COURT OF APPEAL FOR ONTARIO

CITATION: Nexus Solutions Inc. v. Krougly, 2026 ONCA 199
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Miller, Zarnett and Monahan JJ.A.

BETWEEN

Nexus Solutions Inc. on behalf of itself and all other creditors of Vladimir Krougly

Plaintiff
(Appellant)

and

Vladimir Krougly, Limesoft Inc., Sergiy Bateyshchykov, also known as Serge Bays, Daria Krougly, also described as Darya Bateyshchykova and Advanced Consulting and Technology Group Inc.

Defendants
(Respondents)

Matthew B. Lerner, Brian Kolenda and Nicole Naglie, for the appellant

William Fawcett, for the respondents

Heard: January 14, 2026

On appeal from the orders of Justice Spencer Nicholson of the Superior Court of Justice, dated February 28, 2025, with reasons reported at 2025 ONSC 1346.

Monahan J.A.:

I. OVERVIEW

[1] At issue in this appeal is the scope of s. 13(3) of the *Copyright Act*, R.S.C. 1985, c. C-42 (the "Act"), which provides that an employer is the first owner of the copyright in a work created by an employee "in the course of" their employment.

[2] In phase one of a bifurcated trial, the trial judge found that software created by the respondent, Vladimir Krougly ("Krougly"), was not developed in the course of his employment with the appellant, Nexus Solutions Inc. ("Nexus"), even though he secretly developed it while he was employed by Nexus and the software competed with Nexus's software. He therefore dismissed Nexus's s. 13(3) copyright claim. Other causes of action which Nexus pleaded in its statement of claim, including allegations relating to Krougly's duty of loyalty to Nexus, were not considered in the trial below and are not at issue on appeal.

[3] Nexus argues that the trial judge erred in three respects: first, by requiring Nexus to show that it had specifically directed Krougly to develop the software at issue before it could succeed in claiming copyright pursuant to s. 13(3); second, in giving weight to an irrelevant factor, namely, whether Nexus had bargained for or otherwise expended resources to gain the rights in Mr. Krougly's works; and third, to the extent that Nexus's direction to Krougly may have been relevant to its copyright claim, by finding that Krougly had not been sufficiently directed to create the software at issue.

[4] As explained below, the trial judge made none of the errors alleged. The factors he considered, including whether Krougly had been assigned the responsibility of developing the software at issue as well as whether Nexus had expended resources in its development, were relevant to Nexus's copyright claim, and were not given undue weight by the trial judge. The trial judge's finding that Krougly had not in fact been asked to create the software at issue was one of mixed fact and law and is entitled to deference. I see no basis upon which to disturb any of these findings and would therefore dismiss the appeal.

II. BACKGROUND

[5] Nexus is a software development company that was incorporated in 1999 in London, Ontario. Krougly was an original minority shareholder, officer, and director of the company. Nexus develops and markets a continuous emissions monitoring system ("CEMS") software product called CEMView, which monitors and reports the compounds in smokestack emissions produced by heavy industry.

[6] Initially, Krougly was an independent contractor of Nexus, but he became an employee in 2006. In 2008, he sold his shares and resigned as an officer and director, but remained a full-time employee. He was employed as a senior software developer, and his primary responsibility was to write source code for CEMView.

[7] By late 2008 or early 2009, while he was still employed by Nexus, Krougly began surreptitiously developing a competing CEMS software that was named

"Limedas", standing for "Live Measurement Data Acquisition System". As I will explain below, Limedas and CEMView perform similar functions, but some of Limedas's front-end features and back-end architecture differed, including the possible integration of an upgraded "OPC UA" communications protocol. Krougly continued the development of Limedas until he resigned from Nexus, effective January 4, 2011. Following his resignation, he attempted to commercially market Limedas, including to some of Nexus's customers.

[8] Shortly after Krougly's departure, Nexus discovered that Krougly had created the Limedas software while working for the company. Nexus commenced an action seeking various forms of relief. Relevant to this appeal, Nexus functionally sought a declaration that it owned the copyright in the Limedas software by virtue of the fact that it had been created by Krougly in the course of his employment with Nexus and that Krougly and the other defendants infringed that copyright.

III. THE TRIAL JUDGE'S DECISION

[9] The trial judge held that the purpose underlying the grant of copyright to an employer in works created by an employee had been correctly described by Lucie Guibault et al. in *Canadian Intellectual Property Law* (2025), 2022 CanLIIDocs 4489[1], at pp. 62-63, as follows:

[1] I note that the trial judge incorrectly identified the lead author as "Luci" Guibault, and the title of the treatise as *Canadian International Copyright Law*. I have substituted the correct references in the text above.

> The basis for the attribution of the initial ownership of rights to the employer is that since the latter assumes the major financial, organizational, and associative risks involved in the creation, production and distribution of the work, they should have full control, including with respect to third parties, over the exploitation of that work. In these circumstances, the author receives compensation for their intellectual creation not in the form of an exclusive economic right in the work – which is presumed transferred to the employer, but in the form of a salary or any other form of agreed remuneration.

[10] The trial judge found that in interpreting the scope of an employer's rights under s. 13(3), it was relevant to consider the factors identified by the Intellectual Property Enterprise Court (a specialist court of the High Court of England and Wales) in *Penhallurick v. MD5 Ltd.*, [2021] EWHC 293 (IPEC), aff'd [2021] EWCA Civ 1770. *Penhallurick* holds, at para. 58, that the following circumstances may be considered in determining whether a work has been created "in the course of" a person's employment:

(i) the terms of the contract of employment;

(ii) where the work was created;

(iii) whether the work was created during normal office hours;

(iv) who provided the materials for the work to be created;

(v) the level of direction provided to the author;

(vi) whether the author can refuse to create the work; and

(vii) whether the work is "integral" to the business.

[11] Taking into account the factors identified in *Penhallurick*, and guided by the purpose underlying the grant of proprietary rights to employers through s. 13(3), the trial judge was not persuaded on a balance of probabilities that Krougly had developed the Limedas software "in the course of his employment" by Nexus. In coming to this conclusion, the trial judge found the following considerations to be particularly relevant:

(1) There were certain similarities between CEMView and Limedas, since both programs were designed to collect, store, display, and report emissions monitoring data and used similar communication protocols to communicate with and acquire data from physical devices in smokestacks called "analyzers". However, there were also substantial differences, including the fact that their source codes were different, and the algorithms they used and data they acquired were dissimilar. Krougly did not copy any substantial portion of CEMView in creating Limedas;

(2) The bulk of Krougly's work in developing Limedas was done outside normal business hours and did not involve the use of Nexus property;

(3) Krougly's primary role at Nexus was to develop the company's existing CEMView software and he was not permitted to create any other software for Nexus without receiving prior authorization. Had Nexus become aware that Krougly was developing Limedas, his employment at Nexus would have been terminated;

(4) Krougly did not have a written contract of employment and there was no written agreement that prohibited Krougly from working on his own projects on his own time, or allocated ownership of anything that he might create, whether during Nexus's time or his own personal time;

(5) The development of CEMS was squarely within Krougly's duties at Nexus, and had he been ordered to develop a program such as Limedas, he would have been required to do it. However, 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. Krougly's work on Limedas, although intimately related to the work he was doing at Nexus, was clearly a side venture;

(6) Nexus did not bargain for, or expend resources for the development of Limedas; and

(7) Nexus did not assume any major financial, organizational, or associative risks involved in the creation, production, and distribution of Limedas.

[12] The trial judge distinguished these circumstances from those in *Corso v. Nebs Business Products Limited*, 2009 CanLII 11215 (Ont. S.C.), where Strathy J. (as he then was) found that the employer owned the copyright in computer software that was surreptitiously created by an employee. However, in *Corso*, the ideation and development of new software products was an integral part of the employee's responsibilities. In contrast, the trial judge found that Krougly was not authorized to create new products and was directed only to develop Nexus's existing CEMView software. Therefore, unlike in *Corso*, the work Krougly performed in creating Limedas – a new software product – was not part of his assigned responsibilities.

[13] The trial judge concluded "[w]ith considerable reluctance" that Nexus was not entitled to a proprietary remedy under copyright law. He acknowledged that this was a "harsh result" given his conclusion that Krougly had surreptitiously developed software that was intended to compete with Nexus's existing software. However, while Nexus may have remedies available to it in contract or otherwise, the purpose of copyright law is not "to punish bad actors simply because their actions may run afoul of their duties towards their employers". He therefore dismissed Nexus's copyright claim.

IV. GROUNDS OF APPEAL

[14] Nexus alleges that the trial judge erred in three respects:

(i) by holding that it was a “critical determination” in interpreting s. 13(3) that Krougly had not been specifically directed by Nexus to develop Limedas since, by definition, Nexus could not have directed Krougly to develop software of which it was unaware;

(ii) by taking into account an irrelevant factor in interpreting s. 13(3), namely, whether Nexus had bargained for or otherwise expended resources in the development of Limedas; and

(iii) in the alternative, assuming that the direction given by Nexus to Krougly was relevant to the s. 13(3) inquiry, by finding that Krougly had not been sufficiently directed to create Limedas.

V. STANDARD OF REVIEW

[15] The parties are agreed that the standard of review on questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-9. Thus, the first two grounds of appeal, which allege that the trial judge erred in his interpretation of s. 13(3) and the test which governs the analysis, are reviewed on a standard of correctness.

[16] However, the third ground of appeal, which alleges that the trial judge erred in assessing the evidence and/or in weighing the evidence, involves questions of mixed fact and law. The trial judge’s findings in this regard can only be disturbed on the basis of a palpable and overriding error: *Housen*, at para. 36.

VI. DISCUSSION

A. Governing principles

[17] This appeal turns on the proper interpretation of s. 13(3) of the Act, which must be considered alongside s. 13(1). The two provisions provide in relevant part as follows:

> Ownership of copyright
>
> 13(1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.
>
> …
>
> Work made in the course of employment
>
> 13(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright…

[18] Thus, in order for an employer to hold copyright in a work created by an employee, three conditions must be satisfied:

(i) the creator of the work must be, in law, an employee;

(ii) the work must have been created "in the course of … employment"; and

(iii) there is no agreement to the contrary.

[19] In this case there is no dispute that the first and third of these conditions are satisfied, since it is agreed that Krougly was an employee at the relevant time, and there was no agreement, in a contract of employment or otherwise, which

addressed the copyright in works he might create. Thus, the appeal turns on whether Krougly created Limedas “in the course of his employment”, within the meaning of s. 13(3).

[20] It is well established that the modern approach to statutory interpretation requires that the court examine the words of the provision “‘in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’”: *Piekut v. Canada (National Revenue)*, 2025 SCC 13, 502 D.L.R. (4th) 1, at para. 42, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[21] Thus, the plain meaning of the text alone is rarely determinative, and the statutory interpretation analysis is therefore incomplete “without considering the context, purpose and relevant legal norms”: *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31.

[22] 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 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)”: *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30; see also *Society of Composers, Authors and Music Publishers of*

Canada v. Entertainment Software Association, 2022 SCC 30, [2022] 2 S.C.R. 303, at para. 67.

[23] On this basis, s. 13(1) of the Act provides that the author shall generally be the first owner of the copyright in works they create. This fulfills the broader purpose of the Act since it provides authors with an incentive to create and disseminate works, while also benefitting the public by providing them with access to creative works that might otherwise never have come into existence.

[24] What, then, is the purpose of s. 13(3), which provides an exception to the general rule set out in s. 13(1) and grants an employer first copyright in a work created by an employee in the course of their employment?

[25] As Guibault et al. point out at pp. 142-44 of their text, this exception is justified by the fact that where the employer has paid for the development of the work (including through compensating the author(s) for their work in developing it), and assumed the risks associated in its development, the “just reward” should accrue to the employer rather than the individual author(s). Allocating reward to the entity that caused the work to be created is consistent with the principle that copyright should vest in the entity for whom the work was created and who paid for it.

[26] This understanding of the purpose of the s. 13(3) exception, alongside the text of the provision and the surrounding context of copyright law and the scheme

of the Act, assists in understanding the proper meaning and scope of the phrase "in the course of … employment".

[27] Simply put, the s. 13(3) exception is premised on the determination that the employer ought to hold copyright over works that were made by the employee as part of their responsibilities to the employer. The supporting rationale is that the employee was paid to make the work and did so in fulfillment of their agreed role with the employer.

[28] This would likely be the case where the work was made under the employer's instructions and using its resources. Conversely, where the employee made the work on their own time, using their own equipment, and not as part of their assigned duties or responsibilities, the making of the work would likely fall outside of the course of their employment, and copyright would vest in the employee.

[29] There will inevitably be instances which are less clear cut, and the assignment of copyright in such cases will turn on the strength of the connection between the making of the work and the employee's responsibilities. In assessing that nexus, the factors identified in *Penhallurick* will assist in the inquiry, but others may also be relevant. The overriding issue 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.

[30] Of course, an employer and employee may agree that entitlement to copyright in works made by an employee should be determined on the basis of a different legal framework, which will then govern. This is because the "in the course of … employment" rule set out in s. 13(3) applies only "in the absence of any agreement to the contrary".

B. The trial judge did not err in holding that the fact that Krougly was not directed to create the Limedas software was a "critical determination" in denying Nexus's copyright claim

[31] Nexus argues that the trial judge erred in placing particular emphasis on the fact that Krougly was not specifically 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". Nexus argues that this finding was inconsistent with the trial judge's conclusion that, had Krougly been asked to develop such software, he would have been required to do it. Moreover, Nexus argues that the trial judge's requirement subjects it to an impossible burden, since it could not have directed Krougly to develop a program of which it was unaware.

[32] Nexus submits that the proper question to ask in interpreting s. 13(3) is whether a specific work made by the employee falls into the general class or kinds of works that the employer could direct the employee to make. If that is the case, the work was made "in the course of … employment" and the employer is entitled to copyright in the work.

[33] I do not agree.

[34] The fact that an employer could require an employee to carry out a task is a necessary, but not a sufficient condition for that task to fall within the employee's course of employment. 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. At the same time, the employer need not have specifically directed the employee to produce a particular work for that work to have been made in the course of employment. What is necessary, however, is that the employee's actual (as opposed to potential) responsibilities included making the work.

[35] This point can be illustrated through the following hypothetical scenario, adapted from an example set out in the respondents' written submissions. Suppose an employee is hired to write source code for a company's video games and is assigned to develop a particular game, Game A. The employee's responsibilities do not include independently developing or ideating new video games. During nonworking hours and using their home computer, the employee writes source code for a different video game, Game B, for their own profit, which is similar to, but not a copy of Game A.

[36] On the appellant's theory, the employer would hold copyright over whatever source code the employee wrote for Game B, because writing source code for

video games is the kind or class of work for which the employee was hired. But this result ignores what the employee was actually directed to do, which was to write source code for a particular video game – Game A – as opposed to develop video games in general. Nor should it matter that the employer could have asked the employee to produce new video games, such as Game B, given that the employer chose not to do so and instead limited the employee's actual responsibilities to work on Game A.

[37] Not only does Nexus's interpretation of "in the course of … employment" ignore the actual responsibilities of the employee, it runs counter to the purpose of s. 13(3). In the hypothetical scenario above, the employer did not expend any resources in support of the employee's development of Game B, since the employee used their own equipment and undertook the work on their own time and thus were not being paid by the employer when working on Game B. Moreover, the employer had no control over the development of Game B and assumed none of the attendant risks. For example, if Game B were to somehow cause loss or damage to a third party, the third party would have no recourse against the employer from the mere fact that Game B fell into the class or kinds of work that the employer could have assigned the employee to create.

[38] Notice that the allocation of copyright in Game B to the employee does not depend on whether the employer was aware of the employee's work on Game B,

nor whether Game B might be regarded as competitive with Game A.[2] If the creation of Game B was outside of the employee's assigned responsibilities, the video game was not made "in the course of … employment" and the employee is entitled to copyright. Conversely, if the development of other games, such as Game B, was within the employee's assigned responsibilities, the employer would be entitled to copyright in the work, even if the employer was unaware of the fact that the employee was developing that specific game.

[39] This is precisely the basis upon which the trial judge concluded that Limedas was not made by Krougly in the course of his employment by Nexus. The relevant passages in his reasons, with which Nexus takes greatest issue, are as follows:

> [364] I have also considered that the development of CEMS was squarely within Vlad's duties at Nexus, even if he had other duties. However, and probably most importantly, I reiterate that this Limesoft work [Limedas] was not done at the direction of anyone at Nexus. Vlad's work on Limedas was not under the control of anyone at Nexus. He had not been instructed to produce that work, specifically, like Mr. Wiebe, or impliedly like Mr. Corso, given Mr. Corso's role in developing new projects for NEBS.
>
> [365] In the context of copyright law, I think that is a critical determination. I accept that if Joseph [Nexus's president] had ordered Vlad to create CEMS with C# code, Vlad would have been required to do it. But that, in my view, is not the test. The fact is that Vlad was not asked or directed to do this software development.

[2] Although the copyright claim does not turn on these factors, they may well be relevant to a claim for breach of contract or of the employee's duty of loyalty to the employer.

[40] In these paragraphs the trial judge correctly points out that the relevant test under s. 13(3) is not what Nexus could have instructed Krougly to do but, rather, what Nexus actually asked him to do. The trial judge found as a fact that Krougly's responsibilities were limited to the development of CEMView and that the creation of a different CEMS, like Limedas, was therefore outside the scope of his employment responsibilities.

[41] Nor did the trial judge require that Nexus must have provided a "specific direction" to develop the kind of software that Limedas relies on before Krougly could be found to be acting within the scope of his employment in creating it. As the trial judge pointed out, Krougly "had not been instructed to produce that work, specifically … or impliedly" (emphasis added). In fact, Krougly had been expressly told that his responsibilities were limited to the ongoing development of Nexus's existing CEMView software, that he should not undertake any unauthorized software development and, if he did, he would not be paid for it.

[42] The cases relied upon by Nexus, far from contradicting the trial judge's analysis, are consistent with it.

[43] As discussed above, *Corso* was a case in which the employee's duties included coming up with new ideas and strategies, and developing services ancillary to the software that the company already offered. Strathy J. held that the employer in that case was entitled to the copyright in the software at issue because

the employee who developed it had a “duty to use his creative skills to generate concepts … for the benefit of his employer”, arising from his business development role and his leadership of a committee specifically tasked with coming up with new products. The software that the employee created outside of work was exactly the type of innovation he was supposed to be contributing to the company; in fact, during the material timeframe, the employer in *Corso* began developing a concept which was “substantially the same as the … project on which Mr. Corso was secretly working”. In the present case, however, Krougly was not given a broad or expansive mandate to innovate and develop new software that might benefit Nexus and in fact was explicitly told not to do so. This is the fundamental distinguishing factor from *Corso*, which the trial judge correctly identified.

[44] Similarly, in *Wiebe v. Saskatchewan Institute of Applied Science and Technology*, 2007 SKQB 60, 292 Sask. R. 261, the plaintiff employee was a mathematics instructor at the defendant’s educational institution. The employee developed educational materials on his own time and at his own initiative which he intended to sell for profit. The institution asserted that the materials had been developed in the course of his employment and therefore the school had the right to resell them. On a pleadings motion, the application judge found in favour of the employee on the basis that his supervisor “did not suggest, request nor direct that the plaintiff write the materials”; that the employee received “no time off or

remuneration of any kind for the writing of the materials"; and that the employee "voluntarily and of his own volition decided to write the materials".

[45] In contrast, in *Penhallurick*, the employee was employed as a "computer forensic analyst" by a digital forensics company used as a third-party vendor by police agencies. During his employment, the employee developed and iterated several versions of a software program that assisted in that work. The court found that the software program was created in the course of the employee's employment since he wrote the software with the knowledge and encouragement of the employer, with a view to it being commercially marketed by the employer if successful. The court also found that making such software was the central task for which the employee was being paid.

[46] In sum, the trial judge applied the correct interpretation of s. 13(3) and made no error in focusing on Krougly's actual as opposed to potential responsibilities in finding that he was entitled to the copyright in Limedas.

C. The trial judge did not err in taking account of the fact that Nexus did not "expend resources" or "bargain for" the development of Limedas in dismissing Nexus's copyright claim

[47] Nexus claims that the trial judge erred by requiring that it must have "expended resources" or "bargained for" the right to acquire the copyright in Krougly's work associated with Limedas before it could claim copyright in the work.

Nexus argues that it could not have satisfied this requirement, since Krougly developed the software surreptitiously without Nexus's knowledge.

[48] Nexus misconstrues the larger point the trial judge was trying to make, which is simply that Nexus did not expend resources to support the development of Limedas. This is why the trial judge regarded it as relevant that Krougly was being paid "the same salary he was being paid prior to starting Limedas on his own time". In other words, because Krougly did not receive any increase in compensation when he began developing Limedas, and he undertook this work almost entirely on his own time and using his own equipment while still working full-time in his existing role with Nexus, Nexus did not fund the creation of Limedas by paying Krougly's salary or otherwise. Read in context, this is all the trial judge was attempting to convey in his "bargain for" comment.

[49] Nor did the trial judge "require" Nexus to have expended new or specific resources or have bargained for the software associated with Limedas as a precondition to succeeding in its copyright claim. The trial judge merely took this factor into account, along with several other relevant considerations, in determining that the development of Limedas fell outside of Krougly's responsibilities as an employee. He made no error in doing so.

D. The trial judge did not make a palpable and overriding error in finding that Nexus had not directed Krougly to develop a program such as Limedas

[50] Nexus argues in the alternative that the trial judge made a palpable and overriding error in finding that it had not directed Krougly to develop a new software program such as Limedas. Nexus relies on emails and communications between Nexus's president and Krougly which discuss the possible development of a next generation product that would have incorporated the more advanced OPC UA communication protocol into the CEMView architecture. Nexus also points out that Krougly attended workshops or seminars on OPC UA while working for Nexus, and Nexus's president had advised Krougly that the company intended at some point to incorporate OPC UA into CEMView. When Krougly built Limedas, he initially used OPC UA as the communication protocol. Nexus argues that the development of a next generation software such as Limedas was part of Krougly's employment responsibilities.

[51] I see little merit in this ground of appeal. The emails and communications that Nexus relies on indicate, at best, that at some point in the future Nexus intended to develop a next generation product incorporating OPC UA. But Nexus has not identified any evidence suggesting that a decision to move forward with OPC UA had actually been made, much less that Krougly was assigned the task of implementing it. The absence of a firm commitment to OPC UA is confirmed by

the fact that as of the date of trial, 13 years after Krougly resigned from Nexus, OPC UA had still not been integrated into CEMView.

[52] There was ample evidence supporting the trial judge's finding that Krougly's role at Nexus was limited to the development of CEMView, and that he had not been directed to develop a new software product incorporating OPC UA. Nexus has failed to identify any palpable and overriding error in the trial judge's analysis and essentially asks this court to reweigh the evidence and substitute different findings for those of the trial judge, which is not our role.

VII. DISPOSITION

[53] I would dismiss the appeal. Krougly is entitled to costs in the agreed-upon amount of $25,000, inclusive of taxes and disbursements.

Released: March 19, 2026 "B.W.M."

"P.J. Monahan J.A."
"I agree. B.W. Miller J.A."
"I agree. B. Zarnett J.A."