S.C.C. FILE NO. _____

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

BETWEEN:

KEATLEY SURVEYING LTD.

APPLICANT
(Appellant)

AND:

TERANET INC.

RESPONDENT
(Respondent)

AND:

ATTORNEY GENERAL OF ONTARIO

INTERVENER
(Intervener)

APPLICANT'S MEMORANDUM OF ARGUMENT

(Pursuant to Section 25(1)(c) of the *Rules of the Supreme Court of Canada*)

Counsel for the Applicant

Luciana P. Brasil
BRANCH MACMASTER LLP
1410 - 777 Hornby Street
Vancouver, BC V6Z 1S4
Tel: 604-654-2999
Fax: 604-684-3429
Email: lbrasil@branmac.com

Agent for the Applicant

Michael J. Sobkin
Barrister and Solicitor
331 Somerset Street W.
Ottawa, ON K2P 0J8
Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This case raises important issues of national scope concerning the breadth of Crown copyright under s. 12 of the *Copyright Act*. The proposed appeal will address whether government and their agents may use this provision to assert the transfer of copyright in private work product submitted to government authorities pursuant to a statutory scheme and then made available by the government to members of the public.

2. This question arises in the context of a class action by licensed Ontario land surveyors against a private corporation that digitizes and makes available to members of the public online, for a fee, the surveyors' work product without providing any compensation to the surveyors.

3. Land surveyors are highly skilled and self-regulated professionals who prepare plans of survey, which can include drawings, maps and charts. A plan of survey is an expression of a surveyor's opinion of the extent of title to the property under survey following a thorough documentary and field investigation. It undeniably attracts copyright protection under the *Copyright Act*.

4. Plans of survey created for clients may be subsequently registered or deposited at a Land Registry Office ("LRO"). There are a myriad of situations prescribed by law where a plan of survey must be filed, such as the creation of new interests in a property. It is only those plans of survey filed at a LRO that are at issue in this action.

5. The preparation and filing of plans of survey predates photocopiers and computers. Historically, a member of the public who was interested in viewing a plan of survey had to attend a LRO in person. In the event the person wanted to make a copy of the plan of survey, he or she originally had to contact the land surveyor (who typically had a blueprint machine).[1] With the advent of the photocopier a person could obtain a

[1] Cross-Examination of Tom Bunker dated November 29, 2011, qq. 347-50 (Applicant's Leave Book ("ALB"), Tab D12).

copy at a LRO for payment of a fee. This process changed dramatically following the privatization and digitization of Ontario's land registry system.

6. The respondent Teranet Inc. is a private corporation that was established in conjunction with the electronic conversion process. Teranet creates electronic copies of each and every plan of survey that is filed at an LRO under a license agreement with the Province of Ontario. It then allows persons who are licensed to use its proprietary software to view and obtain copies of plans of survey. Those users are charged: (a) a licence fee to use the software and (b) a fee on a per search basis. None of the revenues from the fees charged to members of the public for accessing and using the plans of survey are shared with the surveyors who created the plans. As a result, the surveyors brought a class action for infringement of the copyright they hold in their plans of survey.

7. This would normally be a straightforward claim. The surveyors, as creators of the work, would own copyright; and Teranet would be liable for infringing the surveyors' rights, subject to establishing that its profit-making scheme constituted fair dealing or was carried out pursuant to a licence from the surveyors. However, in defending the action Teranet relied on the protection afforded the Crown under s. 12 of the *Copyright Act*.

8. Originally enacted in 1921 and based on United Kingdom legislation from 1911, s. 12 vests copyright in the Crown for any work "prepared or published by or under the direction or control of Her Majesty or any governmental department." Teranet contends that the plans of survey submitted to LROs are prepared or published under the direction or control of the Province of Ontario which thus owns copyright in those works; and as Teranet was providing online copies under a licence from the Province of Ontario it could not be liable.

9. The courts below agreed with Teranet and dismissed the action without ever embarking upon a fair dealing analysis, despite the fact this question was also certified as a common issue. This Court has stated that a proper application of copyright law, including fair dealing, requires a balance to be struck between providing a just reward for

the creator of a work and the public interest in the dissemination of works.[2] In applying s. 12 to resolve this case, the lower courts avoided the balancing exercise called for by the fair dealing doctrine.

10. The proper interpretation of s. 12 is challenging. It has been described as a "legislative monstrosity" owing to the ambiguity in drafting.[3] In the words of one Canadian academic, precisely what s. 12 covers is "unfortunately murky."[4]

11. Read broadly in favour of the Crown s. 12 would expropriate pre-existing copyright from the creator of a work to the Crown whenever the Crown decides that a work in its possession should be made available to members of the public. Read more narrowly in favour of the creator of the work s. 12 would limit Crown copyright to works commissioned by the government or created by its employees and which it subsequently decides to publish. Where the line is to be drawn is at the heart of the proposed appeal.

12. Some courts have construed Crown copyright narrowly because of its potential unfairness to creators of works. The applicant submits a purposive approach to s. 12 supports that view. Crown copyright emerged at a time when there were legitimate concerns about the accuracy of information. Crown ownership of copyright was seen as a means of ensuring that the public received accurate government information. Thus, in the view of one commentator, Parliament has concluded that "Crown copyright must be retained to ensure accuracy and integrity of government materials."[5]

13. Given this historical context it would be wrong to interpret s. 12 in a way that permits a private corporation to profit from the works of others merely because it obtains those works from a government office under a licence agreement with the Crown. Yet the lower courts have given s. 12 precisely that interpretation.

---

[2] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 30; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at paras. 23, 48.
[3] Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981) ["Torno"] at 49 (citing *The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd.*, 38 S.R. (N.S.W.) 195 at 258) (ALB, Tab D1).
[4] Judge, Elizabeth, "Crown Copyright and Copyright Reform in Canada", in Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law* (2005) ["Judge"] at 556.
[5] Judge, at 551 (emphasis added).

14. Despite the historical longevity of section 12, this Court has not had an opportunity to provide guidance on its meaning and scope. It is submitted that it should do so in this case. When the Crown is entitled to own the copyright that would otherwise belong to the creator of the work is an issue of obvious importance to the creator of the work, to federal and provincial governmental departments that end up in possession of the work, and to the public that might wish to obtain copies of the work from the government department, from a third party hired by the government or directly from the creator. In an era where information is increasingly being digitized and made available for public consumption, the reach of s. 12 in relation to that information is of profound importance.

B. Facts and Proceedings Below

15. The applicant is a professional corporation engaged in land surveying in Ontario. It is owned and operated by Gordon Keatley, a licensed land surveyor.[6] The applicant brought this class action on behalf of the following certified class of land surveyors:

> All land surveyors, whether acting as individuals, corporations, or partnerships in Ontario who on or before March 26, 2014 were the (a) author of a plan of survey; or (b) employer of the land surveyor at the time the plan was made; or (c) an assignee of either an author or employer, whose plan of survey appeared at any time in the defendant's electronic database.[7]

16. Land surveyors are professionals who are trained and authorized to prepare plans of survey. They are licensed and governed by the Association of Ontario Land Surveyors.[8] Plans of survey can include drawings, maps, charts or plans. A plan of survey is the expression of a surveyor's opinion of the extent of title to the property being surveyed following a thorough documentary and field investigation. Preparing a plan of survey requires considerable time, skill and judgment.[9]

---

[6] Affidavit of Gordon Keatley, sworn September 15, 2011 ["Keatley Affidavit"], para. 1 (ALB, Tab D9).
[7] Certification Order dated March 26, 2014 (ALB, Tab D13).
[8] Affidavit of Tom Bunker, sworn September 15, 2011 ["Bunker Affidavit"], para. 9 (ALB, Tab D8).
[9] Bunker Affidavit, paras. 18-20 (ALB, Tab D8).

17. Surveyors create plans of survey as a result of requests by their clients. These plans of survey may be subsequently registered or deposited[10] at a land registry in order to alter a property's record of title ownership.[11] The applicant and the class created thousands of plans of survey that are registered or deposited at LROs.[12]

18. Historically, LROs operated as central repositories of paper documents, including plans of survey.[13] Persons wishing to view copies of plans of survey could do so by attending at a LRO. Persons wishing to obtain copies of plans of survey could obtain them directly from land surveyors or could attend a LRO and request a copy in exchange for a $5 fee.[14]

19. Between 1970 and 1987, the Ontario government was considering the automation of land registration records in Ontario and the creation of a digital map of all land parcels (known as "Polaris").[15] In the late 1980s, the Province was approached by third parties and asked to consider a partnership model with the private sector.[16] In 1991, Teranet was incorporated to implement Polaris across all Ontario LROs.[17] Over time, the relationship between Teranet and the Province evolved to include the offering of remote electronic access to and sale of plans of survey and other documents of record at LROs.

20. Since 1991 Teranet has scanned all registered or deposited plans of survey and added them to an electronic database. As of 2011, Teranet had scanned over 200 million

---

[10] A plan that is registered is one that automatically creates a new property interest while a plan that is deposited has no affect on title but is used only as a reference in registered title documents: see definition of terms in Bunker Affidavit, para. 5 (ALB, Tab D7).

[11] Affidavit of Douglas Alan Buckle, sworn August 8, 2011 ["Buckle Affidavit"], para. 8 (ALB, Tab D7).

[12] Keatley Affidavit, para. 6 (ALB, Tab D9).

[13] Affidavit of Arthur Daniels sworn July 28, 2011 ["Daniels Affidavit"], paras. 6-12 (ALB, Tab D4).

[14] Buckle Affidavit, paras. 15-16 (ALB, Tab D7).

[15] Daniels Affidavit, Exhibit D (ALB, Tab D4); Affidavit of Christopher Valentine, sworn July 28, 2011 ["Valentine Affidavit"], para. 42 (ALB, Tab D5).

[16] Daniels Affidavit, para. 23 (ALB, Tab D4).

[17] Bunker Affidavit, para. 112 (ALB, Tab D8); Statement of Defence, paras. 4, 35 (ALB, Tab D6).

documents, including 950,000 images.[18] Teranet sells remote access to its database and all plans of survey through the licensing of its propriety software, Teraview and GeoWarehouse.[19] This flows from agreements between Teranet and the Province of Ontario.[20]

21. Unlike access to plans of survey at a LRO, which are publicly available, only persons who are licensed to use Teraview or GeoWarehouse can remotely view, download and print plans of survey.[21] Users are charged: (a) a licence fee to use Teraview or GeoWarehouse; and (b) a fee on a per search basis.[22] The cost for a license of Teraview is $595.[23] In addition to the purchase of a licence, persons wishing to view a plan of survey through Teranet must pay: (a) a $5 fee equivalent to the $5 charged for in-person requests at the land registry offices; and (b) an additional $10 for accessing the plan of survey through Teranet.[24] All fees collected by Teranet constitute Teranet's revenue.[25] No portion of those fees is paid to the surveyors, who created the voluminous works that populate the database.[26]

22. The first common issue in this case asked whether copyright subsists in plans of survey. Teranet properly conceded this to be so. The definition of "artistic works" in s. 2 of the *Copyright Act* expressly includes "drawings, maps, charts [and] plans."[27] The question of critical importance then was who owned the copyright, the surveyors as creators of the plans, as would normally be the case under the Act, or exceptionally the Crown by virtue of s. 12, which would require a finding that the plans of survey had been prepared or published under the Crown's direction or control.

---

[18] Buckle Affidavit, para. 42(a) (ALB, Tab D7); Cross-Examination of Arthur Daniels, q. 156 (ALB, Tab D10); Cross-Examination of Douglas Alan Buckle, qq. 238-40, 246-48, 269, 272, 279 (ALB, Tab D11).
[19] Buckle Affidavit, paras. 22, 35 (ALB, Tab D7).
[20] Buckle Affidavit, para. 18 (ALB, Tab D7).
[21] Bunker Affidavit, para. 111 (ALB, Tab D8); Cross-Examination of Douglas Alan Buckle, qq. 238-40 (ALB, Tab D11).
[22] Buckle Affidavit, para. 23 (ALB, Tab D7).
[23] Buckle Affidavit, Exhibit K (ALB, Tab D7).
[24] Ministry of Government Services, Bulletin No. 2010-02 (ALB, Tab D3).
[25] Reasons of Motion Judge, footnote 15 (ALB, Tab B1).
[26] Keatley Affidavit, para. 13 (ALB, Tab D9).
[27] Reasons of Motion Judge, para. 26 (ALB, Tab B1).

23. The motion judge, Belobaba J., first considered whether the plans of survey had been "prepared" under the direction or control of the Crown as argued by Teranet. He answered this question in the negative. While the plans of survey followed certain statutorily prescribed guidelines they were prepared at the request of the surveyor's client, not the Crown.[28] Justice Belobaba also provided the following policy reasons against Teranet's interpretation of Crown copyright (at para. 33):

> I also agree with the plaintiff that Teranet's submission about "preparation" fails for two other reasons: first, it would mean that copyright in all plans of survey, even those that are never registered or deposited, would automatically belong to the Crown upon creation given that their preparation was informed by the same provincial statutes and regulations; and secondly, if Teranet is correct, it would also mean that lawyers who file pleadings or facta at court registries would lose the copyright in their work simply because they complied with the statutory filing requirements about form or content.

24. The motion judge then turned to Teranet's second argument, that copyright exists in the Crown because plans of survey are published under its direction or control. He also rejected this argument (at para. 37):

> I am not persuaded by this submission. In my view, if the statutory provisions in the [provincial] *Registry Act* and the *Land Titles Act* (as already discussed) did not exist and all one had was s. 12 of the *Copyright Act*, this provision by itself would not be enough to acquire copyright. Just because the federal or provincial government publishes or directs the publication of someone else's work (as opposed to governmental material) cannot mean that the government automatically gets the copyright in that work under s. 12 of the *Copyright Act*.

25. In the applicant's submission, this reasoning should have resulted in the question of copyright ownership being decided in favour of the surveyors. The court had rejected both of Teranet's submissions on the two prongs of s. 12: "prepared" and "published".

26. However, the court concluded that because provincial statutes provide that property in the plan of survey, <u>including copyright</u>, is transferred to the Province when the plans are registered or deposited at a LRO, the Province obtains "control" of the plans and, when published, copyright belongs to the Crown.[29]

---

[28] *Ibid*., para. 32 (ALB, Tab B1).
[29] *Ibid*., para. 40 (ALB, Tab B1).

27. The problem with this reasoning is twofold. First, the two provincial statutes referenced by the motion judge do not provide that copyright is transferred; instead, the legislation speaks only of a transfer of property, which the motion judge acknowledged is a different concept.[30] Second, that the Province lacks constitutional authority to decide when copyright subsists and *a fortiori* when it may be taken away contrary to the scheme created by the federal *Copyright Act*. Accordingly, the applicant filed a Notice of Constitutional Question to challenge the *vires* of the provincial legislation in the event that the Court of Appeal accepted the motion judge's interpretation of the effect of the provincial legislation.[31]

28. The Court of Appeal, however, rejected the motion judge's interpretation of the provincial legislation. Doherty J.A. for the court stated:

> Like the motion judge, I am satisfied that registered or deposited plans of survey are "published" by the Crown for the purposes of s. 12 of the *Copyright* Act when copies, digital or paper, are made available to, or provided to, members of the public. However, I would not describe the applicable provincial legislation as transferring "ownership" of the copyright to the Province. In my view, the provincial provisions are relevant to whether the copies of the plans are made available under the Crown's "direction or control." Considered as a whole, the provisions demonstrate that the plans of survey registered or deposited in the ELRS [Electronic Land Registry System] are held and published entirely under the Crown's direction or control. Ownership of copyright does not, however, follow from the provincial land registration scheme. It is s. 12 of the *Copyright Act* that vests copyright in the Crown by virtue of the publication of those plans under the "direction or control" of the Crown.[32] [Emphasis added.]

29. By this reasoning the court was able to cure the *vires* problem generated by the motion judge's decision, a fact the court acknowledged in its reasons.[33]

30. In deciding that the motions judge was right, but for the wrong reasons, the Court of Appeal reasoned as follows. In deciding whether copyright exists under s. 12 "one must consider the nature of the 'rights' in the property held by the Crown when it publishes the property (when the Crown makes copies available)." The more extensive

---

[30] *Ibid*., para. 6 (ALB, Tab B1).
[31] Notice of Constitutional Question filed July 21, 2016 (ALB, Tab D14).
[32] Reasons of Court of Appeal, para. 45 (ALB, Tab B3).
[33] *Ibid*., para. 54 (ALB, Tab B3).

the rights the stronger the inference that publication occurs under the "direction or control" of the Crown.[34] In this case, the relevant "property" rights were the following: custody and control of the plans resides with the Crown, strict controls on the form and content of the plans exist, the surveyor cannot change the content of the plan without consent of a governmental official once the plan is registered or deposited, copies of plans must be made available to the public upon payment of the proscribed fee, and the surveyor cannot place any marking on the plan claiming copyright.[35]

31. Based on these features of the provincial legislative scheme, the court concluded that publication of the plans of survey occurs under the "direction or control" of the Crown within the meaning of s. 12 of the federal *Copyright Act*.

PART II – STATEMENT OF ISSUES

32. The applicant submits that this case raises the following issues of national and public importance:

> (1) What is the test for determining whether a work is "prepared or published by or under the direction or control of Her Majesty or any government department" within the meaning of s. 12 of the *Copyright Act*?
>
> (2) Does s. 12 of the *Copyright Act* operate to transfer copyright from the creator of a work to the government when the government makes available to the public a work that was submitted to government as part of a filing requirement under a regulatory scheme?

PART III – ARGUMENT

A. Debate and uncertainty over the meaning of section 12

33. Crown copyright has long been a part of the law of Canada and other Commonwealth jurisdictions. Originally enacted in Canada in 1921 it was copied verbatim from the United Kingdom's copyright statute of 1911.[36] Its wording has remained substantially unchanged over the years.

---

[34] *Ibid*., para. 33 (ALB, Tab B3).
[35] *Ibid*., paras. 34-43 (ALB, Tab B3).
[36] See s. 18 of the *Copyright Act 1911*, 1& 2 Geo. V, c. 46 (U.K.) and s. 10 of the *Copyright Act 1921*, S.C. 1921, c. 24.

34. Section 12 in Canada's current *Copyright Act* reads as follows:

> 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.

35. The opening words of the section appear to preserve pre-existing Crown rights and privileges in relation to copyright. According to Professor Vaver, this referred to the Crown's prerogative power to exert total control over publishing and had been asserted in the seventeenth-century Britain "when talk of treason and sedition was rife."[37]

36. As Doherty J.A. noted in the Court of Appeal, this power is irrelevant to this case as no one suggested that the Province might acquire copyright under the opening phrase in s. 12. However, it does sound a note of caution for the proper interpretation of the remainder of the section. The Crown copyright provision was enacted in a different era when the Crown held a different position in law. Now, with the passage of Crown liability statutes and the *Canadian Charter of Rights and Freedoms* the case for special treatment must not be extended beyond the legitimate purposes Parliament intended when it re-enacted the provision in Canada's current copyright statute.

37. There is little doubt that many publications emanating from government are captured by s. 12. For example, the provision surely covers statutes and regulations initially prepared by the bureaucracy at the direction of the executive and then enacted by Parliament. While the exclusive printing of statutes and other legislation has been recognized as falling under the Crown prerogative, such materials are also prepared and published at the direction and control of the Crown.[38]

---

[37] Vaver, David, Intellectual Property Law, 2nd ed. (Toronto: Irwin Law, 2011) ["Vaver"] at 134.

[38] See Vaver at 135, noting that legislation and judicial decisions "are said to be within the Crown prerogative, the *Copyright Act*, or both)". See also Judge at 555, stating that many types of material for which the Crown prerogative are claimed "would in any vent be covered by Crown copyright under the substantive portion of s. 12."

38. Government is responsible for creating many reports and studies in a modern state and there appears little doubt that copyright of these materials also resides in the Crown. As Professor Vaver states:

> The Act also vests copyright ownership of any work prepared or published "by or under the direction or control of Her Majesty or any government department" in the federal or provincial government. This includes artwork produced by employees or commissioned from freelancers, reports written by government employees and published under the ageis of their departments, and even transcripts of judicial proceedings.[39]

39. The difficulty comes, as it did in the case at bar, when government does not play a role in the creation of a work, but has a regulatory role that may include establishing registration requirements and facilitating public access. At what point, if any, does a regulatory role change copyright ownership from the creator of the work to the government?

40. It has long been recognized that s. 12 offers the potential for "unfairness to certain authors."[40] The result is that some courts have interpreted s. 12 narrowly, as Professor Vaver explains:

> Difficulties with the British equivalent of this provision caused it to be eventually replaced there in 2008. One problem, which still exists in Canada, lies in deciding when an item has been produced under the government's "direction or control." This phrase tends to be interpreted narrowly – rightfully so, since this provision is an exception from the standard principle that the author is the first owner of the copyright in what she creates.[41]

41. An example of the narrow approach is the decision of the New Zealand Court of Appeal in *Land Transport Safety Authority of New Zealand v. Glogau*.[42] In that case, taxi drivers were compelled by law as a safety measure to maintain log books recording the amount of hours driven. The respondent Glogau saw a commercial opportunity to develop a log book and approached the Ministry of Transport to negotiate the contents and layout of the log book which the Ministry then approved. Subsequently, the Ministry approved other log books parts of which had been taken from Glogau's. Glogau sued the

---

[39] Vaver, at 133-34.
[40] Torno, at 50 (ALB, Tab D1).
[41] Vaver, at 134.
[42] [1991] 1 NZLR 261 (ALB, Tab D2).

Ministry which contended that its involvement in approving the log book gave it Crown copyright under s. 52 of New Zealand's *Copyright Act 1962*. Section 52 gave the Crown copyright over "every original literary, dramatic, musical or artistic work made by or under the direction or control of Her Majesty or a Government Department."

42. The court acknowledged that the log book was produced under the direction or control of the Crown in the sense that the Crown gave directions as to the required content and it had to approve the log book before it could be used. In deciding whether this kind of direction and control gave the Crown copyright the court engaged in the following statutory analysis:

> Section 52 is to be read in context, and with an eye to its history. The basic rule is contained in s. 9: the author has copyright, except where the work arises from a paid commission, or in the course of paid employment. In the latter two cases, copyright vests in the commissioner or employer. The basic rule is, of course, subject to agreement to the contrary.
>
> Section 52, therefore, when it speaks of works made "by or under the direction or control" of the Crown either duplicates s. 9, and is redundant, or somehow extends into situations beyond paid commissions, employment, and particular contracts. Does any such "extension" include factual situations such as the present where the Crown is able, de facto, to exercise direction or control because otherwise a sought-after approval would not be forthcoming? There is a temptation to conclude such must be intended, as it is very difficult in the abstract to envisage any other situation of direction or control not already covered by s 9. However, one should pause. The first difficulty – and it is acute – is an unlikelihood the legislature intended the Crown to gain copyright or a share in copyright simply as a side effect of provision for statutory approval. A requirement to apply for approval, and a result that such application (and consequent direction or control) means loss of copyright are an unlikely catch-22. The second difficulty is that there appear to be historical explanations for s. 52(1), and while the law leans against redundancy the provision may indeed have become an anachronism. The provision can be traced back to s 18 of the Copyright Act 1911 (UK), coming through to s 24 of the New Zealand Copyright Act 1913. It attracted little comment at the time, and evidently was seen as no more than confirming the historical position of the Crown. Under then thinking, the Crown held copyright in what might broadly be termed government publications. It might also have been thought necessary to make special provision for works written by Crown servants, as such traditionally were considered to hold office at will rather than under contracts of service. . . [43]

[43] *Ibid*. at 272-73 (ALB, Tab D2).

43. In light of this historical purpose and the fact that it was no longer part of the law of England and New Zealand the court preferred a view of s. 52 that "does not extend much if at all past commission, employment and analogous situations and merely concentrates ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties."[44]

44. In the case at bar the Ontario Court of Appeal cited *Glogau* as authority for the proposition that government controls on the form and content of a work "do not in and of themselves constitute 'direction or control' for the purposes of s. 12."[45] However, it ignored the New Zealand court's statement on the purpose of Crown copyright and its limitation of s. 52 to the situations it identified. Instead, it breathed a new expansive life into s. 12, finding Crown copyright on the basis of the "controls" exercised by the Crown once the plans of survey were filed.

45. In the applicant's submission the New Zealand Court of Appeal's construction should be preferred given the evolution in society since Crown copyright was first enacted. As Professor Judge cogently argues the original purpose for Crown copyright has largely dissipated:

> . . . Historically, it can be argued that the public purposes of ensuring authentication, accuracy, integrity, public notice and credentialing were usefully, even best, served by the Crown copyright regime. Given a world in which printing was the method of disseminating government information, where piracy and forgery were rife, and where the printed word might circulate far in time and space from the originator of the words, it made some sense for the Crown to exert control over the printer by asserting ownership in the content to ensure that the public received accurate and (relatively) timely works in full.
>
> However, the original reasons put forth to justify Crown copyright either no longer apply or, where they do continue, can be better served by other legal or technological means than asserting ownership over the material and controlling the means of reproduction.[46]

46. While s. 12 remains on the books it must be given meaning. However, it should not be interpreted broadly given its original historical purpose and the fact that it departs

---

[44] *Ibid*. at 273 (ALB, Tab D2).
[45] Reasons of Court of Appeal, para. 37 (ALB, Tab B3).
[46] Judge, at 554.

from the primary approach to ownership under the *Copyright Act*. Government possesses massive power and resources. Its ability to take ownership of others' works through exercise of its regulatory function badly distorts the copyright balance by undermining creator rights and should be severely restricted.

47. Each of the courts below took a different approach to s. 12. This is not surprising given, as the motion judge acknowledged, s. 12 "has not been the subject of definitive judicial interpretation" in Canada.[47]

48. The motion judge noted that there are two prongs to s. 12: works that are "prepared" and works that are "published" under the direction and control of the Crown. He rejected Teranet's argument that plans of survey are prepared under the Crown's direction or control; they are prepared at the request of the surveyor's clients. Likewise, he rejected Teranet's argument that because copies of plans of survey are made available to the public under the Crown's direction and control they are published under the Crown's direction and control:

> Just because the federal or provincial government publishes or directs the publication of someone else's work (as opposed to governmental material) cannot mean the government automatically gets the copyright in that work under s. 12 of the *Copyright Act*.[48]

49. So far the motion judge's approach is consistent with the New Zealand Court of Appeal's in *Glogau* in assigning a narrow interpretation to s. 12. However, he then went on to reason that because provincial law transfers the copyright in the plans of survey to the Province of Ontario the Crown must be regarded as in "control" of the document; and when it makes copies available to the public the plans of survey must be under the control of the Crown at the time of publishing.

50. As noted, the problem with this reasoning is that the provinces cannot, as a matter of constitutional law, change the copyright scheme provided in the federal *Copyright Act*. If the Crown is to assert Crown copyright it must be according to the terms of s. 12, not because it has been transferred to the Crown under provincial legislation dealing with

---

[47] Reasons of Motion Judge, para. 12 (ALB, Tab B1).
[48] *Ibid*., para. 37 (ALB, Tab B1).

title to land. If the motion judge had recognized this error he may very well have decided the common issue of Crown copyright in favour of the applicant.

51. The Ontario Court of Appeal recognized the constitutional problem and thus rendered its decision on the basis that copyright had not been transferred to the Crown by virtue of the provincial land titles scheme. However, it reached the same conclusion as the motion judge. It did this by expanding the reach of s. 12 beyond the scope of the section as interpreted by the New Zealand Court of Appeal in *Glogau*.

52. The Court of Appeal looked at what it considered the Crown's "rights" in the plans of survey, reasoning that the more extensive the rights the stronger the inference that publication occurs under the "direction or control". The first "right" is that the Crown has exclusive custody and possession of the plan once it is filed. But this mistakes physical control of a work from the intellectual property rights associated with the work. Just as a consumer may own a physical copy of a book, the copyright in the work still resides in the author or publisher.

53. The second right is that the scheme places controls on the form and content of the plans of survey and permits a government official to review plans to ensure compliance. But as recognized in *Glogau* this equates a requirement for regulatory approval with loss of copyright, "an unlikely catch-22" to have been imposed by the legislature. Neither of these two reasons supports the conclusion that the government's subsequent provision of a copy of a plan of survey constitutes publication under its direction or control.

54. However, for the Court of Appeal the third reason was the most critical. It was that provincial law requires that copies be made available to the public, "a statutory obligation that is fundamentally inconsistent with the claim by the document's author to a right to control the making of copies of the document."[49] With respect, this reasoning is flawed. The provision of copies to the public, either voluntarily or by legislative direction, does not constitute the control or direction required to satisfy s. 12. One needs to look no further than the operation of this Court to see how inapt it is to label as "control or direction" the mere submission of documents.

[49] Reasons of Court of Appeal, para. 40 (AL, Tab B3).

55. In the Supreme Court of Canada parties file factums on behalf of their clients. Once filed a factum cannot be changed without the consent of the other side or an order or direction from the Court. The factum is then posted online. That is, the Court publishes the factum. If someone comes in to the Registry he or she is entitled to see court documents and the Registry will make a copy of a document for him for a prescribed fee as set out in Schedule A to the *Rules of the Supreme Court of Canada*. Assume for a moment that the Court could obtain the benefit of s. 12. Could it be said that this constitutes publication under the direction or control of the Supreme Court of Canada? It is submitted that the answer would have to be no. The Court is providing a service in making material filed with it available to the public. It is not exercising a function that would justify giving it copyright in the underlying materials.[50]

56. The Court of Appeal's approach is particularly problematic in that Crown copyright is not being invoked to ensure the Crown is able to protect the integrity of the information disseminated to the public, which is the animating historical purpose of s. 12, but to permit a private enterprise to profit from the creativity and work done by the surveyors.

57. Other courts have not permitted Crown copyright to be invoked for that purpose. In *Canadian Standards Association v. P.S. Knight Co. Ltd.*[51] the applicant was an organization involved in the development of standards in fields such as health and safety, preservation of the environment and the facilitation of trade. It published a code of standards over which it claimed copyright. The respondents were competitors who intended to publish a work that was essentially an identical copy of the CSA Code. In resisting a copyright infringement action the respondents argued that because the CSA

---

[50] See also Terms and Conditions posted on this Court's website – http://www.scc-csc.ca/terms-avis/notice-enonce-eng.aspx#cr-da – where under the following appears under the heading Factums on Appeal – Restrictions:

"Factums on appeal on this website are prepared by or on behalf of the parties to the proceedings. To obtain information concerning copyright ownership and restrictions on reproduction of factums on appeal on this site, please contact the copyright holder directly. His or her contact information appears on the first page of each factum."

[51] 2016 FC 294.

Code had been incorporated by reference in provincial laws across the country the Crown owns copyright under s. 12.

58. The court rejected this argument, holding that government's adoption of the standards in legislation "does not constitute preparation or publishing by the government or under their direction." In the view of the court "it would be contrary to a purposive construction of the *Copyright Act* to strip the CSA of its rights in the CSA Code simply because certain provinces have incorporated it in law."[52]

59. It should be noted as well that the Federal Court of Australia reached a different conclusion on the issue of copyright in surveyor's plans than the courts below. In *Copyright Agency Limited v. State of New South Wales*,[53] the collecting society for the purposes of the Copyright Act 1968 sought equitable remuneration for the making of copies of plans of survey. The state argued that copyright was vested in the Crown by virtue of s. 176 and s. 177 of the Act. Section 176 grants copyright to a State where the work is made "under the direction or control of … the State" while s. 177 does the same where the work is first published by, or under the direction or control of . . . the State."

60. Like the New Zealand Court of Appeal, the Federal Court of Australia rejected the argument that a state's involvement in prescribing the criteria for approval of a work means it directs or controls the work. It accepted without any analysis that making the copies available to members of the public constituted publication under the direction or control of the state but found it was not "first publication." That had occurred when the surveyors made the plans of survey available to their clients. Thus Crown copyright did not exist under s. 177.

61. The Ontario Court of Appeal distinguished this case on the basis that Crown copyright in s. 12 "does not depend on whether the work has been previously published in Canada."[54] However, it is submitted this requirement is implicit in the scheme given the historical purpose of s. 12 which was to ensure the integrity of governmental information published by the Crown. If the work has already been published by its

---

[52] *Ibid*. at paras. 39, 40.
[53] [2007] FCAFC 80
[54] Reasons of Court of Appeal, para. 52 (ALB, Tab B3).

creator then it is reading much into the section to say that the creator loses his copyright when the Crown re-publishes.

62. Indeed, in the case at bar there was evidence that the government understood that the surveyors retained copyright in their plans of survey. In an email from the Examiner of Surveys, a government official in the Ministry of Government Services, to the Executive Director of the Association of Land Surveyors, the following was stated: "[w]e take physical ownership of the plan but the surveyor retains intellectual property to their survey. Jim [Statham of the Association] and the Ministry are of the same opinion."[55] Not surprisingly then, the Province in its agreements with Teranet "expressly disclaim any warranties to the effect that the province owns copyright in the plans of survey."[56]

B. Decisions have negative implications for the law of copyright

63. Each of the courts below noted that prior to the establishment of the electronic system paper copies had always been provided to members of the public upon payment of a prescribed fee and that no part of the fee had ever been payable to a surveyor. While this undoubtedly influenced the courts, it is irrelevant to the question of whether the Crown owns copyright under s. 12. The provision of paper copies may have been a breach of surveyors' copyright or it may have constituted fair dealing under s. 29 of the *Copyright Act*. Section 29 reads as follows:

> Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

64. If the provision of paper copies at the office of a LRO constituted fair dealing then there would be no copyright infringement. It would not mean that the surveyors lacked copyright in the plans of survey they had created through their skill and judgment.

65. The Court of Appeal misunderstood this fundamental distinction. It said:

> In my view, both the change from paper to electronic copies and Teranet's role in the operation of the ELRS [Electronic Land Registry System] are irrelevant to the merits of Keatley's claim of copyright in plans of survey registered or deposited in the ELRS. The copyright rests in either the Province or the land surveyor who

[55] Bunker Affidavit, para. 55 and Exhibit "T" to Bunker Affidavit (ALB, Tab D*).
[56] Reasons of Motion Judge, footnote 14 (ALB, Tab B1).

> prepared the plan of survey. If the land surveyor has copyright, the making and distribution of paper or digital copies of the plan of survey is a breach of copyright whether done by an employee of the Province or by a third party hired by the Province to perform that function. Equally, if the Province has copyright in the registered or deposited plans of survey, the appellant has no claim for breach of copyright regardless of whether a government employee, or a third party retained by the government, makes the copy.[57]

66. There are two errors in this passage. First, as noted, if the provision of paper copies or digital copies constitutes fair dealing then there would not be a breach of surveyors' copyright. The failure to appreciate this led the Court to adopt an 'all or nothing' view of the surveyors' copyright claims under s. 12. The result is a broad interpretation of s. 12 for future cases.

67. Second, the court considered the change from paper to digital copies irrelevant to the merits of the claim. However, there are significant differences between the two systems in terms of amount of copying and economic effect. It is thus possible that a court will conclude that the old practice of providing paper copies to persons who attend at a LRO is fair dealing while the mass digitization of millions of works and the further dissemination of those works for a fee is not, particularly where the third party provider, the respondent Teranet, has paid the government a vast sum of money for the privilege of performing that function.[58] By failing to grapple with fair dealing, the courts below mistakenly treated all copying as the same.[59]

C. Conclusion

68. There is considerable uncertainty as to the proper approach to take when deciding whether something is prepared or published under the Crown's direction or control. The proper construction of section 12 is important for it implicates the competing interests of creators of work; government officials through whose hands the works may pass; members of the public who wish access to those works, and private enterprises that may wish to enter into public-private partnerships with government to digitize and then exploit those works for profit.

---

[57] Reasons of Court of Appeal, para. 19 (ALB, Tab B3).
[58] Affidavit of Tom Bunker, para. 111 (ALB, Tab D8).
[59] Fair dealing was engaged by common issue six and fully argued by the parties below.

69. Additionally, this issue comes before the Court at a time when "Governments around the world are taking advantage of digital technologies to advance transparency and make information more readily available to the public."[60] As such efforts take place across Canada, private entities are seeing an opportunity to gain access to and monetize the underlying data, as witnessed in this case and in other provinces.[61] Government open data initiatives, pressure to digitize records, and enhance transparency is likely to increasingly implicate Crown copyright as questions arise about the legal rights associated with public data and other works made available under the auspices of open government. The proper construction of s. 12 is therefore ripe for determination by this Court.

PART IV – SUBMISSION ON COSTS

70. The applicant seeks its costs of this leave application.

PART V – ORDER SOUGHT

71. The applicant submits that leave to appeal should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2017.

Luciana P. Brasil Counsel for the applicant	Michael J. Sobkin Counsel for the applicant

[60] Government of Canada's Draft New Plan on Open Government 2016-2018, available online at http://open.canada.ca/en/consultations/canadas-new-plan-open-government-2016-2018

[61] In 2014 Teranet acquired the operations of the Manitoba land registry (The Property Registry – TPR) for $75 million and future royalties: see https://www.gov.mb.ca/finance/pubs/teranet.pdf. A similar effort was attempted but ultimately rejected in Nova Scotia: see http://cbc.ca/news/canada/nova-scotia/registries-privatize-government-private-sector-service-nova-scotia-1.3540782. ISC, a publicly traded company (TSX:ISV) which "manages several registries" for Saskatchewan, describes itself as a "leading provider or registry and information management services for public data and records": see https://company.isc.ca./who-we-are/default.aspx?section=companyoverview.

PART VI – LIST OF AUTHORITIES

CASES	**Paragraph(s) referenced in Memorandum of Argument**
Canadian Standards Association v. P.S. Knight Co. Ltd., 2016 FCA 294	57-58
CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13	9
Copyright Agency Limited v. State of New South Wales, [2007] FCAFC 80	59-60
Land Transport Safety Authority of New Zealand v. Glogau, [1991] 1 NZLR 261	41-44, 49, 51, 53
Théberge v. Galerie d'Art du Petit Champlain Inc., 2002 SCC 34	9
LEGISLATION	
Copyright Act 1911, c. 46 (U.K.)	33
Copyright Act 1921, S.C. 1921, c. 24	33
Copyright Act 1962, (1962 No 33) (N.Z.)	41-44
Copyright Act 1968, Cth (No 63, 1968)	59-60
Copyright Act, R.S.C. 1985, c. C-42	1, 3, 7-14, 22, 25, 27, 30-32, 34-37, 40, 44, 46-51, 54-58, 61, 63, 66, 68-69

SECONDARY SOURCES	
Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981) at 49 (citing *The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd.*, 38 S.R. (N.S.W.) 195	10, 40
Judge, Elizabeth, "Crown Copyright and Copyright Reform in Canada", in Geist (ed.) *In the Public Interest: The Future of Canadian Copyright Law* (2005)	10, 12, 37, 45
Vaver, David, *Intellectual Property Law: Copyright, Patents, Tradmarks.* Concord, Ont.: Irwin Law, 1997.	35, 37, 38, 40

PART VII – STATUTORY PROVISIONS

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

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.

Research, private study, etc.

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

***Loi sur le droit d'auteur*, L.R.C. 1985, c C-42**

Quand le droit d'auteur appartient à Sa Majesté

12 Sous réserve de tous les droits ou privilèges de la Couronne, le droit d'auteur sur les oeuvres préparées ou publiées par l'entremise, sous la direction ou la surveillance de Sa Majesté ou d'un ministère du gouvernement, appartient, sauf stipulation conclue avec l'auteur, à Sa Majesté et, dans ce cas, il subsiste jusqu'à la fin de la cinquantième année suivant celle de la première publication de l'oeuvre.

Utilisation équitable

Étude privée, recherche, etc.

29 L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.

Copyright Act 1968, Cth (No 63, 1968)

Crown copyright in original works made under direction of Crown

176(1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this subsection.

(2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

Crown copyright in original works first published in Australia under direction of Crown

177 Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.

Copyright Act 1962, (1962 No 33) (N.Z.)

52. Crown copyright – (1) In the case of every original literary, dramatic, musical, or artistic work made by or under the direction or control of Her Majesty or a Government Department, --

> (a) If apart from this section copyright would not subsist in the work, copyright shall subsist therein by virtue of this section; and
>
> (b) In any case, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the work.

(2) Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to copyright in every original literary, dramatic, musical, or artistic work first published in New Zealand, if first published by or under the direction or control of Her Majesty or a Government Department.

(3) Copyright in a literary, dramatic, musical or artistic work, whether unpublished or published, to which Her Majesty is entitled in accordance with either subsection (1) or subsection (2) of this section shall continue to subsist until he end of he period of fifty years from the end of the calendar year in which the work was made, or (in the case of a photograph) was taken, and shall then expire.

(4) In the case of every sound recording, cinematograph film, television broadcast, or sound broadcast made, or edition of any one or more literary, dramatic, or musical works published, by or under the direction or control of Her Majesty or a Government Department, --

> (a) If apart from this subsection copyright would not subsist in the recording, film, broadcast, or edition, copyright shall subsist by virtue of this subsection; and
>
> (b) In any case, Her Majesty shall, subject to the provisions of this Part of this Act, be entitled to the copyright in the recording, film, broadcast, or edition, and it shall subsist for the same period as if it were copyright subsisting by virtue of, and

owned in accordance with, section 13, section 14, section 15, or section 17 of this Act.

(5) The preceding provisions of this section shall have effect subject to any agreement, made by or on behalf of Her Majesty or a Government Department with the author of the work or the maker of a recording, film, broadcast, or edition, whereby it is agreed that the copyright in the work or other subject-matter shall vest in the author or maker, or in another person designation in the agreement in that behalf.

(6) The provisions of Parts I, II, and III of this Act, with the exception of the provisions relating to subsistence, duration, or ownership of copyright, shall apply in relation to copyright subsisting by virtue of this section as they apply to copyright subsisting by virtue of the said Parts I, II, and III.

The Copyright Act, 1921, S.C. 1921, c. 24

10. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

Copyright Act 1911, 1& 2 Geo. V, c. 46 (U.K.)

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.