

COURT OF APPEAL FOR ONTARIO

CITATION: Keatley Surveying Ltd. v. Teranet Inc., 2015 ONCA 248
DATE: 20150414
DOCKET: C59341

Weiler, Sharpe and Blair JJ.A.

BETWEEN

Keatley Surveying Ltd.

Plaintiff (Respondent)

and

Teranet Inc.

Defendant (Appellant)

Paul Morrison, Julie Parla, Shane D'Souza and Timothy Chapman-Smith,
for the appellant

Kirk Baert and Celeste Poltak, for the respondent

Heard: January 7, 2015

On appeal from the order of the Divisional Court (Justice Harriet E. Sachs, Justice Susan G. Himel, and Patricia C. Hennessy concurring), dated March 26, 2014, with reasons reported at 2014 ONSC 1677, 119 O.R. (3d) 497, reversing the order of Justice Carolyn J. Horkins of the Superior Court of Justice, dated December 14, 2012, with reasons reported at 2012 ONSC 7120, 31 C.P.C. (7th) 14.

Sharpe J.A.:

[1] This proposed class proceeding concerns a claim that land surveyors retain copyright in the plans of survey they prepare and register in the land

registry system and that the provision of copies of surveys to users of the system infringes the surveyors' copyright.

[2] The plaintiff Keatley Surveying Ltd. is a professional corporation owned and operated by Gordon R. Keatley, a land surveyor. For convenience, I will refer to Mr. Keatley and his corporation collectively as "Keatley".

[3] The defendant Teranet Inc. manages Ontario's electronic land registry system as a service provider to the government. Documents prepared by land surveyors, including drawings, maps, charts and plans (collectively "plans of survey") are registered in the electronic land registry system. Teranet provides electronic copies of registered plans of survey to members of the public for a fee prescribed by statute but pays no fees or royalties to the land surveyors who prepared the plans of survey.

[4] Keatley asserts copyright in the plans of survey it prepared or otherwise owns. Keatley seeks certification of this action as a class proceeding on behalf of all of the approximately 350 land surveyors in private practice in Ontario whose survey documents appear in digital format in Teranet's database.

[5] The class proceedings judge refused to certify the action. She found that while the pleadings did disclose a proper cause of action, Keatley had failed to satisfy the other criteria for certification. She found that Keatley had failed to show an identifiable class, only one proposed common issue was potentially

certifiable, a class proceeding was not the preferable procedure, Keatley was not representative of the proposed class, and the litigation plan was not workable.

[6] On appeal to the Divisional Court, the action was certified on the basis of a revised class definition and revised common issues.

[7] Teranet appeals, with leave, to this court. Teranet submits that the Divisional Court erred in permitting Keatley to recast the class definition and common issues and that, in any event, the action does not meet the test for certification.

[8] For the following reasons, I would dismiss the appeal.

FACTS

[9] Before the creation of an electronic land registration system, documents registered or deposited with Ontario's land registry offices, including plans of survey, were available to the public. Copies were obtained from a land registry office for a fee. It was a paper-based system. The surveyors who created the plans of survey were not paid a fee or royalty by the government.

[10] In the 1980s, the process of automating the land registry system in Ontario began. All documents in the registry were digitized, remote access to these documents was provided, and each parcel of land was given a unique identifier. The government also began to convert all land registration to the land titles system. In 1991, the Ontario government entered into a public-private

partnership with Teranet. Teranet contracted with the Ontario government to take over the automation and conversion of the paper-based land registration system to an electronic title system. Many surveyors, individually and through The Association of Land Surveyors of which Keatley is a member, participated in consultations with the government and with Teranet as the electronic land registration system was developed. The conversion was completed in October 2010. The last land registry office to be automated and converted to the land titles system was the sole office on Manitoulin Island, where Keatley is located, in about June 2010.

[11] Teranet now manages Ontario's electronic land registry system as a service provider to the government. When plans of survey are registered and deposited in a land registry office in Ontario, Teranet scans the plans of survey into a digital format and adds this electronic information to its database. Teranet provides electronic copies of plans of survey to the public for a statutorily prescribed fee. The provision of copies by way of electronic means is at issue in this proceeding.

[12] There are two Teranet service portals through which licensed users can access Ontario's electronic land registration system, Teraview and GeoWarehouse. Teraview is a desktop application that allows users to search and register documents. It functions like a virtual land-registry office. Since 1995, users have been able to log on to Teraview to search and obtain copies of

real property records, including plans of survey. GeoWarehouse is an online service that generates reports specifically geared for use by professionals such as real estate agents, appraisers, and surveyors. It allows for access to plans of survey through the electronic land registration system database. Accessing plans of survey through either Teraview or GeoWarehouse requires the payment of statutorily prescribed fees, which are collected by Teranet on behalf of the Ontario government. The terms and conditions for both Teraview and GeoWarehouse state that the intellectual property in documents is either owned by Teranet's suppliers or licenced to Teranet. Many surveyors are licenced users of Teraview and GeoWarehouse, but Keatley is not and he states that he has never used either program.

[13] Surveyors are required to use copies of plans of survey in order to fulfill their professional and statutory duties. For instance, when creating a plan of survey, land surveyors must obtain copies of plans of survey related to the lands and abutting properties.

[14] Keatley is located and operates almost exclusively on Manitoulin Island. Keatley has copies of approximately 4,700 surveys of Manitoulin Island which includes the work of most surveyors who have ever worked on Manitoulin Island. This means that, unlike most surveyors, Keatley ordinarily does not require or obtain copies of surveys from Teranet.

THE CLAIM

[15] Keatley's claim is for copyright infringement. It is common ground that plans of survey are "artistic works" and acquire copyright protection under the *Copyright Act*, R.S.C. 1985, c. C-42, s. 5(1). Keatley pleads that s. 3(1) of the *Copyright Act* gives copyright owners the sole right to produce, reproduce, and publish a work, as well as the sole right "to communicate the work to the public by telecommunication". Keatley pleads that by making digital copies of plans of survey, storing these copies in its database, and making these copies available to the public for a fee, Teranet infringed these exclusive rights. Keatley relies on s. 27(1) of the *Copyright Act*, which states, "It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do." In addition, Keatley asserts s. 27(2) of the *Copyright Act* which states grounds of secondary infringement, such as selling or distributing a copy of a work that "the person knows or should have known infringes copyright." As originally framed, the action claimed both monetary and injunctive relief but, as I will explain, the claim for injunctive relief was abandoned before the Divisional Court heard oral argument.

[16] Teranet pleads several defences. Teranet says that as the surveys are published by or under the direction and control of the Crown, it is the Crown that owns the copyright pursuant to the *Copyright Act*, s. 12. Teranet relies on

provisions in the *Land Titles Act*, R.S.O. 1990, c. L.5; the *Registry Act*, R.S.O. 1990, c. R.20; the *Surveys Act*, R.S.O. 1990, c. S.30; and the *Surveyors Act*, R.S.O. 1990, c. S.29, for the proposition that surveys, once registered, become the property of the Crown. Teranet also pleads the defences of consent, estoppel, waiver, acquiescence, laches, and statutory limitation periods. In addition, Teranet pleads that any infringing uses were fair dealing for research and private study or were justified by their “significant public benefit”.

[17] Keatley disputes Teranet’s interpretation of the relevant legislation and contends that provincial legislation cannot defeat federal copyright protection.

[18] The class proceedings judge struck Keatley’s pleading that scanning hard copies of the plans of survey to create a digital format was a “translation” under the *Copyright Act*, s. 3(1)(a). With respect to the balance of the claim, applying the relaxed standard of scrutiny of the merits that applies at the certification stage, the class proceedings judge found that Keatley satisfied the cause of action requirement for certification. Although she found, at para. 113, that “a compelling case can be made that copyright belongs to the Crown”, she concluded that the claim raised a “novel question” which should not be decided at the certification stage. Teranet did not appeal that finding to the Divisional Court or to this Court. Accordingly, I make no comment as to the merits of this proposed class action.

LEGISLATION

[19] The *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5, sets out the test for certification:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

ISSUES

[20] Teranet raises four issues on appeal:

1. Did the Divisional Court err by considering revised proposals for certification that differed from those presented before the class proceedings judge?
2. Did the Divisional Court err in any event by granting certification on the basis of the revised proposals as to identifiable class, common issues, preferable procedure, and representative plaintiff?
3. Did the Divisional Court err in holding that it is not necessary that there be anyone other than the plaintiff who wishes to pursue its claims as a class action, or at all?
4. Did the Divisional Court err in certifying the proceeding without requiring the plaintiff to propose a workable litigation plan?

ANALYSIS

Issue 1. Did the Divisional Court err by considering revised proposals for certification that differed from those presented before the class proceedings judge?

[21] Teranet submits that the Divisional Court erred by treating the appeal from the class proceedings judge as if it were a *de novo* hearing. Teranet argues that the proposed class definition and common issues considered by the Divisional Court were materially different from those considered by the class proceedings judge. By allowing Keatley to recast its case on appeal, Teranet submits the Divisional Court stepped outside its role as an appellate court in a manner that unfairly prejudiced Teranet. Teranet places particular reliance on para. 7 of the Divisional Court's reasons, which state, "On the case as presented to her, I agree with the motion judge's finding that certification was not appropriate." It is argued that as the Divisional Court found no reviewable error, it was not entitled to

exercise appellate jurisdiction to effectively reverse the decision of the class proceedings judge.

[22] I agree with Teranet that implicit in the exercise of appellate jurisdiction to hear an appeal from a denial of certification are limits on the extent to which a party can recast the case it presented at first instance. I also agree that absent properly admitted fresh evidence on appeal or a material change in the law, an appellate court will ordinarily only intervene where there is an identifiable, reviewable error by the court of first instance.

[23] These guiding principles do not, however, place an appellate court in a straightjacket that would frustrate the interests of justice. It has been judicially recognized that given their very nature, class proceedings evolve as they work their way through the court system. Certification has been described as “a fluid, flexible procedural process” that affords plaintiffs some scope to “reformulat[e] their approach on appeal”; holding “plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the *Act* – judicial economy, access to justice, and behaviour modification”: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, 4 B.C.L.R. (5th) 292, at para. 23.

[24] The case law from this and other appellate courts, thoroughly considered and reviewed by the Divisional Court, establishes that there must be some

latitude for consideration of issues not raised at first instance provided that the other party is afforded procedural fairness. As this court stated in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 (C.A.), at para 39, leave to appeal refused, [2007] S.C.C.A. No. 346, “[p]rovided the defendant is not prejudiced, it is open to a plaintiff to recast its case to make it more suitable for certification”. See also *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.), at para. 30, leave to appeal refused, [2003] S.C.C.A. No. 283.

[25] The issue is whether Keatley’s reformulation of the class definition and common issues exceeded the type of adjustment that is contemplated by this line of authority and whether Teranet was prejudiced thereby.

(a) Class Definition

[26] The proposed class definition presented to the class proceedings judge was:

All land surveyors in Ontario, whether acting as individuals, corporations, or partnerships, who are the owners of copyrights in drawings, maps, charts and plans that have at any time appeared on the Defendant’s electronic database without such copyright holder’s written assignment or license.

[27] Keatley conceded before the Divisional Court that this proposed class definition was fatally flawed as it was merits-based. As ownership of copyright is

a proposed common issue to be determined in the litigation, membership in the class could not be determined until that issue was resolved.

[28] On appeal to the Divisional Court, Keatley recast the proposed class definition in the following terms:

[A]ll land surveyors, whether acting as individuals, corporations, or partnerships, in Ontario who on or before [date of certification] 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.

[29] While the recast definition is certainly different from a legal perspective, I cannot agree that it fundamentally changed the nature of the case presented on appeal in a way that would prejudice Teranet. Although differently described, the proposed class remains essentially the same. The merits-based language – “who are the owners of copyrights” – is replaced with language that identifies the class members in neutral terms by identifying the nature of their actual connection with the surveys - “author”, “employer” or “assignee”.

[30] While allowing Keatley to present this revised class definition on appeal required Teranet to deal afresh with an issue on which it had been successful at first instance, Teranet was put at no procedural disadvantage in arguing the

point. As the Divisional Court found, at paras. 31 and 33-34, this change did not deprive Teranet of an opportunity to respond, as may occur where after the conclusion of argument a judge makes modifications on his or her own initiative. Teranet neither required nor sought an adjournment to consider the change. The change did not cause prejudice arising from a lack of evidence or a proper record. Any prejudice from having to deal with the new class definition on appeal could be, and was, dealt with by the Divisional Court in its costs order: 2014 ONSC 3690, 374 D.L.R. (4th) 529.

(b) Common Issues

[31] I have attached as Schedule “A” to these reasons the proposed common issues that were before the class proceedings judge and as Schedule “B”, the revised proposed common issues presented to the Divisional Court.

[32] The Divisional Court refused to certify issues 8 and 9 dealing with damages. Keatley does not cross-appeal that determination. This court is left to consider issues 1 to 7, which were accepted by the Divisional Court.

[33] Of the issues presented to the class proceedings judge, issues 5, 6, 7 and 8 before her dealt with damages and those issues are now off the table. Issue 9 dealt with injunctive relief, which has been abandoned. This narrows the inquiry to a comparison of Issues 1 to 7, as accepted by the Divisional Court, with Issues 1 to 4 and 10, as presented to the class proceedings judge. For convenience, I

will refer to these as “Divisional Court Issue 1”, “Class Proceedings Judge Issue 1”, and so on.

[34] Divisional Court Issue 1 is merely a refined version of Class Proceedings Judge Issue 1. Divisional Court Issue 1 does not suffer from the defect noted by the class proceedings judge in Class Proceedings Judge Issue 1, namely that given the definition of “plan of survey” provided by the plaintiff, the issue asked if a *surveyor* had rights in a plan of survey *after* it was registered and deposited with the land registry office. By contrast, Divisional Court Issue 1 merely deals with the question of whether there is copyright in plans of survey “registered and/or deposited” in the land registry office, not who owns that copyright. Teranet concedes that the answer to the question is “yes”.

[35] No issues before the class proceedings judge correspond with Divisional Court Issues 2 and 3.

[36] Divisional Court Issue 4 is precisely the same as Class Proceedings Judge Issue 2, except that the “Alleged Uses” were defined more narrowly before the Divisional Court. As I will explain below, I see this proposed common issue as central to the certification. It is my view that the class proceedings judge erred in rejecting it as a common issue and that the Divisional Court erred in failing to identify that error on the part of the Class Proceedings judge.

[37] Divisional Court Issue 5 is identical to Class Proceedings Judge Issue 3, except that the “Alleged Uses” were defined more narrowly before the Divisional Court.

[38] Divisional Court Issue 6 is merely a refined version of Class Proceedings Judge Issue 4. First, the “Alleged Uses” in question were defined more narrowly before the Divisional Court. Second, Divisional Court Issue 6 will be reached only if Divisional Court Issues 2 and 3 are answered in Keatley’s favour. This properly isolates the common issue of whether Teranet’s activities constitute infringement if the class members do retain copyright.

[39] Divisional Court Issue 7 is precisely the same as Class Proceedings Judge Issue 10, except that the “Alleged Uses” were defined more narrowly before the Divisional Court.

[40] There is substantial similarity between the two sets of proposed common issues. The only issues presented to the Divisional Court that could be described as new were issues 2 and 3. Both identify key defences relied on by Teranet. While differently worded issues dealing with damages were advanced before the Divisional Court, those issues were not certified by that court.

[41] I fail to see how Teranet could have been at any disadvantage in presenting arguments to the Divisional Court on the revised set of common issues. The conceptual core of the case remained unchanged. As this court

stated in *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, at para 132: “A core of commonality either exists on the record or it does not. In other words, commonality is not manufactured through the statement of common issues.” The revised common issues on appeal neither expanded nor altered the scope of the litigation that was presented at first instance.

[42] The Divisional Court did not consider the revised, proposed common issues on its own initiative without giving Teranet an opportunity to respond, as may occur when a class proceedings judge certifies on the basis of issues not argued: see *McCracken*, at para. 144. Teranet had prior notice of the revisions and a full opportunity to make submissions before the Divisional Court. All of the revisions rested on the existing record and did not call for fresh evidence. As with the changes to the proposed class definition, the changes to the proposed common issues did not cause Teranet any prejudice or disadvantage that could not be compensated in costs.

[43] The changes made to the proposed common issues fall well within the margin that is contemplated in *Markson*, at para. 39, for a plaintiff to recast its case on appeal “to make it more suitable for certification”. I agree with Keatley’s submission that the change permitted in *Markson* was more drastic than the changes made in the case at bar. *Markson* concerned a claim that the defendant bank’s flat fees on cash advances amounted to an illegal rate of interest.

Certification had been denied, in part, on the ground that determination of that issue would require that millions of transactions be examined individually. This court allowed the plaintiff in *Markson* to advance for the first time on appeal a new damages theory based on statistical sampling and aggregate damages that avoided the need to examine each transaction.

[44] Similarly, in *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 1, the issues as framed before the class proceedings judge claimed personal injury damages arising from emissions from a refinery. On appeal to the Divisional Court, that claim was abandoned and the revised claim was restricted to loss in property value. This court held that the Divisional Court had erred by failing to consider the case as reformulated when assessing the class definition requirement.

[45] Finally, the Divisional Court was fully aware of the permissible limits on recasting certification motions on appeal. I agree with and adopt what that court stated at para. 39:

Nothing in these reasons should be taken as endorsing the practice of recasting certification motions on appeal. This practice clearly undermines the way class action certification motions should proceed through the courts. Using appellate courts to hear matters *de novo* both deprives the courts of the expertise of the judges who have been assigned to hear these cases at first instance and requires three judges to determine issues that could and should have been heard by one judge.

[46] I note that the issue of recasting a class action on appeal was considered in *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.), at paras. 13-16, but as leave to appeal to this court was granted on February 26, 2015, I will say no more about that decision in these reasons.

[47] For these reasons, I reject Teranet's argument that the Divisional Court erred by considering revised proposals for certification that differed from those before the class proceedings judge.

Issue 2. Did the Divisional Court err in any event by granting certification on the basis of the revised proposals as to identifiable class, common issues, preferable procedure, and representative plaintiff?

[48] As I have determined that the Divisional Court was entitled to consider the changes made by Keatley to the proposed class definition and common issues, I now turn to the question of whether the Divisional Court erred in any event by certifying the action.

(a) Class definition

[49] For convenience, I repeat here the proposed class definition considered by the Divisional Court:

[A]ll land surveyors, whether acting as individuals, corporations, or partnerships, in Ontario who on or before [date of certification] 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.

[50] Teranet submits the words "whose plan of survey" necessarily refer to ownership of copyright and, as that is an issue to be determined in the action, the proposed class definition remains merits-based.

[51] This submission is without merit. The revised class definition does not rest upon or require a determination of copyright ownership. "Whose plan of survey" relates not to copyright ownership but to the connections between the class members and the survey, be they the author, the employer of the author or the assignee of the author or employer. That those connections may be found to provide a basis for copyright ownership does not make the class definition merits-based.

(b) Common Issues

[52] Teranet argues that the central issue in this litigation is whether or not each class member consented to Teranet's use of the plans of survey and that the plaintiff must demonstrate lack of consent to make out its claim. It is Teranet's further contention that individual inquiries respecting each class member's involvement in the numerous interactions between surveyors, Teranet and land registry offices over the past 25 years are required to determine the

issue of consent. Teranet submits that the common issues proposed by Keatley cannot significantly advance the litigation.

[53] As the Divisional Court pointed out, at para. 98, Keatley's revised common issues isolated four fundamental questions:

(1) whether, once plans of survey are registered or deposited in land registry offices, the Crown acquires the copyright to those plans by virtue of s. 12 of the *Copyright Act* [common issue 2];

(2) whether the signed declaration that is affixed to a plan of survey at the time of registration or deposit constitutes a written assignment of copyright to the Crown pursuant to subsection 13(4) of the *Copyright Act* [common issue 3];

(3) whether by registering and/or depositing the plans of surveys at the land registry office the class members are deemed to have consented to the Alleged Uses by [Teranet] [common issue 4]; and

(4) whether [Teranet] has a defence to copyright infringement based on public policy [common issue 7].

[54] Each of these common issues is based upon the legal position taken by Teranet in this litigation, namely, that for at least four different legal reasons, Teranet's use of the surveys does not amount to copyright infringement. The resolution of each of those common issues will turn on legal interpretations having general application to class members that do not require any inquiry into the individual circumstances of the class member. I agree with the Divisional Court that resolution of these issues would significantly advance the litigation.

[55] The Divisional Court's assessment of these proposed common issues is entirely consistent with decisions dealing with certification in other copyright cases. As in *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.), at para. 30, Teranet's procedural position that the issue of consent is wholly individual cannot be reconciled with its substantive position that by depositing a survey in the registry, a surveyor must be taken to have agreed to Teranet's use of the survey in the manner contemplated by the land registry scheme. See also *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, 22 C.P.C. (7th) 33, at paras. 162-65 and 182-83, leave to appeal refused, 2012 ONSC 3436 (Div. Ct.).

[56] It may well be, as the Divisional Court fully appreciated, that even if Teranet fails on these common issues, Teranet will still be able to defend its use of the plans of survey because of particular individual actions taken by various class members. Individual inquiries would have to be undertaken in that regard. However, it is well-established that the need for this type of inquiry following the resolution of common issues that do advance the litigation is not a reason to refuse certification: see, e.g., *Robertson*, at para. 33; *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 53, leave to appeal refused, [2005] S.C.C.A. No. 50: "an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though individual issues remain to be decided after its resolution."

[57] It follows from what I have said on this issue that I think the class proceedings judge erred in refusing certification on the ground that individual inquiries into the circumstances of class members would be required. The Divisional Court erred by failing to point out that error.

(c) Preferable Procedure

[58] Teranet's contention that the Divisional Court erred in finding that the preferable procedure requirement was satisfied essentially reiterates the argument that individual issues overwhelm the common issues arising from Teranet's legal defences.

[59] I agree with the Divisional Court's conclusion, at paras. 112-113, that the common issues identify significant elements of this litigation that, if resolved in Teranet's favour, would be fatal to the claim. If Teranet does not succeed on the common issues, the remaining issues requiring individual trials would be fewer and simpler by virtue of the determination of the common issues.

(d) Representative Plaintiff

[60] Most land surveyors in Ontario – indeed, on the record before us, all surveyors other than Keatley - are both users and providers of the surveys in the electronic land registry system operated by Teranet. They must acquire copies of relevant surveys when preparing new surveys and then they register and deposit the new survey that they have prepared. As Keatley's surveying work is limited

almost exclusively to Manitoulin Island, and it has an extensive collection of surveys of the island, Keatley relies on neither Teranet nor the land registry office to do the necessary research.

[61] Teranet seizes on this unusual aspect of Keatley's surveying practice. It argues that if the action succeeds, as a practical matter, Teranet would be required to pay royalties to the class members and to impose corresponding additional fees on users. Class members would gain from the payments they receive for use of the surveys they prepare and lose from the additional fees they will pay for the surveys they require. By contrast, Keatley is in an unusual position. It does not require copies of surveys and therefore only stands to gain if the class proceeding is successful. Teranet argues that Keatley is not a suitable representative plaintiff for this reason.

[62] Section 5(1)(e) of the *Class Proceedings Act, 1992* provides that a representative plaintiff is one who:

- (i) would fairly and adequately represent the interests of the class,
- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[63] In this part of my reasons I will focus on points (i) and (iii) and return to (ii) the issue of an appropriate litigation plan below.

[64] The class proceedings judge ruled that Keatley was not a proper representative plaintiff as it does not rely on Teranet to obtain copies of plans of survey. Before the class proceedings judge, Keatley claimed “a permanent injunction enjoining [Teranet] from dealing with, in any way or fashion, copies of [plans of survey] that it currently has in its possession.” If granted, such an injunction would shut down Teranet’s capacity to provide copies of plans of survey. As surveyors other than Keatley require such copies to do their work, the class proceedings judge ruled that this put Keatley’s interests in conflict with the proposed class members.

[65] Keatley withdrew the claim for an injunction in the factum it filed in the Divisional Court so that Teranet had notice of that change of position before the appeal to the Divisional Court was argued. The Divisional Court concluded that any conflict between Keatley and members of the proposed class was thereby removed. Citing *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 41, the Divisional Court ruled that the circumstances of the representative plaintiff need not be the same as all or many of the members of the class. The Divisional Court found, at para. 120, “it is arguable that [Keatley’s] unique circumstances, in particular his lack of reliance on [Teranet], make him ideally suited to vigorously prosecute the claim.”

[66] I agree with the Divisional Court's analysis of this issue and reject Teranet's submission that even if the claim is restricted to damages, there remains a conflict between Keatley and the members of the proposed class.

[67] I observe at the outset that by accepting Keatley as a proper representative plaintiff, the Divisional Court did not ignore or obliterate any legitimate defences that Teranet may assert. As I have indicated above in my discussion of the common issues, Teranet is able to assert defences to the claims of those class members who may have waived, assigned, or surrendered their rights. The possibility of a judgment that results in success for some but not all class members does not amount to a conflict that disentitles Keatley to act as the representative plaintiff.

[68] If Keatley is able to establish a breach of copyright on behalf of all or some members of the class, those class members would legally benefit from a judgment holding that they retain copyright in the plans of survey they register and deposit in Ontario's electronic land registry system. They would certainly gain from any damages or disgorgement ordered with respect to past infringement. As for the future, the likely result of a judgment in favour of the class may well be a process of negotiation to license Teranet to provide electronic copies of plans of survey in exchange for a royalty or fee. Surveyors stand to benefit from such payments. While they might reasonably expect that Teranet would endeavour to pass on the added cost of the licence or royalty

through an increased fee for providing copies of surveys, that is a cost surveyors could in turn pass on to their clients.

[69] While it may be the case that Keatley stands to gain more than other surveyors because of his unusual situation, I am not persuaded that the situation of other surveyors is so different or distinct so as to give rise to a conflict or make Keatley unsuitable to represent their interests.

Issue 3. Did the Divisional Court err in holding that it is not necessary that there be anyone other than the plaintiff who wishes to pursue its claims as a class action, or at all?

[70] A related but distinct issue to the one I have just discussed is whether the Divisional Court properly concluded that the class proceedings judge erred in holding, at paras. 139 and 156 that Keatley was required to “provide evidence of two or more people who are desirous of having their claims determined in a class proceeding” and that failure to do so was fatal to certification. After a thorough review of the relevant case law, including *Lambert v. Guidant Corp.* (2009), 72 C.P.C. (6th) 120, leave to appeal refused (2009), 82 C.P.C. (6th) 367 (Div. Ct.), and *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276, the Divisional Court concluded, at para. 85:

In short, the ‘desirous’ component of the identifiable class criterion is not mentioned in the legislation, not required to achieve the purposes of the criterion and not mentioned in the Supreme Court of Canada jurisprudence that discusses the issue.

[71] It is, of course, incumbent on the proposed representative plaintiff to show that there are two or more individuals who have the same claim as the representative plaintiff to advance. Ordinarily, the existence of more than one claim will be apparent from the very nature of the claim being advanced. This case falls into that category. If the representative plaintiff has claim for breach of copyright, it is apparent that other surveyors will have a like claim.

[72] Where the existence of multiple claims is not apparent, some evidence that multiple claims exist may be required: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 24-25. As stated in *Lau v. Bayview Landmark Inc.*, (1999), 40 C.P.C. (4th) 301 (S.C.), at para. 27, “the threshold for establishing the existence of the class ... will vary from case to case”. For instance, the existence of the cause of action may turn on subjective factors “where a plaintiff’s allegations of harm raise a question as to the tolerance level of other individuals”: *Lau*, at para. 29. In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff’d (1999), 42 O.R. (3d) 576 (Div. Ct.), the proposed representative plaintiff alleged that there was mould in the bathroom of her rental apartment, but there was no evidence that mould was present elsewhere in the building. Certification was denied as there was no evidence led that the harm complained of was the subject of concern to anyone else. In *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, [2013] 3 S.C.R. 545, a price-fixing case, the class definition included purchasers of products containing,

among other ingredients, the substance for which the price had allegedly been fixed. This was fatal to certification of indirect purchasers as class members because the uncontradicted evidence was that the impugned substance had been used interchangeably with another in products and there was no way for an indirect purchaser to know which of the two substances had been used. As a result, the majority held at para. 69, there was no evidence to show that two or more persons had purchased a product containing the substance for which the price had allegedly been fixed.

[73] I agree with the Divisional Court that a distinction must be drawn between the existence of multiple claims and the subjective wishes or intentions of individual class members to assert a claim. It is in the very nature of class actions that many, if not most, individual class members lack the motivation or the will to commence proceedings. The access to justice and behavior modification goals of class proceedings will often depend upon a representative plaintiff taking the initiative in circumstances where other members of the class would be ignorant of their loss or acquiesce because of disinterest, lack of resources or fear of an adverse costs award. If multiple claims exist, the representative plaintiff does not have to conduct a referendum to determine how many class members want to sue. Ontario's class action regime features an opt-out procedure which affords class members who do not wish to have their claims advanced the right to

disassociate themselves from the action. There is no corresponding requirement to establish a willing class.

[74] As the Divisional Court observed, citing *Lambert*, at para. 98, and *Singer*, at para. 136, in cases where the interest of the representative plaintiff is sufficiently idiosyncratic to call into question the utility of a class proceeding, the court may exercise a gatekeeper function under the s. 5(1)(d) preferable procedure requirement. As Keatley's claim is one that, if successful, would benefit some or all of the class members, I would not put this case into that category.

[75] Accordingly, the Divisional Court did not err in rejecting the proposition that under s. 5(1)(b) of the *Class Proceedings Act, 1992* it is necessary to show that there are class members, other than the plaintiff, who wish to pursue claims as a class action.

Issue 4. Did the Divisional Court err in certifying the proceeding without requiring the plaintiff to propose a workable litigation plan?

[76] The Divisional Court found that, in the circumstances of this case, the litigation plan provided by Keatley was adequate as the common issues judge would be in the best position to determine how to resolve the individual issues. The Divisional Court was alive to the complexity of this litigation and accepted that developing an iron-clad, full-blown litigation plan at this stage of the proceeding would be difficult, if not impossible. As it is almost inevitable that the

litigation plan will be modified as the case proceeds, it was reasonable for the Divisional Court to accept the plan Keatley provided and to refer the details to the common issues judge: see *Cloud*, at para. 95.

CONCLUSION

[77] For these reasons, I would dismiss this appeal.

[78] If the parties are unable to agree as to the costs of the appeal, they may file brief written submissions.

Released: *RJS* APR 14 2015

Robt G Wharf 9A
Laura K M Weiler 9A
Joyce R B Blair 9A

Schedule "A"

PROPOSED COMMON ISSUES BEFORE THE CLASS PROCEEDINGS

JUDGE

1. Do Class Members who create a Plan of Survey have any of the rights to those Plans of Survey as set out under Sections 3(1), 3(1)(a) and/or 3(1)(f) of the *Copyright Act*?

2. Are Class Members deemed to have authorized or consented to any or all of the Alleged Uses by the Defendant of Plans of Survey as a result of the registration and/or deposit of those Plans of Survey to the Ontario Land Registry Office?

3. Did the Defendant make any or all of the Alleged Uses of Plans of Survey? If so, which ones?

4. Absent individual consent, are any or all of the Alleged Uses:

a. Infringement on Class Members' Copyright in Plans of Survey for the purposes of s. 27(1) of the *Copyright Act*;

b. Secondary infringement on Class Members' Copyright in Plans of Survey for the purposes of s. 27(2) of the *Copyright Act*,

and if so, which ones?

5. If Class Members elect under s. 38.1 of the *Copyright Act* to recover statutory damages and liability is established against the Defendant at the common issues trial, then:

a. Should statutory damages be awarded?

b. If so, can the aggregate amount of statutory damages be determined as a common issue? And

c. If so, how should these damages be calculated?

6. If Class Members do not elect under s. 38.1 of the *Copyright Act* to recover statutory damages, and if liability is established against the Defendant at the common issues trial, should the trial judge grant a declaration that the Class Members are entitled to remedies pursuant to the *Copyright Act*, in an amount to be determined at a subsequent hearing?
7. Did the conduct of the Defendant meet the standard required for an award of punitive damages? Once compensatory damages are determined, in what amount and to whom should punitive damages be paid?
8. Should the Defendant pay pre- and post-judgment interest, and, if so, at what annual interest rate?
9. Are Class Members entitled to an injunction pursuant to the *Copyright Act*?
10. Does the Defendant have a defence to copyright infringement based on public policy that would justify the Defendant making the Alleged Uses of Plans of Survey?

DEFINITIONS

"Alleged Uses" means:

- a) Making copies of Plans of Survey;
- b) Translating copies of Plans of Survey into digital formats;
- c) Transmitting digital copies of Plans of Survey to the Defendant's data-receiving centre by telecommunication;
- d) Storing digital copies of the Plans of Survey in the Defendant's electronic database;
- e) Adding the digital copies of the Plans of Survey to the Defendant's index of documents available through Teraview and/or GeoWarehouse;
- f) Communicating the digital copies of Plans of Survey to the public by telecommunications;

g) Offering the digital copies of the Plans of Survey for sale to Customers for a fee; and/or

h) Allowing Customers to print or download one or more copies of Plans of Survey;

...

"Customers" means the Defendant's subscribers and/or members of the public; and

"Plans of Survey" means plans of survey prepared by Land Surveyors and registered and/or deposited in the Ontario Land Registry Office, and includes any drawings, maps, charts or plans contained in same.

Schedule "B"

PROPOSED COMMON ISSUES BEFORE THE DIVISIONAL COURT

COPYRIGHT IN PLANS OF SURVEY

1. Does copyright under the *Copyright Act* subsist in the Plans of Survey?
2. Does the copyright in the Plans of Survey belong to the Province of Ontario pursuant to section 12 of the *Copyright Act* as a result of the registration and/or deposit of those Plans of Survey in the Ontario Land Registry Office?
3. Does the signed declaration affixed to the Plan of Survey at the time of registration and/or deposit constitute a signed written assignment of copyright to the Province of Ontario pursuant to subsection 13(4) of the *Copyright Act*?

DEEMED CONSENT

4. Are Class Members deemed to have consented to any or all of the Alleged Uses by the Defendant of Plans of Survey as a result of the registration and/or deposit of those Plans of Survey to the Ontario Land Registry Office?

INFRINGEMENT

5. Did the Defendant make any or all of the Alleged Uses of Plans of Survey? If so, which ones?
6. If the answers to common issues 2 and 3 are no, do any or all of the Alleged Uses constitute:

a. uses that by the *Copyright Act* only the owner of the copyright has the right to do?

b. uses that are listed in paragraphs 27(2)(a) to (e) of the *Copyright Act* and that the Defendants knew or should have known infringes copyright?

and if so, which ones?

DEFENCES

7. Does the Defendant have a defence to copyright infringement based on public policy that would justify the Defendant making the Alleged Uses of Plans of Survey?

RELIEF

8. Did the conduct of the Defendant justify an award of aggravated, exemplary, or punitive damages?

9. Can an aggregate award of damages be made pursuant to subsection 24(1) of the *Class Proceedings Act, 1992*? If so, in what amount?

DEFINITIONS

"Alleged Uses" means:

- a) Making copies of Plans of Survey;
- b) Transmitting digital copies of Plans of Survey to the Defendant's data-receiving centre;
- c) Storing digital copies of the Plans of Survey in the Defendant's electronic database;
- d) Adding the digital copies of the Plans of Survey to the Defendant's index of

documents available through Teraview and/or GeoWarehouse;

e) Offering the digital copies of the Plans of Survey to Customers for a fee; and/or

f) Allowing Customers to print or download one or more copies of Plans of Survey;

...

"Customers" means the Defendant's subscribers and/or members of the public; and

"Plans of Survey" means plans of survey prepared by Land Surveyors and registered and/or deposited in the Ontario Land Registry Office, and includes any drawings, maps, charts or plans contained in same.