S.C.C. FILE NO. 37863

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

KEATLEY SURVEYING LTD.

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant/Respondent
by way of cross-appeal)

AND:

TERANET INC.

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Respondent/Appellant
by way of cross-appeal)

AND:

ATTORNEY GENERAL OF ONTARIO

INTERVENER
(Intervener)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This is a copyright infringement class action brought by licensed Ontario land surveyors against Teranet Inc., a private corporation that has entered into an agreement with the Province of Ontario with respect to Ontario's electronic land registration system. As a result of this agreement, Teranet has been given access to and a purported "exclusive" right to use plans of survey that are created by surveyors for private clients and filed at an Ontario Land Registry Office ("LRO").

2. Teranet creates electronic copies of the plans of survey, adds them to a database, and then sells access to the database and the plans of survey contained therein to certain members of the public, namely those who have purchased a licence to use Teranet's proprietary software. Although implicit in this arrangement is a recognition that the plans of survey have economic value, all of this occurs without providing any compensation to the surveyors who created them.

3. Land surveyors are highly skilled, self-regulated professionals who prepare plans of survey of properties. A plan of survey is an expression of a surveyor's opinion of the extent of title to the property under survey following a thorough documentary and field investigation.

4. It is agreed by all parties, and the trial judge so found, that plans of survey constitute "artistic works" as defined under s. 2 of the *Copyright Act* and are thus entitled to copyright protection.

5. The approach to resolving a claim of this nature would normally be quite straightforward. The surveyors, as creators of the plans of survey, would hold copyright in their works; and Teranet, by reproducing, making available, and communicating those works without authorization, would be liable for infringing surveyors' copyright, subject to establishing that its profit-making scheme constituted fair dealing under s. 29 of the *Copyright Act* or was carried out pursuant to a licence granted by the surveyors.

6. Teranet did rely on fair dealing and other defences to this act of infringement. However, it also relied on section 12 of the *Copyright Act*, an arcane and rarely used provision that vests

copyright in the Crown for any work "prepared or published by or under the direction or control of Her Majesty or any governmental department." Section 12 has two branches to it: (1) works that are prepared under the direction or control of the Crown and (2) works that are published under the direction or control of the Crown. Teranet contends that the plans of survey submitted to LROs are prepared under the direction or control of the Crown; and when they are subsequently made available to members of the public, they are published under the direction or control of the Crown. In either instance, Teranet contends, the Province of Ontario acquires copyright in the plans of survey; and since Teranet operates pursuant to a licence granted by the Province it cannot be liable for copyright infringement.

7. If Teranet's argument is accepted, it means that the surveyors, who are creators of the work from which Teranet is profiting, have lost their copyright simply because their plans of survey have been submitted to a provincial government department in order to comply with governmental filing requirements or because that department subsequently makes copies of their work available to the public.

8. The courts below rejected Teranet's argument that survey plans are "prepared" under the direction or control of the Crown. However, both courts found (albeit for different reasons) that they are "published" under the direction or control of the Crown. Accordingly, the courts below found that the Province of Ontario owned copyright in the surveyors' plans of survey under s. 12. Because Teranet does what it does with surveyors' plans of survey under a licence agreement with the copyright holder (according to the courts below, now no longer the surveyors but the Province of Ontario under s. 12), the surveyors' action was dismissed.

9. It is submitted that s. 12 was not intended to divest the creator of a work of his or her copyright in such circumstances. Rather it was meant to protect the integrity of government-created or government-commissioned works and to establish the term of the government's copyright in such materials. A plan of survey created by a licensed surveyor that is filed at a LRO at the behest of a private client falls well outside the intended scope of s. 12.

10. The proper interpretation of s. 12 is challenging. It has been described as a "legislative monstrosity" owing to the ambiguity in drafting.[1] Read broadly in favour of the Crown, s. 12 would expropriate pre-existing copyright from the creator of a work whenever the work is filed with a government department to comply with regulatory requirements or whenever the government subsequently makes a copy of such work available to members of the public. Read more narrowly in favour of the creator of the work, s. 12 would limit Crown copyright to works commissioned by the government or created by its employees.

11. Neither of the courts below engaged in the full analysis required by the modern approach to statutory interpretation to decide which of these (or other possible) interpretations is correct. In the first place, neither court referred to the historical reasons for Crown copyright which included assuring the accuracy of government-created or government-commissioned documents that are made available to members of the public. This supports a narrower interpretation of s. 12 in favour of the creator of a work.

12. The courts below also failed to give any consideration to the overarching purpose of the *Copyright Act*. This Court has stated that a proper application of copyright law requires a balance to be struck between providing a just reward for the creator of a work and the public interest in the dissemination of works. Permitting Crown copyright to divest the creator of a work that was not prepared by or at the behest of the government for governmental purposes (nor paid for by government), but prepared for private clients and then filed to comply with regulatory requirements represents a significant imbalance in the approach to copyright.

13. If this Court accepts the surveyors' position of a balanced, more limited scope to Crown copyright it will mean that the surveyors have not been stripped of copyright over their works under s. 12 merely because those works were submitted under provincial legislation or subsequently made available to the public pursuant to that legislation (common issue two in the class action). In that case, Teranet's use of their plans of survey may still be assessed under the fair dealing provision of the *Copyright Act* (common issue six in the class action) and other

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[1] Torno, Barry, Crown Copyright in Canada: A Legacy of Confusion (Ottawa: Consumer and Corporate Affairs Canada 1981) [Torno] at 49 (Appellant's Book of Authorities ("ABA"), Tab 2), citing *The Attorney-General for New South Wales v. Butterworth & Co. (Australia Ltd.)*, 38 S.R. (N.S.W.) 195 at 258.

defences raised by Teranet. But the copyright will reside where it should: in the creators of the works, the surveyors.[2]

B. Facts and Proceedings Below

(1) Land Surveyors and Plans of Survey

14. The appellant is a professional corporation engaged in land surveying in Ontario. It is owned and operated by Gordon Keatley, a licensed land surveyor.[3] The appellant brought this class action on behalf of the following certified class of land surveyors:

> All land surveyors, whether acting as individuals, corporations, or partnerships in Ontario who on or before March 26, 2014 were the (a) author of a plan of survey; or (b) employer of the land surveyor at the time the plan was made; or (c) an assignee of either an author or employer, whose plan of survey appeared at any time in the defendant's electronic database.[4]

15. Land surveyors are professionals who are trained and authorized to prepare plans of survey. They are licensed and governed by the Association of Ontario Land Surveyors ("AOLS") under the *Surveyors Act*.[5] They have been licensed to perform their functions since 1892.[6]

16. To qualify as a licensed land surveyor in Ontario, a person is normally required to have a university degree in Survey Science/Engineering and must article for a minimum of 18 months. They must demonstrate knowledge and good judgment by passing both oral and written professional entrance exams.[7]

17. As defined in the *Surveyors Act*, the "practice of professional surveying' means the determination or analysis of spatial attributes of natural and artificial features on, above or below the surface of the earth, whether or not the surface of the earth is situated below water, and the

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[2] Neither of the courts below addressed fair dealing because of their findings on Crown copyright.
[3] Affidavit of Gordon Keatley, sworn September 15, 2011 [Keatley Affidavit], para. 1 (Appellant's Record ("AR"), Vol. V, Tab 73, p. 140).
[4] Certification Order dated March 26, 2014 (AR, Vol. I, Tab 4, pp. 82-83).
[5] *Surveyors Act*, R.S.O. 1990, c. S.29 [*Surveyors Act*].
[6] Affidavit of Tom Bunker, sworn September 15, 2011 [Bunker Affidavit], para. 9 (AR, Vol. V, Tab 52, p. 4).
[7] Bunker Affidavit, para. 8 (AR, Vol. V, Tab 52, p. 4).

storage and representation of such features on a chart, map, plan or graphic representation, and includes the practice of cadastral surveying".[8]

18. The "'practice of cadastral surveying' means advising on, reporting on, conducting, or supervising the conducting of surveys to establish, locate, define or describe lines, boundaries, or corners of parcels of land or land covered with water".[9] Only a licensed surveyor can "engage in the practice of cadastral surveying or hold himself or herself out as engaging in such a practice."[10]

19. A plan of survey is the expression of a surveyor's opinion of the extent of title to the property being surveyed following a thorough documentary and field investigation. Preparing a plan of survey requires considerable time, skill and judgment.[11]

20. Surveyors create plans of survey as a result of requests by their clients.[12] These plans of survey may be subsequently registered or deposited at a LRO to enable dealings with the lands described therein in accordance with provincial legislation that governs the granting of an interest in the land. Whether a survey must be registered or deposited depends on the ultimate purpose for which they were created.[13] At issue in this proceeding are the voluminous plans of survey created by the appellant and the class that are required to be registered or deposited at LROs.[14]

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[8] *Surveyors Act*, s. 1(1).
[9] *Surveyors Act*, s. 1(1).
[10] *Surveyors Act*, s. 11(1).
[11] Bunker Affidavit, paras. 18-20 (AR, Vol. V, Tab 52, p. 7).
[12] Reasons of Motion Judge, para. 32 (AR, Vol. I, Tab 7, p. 149).
[13] A plan that is registered is one that automatically creates a new property interest while a plan that is deposited has no effect on title but is used only as a reference in registered title documents: see definition of terms in Bunker Affidavit, para. 5 (AR, Vol V, Tab 52, p. 3). In both situations, the plan of survey is filed at a LRO: see Affidavit of Douglas Alan Buckle, sworn August 8, 2011 [Buckle Affidavit], para. 8 (AR, Vol. IV, Tab 35, p. 3).
[14] See ss. 145(2) and 150(1) of the *Land Titles Act*, R.S.O. 1990, c. L.5 [*Land Titles Act*], which address when plans of survey must be registered or deposited.

(2) Copying and Selling Plans of Survey

21. Historically, LROs operated as central repositories of paper documents, including plans of survey.[15] Persons wishing to view copies of plans of survey could do so by attending at a LRO.[16] Prior to the advent of the photocopier, a person could obtain a copy of a plan of survey from the land surveyor who had a "blueprint machine"[17] or through a laborious hand transcription.[18] Once photocopiers were invented, a person could obtain a copy at a LRO upon payment of a fee.[19] No part of the fee was paid to surveyors.[20]

22. During the 1970s and 80s, the Ontario government was considering the automation of land registration records in Ontario and the creation of a digital index map of all land parcels (known as "Polaris").[21] Originally, there was no intention on the part of the Province to privatize Polaris.[22] In the late 1980s, the Province was approached by third parties and asked to consider a partnership model with the private sector.[23] In 1991, Teranet was incorporated to implement Polaris across all Ontario LROs.[24] The initial index mapping project was completed in June 2010.[25]

23. Land surveyors generally supported the Polaris project as it was hoped that it would assist in the reorganization of the paper-based registration system. A number of surveyors were hired to assist in the creation of the digital index map. This involved taking information from plans of survey and using it to create property index maps. The surveyors who were privately engaged to

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[15] Affidavit of Arthur Daniels, sworn July 28, 2011 [Daniels Affidavit], paras. 6-12 (AR, Vol III, Tab 32, pp. 33-35).
[16] Daniels Affidavit, para. 9 (AR, Vol III, Tab 32, p. 34).
[17] Cross-Examination of Tom Bunker dated November 29, 2011, qq. 347-50 (AR, Vol. VIII, Tab 100, pp. 69-70).
[18] Bunker Affidavit, para. 105 (AR, Vol. V., Tab 52, p. 26).
[19] Buckle Affidavit, paras. 15-16 (AR, Vol. IV, Tab 35, p. 4).
[20] Buckle Affidavit, para. 16 (AR, Vol. IV, Tab 35, p. 5).
[21] Daniels Affidavit, para. 16 (AR, Vol. III, Tab 32, p. 35); Exhibit D to Daniels Affidavit, p. 3 (AR, Vol. III, Tab 33, p. 47).
[22] Cross-Examination of Arthur Daniels dated November 22, 2011, q. 164 (AR, Vol. VI, Tab 96, p. 72).
[23] Daniels Affidavit, para. 23 (AR, Vol. III, Tab 32, p. 37).
[24] Court of Appeal Reasons, para. 12 (AR, Vol. I, Tab 9, p. 162); Buckle Affidavit, para. 17 (AR, Vol. IV, Tab 35, p. 5); Bunker Affidavit, para. 112 (AR, Vol. V, Tab 52, p. 28); Statement of Defence, paras. 4, 35 (AR, Vol. II, Tab 12, pp. 1, 9).
[25] Buckle Affidavit, paras. 51, 72-73 (AR, Vol. IV, Tab 35, pp. 13, 18).

assist in this process were paid for this work.[26] The Polaris mapping project is not in issue in this action.

24. Initially, Teranet was a joint public-private partnership. However, the relationship evolved and Teranet eventually purchased the Province of Ontario's 50% share in the company.[27]

25. In 2010, Teranet paid the Province of Ontario $1 billion for a fifty-year monopoly to continue to manage the "Official Data" in Ontario's electronic land registry system ("ELRS").[28] "Official Data" is broadly defined and includes plans of survey. The right granted by the Province to Teranet is "an exclusive, non-transferable, worldwide right to access and use the "Official Data," extending from November 22, 1991 to March 31, 2067.[29] At issue in this action is Teranet's extensive use of registered or deposited plans of survey created by class members pursuant to this purported grant of authority from the Province.

26. Pursuant to the agreements between Teranet and the Province of Ontario,[30] Teranet has scanned all registered or deposited plans of survey since 2011 and added them to an electronic database. By 2011, Teranet had created the largest electronic land registry database in Canada, digitizing around 200 million documents, including 950,000 images of plans of survey.[31] Also pursuant to the agreements with the Province of Ontario, Teranet makes commercial use of the surveyors' works by selling remote access to its database and all plans of survey through the licensing of its proprietary software, Teraview and GeoWarehouse.[32]

27. Unlike access to plans of survey at a LRO, which are publicly available, only persons who purchase a licence to use Teraview or GeoWarehouse can remotely view, download and

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[26] Bunker Affidavit, paras. 96-100 (AR, Vol. V, Tab 52, pp. 24-25).
[27] Cross-Examination of Arthur Daniels, qq. 164-67 (AR, Vol. VI, Tab 96, pp. 72-73).
[28] Bunker Affidavit, para. 111 (AR, Vol. V, Tab 52, p. 27) and Exhibit CC to Bunker Affidavit (AR, Vol. V, Tab 65).
[29] Buckle Affidavit, Exhibits B and D (AR, Vol. IV, Tab 36, p. 24 and Tab 38, p. 127).
[30] Buckle Affidavit, para. 18 (AR, Vol. IV, Tab 35, pp. 5-6).
[31] Buckle Affidavit, paras. 34, 42(a) (AR, Vol. IV, Tab 35, pp. 9, 11); Cross-Examination of Arthur Daniels, q. 156 (AR, Vol. VI, Tab 96, pp. 70-71); Cross-Examination of Douglas Alan Buckle, qq. 238-40, 246-48, 269, 272, 279 (AR, Vol. VII, Tab 99, pp. 174-75, 180-81).
[32] Buckle Affidavit, paras. 22, 35 (AR, Vol. IV, Tab 35, pp. 6, 9).

print plans of survey.[33] Users are charged: (a) a licence fee to use Teraview or GeoWarehouse; and (b) a fee on a per search basis.[34] The cost for a license of Teraview (in 2011) was $595.[35] In addition to the purchase of a licence, persons wishing to view a plan of survey through Teranet must pay: (a) a $5 fee equivalent to the $5 charged for in-person requests at the land registry offices; and (b) an additional $10 for accessing the plan of survey through Teranet.[36]

28. No portion of the fees collected by Teranet is paid to the surveyors who created the voluminous works that populate and give value to the database. Indeed, no fees, royalties, or compensation have ever been paid to the surveyors for any of Teranet's multiple uses of their works.[37]

29. Teranet never sought the written consent of land surveyors to copy, distribute or sell their plans of survey.[38]

(3) Statements by Surveyors and Government concerning copyright ownership

30. Teranet filed two bulletins issued by the AOLS concerning copyright. According to Teranet' deponent, Alan Buckle, these bulletins confirm that surveyors do not have copyright in plans of survey registered or filed at a LRO.[39] This is incorrect.

31. The first bulletin was a series of questions and answers about the ability of surveyors to put a copyright symbol on their plans of survey. It said this:

> Q. Which surveyors should be using copyright symbols, and on what documents?
>
> A. All plans and reports not entering the registry system should be copyrighted by the member of the Association.[40]

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[33] Bunker Affidavit, para. 111 (AR, Vol. V, Tab 52, p. 27); Cross-Examination of Douglas Alan Buckle, qq. 238-46 (AR, Vol. VII, Tab 99, pp. 174-75).
[34] Buckle Affidavit, para. 23 (AR, Vol. IV, Tab 35, pp. 6-7).
[35] Buckle Affidavit, Exhibit K (AR, Vol. IV, Tab 45, p. 260).
[36] Bunker Affidavit, para. 109 (AR, Vol. V, Tab 52, p. 27); Keatley Affidavit, para. 13 (AR, Vol. V, Tab 73, p. 142).
[37] Reasons of Motion Judge, footnote 15 (AR, Vol. I, Tab 7, p. 147); Keatley Affidavit, para. 13 (AR, Vol. V, Tab 73, p. 142).
[38] Cross-Examination of Douglas Alan Buckle, q. 273 (AR, Vol. VII, Tab 99, p. 181).
[39] Buckle Affidavit, para. 50 (AR, Vol. IV, Tab 35, pp. 12-13).
[40] Buckle Affidavit, Exhibit Q (AR, Vol. IV, Tab 51, p. 278).

32. The second bulletin concerned procedures for copyrighting survey plans and reports. It contained this statement:

> Proper subjects of copyright are all plans and reports prepared by a surveyor with the exception of those plans prepared under the instructions from the Crown, and plans prepared for registration or deposit in a Registry Office.[41]

33. The context in which these bulletins were issued is relevant to an understanding of the position taken by the AOLS. Surveyors who had wanted to place copyright symbols on their plans of survey were unable to do so initially as a result of a government policy stated in 1981 in Bulletin 81015.[42] Subsequently, the government enacted a regulation that prohibited the filing of any plan of survey that included "any notes, words or symbols that indicate that the right to make or distribute copies is in any way restricted."[43] The concern expressed by the government was that while such symbols might not restrict the LRO's ability to provide copies of plans of survey, it might do so for other public agencies, such as municipal offices.[44]

34. The AOLS bulletins were consistent with that restriction but did not take a position on the legal interpretation of s. 12 of the *Copyright Act*. Indeed, the evidence of Mr. Bunker, a deponent for the class and former president of the AOLS, was that he considered that the Bulletin "did nothing to extinguish our copyrights in the registered or deposited plans of survey."[45]

35. In fact, a government official acknowledged that surveyors retained copyright in their plans of survey. In an email from Doug Aron, Examiner of Surveys, Ministry of Government Services to several senior members of government, Mr. Aron refers to discussions with the then Executive Director of the AOLS, Jim Statham, on the issue of copyright and Bulletin 81085. He says the following:

> We take physical ownership of the plan but the surveyor retains the intellectual property to their survey. Jim [Statham] and the Ministry are of the same opinion.

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[41] Buckle Affidavit, Exhibit Q (AR, Vol. IV, Tab 51, p. 279).
[42] Bunker Affidavit, para. 40 (AR, Vol. V, Tab 52, p. 12).
[43] O. Reg. 43/96, s. 9(1)(e).
[44] See Bulletin 81015 dated June 4, 1981, Bunker Affidavit, Exhibit O (AR, Vol. V, Tab 57, p. 70) (also appears as Exhibit N to Buckle Affidavit (AR, Vol. IV, Tab 48, p. 274).
[45] Bunker Affidavit, paras. 1, 47 (AR, Vol. V, Tab 52, pp. 1, 13).

> I believe the author of the letter had a different view, in that he thought the Bulletin 81015 stated that when a plan enters the land registration system all rights of the surveyor to the intellectual property transferred to the Ministry. This would be incorrect.[46]

36. The government has always known that surveyors take the position that they retain copyright in their plans of survey. In a redacted Briefing Note entitled *Ownership of land registration survey plans* dated December 3, 2007, which dealt with complaints by Teranet that a company was selling duplicates of plans registered or deposited at a LRO in violation of its "exclusive licence" to do so, there appears this statement: "Land surveyors are ministry stakeholders and will assert that they have copyright in the plans they have prepared."[47]

37. Moreover, the agreements between Teranet and the Province of Ontario explicitly disclaim any warranties to the effect that that the province owns copyright in the plans of survey. Under the agreements "Teranet acknowledges that the Ministry has not sought consent of any private sector third parties with respect to the inclusion of any Official Data in the Official Databases, and that such consent may be required".[48]

38. It is apparent from the foregoing that (1) surveyors believed they retained copyright in their plans of survey (2) certain government officials shared that view and (3) the Province was not asserting that it had Crown copyright in its transactions with Teranet.

(4) Motion Judge's Decision

39. The first common issue in this case asks whether copyright subsists in plans of survey. On this question there was no dispute between the parties. The definition of "artistic works" in s. 2 of the *Copyright Act* expressly includes "drawings, maps, charts [and] plans." Accordingly, the motion judge, Belobaba J., answered this question in the affirmative.[49]

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[46] Bunker Affidavit, Exhibit T (AR, Vol. V, Tab 60, p. 85). See also affidavit of Jim Statham, sworn September 22, 2015, para. 3, stating that Mr. Aron's email accords with his recollection of his discussion with Mr. Aron regarding copyright in registered or deposited plans of survey (AR, Vol. VI, Tab 93, p. 33).

[47] Bunker Affidavit, para. 133 (AR, Vol. V, Tab 52, p. 32).

[48] Exhibit B to Buckle Affidavit, Sections 1.1 (definition of "Official Data") and 18.1 (AR, Vol. IV, Tab 36, pp. 39, 81).

[49] Reasons of Motion Judge, para. 26 (AR, Vol I, Tab 7, p. 148).

40. The second common issue asks whether the Province of Ontario owns copyright pursuant to s. 12 of the *Copyright Act*. As noted, this section vests copyright in the Crown where a work is "prepared or published by or under the direction and control of Her Majesty or any government department."

41. Belobaba J. first considered whether the plans of survey had been "prepared" under the direction or control of the Crown as argued by Teranet. He answered this question in the negative. While the plans of survey follow certain statutorily prescribed guidelines, they were prepared at the request of the surveyor's client, not the Crown.[50] Justice Belobaba also provided the following policy reasons against Teranet's interpretation of s. 12 (at para. 33):

> I also agree with the plaintiff that Teranet's submission about "preparation" fails for two other reasons: first, 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 given that their preparation was informed by the same provincial statutes and regulations; and secondly, if Teranet is correct, it would also mean that lawyers who file pleadings or facta at court registries would lose the copyright in their work simply because they complied with the statutory filing requirements about form or content.

42. The motion judge then turned to Teranet's second argument, that copyright exists in the Crown because plans of survey are published under its direction or control. He dealt with this argument as follows (at para. 37):

> Teranet, however, argues that s. 12 should be read literally. After the plans of survey are registered or deposited at the land registry office, they are digitized and then published (that is, made available to the public) on-line. And because all of this is done "by or under the direction or control" of the province, it follows says Teranet, that the copyright belongs to the province. The province in turn has duly licensed Teranet to make and sell the copies. There is thus no infringement.
>
> I am not persuaded by this submission. In my view, if the statutory provisions in the [provincial] *Registry Act* and the *Land Titles Act* (as already discussed) did not exist and all one had was s. 12 of the *Copyright Act*, this provision by itself would not be enough to acquire copyright. Just because the federal or provincial government publishes or directs the publication of someone else's work (as opposed to governmental material) cannot mean that the government automatically gets the copyright in that work under s. 12 of the *Copyright Act*.

43. In the appellant's submission, this reasoning should have resulted in the question of copyright ownership being decided in favour of the surveyors. Copyright in this case is

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[50] Reasons of Motion Judge, para. 32 (AR, Vol I, Tab 7, p. 149).

determined solely under the federal *Copyright Act* (not provincial legislation) and thus s. 12 was "all one had".[51] As the motion judge had rejected both of Teranet's submissions on the two prongs of s. 12, "prepared" and "published", the Crown copyright claim should have been dismissed.

44. According to the motion judge, however, the provincial *Registry Act*[52] and *Land Titles Act*[53] dictated a different outcome. Section 50(3) of the *Registry Act* provides that "Every registered instrument is the property of the Crown" while section 165(1) of the *Land Titles Act* provides that "Every registered instrument and deposited or registered plan is the property of the Crown". Also relevant to the trial judge was s. 15(4) of the *Registry Act* which requires the land registrar to supply a copy of "any instrument or document relating to the land that is registered or deposited in the office, or a facsimile of the instrument of the document." A similar requirement is imposed by s. 165(4) of the *Land Titles Act*. Included in the definition of facsimile under both statutes is "a print from microfilm and a printed copy generated by or produced from a computer record."

45. In the motion judge's view, "these statutory provisions make clear that when plans of survey are registered or deposited at the land registry, the province takes ownership of the property in these works which includes the right to make copies."[54] These provisions combine with s. 12 to transfer copyright to the Province:

> . . . As a result of the registration or deposit of the plans of survey in the land registry office, the ownership of the property in this material, including the copyright, is transferred to the province. At that point, the province has "control" of the plans of survey. The plans of survey are then published "by or under the direction or control of Her Majesty." When this happens, the copyright in these works belongs to the province for the term of years that is prescribed.[55] [Emphasis added.]

46. Accordingly, the motion judge answered common issue two in favour of Teranet.

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[51] See s. 89 of the *Copyright Act* which provides that "No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence."
[52] R.S.O. 1990, c. R.20.
[53] R.S.O. 1990, c. L.5.
[54] Reasons of Motion Judge, para. 9 (AR, Vol. I, Tab 7, p. 144).
[55] Reasons of Motion Judge, para. 41 (AR, Vol. I, Tab 7, p. 151).

47. The motion judge noted that this answer was the determinative issue and the manner in which he answered it meant that "there is no copyright infringement and that is the end of the class action."[56] With respect to the remaining common issues, he answered some in favour of the appellant and some in favour of Teranet; others, including the question of fair dealing, he declined to answer.[57]

(5) Court of Appeal's Decision

48. Prior to the hearing of the appeal in the Ontario Court of Appeal the appellant issued a notice of constitutional question.[58] This was a consequence of the trial judge's finding that it was provincial legislation that had provided for the transfer of copyright to the province (and not s. 12 on its own). The Province lacks constitutional authority to decide when copyright subsists and *a fortiori* when it may be taken away contrary to the scheme created by the federal *Copyright Act*. A notice of constitutional question was necessary in the event that the Court of Appeal accepted the motion judge's interpretation of the effect of the provincial legislation.

49. The Court of Appeal, however, rejected the motion judge's interpretation of the provincial legislation. Doherty J.A. for the court stated:

> Like the motion judge, I am satisfied that registered or deposited plans of survey are "published" by the Crown for the purposes of s. 12 of the *Copyright* Act when copies, digital or paper, are made available to, or provided to, members of the public. However, I would not describe the applicable provincial legislation as transferring "ownership" of the copyright to the Province. In my view, the provincial provisions are relevant to whether the copies of the plans are made available under the Crown's "direction or control." Considered as a whole, the provisions demonstrate that the plans of survey registered or deposited in the ELRS [Electronic Land Registry System] are held and published entirely under the Crown's direction or control. Ownership of copyright does not, however, follow from the provincial land registration scheme. It is s. 12 of the *Copyright Act* that vests copyright in the Crown by virtue of the publication of those plans under the "direction or control" of the Crown.[59] [Emphasis added.]

50. By this reasoning the Court of Appeal was able to cure the *vires* problem generated by the motion judge's decision.[60]

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[56] Reasons of Motion Judge, para. 43 (AR, Vol. I, Tab 7, p. 151).
[57] Reasons of Motion Judge, paras. 44-58 (AR, Vol. I, Tab 7, pp. 151-53).
[58] Notice of Constitutional Question (AR, Vol. II, Tab 17, p. 110).
[59] Court of Appeal Reasons, para. 45 (AR, Vol. I, Tab 9, p. 174).
[60] Court of Appeal Reasons, para. 54 (AR, Vol. I, Tab 9, p. 177).

51. In deciding that the motion judge was right, but for the wrong reasons, the Court of Appeal reasoned as follows. In deciding whether copyright exists under s. 12 "one must consider the nature of the 'rights' in the property held by the Crown when it publishes the property (when the Crown makes copies available)." The more extensive the rights the stronger the inference that publication occurs under the "direction or control" of the Crown.[61] In this case, the relevant "property" rights were the following: custody and control of the plans resides with the Crown; strict controls on the form and content of the plans exist; the surveyor cannot change the content of the plan without consent of a governmental official once the plan is registered or deposited; copies of plans must be made available to the public upon payment of the proscribed fee, and the surveyor cannot place any marking on the plan claiming copyright.[62]

52. Based on these features of the provincial legislative scheme, the Court of Appeal concluded that publication of the plans of survey occurs under the "direction or control" of the Crown within the meaning of s. 12 of the federal *Copyright Act*. No other attempt to ascertain the purpose and scope of s. 12 was attempted.

PART II – STATEMENT OF ISSUES

53. The issue on this appeal may be stated as follows:

> Does s. 12 of the *Copyright Act* transfer copyright in plans of survey that are filed in provincial land registry offices from the surveyor creators to the government?

PART III – ARGUMENT

A. Parliament's Intention in Enacting Section 12

54. Crown copyright has long been a part of the law of Canada and other Commonwealth jurisdictions. Originally enacted in Canada in 1921 it was copied verbatim from the United Kingdom's copyright statute of 1911.[63] Its wording has remained substantially unchanged in Canada over the years.

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[61] Court of Appeal Reasons, para. 33 (AR, Vol. I, Tab 9, p. 168).
[62] Court of Appeal Reasons, paras. 34-43 (AR, Vol. I, Tab 9, pp. 169-73).
[63] See s. 18 of the *Copyright Act 1911,* 1& 2 Geo. V, c. 46 (U.K.) and s. 10 of the *Copyright Act 1921*, S.C. 1921, c. 24.

55. Section 12 in Canada's current *Copyright Act* appears in a section entitled "Term of Copyright" and reads as follows:

> Term of Copyright
>
> . . .
>
> 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.

56. There is some indication in the United Kingdom legislation of 1911 what the legislature intended to address. The Crown copyright provision in that statute appeared in s. 18, which is in a section of the act entitled "Special Provisions as to certain Works". The heading immediately above s. 18 reads: "Provisions as to Government Publications." Thus, from the outset the idea was to address copyright for "government publications" not "publications by government".

57. The opening words of s. 12 indicate that its provisions are "Without prejudice to the rights and privileges of the Crown." Professor Vaver has explained the meaning of this phrase:

> This language refers to the government's prerogative power to control publishing. In seventeenth century Britain, when talk of treason and sedition was rife, the power was asserted as a form of censorship over everything published. Three centuries later, a Canadian court gave this power a more limited range. It now encompassed only "a somewhat miscellaneous collection of works, no catalogue of which appears to be exhaustive."[64]

58. Professor Judge notes that "Crown grants based on the royal prerogative accorded exclusive printing and publication rights" and that such "grants included at least the King James Bible, Measures of the Church of England, statutes, and judicial decisions."[65]

59. As Doherty J.A. noted in the Court of Appeal, the Crown's prerogative power is irrelevant to this case as no one suggested that the Province might acquire copyright under the

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[64] Vaver, David, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed. (Toronto: Irwin Law, 2011) [Vaver] at 134 (ABA, Tab 8).

[65] Judge, Elizabeth, "Crown Copyright and Copyright Reform in Canada", in Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law* (2005) [Judge] at 558 (ABA, Tab 3).

opening phrase in s. 12.[66] However, it does sound a note of caution for the proper interpretation of the remainder of the section. The Crown copyright provision was enacted in a different era when the Crown held a different position in law. Now, with the passage of Crown liability statutes and the *Canadian Charter of Rights and Freedoms* the case for special treatment of the Crown is hard to justify. While s. 12 remains on the books, its meaning should not be stretched beyond the intended purposes of the legislature.[67]

60. This was recognized by text writers soon after the United Kingdom legislation was enacted. Writing in 1912, George Robertson noted that it was unclear whether a court's judgment "can be said to be a work prepared or published by or under the direction of the Crown or any Government." In Mr. Robertson's opinion: "The actual words might cover it, but the intention of the provision does not seem directed to such a work."[68] In the appellant's submission a similar approach must be employed to ascertain the reach of s. 12. The seemingly broad language must be read in light of the legislative purpose behind s. 12.

61. What was the intention of Parliament in enacting s. 12? L.C.F. Oldfield, also writing in 1912, expressed the view that the section was designed to provide copyright protection for "government publications". In that connection, he referred to an 1887 Treasury Minute in which the Crown classified government publications into seven categories and indicated which publications it would enforce by copyright and which could be reproduced without restriction. On that list were items such as reports of select committees of Parliament or of Royal Commissions; "[p]apers required by statute to be laid before Parliament" and "[l]iterary or quasi literary works" such as Reports of the Challenger Expedition and State Trials. In Oldfield's view, the Crown copyright provision "substantially reproduces the old law, that copyright in Government publications belongs to the Crown" (emphasis added).[69]

62. The reason special protection was needed for the Crown was explained by E.J. MacGillivray:

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[66] Court of Appeal Reasons, para. 28 (AR, Vol. I, Tab 9, p. 167).
[67] For criticism of Crown copyright, see Vaver, David, "Copyright and the State in Canada and the United States" available online at https://lexum.com/conf/dac/en/vaver/vaver.html
[68] Robertson, George Stuart, The Law of Copyright (Oxford: Clarendon Press 1912) at p. 66 (ABA, Tab 6).
[69] Oldfield, L.C.F., The Law of Copyright (London: Butterworth & Co. 1912) at p. 111 (ABA, Tab 5).

> As regards Government publications, such as ordnance maps, reports, and other papers, the title of the Crown has hitherto not been very clear. It would seem that, in such works the copyright is *prima facie* in the author, and that the Crown could only show a title by assignment from the author. Certain works might, as collective works, come under the provisions of sect. 18 of the Copyright Act, 1842, and others might vest in the Crown on the ground that the work done by a paid servant in the course of his employment vests *ab initio* in the employer. In many cases, however, the difficulties of proof, either of title or duration of copyright, were considerable, and the object of this section is to get over such difficulties by proof of fifty years from publication. The introductory words of the section will operate to preserve the Royal prerogative in the Bible and Common Prayer Book.[70] [Emphasis added.]

63. Parliament's concern then was to address difficulties concerning proof of title and term of copyright where government publications are prepared by persons other than paid servants. This view is consistent with the fact that s. 12 appears in a section of the *Copyright Act* that provides for the appropriate term of copyright for a number of different types of work.

64. The New Zealand Court of Appeal reached a similar conclusion on Crown copyright in its 1999 decision in *Land Transport Safety Authority of New Zealand v. Glogau*.[71] In that case, taxi drivers were compelled by law, as a safety measure, to maintain log books recording the amount of hours driven. The respondent Glogau saw a commercial opportunity to develop a log book and approached the Ministry of Transport to negotiate the contents and layout of the log book which the Ministry then approved. Subsequently, the Ministry approved other log books, parts of which had been taken from Glogau's work. Glogau sued the Ministry which contended that its involvement in approving the log book gave it Crown copyright under s. 52 of New Zealand's *Copyright Act 1962*.[72] Section 52 gave the Crown copyright over "every original literary, dramatic, musical or artistic work made by or under the direction or control of Her Majesty or a Government Department."

65. The court acknowledged that the log book was produced under the direction or control of the Crown in the sense that the Crown gave directions as to the required content; moreover, the Crown had to approve the log book before it could be used. In deciding whether this kind of

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[70] MacGillivray, E.J., The Copyright Act, 1911, Annotated (London: Stevens and Sons, Limited 1912) at p. 18 (ABA, Tab 4).
[71] [1999] 1 NZLR 261 (ABA, Tab 1).
[72] (1962 No 33) (N.Z.).

direction and control transferred copyright from Glogau to the Crown, the court engaged in the following statutory analysis:

> Section 52 is to be read in context, and with an eye to its history. The basic rule is contained in s. 9: the author has copyright, except where the work arises from a paid commission, or in the course of paid employment. In the latter two cases, copyright vests in the commissioner or employer. The basic rule is, of course, subject to agreement to the contrary.
>
> Section 52, therefore, when it speaks of works made "by or under the direction or control" of the Crown either duplicates s. 9, and is redundant, or somehow extends into situations beyond paid commissions, employment, and particular contracts.
>
> Does any such "extension" include factual situations such as the present where the Crown is able, de facto, to exercise direction or control because otherwise a sought-after approval would not be forthcoming? There is a temptation to conclude such must be intended, as it is very difficult in the abstract to envisage any other situation of direction or control not already covered by s 9. However, one should pause. The first difficulty – and it is acute – is an unlikelihood the legislature intended the Crown to gain copyright or a share in copyright simply as a side effect of provision for statutory approval. A requirement to apply for approval, and a result that such application (and consequent direction or control) means loss of copyright are an unlikely catch-22. The second difficulty is that there appear to be historical explanations for s. 52(1), and while the law leans against redundancy the provision may indeed have become an anachronism. The provision can be traced back to s 18 of the Copyright Act 1911 (UK), coming through to s 24 of the New Zealand Copyright Act 1913. It attracted little comment at the time, and evidently was seen as no more than confirming the historical position of the Crown. Under then thinking, the Crown held copyright in what might broadly be termed government publications. It might also have been thought necessary 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. . . [73]

66. In light of this historical purpose and the fact that it was no longer part of the law of England and New Zealand, the court preferred a view of s. 52 that "does not extend much if at all past commission, employment and analogous situations and merely concentrates ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties."[74]

67. The New Zealand Court of Appeal added the following view of what was not covered by Crown copyright:

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[73] *Ibid*. at 272-73 (ABA, Tab 1).
[74] *Ibid*. at 273 (ABA, Tab 1).

> We are satisfied it was not intended to capture "approval" situations such as the present, conferring copyright upon the Crown as a side wind where there is a significant Crown input resulting from the Crown' de facto position of strength.

68. The appellant submits that the New Zealand Court of Appeal has correctly interpreted the phrase "made by or under the direction or control of Her Majesty or a Governmental Department." It is consistent with the historical purpose of the provision and with the fundamental principle enshrined in copyright legislation, namely, that copyright is vested in the creator of the work.

69. Another example of a court refusing to apply s. 12 beyond its intended purpose is *Canadian Standards Association v. P.S. Knight Co. Ltd.*[75] In that case, the applicant was an organization involved in the development of standards in fields such as health and safety, preservation of the environment and the facilitation of trade. It published a code of standards over which it claimed copyright. The respondents were competitors who intended to publish a work that was essentially an identical copy of the CSA Code. In resisting a copyright infringement action the respondents argued that because the CSA Code had been incorporated by reference in provincial laws across the country the Crown owned copyright under s. 12.

70. The Federal Court of Canada rejected that argument, holding that governments' adoption in legislation of the standards created by the CSA "does not constitute preparation or publishing by the government or under their direction." In the view of the court "it would be contrary to a purposive construction of the *Copyright Act* to strip the CSA of its rights in the CSA Code simply because certain provinces have incorporated it in law."[76]

71. Like the log books in *Glogua* and the CSA Code in *Canadian Standards Association*, plans of survey created by the surveyors for their private clients do not attract Crown copyright. Bestowing on the Province of Ontario exclusive ownership of copyright in the plans of survey as a "side wind" to its regulatory function in receiving and making available to the public copies of plans of survey would be stretching s. 12 of Canada's copyright statute beyond its intended purpose.

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[75] 2016 FC 294 [*Canadian Standards Association*].
[76] *Ibid*. at paras. 39, 40.

72. This interpretation does not render s. 12 a dead letter. There is little doubt that many publications emanating from government will be captured by s. 12. For example, the provision surely covers statutes and regulations initially prepared by the bureaucracy at the direction of the executive and then enacted by Parliament. While the exclusive printing of statutes and other legislation has been recognized as falling under the Crown prerogative preserved by the opening words of s. 12, such materials are also prepared and published at the direction and control of the Crown.[77]

73. In addition, in the modern state governments are responsible for the creation of many reports and studies, either directly by civil servants or by third parties under contract with the government, and there appears little doubt that copyright of these materials resides in the Crown. As Professor Vaver states:

> The Act also vests copyright ownership of any work prepared or published "by or under the direction or control of Her Majesty or any government department" in the federal or provincial government. This includes artwork produced by employees or commissioned from freelancers, reports written by government employees and published under the ageis of their departments, and even transcripts of judicial proceedings.[78]

74. But that is as far as it goes. There is no justification for going beyond the historical purpose behind the provision or to tilt the copyright balance against creators. Indeed, it has long been recognized that s. 12 offers the potential for "unfairness to certain authors."[79] The result is that most courts have interpreted s. 12 narrowly, as Professor Vaver explains:

> Difficulties with the British equivalent of this provision caused it to be eventually replaced there in 2008. 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 – rightfully 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.[80]

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[77] See Vaver at 135, noting that legislation and judicial decisions "are said to be within the Crown prerogative, the *Copyright Act*, or both)" (ABA, Tab 8). See also Judge at 555, stating that many types of material for which the Crown prerogative are claimed "would in any event be covered by Crown copyright under the substantive portion of s. 12" (ABA, Tab 3).

[78] Vaver, at 133-34 (ABA, Tab 8).

[79] Torno, at 50 (ABA, Tab 2).

[80] Vaver, at 134 (ABA, Tab 8).

75. The narrow interpretation is completely consistent with Parliament's intention in enacting the Crown copyright provisions in the first place. It was to deal with documents created by or at the behest of government. Indeed, the federal government has confirmed that s. 12 addresses copyright in documents prepared by a Government of Canada employee.[81] Reading s. 12 narrowly then is not a departure from the modern approach to statutory interpretation; rather, it is an incidence of its application.[82]

76. There is therefore a direct line connecting the early English text writers' view of Crown copyright with the contemporary understandings of the provision: it is documents created by the government or commissioned by the government, which could raise issues as to authorship and the applicable term of copyright, that are seen as warranting the special protection given to the Crown under s. 12.

77. Simply put, section 12 was never intended to transfer copyright for works created by private individuals for private clients that are subsequently filed in a central repository to comply with a legislative scheme. To the extent that the words of s. 12, read literally, are arguably broad enough to capture such works, it was never the intention of Parliament to do so.

B. Lessons from the Australian Surveyors Case

78. The question of copyright ownership of plans of survey was recently litigated in Australia.[83] Like in Ontario, surveyors prepare "survey plans" that are filed with a government department. Like in Ontario, the plans must conform to certain regulatory requirements and government officials can require changes to be made to a plan. Australian legislation also imposes on the government an obligation to make copies of plans available to the public. While there is not a single entity like Teranet that operates under an exclusive licence from the

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[81] See question and answer #14 in Crown Copyright – FAQ, available online at http://www.dfo-mpo.gc.ca/copyright-droits-FAQ-eng.htm

[82] See *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 55 at paras. 28-29 where this Court concluded that reading legislative provisions narrowly where they have the potential to interfere with solicitor client privilege was an application of the modern approach to statutory interpretation.

[83] *Copyright Agency Limited v. State of New South Wales*, [2007] FCA 80 [*Copyright Agency FCA*], overruled [2008] HCA 35 [*Copyright Agency HCA*].

government, there are "information brokers" who "may manage thousands of clients." The equivalent of an Ontario LRO also sells copies to the public in a number of digital formats.[84]

79. Like in Canada, Australia has enacted provisions that grant copyright to the Crown for works made or published by or under the direction or control of the Crown.[85] The Australian Parliament has also recognized the inequity of permitting the government to use works created by others without paying compensation. Thus, Parliament provided that where the government uses the works of others "for the services of the Commonwealth or State" it does not infringe copyright[86] but it may be obliged to pay compensation to a collecting society for the benefit of the creator of the work. Pursuant to that scheme, Copyright Agency Limited, a collecting society, applied to the Copyright Tribunal to determine a method for calculating equitable remuneration payable by the State for making digital copies of survey plans and also to fix the terms upon which the State may communicate those plans to the public.[87]

80. The State of New South Wales argued that copyright was vested in the State by reason of the Crown copyright provisions of the Australian Copyright Act, 1968. Thus, it argued, the provisions governing the payment of compensation were not engaged.

81. While the Canadian government has yet to turn its mind to the issue of compensation for government use of copyrighted materials, the Australian courts' analysis of Crown copyright is of interest to the interpretation of s. 12 of Canada's *Copyright Act*.

82. As in the case at bar, it was common ground that surveyors' work product was an original artistic work for which copyright protection applied.[88] However, like Teranet, the State of New South Wales argued that the survey plans were prepared by or under the direction of the Crown. The State relied on the same features of the legislative scheme in place in Ontario, namely the fact that the survey plans must satisfy certain statutory requirements and government officials can require changes to the plan before it can be registered.

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[84] *Copyright Agency HCA*, paras. 4, 30. 32-33; *Copyright Agency FCA*, paras. 47, 71-76, 117-19.
[85] *Copyright Act 1968*, Cth (No. 63, 1968), ss. 176 and 177.
[86] *Copyright Act, 1968*, s. 183(1)
[87] *Copyright Agency HCA*, para. 23.
[88] *Copyright Agency FCA*, para. 8.

83. The Federal Court of Australia rejected that argument. Relying on dictionary definitions of "direction" and "control," Emmett J. (Lindgren J. concurring) held that the phrase "under the direction or control" captures the situation where the Crown is responsible for "bringing about the making of the work. It does not extend to the Crown laying down how a work is to be made, if a citizen chooses to make a work, without having any obligation to do so."[89]

84. The court provided further guidance on what is, and is not, captured by Crown copyright (at paras. 126-27):

> The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, **if it is to be made at all**, it will be made in a particular way or in accordance with particular specifications. The phrase "*under the direction or control*" does not include a factual situation where the Crown is able, *de facto*, to exercise direction or control because an approval or licence that is sought would not be forthcoming unless the Crown's requirements for such approval or licence are satisfied. The phrase may not extend much, if at all, beyond commission, employment and analogous situations. It may merely concentrate ownership in the Crown to avoid the needs to identify particular authors, employees or contracting parties.
>
> The Parliament did not intend that the Crown would gain copyright, or share in copyright, simply as a side effect of a person obtaining a statutory or other regulatory approval or licence from the Crown. The Parliament is hardly likely to have intended that copyright would be lost merely by reason of satisfying a requirement or prerequisite for the grant by the Crown of an approval or a licence for something. The provisions in question were not intended to have the consequence that where an approval or licence by the Crown was required in respect of a work, copyright would vest in the Crown as a side wind of the work complying with the requirements for such approval or licence (see *Land Transport Safety Authority of New Zealand v. Glogau* [1999] 1 ZLR 261 at 272-273). [Emphasis in original.]

85. Finkelstein J. issued a concurring set of reasons. He began his analysis by looking at the history of the Crown copyright provisions, citing many of the early English writers on Crown copyright that are discussed above.[90] Finkelstein J. concluded that properly interpreted works made under the direction or control of the Crown would cover "most works made by a servant of the Crown or by the holder of a public office in the performance of his or her duties." He left open whether it "would go to works commissioned by the Crown".[91] However, "it has no application when a work is brought into existence by the voluntary act of the author." Nor does it

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[89] *Copyright Agency FCA*, para. 125.
[90] *Copyright Agency FCA*, paras. 175-81.
[91] *Copyright Agency FCA*, para. 187.

matter that "the work must take a form that is dictated by the Crown if the work is to be used for a particular purpose."[92]

86. In the case at bar, both the motion judge and the Court of Appeal agreed that plans of survey are not prepared by or under the direction or control of the Province of Ontario. While he did not cite the Federal Court of Australia decision, the motion judge's reasoning is consonant with it. He said (at para. 32):

> In my view, plans of survey are not prepared "under the direction or control" of the province. Plans of survey are generally prepared at the request of private clients who have an interest in the land under survey and who contract directly with the surveyor. It is true that the preparation of a plan of survey must conform to certain statutorily prescribed guidelines but these are guidelines about the form, not the content of the survey.

87. The Ontario Court of Appeal agreed with this finding, citing in support the Federal Court of Australia's decision.[93]

88. It is submitted that all courts – the New Zealand Court of Appeal, the Federal Court of Australia, the motion judge and Court of Appeal in this case – have correctly concluded that plans of survey are not prepared by or under the direction or control of the Crown. For the reasons discussed above, it was not the intention of Parliament to provide for the transfer of copyright from the creator of the work to the Crown in such circumstances.

89. The Federal Court of Australia then turned to consider whether plans of survey are first published under the direction or control of the Crown within the meaning of s. 177 of Australia's *Copyright Act, 1968*. That section reads as follows:

> Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

90. On the question of whether survey plans were "prepared" under the direction or control the court's analysis was extensive. But on the question of whether survey plans are "published" under the direction or control of the Crown the court did not engage in any statutory interpretation analysis. It merely accepted, without any analysis, that by making survey plans

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[92] *Copyright Agency FCA*, para. 191.
[93] Court of Appeal Reasons, para. 30 (AR, Vol. I, Tab 9, pp. 167-68).

available to members of the public and governmental bodies the State was publishing those plans within the meaning of s. 177. In fact, its entire analysis of the issue is contained in the following single sentence:

> Clearly, those acts constitute publication of the registered plans by or under the direction or control of the State in terms of s. 177.[94]

91. A possible reason for the absence of analysis is that the court was going to find for the surveyors on the question of whether the survey plans were "first published" by the Crown. In its view, first publication occurs when the surveyor provides the survey plan to the client who retained the surveyor. When the survey plan is subsequently registered and made available to the public the Crown is not the first publisher. Thus, the court concluded that Crown copyright in surveyors' plans had not been made out.[95]

92. The absence of analysis on the publication point makes the case of little assistance to the proper construction of this branch of s. 12 of the *Copyright Act*. We will provide that analysis when addressing the Ontario Court of Appeal's reasoning on s. 12.

C. Ontario Court of Appeal's Flawed Approach to Statutory Interpretation

93. In the case at bar the Ontario Court of Appeal cited *Glogau* as authority for the proposition that government controls on the form and content of a work "do not in and of themselves constitute 'direction or control' for the purposes of s. 12."[96] However, it ignored the New Zealand court's statement on the purpose of Crown copyright and its finding that Crown copyright "does not extend much if at all past commission, employment and analogous situations".[97] Instead, it breathed a new, expansive life into s. 12, finding Crown copyright on the basis of "controls" exercised by the Crown once the plans of survey are filed.

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[94] *Copyright Agency, FCA*, para. 145.
[95] *Copyright Agency, FCA*, paras. 146-48, 151. The court went on to find that the Crown had an implied licence to provide copies to the public, a finding that meant the surveyors were not entitled to compensation. The High Court of Australia overturned the court on the question of implied licence. It did not address Crown copyright as the State did not appeal the Federal Court of Australia's decision on that branch of the case. See *Copyright Agency, HCA*, para. 29.
[96] Court of Appeal Reasons, para. 37 (AR, Vol. I, Tab 9, p. 170).
[97] *Glogua*, *supra* at 273 (ABA, Tab 1).

94. The first error in the Court of Appeal's approach is that it ignored the historical purpose of s. 12. As this Court's jurisprudence shows, ascertaining the purpose of a statute is a key part of its construction.[98]

95. As explored in detail above, the purpose of the section was to provide the Crown with a term of copyright protection for government documents prepared in circumstances where those documents are prepared by persons other than paid servants or where it might be difficult to establish a single author within government who created the work. Such situations bear no resemblance to the preparation, filing and copying of plans of survey made by licensed surveyors for their private clients. Plans of survey are not within Parliament's intended scope of s. 12.

96. The second error is that the Court of Appeal failed to interpret s. 12 in light of the overall purpose of the Act, which is to achieve a balance between the rights of those who create a work and those who use it. As this Court stated in *Théberge v. Galerie d'Art due Petit Champlain inc.*:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).[99]

97. Thus, as this Court subsequently held in *CCH*, "In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals."[100]

98. Divesting surveyors of their copyright in plans of survey, and bestowing that copyright on the Province of Ontario, gives the Province the exclusive right to make copies. This permits the Province, as it has done in this case, to authorize the digitization of every single plan of survey filed at a LRO, whether or not a member of the public has made a request for a plan; it also authorizes the Province, as it has done in this case, to exploit those plans commercially without paying any royalties to the surveyors. There is no balance in this process, just expropriation.

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[98] *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 at 1042; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. 21; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paras. 42-47; *Halifax Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108 at paras. 50-58.
[99] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 30. See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 [*CCH*] at paras. 23, 48.
[100] *CCH*, para. 10.

99. Properly interpreted, however, s. 12 does achieve a balance between the two competing objectives identified in *Théberge*

100. Where a work is created by a government employee or by an independent contractor retained by the government, it is reasonable to confer on the government the right to make that work available to the public at large. The public has effectively paid for that work through its taxes, and it is fair to empower the government to own copyright.

101. There is in fact evidence in this case of the government providing for copyright in a plan of survey precisely because it commissioned that plan. Mr. Bunker provided an extract from a Request for Quotation Agreement from the Province of Ontario regarding a survey project. It contains this provision:

> For the purpose of the Copyright Act (Canada), the Consultant acknowledged that the materials produced by it pursuant to this Agreement have been or will be prepared under the direction and control of the Ministry, and the copyright shall belong to the Crown in right of Ontario. The Consultant waives any moral rights it may have under the Copyright Act concerning the said materials in favour of the Crown in right of Ontario.[101]

102. But where the Province has not retained the surveyor to prepare a plan of survey for the Province, the appropriate balance between the two competing objectives of the *Copyright Act* is struck by concluding that copyright remains with the surveyor.

103. As an overarching objective of the *Copyright Act*, the striking of a fair balance between creator rights and user rights is also sought in other provisions of the Act. An important area where this balance is struck is under the fair dealing defence found in s. 29 of the *Copyright Act*. This Court has described the fair dealing "as an integral part of the *Copyright Act*".[102] By taking an unbalanced view of s. 12, however, the lower courts never got to the question of how to balance the interests of the surveyors and Teranet under s. 29.

104. A third error is that the Court of Appeal failed to consider the significance of its holding on the first branch of s. 12 for the question of whether the second branch was made out. Both lower courts reached the conclusion that all of the measures of control relied upon by Teranet to support Crown copyright did not constitute preparation of the plans of survey under the direction

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[101] Bunker Affidavit, Exhibit X (AR, Vol. V, Tab 63, p. 100).
[102] *CCH*, para. 48.

or control of the Crown. Why, it must be asked, in the context of s. 12 read as a whole, would those controls not grant copyright to the Crown when the documents were filed, but would constitute that control when they were subsequently made available to the public?

105. The Court of Appeal relied on the fact that a plan, once registered or deposited, cannot be changed without the Examiner of Survey's permission and that someone other than the surveyor who created the work can apply to the Examiner for an order directing that a change be made to the registered or deposited plan.[103] These provisions are consistent with the Crown being the owner of the physical plan of survey once filed, not with copyright ownership. Under provincial legislation plans of survey filed at a LRO become "the property of the Crown".[104] However, it is well understood that ownership of a physical good and ownership of the intellectual property contained within the physical good are not the same thing.[105]

106. A person who buys a novel can decide what to do with the physical copy. He or she may read it, write on it, give it away or do anything else with the physical copy. However, that person does not obtain the intellectual property in the book merely by purchasing the physical copy. The author retains the copyright which stands untouched alongside the consumer rights associated with ownership of the physical copy.

107. In the appellant's submission there is no justification for divesting land surveyors of their copyright simply because a government department, as owner and custodian of the physical plans, makes copies of those plans available to the public. The plans of survey before and after deposit or registration remain fundamentally the surveyor's work product. There is no reason why Parliament would not provide for the divestiture of copyright in one situation (because the work was not prepared under its direction or control) but would in the other (because a copy of the same work is made available to members of the public).

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[103] Court of Appeal Reasons, para. 38 (AR, Vol. I, Tab 9, p. 171).
[104] Section 50(3) of the *Registry Act* and section 165(1) of the *Land Titles Act* provide that documents submitted for registration or deposit become "the property of the Crown" and shall be retained "in the custody of the land registrar in his or her office."
[105] *Massie & Renwick Limited v. Underwriters' Survey Bureau, Limited*, [1940] S.C.R. 218 at 229 (holding that an "author, in transferring the property in his manuscript, does not thereby necessarily assign the incorporeal right").

108. But there is a reason why Parliament would distinguish between works prepared and works published by or under the direction of the Crown. It is to provide for the appropriate term for Crown copyright. As noted, s. 12 appears in a section of the *Copyright Act* entitled "Term of Copyright". Where a work prepared by or under the direction of the Crown is not published, copyright will be perpetual; where it is published, the term shall be 50 years from the date of first publication.[106] So understood, s. 12 is not meant to bestow copyright on the Crown for a work that was not created by it, or under its direction or control, simply because it was published. The circumstances under which the work was created are the same whether it is published or not, and it is those circumstances that will determine whether the Crown has copyright.

109. The motion judge was alive to this purpose of s. 12. He noted that s. 12 was "primarily a 'term of copyright' provision."[107] Unfortunately he did not explore the implications of this. While s. 12 bestows copyright, it is undeniable that an important objective of Parliament in enacting s. 12 was to set the appropriate term of copyright. In that regard it is notable that s. 12 appears under the heading "Term of Copyright" and not under the next heading, which is "Ownership of Copyright". Given that the establishment of the *term* of copyright is a central focus of the section, it is unlikely that Parliament would have intended copyright ownership for a particular work to turn on whether it was prepared or whether it was published by or under the direction or control of the Crown. Only the copyright term should be different.

110. This view is consistent with s. 2.2(3) of the *Copyright Act* which provides that a work "is not deemed to be published" if it "is done without the consent of the owner of the copyright." It is necessary to address non-consensual publication because s. 2.2(1) defines "publication" to include "making copies of a work available to the public". Thus, if a land surveyor has copyright by virtue of his creation of a plan of survey, he or she should not lose that copyright under s. 12 by virtue of the fact that the government makes copies of plans "available to the public". Section 12, as noted, pertains to situations where the Crown is entitled to copyright by virtue of its role in bringing about the creation of the work.

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[106] Vaver, David, *Copyright Law* (Toronto: Irwin Law Inc. 2000) at 107 (noting that "Copyright in a work that is prepared under the government's direction or control, but that is never published, may therefore be perpetual, even if the government later transfers the copyright to someone else") (ABA, Tab 7).

[107] Reasons of Motion Judge, para. 41 (AR, Vol. I, Tab 7, p. 151).

111. For all of these reasons, s. 12 cannot be interpreted so as to transfer copyright from the class members to the Province of Ontario and the appeal must be allowed.

PART IV – SUBMISSION ON COSTS

112. The motion judge dismissed the action with costs on the basis of his answer to common issue two and the Court of Appeal dismissed the appellant's appeal with costs. The appellant has paid both costs orders. Accordingly, if Crown copyright is decided in favour of the appellant it should have its costs throughout.

PART V – ORDER SOUGHT

113. The appellant seeks an order allowing the appeal with costs throughout.

114. The appellant also seeks an order that common issue two be answered "no".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2018.

Luciana P. Brasil
Counsel for the appellant

Michael J. Sobkin
Counsel for the appellant

PART VI – LIST OF AUTHORITIES

CASES	**Paragraph(s) referenced in factum**
Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53, [2016] 2 S.C.R. 55	75
The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd., 38 S.R. (N.S.W.) 195	10
Canadian Standards Association v. P.S. Knight Co. Ltd., 2016 FC 294	69-71
CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13	96-97, 102
Copyright Agency Limited v. State of New South Wales, [2007] FCAFC 80	78, 82-85, 89-91
Copyright Agency Limited v. State of New South Wales, [2008] HCA 35	78-79, 91
Halifax (Regional Municipality) v. Canada (Public Works and Government Services), 2012 SCC 29, [2012] 2 S.C.R. 108	94
Land Transport Safety Authority of New Zealand v. Glogau, [1999] 1 NZLR 261	64-67, 71, 93
Montréal (City) v. Montreal Port Authority, 2010 SCC 14, [2010] 1 S.C.R. 427	94
R. v. Z. (D.A.), [1992] 2 S.C.R. 1025	94
Rizzo & Rizzo Shoes Ltd., Re, [1998] 1 S.C.R. 27	94
Théberge v. Galerie d'Art du Petit Champlain Inc., 2002 SCC 34	96, 99
Massie & Renwick Limited. v. Underwriters' Survey Bureau, Limited, [1940] S.C.R. 218	105
LEGISLATION	
Copyright Act 1911, c. 46 (U.K.)	54, 56

Copyright Act 1921, S.C. 1921, c. 24	54
Copyright Act 1962, (1962 No 33) (N.Z.)	64-66
Copyright Act 1968, Cth (No 63, 1968)	79, 89-91
Copyright Act, R.S.C. 1985, c. C-42	cited throughout
Land Titles Act, R.S.O. 1990, c. L.5	20, 44, 105
Registry Act, R.S.O. 1990, c. R.20	44, 105
Surveyors Act, R.S.O. 1990, c. S.29	15, 17, 18
Surveys, Plans and Description of Land, O. Reg. 43/96	33
SECONDARY SOURCES	
Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981)	10, 74
Judge, Elizabeth, "Crown Copyright and Copyright Reform in Canada", in Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law* (2005)	58, 72
MacGillivray, E.J., The Copyright Act, 1911, Annotated (London: Stevens and Sons, Limited 1912)	62
Oldfield, L.C.F., The Law of Copyright (London: Butterworth & Co. 1912)	61
Robertson, George Stuart, The Law of Copyright (Oxford: Clarendon Press 1912)	60
Vaver, David, *Copyright Law* (Toronto: Irwin Law Inc. 2000)	108
Vaver, David, *Intellectual Property Law: Copyright, Patents, Trade-marks* (Toronto: Irwin Law Inc. 2011)	57, 72-74
Vaver, David, "Copyright and the State in Canada and the United States" available online at https://lexum.com/conf/dac/en/vaver/vaver.html	59

PART VII – STATUTORY PROVISIONS

Copyright Act, R.S.C. 1985, c. C-42

Definitions

2 In this Act,

. . .

artistic work includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works; (*oeuvre artistique*)

Definition of *publication*

2.2 (1) For the purposes of this Act, *publication* means

(a) in relation to works,

(i) making copies of a work available to the public,

(ii) the construction of an architectural work, and

(iii) the incorporation of an artistic work into an architectural work, and

(b) in relation to sound recordings, making copies of a sound recording available to the public,

but does not include

(c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or

(d) the exhibition in public of an artistic work.

. . .

Where no consent of copyright owner

(3) For the purposes of this Act, other than in respect of infringement of copyright, a work or other subject-matter is not deemed to be published or performed in public or communicated to the public by telecommunication if that act is done without the consent of the owner of the copyright.

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.

Research, private study, etc.

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

***Loi sur le droit d'auteur,* L.R.C. 1985, c C-42**

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

. . .

oeuvre artistique Sont compris parmi les oeuvres artistiques les peintures, dessins, sculptures, oeuvres architecturales, gravures ou photographies, les oeuvres artistiques dues à des artisans ainsi que les graphiques, cartes, plans et compilations d'oeuvres artistiques. (*artistic work*)

Définition de *publication*

2.2 (1) Pour l'application de la présente loi, *publication* s'entend :

a) à l'égard d'une oeuvre, de la mise à la disposition du public d'exemplaires de l'oeuvre, de l'édification d'une oeuvre architecturale ou de l'incorporation d'une oeuvre artistique à celle-ci;

b) à l'égard d'un enregistrement sonore, de la mise à la disposition du public d'exemplaires de celui-ci.

Sont exclues de la publication la représentation ou l’exécution en public d’une oeuvre littéraire, dramatique, musicale ou artistique ou d’un enregistrement sonore, leur communication au public par télécommunication ou l’exposition en public d’une oeuvre artistique.

. . .

Absence de consentement du titulaire du droit d’auteur

(3) Pour l’application de la présente loi — sauf relativement à la violation du droit d’auteur —, une oeuvre ou un autre objet du droit d’auteur n’est pas réputé publié, représenté en public ou communiqué au public par télécommunication si le consentement du titulaire du droit d’auteur n’a pas été obtenu.

Quand le droit d’auteur appartient à Sa Majesté

12 Sous réserve de tous les droits ou privilèges de la Couronne, le droit d‟auteur sur les oeuvres préparées ou publiées par l‟entremise, sous la direction ou la surveillance de Sa Majesté ou d‟un ministère du gouvernement, appartient, sauf stipulation conclue avec l‟auteur, à Sa Majesté et, dans ce cas, il subsiste jusqu‟à la fin de la cinquantième année suivant celle de la première publication de l‟oeuvre.

Utilisation équitable

Étude privée, recherche, etc.

29 L‟utilisation équitable d‟une oeuvre ou de tout autre objet du droit d‟auteur aux fins d‟étude privée, de recherche, d‟éducation, de parodie ou de satire ne constitue pas une violation du droit d‟auteur.

Copyright Act 1968, Cth (No 63, 1968)

Crown copyright in original works made under direction of Crown

176(1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.

(2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

Crown copyright in original works first published in Australia under direction of Crown

177 Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

Copyright Act 1962, (1962 No 33) (N.Z.)

52. Crown copyright – (1) In the case of every original literary, dramatic, musical, or artistic work made by or under the direction or control of Her Majesty or a Government Department, --

(a) If apart from this section copyright would not subsist in the work, copyright shall subsist therein by virtue of this section; and

(b) In any case, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the work.

(2) Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to copyright in every original literary, dramatic, musical, or artistic work first published in New Zealand, if first published by or under the direction or control of Her Majesty or a Government Department.

(3) Copyright in a literary, dramatic, musical or artistic work, whether unpublished or published, to which Her Majesty is entitled in accordance with either subsection (1) or subsection (2) of this section shall continue to subsist until he end of he period of fifty years from the end of the calendar year in which the work was made, or (in the case of a photograph) was taken, and shall then expire.

(4) In the case of every sound recording, cinematograph film, television broadcast, or sound broadcast made, or edition of any one or more literary, dramatic, or musical works published, by or under the direction or control of Her Majesty or a Government Department, --

(a) If apart from this subsection copyright would not subsist in the recording, film, broadcast, or edition, copyright shall subsist by virtue of this subsection; and

(b) In any case, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the recording, film, broadcast, or edition, and it shall subsist for the same period as if it were copyright subsisting by virtue of, and

owned in accordance with, section 13, section 14, section 15, or section 17 of this Act.

(5) The preceding provisions of this section shall have effect subject to any agreement, made by or on behalf of Her Majesty or a Government Department with the author of the work or the maker of a recording, film, broadcast, or edition, whereby it is agreed that the copyright in the work or other subject-matter shall vest in the author or maker, or in another person designation in the agreement in that behalf.

(6) The provisions of Parts I, II, and III of this Act, with the exception of the provisions relating to subsistence, duration, or ownership of copyright, shall apply in relation to copyright subsisting by virtue of this section as they apply to copyright subsisting by virtue of the said Parts I, II, and III.

The Copyright Act, 1921, S.C. 1921, c. 24

10. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

Copyright Act 1911, 1& 2 Geo. V, c. 46 (U.K.)

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.