



GARDINER ROBERTS

April, 2010

Gardiner Roberts LLP

Scotia Plaza
40 King St. West
Suite 3100
Toronto, ON
M5H 3Y2

Tel: 416-865-6600
Fax: 416-865-6636

www.gardiner-roberts.com

This article was prepared by
William O'Hara and Stephen
Thiele.



Mr. O'Hara is a partner in our
dispute resolution
department and can be
reached at
416-865-6632 or
wohara@gardiner-roberts.com



Mr. Thiele is a partner and
the director of legal
research and can be reached
at
416-865-6651 or
sthiele@gardiner-roberts.com

Is the Crown Bound by the Copyright Act?

(Published in the *Ontario Professional Surveyor* Volume 53, No. 1,
Winter 2010)

Earlier this year I had the pleasure of speaking at the AGM on copyright and land surveys prepared by Association of Ontario Land Surveyor members. I expressed the view that plans of survey are covered by copyright as soon as they are created, regardless of any copyright mark or other indication of copyright protection on the plans, and that the land surveyor who creates a plans holds the copyright.¹ During questions the subject turned to Crown copyright and whether the Crown was bound by the provisions of the *Copyright Act*. It was observed that the provincial Land Titles and Registry Offices – and other government agencies – sometimes copy (or licence the right to copy) surveys registered in the provincial Land Titles or Registry Offices. It was my view that filing a survey with these offices transferred *possession* of the document to the Crown, but did not transfer *copyright* in the document, or indicate that the surveyor who created the survey has assigned, abandoned or otherwise lost his or her copyright in the document.²

The question lingered. AOLS members wanted to know whether the Crown can copy plans of survey in its possession, or licence others to do so, without paying royalties to the surveyor who holds the copyright.

The question brought an observation from a distinguished gentleman on the floor that the *Interpretation Act* gave the answer. Both the federal and provincial *Interpretation Acts*³, he said, clearly state that a statute does not bind the Crown unless it specifically says the Crown is bound. The *Copyright Act* does *not* say the Crown is bound, and therefore the Crown is not bound by the *Copyright Act*. Case closed!

It was a compelling argument made in a convincing way, but was it the last word in Crown immunity from copyright? Rarely is anything to do with the Crown simple, and copyright law is no exception. Our review of the

¹ *Is There an Enforceable Copyright in a Plan of Survey?* by Will O'Hara and Anna Husa, *Ontario Professional Surveyor*, Volume 49, No. 4, 2006

² *What Happens To The Copyright In A Registered Plan Of Survey?* by Will O'Hara and Anna Husa, *Ontario Professional Surveyor*, Volume 51, No. 4, Fall 2008

³ The Ontario *Interpretation Act* was repealed and has been replaced by the *Legislation Act*, 2006



Copyright Act and cases interpreting the *Act* indicates that the Crown is bound by the *Act* and must respect copyright belonging to others. In our view, the Crown has no legal right to flaunt the law of copyright.

Crown Copyright

Section 12 of the *Copyright Act*⁴ gives the Crown the right to claim copyright in works it creates through its employees and agents. There is no doubt that the Crown has that right under the *Act*, and there is no doubt that it enforces the right. The section opens with a curious phrase: “*Without prejudice to any rights or privileges of the Crown*”, and it goes on to say that the copyright to any work prepared by or under the direction of the Crown belongs to the Crown.⁵

Prerogative rights

The “rights and privileges of the Crown” in s. 12 refer to the Crown’s broad prerogative rights that date from the Middle Ages. Historically the Crown, as embodied by the Monarch, exercised the prerogative right to control *all* printing within the realm.⁶ In this way, the Monarch is said to have controlled copyright. Those days are gone. Today, printing is open to thriving private interests that require no special Crown licence to set up shop. The former Crown prerogative to control printing a book – or a survey for that matter – has ceased to exist. In the words of one Canadian judge, “constitutional changes shattered the idea of prerogative.”⁷

There may be some vestiges of Crown prerogative in relation to copyright, such as copyright in legislation, but it does not extend to works created by private businesses or professions. Powers and privileges which are enjoyed equally by persons other than the Crown do not form part of the Crown’s special prerogative right.⁸

⁴ *Copyright Act*, RSC 1985, c. C-42

⁵ Section 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.

⁶ David Vaver, *Copyright and the State in Canada and the United States*, www.lexum.umontreal.ca/conf/dac/en/vaver.html

⁷ *R. v. Bellman*, 1938 CarswellNB 10 (C.A.), at para. 11

⁸ Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed. (Carswell: 2000), p. 16



The prerogatives that remain in the Crown, most of which are irrelevant to the issue of copyright, are those powers relating to the legislature, powers relating to foreign affairs, powers relating to armed forces, appointments and honours, immunities and privileges, and the “emergency” prerogative.⁹ It is difficult to imagine an “emergency” that would require the Crown to republish a survey without the need to recognize the rights of the copyright holder. Certainly they do not occur every day. In our view, the Crown has no prerogative rights to ignore copyright belonging to land surveyors.

So how does the Crown republish surveys or licence the right to republish copyrighted surveys registered in the provincial Land Titles or Registry Offices?

Crown immunity

Even if the Crown has no prerogative right to control printing and ignore a land surveyor’s copyright, is the Crown protected from a claim for breach of copyright because of Crown immunity?

Crown immunity stems from the ancient proposition that the King was above parliament and could not be bound by acts of parliament. This rule has been codified by the *Interpretation Acts* in Canada and in the provinces. The general rule, as was pointed out at the AGM, is that the Crown is not bound by a statute unless the statute says it is bound. There is no question that the *Copyright Act* does not say the Crown is bound, so, according to the general rule, the Crown isn’t bound by the *Act*. In that case the Crown would be immune from the *Act*. But that’s not the end of it. There are well-recognized exceptions to the general rule and the principle of Crown immunity.

Benefit/burden exception

The main exception to this principle is the ‘benefit/burden’ exception. Even in ancient times the King couldn’t have it both ways. The Supreme Court of Canada has stated the exception clearly. Where the Crown takes the benefit of legislation, it “will be treated as having assumed the attendant burdens, *though the legislation has not been made to bind the Crown* expressly or by necessary implication.”¹⁰ In other words, the fact that the *Copyright Act* does not specifically or by necessary implication bind the Crown is not the end of the inquiry. It is a starting point for an exploration of the benefit/burden exception.

The benefit of the *Act* is that the Crown can have copyright in its own creations, by way of s. 12. The corresponding burden is being prohibited from infringing the copyrights of others, and as long as there exists a

⁹ *Ibid.*, pp. 18-19

¹⁰ *Sparling v. Québec* (Caisse de dépôt et placement du Québec), 1988 CanLII 26 (S.C.C.), at para. 19



sufficient connection between the benefit and the burden – even in different statutes – the Crown will be bound, and its immunity will be displaced. In other words, the Crown can't have it both ways: it will be bound by the burdens whenever it takes benefits.¹¹ The Crown clearly enjoys the benefits bestowed by s. 12 and has engaged in court proceedings in the past to protect and enforce its own copyrights.

The Supreme Court of Canada held in *Sparling v. Québec (Caisse de dépôt et placement du Québec)*¹² that the Caisse, as agent of the Crown, was not immune from the insider trading provisions under the Canada Business Corporations Act in circumstances where it had become a shareholder in a company. When the Caisse purchased shares and took the benefit of the CBCA, it became bound by the burdens of the statute.

In a matter involving the Ontario Ministry of Consumer and Commercial Relations, a freedom of information request was made for the Ministry's copy of the ONBIS Database and the NUANS Database.¹³ These databases contain specific information about all corporations registered in Ontario. The information is publicly available on a record-by-record basis and can be searched for a small fee. The Ministry vigorously opposed the release of the copies of the databases and argued that the Crown was entitled to copyright protection for them under s. 12 of the *Copyright Act*. The Information Privacy Commissioner agreed. But the Commissioner also noted that it was the *compilation* that was protected – not the individual data elements extracted from the forms or entered by Crown employees from other sources. Accordingly, the Crown may have a copyright in a database of surveys *as a compilation*, but that does not give it the copyrights to the individual surveys that make up the compilation. The copyrights to the individual surveys still belong to the surveyors who created them.

The benefit/burden exception has been directly applied in a copyright case. In a 2004 case before the Federal Court¹⁴, the Ministère des Affaires sociales (MAS) was sued for copyright infringement with respect to the use of a literary work in electronic format. In defending the action, MAS contended that it could rely on Crown immunity since the *Copyright Act* did not state that it applied to the Crown. The Federal Court disagreed. It concluded that the MAS had made use of provisions of the *Act* and that there was a close connection provided by an exclusive licence to use the work of the plaintiff to the exclusion of any other person, and the burden not to infringe the rights

¹¹ *Ibid.*, at paras. 16 and 19

¹² *Supra note 10*

¹³ *Re Ontario (Consumer and Commercial Relations)*, 1996 CanLII 7705 (On I.P.C.)

¹⁴ *Eros-Équipe de Recherche Opérationnelle en Santé Inc. v. Conseillers en Gestion et Informatique C.G.I. Inc.*, 2004 FC 178 (CanLII)



which the plaintiff had chosen not to assign (i.e. the right to electronic application of its work).¹⁵

No implied licence

When a survey is registered in a Land Titles or Registry Office there is no contract entered with respect to its use. A surveyor does not voluntarily surrender his or her copyright in the survey. No assignment of rights takes place, and therefore the Crown ought not to be able to profit from the reprinting or licencing of registered surveys. In Australia, the High Court held that the State of New South Wales did not have the authority to reproduce registered survey plans and communicate them to the public since copyright belonged to the surveyors of the plans.¹⁶ Similar to the system which exists in Canada, surveyors in Australia are registered to ensure that survey plans prepared by them meet state requirements. Plans of survey are then registered through the Department of Lands. A division of that Department then provides land administration services, including the registration of land titles and survey plans which are integral to the Torrens System.¹⁷ Notwithstanding this process, the court held that surveyors had not given the state an implied licence to reproduce or communicate surveys merely as a result of the conduct of surveyors permitting their plans to be registered, even though they had knowledge of the uses to which they would be put.¹⁸

Public Policy

In addition to the law on Crown immunity, the policy articulated by the Canadian government supports the broadest application of copyrights held by private individuals, businesses and professions. Government policy promotes the protection of intellectual property as a means of building a strong and sound economy. Strong intellectual property laws that afford protection to the creators of intellectual property are regarded as “promoting investments in research and innovation, international trade and investment, consumer protection and overall economic growth.”¹⁹ The Crown does not engage in conduct which threatens economic growth or flies in the face of government policy.

Conclusion

The bottom line is that a plan of survey is the creation of the surveyor. This creation and its antecedent rights are protected by our copyright laws. No one

¹⁵ *Ibid.*, at para. 63

¹⁶ *Copyright Agency Ltd. v. State of New South Wales*, [2008] HCA 35 (AustLII)

¹⁷ *Ibid.*, at para. 4

¹⁸ *Ibid.*, at para. 80

¹⁹ Perrin Beatty, “Canada’s law must be updated and toughened to combat piracy of intellectual property.”



GARDINER ROBERTS

can profit by selling, licencing or reprinting the work of another, unless the copyright owner has sold or assigned his or her rights. While in the case of surveys the Crown might contend that it has a prerogative right to reprint registered surveys or that it is immune from the provisions of the *Copyright Act*, the legal precedents indicate that any unauthorized reprinting or licencing of rights to reproduce surveys constitutes copyright infringement for which the Crown would be liable.

The case is not closed – it is wide open and in need of resolution.

This article is not intended to provide a legal opinion on the issues discussed therein, but is intended for educational purposes only.



GARDINER ROBERTS