg. 49/01, s. 17.

O. Reg. 216/10, s. 8.

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Brown and Miller JJ.A.), 2017 ONCA 748, 418 D.L.R. (4th) 425, 87 R.P.R. (5th) 4, 139 O.R. (3d) 340, [2017] O.J. No. 5023 (QL), 2017 CarswellOnt 14961 (WL Can.), affirming a decision of Belobaba J., 2016 ONSC 1717, 131 O.R. (3d) 703, 72 R.P.R. (5th) 248, [2016] O.J. No. 2370 (QL), 2016 CarswellOnt 7233 (WL Can.). Appeal dismissed.

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Rahool P. Agarwal and Khrystina McMillan, for the interveners the Canadian Legal Information Institute and the Federation of Law Societies of Canada.

Jeremy de Beer and *David Fewer*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Steve Garland, Theodore Sum and *Laura Easton*, for the intervener the Land Title and Survey Authority of British Columbia.

Michael Shortt and *Jean-Philippe Mikus*, for the interveners the Centre for Intellectual Property Policy and Ariel Katz.

John E. Callaghan and *Kevin Sartorio*, for the intervener the Canadian Standards Association.

The judgment of Abella, Moldaver, Karakatsanis and Martin JJ. was delivered by

ABELLA J. —

[1] This appeal gives the Court its first opportunity to examine the scope and application of Crown copyright. The tools at our interpretive disposal are not only the usual principles of statutory interpretation, they also include extensive jurisprudence explaining how this Court has come to understand copyright law in the years since the Crown copyright provision was enacted in 1921. Together, in my view, they yield a narrow scope for Crown copyright, one that protects the rights of the creators of a

work but grants ownership to the Crown only where it has exercised a sufficiently extensive degree of direction or control in the creation or dissemination of the work.

[2] The context is Ontario's land registration system. Historically, land registration in Ontario was exclusively paper-based. The documents comprising the land registry, including plans of survey, were registered or deposited with Ontario's land registry offices. Members of the public who wished to obtain copies of these documents could attend a physical land registry office and request a copy for a prescribed fee. The surveyors who created the plans of survey were paid neither fee nor royalty when the government provided copies of registered and deposited plans to members of the public.

[3] In the 1980s, Ontario began to develop the Province of Ontario Land Registry Information System, or POLARIS, which, among other goals, was intended to automate Ontario's land registry system. POLARIS was initially designed to complement the existing land registry offices in their delivery of services to the public. However, the stakeholders in the land registry scheme were concerned that POLARIS alone would not meaningfully assist those who used and relied on the land registry. In particular, users would still be required to attend a physical office to perform land-related transactions. To alleviate those shortcomings, land surveyors, along with the other users of the system, lobbied for the ability to have remote access to the land registry offices.

[4] The process of creating a fully automated and electronic land registry system with remote access capabilities came, however, with a high price tag. In 1987, Ontario started a consultation process surrounding the modernization of the land registry system. Surveyors taking part in the consultation advocated for a public-private partnership to undertake this modernization. In 1988, Ontario requested expressions of interest and then proposals for the creation of an electronic land registry and administration system. Developing this system involved two interrelated goals: digitalizing all land registration documents and providing remote access to these documents, and creating a province-wide index map. Surveyors were involved with both aspects of modernization. Ontario also worked closely with the Association of Ontario Land Surveyors, the professional self-governing body responsible for the licensing and governance of Ontario land surveyors, in the electronic land registry system's development phase.

[5] Because of the interdisciplinary nature of the modernization process, individual companies lacked the capacity to complete the project. Accordingly, bidding consortia were formed. Surveyors and surveying companies were integral to these consortia. Real/Data Ontario Inc., the ultimately successful entity, for example, was composed of over a dozen participating member corporations, five or six of which were surveying firms or consortia of surveying firms.

[6] In 1991, Ontario entered into a public-private partnership with Real/Data, which was subsequently incorporated as Teranet Inc. Teranet contracted with Ontario

to perform the automation and conversion of the paper-based registry system into an electronic land title system, as well as to operate and maintain this system on Ontario's behalf. When Teranet was incorporated, LanData Group, a consortium of surveying firms, became a shareholder in Teranet.

[7] The Ontario-Teranet public-private partnership was part of the so-called "first wave" of public-private partnerships. These projects were planned directly by government departments or agencies in order to increase public funding for infrastructure by raising new money through user fees or payments, and transfer supply, availability and demand risk to the private sector partner. These partnerships were undertaken in the belief that greater competition and involvement in the provision of public services would lead to lower costs and greater efficiency.¹

[8] In 1991, Teranet began building the POLARIS province-wide index map. LanData was tasked with building the "fabric" of the POLARIS map. Teranet entered into agreements with LanData for work related to a specific geographical region, which LanData then assigned the work to a member surveying firm. LanData and Teranet also entered into an Implementation Services Agreement confirming that LanData would provide Implementation Services to Teranet. These Implementation Services included mapping as well as automation and conversion of registry documents and records, and maintenance of the land registration database and the POLARIS map. The Implementation Services Agreement stipulated that Ontario

¹ Matti Siemiatycki, *Public-Private Partnerships in Canada: Reflections on twenty years of practice* (2015), 58 *Canadian Public Administration* 343, at p. 347.

retained all right, title and interest in and to the land registration documents, including plans of survey. LanData disbanded in 1999. From that point on, Teranet contracted directly with individual surveyors and surveying firms. These contracts were made publicly available to any surveyor. In the period between 1991 and 2010, approximately \$40 million of the cost of creating the POLARIS map was paid to surveyors. Surveyors were responsible for a plethora of roles in the creation of POLARIS including field work, the preparation of digital files, data collection and the preparation of reports based on survey findings. In creating the automated electronic land registry system, the surveyors contracted for by Teranet relied on existing plans of survey. The conversion to an electronic land registry system was completed in 2010.

[9] Teranet now manages Ontario's electronic land registry system as a service provider to the government. Teranet acts pursuant to statutory authority and in accordance with the terms of implementation and licensing agreements with the province (*Electronic Land Registration Services Act, 2010*, S.O. 2010, c. 1, Sch. 6). Under these agreements, Ontario retains all rights, title and interest, including intellectual property rights, to the data used in the electronic land registry system, including plans of survey. The licensing agreement allows Teranet to access registry documents, which belong to Ontario, to facilitate the electronic land registry system.

[10] Since 1999, land registry documents could be registered electronically, with the sole exception of plans of survey. When plans of survey are registered and

deposited at a physical land registry office in Ontario, Teranet scans the plans of survey and adds this electronic information to its databases. Teranet provides electronic copies of plans of survey to the public for a statutorily prescribed fee. In certain circumstances, copies of the plan of survey are immediately distributed to a variety of persons and entities, including, for example, when an application for the first registration of a land parcel or the registration of a condominium plan is made (*Procedures and Records*, R.R.O. 1990, Reg. 690, to the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 3; *Description and Registration*, O. Reg. 49/01, to the *Condominium Act*, 1998, S.O. 1998, c. 19, s. 17).

[11] Teranet operates two service portals, Teraview and GeoWarehouse, through which licensed users can access Ontario's land registry documents, including plans of survey, for a statutorily prescribed fee, which, when viewed on either service is currently in the amount of \$16.30 per plan.²

[12] Teranet collects these statutorily prescribed fees on behalf of Ontario. According to an agreement between Ontario and Teranet, Teranet invoices Ontario for the services it has provided and is then paid by Ontario for the performance of those services.

² Of this \$16.30, \$5.00 is the statutory fee, \$10.00 is the fee incurred under the authority of the *Electronic Land Registration Services Act*, and \$1.30 is tax. In 2011, a Teraview license cost \$595.

[13] Land surveyors are required to use copies of plans of survey in order to fulfill their statutory and professional duties, which are codified in the *Surveyors Act*, R.S.O. 1990, c. S.29, and its accompanying regulations. When surveyors create a plan of survey, they must research all evidence related to the parcel of land being surveyed (O. Reg. 216/10). This evidence includes copies of registered plans of survey prepared in relation to the land being surveyed and the abutting lands (s. 8). Many surveyors routinely access registered plans of survey through Teranet's online service portals. The terms and conditions accompanying the licenses to these portals state that the intellectual property in the products accessed on Teraview or GeoWarehouse are either owned by Teranet's suppliers or have been licensed to Teranet.

[14] A web of legislation governs the deposit and registry of plans of survey, the format and content of these plans of survey, and the government's subsequent use of these documents. Ontario Regulation 43/96, made under the *Registry Act*, R.S.O. 1990, c. R.20, applies to plans registered and deposited under the *Registry Act* or *Land Titles Act*. Section 5(1) of this Regulation states:

... plans that are to be submitted for registration or deposit shall comply with,

- (a) the Act, or the *Land Titles Act* if the plan was prepared under that Act, and this Regulation;
- (b) the *Surveys Act* and the regulations made under it;
- (c) the Act and the regulations under which the plan was prepared; and
- (d) the *Surveyors Act* and the regulations made under it.

[15] In accordance with s. 165(1) of the *Land Titles Act*, all plans submitted for registration and deposit at a land registry office become the property of the Crown. Section 50(3) of the *Registry Act* similarly indicates that every registered instrument is the property of the Crown, while s. 18(1) states that all records created, used or maintained for the purposes of the land registry system are the property of the Crown.

[16] A plan of survey will not be accepted for registration or deposit when it contains any copyright mark, by words or symbols, on the face of the plan (s. 9(1)(e), O. Reg. 43/96 to the *Registry Act*; *Land Titles Act*, s. 164). In accordance with s. 14(1) of the *Land Titles Act*, the Deputy Minister is responsible for appointing an Examiner of Surveys, who carries out the duties prescribed by the land registration legislation, including the *Land Titles Act* and the *Registry Act*. The Examiner of Surveys is, in turn responsible for ordering the correction of any defect or omission in a registered or deposited plan of survey. Once a plan of survey has been registered or deposited, the surveyor is prohibited from amending the content of the plan without permission from the Examiner of Surveys. A person other than the surveyor who created the plan may also 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, s. 49(2)).

[17] This appeal arises from a motion to certify a class action brought by Keatley Surveying Ltd., a professional corporation owned and operated by Gordon R. Keatley, a professional land surveyor and member of the Association of Ontario Land Surveyors.

[18] In 2007, Keatley brought a motion to certify a 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 Teranet infringed surveyors' copyright by digitizing, storing and copying the plans of survey created by the surveyors and registered or deposited in the electronic land registry system.

[19] The class proceedings judge declined to certify the action (*Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120, 107 C.P.R. (4th) 237). Keatley revised its proposed list of common issues, and the Divisional Court certified the action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, with seven Common Issues (*Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677, 119 O.R. (3d) 497):

1. Does copyright under the *Copyright Act* [R.S.C. 1985, c. C-42] subsist in the Plans of Survey?
2. Does the 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?
3. Does the signed declaration affixed to the Plan of Survey at the time of registration and/or deposit constitute a signed written assignment of copyright to the Province of Ontario pursuant to subsection 13(4) of the *Copyright Act*?

4. Are Class Members deemed to have consented to any or all of the Alleged Uses by the Defendant of Plans of Survey as a result of the registration and/or deposit of those Plans of Survey to the Ontario Land Registry Office?
5. Did the Defendant make any or all of the Alleged Uses of Plans of Survey? If so, which ones?
6. If the answers to common issues 2 and 3 are no, do any or all of the Alleged Uses constitute:
 - a. uses that by the *Copyright Act* only the owner of the copyright has the right to do?
 - b. uses that are listed in paragraphs 27(2)(a) to (e) of the *Copyright Act* and that the Defendant knew or should have known infringes copyright? and if so, which ones?
7. Does the Defendant have a defence to copyright infringement based on public policy that would justify the Defendant making the Alleged Uses of Plans of Survey?

[20] Teranet's appeal of the certification decision to the Ontario Court of Appeal was dismissed (*Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d) 447).

[21] In early 2016, both Keatley and Teranet moved for summary judgment. Belobaba J. considered the seven Common Issues (*Keatley Surveying Ltd. v. Teranet Inc.*, 2016 ONSC 1717, 131 O.R. (3d) 703). The first — whether copyright subsists in the plans of survey — was not disputed. The parties agreed that plans of survey fall within the definition of an “artistic work” in s. 2 of the *Copyright Act*, which includes “drawings, maps, charts, [and] plans”.

[22] The second Common Issue — whether the copyright in the plans of survey belongs to the province of Ontario pursuant to s. 12 of the *Copyright Act* — was most intensely contested by the parties. Section 12 of the *Act* says:

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.

Teranet alleged that the plans of survey were “prepared or published by or under the direction or control” of the province, and therefore copyright belongs to the Crown.

[23] In Belobaba J.’s view, s. 12 has two prongs: the “prepared” prong and the “published” prong. In his opinion, plans of survey are not prepared “under the direction or control” of the province. Plans are generally prepared by surveyors at the request of private clients. While these plans must conform to statutorily prescribed guidelines, these guidelines speak to form and not content. If the plans of survey were found to be “prepared” under the direction or control of the province, it would mean that copyright in all plans of survey, even those that are never registered or deposited, would automatically belong to the Crown upon creation.

[24] Belobaba J. then considered whether the plans of survey were published under the province’s direction or control. He was not persuaded that, because the

digitization and publication of plans of survey registered or deposited at the land registry office is done under the direction or control of the province, it follows that the copyright in the documents belongs to the province. However, this was not dispositive because provincial statutes make clear that the property in the plans of survey, including copyright, is transferred to the province when they are registered or deposited at the land registry office. The province then has “control” of the plans of survey, and publications of these documents are done “by or under the direction of control of Her Majesty”. When this happens, s. 12 dictates that the copyright in these works belongs to the province for the prescribed term. In the result, the answer to the second Common Issue — the dispositive issue for Keatley’s claim — was that the copyright belongs to the Crown and therefore there was no copyright infringement.

[25] Belobaba J. considered the remaining certified Common Issues, starting with the third Common Issue, which was whether a signed declaration affixed to plans of survey at the time of registration or deposit constitutes an assignment of copyright to the province of Ontario pursuant to s. 13(4) of the *Copyright Act*. This declaration stated that the plan complied with all applicable Acts, regulations and practice standards. Because the declaration says nothing about copyright or an assignment of rights, Belobaba J. concluded there was no assignment of copyright.

[26] The fourth Common Issue was whether class members are deemed to have consented to the alleged uses of the plans of survey by Teranet as a result of the registration or deposit of those plans of survey. Because of the answer to the second

Common Issue, there was no need to inquire into the consent or deemed consent of the surveyors. As owner of the copyright in the plans of survey, the province could make and distribute copies of the documents.

[27] Belobaba J. concluded that the answer to the fifth Common Issue, which was whether Teranet made any of a number of alleged uses of the plans of survey, was yes. Teranet made use of the plans of survey in all of the ways alleged.

[28] The sixth Common Issue was whether any or all of the alleged uses constitute copyright infringement. Because the answer to the second Common Issue was yes, and the Crown has copyright in the registered and deposited plans of survey, the sixth Common Issue could not be answered. There was no need to consider the “fair dealing” defence. Similarly, the seventh Common Issue, which considered a public policy defence to copyright infringement, did not need be answered, as there was no copyright infringement.

[29] In the result, based on the answer to the second Common Issue, Teranet’s motion for summary judgment was allowed and Keatley’s class action was dismissed.

[30] Keatley appealed to the Court of Appeal. Teranet cross-appealed in relation to the other Common Issues. Doherty J.A., writing for the court, noted that it was uncontested that there is copyright in plans of survey prepared by surveyors since they are artistic works as defined in s. 2 of the *Copyright Act* (2017 ONCA 748, 139 O.R. (3d) 340). The land surveyor who prepares the plan of survey is the “author” of

the work and the first owner of the copyright in the work (*Copyright Act*, s. 13(1)). Doherty J.A. emphasized that surveyors are under no obligation to deposit or register plans of survey. Since land surveyors are capable of preventing any plan from being registered or deposited, there is no validity to the proposition that Teranet had expropriated the copyright of land surveyors whose plans are registered or deposited in the electronic land registry system.

[31] Doherty J.A. noted that s. 12 of the *Copyright Act*, which is closely modeled on the United Kingdom's *Copyright Act, 1911* (U.K.), 1 & 2 Geo. 5, c. 46, s. 18, has remained unchanged for nearly a century. Section 12's opening words, "[w]ithout prejudice to any rights or privileges of the Crown", is a reference to the Crown's common law prerogative to control the publication of a variety of materials, like statutes, and was not relevant to the disposition of the case.

[32] Doherty J.A. agreed with Belobaba J. that the plans of survey were not prepared by or under the control or direction of Her Majesty. The relevant inquiry was whether they were *published* by or under the direction or control of the Crown. Section 2.2(1)(a)(i) of the *Copyright Act* defines "publication" as "making copies of a work available to the public". Teranet, by the terms of the *Registry Act* and the *Land Titles Act*, is required to provide copies of the plans of survey to the public. There is no doubt then that Teranet "and hence, the Crown" publishes the plans of survey when they make copies of the plans available to the public (para. 31). Mere publication by the Crown does not suffice to vest copyright in the Crown pursuant to

s. 12. Instead, in order to meet the requirements of s. 12, this publication must be “by or under the control or direction of Her Majesty”.

[33] In order to determine whether a work is published under the direction or control of the Crown, the nature of the property rights held by the Crown at the time of publication must be considered. In Doherty J.A.’s 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” (para. 33). The nature of the rights held by the Crown at the time of publication are informed by a series of provincial statutes. Doherty J.A. considered the *types* of rights granted to the Crown by these statutes.

[34] First, the relevant provisions of these enactments transfer assorted *property* rights in the registered or deposited plans to the Crown. The physical plan must be filed in a land registry office (O. Reg. 43/96 to the *Registry Act*, s. 7). These plans then remain in the custody and possession of the Crown, and they are declared to be “the property of the Crown” (*Land Titles Act*, s. 165(1); *Registry Act*, ss. 18(10), 50(3)).

[35] Second, the statutory scheme places strict controls on the *form and content* of the registered and deposited plans of survey. Broad authority is given to the Examiner of Surveys to review, and, if necessary, modify the plans. Absent permission, the surveyor depositing the plan may not make subsequent changes to the plan. These provisions do not in and of themselves constitute “direction or control”

for the purposes of s. 12. They do, however, inform the inquiry into whether their publication occurs under the direction or control of the Crown.

[36] Third, the provisions of both the *Land Titles Act* and the *Registry Act* state that certified copies of the plans must be made available to the public upon payment of a prescribed fee. Statutory provisions which place an obligation on the Crown to make copies, speak to the nature and extent of the Crown's control over the publication of the plans. The statutory regime makes it clear that it is not the author who has control over making copies of the work.

[37] While custody and control are not the same as holding copyright in the plan, these statutory controls over the plans are relevant to the inquiry of whether the Crown's subsequent publication of the plans occurs under the Crown's direction or control. In Doherty J.A.'s view, this statutory regime gives the Crown complete control over registered and deposited plans of survey and complete control over the "publication" of these works within the meaning of s. 12 of the *Act*.

[38] As a result, the Court of Appeal dismissed Keatley's appeal and Teranet's cross-appeal. It declined to consider any of the additional Common Issues because Common Issue 2 was dispositive.

[39] Keatley appealed to this Court and Teranet cross-appealed in order to preserve its rights in relation to the remaining Common Issues.

Analysis

[40] Copyright in Canada is a creature of statute and the rights and remedies afforded by the *Copyright Act* are exhaustive (*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 5; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 9).

[41] The interpretation of s. 12 of the *Copyright Act* is at the core of this appeal. It states:

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.

[42] Section 12 of the *Copyright Act* has remained largely unchanged since 1921 when it was first enacted. Its interpretation is informed both by the words of the provision and the general purposes and objectives of the *Copyright Act*.

[43] As Binnie J. noted in *Théberge*, the *Copyright Act* aims to achieve “a balance between promoting the public interest in the encouragement and dissemination of works ... and obtaining a just reward for the creator” (para. 30). Creators’ rights must be recognized, but achieving the proper balance between the

Act's objectives requires curtailing their scope. As he said, “[i]n crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them” (para. 31).

[44] This Court’s post-*Théberge* jurisprudence has sought to calibrate the appropriate balance between creators’ rights and users’ rights. This balance infused the Court’s treatment of fair dealing in *CCH*, for example, where McLachlin C.J. noted that “the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right” (para. 48).

[45] In *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 (*SOCAN*), and *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345, the Court confirmed that fair dealing — and users’ rights — are to be given a large and liberal interpretation. In *SOCAN*, the Court emphasized the vital role played by users’ rights in promoting the public interest. The ability to access and use “works” within the meaning of the *Copyright Act*, are “central to developing a robustly cultured and intellectual public domain” (paras. 9-10).

[46] Fair dealing is, of course, only one component of Canada’s copyright law. It is, however, an emblematic one as it presents a clear snapshot of the general approach to copyright law in Canada — an approach which balances the rights of creators of works and their users. As Professor Michael Geist has noted, the users’

rights framework, so integral to Canadian copyright law, is “increasingly cited as the paradigm example for emphasizing both creator and user rights” (Michael Geist, “Introduction”, in Michael Geist, ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013), iii, at p. iv). All provisions of the *Copyright Act*, including s. 12, must be interpreted with this balance in mind so that the *Copyright Act* continues to further the public interest.

[47] This balance between creators’ rights and users’ rights must also inform the proper interpretation and scope to be given to s. 12 of the *Act*. The *sui generis* nature and purpose of Crown copyright make it uniquely amenable to realizing a balance between creators’ rights and users’ rights *within the scope of s. 12 itself*.

[48] The opening language of s. 12 — “[w]ithout prejudice to any rights or privileges of the Crown” — reflects the historical Crown prerogative over publishing. The prerogative power is characterized not as “copyright”, but rather as a “property right” which grants the Crown a monopoly on printing certain works in perpetuity (Elizabeth F. Judge, “Crown Copyright and Copyright Reform in Canada”, in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (2005), 550, at p. 557 (“Crown Copyright”).

[49] The incorporation of the Crown prerogative into the *Copyright Act* brought with it centuries of English law and history surrounding the scope of the prerogative power over publishing. With the development of the printing press, printing in England was considered to be a matter of state. Initially, *all* printing was

regulated by the Crown. The Crown's prerogative power over publishing in the seventeenth century was used as a censorship tool to suppress "treason" and "sedition" (David Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (2nd ed. 2001), at p. 134). The Crown *exercised* its prerogative rights by the grant in letters patent of exclusive licenses to print and publish those works (John Gilchrist, "Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England" (2011), 10 *Canberra L. Rev.* 139, at p. 140).

[50] The types of works which the Crown traditionally had the sole right to originally publish included works of religion, statutes and public documents and law reports (Harold G. Fox, "Copyright in Relation to the Crown and Universities with Special Reference to Canada" (1947-48), 7 *U.T.L.J.* 98, at pp. 108-16). In 1820, Joseph Chitty quoted from a speech delivered by Lord Erskine in 1779, arguing that the Crown's prerogative encompasses works which:

. . . upon just and rational principles of government, must ever belong to the executive magistrate in all countries, namely, the exclusive right to publish religious or civil constitutions — in a word, to promulgate every ordinance by which the subject is to live, and be governed. These always did, and from the very nature of civil government always ought, to belong to the Sovereign, and hence have gained the title of prerogative copies.

(*A Treatise in the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), at p. 239, quoting Thomas Erskine, *Speeches of Lord Erskine, While at the Bar*, vol. 1, James L. High, ed. (1876), at p. 61.)

[51] Justifications for the continued existence of the Crown prerogative over publishing include ensuring the preservation, authenticity, accuracy and reliability of

certain documents, while simultaneously retaining the discretion of the executive (*R. v. Bellman*, [1938] 3 D.L.R. 548 (N.B.S.C. (App. Div.))); Sebastian Payne, “The Royal Prerogative”, in Maurice Sunkin and Sebastian Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (1999), 77, at p. 87).

[52] Section 12’s reference to the Crown prerogative thereby preserves the Crown’s historic ability to publish certain works and have proprietary rights in those works. In a certain sense, the continued subsistence of the Crown prerogative is a derogation from the general rule that copyright is wholly a “creature of statute” (*Théberge*, at para. 5). The remainder of s. 12 provides a *statutory* basis for Crown copyright, which will subsist in any work “prepared or published by or under the direction or control of Her Majesty”.

[53] Similar rationales and purposes apply to statutory Crown copyright: to protect works prepared or published under the control of the Crown where it is necessary to guarantee authenticity, accuracy and integrity in the public interest (see Judge, “Crown Copyright”, at p. 553; David Vaver, “Copyright and the State in Canada and the United States” (1996), 10 *I.P.J.* 187; Judy Erola and Francis Fox, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act* (1984), at p. 76).

[54] But Crown copyright cannot be so expansive in scope that it allows for the routine expropriation of creators’ copyright in their works. As was noted in *Théberge*, the other half of the *Copyright Act*’s balance is “obtaining a just reward for

the creator”. There is also a danger of Crown copyright undermining the very purpose it was meant to serve if interpreted too expansively. Sweeping classes of works into the scope of Crown copyright, when such rights were heretofore unacknowledged as being subject to copyright at all, risks impeding the public interest in accessing these works and could compromise the existence of a robust public domain (see e.g. Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (1981), at Summary). Put differently, the Crown’s public interest in ensuring the accuracy and integrity of government documents cannot lead to such an expansive Crown copyright regime that the public interest in accessing information is harmed.

[55] Section 12 of the *Copyright Act*, irreverently described as a “legislative monstrosity” characterized by “atrocious drafting” (Torno, *Crown Copyright in Canada*, at p. 51³), has received little judicial attention. Copyright scholars and practitioners have, however, commented on the scope and operation of s. 12. Writing in 1947, Harold G. Fox cited what is now s. 12 (then s. 11) and observed:

Where, therefore, a work is prepared under the direction or control of the crown or a government department, the copyright will immediately vest in the crown and will remain there until publication, whenever that may occur, and for fifty years after publication. Where the work is independently prepared but is later published by or under the control of the crown or a government department, the copyright will remain in the author until publication when it will automatically pass to the crown, and there remain for the ensuing period of fifty years. In the case of a work prepared by or under the control of the crown or a government department the vesting of the copyright in the crown occurs quite apart

³ These “pejoratives” refer to counsel’s comment in *Attorney-General (N.S.W.) v. Butterworth & Co. (Australia) Ltd.* (1938), 38 S.R. (N.S.W.) 195, at p. 258 (S.C.), and the criticism made by the Patent and Trademark Institute of Canada in a 1978 brief to a copyright committee.

from the existence of a contract of service such as is required in the ordinary case of employment under section 12(b) [now s. 13(3)].

(“Copyright in Relation to the Crown”, at p. 105.)

[56] Dr. Fox went on to describe his view of s. 12’s reach:

The crown will have copyright in any work so long as it is published by or under such direction or control. Subject to any agreement with the author, the crown will have copyright merely by paying for the publication of a work or, even without paying for it, by having it published under the direction or control of the crown or a government department. This is a reversal of the usual position with respect to ownership of copyright, for the general basis of the statute is that copyright shall in the first instance be the property of the author . . . in the case of works prepared for or published by the crown or the government no contract of service is necessary to vest the copyright in the crown. [Footnotes omitted; p. 125.]

[57] The most recent edition of John S. McKeown’s *Fox Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at pp. 18:5(a)-(b), describes s. 12 of the *Act* as applying in two different situations:

First, where a work is prepared under the direction or control of the Crown or a government department, the copyright belongs to the Crown

Second, where the work is independently prepared but is later published by or under the control of the Crown or a government department

[58] Professors David Vaver and Elizabeth Judge, respectively, have commented on the uncertainty surrounding the scope of s. 12. Professor Vaver has

noted the potentially “striking . . . breadth” of s. 12 (“Copyright and the State”, at pp. 189-90). In his textbook, *Intellectual Property Law*, Professor Vaver said:

Difficulties with the British equivalent of this provision caused it to be eventually replaced there in 1988. One problem, which still exists in Canada, lies in deciding when an item has been produced under the government’s “direction or control”. This phrase tends to be interpreted narrowly — rightly so, since this provision is an exception from the standard principle that the author is the first owner of the copyright in what she creates. For the copyright to be the government’s, the production of the work must be the principal object, not a peripheral consequence, of the government’s direction or control. “Direction or control” exists only if the government prescribes how the work should be made, not if it is merely entitled to accept a voluntarily produced work that follows statutory specifications regulating form and content. The fact that the government can demand changes or veto publication, or refuse to accept the work for any reason, does not mean that the work is subject to its direction or control. [Footnotes omitted; at p. 134.]

[59] Professor Elizabeth Judge has commented that “[w]hat exactly Crown copyright covers is unfortunately murky” (“Crown Copyright”, at p. 556). She notes that

section 12 covers any work prepared or published under the direction and control of the Crown or any government department. Unless there is a contractual agreement that the individual author has copyright, the copyright in such works belongs to the government. This is one of the exceptions to the general presumption under copyright law that the author of a work is the first owner. To take an example, where an individual who is a government employee writes a report in the regular scope of her duties, the copyright belongs to the government unless there is an agreement to the contrary. Likewise, where an independent contractor prepares a report “under the direction or control” of the government, the copyright belongs to the government. [Footnote omitted; *ibid.*]

[60] It is worth noting that s. 13(3) of the *Act* states that an employer will be the first owner of the copyright of a work produced by an employee in the course of their employment, or some other person under a contract of service.⁴ This means that the Crown will own copyright in works produced by its employees created in the course of their employment. Because s. 13(3) generally only applies if the author is an employee and not a freelancer or independent contractor, a determination of whether the employer owns the copyright requires recourse to labour law principles. The relationship between the parties must be analysed to determine if the author is an independent contractor or under the control of whoever is paying him or her (*Intellectual Property Law*, at p. 125).

[61] This has led some commentators to suggest that, by the operation of s. 12 of the *Act*, independent contractors may have different intellectual property rights vis-à-vis the Crown than with other “employers”. Indeed, the New Zealand Court of Appeal has theorized that s. 12’s statutory progenitor, s. 18 of the *Copyright Act, 1911* (U.K.), was enacted partly to “make special provision for works written by Crown servants, as such traditionally were considered to hold office at will rather than under contracts of service” (*Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 N.Z.L.R. 261, at p. 273).

⁴ Section 13(3) of the *Copyright Act* says: “Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.”

[62] All this had led to two contrasting visions of Crown copyright being advanced by the parties in this appeal. Keatley argued for an interpretation of s. 12 which would, in effect, only apply to works *prepared* by or under the direction or control of Her Majesty. Section 12 would be tantamount to a “work for hire” provision. Teranet, on the other hand, proposed an interpretation of s. 12 which would allow *any* work to be caught by Crown copyright if the Crown simply publishes it on or in any platform. In my respectful view, the correct position is between these extremes.

[63] Section 12 states that the Crown will have copyright when a work is prepared or published by or under its direction or control. Critical to the assessment of whether Crown copyright subsists, is the notion and extent of government direction or control in relation to a work. As it is in the *Copyright Act* generally, the “work” is the lynchpin of s. 12. While it is true that s. 12 has two parts — the prepared prong and the published prong — these two “prongs” are different only to the extent that preparation and publication are different processes. The goal of the s. 12 inquiry in its entirety is to determine whether the degree of direction and control of the Crown over the preparation or publication of the work is sufficient to vest copyright in the Crown. While the manner of assessing whether the requisite degree of direction or control is present will necessarily vary depending on whether Crown copyright is asserted on the basis of preparation or publication, the overarching question remains: has the Crown exercised sufficient direction or control, consistent with the purposes of Crown copyright, that it can be said that Crown copyright subsists?

[64] Considering first when it can be said that a work was *prepared* by the Crown within the meaning of s. 12, it seems to me that two circumstances are broadly captured. A work will be prepared by the Crown when an agent or servant of the Crown brings the work into existence for and on behalf of the Crown in the course of his or her employment. In such circumstances, the Crown — including its agents and employees — has ultimate direction and control over the creation of a work.

[65] Similarly, a work will be prepared under the Crown's direction or control within the meaning of s. 12 when the Crown essentially determines whether and how a work will be made. In such circumstances, Crown copyright will subsist even though the Crown is not the "author" of the work because the Crown exercises direction or control over the work's creation. In this way, works produced by independent contractors who complete Crown commissions in which the Crown exercises the direction or control over the creation of the work will be subject to Crown copyright. As the reasons of Belobaba J. and Doherty J.A. note, the "prepared" branch of s. 12 does not extend to situations in which the Crown merely lays down formal requirements or guidelines for how a work should be made. I agree with Professor Vaver: a work will only be prepared under the Crown's direction or control if "the production of the work [is] . . . the principal object, not a peripheral consequence, of the government's direction or control" (*Intellectual Property Law*, at p. 134).

[66] This interpretation of what “prepared” means coheres with the general principles surrounding the ownership of copyright set out elsewhere in the *Act*, in particular, s. 13(3), which gives employers the copyright in works produced by employees in the course of their employment. While the Crown would already own the copyright in the works produced by its employees in the course of their employment, the “prepared” branch of s. 12 extends Crown copyright to works produced by independent contractors in circumstances where sufficient direction or control is present. In these two circumstances, the Crown exercises direction and control over both the person preparing the work and the work that is ultimately prepared.

[67] The evaluation of the Crown’s direction or control takes on a heightened importance in determining if a work was *published* by the Crown within the meaning of s. 12. Merely making someone else’s work available to the public is insufficient. This is because, unlike the “prepared” prong, the “published” prong — if interpreted expansively — profoundly derogates from the general scheme of the *Act* wherein the author of a work owns the copyright in it. The proper scope, therefore, should be conceptually symmetrical with the approach to “prepared”. Just as the Crown must cause the work to come into existence for the prepared branch to apply, a work will only 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 a work.

[68] Like Doherty J.A., I am of the view that determining whether a work was published with sufficient governmental direction or control to comply with s. 12 necessitates an inquiry into the Crown's interest in the works at the time of publication since this interest will demonstrate the degree of direction or control exercised by the Crown over the publication process. As with the "prepared" prong, the Crown must wield direction or control over the publication process, regardless of whether the works are published "by" the Crown itself, or by a third party under the Crown's "direction or control".

[69] In determining whether a work was published "by" the Crown for the purposes of s. 12, relevant *indicia* of governmental direction or control may include 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. It is only when it can be said that the Crown has sufficient governmental direction or control over the publication process that Crown copyright will subsist within the meaning of s. 12.

[70] These same factors are relevant to the inquiry of whether a work is published "under the direction or control" of the Crown when a third party is involved in the publication process. When it is a third party who does the actual publishing,

however, it will also be necessary to examine the direction or control exercised by the Crown over the third party publisher.

[71] Under both the prepared and published prongs of s. 12, therefore, the inquiry will always be whether the extent of the government's direction or control over the preparation or publication of the work are sufficiently extensive to vest copyright in the Crown. The prepared and published prongs of the s. 12 inquiry cohere: both necessitate an examination into the level of the Crown's direction or control over the person preparing or publishing the work and the work that is being prepared or published. While the inquiry may vary, the overarching task is the same — to measure the degree of direction or control exercised by the Crown in bringing about the creation or dissemination of a work.

[72] Does s. 12 operate to vest copyright in the Crown in the registered or deposited plans of survey? Again, I agree with Belobaba J. and Doherty J.A. that these plans of survey are not *prepared* by or under the direction or control of the Crown. As the motion judge observed, plans of survey are generally prepared at the request of private clients who contract with the surveyor. The Crown does not determine whether or not the plans of survey are made. They are not prepared by or under the direction or control of the Crown.

[73] This leads to the crux of the appeal: publication. Namely, are the registered and deposited plans of survey published by or under the direction or control of the Crown? Answering this question requires an examination into the

degree of direction or control exercised by the Crown over the publication process culminating in the published work.

[74] As Doherty J.A. stated, the nature and extent of the Crown's direction and control are informed by a comprehensive statutory regime governing land registration in Ontario. By the terms of the *Registry Act* and its regulations, the physical plan of survey must be filed at a land registry office (O. Reg. 43/96 to the *Registry Act*, s. 7). Once filed, registered or deposited, plans must generally remain in the exclusive custody and possession of the Crown, and these plans are "the property of the Crown" (*Land Titles Act*, s. 165(1); *Registry Act*, ss. 18(10), 50(3)). The statutory regime surrounding land registration also places strict controls on the form and content of the registered and deposited plans of survey (see O. Reg. 43/96, s. 5(1)), which states that plans submitted for registration or deposit shall comply with the provisions of the *Registry Act*, the *Land Titles Act*, the *Surveys Act*, R.S.O. 1990, c. S.30, and the *Surveyors Act*).

[75] This statutory regime also compels Ontario to make copies of the registered or deposited plans of survey available to the public for the payment of the prescribed fee (see e.g. *Land Titles Act*, s. 165(4); *Registry Act*, s. 17(4)). The right to make copies of a work is, of course, one of the essential elements of copyright (*Théberge*, at para. 42). Statutory provisions which give the Crown the right to control the making of copies suggest that the Crown possesses extensive control over the publication process. It is only the Crown that can control the dissemination of

registered and deposited plans of survey; no plan will be accepted for registration or deposit if it includes any notes, words or symbols indicating that the right to make or distribute copies of the plan is restricted in any way (O. Reg. 43/96, s. 9(1)(e)).

[76] As has been discussed in relation to when works can be said to be prepared by the Crown, and as Doherty J.A. noted, legislative provisions controlling the content and form of works cannot suffice to vest copyright in the Crown. However, these detailed rules governing content and form speak to the control exercised by the Crown in the publication of the official, published version of the plans of survey.

[77] It is particularly significant that the Crown has the power to amend the content of the plans of survey once registered or deposited. Once an individual surveyor deposits a plan, only the Examiner of Surveys can amend or correct the registered and deposited plans of survey. Someone other than the surveyor who created the plan is also able to apply to the Examiner for an order directing that a change be made to the registered or deposited plan. The post-registration powers given to the Examiner of Surveys reflect the government's significant direction and control of the publication process. It is the Crown, rather than the surveyor, who is ultimately responsible for ensuring that the plans of survey comply with all relevant statutory guidelines and that they are accurate, reliable and official. As Doherty J.A. observed, "[c]ommon sense . . . 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” (para. 38).

[78] Taken together, the provincial land registration regime gives the Crown complete control over the process of publication. The Crown has proprietary rights in the plan, and custody and control over the physical plans. The statutory scheme ensures that the Crown directs and controls the format and content of registered plans. Significantly, this control subsists after registration or deposit. It is only the Crown, through the Examiner of Surveys, who is able to alter the content of the plans, and only the Crown has ongoing control over and responsibility for the publishing process, including the final form of the work. Likewise, it is the Crown who — by validly enacted legislation — has the exclusive authority to make copies of the registered or deposited plans of survey.

[79] 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. The Crown directs and controls every aspect of the publication of the registered and deposited plans of survey. Because of the extent of this direction and control, copyright vests in the Crown by operation of s. 12 of the *Act* when the registered or deposited plans of survey are published. When it is the Crown that publishes the works by making them available through the Land Registry offices, the works are published “by” the Crown within the meaning of s. 12.

[80] These same *indicia* of direction and control surrounding the work being published apply when Teranet publishes the registered or deposited plans of survey by making them available on Teraview or GeoWarehouse. In order to determine whether Teranet, a third party, publishes the work under the Crown's direction or control, it is also necessary to examine the nature of the relationship between Teranet and the Crown. As described above, Teranet acts in accordance with the terms of implementation and licensing agreements with Ontario (*Electronic Land Registration Services Act, 2010*, Sch. 6). Teranet is not entitled to act outside the parameters of either its agreements with the Crown or the provisions of the statutory regime, summarized above. When it is Teranet that publishes the works by making them available on Teraview or GeoWarehouse, therefore, this publication is done under the Crown's "direction or control".

[81] When either the Crown *or* Teranet publishes the registered or deposited plans of survey, copyright vests in the Crown because the Crown exercises direction or control over the publication process, which includes both the publisher and the resulting publication. While the s. 12 test is a stringent one, it is readily met on the facts of this case.

[82] It is also important to note that this conclusion furthers the underlying purposes of Crown copyright. A key fact in this case is that registered and deposited plans of survey in the land registry system are intended to be relied upon by members of the public to determine property rights and obligations. It is for this very reason

that the Crown decided to create a single, authoritative registry. These are precisely the types of works over which Crown copyright should subsist — those over which it is necessary for the Crown to guarantee authenticity, accuracy and integrity in the public interest.

[83] I pause to emphasize that it is only the plans of survey that are registered or deposited in the land registry that are under the Crown’s direction or control. If plans are not registered or deposited, s. 12 is not engaged. As Doherty J.A. noted in the Court of Appeal, surveyors are under no obligation to deposit or register plans of survey in the land registry system. Surveyors can take a number of steps to actively *prevent* registration or deposit. Section 12 only applies to vest copyright in the Crown in registered or deposited plans of survey, published as part of an *opt-in* government scheme.

[84] Before Belobaba J., Keatley “apparently” took the position that there was no copyright infringement under the old, paper-based registry system. It was only the intercession of Teranet, a third-party for-profit entity, that led to the infringement of surveyors’ copyright. Before the Court of Appeal, Keatley repeated this point, but also argued that there was infringement under the paper-based system, but that this infringement was less egregious. These submissions merit several observations.

[85] As the holder of copyright in the plans of survey, the Crown is free to license the use of the works in the manner that it sees fit, which includes permitting Teranet to access, publish and make copies of the registered or deposited plans of

survey as Ontario's licensee. Ontario's choice to have Teranet manage the electronic land registry system was supported by duly enacted legislation and valid licensing agreements. All fees charged by Teranet are statutorily prescribed. As Belobaba J. succinctly put it "[t]he province had every right to do what it did".

[86] No claim for copyright infringement was made under the former paper-based land registry system. While it is not necessary for the purposes of this appeal to determine whether there was copyright infringement under the paper-based system, it seems to me that a similar level of direction and control were exercised by the Crown under the paper system. Ontario's reliance on new technologies post-digitization does not, in my view, change the assessment of whether the Crown had copyright by virtue of s. 12 of the *Act*. In fact, the principle of technological neutrality *demand*s that it does not.

[87] This Court's jurisprudence has repeatedly emphasized that technological neutrality is a fundamental tenet of copyright law. It "seeks to have the *Copyright Act* applied in such a way that operates consistently, regardless of the form of media involved, or its technological sophistication" (*SOCAN*, at para. 43, citing *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363, at para. 43). Technological neutrality requires "that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media" (*Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at para. 5 (*ESA*) (emphasis added)).

[88] In other words, the *Copyright Act* should not be interpreted or applied to either favour or discriminate against any form of technology (*ESA*, at para. 5; *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363, at para. 49; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 66). In *ESA*, for example, this Court relied on the principle of technological neutrality to conclude that there was “no practical difference between buying a durable copy of the work in the store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user” (para. 5).

[89] In my view, a similar logic applies here. There is no practical difference between obtaining a copy of a registered or deposited plan of survey from a physical land registry office or through Teraview or GeoWarehouse. And, as previously noted, Ontario was fully within its rights as copyright holder to enter into license agreements with Teranet. Because the Crown has copyright in the works by virtue of s. 12 of the *Copyright Act*, there is no infringement under the electronic registry system.

[90] A final note on s. 12. This provision is a century old. Since this is the first time this Court has reviewed its scope, our approach has taken into deliberative account the jurisprudential developments in copyright law in recent decades. Parliament is of course free to consider updating the provision in its current review as it sees fit.

[91] I would dismiss the appeal. It is therefore unnecessary to deal with Teranet's cross-appeal. I would not order costs in light of the novel jurisprudential issues involved.

The reasons of Wagner C.J. and Côté and Brown JJ. were delivered by

CÔTÉ AND BROWN JJ. —

[92] We have read our colleague's reasons. We agree that the Keatley's appeal should be dismissed, since copyright in plans of survey registered or deposited in the Land Registry Office belongs to the Province of Ontario under s. 12 of the *Copyright Act*, R.S.C. 1985, c. C-42. We disagree, however, with her interpretation of s. 12.

[93] We would adopt only our colleague's summary of the facts and procedural history (paras. 2-39).

[94] Section 12 of the *Copyright Act* states:

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.

[95] Statutory interpretation entails discerning Parliament's intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's schemes and objects (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[96] On its face, it would appear that the ordinary and grammatical sense of the text of s. 12 is clear: copyright in "any work" vests in the Crown where the Crown prepares or publishes the work, or a third party prepares or publishes the work under the Crown's direction or control. But the principles of statutory interpretation tell us that this is not the end of the discussion. In *Rizzo*, this Court recognized that "the legislature does not intend to produce absurd consequences", and that an interpretation is "absurd" if it "defeat[s] the purpose of a statute or render[s] some aspect of it pointless or futile" (*Rizzo*, at para. 27; citing R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 88).

[97] This looms large here, since a literal reading of s. 12 would result in an overly broad Crown copyright which sweeps aside the careful balance that Parliament struck between creators' and users' rights (see *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 30-31). Specifically, a literal reading would effectively empower the Crown to expropriate copyright from independent creators in any copyrightable work *merely by publishing the work itself*

or causing a third party to publish the work. For example, the Crown could publish a copy of *Barney's Version* on a government website, thereby stripping copyright from Mordecai Richler and vesting the copyright in itself — a plainly absurd result, which would grossly undermine both the balance preserved in the *Copyright Act* between users' and creators' rights, including the concept of just rewards for creators. All this, while doing little to actually increase the public interest in the dissemination of works. It is on this basis that we agree with our colleague that “Crown copyright cannot be so expansive in scope that it allows for the routine expropriation of creators' copyright in their works” (Abella J.'s reasons, at para. 54).

[98] Each of the courts below recognized the absurdity worked by a literal reading of s. 12 such that Crown copyright exists where a work is solely “published by” the Crown, and each expressly rejected it (Sup. Ct. reasons, 2016 ONSC 1717, 131 O.R. (3d) 703, at para. 37; C.A. reasons, 2017 ONCA 748, 139 O.R. (3d) 340, at para. 32). Their solution was to ignore the disjunctive nature of “direction or control”, and to consider only the level of governmental control over the works themselves. Our colleague has taken a similar view of s. 12 as requiring that the Crown have sufficient “direction or control” in the publishing process, which includes the work itself. In our respectful view, however, this reads out parts of s. 12 and distorts what is left.

[99] We would interpret “prepared or published by or under the direction or control” of the Crown according to its ordinary meaning. To avoid the absurd result

from interpreting *all* of s. 12 literally, however, we would adopt an interpretation whereby the copyright in a work is vested 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*. A government work is a work that serves a public purpose and in which vesting the copyright in the Crown furthers that purpose. This interpretation properly respects the language of s. 12, the purposes of Crown copyright and the balance which Parliament struck by enacting the *Copyright Act*.

[100] Since it is clear, based on the definition outlined above, that the registered or deposited plans of survey are government works published “by or under the direction or control” of the Province, we would hold that s. 12 vests copyright in these plans in the Province. We would therefore dismiss the appeal.

I. Interpretation of Section 12 of the *Copyright Act*

A. *“Prepared or Published by or under the Direction or Control”*

[101] As already canvassed, s. 12 states that copyright in a work belongs to the Crown where the work is or has been “prepared or published by or under the direction or control” of the Crown. The courts below correctly identified two “prongs” to s. 12: a “prepared” prong and a “published” prong (Sup. Ct. reasons, at para. 31; C.A. reasons, at paras. 30-31). We begin our analysis by explaining the proper meaning of “by or under the direction or control”, before turning to consider each “prong” in more detail.

(1) Meaning of “by or under the Direction or Control” in Section 12

[102] Section 12’s references to “prepared” and “published” are followed by the condition that such preparation or publication occur “by or under the direction or control” of the Crown. In our view, this should also be interpreted literally: the act of preparing or publishing the work must be done either by the Crown itself or under the Crown’s direction or control. A work is prepared or published *by* the Crown where the Crown prepares or publishes the work through an employee or agent. Preparation or publication *under the direction or control* of the Crown occurs where a third party does so at the behest of the Crown.

[103] In short, we would read the entirety of the phrase consistently, in each case inquiring into the person preparing or publishing the work, and into that person’s relationship to the Crown. This divides us from our colleague in this way: she would import into the statute a requirement that both the “prepared” prong and the “published” prong entail inquiring into whether the Crown has *sufficient direction or control in the work itself*. Specifically, a work is “prepared or published by or under the direction or control” of the Crown where the Crown has “sufficient” direction or control in the preparation or publication *process*, including the person preparing or publishing the work *and* the Crown’s interest in the work itself at the time of preparation or publication (Abella J.’s reasons, at paras. 63-71). But we see several difficulties with such an interpretation.

[104] First, an ordinary, grammatical reading of s. 12 does not support an inquiry into the Crown’s “direction or control” in the work itself. The language of “direction or control” in s. 12 is clearly connected to the verbs in the provision — “prepared” or “published”. By requiring “direction or control” over *the work itself*, our colleague erroneously disconnects this phrase from the work’s preparation or publication (see I.F. (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic), at para. 21). This is simply an unsustainable reading of s. 12, which speaks of “direction or control” over the *act* of preparation or publication, and not over the object being prepared or published.

[105] We are, further, unsure what it would mean for the Crown to have “direction” over a work. In this regard, it is telling that the elements of the provincial scheme considered both by our colleague and the courts below relate directly to the Province’s “*control*” of the physical plans of survey, and not its “*direction*” over them.

[106] Secondly, it is unclear on our colleague’s interpretation how “prepared or published by” could be read as requiring that the Crown have “direction or control”. According to our colleague’s interpretation, “[t]he evaluation of the Crown’s direction or control takes on a heightened importance in determining if a work was *published by* the Crown within the meaning of s. 12” (para. 67 (emphasis added)). She then states that “a work will only 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” (para. 67 (emphasis added)).

[107] “[B]y” and “direction or control” are separated by the word “or” in s. 12, thereby making them disjunctive. We therefore do not see on the text of s. 12 how any inquiry into the Crown’s “direction or control” could have any relevance to whether a work is “prepared or published by” the Crown. And, by requiring that the Crown have “direction or control” over the process, including the product, for the work to be “prepared or published by” the Crown, our colleague’s interpretation effectively collapses the “prepared or published by” and the “prepared or published under the direction or control” aspects of s. 12 into a single test. This rewrites s. 12, thereby eliminating any distinction between the Crown preparing or publishing a work itself and the government causing a third party to prepare or publish the work — a distinction that s. 12, as legislated, expressly mandates.

[108] Thirdly, the French text of s. 12 supports the interpretation that “direction” and “control” relate to the preparer or publisher and act of preparation or publication, but does not support its relation to the work itself.

[109] Indeed, reading s. 12 as requiring “direction or control” over the work itself is inconsistent with the French version of s. 12, which uses the phrase “*sous la direction ou la surveillance*” in place of the English phrase “under the direction or control”. The French word “*surveillance*” is the noun form of the verb “*surveiller*”, which can be defined as “[o]bserver avec une attention soutenue” ([TRANSLATION]

“observe with sustained attention”) or “[o]bserver attentivement, fixer son attention sur, pour éviter ou prévenir un danger, une action” ([TRANSLATION] “observe attentively, focus one’s attention on, in order to avoid or prevent a danger, an action”) (*Le Petit Robert* (2019), at p. 2477, “surveiller”). However, while an inanimate object can be under one’s “direction or control”, one cannot “surveiller” an inanimate object, at least not without literally observing it — something that we seriously doubt s. 12 requires for copyright to vest in the Crown. In the context of s. 12, “surveillance” only makes sense as relating to the preparer or publisher and to the activity of preparation or publication, and not to the work itself.

[110] Finally, our colleague’s interpretation provides no future guidance on how to determine where copyright vests in the Crown under s. 12. Our colleague’s reasons often refer to the test under s. 12 — particularly for the “published” prong — as a question of degree. For example, the test asks “whether the degree of direction and control of the Crown over the preparation or publication of the work is sufficient to vest copyright in the Crown” (para. 63 (emphasis added)) and “whether the extent of the government’s direction or control over the preparation or publication of the work are sufficiently extensive to vest copyright in the Crown” (para. 71 (emphasis added)); our colleague’s test requires “an examination into the degree of direction or control exercised by the Crown” (para. 73 (emphasis added)). This suggests a threshold *level* of “direction or control” that is sufficient to vest the Crown with copyright under s. 12.

[111] What we do not see in our colleague's reasons, however, is assistance in identifying when this threshold will be met in individual cases. We are told that s. 12 applies in this case because "the provincial land registration regime gives the Crown complete control over the process of publication" (para. 78 (emphasis added)). But *must* the Crown's control be "complete"? If "complete" control is not required, what lesser degree of direction or control will suffice? We are not told. Instead, our colleague simply describes the overarching question as whether the extent of direction and control is extensive enough for Crown copyright to exist. But this analysis is circular, as it effectively entails determining whether there is sufficient direction or control such that there is sufficient direction and control.

[112] This lack of guidance will inevitably create instability in Crown copyright — at least where the degree of government control falls short of the "complete" control found in this case.

[113] We would avoid these serious difficulties by asking simply 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, because inquiring into the identity of the preparer or publisher of the work and that person's relationship to the Crown will generate findings of fact, proceeding thusly provides far more certainty and predictability to all parties.

[114] Our interpretation of "published by or under the direction or control" is also consistent with the academic authorities cited by our colleague (paras. 55-59).

There is no mention in these authorities of a requirement that the Crown have “direction or control” over the work itself or that an inquiry into the Crown’s interest in the work is necessary. Rather, they acknowledge that s. 12 grants the Crown copyright in a work by preparing or publishing it or having the work prepared or published by a third party under the Crown’s direction or control. For example, Dr. Fox states that: “the [C]rown will have copyright merely by paying for the publication of a work or, even without paying for it, by having it published under the direction or control of the [C]rown or a government department” (H. G. Fox, “Copyright in Relation to the Crown and Universities with Special Reference to Canada (1947-48),” 7 *U.T.L.J.* 98, at p. 125 (emphasis added)).

[115] Further, although similarly not binding, our interpretation accords with that given to broadly similar Crown copyright provisions in other Commonwealth statutes. In *Copyright Agency Limited v. State of New South Wales*, [2007] FCAFC 80, 159 F.C.R. 213, rev’d on other grounds, [2008] HCA 35, 233 C.L.R. 279, the Federal Court of Australia considered a substantially similar issue to the one raised in this appeal: whether copyright belongs to the Crown in land survey plans registered in the local land registry system. Like s. 12, the relevant Australian Crown copyright legislation originated in s. 18 of the *Copyright Act, 1911* (U.K.), 1 & 2 Geo. 5, c. 46, and vested copyright in the Crown where works were prepared or published “by or under the direction or control” of the Crown (*Copyright Agency Limited*, at para. 121). Emmett J., writing for a majority of the court, explained, at para. 122:

Since the enactment of the 1911 Act, the phrase “by or under the direction or control of the [Crown]” has governed ownership of copyright by the Crown, both in works made by or under the direction or control of the Crown in its various manifestations, and works first published by or under the direction or control of the Crown. “By” is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. “Direction” and “control” are not concerned with the situation where the work is made by the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. [Emphasis omitted.]

At no point in his analysis did Emmett J. consider the government’s control over the *plans of survey themselves* to determine whether they were made or published “by or under the direction or control” of the Crown. (Similarly, Finkelstein J., writing separately, explained that “[t]he assumption that underlies each concept (direction and control) is the existence of a relationship between the Crown and the author that authorises the Crown to give the direction or exercise the control as the case may be” (para. 186).)

[116] Ultimately, the result in *Copyright Agency Limited* turned on whether the publication of the plans of survey “by or under the direction or control” of the Crown was the *first* publication, a statutory requirement in the Australian legislation that does not appear in s. 12 of the *Copyright Act*. But that does not detract from the significance of the finding of that court that the statutory text “by or under the direction or control” of the Crown refers to the Crown’s determination of whether to make or publish the work, and not to whether the Crown exercises sufficient control over the work.

[117] In sum, we would interpret “by or under the direction or control” of the Crown as relating to the acts of preparation or publication. This is satisfied either where the Crown prepares or publishes the work itself, or the work is prepared or published by a third party acting under the Crown’s direction or control.

(2) The “Prepared” Prong of Section 12

[118] A work is “prepared . . . by or under the direction or control” of the Crown where “the Crown is in a position to determine whether or not a work will be made” (*Copyright Agency Limited*, at para. 126). It is not sufficient for the purposes of the “prepared” prong for the Crown to determine that, if the work is to be made, it will be made a particular way (see *Copyright Agency Limited*, at para. 126; *Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 N.Z.L.R. 261, at pp. 272-73).

[119] We agree with our colleague’s conclusion, at paras. 64-65, that there are two circumstances in which the “prepared” prong is satisfied: where the work is prepared *by* the Crown and where the work is prepared *under the direction or control* of the Crown (Abella J.’s reasons, at paras. 64-65). A work is prepared *by* the Crown where an agent or servant of the Crown brings the work into existence in the course of his or her duties. A work is prepared *under the direction or control* of the Crown where the Crown determines that a third party shall make the work, for example by commissioning the work from an independent contractor. In either circumstance, the question is whether the Crown determines whether or not the work is made. If so,

copyright in the work belongs to the Crown, subject to any agreement with the author. If not, the author holds copyright in the work (*Copyright Act*, s. 13(1)).

[120] As explained above, we disagree that the inquiry into the “prepared” prong involves determining whether “the Crown exercises direction and control over both the person preparing the work and the work that is ultimately prepared” (Abella J.’s reasons, at para. 66). Rather, determining whether a work is “prepared . . . by or under the direction or control” of the Crown requires consideration only of the identity of the author and the relationship of that author to the Crown.

[121] There is no question here that the “prepared” prong is not satisfied with respect to the registered or deposited plans of survey. The plans of survey are not “prepared by” the Crown, since the surveyors are not Crown agents or employees. As well, the plans are not “prepared under the direction or control” of the Crown. Although the plans must conform with statutorily prescribed guidelines, these guidelines merely relate to form. The plans of survey are prepared voluntarily by surveyors at the request of private clients, and therefore, the Province does not determine whether or not the plans are made.

(3) The “Published” Prong of Section 12

[122] As with the “prepared” prong, the “published” prong of s. 12 is satisfied where the Crown decides that a work shall be published (*Copyright Agency Limited*, at para. 128). More specifically, a work is published *by* the Crown where the Crown

itself publishes the work and a work is published *under the direction or control* of the Crown where a third party, such as an independent contractor, publishes the work at the Crown's behest.

[123] In determining what it means for a work to be "published" for the purposes of s. 12, we would rely on the definition of "publication" in s. 2.2(1) of the *Copyright Act*. Section 2.2(1)(a)(i) states that "publication" means "making copies of a work available to the public". It follows that "to publish" means "to make a copy of a work available to the public" (*P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222, 161 C.P.R. (4th) 243, at para. 79).

[124] As to whether a work was "published" and whether that publication occurred "under the direction or control" of the Crown, the provincial statutory scheme may be relevant to the extent that it demonstrates that a work is made available to the public and that the third party publisher is acting under the Crown's direction or control.

[125] There is no doubt in this case that the plans of survey are made available to the public and are therefore "published". Under s. 15(4) of the *Registry Act*, R.S.O. 1990, c. R.20, and s. 165(4) of the *Land Titles Act*, R.S.O. 1990, c. L.5, the registrar *must* provide a copy of registered surveys upon payment of a prescribed fee. In this way, it is statutorily required that the surveys be made available to the public. The deposited and registered plans of survey are therefore both "published by" the Province and published by Teranet under the Province's direction or control, since the

Province makes the plans available in the Land Registry Office, and Teranet makes the plans available to subscribers of its platforms (in accordance with the *Electronic Land Registration Services Act, 2010*, S.O. 2010, c. 1, Sch. 6, and under its contract with the Province). The Province's arrangement with Teranet is important, since Teranet assumes thereunder the role of a service provider to the Province (Sup. Ct. reasons, at para. 21) such that, when Teranet makes the plans of survey available to the public, it is acting under the Province's direction and control. Meaning, it is *the Province* that is deciding to publish the work. Here, we are agreeing with the Court of Appeal 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" (para. 31).

B. *Section 12 is Confined to "Government Works"*

[126] The fact that the plans of survey were published "by or under the direction or control" of the Crown is not the end of the s. 12 analysis. While we would read the "prepared" and "published" prongs of the provision as the statutory language demands, s. 12 clearly requires more for copyright to vest in the Crown. As we have explained, reading s. 12 literally leads to an absurdity. This is avoided by giving effect to s. 12's application to the particular category of works that Parliament intended: *not* to any and every work, but to what we will call "government works".

[127] It follows that, once a court is satisfied that a work was "prepared or published by or under the direction or control" of the Crown, it must then consider

whether, at the time of preparation or publication, the work is a “government work”. This entails examining the character and purpose of the work. The work will be a “government work” where the work serves a public purpose and Crown copyright furthers the fulfillment of that purposes. These will be works in which the government has an important interest concerning their accuracy, integrity, and dissemination.

[128] Understanding the scope of s. 12 in this way is consistent with the text, context, purpose, and history of s. 12, as well as the purposes of the *Copyright Act*. First, this interpretation does not read out any words from the text of the provision and it maintains proper parity between the “prepared” and “published” prongs. As we have already noted, it respects Parliament’s chosen text by construing “prepared or published by or under the direction or control” of the Crown as intended, while also confining it to the category of works that was intended.

[129] Secondly, the opening words of the provision (“[w]ithout prejudice to any rights or privileges of the Crown”) — which is widely accepted to refer to the Crown’s prerogative power to control publishing — is also part of the context of s. 12 that must be accounted for when interpreting the rights conferred in the rest of the provision (D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 134-35; B. Torno, *Crown Copyright in Canada: A Legacy of Confusion* (1981), at p. 3; J. S. McKeown, *Fox Canadian Law of Copyright and Industrial Design* (4th ed. (loose-leaf)), at pp. 18-3—18-4). While the Crown

prerogative over publishing was historically quite broad, it referred, by the early 20th century, to “the sole right of printing a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive” (*R. v. Bellman*, [1938] 3 D.L.R. 548 (N.B.S.C. (App. Div.)), at p. 553), including statutes, orders-in-council, state papers, proclamations, admiralty charts, various authorized versions of religious texts (in the U.K.), and possibly judicial decisions (see Vaver, “Copyright and the State in Canada and the United States” (1996), 10 *I.P.J.* 187, at p. 189; McKeown, at pp. 18-6—18-9; Torno, at p. 3). At the time s. 12 was originally enacted, then, the prerogative was clearly the source of the Crown’s exclusive right to publish specific categories of “public” works. By conditioning s. 12’s operation such that the Crown’s statutory copyright is “[w]ithout prejudice” to this prerogative, then, Parliament clearly intended that the types of works historically caught by the prerogative would animate the scope of works captured by the rest of s. 12. That is, Parliament wished to preserve the Crown’s exclusive right to publish these particular works, while also expanding it to a greater catalogue of works of a similar public character — provided, of course, that the Crown was responsible for their preparation or publication.

[130] Thirdly, this interpretation is bolstered by s. 12’s legislative history. The original marginal note that accompanied s. 18 of the *Copyright Act, 1911* (U.K.) — from which, as we have already noted, s. 12 originated — referred to “Provisions as to Government publications”. This suggests the nature of the work that the provision intended to cover.

[131] The fact that the Crown copyright provision is restricted to government works was acknowledged by commentators at the time that it was initially enacted. L. C. F. Oldfield, writing shortly after the passage of the *Copyright Act, 1911* (U.K.), explained that the Crown copyright section “substantially reproduces the old law, that copyright in government publications belongs to the Crown” (*The Law of Copyright* (1912), at p. 111 (emphasis added); see also *Glogau*, at pp. 272-73). In support, he referred to an 1887 Treasury Minute which classified “government publications” into a number of categories, including reports of select committees of the Houses of Parliament, papers laid before Parliament, official books such as regulations for the army, charts and ordinance maps, and literary or quasi-literary works such as the reports of the Challenger Expedition and state trials. It is clear, then, that, from the start, s. 12 was intended to apply only to a category of works which were of a public or governmental nature.

[132] Fourthly, an interpretation that restricts Crown copyright to government works is harmonious with the objectives of s. 12. This interpretation ensures that Crown copyright is extended to works only where doing so furthers the underlying purposes of Crown copyright. Those purposes have been identified as ensuring accuracy and integrity of works. (E. Judge, “Crown Copyright and Copyright Reform in Canada” in M. Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (2005), at pp. 551 and 554; Vaver (1996), at pp. 199-200 and 211-12). Professor Judge explains:

Given a world in which printing was the method of disseminating government information, where piracy and forgery were rife, and where the printed word might circulate far in time and space from the originator of the words, it made some sense for the Crown to exert control over the printer by asserting ownership in the content in order to ensure that the public received accurate and (relatively) timely works in full. [p. 554]

[133] This makes sense: it is important for people to be able to trust the authenticity of government works, particularly those that describe legal or moral obligations (Vaver (1996), at pp. 199-200). To this list, Professors Vaver and Judge add another purpose of Crown copyright: to enable the government to control dissemination of government works (Vaver (1996), at pp. 203-5; Judge, at pp. 572-73). This includes both ensuring wide dissemination of works of public importance (by granting the Crown the right to reproduce them), and restricting dissemination (to ensure that works are not being used for improper purposes).

[134] These purposes clearly explain why Parliament would allow the government to grant itself copyright in a government work through the act of preparing or publishing the work or directing or controlling its preparation or publication. By owning copyright in works of a public character, the Crown can ensure their accuracy, reliability, and appropriate dissemination.

[135] Further, these purposes inform what works are government works covered by s. 12, by clarifying that s. 12 applies to works of a public character — that is, where they serve a *public purpose*. These will be works for which accuracy, integrity and dissemination will be important for the works to effectively fulfill their

public purposes. In determining whether a particular work is a government work, then, the purpose of the work must be considered. Section 12 gives the Crown copyright in works where it would be detrimental to the public interest to have multiple versions available, containing potentially different and contradictory information. It applies to works which the public will rely upon, such that there is a public interest in knowing where to obtain copies of the work and receiving authentic versions. Additionally, it covers works to which many people may need access, such that limited dissemination would not be in the public interest, and works to which access may be restricted in the public interest.

[136] The mere fact that the government has a work prepared or published is not itself conclusive that the work serves a public purpose. For s. 12 to apply, the court must be satisfied that the work serves such a purpose, and that giving the Crown copyright to allow it to ensure the accuracy, integrity and appropriate dissemination of the work assists the work in fulfilling that purpose.

[137] We would note that a legislative scheme related to the work — either federal or provincial — may be relevant to determine the purpose of a work and whether accuracy, integrity and dissemination are important for the work to fulfill its intended purpose. For example, the fact that the government is given the exclusive right to make modifications to a work may indicate the importance of accuracy. Ultimately, however, a work is a government work where it 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. Where the work is also prepared or published by or under the direction or control of the Crown, the copyright in the work will vest in the Crown pursuant to s. 12.

[138] It is important to note that the restriction of Crown copyright to government works applies *throughout* s. 12. Accordingly, for copyright to vest in the Crown, the work must fall within this category, irrespective of whether the Crown is responsible for its preparation, publication, or both. It is, however, likely that deciding the nature and purposes of the work will be more important where the government seeks to rely on the “published” prong of s. 12; under the “prepared” prong, once it is determined that an employee or independent contractor of the government prepared the work in the course of employment or a contract with the government, the public nature of the work — and the importance of accuracy, integrity, and dissemination — will usually be apparent.

[139] Our colleague appears to accept that accuracy and integrity are important objectives of Crown copyright (although she does not specifically mention dissemination in this regard) (see paras. 51 and 53). She describes her test under s. 12 as asking whether “the Crown [has] exercised sufficient direction or control, consistent with the purposes of Crown copyright, that it can be said that Crown copyright subsists?” (para. 63 (emphasis added)). It is far from clear, however, how this qualification applies under her approach. We are not told whether courts must independently assess whether the purposes of Crown copyright are being furthered in

a particular case. Nor are we told whether s. 12 applies where the Crown exercises “complete” control in a work, but has little interest in the accuracy, integrity or dissemination of the work. In short, while raising the point, our colleague does not explain precisely how the purposes of Crown copyright affect s. 12’s applicability, as she sees it.

[140] Finally, we would add that interpreting the text of s. 12 as we have protects the balance between the rights of creators and users that lies at the heart of the *Copyright Act*. It preserves just rewards for creators by confining the Crown’s acquisition of copyright under s. 12 to works that are “public” in nature, and it prevents the Crown from abusing this power by expropriating copyright in private works from their creators through the mere act of publication. Under our colleague’s interpretation, such an abuse is possible where a legislature enacts a legislative regime granting the Crown “complete” control over a physical copy of a private work. Further, our interpretation protects *users’* rights by ensuring appropriate dissemination of works that are important to the public. Ultimately, this interpretation confines the ambit of s. 12 to the types of works that the provision was always intended to cover, and no more.

[141] While s. 12 refers to Crown copyright in “any work”, this text does not foreclose our interpretation. The use of the phrase “any work” in s. 12 conveys that the Crown may obtain copyright in a work under s. 12 regardless of the “type” of work. The *Copyright Act* does not exhaustively define the term “work”. It does,

however, define different types of works, including architectural works, artistic works, cinematographic works, collective works, dramatic works, literary works, and musical works (*Copyright Act*, s. 2). The reference to “any work” in s. 12 therefore plainly means that the Crown is able to obtain copyright in any of those types of government works (architectural, artistic, cinematographic, etc.) covered by the *Copyright Act*, provided that the requirements of the section are satisfied.

[142] Multiple interveners in this case raised concerns regarding the copyright status of what they termed “primary sources of law” or “public legal documents”, encompassing statutes, regulations and judicial decisions. They advanced public policy arguments as to why such documents should be excluded from the scope of s. 12 and why no entity — including the Crown — should hold the copyright in them. In our view, determining the proper copyright status of these legal documents raises unique and complicated issues that are beyond the scope of this case. Therefore, we leave this issue for another day in which the Court has received full submissions on the issue.

[143] As to the plans of survey at issue in this case, it is clear that they are government works to which s. 12, properly interpreted, applies. They have a clear public character, as they define and illustrate the legal boundaries of land within the Province. This information is of the highest public importance, clarifying land ownership, and allowing landowners and users to govern their affairs accordingly. Therefore, the works serve a public purpose within the Province.

[144] Crown copyright in this information is of similar importance. People rely on the accuracy of survey plans for determining their interest in property and facilitating land transactions. The Crown has a strong interest in the integrity of the land registry system and in public access to accurate versions of surveys. (Indeed, the fact that only the Examiner of Surveys can amend deposited or registered plans of survey demonstrates just how crucial accurate survey plans are to the system.) By holding copyright in the plans, the Crown can restrict the ability of a surveyor or other private party to make alterations to the plans and then sell or distribute them privately. By asserting Crown copyright, the government can ensure that survey plans obtained from the Land Registry Office or from Teranet are accurate. As well, because survey plans are so widely relied upon, it is important to ensure wide public availability so that whomever requires access to them can obtain it. In this regard, the pertinent statutes actually *require* the Province to make the plans available to the public for a prescribed fee (*Land Titles Act*, s. 165(4); *Registry Act*, s. 15(4)). Were private surveyors to continue to hold the copyright in the registered and deposited plans of survey, they could restrict the Crown's ability to ensure the plans are disseminated widely. The record indicates that accuracy, integrity, and dissemination of the works in question are of great importance to the proper functioning of the land registry system in Ontario.

[145] All of these considerations support the conclusion that the registered or deposited plans of survey are government works once published by Teranet and/or the Land Registry Office. We agree with our colleague that “[t]hese are precisely the

types of works over which Crown copyright should subsist — those over which it is necessary for the Crown to guarantee authenticity, accuracy and integrity in the public interest” (para. 82). Indeed, if these plans of survey do not qualify as government works, we would be at loss to know what would.

[146] As the registered and deposited plans of survey are government works when they are “published by or under the direction or control” of the Province, copyright in them is vested in the Crown under s. 12, and not in the original surveyors. This copyright vests in the Crown from the first time the works are published “by or under the direction or control” of the Province and continues “for the remainder of the calendar year of [that] first publication of the work and for a period of fifty years following the end of that calendar year”.

II. Disposition

[147] We would dismiss the appeal. We agree with our colleague that it is unnecessary to consider Teranet’s cross-appeal and would dismiss it as moot.

Appeal dismissed without costs.

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