SCC File No. 37863

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

B E T W E E N :

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)

RESPONDING FACTUM OF THE RESPONDENT/ APPELLANT ON CROSS-APPEAL, TERANET INC., TO INTERVENERS

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

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AND:

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

INTERVENERS
(Interveners)

ORIGINAL TO : **THE REGISTRAR OF THE SUPREME COURT OF CANADA**

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PART I—RESPONDENT'S REPLY STATEMENT OF ARGUMENT

A. OVERVIEW

1. This appeal is about whether copyright in plans of survey – that are registered and deposited under a comprehensive provincial regime, and are copied and made available to the public pursuant to a statutory obligation – belongs to the Crown. Section 12 of the *Copyright Act* has been in effect and unchanged for nearly 100 years. This case presents the singular instance in Canada of any legal proceedings objecting to Crown publication of documents that implicates either the Crown prerogative right to publication or s. 12 in that 100 year history.

2. Plans of survey have been registered and deposited through Ontario's statutory scheme for even longer. They are published by the Crown pursuant to clear statutory obligations in order to publicly promulgate and guarantee title, to effect transactions of land in the province. Other provincial and federal statutory schemes similarly ensure such documents are available.

3. This appeal is not about whether copyright can subsist in public legal documents or primary sources of law, or the meaning of "publish" under the *Copyright Act*. It is not about the "public domain". There is no dispute in this case that plans of survey are "works" within the meaning of the *Copyright Act*, and that copyright subsists in them. There is similarly no dispute that plans of survey are published pursuant to clearly worded legislation and not in an arbitrary instance or pursuant to an undefined policy.

4. This appeal is similarly not a referendum on Crown copyright, whether it should be abolished or given a limited interpretation in order to read out clear and explicit statutory language and terms. Hypothetical arguments advanced by the interveners criticizing the ***potential*** application of s. 12 or the ***possibility*** of abuse have no basis in the evidence before this Court.

5. While this Court may take into consideration the effect an interpretation of s. 12 in this case will have generally, the issue of whether, how, and to what extent s. 12 will apply in any given case is a fact-specific inquiry. Any number of hypotheticals can be posited. Precisely for this reason, this Court has a factually grounded interpretive question before it that does not require redrafting the *Copyright Act.*

B. PRINCIPLES OF TECHNOLOGICAL NEUTRALITY

6. The intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("**CIPPIC**") suggests there is a distinction between works being published online and works being published in paper. CIPPIC argues s. 12 should be differently interpreted or applied with respect to paper as opposed to online publication.[1] This argument both misapplies the principles of technological neutrality, and imports an additional requirement of "investment" by the Crown that finds no basis in the language of s. 12.

7. Plans of survey have been published in paper long before the inception of any online technology. The Appellant and the class have never objected to the paper-based system.[2] The transition to the electronic system was a process of conversion spanning 20 years and costing hundreds of millions of dollars.[3] Other than the medium of access, the paper-based and online systems are identical.[4] The Court of Appeal properly analysed s. 12 in light of the well-established principle of technological neutrality, holding that the conversion from the paper-based system to an electronic system was irrelevant.[5]

8. The form of how a work is published has no bearing on whether it occurs under the direction or control of the Crown: "The principle of technological neutrality is reflected in s. 3(1) of the Act, which described the right to produce or reproduce a work 'in any material form whatever'."[6] Publication of registered and deposited plans of survey under the paper-based system was never considered to be an infringement by the Crown. The fact that access is now available online is likewise not infringing under this principle. Moreover, the paper-based system is still operational. Registered and deposited plans of survey are now made available both in paper and digital forms.[7] It would be illogical to find that the same plan made available in paper

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[1] Factum of the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, dated December 18, 2018 ("**CIPPIC Factum**"), ¶6, 11, and 20.
[2] Factum of Teranet Inc., dated December 11, 2018 ("**Teranet Responding Factum**"), ¶15.
[3] Teranet Responding Factum, ¶23.
[4] Teranet Responding Factum, ¶29.
[5] *ONCA SJ*, ¶19. References herein have the same meaning as in Teranet's Responding Factum.
[6] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, ¶5; see also *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, ¶66 [*SODRAC*]; *Robertson v. Thomson Corp.*, 2006 SCC 43, ¶49.
[7] Teranet Responding Factum, ¶35-36, and 40-45.

form would not be infringing while finding that when it is simultaneously made available in both paper and digital form it would be.

C. THE MEANING OF "WORK" IS NOT IN ISSUE IN THIS APPEAL

9. It is apparent from CIPPIC's arguments, as well as those advanced by Canadian Legal Information Institute ("**CanLII**"), the Canadian Association of Law Libraries ("**CALL**"), and the Centre for Intellectual Property Policy and Ariel Katz ("**CIPP**"), that many of the interveners' objections are with the statutory definition of "work" in the *Copyright Act*. These issues are not raised in the appeal.

10. CanLII, CALL and CIPP all variously argue that the definition of "work" cannot include public legal documents (or primary law) or other public or official documents. CanLII and CALL argue primarily that judicial decisions and legislation should be exempt from copyright;[8] CIPPIC argues there ought to be a relevant distinction between "existing works" and "new works" for the purposes of s. 12. CIPP goes so far as to argue that plans of survey may be "law-like documents" in which copyright cannot subsist.[9]

11. All of these arguments raise new issues contrary to Order of Justice Abella dated November 14, 2018. Further, these interveners advocate for arbitrary limitations on various terms for the purposes of interpreting s. 12. There is no basis on which this Court should (or could) rewrite the *Act*, particularly when these issues are not before this Court and have no bearing on the determination of this case. Any such limitation would also be wholly divorced from any factual basis and undoubtedly affect the *Act*'s operation generally.

12. In any event, the Federal Court of Appeal (the "FCA") recently held in *P.S. Knight Co. Ltd. v Canadian Standards Association* that laws and regulations may be the subject of copyright – s. 12 is recognition of this fact.[10] The FCA concluded "statutes and regulations therefore fall within the ambit of section 12" and are made available to the public by or under the direction or

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[8] Factum of Canadian Legal Information Institute ("**CanLII Factum**"), ¶19-36; Factum of the Canadian Association of Law Libraries ("**CALL Factum**"), ¶7, 19, 26; CIPPIC Factum, ¶11, 12, and 15.

[9] Factum of the Centre for Intellectual Property Policy and Ariel Katz ("**CIPP Factum**"), ¶33.

[10] *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2018 FCA 222 at paras. 73-75 [*Knight FCA*]

control of the federal and provincial Crown.[11] Section 12 was held to be inapplicable in *Knight* because the work at issue, an electrical standards guide that was incorporated by reference into certain statutes, was not published by or under the direction or control of the Crown.

13. Whether laws, judicial decisions and regulations are "works" in which copyright subsists and therefore are "works prepared or published" pursuant to s. 12 is a separate inquiry entirely. Whether a survey is a "law-like" document is similarly beside the point. These arguments are ones of policy that cannot override the clear wording of the *Copyright Act*.[12] Rather, they highlight that the application of s. 12 in any given instance is an individual inquiry. While this Court can develop a test or criteria that can be used to determine the indicia of establishing when something is "prepared" or "published, "by" or "under the direction" or "under the control" of the Crown, how and whether these criteria will apply to a specific case (e.g. one considering the publication of statutes) is a matter best left for determination in that individual case.

D. PROPOSED INTERPRETATIONS OF SECTION 12

14. As the authorities confirm, s. 12 is broad and has multiple applicable combinations.[13] If the criteria set out in s. 12 are met, the section applies. The fact that the section ***could*** or ***does*** apply to numerous sets of circumstances is insufficient to substantiate the conclusion that the clear disjunctive language should be ignored or that a fragmented analysis such as proposed by CIPPIC should be applied. Similarly, because the section uses terms like "direction or control" to define its scope does not inherently make it a "legislative monstrosity", a term which CIPPIC and CALL attribute to s. 12, both incorrectly and out of context.[14]

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[11] *Knight FCA*, ¶79.
[12] *SODRAC*, ¶ 47.
[13] See Teranet Responding Factum, ¶82-86.
[14] CIPPIC Factum, ¶14; CALL Factum, ¶15. The phrase quotes from a barrister's arguments before the Court, which were not accepted or endorsed, and ultimately advanced by the unsuccessful party: *N.S.W. v. Butterworth & Co. (Australia) Ltd. (1938)*, 38 SR (NSW) 195 at 258 [*Butterworth*]. Barry Torno quotes the phrase from the judgment alongside criticism advanced against the Keyes-Brunett report for not dealing sufficiently with discussion of potential revision to s. 12: *Torno*, p. 49-50, ABOA, Tab 2. Vaver's texts merely note Torno's paper and in fact he offers an interpretation of s. 12 consistent with Teranet's: Vaver, David,

15. CIPPIC argues for a "common sense" limitation of the plain wording of the section. It advances the same interpretation put forth by the Appellant, which would effectively require that the "publish" prong be wholly read out of s. 12. Second, it argues that "direction or control" ought only to refer to a person, and not a work. CIPPIC's proposed interpretation is inconsistent with the principles of statutory interpretation and produces the same result it argues is an absurdity. Further, it would impair the Crown's ability to carry out its functions including those mandated by statute.

16. The suggestion that "published" takes its meaning within the section from "prepared" and that this "suggests the addition of value through the creation or release of new works" has no basis in the text of the *Act*, the legislative history, or interpretations of the section in Canada and in other Commonwealth jurisdictions.[15] "Publish" has always meant to make copies available to the public.[16]

17. Further, the consideration of these separate prongs was not a "blind application" by the lower Courts. The Courts' reasoned analysis rightly concluded that "prepare" and "publish" are distinct terms, with distinct meanings, and apply disjunctively within the section.[17] This interpretation is correct and consistent with leading judicial decisions and authorities.[18]

18. CIPPIC also advances the policy argument that the "publish" prong of s. 12 should be read as "first published".[19] This too is contrary to the principles of statutory interpretation that presume consistent expression and that each word is intentional.[20] Even if s. 12 is construed (wrongly) to be limited to works "first published", the publication by the Crown (via Teranet) of registered and deposited plans of survey is not making an "available work more available".[21] As

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Copyright Law (Toronto: Irwin Law, 2000) at p. 92, RBOA, Tab 23; Vaver, "Copyright and the State in Canada and the United States" (1996) 10 IPJ 187.

[15] Teranet Responding Factum, ¶81-87, and 112-118.
[16] *Copyright Act*, S.C. 1921, c.24, s. 3(2); CIPPIC Brief of Authorities, Tab 2.
[17] *ONSC SJ*, ¶31; *ONCA SJ*, ¶29-31.
[18] Teranet Responding Factum, ¶81-87.
[19] CIPPIC Factum, ¶8 and 17.
[20] Teranet Responding Factum, ¶81, ff. 154.
[21] CIPPIC Factum, ¶17.

the Appellant acknowledges, prior to entering the land registration system, plans of survey are private works.[22] Relevant plans of survey are only published when registered or deposited.

19. CIPPIC's proposal to limit the "direction and control" to Crown employees, agents, or contractors also has no basis in the language of s. 12.[23] It also makes no difference on the facts of this case. Employees of the LRO are Crown employees – they take in, review, accept, and make copies of plans of survey. Teranet is a contractor to the Crown, publishing plans of survey at the Crown's direction. Publication therefore occurs by a person or entity under or at the direction or control of the Crown. The other circumstances complained of by CIPPIC are the same – the Intellectual Property Office are Crown employees, publishing patent documents; Court registrars are Crown employees, copying and making available facta and court documents.

20. CIPPIC's argument that s. 12 should be interpreted as a "work-for-hire" provision also has no basis in the *Act*. It would read out the "publish" prong and substitute some vague new concept for the existing statutory wording of "direction or control", based on an unsupported analysis of whether the factors of an employment, agency or other relationship are present. Section 12 expressly applies where a work is published ***by*** the Crown ***or*** published under the direction or control of the Crown. Teranet agrees with the Land Title and Survey Authority of British Columbia ("**LTSA**") that enabling necessary public access is a quintessential circumstance in which s. 12 ought to apply.[24] If operating pursuant to a statutory directive and authority does not come within the ambit of acting "by or under the direction or control of the Crown", then no activity can meet that standard. The section would be rendered meaningless.

21. Each of the examples CIPPIC advances produces the same outcome. The *Patents Act* provides that copies of filed documents will be published and may be sold by the Commissioner.[25] Various Acts and policies provide that court documents shall be made available to the public.[26] Such documents are made available pursuant to statute or enacted policy,

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[22] Factum of Keatley Surveying Ltd., dated September 27, 2018, ¶12, 77.
[23] CIPPIC Factum, ¶9.
[24] Factum of Land Title and Survey Authority of British Columbia dated December 18, 2018, ¶22-23
[25] *Patents Act*, R.S.C., 1985, c. P-4, s. 26.1(2).
[26] E.g., *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137(4); Court of Appeal of British Columbia, *Record and Courtroom Access Policy* (updated 31 January 2017), made pursuant to s.

undertaken by Crown employees operating in furtherance of that statute or policy – they are being published by or under the direction or control of the Crown. There is no evidence of any "clear expectations and longstanding legal relationships" that are disrupted by this interpretation.[27] The fact that there may be more than one circumstance in which s. 12 can apply is no reason to eviscerate the plain reading of its language with a perverse interpretation that creates confusion, or Crown liability.

22. CIPPIC further argues that if read in its plain context, there is no potential scenario in which there could be an "agreement" with the author. This is not the case. Individuals can contract with the Crown and the term "author" in s. 12 can be construed as including successors or assigns. Either by contract,[28] clear legislative amendment, or by avenues such as the *Reproduction of Federal Law Order*,[29] if the Crown wants to direct or control when a work is published, and provide for terms of access, it is free to do so. It is not the work of the Courts to determine the scope of how this may take shape, which could vary in each individual case.

E. THERE IS NO EXPROPRIATION IN THESE CIRCUMSTANCES

23. The land registration regime and other registry systems cited by CIPPIC are voluntary. As the Court of Appeal correctly held, there is no question of expropriation.[30] Expropriation is defined as the compulsory acquisition of property without consent, and is generally concerned with real property.[31] *De facto* expropriation of a non-real property interest requires (1) acquiring a beneficial interest in the property and (2) removing all reasonable uses of the property.[32]

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32 of the *Court of Appeal Act*, R.S.B.C. 1995, c. 77; *Policy for Access to Supreme Court of Canada Court Records* (updated 31 January 2017).

[27] CIPPIC Factum, ¶38.

[28] As was the case in *R. v. Kerr* in which the Court found there was an operable contract between the Crown and the author and therefore s. 12 did not apply: 1982 CarswellNat 659 (FC-TD), Teranet Reply Brief of Authorities ("**Reply BOA**"), Tab 3.

[29] SI/97-5.

[30] *ONCA SJ*, ¶24.

[31] *R. v. Tener*, [1985] 1 S.C.R. 533, ¶47; *Lanty v. Ontario (Minister of Natural Resources)*, 2006 CanLII 1452 (O.N.S.C), ¶162, aff'd 2007 ONCA 759; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, ¶142 (dissent).

[32] *Canadian Pacific Railway v. Vancouver (City)*, 2006 SCC 5, ¶30. Any right to compensation *if* there is expropriation must be mandated by statute: *R. v. Tener*, [1985] 1 S.C.R. 533, ¶24.

24. The benefit of registration and deposit in the land registry systems does not inure to the Crown. The benefit is to the land owner and to the public, confirming and/or modifying the title and describing the interest in the property. Section 12 ***has been operating and in effect since 1921***. There is no evidence of any concern of abusive expropriation. Any such hypothetical concern ought not to impugn the proper construction and interpretation of the section.

F. CROWN PREROGATIVE SUPPORTS TERANET'S POSITION

25. Teranet agrees with the arguments advanced by the Attorney General of Canada and others that this case could be resolved in favour of Teranet by reason of the Crown prerogative, preserved in the opening words of s. 12. Under the prerogative, the Crown owns the copyright and the right to exclusively print and publish and make available in paper and online form registered or deposited plans of survey. The Crown has and retains this right even without resorting to the balance of s. 12 which expressly vests copyright in the Crown in accordance with the prepared and published prongs of the section (the "vesting portion of s. 12"). This should not be read, however, as creating a mutual exclusivity as between the Crown prerogative preserved in the opening part of s. 12, and the vesting portion of s. 12. Both parts of the section co-exist and preserve or provide the Crown with the copyright rights in accordance with their terms.

26. The application of s. 12 is expressly "without prejudice to" the Crown's prerogative rights. Copyright in a work may belong to the Crown by virtue of its prerogative right ***or*** the application of s. 12, and one work can admit of the ***coexistence of both*** the prerogative and coming within s. 12.[33]

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[33] *Robic*, RBOA Tab 19, s. 12 at §5.2: "Crown statutory copyright under section 12 is complementary to the rights and privileges which are expressly reserved in favour of the Crown by the saving words that introduce that section."; *Fox 1967* at 278, RBOA Tab 10: "The statute throws a wide net over every work of that nature, which may or may not be the subject of prerogative copyright. So long as it was prepared by or under the direction or control of Her Majesty or any government department, Crown copyright subsists therein… The Crown will have copyright in any work so long as it is published by or under such direction or control." *McKeown*, at §18.5(a) and (e), RBOA Tab 18; see also *Butterworth*, at 226, 257-259 and *Knight*

27. The Crown prerogative is a proprietary right in a work. It gives the Crown the exclusive copyright to, among other things, print and publish certain classes of works and to exclude others from doing so, except as expressly abolished or limited by statute, which is not the case for Crown copyright in Canada.[34] It also includes the right to make available copies of works online.[35]

28. Contrary to the suggestion that the prerogative is a vestigial basis of copyright,[36] there remains a relevant practical element in the application of the prerogative power. Its continued existence is consistent with its underlying justifications to ensure the preservation, authenticity, accuracy and reliability of certain documents.[37] The prerogative has been held to apply to plans of survey.[38] The continued operation of land registration systems across the country is the functional role that the prerogative continues to serve.

FCA, at ¶75-77, where the Courts' analysis accepted s. 12 is separate from Crown prerogative, and indicated both may be applicable to the work at issue.

[34] *Bellman,* at 555: "…the Crown must have, in its own publications, an effective copyright at common law, whether based upon prerogative or property or both."; *Fox 1967* at 273-280, RBOA Tab 10; *Gilchrist*, at 74-75, RBOA Tab 13: "The prerogative right of the Crown in the nature of copyright is the oldest basis of Crown ownership of works."; *Fox 1947* at 107, RBOA Tab 11: "The right of the crown to copyright, at least in a considerable number and variety of works, depends not upon statute but upon prerogative."; *Butterworth* at 247, cf. 238-239, 244-249, 259-260: "[T]he Crown had a property in the nature of copyright…that right, in my opinion, flows from property."; *Laddie* at §39.23, RBOA Tab 17; John Gilchrist, "Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England", Canberra L. Rev. 139 (2011) at 143, Reply BOA, Tab 5; *Copinger* at 244, RBOA Tab 21; *Copyright Act*, s. 2, "copyright" definition, s. 3; *Knight FCA*, ¶114-135.

[35] *Knight FCA*, ¶141.

[36] CALL Factum, ¶2.

[37] *Bellman,* ¶12 and 15; Teranet Responding Factum, ¶ 121; Sebastien Payne, "The Royal Prerogative", Sunkin & Payne eds., *The Nature of the Crown* (Oxford: Oxford University Press, 1999) 77, at 87, Reply BOA Tab 6.

[38] Teranet Responding Factum, ¶115.

G. OTHER MATTERS NOT IN ISSUE

29. The Attorney General for Saskatchewan suggests that there is a constitutional element to both the analysis and outcome, in that the federal copyright scheme should not impair the provincial schemes dealing with its constitutional scope of civil and property rights.[39] The Ontario Court of Appeal did not "avoid" any constitutional issue – no such issue arises. Copyright belongs to the Crown (including the provincial Crowns) by virtue of s. 12 and there is no tension or impediment created by its application to provincial land registration systems.

30. The LTSA advances the argument that surveyors "retain their moral rights" seemingly putting in issue a question to be decided as to the impact or existence of moral rights in plans of survey. Any question of moral rights is not in issue in this case. No such issue was certified, and indeed the Plaintiff deleted all allegations related to moral rights in its Amended Statement of Claim.[40] The Ontario Court of Appeal made no finding whatsoever in relation to moral rights.[41]

31. The intervenors CIPP, CIPPIC, CanLII and CALL suggest there is a major problem with Crown copyright in Canada. Yet, aside from this matter, there are only 9 cases in which s. 12 has been mentioned or discussed in Canada,[42] in only 2 of which s. 12 had any application to the determination of copyright.[43] There is also no decided case in Canada in which the Crown prerogative has been evoked or applied to resolve a copyright dispute in favour of the Crown. There is no evidence before this Court that the section is creating problematic, abusive, absurd, or unjustifiably unfair results to justify wholly rewriting s. 12 as suggested by these interveners. If changes to s. 12 are required, Teranet respectfully submits that is a matter for Parliament.

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[39] Factum of the Attorney General of Saskatchewan, ¶15, 16 and 22.
[40] *Keatley Surveying Ltd. v. Teranet*, 2012 ONSC 7120, ¶91; Amended Claim, AR, Tab 4.
[41] Contrary to the suggestion at para. 24 of the LTSA Factum.
[42] *Reprographic Reproduction 2005-2014 Re*. (2012, C.B.), aff'd 2013 FCA 91; *Re Editors Assn. of Canada*, 2001 CAPPRT 033, Reply BOA Tab 1; *Bellman*; *Re Ontario (Minister of Consumer and Commercial Relations)*, [1996] O.I.P.C. No. 373 (Ont. Privacy Commissioner), Reply BOA Tab 4; *R. v. James Lorimer & Co.*, [1984] F.C.J. No. 78 (C.A.), RBOA Tab 6, *Kerr v. R*, 1982 CarswellNat 659 (FC-TD), Reply BOA Tab 3; *P.S. Knight Co. Ltd. v. Canadian Standards Association*, 2016 FC 294, aff'd 2018 FCA 222; *Glaxo Canada Inc. v. Apotex Inc.*, 1994 CarswellNat 1896 (FCTD), rev'd, Reply BOA Tab 2; *A.G.C. v. Madeleine Rundle c.o.b. NEC Plus Ultra*, 2012 ONSC 2747; *Waldman v. Thomson Reuters Corporation*, 2012 ONSC 1138.
[43] *Lorimer*, *ibid.* where the Crown was the author; *Rundle*, *ibid.* where the defendant admitted the Crown had copyright as the works were written by Crown employees.

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

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