

**COPYRIGHT – SURVEYOR’S ENTITLEMENT TO COPYRIGHT IN SURVEY
DOCUMENTATION INCLUDING WRITTEN LEGAL DESCRIPTIONS, PLANS
AND REAL PROPERTY REPORTS**

INTRODUCTION:

The Association of Newfoundland Land Surveyor’s has retained the undersigned to provide a written opinion as to whether or not the said Association and its individual members had a legal right or entitlement to claim *copyright* in survey descriptions and plans and real property reports (lot location certificates) generated by individual licensed members.

In that regard we have prepared the within paper in order to provide guidance to our client and to simultaneously inform the Law Society of Newfoundland and its members as to the position taken by the Association of Newfoundland Land Surveyors in the future.

BACKGROUND:

We were retained by the Association of Newfoundland Land Surveyors as a result of a number of concerns that had been raised by individual members and had been expressed by those members to the Council of Management of the Association. These included, inter alia, the following:

- i) a practice that had evolved amongst members of the Law Society wherein written legal descriptions prepared by members of the Association of Newfoundland Land Surveyors had been reproduced in various ways, forms, or methods, without the express and/or implied authorization of the members of the Association of Newfoundland Land Surveyors who had originally prepared the said written survey descriptions, plans and/or real property reports. In particular, a common practice by vendors’ solicitors was to utilize a written description and/or plot plan

in a Deed of Conveyance on a sale to a purchaser without consulting with the surveyor who had originally prepared the written description and/or plan to confirm both the written descriptions and/or attached plans authenticity and/or continuing accuracy and reliability. Often, the typed description from the original prepared by a member of the Association of Newfoundland Land Surveyors would be re-typed and/or photocopied and then disseminated to those who would ultimately rely upon its authenticity and continuing accuracy and reliability i.e. purchasers, purchasers' solicitors and/or the purchaser's financial institution, etc. Inherently, this is a particularly dangerous practice. For example, a review of past materials prepared by members of the Law Society and/or the Judiciary have in the past made various comments about the inherent danger of repeated copying, in various forms, of a legal description of a piece of land. In particular, the late Judge Noel Goodridge, (as he then was) in a written paper provided for the Law Society seminar on Real Property Law in 1983,¹ stated (to paraphrase) that the more often a survey's written description is rewritten, re-typed or reproduced there is a greater likelihood that there will be an error. In fact, this writer has observed, that quite often Deeds of Rectification are required to rectify instruments such as Deeds of Conveyances and Mortgages wherein an error via commission or omission had been caused by either re-typing a written legal description and/or photocopying a plot plan or in some other way the written legal description had been reproduced other than in its original form and the error therefore would continue to be repeated in subsequent instruments such as Deeds of Conveyance and/or Mortgages until it was discovered by a subsequent solicitor who had been either acting for a client on a refinance or had been acting for a client on a purchase and had noticed the error in the legal description and/or plot plan. Often, the subsequent errors had not been produced in the original written description of the surveyor who originally prepared same but had occurred as a result of either a typist omitting a certain portion of a written description and/or had added something that should not have been there originally. As well, with

¹ Judge Noel Goodridge (as he then was) in a paper prepared for the Real Property Seminar presented to the Law Society in 1983 regarding the Legal Descriptions attached to Quieting of Titles Application.

respect to plot plans, the constant photocopying and/or means of reproduction and transmittal via fax, for example, had resulted in some portion of the plot plan being omitted or no longer being legible in terms of being able to compare the plot plan to the written description. In other instances the faxed legal description and plot plan would be merely photocopied onto good photocopy paper and then attached to a Deed or other instrument without it being checked to determine whether the act of reproduction and/or fax transmittal had obliterated and/or reconfigured a mathematical measurement or bearing.

Also not unheard of was the situation where a surveyor would be contacted to explain and/or correct an error in his survey description and plan when in fact the error had not occurred in the original survey description and plan produced by him. Needless to say, this would cause the said surveyor great consternation and/or lead to conflict with the inquiring lawyer;

- ii) Another common practice that emerged in conveyancing practice in Newfoundland and Labrador amongst members of the Bar, was to provide Affidavits attached to real property reports (also known as lot location certificates) whereby the vendor(s) would swear that the real property report and attached plot plan (that was the subject of the said Affidavit) accurately depicted the dwelling house, side-yard measurements and any other outbuildings on the attached plan as being *in fact* and/or *in law* an accurate representation and/or depiction of where the said dwelling house, outbuildings, etc, were located on the subject property. The Affidavits that were commonly used (and are still used today) also contained a positive and/or affirmative statement by the vendor(s) swearing the said Affidavit as to whether or not there were any encroachments by the subject property onto adjacent lands owned by third party land owners or whether or not there were encroachments by abutting and/or adjacent properties unto the subject property that was the subject of the vendor(s) Affidavit.

Obviously, unless reviewed by a surveyor, no vendor(s) could be expected to accurately state that either *in fact* or *in law* that a particular property did not have encroachments upon it nor whether it encroached upon the property of an adjacent land owner. More importantly, this would not be in the legal domain of a vendor to state same as no lay person nor in fact a member of the Law Society could accurately swear such a document without the direct experience and academic training to do so, as would be the case with a Newfoundland Land Surveyor. In fact, no party unless licensed by the Association of Newfoundland Land Surveyors, is authorized to give legal and/or factual opinions with respect to same, and therefore the opinion of a vendor(s), is not a professional opinion based upon experience and academic training.

Whilst it is true that a vendor(s) familiar with his own property would have knowledge of his property, whether he, she, they or it could swear a statement with a sufficient degree of accuracy required (in order to ensure that a third party could *safely* rely upon same from a legal perspective) may be very doubtful. Further, the inherent danger of relying upon a vendor(s) statement in such an Affidavit should not be underestimated. For example, the vendor(s) having sworn same in order to facilitate a sale of his/her/their property, very easily could be inaccurate in their assessment of the location of various boundary lines or the distance of dwelling houses, outbuildings or appurtenances to various boundary lines and/or the accuracy of the boundary lines of abutting and/or adjacent property owners. Furthermore, without professional training, he/she/they or it can not be reasonably expected to provide such a level of accuracy as would be required in order to safely place reliance on same.

Further, *quare* the result if the vendor(s) subsequently becomes impecunious, bankrupt, leaves the jurisdiction (and therefore cannot be located) or dies with an insolvent estate, what recourse would a purchaser/mortgagee or any other third party have, who have relied upon the accuracy of the said vendor(s) Affidavit?

As well, there is the concern, that the vendor(s) Affidavit with respect to the aforesaid survey documentation, which would no doubt permit a vendor(s) to facilitate the sale without the need of further costs by updating his/her/their or its survey documentation, could very well be subject to the danger and/or temptation of providing nothing more than what is referred to as a “self-serving” Affidavit.

TEXT:**THE LAW OF COPYRIGHT WITH RESPECT TO SURVEYOR'S LEGAL
DESCRIPTION, PLANS AND REAL PROPERTY REPORTS**The Law of
Copyright

In one of the opening statements in a work authored by Normand Tamaro, LL.B., (of the Quebec Bar), entitled "The 2001 Annotated Copyright Act", (Thomson Canada Limited, 2001) it reads in part:

*"According to the highest court in our land, copyright law is similar to the law of ownership. It is given to authors by virtue of the principles of natural justice as a reward for property that they have themselves created."*²

Specifically, with respect to legal entitlement of the individual members of the Association of Newfoundland Land Surveyors, to claim copyright in their survey documentation, in particular, written legal descriptions, plot plans and real property reports, (as authored and prepared by an individual member of the said Association), while little case law has emanated from the courts throughout Canada with respect to this specific issue; in general terms, our review of the authorities revealed that a reasonable and accurate analogy can be made with respect to architectural plans and maps pursuant to the Copyright Act.³ As set out in Section 2 of the Copyright Act entitled "*An Act to Amend the Copyright Act*" S.C., 1997, c. 24, as amended, which came into force on April 25, 1997, (hereinafter referred to as "the Act") - : "Artistic Work" which is protected under the Act, "includes paintings, drawings, *maps, charts, plans*, photographs,

² Normand Tomaro, The 2001 Annotated Copyright Act, Carswell: Thompson Professional Publishing, 2001, p. vi.

³ Copyright Act, R.S.C. 1985, c. C-42, as amended.

engravings, sculptures, works of artistic craftsmanship, *architectural works*, and compilations of artistic works.⁴” (note italicized words are my emphasis)

Copyright

In plans

The aforesaid section of the Act has been judicially interpreted and in particular with respect to the issue of copyright in *plans*, in the Canadian Law of Copyright and Industrial Designs, authored by John S. McKeown, LL.B. (of the Ontario Bar) – (and published by Thomson Professional Publishing, 2000 – 3rd Edition) and referring to the decision of Underwriters Survey Bureau Limited v. Massie and Renwick Ltd.,⁵ it is noted “Plans used by insurance underwriters, which consisted of drawings representing the boundaries of a city, town or village, and also representing the types of buildings erected upon the lots, were held to be proper subject matter of copyright.” Also, as stated as McKewon in Canadian Law of Copyright and Industrial Designs, *Ibid.*, referring, *inter alia*, to the decisions of [Chabot v. Davis] [1936], 2 ALL E.R. 221 at 224 (ch.) Alberta, C.A.⁶ the decisions of Emmett v. Meigs (1920) [1921] 1W.W.R. (35 Alta. C.A.),⁷ and in Meikle v. Maufe [1941]⁸ 3 ALL E.R. 244 (Eng. Ch.) *i.v.* that “*artistic works* which (subsequent to amendments to the Act in 1988) include “*maps*”, “*charts*”, and “*plans*”, “are properly the subject of copyright”⁹. (Please note that the italicized words are my emphasis).

The issue of copyright in “plans” was also addressed in 1957 decision of Hay v. Sloan wherein the Ontario Supreme Court – High Court of Justice, reported as [1957] O.W.N. 445, Ont. (H.C.) stated, in part, at page 3, paragraph 6:

“For copyright purposes, the owner of the architectural work of art is the author of the plans and not the builder,” – “nor does copyright pass to the owner of the

⁴ The 2001 Annotated Copyright Act, p. 29.

⁵ John McKeown, Fox Canadian Law of Copyright and Industrial Design (3rd Edition). Carswell-Thomson Professional Building, 2000. p. 121.

⁶ Ibid., p. 121

⁷ Ibid.

⁸ Ibid.

building. It therefore follows that there is copyright not only in the plans, or in so far as it has artistic quality in design, but in the design of the buildings when erected.”¹⁰

The issue of copyright in “plans” was also addressed in two successive British Columbia Supreme Court decisions in 1991 and 1992, namely, respectively, Morton v. Echo Glass Installations Ltd. et al., (British Columbia Supreme Court), 36 C.P.R. (3d) at page 355¹¹ and in Bemben and Kuzych Architects et al. v. Greenhaven – Carnegy Developments Ltd. et al., (British Columbia Supreme Court), 45 C.P.R. (3d) at page 488¹². (See also, *Morton, Ibid.*, page 355¹³)

In *Morton, Ibid.*, the British Columbia Supreme Court considered a fact situation where the plaintiff “designed plans for balconies” and the defendant “attached” to a building permit, “the plaintiff’s plans, which had not been supplied to her by the plaintiff.”¹⁴

The head-note of the aforesaid decision goes on to say that, “The plans had been altered to substitute on them the name of the corporate defendant for that of the plaintiff.”¹⁵

The Court ruled, in *Morton, Ibid.*, that the plaintiff had copyright in the plans. As stated on page 357 of the said reported decision, (citing the Copyright Act as it then was i.e. R.S.C. 1970 c. -30, s. 3(1) which is now cited as “An Act to amend the Copyright Act” S.C., 1997, c. 24, as amended), that “copyright” – means “the sole right to produce or reproduce the work or any substituted part thereof in any material form“.¹⁶

In finding that “the defendant had the plans, used the plans, and reproduced the plans. The defendant knew that plans were necessary, that there was a cost entailed in producing them, and that there could be considerable time and energy expended in obtaining city

⁹ **Ibid.**

¹⁰ Hay v. Sloan [1957] O.W.N. 445 Ont. (H.C.), at page 3.

¹¹ Morton v. Echo Glass Installations Ltd. et al., (1991), 36 C.P.R. (3d) at page 355.

¹² Bemben and Kuzych Architects et al. v. Greenhaven – Carnegy Developments Ltd. et al., (1992), 45 C.P.R. (3d), at page 488

¹³ *Morton, Ibid.*, p. 355

¹⁴ **Ibid.**

¹⁵ **Ibid.**

approval for their own plans,”¹⁷ the British Columbia Supreme Court therefore found a breach of the plaintiff’s copyright in the said plans for the balconies and awarded damages to the plaintiff.

In *Bemben, Ibid.*, the British Columbia Supreme Court also considered a facts situation involving a breach of copyright involving *plans*. The head note of the decision reveals that an architect developed/prepared plans for a 24-unit townhouse project which were given to a different developer who built another 24-unit townhouse on an adjacent site with the use of the plaintiff’s original plans and were used for the purpose of zoning. The plaintiff architect brought an action for infringement of copyright of his plans and drawings on the contiguous site, which were utilized without the plaintiff’s permission or authorization.

The Court ruled in *Bemben, Ibid.*, “that an architect retains copyright in architectural drawings and designs of his creation.”¹⁸ The Court also went on to say that “use of these drawings without consent is an infringement of copyright unless there has been a written assignment of the ownership of the copyright.”¹⁹

Overall, then, as previously stated, the Courts throughout Canada have recognized the inherent right of an architect, draftsman, etc. who has produced original *plans* to retain copyright in the said *plans*.

It is therefore reasonable to conclude, (by analogy to architect’s plans), that a surveyor has copyright in his/her original survey plans.

This issue of Surveyors’ Copyright in plans was addressed in the British Columbia Supreme Court of Island View Beach Estates Corp. v. J. E. Anderson and Associates,

¹⁶ Ibid., p. 357.

¹⁷ *Bemben, Ibid.*, p. 492

¹⁸ Ibid.

¹⁹ Ibid.

2000 CarswellBC 1560, 2000 BCSC 1121, 4 C.L.R. (3d) 142,²⁰, wherein the British Columbia Supreme Court ruled that the surveyor who had prepared surveys for a developer had copyright in his surveys.

The said Court, citing Section 2 of the Copyright Act, R.S.C. 1970, c.-30, (later R.S.C. 1985, c.-42 and now An Act to Amend the Copyright Act, S.C. 1997, c.24, as amended) ruled that “the plans in question are original works and that *plans* are covered by copyright” and therefore the surveyor who prepared the survey plans had the “copyright over the plans as the creator of them”.²¹ (Please note that the italicized words are my emphasis).

RIGHT OF USE AND INFRINGEMENT OF SURVEYOR’S COPYRIGHT

It is the writers opinion that the Copyright Act, Ibid., and relevant case law has clearly established that surveyor’s have *copyright in their survey descriptions, plans and real property reports as originally prepared by the individual surveyor, as the surveyor is “the creator of them”*²² (Please note that the italicized words are my emphasis).

However, having stated that surveyors have a copyright in their survey descriptions, plans and real property reports, if they are the original “creator” of same, the next question is, - : who has the right to use or utilize same and what constitutes “unauthorized use” of a surveyor’s survey descriptions, plans and real property reports and what use causes copyright infringement?

As stated in Copyright Law, Vaver, David, Irwin Law, (2000), at page 57:

²⁰ Island View Beach Estates Corp. v. J.E. Anderson and Associates, 2000 CarswellBC 1560, 2000 BCSC 1121, 4 C.L.R. (3d) 142.

²¹ Ibid., p. 5.

²² Ibid., p. 21.

“Copyright protects only original work. The product must originate from its author, not be copied and involve some intellectual effort.”²³

It is also clear that the amendments to the current Act, made in 1997, creates a lengthy duration of copyright i.e. the year of the life of the author or creator of a work plus the remainder of the year in which the author or creator of the work died, plus 50 years from the end of “that calendar year”.²⁴

*Lawful use of
work that has
copyright protection
or the so called
“legal defences”*

However, to assist in establishing what constitutes an unlawful use of a surveyor’s survey documentation, including written descriptions, plans and/or real property reports, it is equally important to determine what is a “lawful” and “authorized” use by members of the public.

The law of copyright does in fact authorize use of an original uncopied work of the “creator” of “the work” regardless of the subject matter, via so-called “exceptions” or “limitations” on copyright. The right-of-use comes under various headings, including, inter alia, “public interest”; “fair dealings”; “education”; “teaching”; etc. As well, some other rights-of-use come under the heading of “copying authorized by legislation”; “incidental inclusion”; etc.²⁵

²³ David Vaver, Essentials of Canadian Law: Copyright Law. Irwin Law, (2000). p. 57

²⁴ **Ibid.**, p. 100.

²⁵ **Ibid.**, pp. 169-227.

The rights-of-use referred to aforesaid, may, according to David Vaver, *Ibid.*, be classed as “a defence, justification, or excuse,”²⁶ permitting the defendant/user to escape a civil finding of having infringed copyright.

*Defence of
“Public interest”*

For example, the user who claims a right-of-use via the doctrine of “public interest” must prove “a good cause or excuse”²⁷, to deal with material that otherwise would have the protection of copyright if it is “a matter of public interest”²⁸

*Defence of
“Fair dealing”*

The defence or excuse of “fair dealing” may permit an individual dealing with material, that otherwise would have the protection of copyright, (provided the otherwise copyrighted protected material is used “for the purposes of private study, research, criticism, review, or news reporting” - to reproduced in limited form. However, for example, in the case of “criticism” - “review” or “news reporting” – “the source and the name of the author, performer, broadcaster or sound recording maker, if given in the source, must be mentioned before the dealing can qualify as *fair*”²⁹ (please note that the italicized work is my emphasis).

However, it is clear that the defence or excuse of “fair dealing” has considerable restrictions. The key issue is whether there is true “fairness” in dealing with material that has copyright protection and several of the factors utilized to determine whether or not

²⁶ *Ibid.*, p. 172.

²⁷ *Ibid.*, p. 188.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 190.

that use is *fair*, (and germane to the issue of whether copies of surveyors survey plans and real property reports can be freely made by members of the public without the permission of the individual surveyor) is:

- “i) the effect of the dealing on the potential market for or value of the source work;
- ii) whether the source work was available within a reasonable time at an ordinary commercial price;”³⁰

However, once again, as stated by David Vaver, in Copyright Law, Ibid., at page 193, - : “Fair dealing can only occur in respect of a close said of purposes: news reporting, criticism, review, research, or private study,” – and furthermore, - : “particular citation practices are mandatory for news reporting, criticism and review.”

For example, it is not likely that material that represents a copy of the owners original material or used in substitution for, “or competes with”, copyright work will be deemed fair or to put it conversely will be deemed “less likely to be held fair”³¹

Obviously, a surveyor would not allow a third party (with whom or for whom he did not enter into contractual relations with or was not retained thereby, to prepare survey documentation or for whom he did not prepare his “work “ i.e. survey, real property report, etc.) to utilize his or her “work,“ wherein a third party was utilizing same if there was “motive of gain” i.e. some cost savings or cost recovery available to a third party.

Therefore all the exceptions, illustrated or defined by the authorities are based on so called “non-profit” uses or utilizations.”

For example, it would not be an infringement of copyright if an educational institution utilizes “a work” or makes a copy of same “for the purposes of education or training on

³⁰ Ibid., p. 191.

³¹ Ibid., p. 199.

the premises of an educational institution” – (see Section 29.4(1) of the Copyright Act, Ibid., as amended, and/or pages 177-188 of Copyright Law, Vaver, David, aforesaid).³²

Again, with respect to the issue of the exception or defence of “fair dealing” copyright is not infringed if the “use” is for the purposes of “private study, research, criticism, review or news reporting” – however, as stated earlier, in the case of “criticism, review or news reporting” the name of the author etc. “must be mentioned before the dealing can qualify as fair”.³³

As further stated by Vaver, David, Ibid., in his text Copyright Law, Ibid., sources had to be properly attributed where individual authors and/or works are being recopied and/or utilized if falling under the *fair dealing* heading and also in order to qualify as fair dealings, where the so called users are doing so without actually infringing the copyright of the original creator of the “work “.

***The Registry of
Deeds for the Province
of Newfoundland &
Labrador***

Likewise, as with education institutions, aforesaid, as issue that has arisen and is of particular concern to the Association of Newfoundland Land Surveyors, is with respect to the issue of whether the registration of a surveyor’s description plan and real property report, (whether or not it is attached to an indenture, such as a deed of conveyance, mortgage, mechanics lien document, etc.) *extinguishes* the surveyors copyright in same. – (Please note that the italicized words are my emphasis).

³² **Ibid.**, pp. 427-428.

³³ **Ibid.**, p. 190.

As a result of a position put forward by the Council of Management of the Association of Newfoundland Land Surveyors, to Ms. Susan Churchill, LL.B., (the then acting Registrar of Deeds), Ms. Dianne A. Smith, LL.B., of the Provincial Department of Justice wrote to the Association's former Legal Counsel indicating that her correspondence was the basis of a legal opinion provided by her and Peter Fitzgerald, LL.B., to Mr. John McCarthy, LL.B. also of the Provincial Department of Justice with respect to survey plans and the Copyright Act.

In Ms. Smith's correspondence, she stated, (to paraphrase): The consumer who has consumed the work i.e. who has purchased the survey documentation from the surveyor is the "first owner of the copyright". Ms. Smith, LL.B. states that, "The process of creating a legal survey can now be analogous to the creating of an engraving, print or similar work with in the meaning of the copyright, subsection 13(2). In such cases, the person who commissioned the print is the first owner of the copyright ".

We would reply with respect to Ms. Smith's position, that her analysis is incorrect for the following reasons:

Section 13(2) of the Act, i.e. the Copyright Act, only refers to "engravings, photographs or portraits" and does not, expressly or impliedly, contain any reference whatsoever to "maps, charts, plans," which, although generally falling under the heading of "artistic work," as defined in Section 2 of the Act, to include, "paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works"³⁴, (and each of them, i.e. maps, charts, photographs, engravings, etc, had its own definition and meaning under Section 2) Section 13(2) of the Act, Ibid., does not extend the right of ownership and/or the right of publication (which to some degree is the very essence of the right of Copyright), to "drawings, maps, charts" and "plans" or an architectural work, the latter of which, has been

³⁴ Tamaro, p. 29.

previously stated to be the most analogous comparison to Copyright in survey descriptions, plans and real property reports.

In fact, Section 13 of the Act expressly sets “the ownership of copyright” and therefore allows the person who ordered the “plate or other original” for “valuable consideration” to become the “first owner of the copyright”. But this only applies to “an engraving, photographed, or portrait” – where the “plate or other original was ordered by some other person and was made for valuable consideration, and the consideration was paid, in pursuance of that order...” Thus, *drawings, maps, plans, and architectural works*, which are most analogous to survey documentation would not fall under the exception or the exclusion permitted under section 13(2) of the Act. To reiterate, Section 13.(1) of the Act, underpins the general salient principle that “the author of the work shall be the first owner of the copyright therein” – (see Normand Tamaro, The 2001 Annotated Copyright Act, Ibid., page 263).

Furthermore, as stated by Normand Tamaro, in the 2001 Annotated Copyright Act, Ibid., Section 13(2) is “an exception to the general principle of author as first owner...” and “must be interpreted restrictively...” for example, if it has not been proven that the author acted under a commission, he remains the owner of the copyright.”³⁵

In this case, a reasonable analogy can be made to a surveyor, who for “a commission” has allowed the copyright to pass to the consumer, but only that consumer as “first owner” only, and only for the purpose for which the surveyor was “commissioned,” i.e. to prepare a survey and/or real property report for the consumer in that the latter would be recognized as being the first owner, but would also know the extent of his or her legal boundaries in terms of the right of further reproduction, i.e. as stated by the Surveyors Association on their legal documents since the late 1980’s or early 1990’s, a document as provided to the

³⁵ Tamaro, p. 278.

consumer, is subject to copyright and is to be used only for the purpose for which the surveyor is commissioned by that consumer and/or client and was commissioned for that date only and only for that date. This statement expressly and/or impliedly puts forth the statement to any third party reader that if copyright does pass, it passes only for that transaction, i.e. the transaction between the original surveyor and the original consumer and did not extend beyond that transaction.

*Loss of Copyright
via publication of
survey documentation
at the Registry of Deeds?*

Furthermore, Ms. Smith, LL.B., states that another issue or “argument” arises because once the survey documentation is registered at the Registry of Deeds for the Province of Newfoundland and Labrador, “the surveyor’s work” is thus “published.”

As stated previously, the concept of the right to *publish*³⁶ is significant, vis à vis copyright law in general and in particular, with respect to the issue raised by Diane Smith, *Ibid.*, in her October 1st, 1999 correspondence.

Ms. Smith goes on to say in part: “When the registry takes a deed for registration, the purpose of that registration is to give notice to third parties, i.e. the public at large. Section 12 of the Copyright Act, establishes that copyright for materials which are published by the Crown become the property of the Crown on publication. The Crown may very well own the copyright in the survey file for registration, there being no other agreement between the Crown and the author of the survey.”

³⁶ McKeown, p. 93.

Respectfully, Ms. Smith's interpretation of the Crown's alleged ownership or "property of the Crown on publication" of surveyor's documentation, which includes legal descriptions, plot plans, and/or real property reports, is once again incorrect. A review of Section 12 of the Copyright Act, as amended, and as more particularly set out in Normand Tamaro's text, the 2001 Annotated Copyright Act, Ibid., and in particular at pages 261-263 of same, indicates that this particular section, i.e. Section 12 of the Act, only refers to works "prepared or published by Her Majesty or under the control"³⁷ of Her Majesty and/or Her Majesty's agents, servants, etc.

Thus, there is no doubt that unless commissioned by the Crown and/or by a Crown agent and/or servant, and the work is "prepared or published by Her Majesty or under her control" that the Crown does not have ownership of the surveyor's copyright, merely because the surveyor's documentation is registered by the surveyor's client at the Registry of Deeds for the Province of Newfoundland and Labrador.

***Registration not
Synonymous with
Publication***

Ms. Smith's interpretation of the word *registration* of a document at the Registry of Deeds, does not mean that Registration is synonymous with the word publication, as the word publication is defined by the Copyright Act, as amended.

As stated by David Vaver, in Copyright Law, Ibid., "first publication occurs only when at least one physical copy is made publicly available free or for sale or hire."³⁸ The fact that a surveyor permits or allows the client who has contracted with him or her to prepare a survey and/or real property report, on the client's behalf, with respect to the client's property, and the client in turn, either personally or through his or her solicitor, registers

³⁷ Tamaro, p. 262.

³⁸ Vaver, p. 120.

the said survey and/or real property report at the Registry of Deeds, **does not** mean that the first right of publication has now been lost by the surveyor who initially prepared the original survey and/or real property report, nor does the Provincial Crown now become the owner of the surveyor's survey or real property report, or becomes the owner of the copyright in same. Whilst it may be true that the client or consumer who first purchases the survey and/or real property report obtains the first right of Copyright for that transaction only, there is no legal grounds to argue that that first client or consumer, who entered into the original transaction with the surveyor, then has the subsequent right to hold copyright in that document and then pass it on to subsequent buyers and or any other third party for that matter, without the prior written authorization of the surveyor who prepared the documentation and/or without compensation to that said surveyor who prepared same.

In response to Ms. Smith argument that registration means publication and thus a surveyor's copyright is lost in his survey documentation, we look to Section 2 of the Act, as amended, which defines publication, in part, as follows: – Section “2.2(1) for the purpose 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;”³⁹

As well, one key caveat in relation to the act of a client, i.e. registering the surveyor's documentation at the Registry of Deeds, for the Province of Newfoundland and Labrador, is that the surveyor has privity of contract with that client only and has authorized that individual client only to register or publish, the surveyor's documents which, in all cases, are provided to the client (and are original, stamped documents as required by the Surveyors Act⁴⁰ and supporting by-laws and regulations arising therefrom) and most importantly are stamped, written, interlineated or typed thereon, with the surveyor's

³⁹ Tamaro, p. 154.

⁴⁰ Land Surveyors Act, R.S.N. 1990, L-6, as amended.

express written statement, that the subject survey documents are not to be “copied,” “reproduced,” etc., without the surveyor’s prior written authorization and consent. (Please note that the underlining of certain words is my emphasis).

Before accepting therefore, that the surveyor has acquiesced in or permitted “publication” (with all the latter words’ attended meaning), one has to consider the *interest* of the client or his/her solicitor or mortgagee in *registering* or *publishing* the survey documents for a particular individual piece of parcel of land(s). (Please note that the italicized words are my emphasis).

Whilst, we agree with Ms. Smith’s assertion that it is usually (though not always) the consumers “explicit intention...” – “to give notice to the public at large that they have an interest in the property described in the legal survey...” – (we presume that *they* is to be equated with word *consumer* in this sentence), we do not agree with the concept that the registration of the surveyors documents (including, but not limited to, the legal description, plot plan and surveyors real property report), expressly or impliedly grants the Provincial Crown and or the public at large the express and or implied right to reproduce, copy and disseminate, the surveyors “work” without the surveyors express permission and/or without compensation or consideration being provided to the surveyor as *author* of his work in the survey documentation. (Please note that the underlining or italicizing of certain words is my emphasis).

Our argument with respect to Ms. Smith’s position aforesaid, is as follows:

Firstly, there is no doubt that mere registration at the Registry of Deeds does not create “Copyright” in a surveyor’s survey, etc., for the benefit of the Provincial Crown. The Registry of Deeds is no more than a mere archive.

The purpose of our provincial Registry of Deeds and the legal impact, if you will, of registering a document and/or indenture at the Registry of Deeds for the Province of Newfoundland and Labrador, were set out in an article written by J.

Derek Green, LL.B. (as he then was) - (Chief Justice of the Newfoundland and Labrador Supreme Court Trial Division), entitled "Registration, Notice and Defeasance under the Registration of Deeds Act"⁴¹, and presented at a Law Society Continuing Legal Education seminar, at St. John's on April 29th, 1983.

J. Derek Green, LL.B, (as he then was), stated in the aforesaid article (and quoting from Risk "The Records of Title to Land: A plea for Reform" (1971), 21 U. of T.L.J. 465⁴², stated that our Registry of Deeds is defined as "a deeds registration system".

Therefore as set out by Green and Risk aforesaid, a deeds registration system can be defined as follows:

"The registry system is essentially a store house. Documents that effect land may be registered. Registration is generally not a condition of effectiveness, and generally no affirmation of effectiveness is made by the state."⁴³

Thus our position therefore, considering that the Registry of Deeds is a "deed registration system" (and merely, as stated by J. Derek Green, aforesaid, attempts to give publicity to documents, evidencing transactions affecting land), the registration of a survey document does not mean that at law the registration of same can be equated with the definition of publication as set out in the Copyright Act, Ibid.. It is important to note that there must be an "intent to publish" which implies, under the Copyright Act, Ibid. and accompanying case law, that the surveyor intends to part with his or her express right to publish which is an integral part of the law of copyright and thus provides copyright protection to the author or original creator of the work. When a surveyor provides his original documentation to his client he does not intend same to be *published* with the ultimate effect being that he has lost his right of copyright in his original documentation.

⁴¹ J. Derek Green, "Registration, Notice and Defeasance under the Registration of Deeds Act." The Newfoundland Continuing Legal Education. April 29th, 1983.

⁴² Ibid.

⁴³ Ibid.

As stated aforesaid, the surveyor, as part of the practice adopted by the membership at large of the Association of Newfoundland Land Surveyors, expressly states on his original documentation that the original documents remains the property of the surveyor (with the exception of his client who has provided consideration for same) and can not be utilized by a subsequent third party, without the original surveyors express written permission.

As stated by John S. McKeown in Canadian Law of Copyright and Industrial Designs, Third Edition, Ibid., “The right to publish an unpublished work is a fundamental characteristic of copyright.”⁴⁴

Further, as set out in 5.(1) of the Act, “copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions are met:

- (a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;”⁴⁵

In addition, McKeown, goes on to say that provided the work is original, i.e. in this case a survey document prepared by a Newfoundland Land Surveyor and it falls under the definition set out in Section 2 of the Act, (which we have already established that it does) then the original document has the protection of copyright. Conversely, survey documents where the work is original and the author is known, (i.e. the surveyor who prepared the original survey documents has affixed his original stamp on same) does not fall under the exceptions from the general term of protection which was described aforesaid, and is set out in the Act as follows:

1. “anonymous and pseudonymous works;

⁴⁴ McKeown, p. 105

⁴⁵ Tamaro, p. 247

2. posthumous works;
3. works of joint authorship;
4. photographs;
5. cinematographic works;
6. Crown copyright; and
7. performer's performances, sound recordings and communication signals.”⁴⁶

Surely, it would be unreasonable to presume that a surveyor, who permits his/her clients to register his/her documents for the purpose of giving notice to a third party for the purposes set out in the Registration of Deeds Act,⁴⁷ has thereby permitted that client, the Crown, or the public at large to reproduce, copy, transmit, etc., with impunity, without compensation to the first owner of the copyright in the survey documentation, namely the surveyor who authored them.

Further, as stated by McKeown, in his text Canadian Law of Copyright and Industrial Designs, 2000⁴⁸, Ibid., “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 was done without the consent of the owner of the copyright.

More importantly, as stated by McKeown, “If an unauthorized person does something that the owner of the copyright has the sole right to do, then that person infringes copyright and such an act, even if it would otherwise be publication, would not constitute a publication within the meaning of the Act.”⁴⁹

Therefore, Ms. Smith, LL.B., assertion that registration of survey documents at the Registry of Deeds, for the Province of Newfoundland, constitutes *publication* within the

⁴⁶ McKeown, pp. 296-297

⁴⁷ Registration of Deeds Act, R.S.N. 1990, R-10, as amended.

⁴⁸ McKeown, p. 92

⁴⁹ McKeown, pp. 92-93

meaning of the Copyright Act, Ibid., is not supported by the Act, academic authorities and relevant case law.

CONCLUSION

In this paper, which has been prepared for discussion purposes only, we have put forward a legal position on behalf of the Association of Newfoundland Land Surveyors. Our position is based on the legal proposition that surveyors have copyright in their survey documents.

Furthermore, we have responded to the legal position put forward by solicitors with the Department of Justice, Provincial Government of Newfoundland and Labrador, and have pointed out why we disagree with their stated position.

However, as always, the relationship between various professional bodies and different levels of government are best enhanced by negotiation and compromise. We therefore propose as a model of co-operation the relationship between the Manitoba Land Surveyors Association and the Provincial Bar of Manitoba. In that regard, Mr. Bruce H. King, Real Property Chair for the Manitoba Bar Association, has advised the undersigned that the Association of Manitoba Land Surveyors together with the Provincial Bar, had developed a set of protocols with respect to what might be considered fair dealings with surveyors documentation, including, survey descriptions, plot plans, and Surveyor's Real Property Reports.

We take the position that the development of a protocol, for the fair use of survey documentation as prepared by members of the Association of Land Surveyors, in conjunction with the Law Society, and as sanctioned by the Provincial Government will lead to a fair and equitable agreement on the future use of surveyor's original documentation, whether registered or not.

Last but not least, is the opinion of the Department of Justice Lawyers that it may not be “within the public interest” to have a new survey documents prepared every time there is a transaction effecting land. This proposition is based on the erroneous belief that this practice would “impose a heavy financial burden on the public.” What the Department of Justice Lawyers failed to point out is that the Surveyors Association, via the use of an established protocol, is prepared to reach an amicable resolution of the outstanding issue of how additional fees would be charged to update survey documentation to current standards. Furthermore, the Department of Justice Lawyers have also failed to mention the plethora of litigation that has arisen in this jurisdiction as a result of purchasers and/or their solicitors relying on outdated and antiquated survey documentation. Obviously, the cost of this litigation is ultimately born by the public at large. This does not even take into consideration the excessive amount of delays in real estate transactions brought about by the last minute realization that the survey documentation being provided is unsuitable.

We therefore sincerely hope that all relevant stakeholders in this process would use this paper as a starting point to conclusively develop an acceptable practice with respect to the use and/or registration of original survey documentation, in order that the public at large is protected without and undue and unreasonable additional financial burden, while simultaneously protecting the right of members of the Association of Newfoundland Land Surveyors to copyright in their original survey documentation with the accompanying right to be adequately compensated for same.