No. 37863

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

BETWEEN:

KEATLEY SURVEYING LTD.

Appellant
(Respondent on Cross-Appeal)

- and -

TERANET INC.

Respondent
(Appellant on Cross-Appeal)

- and -

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

Interveners

FACTUM OF THE JOINT INTERVENERS
THE CANADIAN LEGAL INFORMATION INSTITUTE/ INSTITUT CANADIEN D'INFORMATION JURIDIQUE AND THE FEDERATION OF LAW SOCIETIES OF CANADA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal has the potential to substantially limit public access to Canadian legal information, including statutes, court judgments and the decisions of administrative tribunals (**Public Legal Documents**).

2. The Court of Appeal applied a broad interpretation to section 12 of the *Copyright Act*. The concern of The Federation of Law Societies of Canada (**Federation**) and the Canadian Legal Information Institute / Institut Canadien d'information juridique (**CanLII**) (together, the **Interveners**) is that the Court of Appeal's interpretation could be construed as a recognition of comprehensive Crown copyright in Public Legal Documents. As a consequence, the Crown and its agents would be authorized to control or impede access to Public Legal Documents – through fees, overly restrictive terms of use, or arbitrary decision-making about who is given access. That outcome would directly prejudice the Interveners' ability to make Public Legal Documents openly available online for the public.

3. Open and unfettered access to Public Legal Documents is fundamental to access to justice and a core aspect of a functioning modern democracy. Recognizing Crown copyright in Public Legal Documents is antithetical to those critical public policy objectives. It could limit the ability of members of the public and the legal profession to research and review legal information, to know their legal rights and responsibilities, to advocate effectively before courts and tribunals, and to participate in legislative processes on an informed basis.

4. The Court ought to have regard for the consequences a broad interpretation of section 12 may have for access to Public Legal Documents, and should favour an interpretation that accords with the fundamental principles of access to justice and the democratic process.

B. Facts

5. The Interveners accept the facts as set out in paragraphs 1-8 and 10-16 of the decision of the Court of Appeal.[1]

PART II – STATEMENT OF POSITION

6. The Interveners' position is that the interpretation of section 12 should take into account the important public policy priorities of access to justice and democratic participation. A long line of helpful U.S. jurisprudence holds that such public policy considerations must be considered when determining copyright in Public Legal Documents.

7. The Interveners' submissions are two-fold: (a) a broad interpretation of section 12 of the *Copyright Act* would inhibit fundamental principles of access to justice and the democratic process; and (b) the Court of Appeal for Ontario's interpretation of section 12 of the *Copyright Act* deviates from the common law treatment of copyright in Public Legal Documents.

PART III – STATEMENT OF ARGUMENT

A. A broad interpretation of section 12 would impair significant public policy interests

8. The Court of Appeal for Ontario's determination that section 12 of the *Copyright Act* vests the Crown with copyright in "any work" that is prepared or published by or under the direction and control of the Crown could be interpreted as a comprehensive recognition of Crown copyright in all Public Legal Documents.

9. This interpretation would give the Crown the ability to restrict Canadians' unfettered access to Public Legal Documents, thus giving rise to significant public policy concerns related to access to justice and the democratic process.

10. The Court should have regard for the public policy implications arising from a broad reading of section 12 when engaging the statutory interpretation exercise in this appeal. This Court's comments in *Marzetti v. Marzetti* demonstrate that public policy considerations are relevant when applying a purposive approach to statutory interpretation:

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[1] *Keatley Surveying Ltd. v. Teranet Inc.*, 2017 ONCA 748 (CanLII).

> [T]here are related public policy goals to consider…[T]here is no doubt that divorce and its economic effects…are playing a role in the "feminization of poverty"…A statutory interpretation which might help defeat this role is to be preferred over one which does not.[2]

11. The serious issue of access to justice is well documented: approximately 50% of people attempt to solve their legal issues on their own with no or minimal legal or authoritative non-legal assistance, and there is a recognized need to improve accessibility to and coordination of public legal information. [3] Further restricting open and equal access to Public Legal Documents would only impede the noble initiatives of governments, organizations and individuals aimed at bringing accessible justice for all Canadians.

12. The Right Honourable Chief Justice of Canada Richard Wagner's remarks at his official welcome ceremony as new Chief Justice of Canada further echo the importance of these fundamental principles and open access to Public Legal Documents. In describing Canada's "vibrant democracy", Chief Justice Wagner acknowledged the need for judges "to provide better access to justice for Canadians", which includes ensuring "access to information".[4]

13. In particular, certain Canadians may be disproportionately impacted by an overly broad interpretation of section 12 of the *Copyright Act*. This includes individuals and organizations that cannot afford to pay for access to primary legal materials or legal services, academic researchers, and start-up and innovative businesses.

14. Authorizing the Crown and its agents to charge copyrights fees conflicts with pronouncements of all levels of government in Canada as well as the judiciary, which have recognized these principles and the importance of providing public and open access to Public Legal Documents.

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[2] *Marzetti v. Marzetti*, [1994] 2 SCR 765 at 801.
[3] *Access to Civil and Family Justice: A Roadmap for Change*, (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 4, 13, online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.
[4] *Remarks of the Right Honourable Richard Wagner, P.C. Chief Justice of Canada* (Remarks delivered at the Official Welcome Ceremony for the New Chief Justice, 5 February 2018), online: < https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-02-05-eng.aspx>.

15. For example, the federal government has recognized the fundamental importance of unfettered public access to Public Legal Documents:

> Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law; And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission; Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, the Minister of Industry, the Minister of Public Works and Government Services, the Minister of Justice and the Treasury Board, hereby makes the annexed *Reproduction of Federal Law Order*.
>
> REPRODUCTION OF FEDERAL LAW ORDER
>
> Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.[5]

16. Reports[6] and judgments[7] of the Supreme Court of Canada, Federal Court decisions[8] as well as Federal statutes and regulations[9] are all publicly accessible online. Every jurisdiction in Canada also provides open access to full-text current consolidated statutes and regulations on the internet.[10]

17. Beyond public and open access of statutes and regulations, Canadian courts have stressed the public role of the courts and the importance of the courts' judicial function being exercised

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[5] *Reproduction of Federal Law Order*, SI/97-5, (1997) C Gaz II, 444.
[6] "Canada Supreme Court Reports", online: Lexum collection <https://scc-csc.lexum.com/scc-csc/scr/en/nav_date.do>.
[7] "Judgments of the Supreme Court of Canada", online: Lexum collection <https://scc-csc.lexum.com/scc-csc/en/nav.do>.
[8] "Decisions of the Federal Court", online: decisia by lexum <https://decisions.fct-cf.gc.ca/fc-cf/en/nav.do>.
[9] "Justice Laws Website", online: Government of Canada <https://laws-lois.justice.gc.ca/eng/>.
[10] Bora Laskin Law Library, "Step 2: Primary Sources of Law: Canadian Legislation", online: <https://library.law.utoronto.ca/step-2-primary-sources-law-canadian-legislation>.

publicly. It is a trite proposition that the "open court principle" is a hallmark of a democratic society that applies to all judicial proceedings.[11]

18. Public Legal Documents are at the heart of modern democracy. As courts have repeatedly recognized, the nature of law in a democracy is that the public are the sovereign, they govern themselves through their legislative and judicial representatives, and they are ultimately the source of the law.[12]

19. As such, legislatures and judges draft the law exercising delegated authority on behalf of and as servants to the public; whatever they produce, the public is the true author.[13] As the U.S. Court of Appeals for the Eleventh Circuit recently held: "When the legislative or judicial chords are plucked it is in fact the People's voice that is heard."[14]

20. Accordingly, for purposes of the *Copyright Act*, the public is the constructive author of Public Legal Documents – and therefore also the owners of these "works".[15] Any work of which the public is the constructive author is "intrinsically public domain material and is freely accessible to all so that no valid copyright can ever be held in it", not even by the Crown.[16]

21. As one American court explained:

> [P]ublic ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighbourhood association, or simply to amuse.[17]

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[11] *Vancouver Sun (Re)*, [2004] 2 SCR 332 at 345.
[12] *Code Revision Commission v. Public.Resource.Org, Inc.*, Opinion in Case No. 17-11589 (D.C. Docket No. 1:15-cv-02594-RWS) (11th Cir 2018) at 20-21 [***CRC***].
[13] *CRC, supra* note 12 at 21.
[14] *CRC, supra* note 12 at 21.
[15] *CRC, supra* note 12 at 3.
[16] *CRC, supra* note 12 at 21.
[17] *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F 3d 791 (5th Cir 2002) (en banc) [***Veeck***].

B. Canadian jurisprudence is consistent with excluding Public Legal Documents from Crown copyright

22. Although Canadian courts have never commented on whether section 12 of the *Copyright Act* includes Public Legal Documents, previous decisions support the view that Public Legal Documents are part of the public domain and should not be subject to Crown copyright.

23. In *CCH Canadian Ltd. v. Law Society of Upper Canada*, this Court addressed whether photocopies of judicial reasons published in law reports constituted copyright infringement. Three large publishers sued the Law Society of Upper Canada (**Law Society**) for copyright infringement claiming the Law Society infringed copyright when the Great Library at Osgoode Hall created photocopies of their publications works.

24. This Court unanimously held that the Law Society did not infringe any copyright when single copies of materials were made, nor did patrons using photocopiers for the same purpose. The Court declared that reproducing judicial reasons does not amount to copyright infringement as they are not copyrightable:

> [J]udicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright…[t]he reported reasons, when disentangled from the rest of the compilation - namely the headnote - are not covered by copyright.[18]

25. Justice Hutcheon of the BC Court of Appeal came to same conclusion in a concurring opinion in *B.C. Jockey Club v. Standen (Winbar Publications)*. He recognized that judicial decisions are not copyrightable, and held that they are part of the "public domain" and "to recognize the claim to copyright would be contrary to public policy."[19]

C. Historical judicial treatment of copyright in Public Legal Documents by U.S. courts

26. In contrast to Canadian courts, U.S. courts have commented frequently on the topic of copyright in legal information. They have consistently held – through a line of cases stretching

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[18] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339 at para 35.
[19] *B.C. Jockey Club v. Standen (Winbar Publications)*, 1985 CanLII 591 (BC CA) at para 12.

back more than 180 years – that the general public should be regarded as the "author" of such works.

27. The United States Supreme Court (the **U.S. Court**) first addressed copyright in Public Legal Documents in 1834 in *Wheaton v. Peters*. The Court unanimously held that "no reporter has or can have any copyright in the written opinions delivered by this Court; and that the judges thereof cannot confer on any reporter any such right."[20]

28. The U.S. Court revisited the question in 1888 in *Banks v. Manchester*, where it considered an infringement suit filed by a publishing firm that had published official reports containing the decisions of the Supreme Court of Ohio against a defendant who had published the same material in the American Law Journal.[21]

29. The U.S. Court found the copyright invalid and held that the opinions of state judges, just like Supreme Court opinions, were not copyrightable. In arriving at this decision, the U.S. Court provided two main reasons as to why the judges could not be considered the "authors" of their work.[22] First, judges "receive from the public treasury a stated annual salary, fixed by law," and therefore can "have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labours."[23] And second, there is an overriding public policy interest in judgments because "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."[24]

30. *Banks* relied on a decision of the Massachusetts Supreme Judicial Court, which provided the following useful explanation for why copyright cannot extend to Public Legal Documents:

> [I]t needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or

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[20] *Wheaton v. Peters*, 33 US 591 at 668 (1834).
[21] *Banks v. Manchester*, 128 US 244 (1888) [***Banks***].
[22] *Banks*, *supra* note 21 at 252.
[23] *Banks*, *supra* note 21 at 253.
[24] *Banks*, *supra* note 21 at 253.

> to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices.[25]

31. Since *Banks* was decided in 1888, lower courts have confirmed the application of the historical rule to all Public Legal Documents. The jurisprudence establishes that "the law" – including judicial decisions, statutes, and regulations – is excluded from the purview of copyright statutes.

32. For example, the U.S. Court of Appeals for the Sixth Circuit has long held that the text of state statutes cannot be copyrighted. In *Howell v. Miller*, for example, Justice Harlan held that "no one can obtain the exclusive right to publish the laws of the state in a book prepared by him".[26]

33. The U.S. Court of Appeals for the Fifth Circuit has confirmed that the rule applies to regulatory materials. In *Veeck*, the Court stated that "'the law', whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law."[27]

34. This line of jurisprudence has been partially codified by the United States Congress. The 1909 version of the U.S. *Copyright Act* provided that "no copyright shall subsist in the original text of any work which is in the public domain … or in any publication of the United States Government, or any reprint, in whole or in part, thereof."[28]

35. This prohibition persists under current copyright law, enacted in 1976, which, in turn, provides that "[c]opyright protection under this title is not available for any work of the United States Government."[29] This partial codification of *Banks* for works created by the federal government leaves unmodified the rule as it applies to works created by the states. Nonetheless, as the Copyright Office's 1961 Register's Report stated, even though Congress enacted a prohibition that only applies to the federal government, "the judicially established rule [] still

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[25] *Nash v. Lathrop*, 142 Mass 29 at 35, 6 NE 559 (1886).
[26] *Howell v. Miller*, 91 F 129 at 137 (6th Cir 1898).
[27] *Veeck*, *supra* note 17.
[28] 17 USC § 8 (repealed 1976).
[29] 17 USC § 105.

prevent[s] copyright in the text of state laws, municipal ordinances, court decisions, and similar official documents."[30]

36. This Court should give strong regard to the principles established by the U.S. jurisprudence. They provide over a century of thoughtful guidance on public policy concerns that have received virtually no attention in Canadian courts, but which are directly implicated in this appeal.

PART IV – COST SUBMISSIONS

37. The Interveners do not seek costs, and request that no costs order be made against them.

PART V – ORDER REQUESTED

38. The Interveners request that the Court determine this Appeal in a manner consistent with the above submissions.

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[30] *CRC*, *supra* note 12 at 20, citing US Copyright Office, *Sixty-Fourth Annual Report of the Register of Copyrights for the Fiscal Year Ending June 30, 1961* (Washington DC: The Library of Congress, 1962) at 129-30.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF DECEMBER, 2018.

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PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTORY PROVISIONS

17 USC § 105

§ 105. Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546.)

17 USC § 8 (Repealed 1976)

§ 8. Copyright not to subsist in works in public domain, or published prior to July 1, 1909, and not already copyrighted, or Government publications; publication by Government of copyrighted material

No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the United States Postal Service may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 405 of title 39.

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

(July 30, 1947, ch. 39i, 61 Stat. 655; Oct. 31, 1951, ch. 655, § 16(b), 65 Stat. 716; Sept. 7, 1962, Pub. L. 87-646, § 21, 76 Stat. 446; Aug. 12, 1970, Pub. L. 91-375, § 6(0), 84 Stat. 777.)

***Copyright Act*, RSC, 1985, c C-42**

***Loi sur le droit d'auteur*, LRC (1985), ch C-42**

Where copyright belongs to Her Majesty	**Quand le droit d'auteur appartient à Sa Majesté**
12 Without prejudice to any rights or privileges of the Crown, where any work is, or has been,	**12** Sous réserve de tous les droits ou privilèges

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. • RS, 1985, c C-42, s 12; 1993, c 44, s 60.	de la Couronne, le droit d'auteur sur les oeuvres préparées ou publiées par l'entremise, sous la direction ou la surveillance de Sa Majesté ou d'un ministère du gouvernement, appartient, sauf stipulation conclue avec l'auteur, à Sa Majesté et, dans ce cas, il subsiste jusqu'à la fin de la cinquantième année suivant celle de la première publication de l'oeuvre. • LR (1985), ch C-42, art 12; 1993, ch 44, art 60.

***Reproduction of Federal Law Order*, SI 97-5**

Décret sur la reproduction de la législation fédérale et des décisions des tribunaux de constitution fédérale

Registration SI/97-5 January 8, 1997 OTHER THAN STATUTORY AUTHORITY **Reproduction of Federal Law Order** P.C. 1996-1995 December 19, 1996 Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law; And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission; Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, the Minister of Industry, the Minister of Public Works and Government Services, the Minister of Justice	Enregistrement TR/97-5 Le 8 janvier 1997 AUTORITÉ AUTRE QUE STATUTAIRE **Décret sur la reproduction de la législation fédérale et des décisions des tribunaux de constitution fédérale** C.P. 1996-1995 Le 19 décembre 1996 Attendu que, pour une societe democratique, il est d'une importance fondamentale que les textes constituant son droit soient largement diffuses et que ses citoyens y aient libre acces; Attendu que le gouvernement du Canada souhaite faciliter l'accès à la législation fédérale et aux décisions des tribunaux de constitution fédérale en autorisant leur reproduction sans frais ni permission, À ces causes, sur recommandation de la ministre du Patrimoine canadien, du ministre de l'Industrie, du ministre des Travaux publics

and the Treasury Board, hereby makes the annexed *Reproduction of Federal Law Order*. **Reproduction of Federal Law Order** Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version. SI/98-113(F).	et des Services gouvernementaux, du ministre de la Justice et du Conseil du Trésor, Son Excellence le Gouverneur général en conseil prend le *Décret sur la reproduction de la législation fédérale et des décisions des tribunaux de constitution fédérale, ci-après*. **Décret sur la reproduction de la législation fédérale et des décisions des tribunaux de constitution fédérale** Toute personne peut, sans frais ni demande d'autorisation, reproduire les textes législatifs fédéraux, ainsi que leur codification, et les dispositifs et motifs des décisions des tribunaux judiciaires et administratifs de constitution fédérale, pourvu que soient prises les précautions voulues pour que les reproductions soient exactes et ne soient pas présentées comme version officielle. TR/98-113(F).