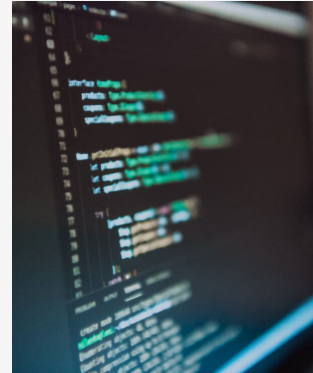


Court of Appeal for Ontario upholds employee's copyright in competing software developed 'off the clock'

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Key Takeaways

- The decision helps to clarify the legal test for identifying when a work is created “in the course of employment” under Canadian copyright law.
- An employer's copyright claim over an employee's work product depends on whether the employee created the work as part of their *actual* assigned responsibilities.
- Employers should clearly define ownership rights in employment contracts to avoid disputes over intellectual property.

The Court of Appeal for Ontario recently released its decision in *Nexus Solutions Inc. v. Krougly*, 2026 ONCA 199, providing important guidance on the scope and purpose of section 13(3) of the *Copyright Act*, R.S.C. 1985, c. C-42.

Under the *Copyright Act* (the Act), the author of a work is presumptively the first owner of copyright in it.^[1] Section 13(3) of the Act provides an exception: an employer is the owner of the copyright in a work authored by an employee under contract if it is created “in the course of” employment. In this case, the Court of Appeal upheld the trial judge's finding that copyright in competing software secretly developed by an employee was owned by the employee, not their employer, because it was not created “in the course of employment”.

Disputes concerning section 13(3) of the Act usually centre on the employment status of the individual involved in the dispute. (Independent contractors are not governed by this provision.) Here, there was no dispute that Mr. Krougly was an employee. The dispute centred on whether his activities in coding the software were done as an employee “in the course of employment” within the meaning of section 13(3) of the Act. This appellate decision thus offers clarity about the legal test for applying the Canadian parallel of the United States’ “work for hire” doctrine in copyright law.

The dispute

Nexus Solutions Inc. (Nexus) develops and markets a continuous emissions monitoring system (CEMS) software product, called CEMView. It monitors and reports on compounds in smokestack emissions produced by heavy industry. Vladimir Krougly was a senior software

developer at Nexus whose primary responsibility was to write source code for CEMView.

In the 2008–2009 timeframe, while still employed by Nexus, Mr. Krougly began developing a competing CEMS software product called “Limedas” outside of his work hours. Limedas and CEMView perform similar functions, but there were differences between them. Mr. Krougly later resigned from Nexus and sought to commercially market his Limedas software, including to some of Nexus’ customers.

Nexus commenced an action seeking, among other things, a declaration that it owned the copyright in Limedas because it was created by Mr. Krougly in the course of his employment with Nexus.

The underlying decision: Mr. Krougly is the copyright owner

With “considerable reluctance”, the trial judge found that Mr. Krougly had not developed Limedas “in the course of” his employment with Nexus. The trial judge considered several factors, including those identified by the English Intellectual Property Enterprise Court (a specialist court of the High Court of England and Wales) in *Penhallurick v. MD5 Ltd*,^[2] which set out several circumstances that may be considered in determining if a work is created “in the course of” a person’s employment:

- the terms of the employment contract
- where the work was created
- whether the work was created during normal office hours
- who provided the materials for the work to be created
- the level of direction provided to the author
- whether the work is “integral” to the business

Applying these factors, the trial judge found that

- there were substantial differences between the CEMView and Limedas software
- the bulk of Mr. Krougly’s work in developing Limedas was done outside normal business hours and did not involve use of Nexus property
- Mr. Krougly’s primary role was to develop Nexus’s existing CEMView software and he was not permitted to create other software without prior authorization
- there were no contractual provisions preventing Mr. Krougly from working on his own projects on his own time, or allocating ownership of such work, whether created during Nexus’s time or during his own personal time
- Mr. Krougly was not asked or directed to develop the software akin to that used by Limedas, and his work in creating it was not at the direction or within the control of anyone at Nexus
- Nexus did not bargain for or expend resources in the development of Limedas
- Nexus did not assume any financial, organizational or associative risks associated with its creation

While the trial judge found that Nexus may find recourse in other claims (such as breach of contract and breach of duty), he dismissed the copyright claim.

Appellate guidance on section 13(3) of the Copyright Act

A key issue on appeal was whether the trial judge erred by holding that it was a “critical determination” in interpreting section 13(3) of the Act that Mr. Krougly had not been specifically directed by Nexus to develop Limedas.

The Court gave helpful guidance on the proper analysis under section 13(3) of the Act in its analysis. For section 13(3) of the Act to apply, three conditions must be satisfied:

1. the creator of the work must be, in law, an employee
2. the work must have been created “in the course of” employment
3. there is no agreement to the contrary

The main issue the Court of Appeal grappled with was the meaning of “in the course of” employment.

The purpose of the Act is to strike a balance between the public interest in the encouragement and dissemination of works of the arts and intellect, on the one hand, and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).^[3] The author is therefore presumptively the first owner of the copyright in works they create.

The Court of Appeal found justification for the exception in section 13(3) of the Act because it allocates reward (copyright ownership) to the employer when they have paid for the development of the work (including through compensating the author(s) for their work in developing it) and have assumed the risks associated in its development.^[4] Stated differently, the section 13(3) exception is premised on the determination that the employer only ought to hold copyright over works that were made by the employee as part of their responsibilities to the employer.

The Court of Appeal expressly endorsed the factors (or considerations) set out in *Penhallurick*. It determined that the overriding issue in the section 13(3) analysis is “whether the making of the work in question is something that the employee *was asked or expected to do*, either expressly or by necessary implication, as part of their employment responsibilities” (emphasis ours).^[5]

The Court of Appeal held that the trial judge did not err by placing particular emphasis upon the fact that Mr. Krougly was not directed to develop software akin to Limedas as the basis for his finding that the work was not made “in the course of his employment”. In affirming the trial judge’s finding, the Court of Appeal established that whether or not the task falls within the employee’s course of employment “depends on whether the employer has actually assigned responsibility to the employee to carry out the task or perform the function in question” (emphasis original). What matters is that the employee’s actual job responsibilities included making the work. The fact that a work could potentially have been within the scope of employee’s responsibilities is insufficient to render the work subject to section 13(3) of the Act.

Conclusion

Nexus v. Krougly is an important decision for employers and employees alike. Section 13(3) of the *Copyright Act* addresses what an employee was *actually asked or expected to do* as part of their employment, not the broad universe of tasks an employer *might have* assigned. This interpretation is grounded in the rationale that copyright should vest in the party that caused the work to be created, funded its development and assumed the associated risks. While many Canadians are familiar with the United States’ “work for hire” doctrine, the Court of Appeal’s clear adoption of the test set out in *Penhallurick* provides important guidance and a

helpful reminder that the principles governing copyright ownership between employers and employees in Canada are distinct from those under U.S. law.

For employers, the decision is a stark reminder that relying solely on the default provisions of the Act can lead to unexpected and harsh results, even where the employee's conduct is (or appears) plainly disloyal. Employers who wish to secure copyright ownership of everything their employees create, whether as part of their assigned tasks or as a side project drawing on their expertise, should spell out those rights expressly in well drafted employment agreements that include, among other things, clear IP assignment provisions.

It should be noted that issues of breach of confidence, copyright infringement and conversion were not canvassed due to bifurcation of the underlying action. These remain important considerations for employers in disputes of this type, particularly if interim injunctive relief is being sought.

[1] Section 13(1).

[2] *Penhallurick v. MD5 Ltd*, [2021] EWHC 293 (IPEC), aff'd [2021] EWCA Civ 1770.

[3] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, at para. 30.

[4] *Nexus v. Krougly*, para. 25.

[5] *Nexus v. Krougly*, para. 29.