SCC FILE NO. 37863

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

BETWEEN:

KEATLEY SURVEYING LTD.

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Appellant/Respondent
by way of cross-appeal)

AND:

TERANET INC.

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Respondent/Appellant
by way of cross-appeal)

AND:

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN ASSOCIATION OF LAW LIBRARIES, ATTORNEY GENERAL FOR SASKATCHEWAN, 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 RESPONDENT ON CROSS-APPEAL,
KEATLEY SURVEYING LTD.

(Pursuant to Rule 43 of the *Rules of the Supreme Court of Canada*)

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

Luciana P. Brasil
Tel: (604) 654-2666
Fax: (604) 684-3429
Email: lbrasil@branmac.com

Counsel for the Appellant/Respondent on Cross-Appeal

MICHAEL J. SOBKIN
331 Somerset Street
West Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Appellant/ Respondent on Cross-Appeal

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Barry B. Sookman,
Julie Parla, and
Hovsep Afarian
Stephanie Sugar
Tel: 416-601-7949
Fax: 416-868-0673
Email: bsookman@mccarthy.ca

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

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

David Taylor
Tel: 613-691-0368
Fax: 613-688-0271
Email: dtaylor@conway.pro

Ottawa Agent for Respondent/ Appellant on Cross-Appeal

MILLER THOMSON LLP
Suite 5800, 40 King St.
West Toronto ON M5H 3S1

F. Paul Morrison
Tel: 416-597-6050
Fax: 416-595-8695
Email: paulmorrison@millerthomson.com

Counsel for the Respondent/ Appellant on Cross-Appeal

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay St., 4th Floor
Toronto, ON M5G 2K1

Michael S. Dunn
Tel: (416) 326-4466
Fax: (416) 326-4015
Email: michael.dunn@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

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

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario

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
Email: 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

Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street
Victoria, BC V8V 1X4

G.J. Underwood
Tel: (250) 356-8866
Fax: (250) 356-8653

Counsel for the Intervener, Attorney General of British Columbia

NÖEL & ASSOCIÉS
111, rue Champlain
Gatineau, PQ J8X 3R1

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

Ottawa Agent for Counsel for the Intervener, Attorney General of British Columbia

JFK LAW CORPORATION
816-1175 Douglas Street
Victoria, BC V8W 2E1

Robert Janes, Q.C.
Tel: (250) 405-3460
Fax: (250) 381-8567
rjanes@jfklaw.ca

Counsel for the Intervener, Canadian Association of Law Libraries

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

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 563-9869
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Association of Law Libraries

ATTORNEY GENERAL FOR SASKATCHEWAN
Ministry of Justice Saskatchewan
Constitutional Law Branch
820-1874 Scarth St.
Regina, SK S4P 4B3

Theodore Litowski
Tel: (306) 787-6642
Fax: (306) 787-9111
theodore.litowski@gov.sk.ca

Counsel for the Intervener, Attorney General for Saskatchewan

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

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General for Saskatchewan

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
Toronto, ON M5J 2Z4

Rahool Agarwal
Fahad Siddiqui
Tel: (416) 216-3943
Fax: (416) 216-3930
rahoo.agarwal@nortonrosefulbright.com

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

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
matthew.halpin@nortonrosefulbright.com

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

UNIVERSITY OF OTTAWA
Faculty of Law, Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Jeremy de Beer
David Fewer
Tel: (613) 562-5800 Ext. 2553
Fax: (613) 562-5417
jdebeer@uottawa.ca

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

UNIVERSITY OF OTTAWA
Faculty of Law, Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Tamir Israel
Tel: (613) 562-5800 Ext. 2914
Fax: (613) 562-5417
tisrael@cippic.com

Ottawa Agent for Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

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

Theodore W. Sum,
Steven Garl,
Laura Easton, and
Matt Campbell
Tel: (604) 682-7780
Fax: (604) 682-0274
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
cbingram@smart-biggar.ca

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

FASKEN MARTINEAU DuMOULIN LLP
800 Square Victoria, Suite 3700
Montreal, QC H4Z 1E9

Michael Shortt
Jean-Philippe Mikus
Tel: (514) 397-7400
Fax: (514) 397-7600
mshortt@fasken.com

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

FASKEN MARTINEAU DuMOULIN LLP
55 rue Metcalfe Street Bureau 1300
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel: (613) 236-3882
Fax: (613) 230-6423
sarseneault@fasken.com

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

Table of Contents

PART I – OVERVIEW OF POSITION ON CROSS-APPEAL..- 1 -
PART II – STATEMENT OF ISSUES ....- 1 -
PART III – ARGUMENT ....- 1 -
A. This Court should decline to rule on the other common issues ....- 1 -
B. Surveyors have not consented to Teranet's uses of their plans of survey ....- 2 -
Common Issue 3: No assignment..- 4 -
Common Issue 4: No implied licence ....- 6 -
C. Teranet makes all of the alleged uses of the plans of survey..- 12 -
D. Teranet's use of plans of survey is not fair dealing..- 13 -
Test for Fair Dealing..- 13 -
Step 1: Is the dealing for an allowable purpose? ....- 13 -
Step 2: Is the dealing fair?..- 14 -
Factor 1: The purpose of the dealing. ....- 15 -
Factor 2: The character of the dealing...- 16 -
Factor 3: The amount of the dealing.. ....- 16 -
Factor 4: The availability of alternatives to Teranet's exclusive dealings........................- 17 -
Factor 5: The nature of the work. ....- 17 -
Factor 6: The effect of the dealing...- 18 -
Technological Neutrality ....- 18 -
E. No public policy defence available to Teranet...- 20 -
PART IV – SUBMISSION ON COSTS ....- 20 -
PART V – ORDER SOUGHT ....- 20 -
PART VI – LIST OF AUTHORITIES ....- 21 -

PART I – OVERVIEW OF POSITION ON CROSS-APPEAL

1. In its factum on the cross-appeal Teranet asks this Court to determine the remaining issues that were not addressed by the Ontario Court of Appeal, namely common issues 3-7. These issues primarily concern Teranet's alternative defences of assignment, deemed consent, fair dealing and public policy.

2. This Court does not have the benefit of rulings from the lower courts on common issues 3-7 and therefore should not decide those issues. Rather, it should remit the case to the Ontario Court of Appeal if it decides Crown copyright (common issue 2) in the surveyors' favour. This in fact was the relief Teranet said it would seek when it applied for leave to cross-appeal to this Court. Teranet should not be permitted to change its position after having obtained leave to cross-appeal on this limited basis.

3. Alternatively, if the Court decides to consider the remaining common issues the appellant submits that they ought to be decided in the surveyors' favour for the reasons discussed below.

PART II – STATEMENT OF ISSUES

4. Teranet's cross appeal raises the following questions:

   (1) Should this Court hear Teranet's cross-appeal or should it remit common issues 3-7 back to the Ontario Court of Appeal as originally requested by Teranet?

   (2) If this Court decides to address some or all of common issues 3-7, how should these common issues be resolved?

PART III – ARGUMENT

A. This Court should decline to rule on the other common issues

5. Teranet is precluded from seeking to have this Court determine common issues 3-7 as it contradicts the relief it said it would seek from this Court if leave to cross-appeal was granted.

6. In its conditional application for leave to cross-appeal Teranet explained that the Ontario Court of Appeal had dismissed its cross-appeal as moot in light of its finding on common issue 2.[1] Accordingly, it submitted that if "Keatley is granted leave to appeal by this Honourable

[1] Teranet's Memorandum of Argument in opposition to leave, para. 61.

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."[2] In its memorandum of argument it confirmed this was the relief it would seek on its cross-appeal.[3] The appellant did not oppose leave to cross-appeal being granted on this limited basis.[4]

7. This Court granted leave to cross-appeal on the basis of Teranet's application. Had Teranet said that it wanted the Court to determine the merits of common issues 3-7, a denial of leave to cross-appeal on this basis was a likely scenario in the circumstances of this case. The Court would effectively be sitting as a court of first instance on common issues 4, 6 and 7 and would be hearing an appeal with respect to common issues 3 and 5 without the benefit of a ruling from the Court of Appeal. This is not the preferred way for the Court to develop the law.[5]

8. Furthermore, in light of the fact that Teranet did not say it would ask this Court to rule on the other common issues, potential interveners have been denied an opportunity to provide the Court with helpful submissions on how the law ought to develop in these areas, in particular on the issue of fair dealing in respect of which no one applied to intervene.

9. For these reasons, this Court should not entertain Teranet's request to have the remaining and undecided common issues determined at this stage. If the Court answers common issue 2 in the appellant's favour, then the outstanding issues ought to be remitted to the court below, as Teranet had requested in its application for leave to cross appeal.

B. Surveyors have not consented to Teranet's uses of their plans of survey

10. Two common issues deal with the question of whether the surveyors have somehow agreed that Teranet could use plans of the survey in the manner that it does. Common issue 3 asks whether a declaration made by surveyors on plans of survey at the time of registration constitutes a signed written assignment of their copyright to the Province of Ontario. Common

---

[2] Teranet's Conditional Application for Leave to Cross Appeal, para. 13.
[3] Teranet's Memorandum of Argument in opposition to leave, para. 62.
[4] Appellant's Joint Reply to Response to Application for Leave to Appeal and Response to Application for Leave to Cross Appeal, para. 18.
[5] See *R. v. Mentuck*, [2001] 3 S.C.R. 442 at para. 17, where the Court stated that "our Court and our judicial system generally greatly benefit from the role of the courts of appeal".

issue 4 asks whether the filing of the plans of survey at a LRO constitute consent by the surveyors to the ways in which Teranet uses the plans of survey.

11. Common issue 3 is based on s. 13(4) of the *Copyright Act* which permits a copyright owner to either assign the right to copyright to another person or to grant an interest in the right by way of licence:

> The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent. [Emphasis added.]

12. Common issue 4 is based on s. 27(1) of the *Copyright Act* which reads as follows:

> It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do. [Emphasis added.]

13. While section 27(1) makes "consent" a general defence to copyright infringement, it is clear that an assignment under s. 13(4) is one where the copyright owner consensually assigns its rights in writing and thus is an illustration of how consent can be manifested under the Act. Common issues 3 and 4 are thus based on the notion of consent.

14. Common issues 3 and 4 are also similar in that they are not based on explicit consent being given by individual surveyors (as Teranet admits no such consent was sought).[6] Rather, they are based on the submission that surveyors have impliedly consented to an assignment of their copyright (common issue 3) and to the uses which Teranet makes of their plans of survey (common issue 4). This implied consent, Teranet argues, can be inferred from the surveyors' submission of surveys into the land registry system.[7]

15. Teranet is wrong. This Court has stated that an "inference of consent must be clear before it will operate as a defence".[8] Surveyors who file plans of survey are acting in accordance

---

[6] Transcript of Cross-Examination of Douglas Alan Buckle, question 273 (AR, Vol. VII, Tab 99, p. 181).
[7] Teranet's Cross-Appeal factum, para. 23 (common issue 3) and para. 38 (common issue 4).
[8] *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 485

with the instructions of their clients in order to comply with statutory requirements. They have not, and cannot be deemed to have, expressed a wish to transfer copyright to the Province. Nor can they be taken to have authorized Teranet to use their plans in the extensive manner that they do. Assignments and licences are legal tools that exist to permit parties to structure their business relationship so as to give effect to their mutual intentions. It is stretching the notion of consent into an unrecognizable form to treat the filing of plans of survey as a "clear" demonstration of surveyors' intention to give up or dilute their ownership of copyright in plans of survey.

16. Teranet's position is also contrary to the High Court of Australia's decision in *Copyright Agency Limited v. State of New South Wales* which held that surveyors' consent to bestow on government rights in their copyright could not be inferred from their participation in a legislative scheme where government officials, to the knowledge of surveyors, make copies of their plans of survey.[9] We will look more closely at that decision under our analysis of common issue 4. But first we will address Teranet's arguments relating to common issue 3.

Common Issue 3: No assignment

17. Common issue 3 reads as follows:

> 3. 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?

18. Common issue 3 refers to a single signed declaration but Teranet relies on two statements, only one of which is referred to as a "declaration" in the applicable legislation.

19. The document that is an actual declaration is the "declaration of compliance with all applicable Acts, regulations under them and practice standards" that a surveyor must provide his client upon completing a project regardless of whether it will be registered or deposited.[10]

---

[9] *Copyright Agency Limited v. State of New South Wales*, [2007] FCA 80 [*Copyright Agency FCA*], overruled [2008] HCA 35 [*Copyright Agency HCA*].

[10] O. Reg. 216/10, s. 4(2)(e). Section 4(3) provides that "if the professional member is a licensed member providing a cadastral survey, the declaration of compliance mentioned in clause (2) (e) shall be signed and dated by the licensed member and shall be in Form 1." Form 1 requires the surveyor to certify that "This survey and plan are correct and in accordance with the *Surveys Act*, the *Surveyors Act* and [any other applicable act] and the regulations made under them."

20. Justice Belobaba had no difficulty rejecting Teranet's argument that this declaration amounted to a transfer of copyright under s. 13(4) of the *Copyright Act*:

> The signed declaration of compliance says nothing about copyright or an assignment of rights. It merely states that a plan is correct and in accordance with statutory requirements.[11]

21. In this Court Teranet identifies no error in the motion judge's analysis of this declaration (yet continues to submit that this declaration supports its argument). Instead, Teranet says there is another document that is more "critical" but was not considered by the motion judge. The document in question is a statement by the signatory that he or she "requires" a plan to be deposited under the *Land Titles Act* or *Land Registry Act*.

22. Teranet argues that "each time a surveyor submits a plan for registration or deposit, he or she confirms in writing a request and intent for the plan to be entered into the registry pursuant to the statutory scheme", a statutory scheme that "requires the Crown to publish plans of survey." Therefore, Teranet argues, the surveyor's signature signifies his or her intention "to transfer copyright in the plan to the Crown."[12]

23. Justice Belobaba's reason for rejecting Teranet's argument that the declaration of compliance constitutes an assignment of copyright is equally applicable to this document. The requisition for deposit is just that: a request to file a document under the applicable statute. It is a legislative formality. It "says nothing about copyright or an assignment of rights." In requesting that a plan be filed, a surveyor (assuming a surveyor is making the request) is giving effect to the instructions of his or her client. There is no intention to create legal relations with the Province of Ontario whereby the surveyor divests his or her copyright ownership.

24. Moreover, the form in question – Form 7[13] – is not a document that could ever be construed as reflecting the mutual intentions of the Crown and the surveyor to create an assignment of copyright for the simple reason that it is not a document that the surveyor must sign. Form 7 is a document that was created for the purposes of compliance with s. 19(1)(k)(ii) and s. 20(1)(d) of the regulations. Those provisions only deal respectively with either a strata

---

[11] Reasons of Motion Judge, para. 48 (AR, Vol. I, Tab 7, p. 152).

[12] Teranet's Cross-Appeal Factum, paras. 22-23.

[13] Form 7, Requisition for Deposit of a Reference Plan (Subclause 16 (1) (K) (II) and Clause 20 (1) (D) of the Regulation, O. Reg. 43/96. See Ontario's website where form is now located.

plan or a reference plan and require the "depositor" to sign "a requisition for deposit in Form 7". It is simply impossible to construe Form 7 as a copyright assignment clause.

25. Teranet cites John S. McKeown's textbook on copyright law that no particular words or form is required to effect an assignment but it is clear from the author's review of the cases that disputes over whether an assignment of copyright has been made arise in the context of a transaction where a sale of a work has occurred and the question is whether the sale included copyright.[14] We are very far removed from that scenario in the case at bar.

26. In short, there is absolutely no basis upon which to conclude that the mutual intentions of surveyors and the provincial Crown was for surveyors to assign their copyright ownership to the Crown when or if they signed these two forms. The answer to common issue 3 must be "no".

Common Issue 4: No implied licence

27. Common issue 4 reads as follows:

> 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?

28. It is important to note at the outset that this question does not ask whether surveyors consent to a government employee making a copy of a document upon request by a member of the public. Rather, it asks whether surveyors consent to Teranet's uses of their plans of survey. The question then is not whether surveyors have granted an implied licence to the Province to copy a plan of survey but whether they have granted one to Teranet to make all of the uses it makes with their plans of survey. Thus, even if an implied licence to the Province could be inferred, which the appellant says is not the case here, this would not assist Teranet in any event.

29. In respect of whether an implied licence was granted to the Province, a similar issue arose in Australia in the *Copyright Reference* case.[15] Section 36(1) of the Copyright Act 1968 provides that copyright is infringed by a person who does any act comprised in the copyright if done

---

[14] McKeown, John S., *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (loose-leaf updated 2018, release 6) at 19.1: Assignment, (g) construction (Respondent's Book of Authorities, Tab 18, pp. 8-9).

[15] *Copyright Agency Limited v. State of New South Wales*, [2007] FCA 80 [*Copyright Agency FCA*], overruled [2008] HCA 35 [*Copyright Agency HCA*].

"without the licence of the owner of the copyright". The Federal Court of Australia held that "By assenting to the submission of the Relevant Plan for registration, the surveyor who made the Relevant Plan authorized the State to do everything that it was obliged to do in consequence of the registration of the Relevant Plan so as to become a registered plan", including acts which "might otherwise constitute an infringement of copyright.[16] Teranet relies on this decision.[17]

30. However, a unanimous High Court of Australia overturned this decision. It listed a number of considerations that led it to conclude that no licence should be implied:

> First, whilst a surveyor's client pays the surveyor for the preparation of survey plans, a surveyor is not permitted by LPI to affix a copyright notice. However, there is nothing in the conduct of a surveyor in preparing plans for registration which involves abandoning exclusive rights bestowed by the Act . . .
>
> Secondly, a surveyor cannot practice his or her profession, insofar as it touches land boundaries, without consenting to the provision of survey plans for registration knowing the uses, subsequent to registration, to which the plans will be put.
>
> . . .
>
> Fourthly, neither a surveyor nor a surveyor's client could be expected to factor into remuneration under any contract of engagement between them, such copying for public uses as may be engaged in by the State.
>
> Fifthly, the State imposes charges for copies issued to the public.[18]

31. All of these considerations, the court said, "militate against the founding of any licence in an authority or consent given by the surveyors to the State".[19]

32. In other words, the surveyors must permit their plans of survey to be registered or deposited because it is a statutory requirement and their clients require the documents to be filed.

---

[16] *Copyright Agency, FCA*, para. 155.
[17] Teranet's Cross-Appeal Factum, para. 33.
[18] *Copyright Agency*, HCA, paras. 85-86, 88-89.
[19] *Copyright Agency*, HCA, para. 91. Teranet incorrectly argues (at footnote 221) that the decision on this point was reversed "because under Australia's Copyright Act there was a statutory license granted to the State on payment of equitable remuneration." In fact, the State of New South Wales argued that they were not subject to the remuneration scheme provided by the Act because they already had the consent of the surveyors to use their plans of survey. The Federal Court of Australia agreed with this argument but the High Court of Australia disagreed. It is clear that the considerations relied upon by the High Court in rejecting the state's argument go to the question of whether it is appropriate to infer consent from the registration or deposit of documents. That is of direct relevance to the case at bar.

It would be wrong to find in that process an agreement on the part of the surveyors that the state can then do what it wants with those original works for a fee. This would, said the New Zealand Court of Appeal in *Glogau*,[20] be "an unlikely catch-22" for class members who, like the surveyors in Australia, are not permitted to affix a copyright notation of plans of survey that are filed or deposited at an LRO.[21]

33. The catch-22 on Teranet's theory is clear. The surveyors (Teranet would say) do not have to submit their plans for survey. This way the government would not receive consent to authorize Terant to sell access to their plans of survey. But if the surveyors do not submit their plans of survey they will no longer be able to practice a significant portion of their profession.

34. As noted above, this Court has said that "[t]he inference of consent must be clear before it will operate as a defence."[22] The requisite clarity is entirely absent in this case. The surveyors may be aware of what Teranet does once it acquires the surveyors' work product. But that cannot constitute consent. Consent should not be inferred where it cannot be said that it was freely and voluntarily given. This is a full answer to Teranet's consent argument.

35. In its factum Teranet relies on a number of cases to support its position on implied consent, including the decision of this Court in *Netupsky v. Dominion Bridge Ltd.*[23] In that case, an engineer, Netupsky, provided an architect with plans for the structural design of the Ottawa Civic Centre. Dominion Bridge, a subcontractor, redesigned some of the plans and made copies of the plans in order to complete the construction after Netupsky had refused to change his plans as requested. The engineer sued the subcontractor for copyright infringement arguing that he alone could make changes to his plans. This Court found that in taking this position the engineer had repudiated the contract and it rejected his argument on infringement as follows:

> In the circumstances of this case, it is clear that the changes or modifications not only were not forbidden but were in contemplation at the time when the City of Ottawa and, through it, Dominion Bridge, its subcontractor, became the licensee of Netupsky for the construction of its Civic Centre. Such a licence carries with it an implied consent to make the changes which Netupsky should have made and refused to make, and also, an implied

---

[20] *Land Transport Safety Authority of New Zealand v. Glogau*, [1999] 1 NZLR 261 at 273 (Appellant's Book of Authorities, Tab 1).
[21] O. Reg. 43/96, s. 9(1)(e).
[22] *Bishop v. Stevens*, *supra* at 485.
[23] [1972] S.C.R. 368 [*Netupsky*].

> consent to reproduce the plans in as many copies as might be necessary for the construction of the work.[24]

36. This case does not assist Teranet. The subcontractor in that case was a licensee of Netupsky for the construction of the building; with that licence came an implied consent to make changes to those plans and to make "as many copies as might be necessary for the construction of the work."[25] Neither the Province nor Teranet is a licensee of the surveyors.

37. Moreover, the actual "statement of principle" applied by this Court was the following:

> …that the engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission or consent or licence in the person making the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement.

38. As with the cases on assignment under s. 13(4), this passage demonstrates how the question of licence properly arises in the context of a business relationship – "the engagement for reward of a person".[26] Neither the Province nor Teranet have engaged the surveyors for reward and it is entirely artificial to invoke the concept of implied licence in this context.

39. Teranet also relies on the Nova Scotia Court of Appeal decision in *Robert D. Sutherland Architects Ltd. v. Montykola Investments Inc.*[27] In that case, an architect, Mr. Sutherland, had submitted a plan for land development to a municipality. The plan was approved but the developer did not purchase the property. In order to allow a new purchaser to obtain the necessary approvals, the owner of the property incorporated the architect's original plan in the development agreement. Mr. Sutherland sued the owner for having done so. The Nova Scotia Court of Appeal dismissed the architect's copyright infringement action.

40. The Nova Scotia Court of Appeal noted that a development proposal involves the investment of time and effort by both the applicant and the planning authority, and as the details get worked out the proposal gets incorporated into the formal documentation for the

---

[24] *Ibid*. at 373, 377.
[25] *Ibid*. at 377.
[26] *Ibid*. at 377-78.
[27] *Robert D. Sutherland Architects Ltd. v. Montykola Investments Inc.* (1996), 150 N.S.R. (2d) 281 [*Montykola*] (RBA, Tab 7).

development.[28] In these circumstances the Nova Scotia Court of Appeal was prepared to infer that the applicant granted a voluntary licence "for the reasonable and appropriate use by the town of any copyrighted material he may provide."[29] It was thus not an infringement of copyright for the owner of the property to execute a development agreement with the town that attached the original plan.

41. In the field of architecture, the architect retains copyright in his plans and designs while the client acquires the right to use the plans for the purpose of constructing the contemplated structure.[30] *Montykola* is consistent with this outcome, though the finding of a licence in favour of the town appears to extend this principle on the ground that the town was actually a party to the development agreement.

42. What is being proposed in the case at bar is fundamentally different. Teranet is saying that the registration or deposit of plans of survey provides the Province with implied consent to use the documents in the manner provided by the *Land Titles Act* and the *Registry Act* which includes providing a copy of a plan of survey to members of the public for a fee. Even if *that* consent could be inferred – and the surveyors say it cannot for the reasons given by the High Court of Australia – it does not mean that *further* consent can be inferred by which the surveyors agreed that the Province could enter into an exclusive worldwide licensing agreement with Teranet under which Teranet was authorized to charge members of the public a fee for acquiring software to access plans of survey and then to charge multiple fees for each copy of a plan of survey obtained through that software. The surveyors' position is that it is not "a reasonable and appropriate use" for a private entity to monetize their work product as Teranet has done.

43. Teranet's argument also fails because, as this Court stated in *Robertson v. Thomson Corp*. "an exclusive licence must be in writing."[31] As noted above under common issue 3, the signed documents relied upon by Teranet have nothing to do with copyright. Thus, the surveyors have not provided written consent to the Province of Ontario or Teranet for the purposes of permitting the latter to enjoy exclusive reproduction and distribution rights over their works.

---

[28] *Ibid*. at para. 27.
[29] *Ibid*. at para. 28.
[30] *Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd.*, 2017 BCSC 333 at paras. 21-22.
[31] [2006] 2 SCR 363, 2006 SCC 43 at paras. 55-56.

44. The final case Teranet relies on is *Geophysical Service Incorporated v. Encana Corporation*.[32] There the court found that copyright subsisted in seismic data gathered by the plaintiff and submitted to various governmental boards. However, the court found that the *Copyright Act* conflicted with other federal legislation that governed the collection and dissemination of the data. As the *Copyright Act* was more general legislation, it was displaced by the other federal legislation governing the treatment of the data. This holding has no bearing on the case at bar. The Province of Ontario cannot, as a matter of constitutional law, displace the *Copyright Act*.

45. The Court went on to conclude (in the alternative) that the federal legislation created a compulsory licensing system governing the treatment of seismic data. As a result, there was no breach of the *Copyright Act*. However, what is relevant to common issue 4 is the court's view of consent. The court said (at para. 317):

> It is also very clear that GSI fought against this disclosure policy for years (and obviously is still fighting). To suggest that it has "consented" to the disclosure of its very valuable seismic data, impliedly or not, does not sit well with me. In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore data to be released and used by the public. The Regulatory Regime provides for this, as discussed above. GSI may not have liked to do so, it certainly never "consented" and it may be unfair, but it is the Regulatory Regime approved by Parliament.

46. Teranet is therefore wrong when it says the Alberta court found that the entity depositing seismic data "was deemed to have consented to the board's use of that data."[33] The court found the opposite.

47. Teranet also relied on individual class members' purported understanding that copies of plans would be provided to the public, their involvement in creating the electronic registry system in Ontario and their use of Teranet's software for accessing survey plans.[34] All of these arguments raise individual issues that are not capable of determination in common for the entire

---

[32] *Geophysical Services Incorporated v. Encana Corporation*, 2016 ABQB 230 at paras. 295-304.
[33] Teranet's Cross-Appeal Factum, para. 32.
[34] Teranet's Cross-Appeal Factum, paras. 34-35.

class. The only permitted inquiry under common issue 4 is whether there is deemed consent "as a result of the registration and/or deposit of those Plans of Survey."[35]

48. But even if they did not raise individual issues these arguments could not prevail. The fact that someone knows his or her copyright will be infringed cannot constitute consent to that infringement, particularly given the catch-22 situation it presents for surveyors. Likewise, participation in the creation of the initial electronic land registry system (for which participating surveyors were paid) is not consent to the ways in which Teranet has used their plans of survey to earn profits. Finally, the terms and conditions of use of Teranet's software state only that Teranet is owner or licensee of intellectual property to the software and to its products and services. They do not speak to copyright in plans of survey.[36]

49. Common issue 4 should be answered "no".

C. Teranet makes all of the alleged uses of the plans of survey

50. Teranet invites this Court to review findings of fact made by the motion judge concerning Teranet's uses of plans of survey.[37] Teranet provides no particulars identifying which alleged uses it claims have not been proven. More importantly, Teranet does not identify any palpable and overriding error on the part of Justice Belobaba. It is not possible to provide a detailed response to this vague and overly broad argument. There was evidence to support all of the motion judge's findings.[38] Mr. Justice Belobaba's findings of fact in regards to common issue 5 should not be disturbed.

---

[35] See Ontario Court of Appeal decision on certification where Sharpe J.A. for the Court notes (at para. 54) that common issues such as common issue 4 "will turn on legal interpretations having general application to class members that do not require any inquiry into the individual circumstances of the class member" (AR, Vol. I, Tab 5, p. 121).

[36] Affidavit of Tom Bunker sworn September 15, 2011 ("Bunker Affidavit"), paras. 78-79 (AR, Vol V, Tab 52, pp. 20-21).

[37] Teranet Cross-Appeal Factum, para. 40.

[38] **(1) Copies**: Affidavit of Douglas Buckle sworn August 8, 2011 ("Buckle Affidavit"), paras. 23, 42(a) (AR, Vol. IV, Tab 35, pp. 6-7, 11); Bunker Affidavit, para. 59 (AR, Vol. V, Tab 52, p. 16); Exhibit E to the Affidavit of Gordon Keatley sworn March 11, 2011 ("Keatley Affidavit") (AR, Vol. III, Tab 28, pp. 16-17). **(2) Transmitting:** Exhibit E to the Keatley Affidavit (AR, Vol. III, Tab 28, pp. 16-17); Buckle Affidavit, paras 23, 42 (AR, Vol. IV, Tab 35, pp. 6-7, 11). **(3) Storing in Database:** Buckle Affidavit, para. 42(a) (AR, Vol. IV, Tab 35, p. 11); Bunker Affidavit, para. 59 (AR, Vol. V, Tab 52, p. 16); Exhibit E to Keatley Affidavit (AR, Vol. III, Tab

D. Teranet's use of plans of survey is not fair dealing

51. Common issue 6 asks whether any of Teranet's uses of plans of survey constitute uses that only the copyright owner has the right to do. Teranet says "no", and relies on the defence of fair dealing under s. 29 of the *Copyright Act*.

52. The thrust of Teranet's argument is that surveyors have effectively recognized and accepted that LROs use of deposited plans of survey constitute fair dealing.[39] Teranet then relies on the doctrine of technological neutrality to say that if the LROs' copying and distribution of plans of survey constituted fair dealing so does Teranet's copying and distribution since the only difference between the two is technological, i.e. from paper to digital copying and distribution.[40] In other words, Teranet is suggesting that what it does with deposited plans of survey is essentially the same thing LROs have been doing for decades in terms of copyright law.

53. As discussed below, Teranet's argument in this regard fails factually and legally and is premised on a misconceived notion of the doctrine of technological neutrality.

<u>Test for Fair Dealing</u>

54. The test for fair dealing involves two steps. The first step is to determine whether the dealing is for an allowable purpose. The second step assesses whether the particular dealing is "fair" by taking into account the following six factors: (1) purpose (2) character, (3) the amount of the dealing; (4) existence of alternatives to the dealing; (5) nature of the work; and (6) the effect of the dealing on the work. The onus is on the person invoking fair dealing to satisfy both aspects of the test.[41]

Step 1: Is the dealing for an allowable purpose?

28, pp. 16-17). **(4) Adding to Index:** Exhibit E to the Keatley Affidavit (AR, Vol. III, Tab 28, pp. 16-17). **(5) Offering for Sale:** Buckle Affidavit, para. 42(a) (AR, Vol. IV, Tab 35, p. 11); Bunker Affidavit, para. 59 (AR, Vol. V, Tab 52, p. 16). **(6) Allowing Download:** Keatley Affidavit, paras. 11-12 (AR, Vol. III, Tab 23, p. 3); Buckle Affidavit, para. 44 (AR, Vol. IV, Tab 35, p. 11).

[39] Teranet's Cross Appeal Factum, para. 43.

[40] Teranet's Cross Appeal Factum, para. 44.

[41] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 [*CCH*], paras. 48-53; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345 [*Alberta Education*], para. 12.

55. Allowable purposes under s. 29 include “research” or “private study”. The relevant perspective at the first stage is that of the end user, not the copier (in this case Teranet).[42]

56. Teranet led evidence that users of plans of survey through its Teraview site are “lawyers, title insurers, financial institutions and surveyors” while users of plans of survey through its GeoWarehouse site are “land information professionals such as real estate agents, appraisers and surveyors”.[43] Mr. Bunker, a deponent for the class, provided evidence that surveyors use copies for research or to support their opinions in a land survey.[44]

57. This Court has “created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair”.[45] The appellant therefore accepts that the first stage is satisfied.

Step 2: Is the dealing fair?

58. In examining whether the dealing is fair, it is important to understand how Teranet deals with plans of survey and how that compares to what took place at the LROs in the previous paper-based system.

59. In the paper context, a plan of survey that was registered or deposited was physically kept at an LRO and might never be copied. The only plans that were copied were those for which there was an actual request. Further, the requesting party was not required to buy additional products in order to view or obtain copies of plans of survey, and the Province was not using plans of survey to sell such additional products.

60. In contrast, under the present regime, Teranet makes an electronic copy of every single plan of survey that is registered or deposited in an LRO and adds them to a database. Teranet then makes those copies available on demand to members of the public, but such access is granted only to persons who (a) have first purchased an additional product from Teranet, namely a licence to use Teranet’s proprietary software through which copies of plans are made available

---

[42] *Alberta Education*, para. 22.
[43] Buckle Affidavit, paras. 29, 35 (AR, Vol. IV, Tab 35, pp. 8-9).
[44] Bunker Affidavit para. 43 (AR, Vol. V, Tab 52, p. 12).
[45] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 [*Bell Canada*], para. 27.

and (b) pay two levels of fees for obtaining the digitized copy of the plan. In addition, the licence granted by the Province purports to empower Teranet to use those plans much more extensively, including to provide "Value Added Products".[46]

61. In this arrangement the Province benefits by having a private entity perform certain functions that the government previously performed. And Teranet benefits by recouping the cost of digitizing the surveyors' work product and by earning a profit on the sale of the plans and additional products it sells in the form of access to Teraview and GeoWarehouse. This is, as the Province has acknowledged, a "business partnership".[47] In this arrangement the only party that does not gain from the sale of plans of survey are the creators.

62. Teranet suggests there was a "profit-making element" under the old paper copying system but the references it provides do not support that assertion.[48] There are references to "revenue" in some documents which of course is not the same thing as profit. The sharing of profit is mentioned in one document but that is in the context of the business relationship that developed between the government and Teranet with respect to the digitization process. The burden to establish fair dealing is on Teranet and it has not proven that under the old paper copying system the government did anything more than cover the costs of the land registry system.

63. We turn now to the six factors identified by the Court.

64. **Factor 1: The purpose of the dealing**. In *Alberta Education* this Court made it clear that the copier's purpose is relevant to the fairness analysis even if the person who obtains the copy uses it for an allowable purpose under the *Copyright Act*. If the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis."[49]

---

[46] Second Amended and Restated Licence Agreement, Section 3.1(ii) and definitions of "VAP" or "Value Added Product" and "ELR Services" (AR, Vol. IV, Tab 36, pp. 31, 45, 48).
[47] Ontario Government Bulletin 2010-02 Fees (December 16, 2010).
[48] Teranet's Cross-Appeal Factum, para. 56. The sources upon which Teranet relies are in footnote 268.
[49] *Alberta Education*, para. 22.

65. Here Teranet's purpose is to make money. To this end it negotiated the right to retain all fees for products offered through Teraview and GeoWarehouse. This extensive and commercial use of plans distinguishes the case from *CCH* (where the Great Library at Osgoode Hall was a non-profit entity) and makes Teranet's use of the plans significantly less fair.

66. **Factor 2: The character of the dealing**. In *CCH* the Court noted that the Great Library only provided a single copy of works to the party requesting it. In *Bell Canada*, a thirty second preview of music was deleted after it was listened to. In this case, Teranet copies all plans of survey, adds all plans of survey to its data base and distributes those plans. Those plans of survey will remain permanently on Teranet's database and permanently on the computer of the end user. While it may be necessary to copy plans for the purpose of digitization of the land registry system, this does not change the fact that copying is considerably more extensive than under the old paper-based system where a survey would only be copied if requested and thus might never be copied. And unlike in *Bell Canada*, the material copied does not disappear after use but remains permanently both in Teranet's data base and on the computer of the end user. This makes the character of the dealing less fair.

67. **Factor 3: The amount of the dealing**. In *Alberta (Education)* the Court stated that this factor is not a quantitative assessment based on aggregate use, but an examination of the proportion between what was copied and the entire work. Quantification is considered under the character of the dealing factor.[50] In *CCH* this Court stated that it might be essential to copy the entirety of a judicial decision or academic article but if it were a work of literature needed for criticism it might only be appropriate to copy a part of the work.[51]

68. In this case the entirety of the plan of survey is copied. This may be necessary because the plan of survey cannot be divided up. This does not make the dealing fair; it just means that no lesser amount of the plan may be copied. This is a neutral factor that does not assist Teranet.

69. However, Teranet does not only copy a complete plan when requested. It copies all plans registered or deposited. Indeed, its business model requires it do so. This amount of copying is unfair.

---

[50] *Alberta Education*, para. 29.
[51] *CCH*, para. 56.

70. **Factor 4: The availability of alternatives to Teranet's exclusive dealings**. Surveyors have made plans of survey electronically available to the public for a fee with the consent of holders of copyright. For example, Land Survey Records Inc. ("LSR"), a private company from Barrie, Ontario, receives plans of survey from land surveyors sent on a voluntary basis and with the consent of the surveyors and sells copies publicly. LSR also makes available digital copies of the survey online. The critical difference between Teranet and LSR is that LSR negotiates a fee-sharing arrangement with land surveyors and pays a negotiated fee to land surveyors upon the sale of their plans.[52]

71. Teranet argues that these plans are not "official" registered or deposited plans.[53] But that is only because Teranet has a monopoly from the Province over distribution of registered plans of survey and has threatened to sue parties that have attempted to distribute such plans independently.[54] The fact that they currently do not does not mean there is no alternative. The availability of alternatives that involve some compensation for the sale of surveys going to the surveyors suggests that Teranet's exclusive dealing is unfair.

72. Teranet itself could compensate surveyors for the use of their protected works. This can be done through some kind of mechanism that would establish tariffs for royalties owed to surveyors every time Teranet copies and/or distributes their plans. This would be similar to a number of common frameworks already in existence in Canada such as the different collective societies which negotiate similar royalty scheme on behalf of Canadian artists and musicians. Indeed, Justice Sharpe on the certification appeal envisioned that "the likely result of a judgment in favour of the class may well be a process of negotiation to license Teranet to provide electronic copies of plans of survey in exchange for a royalty or fee."[55]

73. **Factor 5: The nature of the work**. "Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement

---

[52] Bunker Affidavit, para. 110 (AR, Vol. V, Tab 52, p. 27).
[53] Teranet's Cross-Appeal factum, para. 64.
[54] Affidavit of Tom Bunker sworn September 23, 2015, paras. 5-7 (AR, Vol VI, Tab 84, pp. 3-4); Affidavit of Blake Van Der Veek sworn September 23, 2015, paras. 5-8 (AR, Vol VI, Tab 91, pp. 24-25).
[55] Reasons of Ontario Court of Appeal dated April 14, 2015, para. 68 (AR, Vol. I, Tab 5, p. 25).

could lead to a wider dissemination of the work."[56] Plans of survey have great value when they are needed for a transaction; otherwise they will not be required by a member of the public. Thus, in many cases Teranet will be the only entity copying the plan of survey and it will be doing so for the purpose of conducting its business. This makes the nature of the dealing less fair.

74. **Factor 6: The effect of the dealing**. In *CCH* this Court stated that "if the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair."[57] As noted above, there is a market for surveyors dealing with their own plans of survey. Teranet's dealings directly compete with land surveyors, thereby reducing surveyors' revenues. Mr. Bunker provided the following unchallenged evidence: "Teranet sells our plans at a price that directly competes with us. This means that fewer people contact us or drop into offices to request copies of our surveys."[58] Moreover, the exclusive licence granted by the Province to Teranet negatively impacts the ability of surveyors to provide electronic copies of their works on a commercial basis.[59] In other words, copying by Teranet reduces the ability of surveyors to practice their profession and to benefit commercially from their works. This is clearly unfair.

75. When all of these factors are considered the only reasonable conclusion is that Teranet has not established that it deals fairly with plans of survey in which surveyors own copyright as authors. On the contrary, this is an inequitable, unfair, copyright-infringing arrangement in which the only parties not benefitting from the use of new technology are the creators themselves.

Technological Neutrality

76. Teranet relies on the doctrine of 'technological neutrality' to support its argument that the change from a system based on paper copies to one based on digital copies is not relevant to the outcome of this case. It says if uses of a work were non-infringing in a non-digital environment, they must be non-infringing in a digital environment.

---

[56] *CCH*, para. 58.
[57] *CCH*, para. 59.
[58] Bunker Affidavit, para. 108 (AR, Vol. V, Tab 52, p. 27).
[59] See evidence referred to in footnote 53 above.

77. With respect, Teranet misunderstands the principle of technological neutrality. The principle of technological neutrality requires the *Copyright Act* to be applied "equally between traditional and more technologically advanced forms of the same media."[60] But as this Court explained in the *SODRAC* decision, this does not mean copyright holders should not benefit where a new technology provides greater value to the same work:

> . . . Where the user of one technology derives greater value from the use of reproductions of copyright-protected work than another user using reproductions of the copyright-protected work in a different technology, technological neutrality will imply that the copyright holder should be entitled to a larger royalty from the user who obtains such greater value. Simply put, it would not be technologically neutral to treat these two technologies as if they were deriving the same value from the reproductions.[61]

78. Moreover, the fact that the infringing party may have invested considerable sums of money in developing the technology by which it monetizes the creator's work is not a basis to deny the creator just compensation for the use of his or her works:

> . . . it will never be the case that, because a user makes a significant investment in technology or assumes substantial risk, royalties for the rights holder will amount to zero. From the moment the right is engaged, licence fees will necessarily follow. The amount of the fee will depend upon the Board's consideration of the evidence in each case, always having regard to the principles of technological neutrality and balance and any other factors it considers relevant.[62]

79. 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 which has considerably increased the market value of these works. Nevertheless, only Teranet benefits financially from this development.

80. To the extent the paper system might have 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. Teranet's mode of delivery

---

[60] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 at para. 5.
[61] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 [*SODRAC*], para. 71.
[62] *Ibid.*, para. 77.

has clearly changed the value derived from the use of plans of survey. This is evident from the mere fact that users now pay much higher fees for accessing the same plans.

81. The doctrine of technological neutrality supports the appellant's argument that Teranet's dealings with plans of survey in the digital world are not fair.

E. No public policy defence available to Teranet

82. Teranet's final defence is based on public policy. Teranet cannot point to any instance in which copyright infringement has been justified on this broad and vague basis. Teranet relies on a partial excerpt of an *obiter* comment by the BC Court of Appeal in a 1985 decision. Clearly, this cannot be considered an authority for the availability of a broad public policy defence under Canadian copyright law. The *Copyright Act* is a comprehensive statute which reflects public policy and there is no need to resort to a judicially-created defence in that regard. Nor is it possible to do so as the *Copyright Act* is a complete code.

83. Teranet argues that use of registered and deposited plans is a matter of critical importance that justifies copyright infringement. But paying compensation to surveyors for use of their copyrighted works does not threaten the integrity or reliability of the system, which stems from the LROs statutory authority to accept plans of survey for registration or deposit. The plans of survey will be available; it is only a question of whether the creator is compensated.

PART IV – SUBMISSION ON COSTS

84. If this Court allows the cross-appeal for the limited purpose of referring the matter back to the Court of Appeal, the appellant should be awarded its costs of the cross-appeal as that is the order it says the Court should make. In the event the Court rules on the merits of the cross-appeal, the appellant also seeks its costs.

PART V – ORDER SOUGHT

85. The appellant seeks an order allowing the cross-appeal for the limited purpose of setting aside the Ontario Court of Appeal's order dismissing the cross-appeal as moot and remitting the matter back to the Ontario Court of Appeal to address common issues 3-7, with costs to the appellant. Alternatively, the appellant seeks an order dismissing the cross appeal on the merits with judgment on common issues 3-7 entered in its favour, with costs to the appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December, 2018.

______________________________	______________________________
Luciana P. Brasil Counsel for the appellant, Keatley Surveying Ltd.	Michael J. Sobkin Counsel for the appellant, Keatley Surveying Ltd

PART VI – LIST OF AUTHORITIES

CASES	**Paragraph(s) referenced in factum**
Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), [2012] 2 S.C.R. 345	54, 55, 64 and 67
Ankenman Associates Architects Inc. v. 0981478 B.C. Ltd., 2017 BCSC 333	41
Bishop v. Stevens, [1990] 2 S.C.R. 467 at 485	15 and 34
Canadian Broadcasting Corp. v. SODRAC 2003 Inc., 2015 SCC 57	77 and 78
CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339	54,67,73 and 74
Copyright Agency Limited v. State of New South Wales, [2007] FCA 80	16, 29
Copyright Agency Limited v. State of New South Wales, [2008] HCA 35	16, 29, 30 and 31
Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34	77
Geophysical Services Incorporated v. Encana Corporation, 2016 ABQB 230	44
Land Transport Safety Authority of New Zealand v. Glogau, [1999] 1 NZLR 261	32
Netupsky v. Dominion Bridge Ltd, [1972] S.C.R. 368	35, 36 and 38
R. v. Mentuck, [2001] 3 S.C.R. 442	7
Robert D. Sutherland Architects Ltd. v. Montykola Investments Inc. (1996), 150 N.S.R. (2d) 281	39,40 and 41
Robertson v. Thomson Corp., [2006] 2 SCR 363, 2006 SCC 43	43
Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36, [2012] 2 S.C.R. 326	57
SECONDARY SOURCES	

McKeown, John S., *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed. (loose-leaf updated 2018, release 6)	25
LEGISLATION	
O. Reg. 216/10	19
O. Reg. 43/96	32