SCC FILE NO. 37863

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

KEATLEY SURVEYING LTD.

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant/Respondent
by way of cross-appeal)

AND:

TERANET INC.

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Respondent/Appellant
by way of cross-appeal)

AND:

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN ASSOCIATION OF LAW LIBRARIES, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADIAN LEGAL INFORMATION INSTITUTE, FEDERATION OF LAW SOCIETIES OF CANADA, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, LAND TITLE AND SURVEY AUTHORITY OF BRITISH COLUMBIA, CENTRE FOR INTELLECTUAL PROPERTY POLICY AND ARIEL KATZ

INTERVENERS

FACTUM OF APPELLANT KEATLEY SURVEYING LTD.
IN REPLY TO THE INTERVENERS

(Pursuant to the Order of Justice Abella dated November 14, 2018)

BRANCH MACMASTER LLP
1410 – 777 Hornby Street
Vancouver, BC V6Z 1S4

Luciana P. Brasil
Tel: (604) 654-2666
Fax: (604) 684-3429
Email: lbrasil@branmac.com

Counsel for the Appellant/Respondent on Cross-Appeal

MICHAEL J. SOBKIN
331 Somerset Street
West Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Appellant/ Respondent on Cross-Appeal

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Barry B. Sookman,
Julie Parla, and
Hovsep Afarian
Stephanie Sugar
Tel: 416-601-7949
Fax: 416-868-0673
Email: bsookman@mccarthy.ca

Counsel for the Respondent/ Appellant on Cross-Appeal, Teranet Inc.

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David Taylor
Tel: 613-691-0368
Fax: 613-688-0271
Email: dtaylor@conway.pro

Ottawa Agent for Respondent/ Appellant on Cross-Appeal

MILLER THOMSON LLP
Suite 5800, 40 King St.
West Toronto ON M5H 3S1

F. Paul Morrison
Tel: 416-597-6050
Fax: 416-595-8695
Email: paulmorrison@millerthomson.com

Counsel for the Respondent/ Appellant on Cross-Appeal

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay St., 4th Floor
Toronto, ON M5G 2K1

Michael S. Dunn
Tel: (416) 326-4466
Fax: (416) 326-4015
Email: michael.dunn@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

ATTORNEY GENERAL OF CANADA
130 King Street West Suite 3400, Box 36
Toronto, ON M5X 1K6

Kathryn Hucal
Tel: (416) 954-0625
Fax: (416) 973-5004
Email: kathryn.hucal@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

DEPARTMENT OF JUSTICE
50 O'Connor Street - Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street
Victoria, BC V8V 1X4

G.J. Underwood
Tel: (250) 356-8866
Fax: (250) 356-8653

Counsel for the Intervener, Attorney General of British Columbia

NÖEL & ASSOCIÉS
111, rue Champlain
Gatineau, PQ J8X 3R1

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

Ottawa Agent for Counsel for the Intervener, Attorney General of British Columbia

JFK LAW CORPORATION
816-1175 Douglas Street
Victoria, BC V8W 2E1

Robert Janes, Q.C.
Tel: (250) 405-3460
Fax: (250) 381-8567
rjanes@jfklaw.ca

Counsel for the Intervener, Canadian Association of Law Libraries

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 563-9869
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Association of Law Libraries

ATTORNEY GENERAL FOR SASKATCHEWAN
Ministry of Justice Saskatchewan
Constitutional Law Branch
820-1874 Scarth St.
Regina, SK S4P 4B3

Theodore Litowski
Tel: (306) 787-6642
Fax: (306) 787-9111
theodore.litowski@gov.sk.ca

Counsel for the Intervener, Attorney General for Saskatchewan

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General for Saskatchewan

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
Toronto, ON M5J 2Z4

Rahool Agarwal
Fahad Siddiqui
Tel: (416) 216-3943
Fax: (416) 216-3930
rahoo.agarwal@nortonrosefulbright.com

Counsel for the Interveners, Canadian Legal Information Institute and Federation of Law Societies of Canada

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street - Suite 1500
Ottawa, ON K1P 1A4

Matthew J. Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Interveners, Canadian Legal Information Institute and Federation of Law Societies of Canada

UNIVERSITY OF OTTAWA
Faculty of Law, Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Jeremy de Beer
David Fewer
Tel: (613) 562-5800 Ext. 2553
Fax: (613) 562-5417
jdebeer@uottawa.ca

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

UNIVERSITY OF OTTAWA
Faculty of Law, Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Tamir Israel
Tel: (613) 562-5800 Ext. 2914
Fax: (613) 562-5417
tisrael@cippic.com

Ottawa Agent for Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

SMART & BIGGAR
2300-1055 West Georgia Street
Vancouver, BC V6E 3P3

Theodore W. Sum,
Steven Garl,
Laura Easton, and
Matt Campbell
Tel: (604) 682-7780
Fax: (604) 682-0274
twsum@smart-biggar.ca

Counsel for the Intervener, Land Title and Survey Authority of British Columbia

SMART & BIGGAR
900-55 Metcalfe Street 10th Floor
Ottawa, ON K1P 6L5

Colin Ingram
Tel: (613) 232-2486
Fax: (613) 232-8440
cbingram@smart-biggar.ca

Ottawa Agent for Counsel for the Intervener, Land Title and Survey Authority of British Columbia

FASKEN MARTINEAU DuMOULIN LLP
800 Square Victoria, Suite 3700
Montreal, QC H4Z 1E9

Michael Shortt
Jean-Philippe Mikus
Tel: (514) 397-7400
Fax: (514) 397-7600
mshortt@fasken.com

Counsel for the Intervener, Centre for Intellectual Property Policy and Ariel Katz

FASKEN MARTINEAU DuMOULIN LLP
55 rue Metcalfe Street Bureau 1300
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel: (613) 236-3882
Fax: (613) 230-6423
sarseneault@fasken.com

Ottawa Agent for Counsel for the Intervener, Centre for Intellectual Property Policy and Ariel Katz

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A. Crown copyright is not necessary to preserve the integrity of a land registry system

1. A number of interveners argue that Crown copyright under s. 12 is necessary to preserve a reliable and properly functioning land registry system.[1] One example of this argument is the submission of the Land Titles and Survey Authority of British Columbia ("LTSA") that "copyright is divested from the [surveyors] pursuant to s. 12 to facilitate a public good."[2]

2. But none of these interveners explain why it is necessary to "divest" the surveyors of copyright in their creations to facilitate the proper functioning of the land registry system.

3. The reliability and functionality of the system does not depend on the Crown obtaining exclusive reproduction and communication rights in plans of survey. Rather, it stems from the accuracy of the surveyors' work product and the availability of that work product to members of the public through its inclusion in a central repository of documents.

4. That reliability and functionality will continue regardless of the outcome of this litigation. The surveyors merely seek affirmation of their copyright in their plans of survey, which would include the right to seek compensation from a private corporation that uses those works without their consent to turn a substantial profit. As discussed in the appellant's factum, such compensation is payable to land surveyors in New South Wales, and no one has argued that the proper functioning of the land registry system in that state has been compromised as a result. This Court should reject these interveners' erroneous, *in terrorem* argument.

B. There are fairer alternatives to expropriation of surveyors' copyright under s. 12

5. The doctrine of fair dealing permits government officials and non-government officials to use copyrighted material provided it is done in a legitimate and fair manner. No province has explained why it cannot use the principles of fair dealing in designing and maintaining a system for providing public access to plans of survey. In this case, Teranet's use of plans of survey do not constitute fair dealing. The principles remain available to guide other provinces.

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[1] Factum of Land Titles and Survey Authority of British Columbia ("LTSA Factum"), paras. 16, 25, 28; Factum of the Attorney General of Ontario ("Ontario's Factum"), para. 21; Factum of Attorney General for Saskatchewan ("Saskatchewan's Factum"), para. 1.

[2] LTSA Factum, para. 28.

6. In addition, it would be open to surveyors to enter into licensing or collective management arrangements with governments or third parties with respect to use of their intellectual property. Indeed, the Attorney General of British Columbia refers to this as a possibility if s. 12 does not vest copyright in the Crown and notes that it already "publishes private works pursuant to licenses granted by third-party property copyright owners".[3]

7. Alternatively, statutory licensing schemes such as those found in Australia could be used whereby governments are authorized to use plans of survey and surveyors receive compensation.

8. A problem identified by the LTSA with respect to the Ontario Court of Appeal's decision provides another reason why such alternatives are preferable to expropriation under s. 12. Unlike Teranet, the LTSA is a not-for profit- corporation.[4] LTSA is "an independent body, and is not Her Majesty, a government department or an agent of the government, except in limited circumstances."[5] (Teranet has also not been designated a Crown agent by statute.[6]) It is the LTSA, and not the Crown, that "retains ownership and control of registered or deposited plans of survey."[7] Despite this, the LTSA says it should acquire copyright ownership of plans of survey in British Columbia under s. 12. However, s. 12 is limited to "Her Majesty or any government department" and thus not available to the LTSA.

C. The principle of cooperative federalism has no application to this case

9. The Attorney General of Ontario ("Ontario") and Attorney General of Saskatchewan ("Saskatchewan") submit that the principle of cooperative federalism supports Crown copyright under s. 12.[8] This principle is a rule of constitutional interpretation that applies in cases where

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[3] Factum of Attorney General of British Columbia, paras. 5 and 16, footnote 2.
[4] Section 2(1) of the *Land Title and Survey Authority Act*, S.B.C. 2004, c. 66 provides that the LTSA "must not be operated, for profit".
[5] LTSA Factum, para. 3.
[6] Section 2(6) of the *Electronic Land Registration Services Act, 2010*, S.O. 2010, c. 1, Sch. 6, provides that "A service provider is not an agent of the Crown except as may be provided in the service provider agreement."
[7] LTSA Factum, para. 15.
[8] Ontario's Factum, paras 9-14; Saskatchewan's Factum, paras. 23-26.

the validity, applicability or operability of legislation is being challenged under the *Constitution Act, 1867*.[9]

10. No one in this case is challenging the constitutionality of either the federal *Copyright Act* or provincial legislation governing land titles registration, so the principle is of no application.

11. Ontario intervened at the Ontario Court of Appeal in response to the notice of constitutional question filed by the appellant as a result of the *vires* problem that arose from the decision of Justice Belobaba. But once the Ontario Court of Appeal fixed the *vires* problem the constitutional issue went away.[10] Ontario is addressing an issue that no longer exists.

12. Saskatchewan makes the further argument that "Parliament did not intend for the *Copyright Act*, at any point between 1868 and 2018, to trench upon the well-established practice of federal and provincial land title systems." Saskatchewan relies on the presumption that the legislature did not intend to depart from the general system of law unless it does so with irresistible clearness, and submits that it is not "irresistibly clear" that Parliament intended surveyors would hold copyright in plans of survey filed at a land registry office.[11]

13. There are a number of problems with this argument.

14. First, the motion judge found that all plans of survey fall within the definition of artistic works and thus are properly subject to claims of copyright. Neither party has appealed that decision, and it is not open to Saskatchewan to call that conclusion into question.

15. Second, and quite independently of the fact that the motion judge made this finding, it is astonishing for Saskatchewan to argue that plans of survey are not even subject to copyright protection. This is entirely at odds with the longstanding principles of protecting creator rights.

16. Third, the fact that certain types of work pre-dated the *Copyright Act, 1921* does not mean that similar works created after the Act came into force are not subject to it. If certain works are to be exempted, this must occur expressly.

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[9] *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641 at 669. See also *Saskatchewan (Attorney General) v. Lemare Logging Ltd.*, [2015] 3 S.C.R. 419 at paras 22-23.
[10] See appellant's factum on main appeal for discussion of how this issue arose, paras. 48-50.
[11] Saskatchewan's Factum, paras. 16-17.

17. Fourth, the *Copyright Act* is not being employed to entrench on the land registry system. As noted above, the land registry system will continue unaffected by the outcome of this appeal. What has led to years of litigation is the surveyor creators seeking fair treatment of their work within that system. With respect, it should fall to Teranet and the government interveners to explain why fair compensation to creators is such an impossibility in a system that generates huge profits.

18. Fifth, Saskatchewan's argument is inconsistent. On the one hand, it says the *Copyright Act* does not apply to plans of survey. On the other hand, it says s. 12 operates to vest copyright in plans of survey in the provincial Crown. Clearly, the *Copyright Act* applies to registered or deposited plans of survey and the only question on this appeal is whether s. 12 operates to transfer copyright in such plans from the surveyors to the Crown.

D. Features of land title scheme relied upon by Ontario do not support Crown copyright

19. Ontario argues that the following features support the Court of Appeal's conclusion that deposited plans of survey are "<u>published</u> by or under the direction and control of the Crown":

(a) the physical filing of plans of survey at an LRO;

(b) Crown's exclusive custody and ownership of the plans of survey;

(c) strict controls on the form and content of plans of survey;

(d) Examiner of Surveys may review plans and ensure form and content compliance;

(e) Examiner of Surveys may require surveyors to produce evidence to support survey;

(f) Examiner of Surveys may order changes to plans without consent of the surveyor;

(g) plans of survey must be made available to members of the public, and

(h) plans of survey must not contain any copyright claims.[12]

20. Features (c), (d), (e) and (f) relate to the form and content of plans of survey and thus relate to their "preparation", not their "publication". Both the motion judge and the Court of Appeal considered that plans of survey were not "prepared . . . by or under the direction and control of the Crown" and Teranet has not challenged those findings on this appeal. These

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[12] Ontario's Factum, para. 18 (emphasis added).

custodial features are therefore irrelevant to the question of whether plans of survey are published by or under the direction or control of the Crown.

21. Feature (h) is irrelevant to either the "preparation" or "publication" issue as it is well understood that artistic works do not need to contain marks or words indicating that copyright exists, or is being claimed, for the creator to own copyright in that work.[13] Features (a) and (b) are custodial in nature. Only feature (g) is about making plans of survey available to the public, but that does not make them "published" under s. 12, as discussed in the next section below.

E. Proper Construction of Section 12

22. The Attorney General of Ontario's focus on the mechanisms of the land registry system to determine whether it can be said that sufficient "direction" or "control" has been exercised is not the proper starting point for interpreting s. 12 of the *Copyright Act*. The starting point is to ascertain the purpose of s. 12 and only then consider how, if at all, it applies to land title systems. The appellant has examined the legislative purpose of s. 12 at great length in its factum. While some interveners suggest too much focus is made of this question, none say the appellant's analysis is wrong. In the appellant's submission this analysis is essential to the process of ascertaining what Parliament intended to capture under s. 12. When that analysis is undertaken it is clear that fine parsing of the words "direction" and "control" is not necessary. It is the type of work in question, and who the creator of the work is, that determine whether Crown copyright applies in a given case.[14]

23. The LTSA submits that the appellant's statutory interpretation analysis does not address the "published" component of s. 12.[15] This is incorrect. The appellant interprets s. 12 to cover situations where the Crown has published "documents created by the government or commissioned by the government." If the document does not fall into that category, and thus is not prepared by or at the behest of government, the government does not acquire copyright under s. 12 simply because it chooses to make the document available to the public.[16] If the appellant's

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[13] See, for example, *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 at para. 8.
[14] See appellant's factum on main appeal, paras. 61-63, 66-68, 72-77.
[15] LTSA Factum, para. 29.
[16] See appellant's main factum on appeal, paras. 75-76, 107-110.

interpretation were not correct, the government could arrogate to itself copyright for absolutely anything it chooses to make available to the public. Merely posting a Harry Potter novel on a government website would vest copyright in the Crown. This is not the purpose of s. 12.

F. The concept of "public domain" is irrelevant to this appeal

24. It is by now well understood that interveners are not to address the merits of the appeal. However, the Centre for Intellectual Property Policy and Ariel Katz ("CIPP/Katz") have done just that in two respects. First, the motion judge found, when answering common issue one, that plans of survey do constitute artistic works that attract copyright protection. Neither party has appealed that finding. Yet CIPP/Katz ask that "this Court does not inadvertently affirm the potentially erroneous holdings below on the issue of copyrightability."[17] Secondly, in arguing that registration or deposit of a plan of survey "imbues it with a sufficiently law-like character to make it a public document"[18] (which for CIPP/Katz means neither the surveyors nor the Province can acquire copyright), these interveners are addressing the merits of common issue two, which is before the Court. For this reason, the Court should ignore the submissions of CIPP/Katz.

25. In any event, CIPP/Katz's submissions are flawed. They argue that this Court should recognize that certain documents of a legal nature are part of the public domain and thus are not copyrightable. Their main focus is on statutes and judicial decisions, which are not at issue on this appeal. While raising the possibility in paragraph 1 of their factum that neither the appellant nor the Province of Ontario can own copyright in plans of survey "because they form part of the public domain", they never return to the subject and explain why this is so.

26. This Court has referred to material in the public domain to mean material that <u>is not</u> subject to copyright protection under the Act.[19] What CIPP/Katz is really saying is that surveyors' work product <u>should not</u> be copyright-protected. For that to occur, however, it would be necessary for Parliament to amend the *Copyright Act*. CIPP/Katz suggests that this would not be necessary because a court could recognize the concept of public domain as a matter of public policy or as a matter of Crown prerogative. As discussed below, the Crown prerogative to publish documents is limited in its modern incarnation and cannot be extended to plans of

[17] CIPP/Katz Factum, p. 2, footnote 9.
[18] CIPP/Katz Factum, para. 33 (under the heading "Costs and Order Sought").
[19] *Cinar Corporation v Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168 at paras. 23-28.

survey. And courts cannot graft on to the *Copyright Act* a public policy defence to copyright infringement that does not exist in the Act (see para. 82 of appellant's cross appeal factum).

G. There is no Crown prerogative to publish plans of survey

27. The Attorney General of Canada ("Canada") makes submission on the opening words of s. 12 which state that the section is "Without prejudice to any rights or privileges of the Crown". These words, Canada says, "safeguard the Crown's ability to use copyright works in the course of discharging its public duties and obligations" and provide authority to the Crown "apart from any rights flowing from the statutory copyright provided for in the latter part of s. 12 of the Act."[20] Canada makes no submissions on "the latter part of s. 12 of the Act."

28. The problem with Canada's factum is that it is "the latter part of s. 12 of the Act" that is at issue on this appeal, not the opening words of s. 12. As the Ontario Court of Appeal noted, no one argued that "the Province gains any copyright under the opening phrase in s. 12".[21]

29. The appellant therefore submits that this Court should decline to provide any authoritative consideration of the opening words of s. 12 and should instead leave that for a case where the Crown in fact relies on Crown prerogative. Canada seems most concerned that this Court not lend "support either expressly or by implication to a narrow understanding of 'any rights or privileges.'"[22] By leaving construction of the opening words of s. 12 to another day, Canada's concern vanishes.

30. The appellant will nevertheless address Canada's submissions because it is of the view that Canada has made broad and unsupportable claims about Crown prerogative.

31. Canada argues that the "outer boundary of this prerogative power remains undefined",[23] and suggests that it includes three particular rights and privileges.

32. The first "right and privilege" Canada claims is Crown immunity from statute. While it is not entirely clear, it appears that Canada may be advancing the extraordinary claim that the Crown is not subject to the *Copyright Act*.[24]

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[20] Canada's Factum, para. 1.
[21] Court of Appeal Reasons, para. 28 (AR, Vol. I, Tab 9).
[22] Canada's Factum, para. 3.
[23] Canada's Factum, para. 18.

33. If Canada is correct, then there would be no need to vest copyright in the Crown under s. 12 because the Crown can publish anything it wants. It seems to retreat from such a position at one point, saying that the Crown would be subject to the rules of "fair usage",[25] a defence under the *Copyright Act* (thus contradicting its position that it is immune from the Act).

34. The appellant submits that Canada is not correct. The Crown is subject to the *Copyright Act* by necessary implication.[26] The very existence of s. 12 demonstrates this. The Crown is given copyright for a term of 50 years under that section. Having bestowed a benefit on the Crown Parliament clearly intended that it would be subject to other provisions. The Crown cannot have the benefits yet avoid the burdens of the *Copyright Act*.[27]

35. Moreover, the special exemption given to government officials under s. 32.1(a) of the *Copyright Act* shows that the Crown is bound by the *Copyright Act*. Under s. 32.1(a) it is not copyright infringement "to disclose, pursuant to the *Access to Information Act*, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material". If the Crown were not bound by the *Copyright Act*, no such exemption would be required.

36. The second "right and privilege" Canada claims is an "exclusive prerogative right to publish certain works of an official or public character that serve to establish individual's rights and obligations" (at para. 2). Canada lists statutes, orders, regulations and proclamations as examples of such works. While a specific right to publish statutes has been recognized as falling within the royal prerogative, Canada has provided no authority for a sweeping general right to publish anything establishing an "individual's rights and obligations".

37. But Canada goes even further. It submits that falling within this power is authority to publish plans of survey made under the *Canada Lands Survey Act*.[28] No authority is provided for this claim.

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[24] See Canada's Factum, paras 11-16.
[25] Canada's Factum, para. 16.
[26] *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222 [*Knight FCA*] at para. 110; *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91 at paras. 27-47.
[27] *Sparling v. Québec (Caisse de Dépôt et Placement du Québec)*, [1988] 2 S.C.R. 1015.
[28] R.S.C. 1985, c. L-6.

38. Plans of survey of Canada's lands have not been the subject of analysis in this case and no record has been established concerning those plans. A review of the *Canada Lands Survey Act* demonstrates differences with the Ontario scheme. For example, section 24(2) of the Act provides that "Surveys of Canada Lands shall be made in accordance with the instructions of the Surveyor General." There is in the record a contract between a surveyor and the Province of Ontario as client under which the parties acknowledge that the plan has been prepared under the direction and control of the Ministry.[29] This demonstrates that the legal situation can be different where plans are made at the direction of the government. There is nothing similar in the record in this case. It is submitted this Court should not make any findings with respect to copyright of plans of survey of Canada's lands under the opening words of s. 12. That is not an issue here.

39. The third "right or privilege" claimed by Canada is "the right of governmental authorities duly authorized by legislation to permit, control, and prevent the circulation, exhibition or representation of any work otherwise subject to copyright."[30] In other words, Canada claims a right of censorship and a right to veto copyright.

40. Canada sources this right in Article 17 of the 1908 Berne Convention which it submits was "incorporated into the Copyright Act in 1921" and "is still reflected by the opening words of s. 12."[31] It goes so far as to imply that the predecessor to s. 12 in the United Kingdom (s. 18 of the *Copyright Act, 1911*) gave effect to Article 17.[32]

41. Canada's submission is misleading and wrong. There is no evidence to suggest that the opening words of s. 18 of the *Copyright Act, 1911* were intended to give effect to Article 17 of the Berne Convention. There is no indication in the historical record why s. 18 was included as an amendment to the Copyright Bill passing through the UK Parliament.[33] Furthermore, it is

[29] See appellant's factum on main appeal, para. 102.
[30] Canada's Factum, para. 2.
[31] Canada's Factum, para. 23.
[32] It does this by including in footnote 6 references to both a 1909 report recommending that any legislation passed by Parliament "include dealing with" this and two other articles (Canada's Book of Authorities, Tab 14, p. 27) and a 1911 report which records revisions to the Copyright Bill, including the insertion of a new clause dealing with Crown copyright (now s. 12) (Canada's Book of Authorities, Tab 14, p. 36).
[33] See discussion by John Gilchrist in "The Government as Proprietor, Preserver and User of Copyright Material under the Copyright Act 1968 (CTH)" (Doctor of Philosophy Thesis, Queensland University of Technology 2012) at 86 (Respondent's Book of Authorities ("RBA"),

misleading to say that Article 17 was "incorporated" into Canada's *Copyright Act, 1921*. The Berne Convention was included as a schedule to the Act but for the purposes of identification, as section 49 of the *Copyright Act, 1921* authorized the Governor in Council to "take such action as may be necessary to secure the adherence of Canada" to the Convention "set out in the Second Schedule to this Act."

42. The historical evolution of the prerogative speaks against the wide powers claimed by Canada under the opening words of s. 12. In the sixteenth and seventeenth centuries "the Crown claimed the right to control all printing by virtue of the royal prerogative and the grant of exclusive rights to print and publish books."[34] Such a claim today would be unconstitutional and is clearly not part of the rights and privileges guaranteed by the opening words of s. 12. Text writers and courts recognize the prerogative in relation to a set of discrete publications, such as laws, judicial decisions and the King James version of the bible.[35]

43. The Crown prerogative should not be expanded to confer on the Crown special publication rights beyond these recognized categories.[36] If Parliament wishes to grant special rights to government it can do so after proper consultation and reflection. It should not be left to the judiciary to accomplish this by way of expansion of Crown prerogative or by introducing a new exception to copyright not found in the *Copyright Act*.

Vol. I, Tab 13). Gilchrist notes that "The reasons for the insertion of the clause which became s. 18 are not expressed in any of the British Parliamentary deliberations on the Copyright Bill." Gilchrist points out that at the time there was "ongoing concern about the costs to the taxpayer of the publication of government works and of unfettered use of government publications by private publishers, who were taking a free ride on the products of government for their own profit." Crown copyright then may have been seen as the method by which the Crown could prevent private enterprise from profiting from government publications. This is far from how it is being used by Teranet in this case.

[34] *Oxford and Cambridge University v. Eyre and Spottiswoode Ltd*, [1963] 3 All ER 289 [*Oxford and Cambridge University*] at 293.

[35] *Oxford and Cambridge University* at 293-95; McKeown, John S., *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (loose-leaf updated 2018, release 6) chapter 18:3, 18:5 (RBA, Vol. I, Tab 18); see also Fox, Harold G. "Copyright in Relation to the Crown and Universities" (1947), 7 U. Toronto L.J. 98 at 107-19 (RBA, Tab 11); See further Finkelstein J.'s comments on Crown prerogative in *Copyright Agency Limited v. State of New South Wales*, [2007] FCAFC 80 at paras. 176-78, where he stated that Crown prerogative has been significantly cut back over time and currently would potentially apply only to statutes.

[36] See *Knight (FCA)* at paras. 112, 128-32, 137-43 for an example of a court not expanding Crown prerogative at the behest of a third party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2019.

Luciana P. Brasil Counsel for the appellant, Keatley Surveying Ltd.	Michael J. Sobkin Counsel for the appellant, Keatley Surveying Ltd.

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