**SCC Court 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.**

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant/Respondent on cross-appeal)

- and -

**TERANET INC.**

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Respondent/Appellant on cross-appeal)

- and -

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNETY GENERAL OF BRITISH COLUMBIA, ATTORNETY GENERAL FOR SASKATCHEWAN, CANADIAN ASSOCIATION OF LAW LIBRARIES, CANADIAN LEGAL INFORMATION INSTITUTE AND FEDERATION OF LAW SOCIETIES OF CANADA, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, LAND TITLE AND SURVEY AUTHORITY OF BRITISH COLUMBIA, and CENTRE FOR INTELLECTUAL PROPERTY POLICY AND ARIEL KATZ**

INTERVENERS

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# FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

*Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada*

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**Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)**
University of Ottawa, Faculty of Law
57 Louis Pasteur Street,
Ottawa, ON K1N 6N5

**Jeremy de Beer**
**David Fewer**
Tel: (613) 562-5800 x 2558
FAX: (613) 562-5417
E-mail: jdebeer@uottawa.ca,
dfewer@uottawa.ca

**Counsel for the Intervener**

**Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)**
University of Ottawa, Faculty of Law
57 Louis Pasteur Street,
Ottawa, ON K1N 6N5

**Tamir Israel**
Tel: (613) 562-5800 x 2419
FAX: (613) 562-5417
E-mail: tisrael@cippic.ca

**Agent for the Intervener**

**TO:** **THE REGISTRAR**

**COPY TO:**

**BRANCH MACMASTER LLP**
1410-777 Hornby Street
Vancouver, BC V6Z 1S4

**Luciana P. Brasil**

Tel: (604) 654-2999
FAX: (604) 684-3429
E-mail: lbrasil@branmac.com

**Counsel for the Appellant/Respondent on Cross-Appeal,**
Keatley Surveying Ltd.

**MICHAEL J. SOBKIN**
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

**Michael J. Sobkin**

Tel: (613) 282-1712
FAX: (613) 288-2896
E-mail: msobkin@sympatico.ca

**Agent for the Appellant/Respondent on Cross-Appeal,**
Keatley Surveying Ltd.

**AND TO:**

**MCCARTHY TÉTRAULT LLP**
PO Box 48, Suite 5300
Toronto-Dominion Bank Tower
Toronto, ON M5K 1E6

**Stephanie Sugar**
**Barry B. Sookman**
**Julie Parla**
**Hovsep Afarian**

Tel: (416) 601-7887
FAX: (416) 868-0673
E-mail: ssugar@mccarthy.ca

**MILLER THOMSON LLP**
40 King Street West, Suite 5800
Toronto, ON M5H 3S1

**F. Paul Morrison**

Tel: (416) 597-6050
FAX: (416) 595-8695
E-mail: paulmorrison@millerthomson.com

**Counsel for the Respondent/Appellant on Cross-Appeal,**
Teranet Inc.

**CONWAY BAXTER WILSON LLP**
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

**David P. Taylor**

Tel: (613) 691-0368
FAX: (613) 688-0271
E-mail: dtaylor@conway.pro

**Agents for the Respondent/Appellant on Cross-Appeal,**
Teranet Inc.

**AND TO:**

**ATTORNEY GENERAL OF ONTARIO**

**BORDEN LADNER GERVAIS LLP**
World Exchange Plaza

Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

**Michael S. Dunn**

Tel: (416) 326-4466
FAX: (416) 326-4015
E-mail: michael.dunn@ontario.ca

**Counsel for the Intervener,**
Attorney General of Ontario

100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

**Nadia Effendi**

Tel: (613) 237-5160
FAX: (613) 230-8842
E-mail: neffendi@blg.com

**Agent for the Intervener,**
Attorney General of Ontario

**AND TO:** **ATTORNEY GENERAL OF CANADA**
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

**Kathryn Hucal**

Tel: (416) 954-0625
FAX: (416) 973-5004
E-mail: kathryn.hucal@justice.gc.ca

**Counsel for the Intervener,**
Attorney General of Canada

**DEPARTMENT OF JUSTICE**
50 O'Connor Street
Suite 500
Ottawa, ON K1A 0H8

**Christopher Rupar**

Tel: (613) 670-6290
FAX: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

**Agent for the Intervener,**
Attorney General of Canada

**AND TO:** **ATTORNEY GENERAL OF BRITISH COLUMBIA**
1001 Douglas Street
Victoria, BC V8V 1X4

**G.J. Underwood**

Tel: (250) 356-8866
FAX: (250) 356-8653
E-mail: graham.Underwood@gov.bc.ca

**Counsel for the Intervener,**
Attorney General of British Columbia

**NOËL & ASSOCIÉS**
111, rue Champlain
Gatineau, QC J8X 3R1

**Pierre Landry**

Tel: (819) 771-7393
FAX: (819) 771-5397
E-mail: p.landry@noelassocies.com

**Agent for the Intervener,**
Attorney General of British Columbia

**AND TO:** **JFK LAW CORPORATION**
816-1175 Douglas Street
Victoria, BC V8W 2E1

**GOWLING WLG (CANADA) LLP**
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, ON K1P 1C3

**Robert Janes, Q.C.**

Tel: (250) 405-3460
FAX: (250) 381-8567
E-mail: rjanes@jfklaw.ca

**Counsel for the Intervener,**
Canadian Association of Law Libraries

**Matthew Estabrooks**

Tel: (613) 786-0211
FAX: (613) 563-9869
E-mail:
matthew.estabrooks@gowlingwlg.com

**Agent for the Intervener,**
Canadian Association of Law Libraries

**AND TO:** **MINISTRY OF JUSTICE SASKATCHEWAN**
Constitutional Law Branch
820-1874 Scarth Street
Regina, SK S4P 4B3

**Theodore Litowski**

Tel: (306) 787-6642
FAX: (306) 787-9111
E-mail: theodore.litowski@gov.sk.ca

**Counsel for the Intervener,**
Attorney General for Saskatchewan

**GOWLING WLG (CANADA) LLP**
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

**D. Lynne Watt**

Tel: (613) 786-8695
FAX: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

**Agent for the Intervener,**
Attorney General for Saskatchewan

**AND TO:** **LAX O'SULLIVAN LISUS GOTTLIEB LLP**
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

**Rahool P. Agarwal**

Tel: (416) 645-1787
FAX: (416) 598-3730
E-mail: ragarwal@lolg.ca

**NORTON ROSE FULBRIGHT CANADA LLP**
Royal Bank Plaza, South Tower
200 Bay Street, P.O. Box 84, Suite 3800
Toronto, ON M5J 2Z4

**Fahad Siddiqui**

Tel: (416) 216-3943
FAX: (416) 216-3930
E-mail:
fahad.siddiqui@nortonrosefulbright.com

**NORTON ROSE FULBRIGHT CANADA LLP**
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4

**Matthew J. Halpin**

Tel: (613) 780-8654
FAX: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

**Agent for the Intervener,**
Canadian Legal Information Institute and
Federation of Law Societies of Canada

**Counsel for the Interveners,**
Canadian Legal Information Institute and
Federation of Law Societies of Canada

**AND TO:**


**SMART & BIGGAR**
2300 - 1055 West Georgia Street
Vancouver, BC V6E 3P3

**Theodore W. Sum**
**Steven Garland**
**Laura Easton**
**Matt Campbell**

Tel: (604) 682-7780
FAX: (604) 682-0274
E-mail: twsum@smart-biggar.ca

**Counsel for the Intervener,**
Land Title and Survey Authority of British Columbia

**SMART & BIGGAR**
900-55 Metcalfe Street, 10th Floor
Ottawa, ON K1P 6L5

**Colin Ingram**

Tel: (613) 232-2486
FAX: (613) 232-8440
E-mail: cbingram@smart-biggar.ca

**Agent for the Intervener,**
Land Title and Survey Authority of British Columbia


**AND TO:**


**FASKEN MARTINEAU DUMOULIN LLP**
800 Square Victoria, Suite 3700
Montréal, QC H4Z 1E9

**Michael Shortt**
**Jean-Philippe Mikus**

Tel: (514) 397-7400
FAX: (514) 397-7600
E-mail: mshortt@fasken.com

**Counsel for the Intervener,**
Centre for Intellectual Property Policy and Ariel Katz

**FASKEN MARTINEAU DUMOULIN LLP**
55 rue Metcalfe, Bureau 1300
Ottawa, ON K1P 6L5

**Sophie Arseneault**

Tel: (613) 236-3882
FAX: (613) 230-6423
E-mail: sarseneault@fasken.com

**Agent for the Intervener,**
Centre for Intellectual Property Policy and Ariel Katz

## TABLE OF CONTENTS

## Part I – OVERVIEW

1. Surveyors allege that the corporation managing Ontario's electronic land registry system, Teranet Inc., infringes copyrights by copying and selling their works online. One of Teranet's defences claims that the surveyors don't own their copyrights anymore; the Ontario government does. Teranet purports that the allegedly infringing behaviour—making surveys available online—is what divests surveyors of their copyrights and gives those rights to the government.

2. CIPPIC submits that is not how Crown copyright works. Section 12 is not a way for the government to expropriate, in a formal or colloquial sense, other peoples' copyrights. Justice Belobaba's first instinct to reject Teranet's argument was right: "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."[1] Justice Doherty, writing for the Court of Appeal, agreed.[2]

3. The legal mistake, however, was holding that various provincial statutes and regulations, combined with section 12, can and do give the province "direction or control" that transfers (according to the Motions Judge) or vests (according to the Court of Appeal) copyright to or in the Crown.

4. The Supreme Court of Canada, on behalf of the government, will make this factum available on its website. Does the government thereby acquire the copyright? The Supreme Court's online publication of factums would, on a literal reading of section 12, be among the clearest cases of Crown copyright. The Supreme Court doesn't just *direct* or *control* the making available of factums; the making available is *by* the Court. The government would not even need to resort to the argument that its rules direct or control the preparation of every document before the Court.[3]

5. Governments make available, or direct or control the making available, of countless copyrighted works online. Other examples include documents such as prospectuses and financial statements made available by government securities regulators, and patent and trademark applications made available by the Canadian Intellectual Property Office (CIPO).

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[1] *Keatley Surveying Ltd v Teranet Inc,* 2016 ONSC 1717 at para 37 [ONSC].
[2] *Keatley Surveying Ltd v Teranet Inc,* 2017 ONCA 748 at para 32 [ONCA].
[3] *Rules of the Supreme Court of Canada*, SOR/2002-156 at s 21 [*Rules*].

6. If the owners of copyrights in those and many other kinds of works lose their copyrights to the Crown any time the government publishes or directs or controls publication of the works, the consequences would be absurd. It would destroy Parliament's balance between copyright owners and users. It would undermine technological neutrality, given the relative ease of online compared to paper publication. And, while it is surely convenient and maybe profitable for governments and their third-party partners, it would be unjustifiably unfair to copyright owners.

7. CIPPIC invites this Court to adopt a more common-sense interpretation of Crown copyright. Section 12 is like a government work-made-for-hire provision. It gives the government ownership of copyright where it, or its contractor or agent, creates or releases a new work.

8. To be "published" means the first publication is put into circulation by and emits from the Crown, which is consistent with the legislative history. That is also consistent with the statutory context, since section 12 is part of the provisions establishing "Term of Copyright" and the term of Crown copyright runs from the time of first publication. Publication for the purpose of section 12 is not meant to trigger the transfer of copyright through the otherwise infringing act of making a work available.

9. If the government does not prepare or publish the work itself, then Crown copyright may still subsist if the person who does prepare or publish the work does so under the government's "direction or control". The relevant direction or control in section 12 is not over the work *per se*, for example pursuant to a regulatory scheme, but over who prepares or publishes the work and how. In such cases section 12 reverses the default allocation of first ownership and sets the term of protection accordingly.

10. CIPPIC's common-sense approach is more logical than any alternative interpretation. There is no plausible rationale for requiring the transfer of rights from a copyright owner to the government, especially since the opening phrase of section 12 preserves all rights and privileges of the Crown. It is unnecessary to open the Pandora's Box of problems triggered by such a strained interpretation of section 12. CIPPIC's common-sense interpretation simply avoids questions about the provinces' constitutional power to confer copyright on themselves via regulatory schemes, multiple conflicting copyrights when different provincial or federal governments make works available, and the extinguishment (possibly expropriation) of rights absent a clear legislative intent to do so.

## Part II – POSITION ON APPELLANT'S AND CROSS-APPELLANT'S QUESTIONS

11. CIPPIC submits that section 12 of the *Copyright Act* does not transfer copyright in existing works that are made available online by the government from the copyright owners to the government.

12. Two arguments based on the text, context, and purpose[4] of section 12 support CIPPIC's position:

**A. CIPPIC's common-sense interpretation is simple and logical:** The phrase "prepared or published" captures creation or release of new works, not infringing republications. And "direction or control" incorporates contractors and agents, not provincial regulatory schemes. In contrast, defending infringement by divesting owners of copyright triggers intractable problems.

**B. CIPPIC's common-sense interpretation avoids unintended consequences:** Giving the government copyright when it makes available, or through provincial statutes directs or controls the making available of, existing works would cause chaos by stripping many different kinds of copyright owners of their rights. That perverse outcome is not and never was the purpose of section 12.

13. CIPPIC takes no position on the outcome of this appeal, or the common issues on cross-appeal. Although arguments about the effects of the provincial regulatory scheme are better considered in relation to the defences of implied licence or public policy, thus avoiding collateral damage to Crown copyright, they deserve more diverse and thorough submissions than are before this Court.

## Part III – STATEMENT OF ARGUMENT

14. The Respondent suggests that this Court can simply read through the clear words of section 12.[5] CIPPIC shares Professor Vaver's contrary view that textual, contextual, and purposive analysis is needed to understand this "legislative monstrosity with its atrocious drafting"[6]:

> **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.

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[4] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42; *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54.
[5] Factum of the Respondent at paras 77, 79-82.
[6] David Vaver, "Copyright and the State in Canada and the United States" (1996) 10 IPJ 187 at 192, online: <https://lexum.com/conf/dac/en/vaver/vaver.html>, citations omitted [Vaver].

15. CIPPIC's interpretation is simple and logical. When the government, or a person directed or controlled by government, creates or releases a new work, copyright belongs the Crown. CIPPIC's approach avoids unintended consequences of the alternative, that an otherwise infringing act transfers copyright.

### A. CIPPIC's common-sense interpretation is simple and logical.

#### *1. "Prepared or published" connotes releasing a new work, not republishing an old one.*

16. There are two ways to look at the phrase "prepared or published" in section 12. On CIPPIC's common-sense approach, the meaning of the word "published" is informed by its association with the word "prepared". The idiomatic phrase suggests the addition of value through the creation or release of new works. By contrast, the lower courts spliced the phrase into unrelated prongs, and blindly applied to the "published" prong a relatively new definition of "publication" divorced from historical or statutory context. In isolation from the word "prepared", the lower courts held that making an already-published work available—normally an infringement—is a (re)publication that makes the work published again, thus transferring copyright to the government.

17. The definition of "publication" may give insight into the meaning of "published", but only in context. CIPPIC's interpretation is consistent with both the current and pre-1993 language of the *Act* defining "publication" as "the issue of copies". To publish was to issue, *i.e.* "to put into circulation; to emit."[7] To "make … available" means to make an unavailable work available, as opposed to keeping it unavailable. It does not mean to make an already available work *more* available.

18. The purpose of updating the definition of publication in 1993 was not to broaden Crown copyright. The purpose, according to Parliament, was to address the film industry's concern that distributing films and analogous material does not technically involve the "issue of copies".[8] Given that purpose, it would be perverse if the newer definition were used by the Crown to strip creators of their copyrights.

19. The Respondent argues that the copyright owner's consent is not needed for republication to confer Crown copyright under section 12, dismissing subsection 2.2(3)—which requires an owner's consent

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[7] Hugues G Richard and Laurent Carrière, *Canadian Copyright Act annotated* (Scarborough, Ont: Carswell, 1993) at s 2.2 § 5.4.4, citing Raoul P Barbe, "Les définitions continues dans les actes législatifs et réglementaires" (1983), 43 Revue de Barreau 1105, at 1118-1120.

[8] House of Commons Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators* (Gabriel Fontaine, Chairman) (Ottawa: Supply and Services Canada, 1985), at 38.

for a work to be deemed to be published—as irrelevant.[9] While subsection 2.2(3) is consistent with CIPPIC's interpretation of the purposes of Crown copyright, CIPPIC's approach is based on a textual, contextual, and purposive reading of section 12, not necessarily subsection 2.2(3).

20. CIPPIC's approach to the phrase "prepared or published" in section 12 is technology neutral. It preserves in the digital environment the traditional balance inherent in copyright.[10] To invoke section 12 in respect of Crown publications prior to the Internet, the Crown had to carefully plan for and invest significant resources in the paper publication of government materials. Today, as "open government" is becoming the norm facilitated by digital technologies, Crown copyright should not be expanded.

***2. "Direction or control" includes contractors or agents, not another regulatory scheme.***

21. There are also two ways to look at the phrase "by or under the direction or control". On CIPPIC's common-sense approach, the phrase captures works prepared or published "by" the government itself or by a partner acting under government "direction or control". Direction or control means over the publisher and the act of being published (the verb). By contrast, the lower courts looked for "direction or control" not of the government's partner or partner's actions, but rather of the underlying works. Direction or control, according to the lower courts, can be over the object of publication (the noun). The lower courts were willing to infer, moreover, control based not on the relationship between the government and its partner, but between the work and a provincial regulatory scheme.

22. CIPPIC submits that section 12 is analogous to a work-made-for-hire provision for government. Its purpose is similar to a section in the United States Code covering "a work prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned …"[11]. In Canada, employment is addressed in subsection 13(3). There is no general work-made-for-hire rule in Canadian copyright law. So, a purpose of section 12 is to reverse the default allocation of ownership. It gives the government copyright not only when it is or employs the author, but also when it directs or controls someone else's preparation/publication of a work.

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[9] Factum of the Respondent at paras 104-111.
[10] *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57.
[11] United States, *Copyright Act 1976*, Pub L No 94-553, 90 Stat 2541 (codified *as amen.* at 17 USC § 101 (1976)), "work made for hire".

23. The presence of the phrase "subject to any agreement with the author" supports CIPPIC's approach. If under section 12 the Crown could, by directing or controlling the making available of an existing work, acquire copyright from the work's *owner*, why would an agreement with the *author* matter? That phrase only makes sense if the preparation/publication is of a new work, and the direction/control covers situations where the preparer/publisher is a contractor or agent, not an employee.

24. CIPPIC's approach to this issue resembles the approach to subsection 13(3), "Work made in the course of employment". Article 2805 of the Quebec Civil Code, for example, directs one to assess the "direction or control" exercised by a putative employer, including in disputes over copyright. In *Glasz c Choko*, the Quebec Superior Court looked to evidence of "direction or control" of the sort suggested by CIPPIC: the existence and form of any contract between the parties, remuneration paid to the author, ownership of the tools of authorship used in creation, who bore the costs of authorship, and who exercised skill, judgment and creativity in the authorship and editing of the work.[12]

25. The indicia of "direction or control" that determine employment, contractor or agency relationships are relatively simple factors that parties and courts are accustomed to consider for ownership of copyright. In comparison, looking at a wide-ranging spectrum of regulatory schemes that vary across contexts and jurisdictions is a convoluted and unpredictable way to infer Crown copyright ownership.

***3. The phrase conferring Crown copyright should be read as a whole, not in fragments.***

26. A flaw in the fragmented approach to section 12 is its arbitrariness. It does not make sense to separate "prepared or published" into distinct prongs, but then to ignore the word "by" and conflate the words "direction or control". There is no explanation why the lower courts would even need to look at the provincial regulatory scheme to find "direction or control", since surveys are made available "by" the government and its licensed partner.[13] Moreover, the lower courts conflated the analyses of "direction" and "control", and never explained whether this provincial regulatory scheme purportedly demonstrates direction or control or both. Also, the analysis omitted discussion of the other putative alternatives listed in section 12: "is, or has been" and "Her Majesty or any government department".

[12] 2018 QCCS 5020 (CanLII) at paras 51, 58.
[13] The Court of Appeal, for example, ignored this point between paras 31 and 32 of its reasons.

27. Professor Vaver points out the problem with splicing section 12 into fragments: "If those 'or's are truly conjunctive, that phrase of 24 words potentially includes 24 classes of material."[14] Can one really say that Parliament intended to confer Crown copyright in two dozen "distinct" scenarios?

28. While at first glance the fragmented application of select words in section 12 is attractive, it raises more questions than answers. After any work is made available by the Crown, would the term of copyright suddenly change, along with ownership? From whose "first publication" is that term measured: the initial owner's, or the Crown's? Could copyright revert back to the initial owner after 50 years? The Court of Appeal said that pursuant to section 12, "copyright in registered or deposited plans of survey 'belongs' to the Crown for the period of time prescribed in that section."[15] Because there is no clear intention to extinguish another owner's rights, does the original copyright lurk in the background, enforceable for some purposes but not others?

### B. CIPPIC's common-sense interpretation avoids unintended consequences.

#### *1. Existing rights should not be extinguished or transferred absent clear intention.*

29. Legislation is presumed not to take away existing rights unless such an intention is clear.[16] If the lower courts were correct that federal, provincial, or a combination of legislation could transfer copyright from its author or first owner to the Crown, it would raise serious concerns about the expropriation of property.[17] While property is not constitutionally protected from regulatory takings, Canadian courts have had to grapple with *de facto* expropriation claims involving copyright.[18]

30. Even if surveyors are not forced to file their works with the government, other copyright owners may be. An interpretation that avoids taking away existing rights should be preferred. By adopting CIPPIC's common-sense approach these problematic issues would not even arise. The approach adopted by the lower courts would, however, jeopardize copyrights and unsettle expectations in a wide range of areas.

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[14] *Vaver, supra* note 6 at 187.
[15] *ONCA, supra* note 2 at para 44.
[16] *Morguard Properties Ltd v City of Winnipeg*, [1983] 2 SCR 493 at 509.
[17] *Leiriao v Val-Bélair (Ville)*, [1991] 3 SCR 349 at 356; *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at para 20.
[18] *Geophysical Service Inc v Canada*, 2018 FC 670.

31. Problems appear in two common scenarios: (a) when a work is made available "by" the government itself, and (b) when regulatory schemes show some "direction or control" over the work.

*a. Many works are made available "by" the government.*

32. In addition to the factums made available by the Supreme Court on its website, the government makes many other kinds of works available. There is no rationale consistent with the context or purpose of section 12 that suggests the Crown should acquire copyright when existing works are made available "by" the government. The Crown may already have all the immunity it needs through the preservation of its rights and privileges in the opening words of section 12.

33. The Motions Judge did turn his mind to this problem, writing at paragraph 33: "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." He therefore rejected the argument that the works were "prepared" by or under the direction or control of the government. Yet his ruling that the works were "published", *i.e.* made available online, by or under the direction or control of the government has the same perverse effect.

34. The government makes patent and trademark documents available via CIPO's website. Nobody expects that the republication of these documents *by* the government transfers copyright ownership to the government, but that would be the impact of the lower courts' interpretation of section 12.

35. Securities documents including prospectuses and financial statements are also made available *by* the government on its SEDAR website. The purpose is to enhance investor awareness and promote confidence and transparency in capital markets, not to give the government ownership of the documents. Yet a literal reading of section 12 would confer copyright on the Crown. Logical and legal problems are compounded by the fact that these works are filed by issuers with 13 different provincial and territorial regulators. While the lower courts' interpretation of section 12 would transfer copyright away from the initial owners, it is anyone's guess which government(s?) would get Crown copyright.

36. The solution to these problems is not, as the lower courts did, to ignore the word "by" and look instead for further indicia of "direction or control" in a regulatory scheme. The solution is a common-sense interpretation of the phrase "prepared or published" to connote the creation or release of a new work.

*b. Many works are under government "direction or control" via regulatory schemes.*

37. The lower courts were uncomfortable with the prospect of conferring Crown copyright whenever a work is made available "by" the government, so instead looked for "direction or control" in the form of a regulatory scheme. The crux of the error here is that "direction or control" is not meant to invite inferences about copyright-like powers proscribed by other regulatory schemes. The phrase "under the direction or control" modifies the verbs "prepared or published", not the noun "any work". The relevant direction or control is not over the object that is prepared or published, *i.e.* the work, but over the person who prepares or publishes it. Regulatory details examined by the lower courts—like provisions governing filing and custodianship, form and content, amendments, and registry services[19]—have little to do with any government control over the surveyors who prepare and publish, *i.e.* create and release, the works. And, even if the relevant consideration were direction or control over the works not the workers, the government's powers under this scheme fall short of the rights of a copyright owner.

38. If the lower courts' contrary approach is correct—that Crown copyright could be conferred whenever a regulatory scheme proscribes rules over the submission of works, their content or form, and their subsequent treatment—it would unsettle clear expectations and longstanding legal relationships.

39. Rule 21 of the *Rules of the Supreme Court of Canada* directs and controls the preparation of every document before the Court in accordance with the *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*.[20] Moreover, the *Rules* direct and control the preparation of documents according to the regulatory instrument "as amended from time to time". Applying the lower courts' logic, each amendment would require a fresh analysis of whether more or fewer rights associated with copyright strengthen or weaken an inference of direction or control.

40. The patent and trademark documents made available by CIPO, and prospectuses and financial statements made available on SEDAR, are not only published "by" government; they are also prepared

[19] *ONCA, supra* note 2 at paras 34-42.
[20] *Rules*, *supra* note 3; *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*, SOR/2016-271 online: <https://www.scc-csc.ca/parties/gl-ld2017-01-01-eng.aspx>.

and published pursuant to detailed regulatory schemes. Those regulatory schemes direct and control filing, formatting, distribution, amendment, and even aspects of the content of such documents.[21]

41. CIPPIC submits that this Court should not interpret Crown copyright to degenerate into a case-by-case analysis of where on the Court of Appeal's spectrum of inferences[22] each regulatory scheme lies. This problem simply doesn't arise with CIPPIC's common-sense approach to Crown copyright.

42. CIPPIC's interpretation of section 12 also avoids the federalism issue that only became apparent after the Motions Judge unexpectedly interpreted Ontario's regulatory scheme to transfer, in combination with section 12, ownership of copyright. It is confusing under the Court of Appeal's reasoning whether the federalism issue is exactly the same or slightly different. The need to resolve this complicated and controversial federalism question disappears under CIPPIC's approach. The fact that provinces may—if the Respondent's other defences don't succeed—be subject to the *Copyright Act* does not cause a constitutional problem.

## Part IV – COSTS

43. The intervener does not seek costs and asks that no costs be awarded against it.

## Part V – ORDER SOUGHT

44. The intervener respectfully requests that its submissions be considered in resolving this appeal.

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[21] *Securities Act*, RSO 1990 c S5, ss 52-74; and RRO 1990, Reg 1015, ss 43, 161; *General Prospectus Requirements*, OSC NI 41-101, online: <http://www.osc.gov.on.ca/en/14326.htm>; *Patent Act*, RSC 1985, c P-4; *Patent Rules*, SOR/96-423; *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133; Canadian Intellectual Property Office, "Manual of Patent Office Practice (MOPOP)", online: <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00720.html>; *Trade-marks Act*, RSC 1985, c T-13; *Trade-marks Regulations*, SOR/96-195; Canadian Intellectual Property Office, "Trademarks Examination Manual (TEM)", online: <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr01614.html>.

[22] *ONCA, supra* note 2 at para 33: "In my view, the more extensive those rights, and the more rights associated with copyright are in the Crown's hands, the stronger the inference that the publishing occurs under the 'direction or control' of the Crown."

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

**DATED** in Ottawa, Ontario, this 18h day of December, 2018.

Jeremy de Beer

David Fewer

Samuelson Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law, Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Tel: (613) 562-5800 x 2558
Fax: (613) 562-5417
Email: jdebeer@uottawa.ca

**Counsel for the Intervener**

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