SCC File No. 37863

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

B E T W E E N :

KEATLEY SURVEYING LTD.

APPLICANT
(Appellant)

AND:

TERANET INC.

RESPONDENT
(Respondent)

AND:

ATTORNEY GENERAL OF ONTARIO

INTERVENER
(Intervener)

Proceeding under the *Class Proceedings Act, 1992*

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL and CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL OF THE RESPONDENT, TERANET INC.

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I—STATEMENT OF FACTS

A. Overview

1. Since before Confederation, Ontario land surveyors have submitted plans of survey for registration or deposit in Ontario's land registration system. In so doing, they have always understood and accepted that, by reason of the statutory regime governing real property in Ontario, those plans of survey will be copied and provided to the public upon payment of a prescribed statutory fee. Over 25 years ago, the Province decided to digitize the Ontario land registration system and to create an electronic land registration system ("**ELRS**") through a public-private partnership with a private sector service provider. The Respondent, Teranet Inc. ("**Teranet**"), is that service provider. Land surveyors were a driving force behind the digitization effort and participated extensively in the ELRS conversion. Today, surveyors are among the primary users of the ELRS. They also continue to register and deposit plans of survey as they always did in the predecessor paper-based system.

2. Nonetheless, this class of Ontario land surveyors led by the representative plaintiff, the Applicant, Keatley Surveying Ltd. ("**Keatley**"), claims that Teranet's operation of the ELRS as a service provider to and on behalf of the Province infringes copyright in registered and deposited plans of survey. Prior to Keatley's claim, surveyors in Ontario have never complained about copyright infringement in the paper-based system, and indeed previously conceded in this action that it was non-infringing. Many Ontario surveyors participated in and were remunerated for their services in the creation of the ELRS. The fact that almost the entire class may be estopped from bringing this claim is only one of Teranet's multiple defences that have not been fully adjudicated. The determination of Crown copyright and the interpretation of s. 12 of the *Copyright Act* is only one of the certified common issues in this case.

3. On summary judgment the Honourable Mr. Justice Belobaba agreed with Teranet that Keatley's interpretation of s. 12, and particularly the argument that there is a difference between the paper-based and electronic systems, cannot be sustained. The Ontario Court of Appeal unanimously upheld that decision.

4. Justice Belobaba found that copyright in plans of survey transferred to the Crown on deposit or registration in Ontario's Land Registry Offices. His Honour further confirmed that the Province's decision to modernize the land registration system did not change the essential character of the system, and therefore copyright in plans of survey belongs to the Crown. He dismissed the action.

5. The Court of Appeal affirmed "the extensive property-related rights bestowed on the Crown by the land registration scheme in Ontario compel the conclusion" that plans of survey are published under the direction of the Crown.[1] Consequently, s. 12 "declares that the copyright in the registered or deposited plans of survey belongs to the Crown."[2]

6. Keatley frames its case as raising questions of "national scope concerning the breadth of Crown copyright under s. 12 of the *Copyright Act*".[3] This is a strained assertion. Underlying the spectre of national and public importance, this appeal is yet another attempt to reformulate factual and context-specific questions that have been correctly and conclusively determined by both the Ontario Superior Court and Ontario Court of Appeal. Additionally, Keatley puts forward arguments about constitutional issues that were never pleaded in its Statement of Claim, and were not advanced at summary judgment. Notably, the plaintiff was asked by the Motions Judge whether such argument was being made and unequivocally responded "no". This argument should not be determined at first instance by this Court.

7. Teranet respectfully submits that the application for leave to appeal fails to satisfy the criteria required by section 40(1) of the *Supreme Court Act*. This case raises no issues of public importance and Keatley's submissions do not support this Court exercising its discretion to grant leave to appeal:

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[1] *Keatley Surveying Ltd. v. Teranet Inc.*, 2017 ONCA 748 at para 53.

[2] *Ibid.*

[3] Applicant's Memorandum of Argument, dated 27 November 2017 ("Keatley MOA"), at para 1.

(a) There are no issues of national importance – the heart of this case is whether by virtue of *Ontario's statutory land registration system*, plans of survey are "published by or under the direction or control of the Crown", such that s. 12 of the *Copyright Act* is engaged;

(b) There are no conflicts between the decisions of the courts below – the Court of Appeal's unanimous judgment approved the Motion Judge's conclusions;

(c) There are no conflicts between decisions of appellate courts – the Court of Appeal's decision was province-specific, did not purport to bind or analyze any other provincial statutory scheme, and is not inconsistent with any other Canadian case law;

(d) There is no uncertainty of legal principles – the Court of Appeal gave cogent, well-supported reasons for its conclusions and the arguments Keatley now advances are issues that have been answered clearly by this Court and do not need to be revisited;

(e) There are no issues of statutory interpretation with broad applicability – s. 12 of the *Copyright Act* is rarely litigated, and its interpretation in this case is circumscribed by the provincial statutes the federal legislation interacts with; and

(f) Section 12 clearly applies in this case, and accordingly, there is no reason for this Honourable Court to grant leave to consider the scope of the Section.

8. Justice Belobaba heard cross-motions by Keatley and Teranet for summary judgment on the certified Common Issues. He correctly found that copyright in registered or deposited plans of survey belongs to the Crown by the operation of s. 12 of the *Copyright Act* and dismissed Keatley's action. The Ontario Court of Appeal correctly affirmed the decision that, pursuant to s. 12, copyright belongs to the Crown. Keatley's appeal was dismissed.

9. Keatley's request of this Court for leave to appeal should likewise be dismissed.

B. The Public-Private Partnership to Develop the ELRS

10. Land registry offices ("**LROs**") have historically managed real property registration and administration in Ontario.[4] LROs make land ownership and description information available to the public through access to registered and deposited title documents, including plans of survey, in order to facilitate land transactions.[5]

11. Ontario is the first jurisdiction to offer electronic land registration and search and is an industry leader. The creation of the electronic system is a public benefit, providing efficiencies for the government and public as well as positively impacting the economy.[6] In order for the Government to meet its obligations and ensure these benefits are realized, control over the registered and deposited documents is essential to the public interests the system serves.[7] These are precisely the circumstances that the Applicant concedes are contemplated by the application of section 12 of the *Copyright Act*.

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[4] Affidavit of Arthur Daniels sworn July 28, 2011 ("Daniels Affidavit"), at para 6, Appeal Book and Compendium of the Appellant, Keatley Surveying Ltd. ("ABCo"), Tab 17, p. 244. There are 65 LROs in Ontario.

[5] Daniels Affidavit, at para 7, ABCo, Tab 17, p. 244; Excerpt from Ontario Government's Website, Exhibit "B" to the Daniels Affidavit, Compendium of the Respondent, Teranet Inc. ("RSPCo"), Tab 10.

[6] Daniels Affidavit, at paras 50-53, ABCo, Tab 17 pp. 254-255.

[7] For example, the Land Titles Assurance Fund, established by Part V of the *LTA*, is mandated to compensate persons deprived of interests in land due to fraud or ineffective transfer.

12. Prior to the creation of the ELRS, to search for land registration documents, a person had to attend at a LRO and have the staff copy the relevant document upon payment of a statutory fee.[8] Registering documents also required personal attendance.[9]

13. In the original paper-based system, documents registered or deposited with LROs, including plans of survey, were made available to any member of the public upon attending at a LRO and paying the prescribed fee.[10] Surveyors have never been paid any fee or royalty when the Crown provided copies of plans to the public.[11]

14. Keatley and the Class have never objected to the paper-based system.[12] Only when pressed by the Court of Appeal,[13] was the argument raised that "the provision of paper copies *may have* been a breach of surveyors' copyright".[14]

15. In 1991, the Province entered into a public-private partnership with Teranet to convert the paper-based system into the ELRS, which project was completed in 2010. Plans of survey and other land registration documents may now be accessed and

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[8] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717, at para 5; Daniels Affidavit, paras 9-15, ABCo, Tab 17, pp. 245-246. The system contained approximately 400 million paper documents and 3.7 million manual land parcels (dating back to 1795). Not all of these documents were land surveys.

[9] Daniels Affidavit, at para 15, ABCo, Tab 17, p. 246. Wait times burgeoned to 4-5 hours per transaction on average. There was also significant backlog in processing: it took LRO staff upwards of 2-3 months to process each transaction.

[10] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717, at para 5; Affidavit of Douglas Alan Buckle sworn August 8, 2011 ("Buckle Affidavit"), at para 15, ABCo, Tab 20 p. 345.

[11] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717, at para 5; Buckle Affidavit, at para 16, ABCo, Tab 20, pp. 345-346.

[12] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717, at para 19; Cross-Examination of Tom Bunker dated September 15, 2011("Bunker Cross-Examination"), p. 68-71, qq. 338-353, RSPCo, Tab 17.

[13] *Keatley Surveying Ltd. v. Teranet Inc.*, 2017 ONCA 748 at para 18.

[14] Keatley MOA at para 63, emphasis added.

obtained remotely and electronically by means of two online portals, Teraview and GeoWarehouse, upon payment of statutorily prescribed fees. These portals use the same data as the paper-based system. To use either portal, a user must obtain an account and licence from Teranet, which are subject to terms and conditions as prescribed by the Province.[15]

16. Surveyors, individually and through their professional association, the Association of Ontario Land Surveyors ("**AOLS**"), participated extensively in the creation and development of the ELRS.[16] Indeed, as Justice Belobaba found, surveyors "took a lead role in advocating a fully electronic and remotely accessible system."[17] Among other things: the AOLS was consulted as to the design of the ELRS and its regulatory structure;[18] surveyors were involved in both consortia that bid to be selected as the Province's private sector partner to develop the ELRS (one of which ultimately

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[15] Section 6.1 of Teraview's Legal Terms and Conditions, Exhibit "I" of the Buckle Affidavit, RSPCo, Tab 1. Section 1.1 confirms that "Products" includes registered and deposited plans of survey. Similar provisions are found in the GeoWarehouse Legal Terms and Conditions, Exhibit "L" to the Buckle Affidavit, RSPCo, Tab 2. The Province retains approvals and oversight of licences, including the authority to suspend, revoke, or reinstate access for non-payment.

[16] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at para 15; Daniels Affidavit, at paras. 43-44, ABCo, Tab 17, p. 253; Bunker Affidavit, at para. 9, ABCo, Tab 23, pp. 4-5; Cross-examination of Gordon Keatley, December 21, 2011 ("Keatley Cross-Examination") pp. 61-62, qq. 277-279, RSPCo, Tab 16; Bunker Cross-Examination, pp. 42-43, qq. 203-207, RSPCo, Tab 17; Ministry Bulletin dated January 26, 1999, Exhibit "G" to the Daniels Affidavit, RSPCo, Tab 11G; Buckle Reply Affidavit at para. 19, RSPCo, Tab 13.

[17] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at para 16.

[18] Buckle Reply Affidavit at paras. 19-20, RSPCo, Tab 13; Daniels Affidavit at para. 45, ABCo, Tab 17, p. 253.

became Teranet);[19] and surveyors were paid approximately $40 million to perform work for Teranet on the digital mapping project required to establish the ELRS.[20]

17. Keatley's chief complaint is the public-private partnership the Province adopted to operate the ELRS.[21] As held in the Courts below, this complaint is unfounded.

18. First, there are extensive statutory bases for the ELRS,[22] including that the Crown is *required* to provide access to and copies of land registry documents,[23] and that these documents are to be provided in electronic format.[24]

19. Second, the Crown has statutory authority to enter into contracts with a service provider to enable registration and related services.[25] Teranet, as the Crown requires, accesses Crown data to provide electronic land registration services pursuant to an exclusive licence.[26] The agreements between Teranet and the Province make clear Teranet's role as a service provider to the Crown.[27] Accordingly, the Crown, not

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[19] Valentine Affidavit, at paras. 28-36, ABCo, Tab 16, pp. 238-241; Daniels Affidavit at paras. 30-34, ABCo, Tab 17, p. 250.

[20] Buckle Affidavit, at para. 73, ABCo, Tab 20, p. 359.

[21] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at paras 17-19; Keatley MOA at paras 6, 7, 13, 56, and 67.

[22] See *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at paras 6-9, footnotes 7, 8 and 13.

[23] *Land Titles Act*, R.S.O. 2000, c. L-4, 2, s. 165 [*LTA*]; *Registry Act*, R.S.O. 1990, c. R.20, s. 15 [*RA*].

[24] *Land Registration Reform Act,* R.S.O. 1990, c. L.4, s. 27(1) [*LRRA*], s. 1 and Part III; See also s. 15(4) of the *RA* and s. 165(4)(b) of the *LTA.*

[25] *Electronic Land Registration Services Act,* S.O. 2010, c. 1, Schedule 6, s. 2 [*ELRSA*],

[26] Buckle Affidavit, at para 20, ABCo, Tab 20, p. 347; *ELRSA*, s. 2; Second Amended and Restated Licence Agreement, s. 8.2(1): "Teranet, on behalf of the Ministry, ***shall*** facilitate the delivery of ELR Services in accordance with the Land Registration Statutes and this Agreement:", Exhibit "B" to the Buckle Affidavit, ABCo, Tab 21.

[27] *Keatley Surveying Teranet*, 2016 ONSC 1717 at para 21; Buckle Reply Affidavit, at para 4(a) – (f), RSPCo, Tab 13 ; Second Amended and Restated Licence Agreement, Exhibit "B" to the Buckle Affidavit, ABCo, Tab 21, p. 366; See, in particular: (i) the definitions of "ELR Services" or "Electronic Land Registration Services"; (ii) Articles

Teranet, owns the documents in the ELRS database and the Crown, not Teranet, maintains ultimate responsibility for its accuracy and integrity and the manner in which it is accessed.[28]

20. Third, the Crown retains authority over all fees for searches and registration, which are statutorily prescribed.[29] The "statutory fees" and "mutually agreed fees" charged for remote access to the ELRS are prescribed by Minister's Order. Teranet may not charge anything other than the prescribed fees for access to and providing copies of plans of survey.[30] The Crown also sets the fees Teranet charges for use of Teraview; those fees are intended to compensate Teranet for the use of its proprietary systems which enable remote functionality, not to obtain land registry documents.[31]

21. Fourth, all ELRS fees are collected on behalf of the Province. Teranet is then remunerated by the Province as a service provider to the Crown, including for its role

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8.1 and 8.2; (iii) Article 3.1; (iv) Article 5.1(1)(i); (v) Article 8.9(1); and (vi) Schedule 1.

[28] Articles 3.2 and 5.1 Second Amended and Restated Licence Agreement, Exhibit "B" to the Buckle Affidavit, ABCo, Tab 21, s. 3.2 and 5.1.

[29] Currently, the fees are authorized by Minister's order dated December 10, 2010, made under the *LTA*, pursuant to section 163.1 of the *LTA*, section 101.1(1) of the *RA* and ss. 2(3) and 2(4) of the *ELRSA*: see Exhibit "B" to the Buckle Reply Affidavit, RSPCo, Tab 13B; Buckle Affidavit, at para 21, ABCo, Tab 20, p. 347.

[30] *Keatley Surveying Teranet*, 2016 ONSC 1717, footnote 15. See Articles 7.1, 7.4(1) and (2) of the 2010 Second Amended and Restated Licence Agreement, Exhibit "B" to the Buckle Affidavit, ABCo, Tab 21.

[31] See the description of Licence fees in the Ministerial Order: Fee Schedule, p. 25, RSPCo, Tab 13A. GeoWarehouse is a Value Added Product, authorized by the Province pursuant to the terms of the 2010 Second Amended and Restated Licence Agreement, which provides subscribers with customizable reports and other functionality, together with a remote portal to access the ELRS. User fees set by Teranet reflect the suite of additional products offered through GeoWarehouse.

in creating, managing, and maintaining the ELRS.[32] The fees paid to Teranet are paid ***by the Ministry*** for the provision of services to it; the fees are ***not*** monies Teranet earns for the sale of plans or other documents.[33]

22. Keatley puts significant weight and focus on the argument that Teranet is exploiting surveyors' works for profits.[34] Respectfully, these suggestions are incorrect, and a misleading interpretation of the statutory system.

C. The Class Members use the ELRS and acknowledge the Crown's copyright

23. Keatley also fails to recognize that Ontario land surveyors (i.e., the class) are one of the key groups of professionals who use the ELRS.[35] Currently there are only approximately 349 land surveyors in private practice in Ontario. 73 Ontario land

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[32] Pursuant to the terms of the Exclusive Licence, Teranet's remuneration is equivalent to the amount of ELRS fees collected, which it retains. Teranet invoices the Ministry to account for the ELRS fees, which invoices set out applicable HST for the services Teranet provides; Buckle Reply Affidavit at para. 6, RSPCo, Tab 13.

[33] When a user accesses the ELRS database through GeoWarehouse, the only fees that can be and are charged are for ELRS documents are the statutorily prescribed fees: see Article 7.4 of the Second Amended and Restated Licence Agreement, Exhibit "B" to the Buckle Affidavit, ABCo, Tab 21. The Ministry authorizes Teranet to retain fees collected in respect of electronic land registration services. See Buckle Reply Affidavit at paras. 5-6, RSPCo, Tab 13.

[34] Keatley MOA at paras 7, 21, 56, 68.

[35] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at para 15. Prior to the development of Ontario's electronic land registration system, surveyors were amongst the top three most frequent users of the LROs, together with real property lawyers and title searchers/conveyancers; Buckle Affidavit, at para 74, ABCo, Tab 20, p. 360.

surveying firms hold active Teraview licences, and 22 surveying firms hold active GeoWarehouse licences, including the two largest surveying firms in Ontario.[36]

24. In the course of their practice, surveyors regularly obtain copies of plans of survey created by other surveyors. Regulations require a surveyor, in preparing a plan, to research all of the evidence related to the parcel of land being surveyed, including adjacent parcels, and in certain circumstances to submit paper prints of existing plans.[37] To fulfill this requirement, surveyors must obtain copies of registered or deposited plans.[38] Thomas Bunker, a deponent for the class and former AOLS president, confirmed that: (a) surveyors rely on LROs to obtain copies of plans to comply with regulatory requirements, and (b) surveyors have never received payment when LROs provide copies of registered plans of survey that they prepared.[39]

25. As the Motion Judge found, surveyors have always "understood and accepted … that the province had the right to copy and sell the plans of survey once they were

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[36] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at para 15. Many land surveying firms employ multiple surveyors. The two largest firms are J.D. Barnes and Marshall Macklin Monaghan: Buckle Affidavit, at para 77, ABCo, Tab 20, p. 360; List of Licenced Teraview and GeoWarehouse Users, Exhibits "EE" and "FF" to the Buckle Affidavit, RSPCo, Tab 13EE and FF; Bunker Affidavit, at para 25, ABCo, Tab 23, p. 431; Keatley Cross-Examination, p. 75, Q. 347, RSPCo, Tab 16.

[37] O. Reg. 216/10 to the *Surveyor's Act*, R.S.O. 1990, c. S.29; *Surveys Act*, R.S.O. 1990 c. S. 30 [*SA*], s. 7; O. Reg 43/96 to the *RA*, R.S.O. 1990, c. L.5, Sections 6(6)(b) and 7(2)(c) of O. Reg. 43/96 under the *Registry Act*. They must therefore obtain copies of plans of survey prepared in relation to the land being surveyed and all abutting properties. Surveyors use those plans as a reference to create new plans and as evidence to support the accuracy of their own resulting work: Buckle Affidavit, at para 75, ABCo, Tab 20, p. 360; Bunker Cross-Examination, pp. 21-22, qq. 104-110, RSPCo, Tab 17.

[38] Buckle Affidavit, at para 76, ABCo, Tab 20, p. 360.

[39] Bunker Cross-Examination, pp. 43-44, qq. 208-213, RSPCo, Tab 17.

registered or deposited at the land registry office" in the paper-based system.[40] Nothing has changed with the advent of the ELRS. The Court of Appeal agreed, "the change from paper to electronic copies and Teranet's role in the operation of the ELRS are irrelevant to the merits of Keatley's claim".[41] Though Keatley now argues the Court's conclusion is an error, this issue has not previously been contested through the history of this litigation.

26. Similarly, though Keatley now implies that there are fundamental constitutional questions, until the hearing before the Court of Appeal, Keatley "expressly disavowed any claim that the provincial legislation was *ultra vires*".[42] Both the Motion Judge and the Court of Appeal correctly interpreted and understood the complex operation of the provincial regulatory system, and the interaction of that system with the federal *Copyright Act*. There are no factual, legal, or constitutional questions that merit determination by this Court.

PART II—RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

27. The decisions below do not give rise to the issues Keatley articulates:[43]

(a) The Court of Appeal did not purport to develop a broadly applicable test to determine when a work comes within the meaning of s. 12 of the *Copyright Act*. Rather, the Court expressly recognized that determining whether a work is "prepared or published by or under the direction or control" of the federal or provincial Crown is a fact-specific inquiry.

(b) The Court of Appeal did not conclude that the filing of a work pursuant to a regulatory scheme is the operative conduct that engages s. 12 of the *Copyright Act* and transfers copyright to the Crown. Rather, the Court held that it is "the extensive property-related rights bestowed on the Crown by the land registration scheme in Ontario" which all lead to the

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[40] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at para 11.

[41] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at para 19.

[42] *Ibid* at para 7.

[43] Keatley MOA at para 32.

conclusion that the publishing and copying of plans for the public are done under "the direction or control of Her Majesty".[44]

28. Keatley attempts to satisfy its burden of establishing public importance by casting certain questions specific to this case in the light of a general interpretation of s. 12. There, is however, no difficult case of general application here. Keatley concedes that Crown copyright has long been part of the law of Canada, and submits its purpose "was to ensure the integrity of governmental information published by the Crown."[45] There are few more fundamental purposes of government than ensuring an accurate and efficiently functioning land transfer and registration system.

29. A broad test or interpretative analysis of the use and application of s. 12 should not be developed from the facts of this singular case. This case is about copyright in surveys and plans relating to land that are prepared and registered in accordance with an extensive, particularized provincial regulatory scheme, by a limited class of professionals who in the course of their business actively participate in and benefit from the provincial system.

30. Keatley wrongly asserts that Teranet's role as a service provider to the Province is an exploitative "profit-making scheme".[46] Respectfully, the Applicant is cloaking its individual, economic interests with the artifice of public importance by implying governments and private enterprises will use s. 12 to impose mass, illegitimate, digitization of intellectual property. Nothing about this case, or the Applicant's position throughout, supports these contentions or in any way suggests that the Province is using s. 12 for mass appropriations of copyrighted works.

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[44] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at para 53.

[45] Keatley MOA at para 61.

[46] Keatley MOA at para 7.

PART III— STATEMENT OF ARGUMENT

A. The Applicant Mischaracterizes the Courts' Analysis under s. 12

31. Justice Doherty, for a unanimous Court of Appeal, undertook a comprehensive and holistic analysis of Ontario's statutory scheme and correctly concluded that plans of survey are prepared and published under the "direction and control" of the Crown.[47]

32. Contrary to the Applicant's arguments, the Court of Appeal did not base the analysis on one singular provision or determination; it concluded that Ontario's statutory framework as a whole provides the required direction and control to engage s. 12:

> ***The extensive property-related rights in the registered or deposited plans of survey bestowed on the Crown by the provincial legislative scheme must be considered as a whole when deciding whether registered or deposited plans of survey are under the "direction or control" of the Crown when they are "published"*** (when copies are made available to the public). …The [statutory] provisions oblige the Crown to maintain possession and custody of all registered plans of survey. The Crown must provide access to those plans upon request. The surveyor cannot place any marking on the plan claiming any kind of copyright. The surveyor cannot make any change to the plan once it is registered or deposited, without the permission of the Examiner of Surveys. The Examiner, on the other hand, can make changes even without the permission of the surveyor. Finally, of course, the Crown is statutorily obliged to provide certified copies upon request.
>
> ***The statutory provisions give the Crown complete control over registered or deposited plans of survey and complete control over the "publication" of those plans of survey within the meaning of the Copyright Act. I am satisfied that certified copies of plans of survey made available to members of the public under the statutory scheme are works published under the "direction or control" of the Crown for the purposes of s. 12 of the Copyright Act.***[48]

33. Keatley also advances for the first time in this Court the argument that in order to correctly analyse whether copyright subsists pursuant to s. 12, courts must "grapple

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[47] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at paras 31-44.

[48] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA at paras 43 and 44 [emphasis added].

with fair dealing".[49] Keatley argues that the Court of Appeal fundamentally erred in its understanding and analysis of the claim because it failed to consider fair dealing[50] and that a fair dealing analysis and "balancing exercise" is required for a "proper application of copyright law" in this case.[51]

34. This argument misinterprets the Court of Appeal's analysis and misstates how fair dealing applies. Fair dealing is a defence or exception to infringement.[52] It is not relevant to the analysis of who owns copyright, and therefore is not relevant to the s. 12 analysis.

35. Both the Motion Judge and Court of Appeal understood that the first determination is to answer who owns copyright in plans of survey. As the Court of Appeal correctly stated embarking on its analysis: "The copyright rests in either the Province or the land surveyor who prepared the plan of survey".[53] It is in answer to this primary question that the s. 12 analysis is engaged.

36. Any discussion of infringement, and then possible defences to that infringement, such as fair dealing, are all analytically subsequent to the initial determination of copyright ownership.[54] This framework of analysis has been consistently and correctly stated in every decision in this action, at every level of court.[55]

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[49] Keatley MOA at paras 63-64 and 67.

[50] *Ibid.* at para 65.

[51] *Ibid.* at para 9

[52] *Copyright Act*, s. 29. Fair dealing is the first item under "Exemptions" to infringement. See, *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at paras 47-53.

[53] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at para 19.

[54] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at paras 14-25, 37-38, 47-60.

[55] *Keatley Surveying Ltd. v. Teranet*, 2012 ONSC 7120 at paras 113, 162 and 165; *Keatley Surveying Ltd. v. Teranet*, 2014 ONSC 1677 (Div Ct) at paras 47 and 49; *Keatley Surveying Ltd. v. Teranet*, 2015 ONCA 248 at paras 27 and 51; *Keatley*

37. Further, throughout this litigation Keatley has continued to change its position on virtually every argument, common issue, and formulation of its case.[56] It does so again before this Court: it tries to avoid its past unsuccessful arguments by now suggesting that "provision of paper copies may have been a breach of surveyors' copyright".[57]

38. Notably, Keatley only selectively excerpts from the Reasons, in part because the Court of Appeal squarely rejected the argument that copyright is dependent on either the technological medium or the status of the provider, in accordance with the well-established principle of technological neutrality:

> ***In argument before the motion judge, Keatley apparently took the position that there was no breach of copyright under the paper-based system operating before the implementation of the ELRS. As the motion judge summarized, the appellant argued that the Province's outsourcing of the operation of the ELRS to a for-profit third party, including providing copies of plans of survey, created the copyright violation***: *Keatley Surveying Ltd. v Teranet Inc.*, 2016 ONSC 1717
>
> ***When pressed in oral argument in this court, counsel maintained the position taken before the motion judge***, but argued that providing copies of plans of survey under the old paper regime also breached land surveyors' copyright, albeit in a less egregious manner.
>
> In my view, ***both the change from paper to electronic copies and Teranet's role in the operation of the ELRS are irrelevant to the merits of Keatley's claim of copyright in plans of survey***….The copyright

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Surveying Ltd. v. Teranet, 2016 ONSC 1717 at para 40; *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at paras 17-19 and 45.

[56] The Applicant similarly put forward a variety of versions of its case through the certification stage: See *Keatley Surveying Ltd. v. Teranet*, 2014 ONSC 1677 (Div Ct) at paras 5-6. In awarding costs the Divisional Court held that "this was not a case that just 'evolved' from the case that was presented to the certification judge. It was almost completely re-formulated. As we noted in our appeal decision at para 39, class action litigants should be deterred from completely re-casting their cases on appeal": *Keatley Surveying Ltd. v. Teranet*, 2014 ONSC 3690 (Div Ct) at para 21; *Keatley Surveying Ltd. v. Teranet*, 2015 ONCA 248 at paras 42-48, 64.

[57] Keatley MOA at para 63.

> rests in either the Province or the land surveyor who prepared the plan of survey…[58]

39. If Keatley is arguing that the Court of Appeal erred by stating that the "change from paper to digital copies [is] irrelevant to the merits of the claim", this argument must also fail. It is directly contrary to the principle of technological neutrality, which has been repeatedly analysed and ruled on by this Court on multiple occasions:

> The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.[59]

40. The Court of Appeal correctly analyzed the issue in light of the governing law. The question of copyright ownership is answered regardless of the content medium.

B. The Land Registry System is an Archetypal use of s. 12

41. The Applicant also claims that the historical purpose of Crown copyright was to ensure accuracy and integrity of government materials, and not spurn private enterprise.[60] This Court is urged to hear this case because "special treatment must not be extended [to the Crown] beyond the legitimate purposes Parliament intended when it re-enacted the provision in Canada's current copyright statute".[61]

42. Keatley's argument paints s. 12 as simply "remain[ing] on the books" as a holdover from a by-gone era, and suggests Parliament has given no thought or

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[58] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at paras 17-19 [emphasis added].

[59] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para 5; see also *Canadian Broadcasting Corp. v. SODRAC 2003 Inc*., 2015 SCC 57 at para. 66; *Robertson v. Thomson Corp.*, 2006 SCC 43 at para 49.

[60] *Ibid* at paras 12, 56 and 61.

[61] *Ibid* at para 36.

reconsideration to the implications of the Crown copyright provisions.[62] This is incorrect.

43. The *Copyright Act* was amended in 1997 and provides at s. 92 for a mandatory review of the Act every five years.[63] The review in 2002 explicitly considered Crown copyright and "whether section 12 of the Act should be amended to limit copyright protection…including limiting the comprehensive nature of the government's right when a work is produced by an independent author".[64] Parliament turned its mind to this issue and declined to amend s. 12. The *Copyright Act* continued to be further debated and amended numerous times since the first s. 92 review.[65]

44. Accordingly, there is no basis to suggest that there has been no review of the *Copyright Act*, or that s. 12 has merely "remained on the books" without meaning or purpose. If significant reform or repeal of this provision is necessary, that decision is for Parliament and is neither the gravamen of the dispute nor a justiciable issue in this case.

45. Even if s. 12 were a hold-over from historical times, the land registry system has been in place in Ontario for over 200 years. The Applicant argues the intended and

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[62] *Ibid* at paras 35 and 46.

[63] *Copyright Act*, s. 92: "Five years after the day on which this section comes into force and at the end of each subsequent period of five years, a committee of the Senate, of the House of Commons or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act."

[64] Industry Canada, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, 2002 Catalogue No Iu4-19/2002 (Ottawa: Industry Canada, 2002) at p. 15, available online at http://publications.gc.ca/site/eng/236796/publication.html.

[65] See, e.g., *Copyright Modernization Act*, S.C. 2012, c 20; A description of the extensive history of amendments is described in John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2003, loose-leaf) updated to 2017, at Section 3:2.

animating purposes of s. 12 are to ensure important information is publicly available, and to protect the integrity of this information when published and disseminated.[66] The land registry system embodies these very purposes.

46. Without consistent, reliable and accurate survey data, the entire land registry system would cease to effectively operate and support its important public mandates, including accuracy and reliability in property transactions. The very purpose of the extensive statutory regime is to protect the integrity of registration documents to enable land transfer. Ensuring an accurate and regulated system for real property in the Province is a fundamental public mandate.

47. Keatley also relies heavily on case law from other jurisdictions to interpret s. 12. The value of this foreign jurisprudence in light of differences in statutory language was expressly considered by the Court of Appeal.[67] This Court has cautioned against relying on foreign jurisprudence, especially where, as here, the regimes are different. Copyright is a creature of statue and the framework of each nation's unique Act will necessarily drive the analysis. Particularly, as in this case, "the distinction between the Canadian and foreign legislation is clear enough to discount any persuasive value" that foreign courts' analysis may have in this case.[68]

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[66] Keatley MOA at para 56.

[67] The Court of Appeal considered the "only" potentially relevant case from Australia which reviewed Crown ownership of copyright in plans of survey. The Court of Appeal found that the Australian *Copyright Act 1978* is similar to s. 12 to support the Court's conclusion that copyright transfers to the Crown when a plan of survey is published because of the "direction and control" of the Crown. However, the Australian Act is different because it provides for a first publication requirement which is not in the Canadian legislation. Accordingly, the decisions are of limited use: *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 248 at paras 46-52.

[68] *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para 44.

C. There is no Constitutional Conflict

48. Keatley now suggests that this case raises constitutional questions that merit determination by this Court. This argument was put forward for the first time before the Court of Appeal. The Statement of Claim does not plead any constitutional conflict or seek any declaration as to the constitutional validity of s. 12 or any other operative statute or regulation. The action has come before all levels of Ontario courts through the class action certification process, yet no constitutional questions were raised as part of the common issues. At the summary judgment motion hearing, as noted by the Court of Appeal, Keatley "expressly disavowed any claim that the provincial legislation was *ultra vires* in proceedings before the motion judge."[69] Despite this, a Notice of Constitutional Question was thereafter first served in July 2016, after Keatley's action was dismissed on summary judgment. The Attorney General of Ontario intervened in support of Teranet's position that there was no merit to the constitutional arguments. The Attorney General for Canada declined to participate.

49. Before the Court of Appeal Teranet argued that Keatley had not raised any issues of paramountcy or interjurisdictional immunity.[70] Nevertheless, the Court of Appeal considered Keatley's constitutional arguments and rightly concluded the Ontario statutes are not *ultra vires* nor is there a paramountcy problem:

> [T]here is no *vires* problem. Federal legislation, s. 12 of the *Copyright Act*, bestows copyright on the Crown. Provincial legislation informs the copyright inquiry mandated by s. 12. Specifically, provincial legislation speaks to whether the plans are "published" by the Crown and if so, whether that publication takes place "under the direction or control" of the Crown.[71]

50. As Teranet has maintained throughout, and as the Reasons from the courts below affirm, the provincial and federal statutes are complementary and do not conflict. The Court of Appeal did not purport to establish a bright line test as to how s. 12 is to

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[69] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at para 7.

[70] Factum of the Respondent, Teranet, before the Ontario Court of Appeal, dated 29 August 2016, at p. 24, footnote 101.

[71] *Ibid* at para 54.

be interpreted for all cases. Rather, the Court of Appeal undertook a detailed and nuanced analysis of the "series of provincial statutes dealing with land registry in Ontario".[72]

51. Keatley asks this Court to establish a bright-line test for determining whether the criteria of s. 12 are satisfied in the abstract. It suggests that there are simplistic elements to this determination that have broad applicability. These are distilled in Keatley's argument to (a) the type of right the Crown has in a work; (b) the control over the form and content of a work; and (c) the requirement the work is made publicly available.[73] Keatley then draws equivalence between plans of survey and, for example, facta filed in the court to suggest that the only operative element triggering s. 12 is the requirement that a document be filed and made available to the public.

52. With respect, the Court of Appeal's analysis was not that simplistic. Throughout the Court of Appeal's Reasons, Justice Doherty repeats that it is not one provision or element of the statutory regime that in and of itself constitutes 'direction or control' for the purposes of s. 12.[74] Rather, the system must be viewed holistically. Plans of survey are not equivalent to facta, and the regulatory scheme is not just one rule akin to prescribing the formatting of court documents: "***The statutory scheme, considered in its entirety, goes far beyond simply authorizing the Crown to impose terms on the content and form of documents*** to be registered or deposited, or to copy plans of survey deposited or registered in the ELRS."[75]

53. Comparing Ontario's land registry system to filing facta is a straw man argument. Keatley does not point to any other regime where the level of control supported by a statutory scheme is akin to the land registry system at issue here.

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[72] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at para 34; Justice Doherty's reasons span from paras 31-44.

[73] Keatley MOA at paras 52-54.

[74] *Keatley Surveying Ltd. v. Teranet*, 2017 ONCA 748 at paras 37, 38, 40 and 43.

[75] *Ibid* at para 43 [emphasis added].

54. The Court of Appeal correctly recognized that the analysis is multi-faceted, and that the federal and provincial statutes must be read together. There is no constitutional conflict and no overarching test for interpreting s. 12 arising out of the facts in this matter that have broad applicability or merit consideration by this Court.

55. In light of Ontario's statutory scheme which gives the Crown complete control over registered or deposited plans of survey, and legislative provisions which mandate that the Crown copy and make plans of survey available to the public, s. 12 clearly applies in this case. If Section 12 does not apply to the facts of this case, it could not apply to any case. There is no reason for the court to consider this case in order to clarify the interpretation of s. 12.

56. Teranet respectfully submits that the Applicant fails to meet its burden to meet the leave test, and this Application should be dismissed.

PART IV—CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL

57. The s. 12 inquiry is only one of seven certified common issues.[76] Notably, the majority of the common issues are defences available to Teranet in response to the allegations in the plaintiff's action.

58. The parties sought summary judgment on all seven of the common issues. For Keatley to ultimately succeed *all of the seven* must be answered in its favour. By contrast, for Teranet to ultimately succeed it must have *only one* of the seven common issues answered in its favour.

59. Even if all of the common issues were answered in the class' favour, this would not determine the action in favour of the class. Numerous individual issues would remain before liability could be established. Justice Horkins originally denied certification, in part based on the fact that if it is held copyright does not belong to the Crown, the ultimate inquiry of who owns copyright is inherently an individual issue:

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[76] See Teranet's Conditional Application for Leave to Cross-Appeal, at Tab A.

> [I]f Teranet is unsuccessful in its attempt to prove that copyright belongs to the Crown, this is not the end of the consent issue. The inquiry then becomes individual. An infringement under s. 27(1) of the *Copyright Act* only occurs if the surveyor did not consent to Teranet's use of the plans. The parties agree that each surveyor has the onus of proving lack of consent on an individual basis to prove their infringement claim.[77]

60. Additionally, even if surveyors are found to own copyright, and that publishing plans of survey are an infringement of that copyright, Teranet has a number of other equitable and statutory defences including consent, estoppel, waiver, acquiescence, laches, statutory limitation periods, fair dealing and permitted use. Although the case was ultimately certified, both the Divisional Court and the Court of Appeal subsequently affirmed Teranet's right to advance these multiple defences:

> Once the common issues are determined, individual decisions will have to be made as to whether the class member is the owner of the copyright and whether, if she is, her claim is statute-barred or barred by virtue of the other equitable defences. (Divisional Court)[78]
>
> It may well be, as the Divisional Court fully appreciated, that even if Teranet fails on these common issues, Teranet will still be able to defend its use of the plans of survey because of particular individual actions taken by various class members. Individual inquiries would have to be undertaken in that regard. (Court of Appeal)[79]

61. On summary judgment only Common Issues 1, 2, 3 and 5 were answered. In light of the conclusion on Question 2, that copyright belongs to the Crown, the Motion Judge found it unnecessary to decide issues 4, 6, and 7, which all relate to Teranet's substantive defences. Teranet cross-appealed seeking to vary the answers to Common Issues 3, 4, 5, 6 and 7. The Court of Appeal made findings and dismissed Keatley's appeal with respect to Common Issue 2. However, the Court of Appeal did not make findings with respect to the balance of the Common Issues under cross-appeal. Instead

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[77] *Keatley Surveying Ltd. v. Teranet*, 2012 ONSC 7120 at para 188, citing to *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2012 FCA 226 at para 31.

[78] *Keatley Surveying Ltd. v. Teranet*, 2014 ONSC 1677 (Div Ct) at para 60; see also paras 43, 47, 60, 98 and 99.

[79] *Keatley Surveying Ltd. v. Teranet*, 2015 ONCA 248 at para 56; see also para 66.

it affirmed the balance of the order below and dismissed Teranet's cross-appeal as moot.[80]

62. If Keatley is granted leave to appeal, Teranet respectfully seeks leave to cross-appeal for an Order that this Court remits the case to the Court of Appeal, and preserve Teranet's rights to appeal and seek findings with respect to the undecided Common Issues.

PART V—ORDER SOUGHT AND SUBMISSION ON COSTS

63. The Respondent respectfully requests the Application for Leave to Appeal be dismissed with costs.

64. In the event leave is granted, the Respondent respectfully requests its Application for Leave to Cross-Appeal also be granted, with an order of costs in the cause for both leave applications.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of January, 2018.

MCCARTHY TÉTRAULT LLP
F. Paul Morrison/Barry B. Sookman/Julie Parla /Hovsep Afarian/Stephanie Sugar

Counsel for the Respondent Teranet Inc.

[80] *Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717 at para 57.

PART VI—TABLE OF AUTHORITIES

	Case	*Paragraph*
1.	*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57	Para 66
2.	*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13	Paras 14-25, 37-38, 47-60
3.	*Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34	Para 5
4.	*Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2012 FCA 226	Para 31
5.	*Keatley Surveying Ltd. v. Teranet Inc.*, 2017 ONCA 748	Paras 7, 17-19, 31-44, 45, 53
6.	*Keatley Surveying Ltd. v. Teranet*, 2012 ONSC 7120	Paras 113, 162, 165, 188
7.	*Keatley Surveying Ltd. v. Teranet*, 2014 ONSC 1677 (Div Ct)	Paras 5-6, 43, 47, 49, 60, 98, 99
8.	*Keatley Surveying Ltd. v. Teranet*, 2014 ONSC 3690 (Div Ct)	Para 21
9.	*Keatley Surveying Ltd. v. Teranet*, 2015 ONCA 248	Paras 27, 42-48, 51, 56, 64, 66
10.	*Keatley Surveying Ltd. v. Teranet*, 2016 ONSC 1717	Paras 5, 6-9, 11, 15, 16, 17, 18, 19, 21,40, 57; footnotes 7, 8, 13, 15
11.	*Re: Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38	Para 44
12.	*Robertson v. Thomson Corp.*, 2006 SCC 43	Para 49

PART VII—STATUTES AND REGULATIONS

	Statutes and Legislation	*Section*
1.	*Copyright Act*, R.S.C. 1985, c. C-42	ss. 12, 29, 92
2.	*Copyright Modernization Act*, S.C. 2012, c 20	
3.	*Electronic Land Registration Services Act*, S.O. 2010, c. 1	ss. 2, 2(3), 2(4), Schedule 6,
4.	*Land Registration Reform Act*, R.S.O. 1990, c. L.4	ss. 1, 27(1), 163.1, Part III
5.	*Land Titles Act*, R.S.O. 2000, c. L-4, 2	ss. 163.1, 165, 165(4)(b)
6.	O. Reg 43/96 to the *Registry Act*, R.S.O. 1990, c. L.5	ss. 6(6)(b), 7(2)(c)
7.	O. Reg. 216/10 to the *Surveyor's Act*, R.S.O. 1990, c. S.29	
8.	*Registry Act*, R.S.O. 1990, c. R.20	ss. 15, 15(4), 101.1
9.	*Surveyor's Act*, R.S.O. 1990, c. S. 29	
10.	*Surveys Act*, R.S.O. 1990, c. S. 30	s. 7

SCC File No. 37863

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

B E T W E E N:

KEATLEY SURVEYING LTD.

RESPONDENT
(Appellant)

AND:

TERANET INC.

APPLICANT
(Respondent)

AND:

ATTORNEY GENERAL OF ONTARIO

INTERVENER
(Intervener)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF CONDITIONAL APPLICATION FOR LEAVE TO CROSS-APPEAL
OF THE RESPONDENT, TERANET INC.
***Rules of the Supreme Court of Canada*, SOR/2002-156, as amended, r. 29, Form 29B**

TAKE NOTICE that, in the event that this Honourable Court grants the Plaintiff and Appellant, Keatley Surveying Ltd., leave to appeal the decision of the Court of Appeal for Ontario, C62211, made September 28, 2017, the Defendant and Respondent, Teranet Inc., hereby applies for leave to cross-appeal to this Court, pursuant to Rule 29 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, as amended, from the judgment of the Ontario Court of Appeal, C62211, made

September 28, 2017, or for such further and other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this conditional Application for Leave to Cross-Appeal is made on the following grounds:

1. This is a certified class action brought on behalf of Ontario land surveyors by the representative Plaintiff Keatley Surveying Ltd. ("**Keatley**") against the Defendant, Teranet Inc. ("**Teranet**").

2. The parties brought cross-motions for summary judgment in respect of the seven certified Common Issues:

    i. Does copyright under the *Copyright Act* subsist in Plans of Survey?

    ii. Does the copyright in the Plans of Survey belong to the Province of Ontario pursuant to section 12 of the *Copyright Act* as a result of the registration and/or deposit of those Plans of Survey in the Ontario Land Registry Office?

    iii. Does the signed declaration affixed to the Plan of Survey at the time of registration and/or deposit constitute a signed written assignment of copyright to the Province of Ontario pursuant to subsection 13(4) of the *Copyright Act*?

    iv. Are Class Members deemed to have consented to any or all of the Alleged Uses by the Defendant of Plans of Survey as a result of the registration and/or deposit of those Plans of Survey to the Ontario Land Registry Office?

    v. Did the Defendant make any or all of the Alleged Uses of Plans of Survey? If so, which ones?

    vi. If the answers to common issues 2 and 3 are no, do any or all of the Alleged Uses constitute:

a. uses that by the *Copyright Act* only the owner of the copyright has the right to do?

b. uses that are listed in paragraphs 27(2)(a) to (e) of the *Copyright Act* and that the Defendants knew or should have known infringes copyright?

and if so, which ones?

vii. Does the Defendant have a defence to copyright infringement based on public policy that would justify the Defendant making the Alleged Uses of Plans of Survey?

3. The Motion Judge, the Honourable Justice Belobaba, decided only Common Issues 1, 2, 3 and 5. Justice Belobaba held that the answer to Common Issue 2, whether the Crown owns copyright in plans of survey by virtue of s. 12 of the *Copyright Act*, was determinative of the action.

4. Justice Belobaba held that Common Issue 2 be answered in the affirmative. Consequently, he found in Teranet's favour, and dismissed the action.

5. Justice Belobaba held that Common Issue 3 be answered in the negative, and found against Teranet on that common issue. His Honour found it unnecessary to decide Common Issues 4, 6, and 7, which form part of Teranet's substantive defences.

6. Keatley appealed to the Ontario Court of Appeal from Justice Belobaba's finding with respect to Common Issue 2.

7. Teranet cross-appealed, seeking to vary the answers to Common Issues 3, 4, 5, 6 and 7.

8. The Ontario Court of Appeal made findings and dismissed Keatley's appeal with respect to Common Issue 2, but did not make any findings or determinations with respect to the balance of the Common Issues which were

the subject of the cross-appeal. The Ontario Court of Appeal affirmed Justice Belobaba's decision and dismissed Teranet's Cross-Appeal as moot.

9. Keatley now seeks leave to appeal to this Court, again only with respect to Common Issue 2.

10. Notably, the majority of the Common Issues constitute defences available to Teranet in response to the allegations in the plaintiff's action.

11. For Keatley to ultimately succeed *all of the seven* Common Issues must be answered in its favour. By contrast, for Teranet to ultimately succeed it must have *only one* of the seven Common Issues answered in its favour.

12. Even if all of the Common Issues were decided in Keatley's favour, this would not determine the action in favour of the class. Numerous individual issues would remain before liability could be established.

13. Accordingly, if Keatley is granted leave to appeal by this Honourable Court, Teranet seeks leave to cross-appeal for an Order that this Court remit the case back to the Court of Appeal to adjudicate upon Teranet's cross-appeal to that Court.

14. In the event Keatley is granted leave to appeal by this Honourable Court, Teranet respectfully requests its Application for Leave to Cross-Appeal also be granted, with an order of costs in the cause for both leave applications.

Dated at Ottawa, Ontario, this 22nd day of January, 2018.

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