Court 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 THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO, 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)

MEMORANDUM OF THE INTERVENERS CENTRE FOR INTELLECTUAL PROPERTY POLICY AND ARIEL KATZ

(Rule 37, 42 – *Rules of the Supreme Court of Canada*)

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PARTS I & II – OVERVIEW

1. This appeal raises fundamental questions about freedom to access and use public documents in Canada. The parties assert copyright in surveys which are crucial to the operation of Ontario's public land registry and dispute ownership of that copyright. As a result, the debate has focused on a "choice" between two regimes: either private ownership of copyright or Crown copyright (exercised here by a private company operating as Ontario's exclusive licensee). Yet there is a third option, namely that neither party owns copyright in the surveys because they form part of the public domain. Constitutional concerns and public policy require that Canadians have unimpeded access to the laws and law-like instruments which govern their legal rights and obligations. Copyright law, which creates private property rights, cannot be the foundation for a public documents regime for Canadian citizens.

2. This Court has long affirmed the importance of the public domain (Part A, below). The Court must now clarify the contours of public domain for particular classes of public documents contained in public databases (Part B). Chief among these documents are judicial decisions, statutes, patents, and other law-like instruments. International norms are virtually unanimous in placing such documents outside the scope of copyright (Part C). There are compelling reasons to do so in Canada as well. However, the process by which these documents enter the public domain is unclear, and, if not clarified, risks privatizing key aspects of public records (Part D). In Canada, the creation of a balanced regime for public documents can be accomplished either by properly defining the scope of Crown prerogative in light of the *Charter* or by developing a public policy exception, as has been done in the United States and France.

PART III – ARGUMENT

A. The Scope and Importance of the Public Domain

3. This Court has described the public domain in the field of copyright as "indicating intellectual works, the titles of <u>which are not subject to individual ownership in either subject or Crown</u>."[1] In other words, the public domain is an ownership-free space in which neither private individuals nor the Crown may exercise rights granted by copyright legislation. Thus, the public domain constitutes material that "all are free to draw upon."[2] However, it goes without saying

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[1] *Ontario (AG) v Fatehi*, [1984] 2 SCR 536 at 553 [emphasis added]. See also *Black's Law Dictionary*, 9th ed (West Publishing, 2009) sv "public domain"; Litman, "The Public Domain" (1990) 39 Emory LJ 965 at 975.

[2] *Robinson v Films Cinar*, 2013 SCC 73 ¶23.

that the public domain is not a law-free zone. Other laws, such as privacy or state secrecy laws, may create non-copyright limits on the use of public domain works.[3] Unlike the blunt instrument of copyright, such limits are tailored to specific legal issues or societal interests in play.

4. This Court has repeatedly endorsed the importance of the public domain, cautioning that excessive copyright may "limit the ability of the public domain to incorporate… creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[4] For many commentators, the public domain serves a crucial role in the copyright balance, such that "without the public domain, it might be impossible to tolerate copyright at all."[5]

5. The content of the public domain is vast and varied. It includes material which could never be the subject of copyright, such as ideas and facts,[6] works whose copyright protection has expired,[7] works which are dedicated to public by the copyright owner,[8] and works not eligible for copyright protection, including documents which do not fall within any of the recognized categories of "work" under the Act.[9] And as explained in the next section, it also includes various

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[3] See e.g. *AT v Globe24h.com*, 2017 FC 114 (judicial decisions and privacy interests); Cass Civ, note 31 (bank notes not copyrighted, illicit reproductions subject to anti-counterfeiting laws).

[4] *Théberge v Galerie d'Art du Petit Champlain*, 2002 SCC 34 ¶32. See also *SOCAN v Bell Canada*, 2012 SCC 36 ¶10; *CCH Canadian v Law Society of Upper Canada*, 2004 SCC 13 ¶23.

[5] Litman, note 1 at 977. See also Lange, "Recognizing the Public Domain" (1981) 44 L & Contemp Prob 147; Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can JL & Juris 3 at 10, 20; Craig, "The Canadian Public Domain: What Where and to What End?" (2010) 7 CJLT 221 at 222-225; Litman, note 1 at 965-975; Greenleaf & Bond, "What Makes Up Australia's Public Domain?" (2013) 23 AIPJ 111.

[6] *CCH*, note 4 at ¶22; *Cinar*, note 2 ¶23; *Delrina v Triolet Systems*, 2002 CanLII 11389 ¶52 (Ont CA); *Rains v Molea*, 2013 ONSC 5016 ¶22; *Maltz v Witterick*, 2016 FC 524 ¶39.

[7] *Drolet v Stiftung Gralsbotschaft*, 2009 FC 17 ¶186, 188.

[8] Greenleaf & Bond, note 5 at 24. Dedication to the public domain is expressly recognized in the case of Canadian patents: *Parke-Davis Division v Canada (Health)*, 2002 FCA 454 ¶81-87.

[9] *Copyright Act*, *ibid*, s 5 and s 2 sv "every original literary, dramatic, musical and artistic work." Indeed, it is not at all clear that the surveys here fall within those categories or possess the necessary originality, nor that they escape merger of idea and expression (*Hollinrake v Truswell* (1894), 3 Ch 420 at 428 (CA); *Sparaco v Lawler, Matusky, Skelly, Engineers LLP*, 303 F.3d 460 at 467 (2nd Cir 2002)). Plans of survey seem to be suitable candidates for the application of these limiting doctrines yet the interveners acknowledge that the record before this Court may not be sufficient to presently determine this point. It is clear, however, that the courts below were not briefed on these important questions, and it is important that this Court does not inadvertently affirm the potentially erroneous holdings below on the issue of copyrightability.

public documents.

B. Public Documents and the Public Domain

6. By "public documents," the interveners refer to documents produced in order to serve a societal or governmental purpose, and whose societal function gives them an intrinsic public character. These documents do not belong to the "literary, scientific or artistic" domains of s. 5 of the *Copyright Act*, and instead belong to other domains of human activity, namely state function or sovereign power. Modern governments produce, directly or indirectly, a wide variety of public documents serving social functions, ranging from statutes to records of Parliamentary debates to reports of Royal Commissions to guidance documents issued by regulators.[10] To the extent and as long as they serve a public purpose, these documents are outside the scope of statutory copyright. The interveners will not address all types of public document. Instead, their submissions focus on certain classes of public documents that affect the legal rights of the public, which may include statutes, judicial decisions, and analogous law-like documents.

7. Canadian case law has generally refused to recognize copyright in judicial decisions. In *CCH Canadian*, this Court held that judicial reasons were "<u>not</u> covered by copyright" and that "[i]t would not be copyright infringement for someone to reproduce only the judicial reasons."[11] In the same case, the Federal Court of Appeal also concluded that "[j]udicial reasons are considered to be in the public domain."[12] As the Québec Court of Appeal ruled: "l'accès des citoyens aux décisions des tribunaux s'impose de lui-même et doit donc être reel."[13] This echoes an earlier statement by the House of Lords in *Fleming v Newton* that "Is it then unlawful to state or publish the… judgment of a Court of Justice? If their proceedings are public, so must the result of such proceedings, namely, the judgment, be."[14]

8. In the case of statutes, the law in Canada is less clear. In *BC Jockey Club*, Hutcheon JA wrote a concurrence in which he opined in *obiter* that "there may be cases where the publication of material becomes part of the public domain either because of a statutory requirement to publish the material or because it is inherent in the circumstances that to recognize the claim to

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[10] See e.g. 1887 and 1912 Treasury Minutes on Copyright in Government Publications.
[11] *CCH*, note 4 ¶35 [emphasis in the original].
[12] *CCH* (FCA), note 39 ¶174. See also *BC Jockey Club*, note 15 ¶12.
[13] *Wilson & Lafleur c SOQUIJ*, 2000 CanLII 8006 ¶27 (Qc CA).
[14] *Fleming v Newton* (1848), 6 Scots HLC 175 at 192.

copyright would be contrary to public policy."[15] This supports the view that statutes and similar texts are uncopyrightable, since they are typically published under statutory requirement, and the factors which support the public domain status of judgments also apply to laws, regulations, orders-in-council, etc. Despite this, a majority of the Federal Court of Appeal followed Australian case law and found that statutes are not part of the public domain.[16] Webb JA, dissenting, held that statutes are freely reproducible as a result of Crown prerogative.[17]

9. This Court should clarify that statutes, just like the judgments which interpret and apply them, form part of the public domain. Access to the law is a fundamental right of citizens, as recognized by the Courts in both Canada and the United States.[18] Copyright cannot interfere with the overarching goal of public dissemination of the law. Nor are the economic incentives of copyright required to motivate judges to write decisions or Parliament to enact statutes.[19]

10. Just as statutes and judicial decisions form part of the public domain, so do analogous documents which are "sufficiently law-like"[20] or perform a public legal function by affecting the rights and obligations of Canadians. For example, a patent or a registered trade-mark creates a statutory monopoly which must be respected by all, under pain of civil liability.[21] Indeed, this Court held in *Whirlpool* that a patent is a form of enactment even though its content is initially proposed by a private party.[22] It is this law-like character of patent documents and trade-mark registrations that justifies their inclusion on a public registry in the first place. Because patent and trade-mark law requires publication of such documents, they become public documents and are taken away from any copyright consideration in the context of their law-like function.

11. The law currently confers absolute privileges on certain public statements and documents, as a result of their importance to the functioning of Parliament, the courts, the government, and Canadian society at large.[23] The same recognition should be confirmed in a copyright context: the Canadian public must be entitled to freely quote from, copy, and distribute primary legal

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[15] *BC Jockey Club v Standen*, 1985 CanLII 591 (BC CA).
[16] *PS Knight Co v Canadian Standards Association*, 2018 FCA 222 ¶75-77, 80-81; *New South Wales (AG) v Butterworth*, [1938] SR (NSW) 195.
[17] *PS Knight Co*, *ibid*, ¶199-202.
[18] *Wilson & Lafleur*, note 13 ¶22-24. See also notes 25-28 and factum paragraphs 24-29.
[19] Scassa, "Table Scraps or a Full Course Meal? The Public Domain in Canadian Copyright Law" in *Intellectual Property at the Edge* (Yvon Blais, 2007) 347 at 368.
[20] *Code Revision Commission*, note 26 at 27.
[21] *Patent Act*, RSC 1985, c P-4, s 42; *Trade-marks Act*, RSC 1985, c T-13, ss 19-22.
[22] *Whirlpool v Camco Inc*, 2000 SCC 67 ¶49(e).
[23] *Grant v Torstar Corp*, 2009 SCC 61 ¶30. See also *Fleming*, supra note 14.

materials free from any fear of copyright liability. Fair dealing and implied licences do not provide sufficient certainty given the importance of these documents. The potential chilling effect of spurious copyright claims must be carefully weighed by this Court.

C. International Norms Confirm the Public-Domain Status of Statutes and Decisions

12. The copyright status of public documents is deliberately left open by international copyright treaties. The *Berne Convention* states that the "protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts" is a matter for national-level decisions.[24] The vast majority of common law and civil law countries have confirmed that documents that are the sources of law in their country cannot be copyrighted.

13. In the United States, courts quickly recognized a public policy exception to copyright in statutes and judicial decisions. The first case was *Wheaton v Peters*, where the US Supreme Court briefly held that there was no copyright in the written decisions of the Court itself; this ruling was extended to judgments by state courts in *Banks v Manchester*.[25] The circuit courts of appeal have consistently ruled that statutes and regulatory documents are also uncopyrightable.[26]

14. For more than a century, the US position has been that statutes and judicial opinions cannot be copyrighted. In 1909, this rule was partially codified for federal (but not state) laws and judicial opinions.[27] However, down to the present, the copyright status of state-level statutes and judgments continues to be governed by the jurisprudential exceptions created in the 1800s. The majority in *PS Knight Co* erred when they attributed the public domain status of laws and regulations in the United States exclusively to the codified federal rule.[28]

15. Other common law countries have similarly taken steps to limit the application of copyright to primary legal materials. New Zealand has denied copyright protection for statutes, judgments, and many other public documents since 2001.[29] Australia authorizes certain reproductions of laws and judgments notwithstanding Crown copyright or prerogative.[30]

16. The major civil law countries are virtually unanimous in removing laws and judgments

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[24] *Berne Convention for the Protection of Literary and Artistic Works* (amd. 1979), article 2(4).
[25] *Wheaton v Peters*, 33 US 591 (1834); *Banks v Manchester*, 128 US 244 (1888).
[26] *Howell v Miller*, 91 F 129 at 137 (6th Cir 1898); *Veeck v Southern Building Code Congress International*, 293 F.3d 791 ¶10-16 (5th 2002 [en banc]); *Code Revision Commission v Public.Resource.Org Inc*, No 17-11589 (11th Cir 2018); *Nash*, note 37.
[27] This codification is currently found at 17 USC § 105.
[28] *Code Revision Commission*, note 26 at 35-39. See also 18-21, 24-26.
[29] *Copyright Act 1994* (NZ), s 27(1).
[30] *Copyright Act 1968* (Cth), s 182A.

from copyright protection. This has occurred both via caselaw and via legislation. In France, for example, the exclusion of laws and judicial decisions from copyright is a jurisprudential creation, based on cases from as early as the mid-1800s.[31] France subsequently enacted legislation regarding official or administrative documents.[32] This pattern of excluding laws and judgments from copyright protection is replicated in countries such as Germany, Italy, China, Japan, Brazil, Mexico, Turkey, Russia, and South Africa.[33]

17. The situation in Canada is less clear and less satisfactory. The Reproduction of Federal Law Order purports to authorize reproduction of certain federally-created legal texts. But this order is revocable at any time via executive action, placing the public's access to the law on fragile basis.[34] Moreover, where the government purports to exclusively licence its rights in public documents, decisions about access to public documents will be made by private parties.[35] This Court should put the public domain status of public documents on clearer and more robust foundations. The next section examines three ways to accomplish that goal.

D. How Public Documents Should Enter the Canadian Public Domain

18. Canadian case law on the status of public documents has been less clear about the mechanics of how such documents enter the public domain. There are three distinct possibilities: statutory Crown copyright (section i, below), public policy (section ii), or the Crown prerogative (section iii). Of these three options, only public policy or a modernized version of the Crown prerogative offer a satisfactory and workable approach. Irrespective of the Court's choice, it will be important to confirm that in certain cases, a private work can form part of a public document and be subject to the same rules when used in that context (section iv).

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[31] Françon, "Le modèle français, les pays continentaux et la Convention de Berne" (1996) 30 RJT 191 at 198-200 and cases cited therein. See also Cass civ 1e, 5 February 2002, case 00-1158 (2002); CA Paris ([4ème] ch), 13 June 1991, Dalloz; CA Paris, 5 April 1867, Ann 109 at 120.

[32] See Book 3 of the *Code des relations entre le public et l'administration,* especially L-300-, L-321-1, L, 321-2, L321-4, L322-5, L-323-1, L-325-1.

[33] See the corresponding country chapters in Silke von Lewinski, ed, *Copyright Throughout the World* (Thomson West, looseleaf). See also Françon, note 31 at 200-201.

[34] See e.g. Geist "Auditor General Wields Crown Copyright To Demand Takedown" (2009); Geist, "House of Commons Lawyers Sent Takedown Notices Over Committee Video" (2009).

[35] Public-private partnerships that grant exclusive licences to the private partner result in private parties having veto rights over the public's access to public documents and information. The result has not always been a happy one: Scassa, note 19 at 369 et seq.

(i) *Statutory Crown Copyright Under Section 12 of the Copyright Act*

19. Section 12 was never intended to be a complete code applicable to copyright in official documents and public records in Canada. If section 12 were intended to exhaustively deal with public documents, it would be remarkably unsuitable for that task, for at least four reasons.

20. First, it expressly preserves Crown prerogative, indicating that Courts were always meant to look beyond the *Copyright Act* in dealing with state documents. Second, s. 12 fails to address the important issue of the copyright status of documents prepared by Canadian municipalities or international organizations. Third, Crown copyright under s. 12 would not extinguish moral rights, so moral rights could be invoked to block the publication and use of public documents. Fourth, s. 12 contains the obvious error of referencing an agreement with "the author" rather than "the copyright owner", which requires courts to either read it more broadly than the text allows or to tolerate an absurdity.

21. As such, s. 12 serves a narrow purpose, and should receive a narrow interpretation. The "analytical heavy-hitting" required to balance copyright in a way that facilitates government operations, protects free discourse regarding state affairs, and guarantees public access to legal documents should be done through either public policy or the Crown prerogative.

(ii) *Public Policy*

22. Public policy is one basis by which law-like instruments arrive in the public domain. The courts of both the United States and France have ruled that statutes and judicial decisions are uncopyrightable as a matter of public policy.[36] In the United States, this basis for the rule was expressly acknowledged in 1888: "The question is one of public policy."[37] This approach continues down to the present day, with the 11th Circuit summarizing the law as follows: "public policy compelled the conclusion that these works [primary legal materials] were in the public domain and uncopyrightable."[38]

23. In Canada, several courts have recognized the possibility of a "public interest" defence to copyright infringement, although no case has yet succeeded on the facts.[39] This Court could

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[36] For the US, see notes 25-28. For France, see notes 31-33.

[37] *Banks*, note 25 at 253. See also *Nash v Lathrop*, 142 Mass 29 at 35 (1886).

[38] *Code Revision Commission*, note 26 at 20.

[39] *R v James Lorimer & Co*, [1982] FC 229 ¶26-34 (TD), aff'd [1984] FCJ 78 at 10-11 (CA); *CCH Canadian v LSUC*, [2000] 2 FC 451 ¶66-69, 168-170 (TD), var'd but affirmed on this point 2002 FCA 187 ¶170, var'd w/o comment *CCH*, note 4; *Waldman v Thomson Reuters*, 2012 ONSC 1138 ¶5, 50-51, 95, 149, 178, 181. See also *BC Jockey Club*, note 15 ¶12.

expand the existing public interest defence into a broader recognition that statutes, judicial decisions, and law-like instruments pass directly into the public domain, subject to the comments found below regarding pre-existing private works incorporated therein.

(iii) ***Crown Prerogative***

24. If statutes, judicial decisions, and other law-like documents are held to fall under the Crown prerogative, then the prerogative must be modernized and constitutionalized. The need for modernization flows not just for the balance principle in copyright law, but also from constitutional imperatives. As this Court explained in *Khadr*, the prerogative is subject to constitutional scrutiny.[40] That scrutiny is separate from, but informed by, the notion of balance developed in this Court's copyright jurisprudence which established the concept of "user's rights" in Canada. A constitutionalized and balanced view of the prerogative affirms the Crown's duty to make the law accessible, without authorizing the Crown to prevent others from doing the same.

25. Historically, prerogative copyright protected the Crown's exclusive right to publish legal and religious texts, including statutes, judicial decisions, religious texts, etc.[41] The justification of prerogative copyright was rooted in the Crown's duty to make and publicize the "civil and religious constitutions" governing society.[42] Consistent with that justification, the scope of Crown copyright has generally been determined with reference to its public purpose: "It is… on grounds of political and public convenience, that the prerogative copyright exists, and its applicability must be restrained to the reasons for its existence. The law reprobates monopolies, and even in the case of the Crown, they are only allowed to subsist when necessity requires it."[43] In other words, the right and the duty are synonymous.

26. The State's duty to publish the law is uncontested and continues down to the present day.[44] However, the Crown's duty the make the law accessible by publishing it neither justifies nor requires a right to exclude others from publishing it. Crown prerogative over statutes, judicial decisions and other law-like documents must now, as in the past, be interpreted in light of its purpose in the context of modern realities, including constitutional realities.[45]

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[40] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 ¶35-38;
[41] Fox, Copyright in Relation to the Crown and Universities" (1947) 7 UTLJ 98 at 107-119.
[42] *Ibid* at 109-110, n 73, 112, 120, 124-125 and cases cited therein.
[43] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 239.
[44] *Victoria University of Wellington Students' Association v Government Printer*, [1973] 2 NZLR 21 at 23 (Sup Ct); *Wilson & Lafleur*, note 13 ¶22-31; *Nash*, note 37 at 35, 39.
[45] Fox, note 41 at 107, 110-111, n 71; *Khadr*, note 40.

27. This process of constitutional reinterpretation has already occurred with respect to some of the religious texts previously covered by prerogative copyright. The Crown's assertion of a prerogative right to print all Bibles was eventually rejected due to changes in Britain's unwritten constitution.[46] The case for such constitutional reinterpretation is even stronger in Canada. In a post-*Charter* world, it would be shocking for the Crown to assert prerogative copyright over the Christian scriptures or any other religious text.

28. These constitutional considerations are even more important for the prerogative's application to legal documents. This Court has held that in certain cases, free access to government documents may be a necessary precondition to the exercise of certain *Charter* rights, and thus attract *Charter* protection.[47] For example, if meaningful public discourse requires the reproduction or distribution of public documents, then absent compelling justification, invoking copyright to withhold those documents would likely breach s. 2(b).[48] And access to statutes and judicial decisions is a surely necessary foundation to the exercise of freedom of speech on matters of public importance, as well as the exercise of many of the legal rights protected by s. 7-11 of the *Charter*. Indeed, as the Québec Court of Appeal stated in *Wilson & Lafleur*:

> [22] Il est un principe fondamental du droit canadien selon lequel les citoyens doivent pouvoir échanger publiquement des idées à propos des institutions étatiques qui les régissent. Il y va de l'existence de la démocratie. …
>
> [23] Dans un état de droit, où chacun est soumis aux lois et où chaque individu est régi par elles, par des règlements et, faut-il le reconnaître, par le droit prétorien, il est essentiel que les citoyens soient en mesure d'échanger et de critiquer librement l'ensemble de ces règles. …[49]

29. Invoking the prerogative without considering constitutional principles led a majority of the Federal Court of Appeal to conclude that there was copyright in statutes, exposing Canadians to copyright infringement for making copies of the law.[50] The majority's conclusion is particularly troubling because prerogative "copyright" is perpetual,[51] and it is by no means certain that it would be subject to the exceptions and fair dealing defences of the Act. Crown copyright over the primary law cannot be justified in a free and democratic society: if everyone is presumed to know the law, everyone should have access to it and be able to disseminate it freely.

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[46] Fox, *ibid* at 110-111; *Grierson v Jackson*, Ridg L&S 304.
[47] *Ontario (Public Safety) v Criminal Lawyers Association*, 2010 SCC 23 ¶30-40.
[48] *Ibid*.
[49] *Wilson & Lafleur*, note 13 ¶22.
[50] *PS Knight Co*, note 16 ¶72-73, 76, 80 (majority).
[51] Fox note 41 at 117: "If the crown was entitled to copyright by prerogative [it] would be perpetual."

Concerns over accuracy or cost recovery do not require or support a right to prohibit access to the law. Parliament cannot invoke the prerogative to put the *Criminal Code* behind a pay-wall.

(iv) *Integration of Private Works into Public Documents*

30. Some public documents possess their public character from the moment of their creation. This would be the case for a judge's reasons, or a statutory text created from scratch by legislative drafters. However, in other cases, a document may begin as a private work, and only later gain the status of a public document. This change in status occurs when the work acquires a law-like or governmental function, normally a result of its publication or registration by the government. Two examples illustrate this process.

31. First, consider a law review article containing proposed text for a statute.[52] If the legislature subsequently adopted that proposed text in an Act, the text *as enacted* should become a public document. If this did not occur, then the author of the article could sue the legislature or private citizens who reproduced the statutory text. This is clearly an absurd outcome. Of course, the original law review article remains a private work, subject to ordinary copyright. But as enacted and embodied in law or regulation, that text has a fundamentally different purpose, and thus a fundamentally different character for the purpose of copyright law.

32. Second, consider a copyrighted logo which is registered as a trade-mark. Apart from the registration scheme of the *Trade-marks Act*, the logo is a copyrighted work entitled to protection as such. Yet the logo is also an integral part of the registration, since without a copy of the logo, the public has no notice of the scope of trade-mark holder's exclusive rights. Thus, the logo can be reproduced, but only as part of the registration; a rogue could not extract the logo from the registration and claim that in isolation it continued to be a public-domain document.[53]

PARTS IV & V – COSTS AND ORDER SOUGHT

33. Without taking a position on the disposition of this appeal, the interveners raise the possibility that registration or deposit of a privately-prepared survey imbues it with a sufficiently law-like character to make it a public document. Nor do they take any position on the circumstances under which certain uses of surveys beyond the scope of the land registry could constitute infringement. They do not seek costs, and request that no costs be awarded against them.

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[52] This example was cited by the dissent in *PS Knight Co*, note 16 ¶191.

[53] This is similar to of newspaper articles, which receive different treatment as part of a newspaper than standing alone: *Robertson v Thomson Corp*, 2006 SCC 43.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Montréal, Québec this 18th day of December, 2018

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PART VI – TABLE OF AUTHORITIES

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