S.C.C. File No. 37863

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)

JOINT REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL AND RESPONSE TO APPLICATION FOR LEAVE TO CROSS APPEAL
(Keatley Surveying Ltd. – Applicant)
(Pursuant to Rules 28 and 30 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

Counsel for the Respondent

F. Paul Morrison and Julie K. Parla
MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Telephone: (416) 601-7887 / (416) 601-8196
Facsimile: (416) 868-0673
Email: jparla@mccarthy.ca
pmorrison@mccarthy.ca

Agent for the Respondent

Owen M. Rees and Julie Mouris
CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Telephone: (613) 780-2026
Facsimile: (613) 688-0271
Email: orees@conway.pro
jmouris@conway.pro

Counsel for the Intervener

Michael S. Dunn
ATTORNEY GENERAL OF ONTARIO
720 Bay St., 4th Floor
Toronto, Ontario
M5G 2K1
Telephone: (416) 326-3867
Facsimile: (416) 326-4015
Email: michael.dunn@ontario.ca

Agent for the Intervener

Nadia Effendi
BORDEN LADNER GERVAIS LLP
1300 – 100 Queen Street
Ottawa, Ontario
K1P 1J9
Telephone: (613) 237-5160
Facsimile: (613) 230-8842
Email: neffendi@blg.com

REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

1. Teranet submits that at the heart of this case is the question of "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."[1] Teranet has it backwards. At the heart of this case is the proper construction of s. 12, a provision of national scope. Until that is answered it is not possible to determine whether Ontario's land registry laws provides for the publication of plans of survey under the direction or control of the Crown.

2. The fact that the proper construction of s. 12 arises in the context of a provincial land registration system makes the case for leave that much greater. All provinces have such systems. They include features similar to those that the Court of Appeal relied upon to find that plans of survey are published under the Crown's "control".[2] Likewise, private corporations, like Teranet, are seeking to acquire land registry operations in other provinces.[3] A decision of this Court on the interpretation of s. 12 in the context of Ontario's system will therefore be of significance well beyond the facts of this case.

3. Teranet wrongly states that the applicant is advancing constitutional issues for determination by this Court.[4] And it has not properly explained how the constitutional issues arose in the courts below. The applicant did not assert that the provincial land titles scheme was unconstitutional. However, the motions judge decided that Ontario legislation provided for the transfer of copyright to the Province of Ontario. This would be *ultra vires* because s. 91 of the *Constitution Act, 1867* grants exclusive jurisdiction over copyright to Parliament.[5] However, the Court of Appeal disagreed with the motions

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[1] Respondent's Memorandum of Argument, para. 7(a) (emphasis in original).
[2] See, for example, *Land Title Act*, RSA 2000, c. L-4, s. 23(1) (requiring the provision of a copy of an instrument upon payment of the prescribed fee), s. 92 (permitting Registrar to correct a plan of survey); *The Land Surveys Act*, 2000, SS 2000, c. L-4.1 , s. 41 (authorizing Controller to "correct any defect, inconsistency error or omission in a plan that has been approved pursuant to this Act").
[3] Applicant's Memorandum of Argument, para. 69, fn. 61.
[4] Respondent's Memorandum of Argument, paras. 6, 26, 48.
[5] See Notice of Constitutional Question (Applicant's Leave Book ("ALB"), tab 14).

judge's interpretation of the legislation with the result that there no longer was a "*vires* problem."[6]

4. Teranet does not submit in its response that the motions judge was correct to hold that the provincial legislation transferred copyright to the Crown. Instead, it relies on the Ontario Court of Appeal decision and its finding that there is no *vires* problem. The applicant therefore does not anticipate the presentation of a constitutional question to this Court and accordingly no such issue was identified in its leave application pursuant to Rule 25(1)(c)(ii) of the *Rules of the Supreme Court of Canada*.

5. Teranet seeks to cast itself as a mere service provider, acting under a partnership arrangement with the Province of Ontario.[7] However, in 2003 the Province agreed to sell its half-interest in Teranet to Teranet's holding company for $370 million,[8] and in 2010 Teranet made an additional payment of $1 billion in exchange for the renewal of its exclusive licence.[9] This is clearly not a service provider relationship. A service provider is ordinarily paid by the entity that hires it to provide a service. In this case, Teranet has paid the provincial government to preserve its monopoly.

6. In any event, whether Teranet is a service provider is irrelevant to the question of whether the Province owns copyright under s. 12 of the *Copyright Act*. So too is its description of the commercial relationship between Teranet and the Province at paras. 17-21 of its Memorandum of Argument. A party cannot license what it does not have. If the Crown does not own copyright, it could never license Teranet to use the surveyors' work. The motions judge found, in answering Common Issue 5, that Teranet uses the plans of survey in all of the ways alleged by the applicant.[10] The applicant's position is that these uses constitute a breach of the surveyors' rights under s. 27 of the *Copyright Act*.

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[6] Reasons of Court of Appeal, para. 45. See also Applicant's Memorandum of Argument, paras. 26-29.
[7] Respondent's Memorandum of Argument, paras. 1-2, 21, 45-46
[8] See: https://www.theglobeandmail.com/technology/ontario-selling-teranet-interest/article20450280/
[9] See: https://news.ontario.ca/mof/en/2010/12/teranet-transaction-reduces-debt-by-1-billion.html
[10] Reasons of Motion Judge, paras. 53-54 (ALB, Tab B1).

7. Teranet makes a number of statements about the role of surveyors in the creation of the ELRS that are irrelevant to the question of whether leave ought to be granted.[11] What is noteworthy is that Teranet acknowledges that in the past it retained surveyors and paid them for their work. This stands in stark contrast to the present situation where Teranet reproduces and distributes surveyors' work product without paying them.

8. Teranet states that in a review of the *Copyright Act* in 2002 Parliament turned its mind to the question of whether s. 12 should be amended and declined to do so.[12] The report Teranet cites is not a Parliamentary report but a report written by Industry Canada setting out issues "that may need to be addressed in the coming years."[13] Crown copyright has received little attention from Parliament and was not addressed during extensive reforms to the act in 2012. It is thus inaccurate to say that Parliament has turned its attention to the issue.

9. Teranet says that the Crown copyright provisions are different in other Commonwealth countries such that case law from those jurisdictions is not helpful. For example, Teranet argues that the Canadian legislation, unlike the Australian legislation, does not have a "first publication requirement." However, Professor Vaver is of the opinion that s. 12 applies to works "first owned" by the Crown.[14] The point is that this case law will assist the Court when determining the proper construction of s. 12.

10. Teranet also misstates the applicant's position on fair dealing. The applicant's leave argument makes it clear that fair dealing is assessed after copyright ownership is determined. The point is that the Court of Appeal erred in determining that if the surveyors had copyright then any use of their plans by the Crown (and its licensee Teranet) would constitute an infringement.[15] It would depend on the subsequent assessment of fair dealing at which time the balance between the rights of creators and users would be assessed. The applicant's position is that s. 12 should receive a narrow

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[11] Respondent's Memorandum of Argument, paras. 1, 16
[12] Respondent's Memorandum of Argument, para. 43.
[13] Executive Summary of 2002 report, at p. iv (cited at footnote 64 of Respondent's Memorandum of Argument).
[14] Vaver, *Copyright Law* (2000) at 107.
[15] See Applicant's Memorandum of Argument, paras. 63-67.

construction, and the balance between the rights of creators and the rights of users should be assessed at the fair dealing stage. This is not what the lower courts did.

11. Teranet argues that surveyors never complained about the provision of paper copies by the Crown under the old paper copy system and only submitted for the first time in the Court of Appeal that "providing copies of plans of survey under the old paper regime also breached land surveyors' copyright".[16]

12. The fact that surveyors never complained about the provision of paper copies does not mean they agreed the Crown had obtained copyright under s. 12. As noted above, regardless of who owns copyright, certain uses of works may constitute fair dealing in which case there is no breach of copyright. However, once the Crown started earning massive revenue for authorizing private corporations to use the plans of survey in a different manner, systematically digitizing, widely disseminating and commercializing those plans, without entering into any arrangement with their creators, surveyors found themselves in a very different situation, legally and practically. What under the old paper system might have been treated as fair dealing became copyright infringement and resulted in this lawsuit where the critical issue is whether s. 12 bestows copyright in the plans of survey on the Crown. This case is not about the surveyors changing their position but about a dramatic change in use of their creations.

13. Teranet also submits that the change from paper copies to digital copies is not relevant to the outcome of this case because of the principle of technological neutrality.[17] This is an interesting argument that provides yet another reason to grant leave to appeal.

14. The principle of technological neutrality requires the *Copyright Act* to be applied "equally between traditional and more technologically advanced forms of the same media".[18] An example is the *ESA* case where this Court found that copyright owners of musical works should not get an additional fee when a video game containing their musical works is downloaded. Reproduction royalties for musical works incorporated

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[16] Respondent's Memorandum of Argument, para. 14; quote is from Reasons of Court of Appeal, para. 18 (ALB, Tab B3).
[17] Respondent's Memorandum of Argument, para. 39.
[18] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para. 5 ("*ESA*").

into video games were negotiated before games are packaged for public sale. Thus, whether the game is sold at a store or downloaded, the royalty should be the same. To hold otherwise would violate the principle of technological neutrality because it would provide creators an additional fee based on the method of purchase.

15. The critically important difference between the case at bar and *ESA*, and the other cases cited by Teranet, is that the original copyright owners in those cases (musicians and authors) licensed third parties to distribute their works on a mass scale and thus the medium of distribution *per se* could not dictate whether additional fees were earned. Here, under the old paper system, surveyors provided their plans of survey on the understanding they would be distributed only to interested parties if and when they made an in-person request and paid a low administrative fee. The government's transition to an electronic database and the systematic making of unlimited copies by Teranet has turned the depository into a system of mass distribution, of which only Teranet benefits financially. The impact of technological neutrality in such a context has not been addressed by this Court.[19]

16. This Court has said, however, that technological neutrality requires a balance to be struck (*SODRAC* at para. 66):

> The principle of technological neutrality is recognition that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology. It is derived from the balancing of user and right-holder interests discussed by this Court in *Théberge* – a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" . . . Because this long-standing principle informs the *Copyright Act* as a whole, it must be maintained across all technological contexts: "The traditional balance between authors and users should be preserved in the digital environment. . ."

17. To the extent the paper system struck a balance, which has never been determined by a court, the digital system creates imbalance and discriminates against surveyors by permitting Teranet to peddle plans of survey for substantial profit. Technological neutrality should not be invoked in aid of that outcome.

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[19] But see *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 ("*SODRAC*") at para. 71which arguably undermines Teranet's position on neutrality.

RESPONSE TO APPLICATION FOR LEAVE TO CROSS APPEAL

18. The applicant does not oppose the application for leave to cross appeal, but says if granted it should be without costs as it has not been opposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Luciana P. Brasil
Counsel for the applicant

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Michael J. Sobkin
Counsel for the applicant

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