S.C.C. FILE NO. 37863

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

BETWEEN:

KEATLEY SURVEYING LTD.

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

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

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PART I - OVERVIEW

1. The central issue in this appeal is the proper understanding of s. 12 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended ("*Copyright Act*"). CALL/ACBD submits that the approach adopted in the court below, if not carefully constrained, threatens to extend a statutory Crown copyright to primary sources of law, such as court judgments, decisions of independent tribunals, decisions of administrative decision makers, statutes and regulations. This case is an opportunity for this Court to build on its decision in *CCH* and clarify that s. 12 Crown copyright does not extend to primary sources of law. This end can be directly achieved (without disturbing either the result in the court below or the words of the *Copyright Act*) by making it clear that primary sources of law are not "works" within the meaning of the *Copyright Act*.

2. Additionally, the Court should take this opportunity to make it clear that the branch of Crown copyright that was found in a very few older cases to exist in primary sources of law by virtue of the royal prerogative is strictly confined to those few cases. The extent to which a vestigial Crown copyright based on the royal prerogative still is seen to encompass primary sources of law is doubtful.

PARTS II and III – ISSUES AND ARGUMENT

3. CALL/ACBD's submissions will address the issue of whether Crown copyright ought to apply to primary sources of law.

Balancing Copyright Protection and the Public Interest in Access to the Law

4. Copyright is a matter of statute law.[1] The *Copyright Act* is recognized to have dual objectives.[2] It promotes the public interest in protection and encouragement of creative activities by giving creators a period of exclusive control over their creative works and broad power to control their dissemination. A copyright holder can exploit this power limit or prohibit dissemination of works to extract an economic benefit.

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[1] *Copyright Act*, RSC 1985, c C-42, s 89; *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 9.
[2] *CCH Canadian Ltd at para 10*, quoting Thébèrge at paras 30-31.

5. This control conferred on the creator by the *Act* must be balanced against countervailing public interests, such as the creation and dissemination of new works. In particular, the public has a broad interest in being able to access and disseminate the law. This facilitates the ability of the public to understand the law and to engage in informed debate about it. This principle is recognized in Canada's access to information regimes.[3] It is also reflected in the open courts principle (that justice must be done openly and be discussed and debated in public)[4] as well as the duty to give reasons (to ensure transparency and accountability not only to the parties or the appellate courts but most importantly to the public).[5]

6. Restriction on the public's ability to access primary sources of law stymies both of these goals and fundamentally interferes with the free discussion of law and its development. Taken literally, the recognition of Crown copyright in primary sources of law would allow the Crown to deny access to court decisions, statutes, administrative decisions and regulations or limit access based upon willingness to pay.[6]

7. The analysis of the court below raises a concern that s. 12 has the potential to significantly affect the proper balance between the rights of persons to control and benefit from their creative works one hand and the crucial public interest in accessing, disseminating and discussing the law on the other. The test in the court below appears to take a broad, multifactorial approach to determining how s. 12 applies that has the potential to apply to judicial functions (which happen with the context of a framework established and controlled by the government), legislative functions and certainly to both independent and dependent administrative decision makers.

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[3] For example, *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-31, s 1; *Access to Information Act,* RSC 1985, c A-1, s 2

[4] *Canadian Broadcasting Corp. v Canada (Attorney General),* [2011] 1 SCR 19, 2011 SCC 2 at paras 1 and 2.

[5] *R v Sheppard*, [2002] 1 SCR 869, 2002 SCC 26 at para 15; see also *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817

[6] In *The Queen v James Lorimer & Co*, [1984] 1 FC 1065 (CA).

The Nature of Crown Copyright in Canada

8. Section 12 of the *Copyright Act* sets out two types of Crown copyright: statutory and prerogative, the latter being a vestigial form of Crown copyright arising from the royal prerogative. The *Act* does not explicitly affirm or define the prerogative form of copyright but the opening words of s. 12 suggest its continued existence, in that the statutory Crown copyright is without prejudice to any rights or privileges of Her Majesty. The *Act* is silent about whether either type of Crown copyright subsists in primary sources of law.

Crown Copyright Under the Royal Prerogative

9. The vestigial Crown copyright based on assertions of the Royal prerogative dates back before the 16th century where the Crown asserted the right to control the printing and publication of legislation and other Crown papers. The historical context suggests that this power was in largely motivated the desire to suppress the expression of religious and political discussion[7].

10. The continued application of this royal prerogative has been the subject of debate. However, an eighty-year old Australian case, *Attorney General (New South Wales) v Butterworth & Co)*[8] is the only thorough assessment of whether the prerogative applies to statute law.[9] *Butterworth* relied on the Crown prerogative to find Crown copyright in statutes.

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[7] Colin Tapper, "*The Law of Databases and Databases of the Law*" in *Essays in Honour of Sir Brian Neill*, (London: 2005, LexisNexis UK). At p 78, he says "Much of the motivation for [Crown control of printing] was the desire to suppress the expression of religious and political discussion."

[8] *AG (NSW) v Butterworths* (1938), 38 NSWLR 195 (Exq) ("*Butterworths*").

[9] *PS Knight Co Ltd and Gordon Knight v Canadian Standards Association*, 2018 FCA 222 (Dec 7, 2018) discusses section 12. The majority held that standards incorporated by reference into legislation did not attract Crown copyright, and that legislation falls within the ambit of s. 12 by interpretation of the words "by or under the direction or

11. Regardless of its historical origins, any necessity that existed for Crown copyright in primary law has now disappeared. Chitty, writing on the Royal Prerogative in 1820 and quoting Lord Erskine's review of the "odious jurisdiction" of the Star Chamber and the "disgraceful statutes" of Charles the Second, wrote of prerogative copyright: "It is, therefore, on grounds of political and public convenience, that the prerogative copyright exists, and its applicability must be restrained to the reasons for its existence. The law reprobates monopolies, and even in the case of the Crown, they are only allowed to subsist when necessity requires it."[10] In *Copyright Agency Ltd v New South Wales*, discussed below, Finkelstein J noted the "very extensive and grasping" claim of prerogative copyright[11] was cut back over the years, and only "possibly" included statutes.[12]

Statutory Copyright

12. Aside from this peculiar assertion of Crown prerogative copyright, copyright is entirely a statutory right. The origin of copyright legislation in the Commonwealth is the *Statute of Anne* or *Copyright Act 1710*, 8 Ann. c. 21 which was a statute about the right to control printing. The *Statute of Anne* was silent about a prerogative copyright or any statutory form of copyright for Crown documents.

13. In the current Canadian *Copyright Act,* s. 5 provides for the existence of copyright and describes the various cases under which copyright arises. The legislation goes on to address in sections 6 through 12 the term of copyright in various works. Section 13 describes who owns the copyright in the first instance and the effect of the assignment to other persons.

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control of" government departments. Its analysis referred to the case under appeal and seems not to have fully considered *Butterworth*. The issue of the section 12 statutory or prerogative copyright in primary sources of law remains a live issue.

[10] Joseph Chitty, Jun, Esq, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London: Butterworth, 1820). *Butterworth* quotes the first sentence of this passage at 237.
[11] At para 176, quoting Scrutton in *The Law of Copyright*, 4th ed, 1903, p 7.
[12] At para 178 and para 181, quoting G S Robertson, *The Law of Copyright*, Clarendon Press, Oxford, 1912, p 65."

14. Section 12 is in an anomalous provision in this framework. While appearing in the part of the legislation that addresses the term of copyright, it speaks both to circumstances in which copyright will be held by 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") and the term of that copyright. Unlike s. 5, it does not actually create a copyright.

Judicial Interpretation of Statutory Crown Copyright

15. Statutory provisions establishing Crown copyright are a relatively modern innovation in the law of copyright, and considerable criticism has been directed against their draftsmanship, including a characterization as a "legislative monstrosity."[13] That description has been often repeated, along with observations of problems posed by "atrocious drafting".[14]

16. In *Copyright Agency Ltd v New South Wales*,[15] the Federal Court of Australia considered when an original literary, dramatic, musical or artistic work is prepared "under the direction or control of" the state and held that a work is "published" by the Crown where the Crown can determine whether or not the work will be published.[16]

17. In concurring reasons Finkelstein J took the opportunity to write about judicial reasons, saying it was not clear they are a work prepared by or under the direction of the Crown, and "the intention of the provision did not seem to be directed to such a work."[17] The work is not made by or under the direction or control of the Crown, but authorship can be attributed to the Crown, as a fiction, in the absence of an identifiable author for copyright purposes.[18]

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[13] *Butterworth*, p 258.
[14] Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* at p 49; David Vaver, "Copyright and the State in Canada and the United States", 10 IPJ 187 (May 1996) at 191.
[15] [2007] FCAFC 80, 73 IPR 1; reversed [2008] HCA 35, without appeal of this issue.
[16] *Copyright Agency Ltd* at paras 122-128.
[17] *Copyright Agency Ltd* at para 181, quoting G S Robertson, *The Law of Copyright*, Clarendon Press, Oxford, 1912, p 65.
[18] *Copyright Agency Ltd* at paras 184 to 185.

18. In the United Kingdom the *Copyright, Designs and Patents Act 1988*, c. 48 makes specific provision for Crown copyright in Acts of Parliament but does so by way of a creation of a form of copyright that is distinct from the Crown copyright extended to literary works.[19] In New Zealand, there is no copyright in primary sources of law, including legislation and judgements of courts and tribunals.[20]

Does Section 12 Create Crown Copyright in Primary Law?

19. CALL/ACBD submits that there should be no copyright in primary sources of law. There is a high public interest in having these writings be public and subject to public analysis and debate.[21] There is no countervailing interest in bestowing an economic advantage on the creator or creators of a primary source of law; these are not writings created with any incentive to profit. The Crown has no interest in controlling their dissemination. There is simply nothing to counterbalance the public interest in the freedom to publish and discuss the contents of primary sources of law. Indeed, no judge in Canada has ever affirmed a claim of Crown copyright over primary law documents is supportable in law.[22]

20. However, the decisions below give rise to a concern that if a similar contextual analysis were applied to primary sources of law, it may lead to the conclusion that statutory Crown copyright applies.

21. In *CCH* (the only judgment of this Court discussing copyright in primary sources of law), this Court said “reported reasons, when disentangled from the rest of the

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[19] By authority of *Copyright Act, 1956*, 4 & 5 Eliz 2 c 74, s 39(1), providing that, if apart from that subsection copyright would not subsist, copyright shall subsist by virtue of that subsection.

[20] *Copyright Act 1994*, Public Act 1994 No 143, s 27.

[21] *BC Jockey Club v Standen* (1985) 8 CPR (3d) 283 at para 12 (BCCA).

[22] David Vaver, “Copyright Inside the Law Library”, (1995) 53 Advocate (Vancouver) 355 at 356-357. *Knight v CSA* (note 9 above) was about originality. CSA held a registered copyright and did not make a Crown copyright claim, nor did the Crown. The majority held the subject of the copyright did not constitute law. Nevertheless, the majority cited the ruling under appeal here in saying s 12 could allow copyright to subsist in the law.

compilation—namely the headnote—are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons" (Emphasis in original).[23] Though the reasoning is not explicit, this result is in keeping with the idea that the law should be open and available to all.

The US Approach

22. In the United States the situation is clearer. It has long been established that a there is no copyright in a judgment (although a collection of judgments or annotations on a judgment may be subject to copyright).[24] In *Wheaton v Peters*[25] the Supreme Court examined whether case reports could be subject to copyright and concluded 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."[26]

23. In this, *Wheaton v Peters* is remarkably similar to *CCH*. The case does not rest on distinctions of Crown prerogative or legislative differences. It simply makes the same point made in *CCH*: that reasons for judgment are not the subject of copyright.[27] In *CCH*, before pronouncing that judicial reasons alone are not covered by copyright, the court addressed the requirement of originality.[28] McLachlin C.J. noted that it is only when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are reported decisions considered "original" works covered by copyright."[29]

24. Regarding statute law, the US Court of Appeals offers an appealing analysis. The people "govern themselves through their legislative and judicial representatives, and

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[23] *CCH v LSUC*, 2004 SCC 33 at para 35.
[24] C Tapper, at 87.This is separate from the codified public domain status of US federal government work *United States Code*, Title 17, s 105.
[25] (1834) 33 US 591 at p 657.
[26] *Wheaton* at p 668.
[27] *Banks v Manchester*, 128 US 244 (1888) and *Callaghan v Myers*, 128 US 617 (1888) confirmed the same for state judgments.
[28] As section 5 applies to "original literary, dramatic, musical and artistic" works.
[29] At para 33.

they are ultimately the source of our law…" For purposes of copyright law, this means the people are the constructive authors and the work then public domain material.[30]

Section 12 of the *Copyright Act* Should not Apply to Primary Law

25. In CALL/ACBD's submission, the American approach arrives at the correct position from a public policy perspective and should be adopted where it is possible to do so in manner that is consistent with Canadian law. In this case the Court should take care to address how s. 12 operates in this regard.

26. The most effective means of achieving this would be to hold that primary sources of law are not "original literary, dramatic, musical and artistic" works within the meaning of s. 5 of the *Copyright Act* and therefore copyright simply does not subsist in such documents. This offers a comprehensive explanation as to why nobody – not even the Crown – holds copyright in primary sources of law.

27. In the case of judicial decisions there is a clear path to achieving the end of ensuring that s. 12 does not undermine this court's holding in *CCH* that there is no copyright in a judgment. The application of s. 12 is premised on the work in question being "prepared or published by or under the direction or control of Her Majesty or any government department", a proposition which is simply inconsistent with the fundamental constitutional principle of judicial independence. Given that the courts have held that judicial independence includes administrative independence, it contradicts this principle to then hold that the judgments of the court are prepared for or published by or under the direction of the Crown or government.[31]

28. This analysis can be extended to bodies that have been legislatively endowed with a significant degree of independence from the control of government or the Crown. For example, certain tribunals are empowered to hear and decide matters independently and the Crown's role is limited to that of a hearing participant. Some, such as the

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[30] *State of Georgia (Code Revision Commission) v Public.Resource.Org, Inc* No 17-11589 P 21 (US Ct App, 11th Cir.).
[31] *Conférence des juges de paix magistrats du Québec v Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 SCR 116.

National Energy Board, are even constituted as courts of record.[32] It could be argued that it would simply be inconsistent with a legislative grant of independence for such a body to be acting under the "direction" of the Crown or the government. However, this may need to be reconciled with this Court's recent decision in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc,*[33] where this Court held that the National Energy Board – in some contexts – is the vehicle through which the Crown acts.

29. In the case of statute law, the recent decisions of this court in *Mikisew Cree #2*[34] and *Clyde River* provide an analytic framework for excluding the application of s. 12 of the *Copyright Act*. In *Clyde River* this Court held that references to the Crown generally were a shorthand for the government exercising executive powers whether under statute or the Royal Prerogative. By contrast, in *Mikisew Cree #2* this court held that the whole legislative process (in the context of acts of parliament or the legislatures) is not executive in nature but arises from powers vested under Part IV of the *Constitution Act, 1867* – that is no part of the legislative process is carried out by the executive acting in its executive capacity but by ministers acting in their parliamentary role. Taken together this makes it clear that the lawmaking process is not under the direction or control of the Crown or the government within the meaning of s. 12 of the *Copyright Act*.

30. While CALL/ACBD would support the application of any of these approaches to limiting the scope and application of s. 12 to primary sources of law, it urges this court to either hold that primary sources of law are in fact not literary works within the meaning of s. 5 or to keep the door open for such a ruling in a future case.

31. Fundamentally, the question of whether primary sources of law were intended to be treated as "original literary, dramatic, musical and artistic" works is a matter of statutory interpretation. As held in *Rizzo & Rizzo Shoes Ltd*[35] this requires not only considering the plain language of a statute but also considering the overall scheme of the

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[32] *National Energy Board Act*, RSC 1985, c N-7, s 11.
[33] 2017 SCC 40, [2017] 1 SCR 1069 at 27-29.
[34] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.
[35] [1998] 1 SCR 27.

legislation as well as the largely statutory framework so as to arrive at a result that is reflective of the intention of Parliament.

32. While the words “original literary, dramatic, musical and artistic work” in s. 2 of the *Act* read in isolation could support the subsistence of copyright in legislation, judgments and administrative decisions, this conclusion ignores the overall scheme of the *Act* – which is to achieve balance between protecting the artistic and commercial interests of creators in their original works, on the one hand and the larger public interest, on the other (including ensuring that the law is known, accessible and capable of being discussed). Moreover, the text of s. 12 itself contemplates that the works in question would have an author that is not the Crown and that author would be capable of entering into agreements with the Crown (“subject to any agreement with the author”), a concept that is difficult to apply to the context of primary sources of law.

33. Given that the Crown does not share the proprietary interests of the creators targeted by the *Act*, it is not reasonable to conclude that it was the intention of Parliament in passing either s. 5 or s. 12 to undermine the larger public interests of access to primary sources of law. There is simply no language in the *Copyright Act* that would suggest such an intention. Accordingly, CALL/ACBD submits that any interpretation of the scope of the Crown copyright set out in s. 12 ought to exclude primary sources of law.

PARTS IV and V – SUBMISSION ON COSTS

34. CALL/ACBD does not seek costs and asks that no costs be awarded against it.

Dated at Victoria, British Columbia this 18th day of December, 2018.

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PART VI – TABLE OF AUTHORITIES AND LEGISLATION

Cases:	Paragraph References
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