

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

BETWEEN:

Keatley Surveying Ltd.

APPELLANT

AND:

Teranet Inc.

RESPONDENT

AND:

**Attorney General of Canada, Attorney General of Ontario, Attorney General of British
Columbia**

INTERVENERS

**FACTUM of the INTERVENER
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TABLE OF CONTENTS

<u>PART</u>	<u>PAGE</u>
PART 1: OVERVIEW AND FACTS.....	1
A. Overview.....	1
B. Facts.....	2
PART II – POINTS IN ISSUE.....	3
PART III – ARGUMENT	4
Consequences if section 12 operates to transfer ownership of copyright.....	4
Consequences if section 12 does not operate to transfer ownership of copyright.....	5
The need for a test in applying section 12	7
PART IV – SUBMISSIONS AS TO COSTS.....	9
PART VI: TABLE OF AUTHORITIES	10
PART VII: LEGISLATION	10
PART VII: Statutory Provisions	11

PART 1: OVERVIEW AND FACTS

A. Overview

1. The Attorney General of British Columbia intervenes to highlight the effect that the operation of section 12 of the *Copyright Act* (the “Act”) may have on the ability of the government of British Columbia (the “Province”) to deal with works in which copyright, without the operation of section 12, would be privately held (“private works”) and, in particular, on the government’s ability to widely disseminate private works via the Internet. Should this Court affirm that section 12 of the *Act* does operate in some circumstances to make the Crown the owner of copyright in private works, governments must be able to discern when section 12 has this effect. In particular, governments need to know when a private work can be said to have been “...prepared or published by or under the direction or control of Her Majesty” such that section 12 operates to make the Crown the owner of copyright in the work. If this Court finds that section 12 does not make Her Majesty the owner of copyright in private works in the circumstances of this case, it is equally important for governments to know if section 12 ever has this effect.

2. The government of British Columbia exercises powers under section 92 of the *Constitution Act*. It administers a wide range of programs that support the economic and social well-being of all residents of British Columbia. These programs operate pursuant to both legislative schemes as well as provincial policy that is not always directly anchored in legislation. The Province is also committed to promoting meaningful and informed dialog and debate among its citizens, and between those citizens and the government itself. Furthermore, the Province recognizes the need to ensure that those whose interests may be affected by government decisions have an opportunity to participate in a meaningful way in those decisions. These imperatives require the proactive disclosure of information to further the goal of open government, to support informed decision-making processes, and to further the formulation and application of government policies. Finally, the goals of strengthening access to justice and supporting the rule of law also make it important for governments to be able to make information

relating to court proceedings, quasi-judicial and statutory decision-making processes, and other administrative proceedings, widely available.

3. In this context, the Province publishes, or wishes to publish, information under a range of provincial statutory, regulatory and policy regimes that range from the highly controlled and prescriptive (akin to Ontario's Electronic Land Registry System, or 'ELRS') to the wholly permissive or non-prescriptive. However, the ability of the Province to publish private works is always constrained by the need to ensure that copyright in these works is respected. Section 12 is one of the key elements that will guide publication by the Province in these circumstances.

4. This appeal arises in the context of a highly prescriptive legislative scheme pursuant to which plans of survey (which are private works) are published by the respondent Teranet. Beyond the narrow issue before this Court, but of equal importance to the Province, is the question of whether, and if so, how, section 12 applies in relation to the publication of private works pursuant to legislative schemes that are less prescriptive than Ontario's ELRS, or pursuant to policies that are permissive but which may not be anchored in a particular legislative scheme.

B. Facts

5. The Province frequently publishes works in which it owns copyright. The government owns copyright in these works because they are authored by employees of the Crown in the course of their employment or because the copyright in the works vests in the Province or is assigned to the Province under contractual agreements. The Province also publishes private works pursuant to licenses granted by third-party copyright owners. Publication of works in these circumstances, whether via the Internet or otherwise, will not be affected by this appeal. However, in other instances the Province receives works in which the Province does not become the owner of copyright and with respect to which the Province does not obtain a license to publish. Ownership of copyright in these private works is a central consideration in deciding whether the government will make them available to the public, and the manner in which section 12 operates necessarily influences the copyright ownership analysis.

6. The Province has an interest in distributing information to members of the public for many purposes. These include: fostering transparency in government; furthering access to justice; supporting the administration of courts and tribunals in British Columbia; enabling informed participation in statutory decision-making and policy-making processes; and administering statutory and regulatory schemes in several spheres of provincial jurisdiction, including the operation of registries for personal property, Crown land and business corporations. Furthermore, for many of these purposes, the public has an interest in accessing information without having to make individual requests for it.

7. When the Province determines that providing a single copy of a private work to a member of the public is justified, it can do so in a manner that respects the rights of the owner of copyright in the private work. However, in the instances identified above, broad, proactive dissemination of private works by government through publication (via the Internet, or otherwise) would be warranted as a more effective way of furthering the public interest.

8. Administration of the British Columbia's land title registration system is the responsibility of British Columbia's Land Title and Survey Authority ("BCLTSA"), an intervener in this appeal. BCLTSA is an independent corporate body, created by the *Land Title and Survey Authority Act*.¹ BCLTSA is not a Crown corporation, and is not an agent of the government except when it performs a limited number of specified functions, including the execution of Crown grants and the collection of certain specified fees.

PART II – POINTS IN ISSUE

9. The appellant asks this Court to determine whether or not section 12 of the *Copyright Act* transfers copyright in plans of survey that are filed in Ontario's land registry offices pursuant to Ontario's prescriptive statutory scheme, to the government. The Attorney General of British Columbia does not take a position on this issue.

¹ *Land Title and Survey Authority Act*, S.B.C. 2004, c. 66.

10. However, the Attorney General of British Columbia urges the Court to use this opportunity to clarify the circumstances, if any, in which section 12 operates to effect a transfer of copyright in private works to governments (instances of “Her Majesty”). This will enable Canadian governments to discern when section 12 is triggered, and to develop statutory schemes and policies accordingly.

PART III – ARGUMENT

11. In this case, the Ontario Court of Appeal affirmed a decision of the Ontario Supreme Court that found section 12 of the *Act* had the effect of making the Crown the owner of the copyright in plans of survey deposited or registered under Ontario’s ELRS, when those plans were published in the context of a prescriptive statutory scheme. The consequences of a finding that section 12 can operate to transfer ownership of the copyright in private works that are published by the Crown pursuant to a prescriptive statutory scheme (as found by the Ontario Court of Appeal, and as contended by the respondent Teranet on this appeal) are significant to the Province. Equally significant would be the consequences of a construction of section 12 that confines its operation to these narrow circumstances.

Consequences if section 12 operates to transfer ownership of copyright

12. It is acknowledged that if this Court finds that section 12, when properly construed, does in some cases operate to transfer ownership of copyright in private works to Her Majesty, the effect in those cases would be to extinguish copyright in the hands of the original copyright holder. The original copyright holder could then no longer deal with the work (with certain narrow exceptions) without some form of permission from the Crown.

13. If section 12 is found to operate in this manner, it is imperative that governments know the circumstances that are necessary (as opposed to sufficient) to trigger a transfer of copyright to Her Majesty by operation of this provision, so that governments can align statutory schemes and policies with this result.

Consequences if section 12 does not operate to transfer ownership of copyright

14. On the other hand, if section 12 is found not to operate to make the Crown the owner of copyright in private works that are published by the Crown, the result is potentially to bring into conflict two competing interests. These are the interest of private authors in the protection of copyright in their works (which is preserved if section 12 does not operate) and the interest of users in having these private works made more broadly available by governments in certain circumstances, either with or without charge (which would be furthered if section 12 does operate).

15. The public interests that would be furthered by governments making private works broadly available include:

- a) augmenting access to justice and fostering open courts by making selected court records widely available;
- b) ensuring the reliable and effective operation of land title and other registry systems;
- c) disclosing information when it is in the public interest to do so, for reasons that include notification of public health or safety concerns, and notification of a risk of significant harm to the environment; and
- d) furthering public engagement in government activities, including environmental impact assessments, land use planning processes, natural resource allocations, and waste and water management policies and decisions.

16. If section 12 is found not to operate to make the Crown the owner of copyright in cases like this one, the public's reasonable right to access information in the hands of government would in some instances² be restricted. This interpretation of section 12 gives rise to questions in several spheres of government activity. For example, to what

² The Crown may be able to secure a licence to publish a private work, thereby enabling publication.

extent would the proactive publication of documents submitted to a government pursuant to a valid judicial or provincial administrative or regulatory regime be permitted, to further the public interest in enhancing access to justice or safeguarding open courts? Could a private work that was the subject of an access to information request ever be distributed beyond an individual requestor to a broader group of affected or interested individuals? Could a private work that is in government's possession ever be published when access to information legislation requires disclosure in the public interest³ and, if so, would this be dependent upon the particular wording of the statute in question? The ability of governments to meet public policy goals in these situations may be significantly curtailed if section 12 does not operate to transfer ownership of copyright in private works to Her Majesty, or if it operates only in limited or exceptional circumstances.

17. As noted, governments administer numerous statutory schemes, some highly prescriptive and others not, that empower or require government officials to obtain information and to make decisions. Administrative law principles apply to statutory decision-making processes, and require that statutory decision-makers adhere to established principles. The requirement for procedural fairness in the exercise of statutory decision-making powers includes the requirement that the decision-maker disclose sufficient information to permit meaningful participation in the decision-making process.⁴ This requirement drives the imperative to disclose works that facilitate or enhance participation in the statutory decision-making process. Much as the exchange of pleadings in civil actions define the issues and set out the positions of the parties, privately-authored works (including expert opinions, assessments, and written arguments or submissions) provide substance to the process of statutory decision makers.

³ See, e.g., British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, section 25, "Information must be disclosed if in the public interest."

⁴ *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159, 1994 CanLII 113 (SCC).

Publication of pleadings and factums by the Courts facilitate access to justice and buttress the constitutional imperative of open courts. The spirit of access to information legislation in every jurisdiction favours the broad publication of information to strengthen public awareness of, and participation in, democratic processes.

The need for a test in applying section 12

18. This case illustrates the need for an authoritative construction of section 12 and the articulation of a test to allow governments to determine when the section operates to transfer ownership of copyright in a private work to Her Majesty. This Court's interpretation of section 12 will necessarily place its operation somewhere on the continuum from "section 12 never operates to transfer copyright in private works to Her Majesty" to "section 12 operates to transfer copyright in private works to Her Majesty in every instance in which the works are published by (or under the direction of) Her Majesty". For this reason, it will be necessary for governments to understand the criteria that determine when section 12 is triggered (if at all), and thus to determine whether or not a private work can be distributed broadly to the public.

19. The Ontario Court of Appeal held that the "extensive property-related rights bestowed on the Crown by the land registration scheme in Ontario" compelled the conclusion that the publication (although not the preparation) of the plans by Teranet was done under the "direction or control of Her Majesty",⁵ and therefore that publication comes within the ambit of section 12. However, the Ontario Court of Appeal did not articulate a test to be applied. Thus, the result is still a "we'll know it when we see it" situation. The *status quo* is of limited help in informing governments (all instances of "Her Majesty") as to what criteria governments and the courts must look to in construing section 12.

20. If this Court finds that section 12 does in some circumstances operate to transfer ownership of copyright in private works to Her Majesty, it is essential for governments to know when this happens. This can be accomplished by the articulation of a test. The

⁵ *Keatley v Teranet*, 2017 ONCA 748, at paragraph 53.

following are examples of circumstances in which government must be able to discern whether section 12 operates to make Her Majesty the owner of copyright in private works:

- a) when a work is prepared and provided to government under a prescriptive statutory scheme (like Ontario's ELRS);
- b) when government simply publishes a private work provided to it under a prescriptive statutory scheme (like Ontario's ELRS);
- c) when a private work is prepared and provided to government under a statutory scheme that is less prescriptive than Ontario's ELRS;
- d) when government simply publishes a private work provided to it under a statutory scheme that is less prescriptive than Ontario's ELRS; and
- e) when government merely publishes a private work that has been provided to it pursuant to government policy.

21. The articulation of a test will also assist governments to formulate policies in other circumstances. Governments need to know:

- a) in what circumstances is publication, "publication under the direction or control of Her Majesty" when a private work is published under a prescriptive statutory scheme (like Ontario's ELRS); and
- b) in what circumstances is publication, "publication under the direction or control of Her Majesty" when a private work is published under a statutory scheme that is less prescriptive than Ontario's ELRS.

22. It is also essential for governments to know the characteristics of a statutory or regulatory scheme or policy framework (if any) that are necessary in order that preparation or publication of a work under the scheme would bring it within the ambit of section 12.

23. Once governments have guidance from this Court on how and when section 12 operates, it will be possible to formulate legislation and policies that strike the appropriate balance between the public interest in having broad public access to information (including private works), and the interests of private copyright holders.

PART IV – SUBMISSIONS AS TO COSTS

24. Pursuant to the order of the Court dated November 14, 2018, the interveners are to pay to the appellant and the respondent any additional disbursements occasioned as a result of their interventions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Victoria, British Columbia, this *13* day of December, 2018.



Graham J. Underwood, Counsel for the
Intervener, Attorney General of the Province of
British Columbia

PART VI: TABLE OF AUTHORITIES

Tab	Authorities	Paragraph # of Factum
1.	<i>Quebec (Attorney General) v. Canada (National Energy Board)</i> , [1994] 1 S.C.R. 159	17

PART VII: LEGISLATION

Tab	Legislation	Paragraph # of Factum
1.	<i>Copyright Act</i> , R.S.C. 1985, c. C-42	Cited throughout
2.	<i>Freedom of Information and Protection of Privacy Act</i> , R.S.B.C. 1996, c. 165	16
3.	<i>Land Title and Survey Authority Act</i> , S.B.C. 2004, c. 66.	8

PART VII: Statutory Provisions

Copyright Act, R.S.C. 1985, c. C-42

Definitions

2 In this Act,

...

artistic work includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works; (*oeuvre artistique*)

Definition of *publication*

2.2 (1) For the purposes of this Act, *publication* means

(a) in relation to works,

(i) making copies of a work available to the public,

(ii) the construction of an architectural work, and

(iii) the incorporation of an artistic work into an architectural work, and

(b) in relation to sound recordings, making copies of a sound recording available to the public,

but does not include

(c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or

(d) the exhibition in public of an artistic work.

...

Where copyright belongs to Her Majesty

12 Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder

of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165

Division 4 — Public Interest Paramount

Information must be disclosed if in the public interest

25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

- (a) any third party to whom the information relates, and
- (b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

- (a) to the last known address of the third party, and
- (b) to the commissioner.

Land Title and Survey Authority Act, S.B.C. 2004, c. 66.

Part 2 — Authority Established

Land Title and Survey Authority of British Columbia established

2 (1) The Land Title and Survey Authority of British Columbia is established as a corporation without share capital and consists of a board of directors appointed under this Act.

- (2) The Authority has the power and capacity of an individual of full capacity.
- (3) The Authority is not organized, and must not be operated, for profit.
- (4) The Authority must have a corporate seal, which may be engraved, lithographed, printed or otherwise reproduced.
- (5) The Authority is not an agent of the government except when executing a Crown grant under the *Land Act* or in accordance with the express terms of a written agreement with the government.
- (6) The Authority may carry on any necessary or advisable activities both inside and outside of British Columbia.

...

Purposes of Authority

- 4 (1) The purposes of the Authority are
- (a) to manage, operate and maintain the land title and survey systems of British Columbia,
 - (b) to facilitate the execution of Crown grants,
 - (b.1) to manage, operate and maintain a land title system for a first nation under an FNCIDA agreement, and
 - (c) to carry on other necessary or advisable activities related to land title or survey systems.
- (2) All money earned by the Authority must be used for the purposes of the Authority.