Federal Court  Cour fédérale

Date: 20171222

Docket: T-1178-12

Citation: 2017 FC 1192

Fredericton, New Brunswick, December 22, 2017

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

CANADIAN STANDARDS ASSOCIATION

Plaintiff

and

P.S. KNIGHT CO. LTD., GORDON KNIGHT AND PETER KNIGHT

Defendants

AND BETWEEN:

P.S. KNIGHT CO. LTD.

Plaintiff By Counterclaim

and

CANADIAN STANDARDS ASSOCIATION

Defendant By Counterclaim

REASONS FOR ORDER AND ORDER

I. Overview

[1] On or about January 3, 2018, the Canadian Standards Association [CSA] intends to publish and distribute its 2018 version of the Canadian Electrical Code [Code]. A version of that Code has been published and distributed by the CSA every third year since at least as early as January 2009; namely, January 2009, 2012 and 2015. The Defendants, P.S. Knight Co. Ltd., Gordon Knight and Peter Knight [Moving Party], knew of each of these past publications.

[2] The Moving Party seeks an injunction prohibiting CSA from publishing its 2018 version of the Code in January 2018. It contends the CSA has not provided a "mature draft" of its standards for public review and comment before final approval by the technical committee, as required by the Standards Council of Canada [Council]. The CSA is a Standards Development Organization [SDO] certified by the Council. Clause 6.6.2 of the Council's SDO accreditation requirements states in part:

> The SDO shall notify the Canadian public of standards available for public review. The public review shall be a minimum period of 60 calendar days when a mature draft is available and shall be completed before final approval of the technical committee.
>
> The notice shall include the start and end date for the review period.

[3] CSA contends it has met the Council's public review requirement by publishing draft standards individually, as opposed to publishing them together as a complete draft Code. These individual standards are published on its public web-site as they are developed, accompanied by a notice setting out the "end date" for public comment. The Moving Party

contends that such a process, spread out over a three-year period, does not meet the public review requirement of a "mature draft" of the amended standards.

[4] At the hearing, CSA contended I had no jurisdiction to consider this application for an interlocutory injunction because the Moving Party had failed to establish it sought injunctive relief in its originating process. I disposed of that argument at the hearing, having satisfied myself that an issue had been raised in the counterclaim which, although worded somewhat imprecisely, was sufficient to ground a claim for an injunction.

II. Analysis

[5] The issues between the parties are long and complicated. They have resulted in several Orders from this Court, and at least one appeal to the Federal Court of Appeal. For the purposes of this motion, I do not consider it necessary to re-visit each of those Orders. Having satisfied myself that I have jurisdiction to consider this matter, my sole task is to determine whether the Moving Party has established each requirement of the conjunctive three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR-MacDonald*], namely, that: (1) there is a serious issue to be determined; (2) the Moving Party will suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours the granting of the injunction (see also *Janssen Inc. v. Abbvie Corp.,* 2014 FCA 112, [2014] F.C.J. No 471 at para 14).

A. *Serious issue to be determined*

[6] The CSA's Code, as supplemented, amended or added to from time to time by it, becomes law automatically in some Provinces (see, for example: ss. 2(c), 3(1) and 3(2) of the *Electrical Code Regulations*, N.S. Reg. 95/99; s. 3(a) of the *Electrical Code Regulation*, Alta. Reg. 209/2006). Accordingly, the Code becomes mandatory in several provinces immediately upon its publication. Contrary to CSA' assertions, large swaths of the Canadian public will have no choice but to comply with the Code once it is published in 2018. This makes the public review requirement particularly important.

[7] Bearing this in mind, I am of the view the Moving Party raises a serious issue for determination by the Court. I conclude that the individual publication of proposed amendments to the individual standards over a three-year time-frame, for the purpose of allowing public review and comment, may not constitute an opportunity of public review of a "mature draft", as contemplated by the Council's SDO accreditation requirements. I conclude the Moving Party raises a serious issue as to whether the CSA's procedure allows for public review of, and comment upon, a mature draft as required by the Council.

B. *Irreparable Harm*

[8] The requirement of irreparable harm is met when there is a risk of damages for which compensation at trial would be impossible to determine or would constitute an inadequate remedy (*RJR-MacDonald* at para. 64). In the event the CSA has failed to meet the Council's

public review requirement, the harm caused to the Moving Party and others by the publication of the Code in January, 2018, would be irreparable for the following reasons.

[9] First, the Canadian public in many provinces (including the Moving Party in Alberta) would become subject to a regulatory scheme that has been developed in a manner inconsistent with legislative intent. That is to say that when the regulations that automatically incorporate the Code into provincial law were adopted, it was understood that amended versions of the mature standards would have been available for public review and comment for 60 days. To what extent a version of a standard is mature is very much up for debate. Furthermore, mature Code has clearly not been available for public comment for 60 days. The harm to the Moving Party and the public of improperly implementing regulations constitutes, in my view, irreparable harm.

[10] Second, the Moving Party, which is in the business of publishing an annotation of the Code, would have been denied the opportunity to review a mature draft of the revised standards, contrary to the Council's SDO accreditation requirements. This would have the effect of preventing the Moving Party from publishing its product in a timely fashion after the release of the revised Code, generating serious and immeasurable harm to the Moving Party's business.

C. *Balance of Convenience*

[11] The Moving Party contends that where there is a serious issue to be determined and where irreparable harm has been established, it follows that the balance of convenience favours the granting of the injunction. While it is admittedly rare that the balance of convenience does

not follow findings of a serious issue to be determined and of irreparable harm, I am satisfied this is one such case.

[12] CSA established that it will cost it in excess of $1 million to adopt a new public review process. It also established that the Council has endorsed its approach for the public review of draft standards. Finally, the evidence demonstrates the Moving Party has known about the existing review process since at least as early as 2009, and has failed to bring any application for an injunction until now.

[13] In my view, the Moving Party has sat on its rights. Its failure to seek injunctive relief before this late date militates in favour of the CSA. Furthermore, the Moving Party is seeking an interlocutory injunction that would disrupt the status quo. This factor also militates in favour of the CSA in a balance of convenience analysis. Finally, I am mindful of the confusion that would reign and the substantial costs that would be incurred if the review process was to be altered at such a late date. For these reasons, I am not satisfied the balance of convenience favours the granting of an interlocutory injunction.

III. Conclusion

[14] Given all of the above, I am satisfied that the Moving Party has not met all three components of the tri-partite test. The balance of convenience does not, in my view, favour the granting of the interlocutory injunction sought. In the circumstances, I would dismiss the motion for an interlocutory injunction prohibiting CSA from publishing a revised version of the Code in January 2018.

ORDER

THIS COURT ORDERS that: the motion for an interlocutory injunction prohibiting CSA from publishing its 2018 version of the Canadian Electrical Code in January 2018 is dismissed without costs.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CANADIAN STANDARDS ASSOCIATION and P.S. KNIGHT CO. LTD., GORDON KNIGHT AND PETER KNIGHT and P.S. KNIGHT CO. LTD. v. CANADIAN STANDARDS ASSOCIATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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DATED:	DECEMBER 22, 2017

APPEARANCES:

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Jeffrey Radnoff and Charles Haworth	FOR THE DEFENDANTS/PLAINTIFF BY COUNTERCLAIM (P.S. KNIGHT CO. LTD.)

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