Federal Court of Appeal | Cour d'appel fédérale

Date: 20181207

Dockets: A-90-16
A-121-16

Citation: 2018 FCA 222

CORAM: **WEBB J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

P.S. KNIGHT CO. LTD. and
GORDON KNIGHT

Appellants

and

CANADIAN STANDARDS ASSOCIATION

Respondent

Heard at Toronto, Ontario, on March 1, 2018.

Judgment delivered at Ottawa, Ontario, on December 7, 2018.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: RENNIE J.A.
DISSENTING REASONS BY: WEBB J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this appeal, the appellants seek to set aside the judgment of the Federal Court in *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2016 FC 294 (*per* Manson J.) as well as the supplemental judgment in *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2016 FC 387 (also *per* Manson J.).

[2] In the judgment, the Federal Court granted the application of the respondent Canadian Standards Association (the CSA) for copyright infringement, enjoined the appellants from continuing that infringement, ordered them to deliver up to the CSA all infringing copies of the 2015 version of the *Canadian Electrical Code, Part I* (the CSA Electrical Code or the Code), as well as all plates or electronic files of the infringing copies, and ordered the corporate appellant (Knight Co.) to pay statutory damages in the amount of $5,000.00. The Federal Court also granted the CSA its costs. In its supplemental judgment, the Federal Court quantified those costs in the amount of $96,336.00 and ordered them to be paid by Knight Co.

[3] For the reasons that follow, I would dismiss both appeals, with costs.

I. The Factual and Statutory Background to these Appeals

[4] It is useful to commence by outlining the relevant factual and statutory background to these appeals.

A. *The CSA and the CSA Electrical Code*

[5] The CSA is a federal not-for-profit corporation governed by the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. It is engaged in developing, testing and certifying over 3,000 voluntary standards. One of the most important of these is the CSA Electrical Code, which sets out safety standards for installation and maintenance of electrical equipment in Canada.

[6] The CSA published the first version of CSA Electrical Code in 1927 and has updated and published revised versions of the Code continuously ever since. The CSA sells the CSA Electrical Code and uses the income from these sales to finance the development of the Code and other voluntary standards. The 2015 version of the CSA Electrical Code is at issue in these appeals.

[7] The CSA has been accredited by the Standards Council of Canada (the Standards Council) as a standards development organization. The Standards Council is a non-agent federal Crown corporation, established pursuant to the *Standards Council of Canada Act*, R.S.C. 1985, c. S-16, s. 3 (the *Standards Council Act*). According to subsection 4(1) of that Act, the Standards Council's mandate is to:

[…] promote efficient and effective voluntary standardization in Canada, where standardization is not expressly provided for by law and, in particular, to	[…] de faire progresser l'économie nationale, de contribuer au développement durable, d'améliorer la santé, la sécurité et le bien-être des travailleurs et du public, d'aider et de protéger les consommateurs, de faciliter le commerce intérieur et extérieur, et de développer la coopération internationale en matière de normalisation, le Conseil a pour mission d'encourager une normalisation efficiente et efficace au Canada lorsque celle-ci ne fait l'objet d'aucune mesure législative, et notamment :
(*a*) promote the participation of Canadians in voluntary standards activities,	*a*) d'encourager les Canadiens à participer aux activités relatives à la normalisation volontaire;
(*b*) promote public-private sector cooperation in relation to voluntary standardization in Canada,	*b*) d'encourager la coopération entre les secteurs privé et public en matière de normalisation volontaire au Canada;

(*c*) coordinate and oversee the efforts of the persons and organizations involved in the National Standards System,	*c*) de coordonner les efforts des personnes et organismes s'occupant du Système national de normes, et de voir à la bonne marche de leurs activités;
(*d*) foster quality, performance and technological innovation in Canadian goods and services through standards-related activities, and	*d*) d'encourager, dans le cadre d'activités relatives à la normalisation, la qualité, la performance et l'innovation technologique en ce qui touche les produits et les services canadiens;
(*e*) develop standards-related strategies and long-term objectives,	*e*) d'élaborer des stratégies et de définir des objectifs à long terme en matière de normalisation.
in order to advance the national economy, support sustainable development, benefit the health, safety and welfare of workers and the public, assist and protect consumers, facilitate domestic and international trade and further international cooperation in relation to standardization.	

[8] Among other things, the Standards Council is empowered to accredit organizations in Canada that are engaged in standards development (paragraph 4(1)(*d.1*) of the *Standards Council Act*) and to approve standards submitted by such organizations as national standards (paragraph 4(1)(*e*) of the *Standards Council Act*). The Standards Council has approved the CSA Electrical Code as a national standard.

[9] The introduction to the 2015 version of the CSA Electrical Code states that it is a "voluntary code for adoption and enforcement by regulatory authorities". The Code has been adopted by the federal, provincial and territorial governments and incorporated by reference into legislation and regulations regarding electrical safety.

[10] For example, at the federal level, section 8.1 of Part VIII of the *Canada Occupational Health and Safety Regulations*, SOR/86-304 incorporates the CSA Electrical Code as part of its definition of "Canadian Electrical Code" that federally-regulated workplaces and employers are required to comply with in accordance with subsection 8.3(1) of those regulations.

[11] At the provincial and territorial level, the CSA Electrical Code has been incorporated by reference into regulations and statutes setting standards for installation and maintenance of electrical equipment, sometimes with variation for local conditions (see, for example, *Electrical Safety Regulation*, B.C. Reg. 100/2004, s. 20; *Electrical Code Regulation*, Alta Reg. 209/2006, s. 3(*a*); *The Electrical Code Regulations*, R.R.S., c. E-6.3 Reg. 16, s. 3; *Manitoba Electrical Code*, M.R. 76/2018, s. 1; *Electrical Safety Code*, O. Reg. 164/99, s. 1; *Construction Code*, C.Q.L.R., c. B-1.1, r. 2, s. 5.01; *General Regulation*, N.B. Reg. 84-165, s. 2; *Electrical Code Regulations*, N.S. Reg. 95/99, s. 3; *Canadian Electrical Code Regulations*, P.E.I. Reg. EC406/13, s. 2; *Electrical Regulations*, N.L.R. 120/96, s. 4; *Electrical Protection Act*, R.S.Y. 2002, c. 65, s. 1.01(1); *Electrical Protection Act*, R.S.N.W.T. 1998, c. E-3, s. 1(1); *Electrical Protection Act*, R.S.N.W.T. (Nu) 1988, c. E-3, s. 1(1)).

[12] The evidence before the Federal Court established that the amendments to the CSA Electrical Code that were included in the 2015 version of the Code were developed by a committee set up under the auspices of the CSA and that members of that committee as well as representatives of the CSA expended time and effort to produce the 2015 version of the CSA Electrical Code. Members of the committee included two CSA employees as well as several representatives of provincial, territorial and municipal electrical inspection authorities, certain

federal departments and agencies and industry, labour and educational associations. The evidence also indicated that the committee members who were not employed by the CSA had signed agreements, assigning to the CSA the copyright in the amendments developed by the committee that were incorporated into the 2015 version of the CSA Electrical Code. However, the practice of obtaining such assignments appears not to have extended back to the earlier versions of the CSA Electrical Code produced before approximately 2010.

[13] Copyright in the 2015 CSA Electrical Code was registered on April 27, 2015 in favour of the CSA. There was evidence before the Federal Court indicating that a similar registration was made for the 2012 version of the Code.

[14] The introduction to the 2015 version of the CSA Electrical Code claims copyright on behalf of the CSA, shows the CSA as being the publisher, states that the CSA is the owner or authorized licensee of the copyrighted works and warns that the unauthorized use, modification, copying or disclosure of the CSA Electrical Code may violate the law and lead to legal action.

[15] The evidence before the Federal Court indicated that the CSA Electrical Code was published by the CSA and the Ontario Electrical Safety Authority. In the Ontario publication, the Electrical Safety Authority specifically acknowledges the CSA's copyright in the Code and the fact that it has been given permission by the CSA to reproduce the Code. There was no evidence to indicate whether the CSA Electrical Code was similarly published by other provincial or territorial authorities nor to indicate how easy or difficult it might be to obtain a copy of the CSA Electrical Code.

B. *The Appellants and the Circumstances Giving Rise to the Application by the CSA to the Federal Court*

[16] Knight Co. is a commercial competitor of the CSA. One of the publications offered and sold in the past by Knight Co. was the Electrical Code Simplified (the ECS), a simplified version of the CSA Electrical Code intended for residential applications. It was developed in the 1960's by Peter Knight, the former president and director of Knight Co. and father of the appellant, Gordon Knight, who is now the president and a director of Knight Co.

[17] At the time the ECS was first developed and published, Peter Knight and the CSA had a good working relationship, providing each other with advance copies of their respective publications. In 1968 and 1969, they exchanged a series of letters, which included reminders from the CSA that Peter Knight ensure that he not infringe the CSA's copyright in the Code and make sure that he properly attributed the excerpts from the CSA Electrical Code used in the ECS. In response, Peter Knight wrote that he was "very careful to avoid any infringement of C.S.A.'s copyright" (Affidavit of Gordon Knight, Exhibit 3, Appeal Book, Vol. 2, p. 485) and that "[i]f we are in fact infringing on C.S.A. copy-right [*sic*] we will take immediate steps to correct this situation" (Affidavit of Gordon Knight, Exhibit 5, Appeal Book, Vol. 2, p. 490).

[18] A letter sent by the CSA in 1969 gave Peter Knight permission to quote from the CSA Electrical Code, so long as "recognition of the source is given in a clear manner on those items which are direct quotations" (Affidavit of Gordon Knight, Exhibit 7, Appeal Book, Vol. 2, p. 495). In his affidavit filed with the Federal Court, Gordon Knight claims that this permitted use was assigned from Peter Knight to Knight Co. after it was incorporated, though no additional

evidence was provided to substantiate this fact, and the CSA claims it did not have knowledge or approve of any such assignment.

[19] In 2004, the CSA offered to purchase Knight Co., but the offer was refused. Following the breakdown in negotiations, the relationship between the parties deteriorated. In a letter dated July 12, 2007, the CSA offered to grant a licence to Peter Knight personally to reproduce excerpts from the Code that could not be assigned or transferred to any other person or legal entity. No response to that letter was received by the CSA.

[20] Following Gordon Knight's purchase of Knight Co. in 2010, the CSA wrote to Knight Co. to inform the company that any licence that may have existed was terminated. In 2012, the CSA discovered that Knight Co. intended to publish a new version of the ECS which is the subject of the action in Federal Court file T-1178-12, which is still pending before that Court. After that action was commenced, the relationship between the parties continued to worsen and Gordon Knight started a website which is intensely critical of the CSA. In response, the CSA launched a defamation proceeding in the Ontario Superior Court of Justice: see *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2015 ONSC 7980 and 2016 ONSC 896. That proceeding appears still to be pending.

[21] At the behest of Gordon Knight, a Member of Parliament asked questions in the House of Commons in 2013 relating to the federal government's perspective on the CSA. The Minister of Industry explained that the CSA was not a regulatory entity, but rather a not-for-profit-membership-based association. The Minister further explained the federal government's view

that standards development organizations such as the CSA "maintain the intellectual property and copyright of voluntary standards that are referenced in regulations" (Affidavit of Doug Morton, Exhibit 14, House of Commons Debates, 41st Parliament, 2nd Session, No. 026 (November 28, 2013), Appeal Book, Vol. 1, pp. 324-327).

[22] In 2016, Knight Co. reproduced and threatened to distribute a complete and identical copy of the 2015 version of the CSA Electrical Code at one-third the price the CSA charges, advertising as follows:

> Why purchase the PS Knight edition of the CEC?
> Same Code – Different Price
> PS Knight's Code Book • $60
> CSA's Code book • $180
> You save $120. All the Code at 1/3 the cost!
>
> (Affidavit of Doug Morton, Appeal Book, Vol. 1, Tab 10, p. 117, para. 37)

[23] In response, the CSA initiated the application under Rules 61 and 300 of the *Federal Courts Rules*, SOR/98-106, and the *Copyright Act*, R.S.C. 1985, c. C-42 that gave rise to the judgments under appeal.

C. *The Statutory and Regulatory Framework for Publication and Reproduction of Statutes and Regulations*

[24] It is convenient to next summarize the framework that applies to the publication and reproduction of statutes and regulations. As the discussion that follows demonstrates, this framework does not apply to materials incorporated by reference into statutes or regulations, like the CSA Electrical Code.

(1) Federal

[25] At the federal level, original statutes and nearly all original regulations are published by the Queen's Printer: *Publication of Statutes Act*, R.S.C. 1985, c. S-21, s. 10; *Statutory Instruments Act*, R.S.C. 1985, c. S-22, ss. 10(1), 11(1). (Section 15 of the *Statutory Instruments Regulations*, C.R.C., c. 1509 exempts certain regulations from publication on national security and other grounds.) The Queen's Printer for Canada is an "officer of the Department [of Public Works and Government Services]" and "exercise[s] [his or her] printing and publishing functions", including those "assigned […] by the Minister [of Public Works and Government Services]", "under the supervision of the Minister": *Department of Public Works and Government Services Act*, S.C. 1996, c. 16, s. 19. Likewise, the federal Minister of Justice and Attorney General maintains and publishes the consolidated statutes and regulations: *Legislation Revision and Consolidation Act*, R.S.C. 1985, c. S-20, ss. 2, 26, 28(1). The Revised Statutes and supplements to them were printed and distributed in accordance with the *Revised Statutes of Canada, 1985 Act*, R.S.C. 1985, c. 40 (3rd Supp.), ss. 8, 15.

[26] The relevant definitions in the *Statutory Instruments Act* exclude from the definition of a "regulation" and "statutory instrument" materials that are incorporated by reference into a regulation. In this regard, subsection 2(1) of the *Statutory Instruments Act* defines a "regulation" as meaning a "statutory instrument":

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or	*a*) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of	*b*) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le

Parliament,	régime d'une loi fédérale.
and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;	Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale.

[27] Subsection 2(1) of the Statutory Instruments Act defines a "statutory instrument" as meaning:

(*a*) […] any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established	*a*) Règlement, décret, ordonnance, proclamation, arrêté, règle, règlement administratif, résolution, instruction ou directive, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat ou autre texte pris :
(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or	(i) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale, avec autorisation expresse de prise du texte et non par simple attribution à quiconque — personne ou organisme — de pouvoirs ou fonctions liés à une question qui fait l'objet du texte,
(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament, [emphasis added]	(ii) soit par le gouverneur en conseil ou sous son autorité, mais non dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale; [mon soulignement]

[28] In accordance with the foregoing, a regulation must be a statutory instrument. Hence, something that is not a statutory instrument cannot be a regulation. And, to be a statutory

instrument, the instrument must either be issued, made or established pursuant to a power established under federal legislation under which the instrument is expressly authorized to be issued, made or established or must have been issued, made or established by or under the non-statutory authority of the Governor in Council.

[29] Neither can be said of the CSA Electrical Code. It was not issued, made or established by or under the non-statutory authority of the Governor in Council. Nor was it made or established in the execution of a power by or under an Act of Parliament under which it was expressly authorized to be issued because it was not issued under the authority of the *Standards Council Act* or any other legislation. Rather, the CSA Electrical Code was developed and issued by the CSA, a private corporation. The fact that the Standards Council has recognized the CSA Electrical Standard as a national standard and that the CSA has been accredited by the Standards Council does not transform the CSA Electrical Code into a statutory instrument. As was noted by the British Columbia Court of Appeal in *R. v. Sims*, 2000 BCCA 437, 148 C.C.C. (3d) 308 at para. 32:

> The Canadian Standards Association is a voluntary non-statutory organization. In developing standards and publishing them, the Association does not exercise powers conferred by or under an Act of Parliament and therefore its standards cannot be regarded as "statutory instruments" or "regulations" within the meaning of the *Statutory Instruments Act*.

[30] The recently-enacted federal *Incorporation by Reference in Regulations Act*, S.C. 2015, c. 33 recognizes that standards like the CSA Electrical Code need not be published in accordance with the requirements set out in the *Statutory Instruments Act*. This Act amends the *Statutory Instruments Act* to provide for an express power to incorporate by reference in regulations:

18.1 (1) Subject to subsection (2), the power to make a regulation includes the power to incorporate in it by reference a document — or a part of a document — as it exists on a particular date or as it is amended from time to time.	18.1 (1) Sous réserve du paragraphe (2), le pouvoir de prendre un règlement comporte celui d'y incorporer par renvoi tout ou partie d'un document, soit dans sa version à une date donnée, soit avec ses modifications successives.

[31] Following these amendments, subsection 18.3(1) of the *Statutory Instruments Act* requires that the appropriate authority, usually the minister responsible for the administration of a regulation, ensure that material that is incorporated by reference is "accessible", though that term is left undefined and has yet to be interpreted in a reported decision. Section 18.4 provides that publication in the *Canada Gazette* of material incorporated by reference is not required, reflecting the understanding that one of the advantages of incorporation by reference is the possibility of bypassing the formal requirements of the *Statutory Instruments Act* concerning publication.

[32] Thus, under federal law, the CSA Electrical Code is not a regulation and need not be published by the federal government, although the appropriate authority must ensure that it is accessible.

[33] The appellants point to the *Reproduction of Federal Law Order*, SI/97-5 (the Reproduction of Federal Law Order), which allows for the copying of federal enactments and decisions, asserting that the Reproduction of Federal Law Order provides authority for Knight Co. to copy and sell the CSA Electrical Code. I disagree.

[34] The Reproduction of Federal Law Order provides that:

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.	Toute personne peut, sans frais ni demande d'autorisation, reproduire les textes législatifs fédéraux, ainsi que leur codification, et les dispositifs et motifs des décisions des tribunaux judiciaires et administratifs de constitution fédérale, pourvu que soient prises les précautions voulues pour que les reproductions soient exactes et ne soient pas présentées comme version officielle.

[35] The term "enactment" is not defined in the Reproduction of Federal Law Order, but, in my view, must be understood as only encompassing statutes enacted by Parliament and regulations made by the Governor in Council or otherwise under statutory authority. The term does not include materials incorporated by reference into a regulation that need not be published in the manner contemplated by the *Statutory Instruments Act*.

[36] The federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2(1) defines an enactment as meaning "an Act or regulation or any portion of an Act or regulation", and a regulation as including:

an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established	Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :
(*a*) in the execution of a power conferred by or under the authority of an Act, or	*a*) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;
(*b*) by or under the authority of the Governor in Council;	*b*) soit par le gouverneur en conseil ou sous son autorité.

[37] Although the definitions in subsection 2(1) of the *Interpretation Act* are stated to apply for the purposes of the *Interpretation Act* itself, paragraph 15(2)(*b*) of the *Interpretation Act* provides that:

Where an enactment contains an interpretation section or provision, it shall be read and construed	Les dispositions définitoires ou interprétatives d'un texte :
[…]	[…]
(*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.	*b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

[38] The *Interpretation Act* and the Reproduction of Federal Law Order relate to the same subject matter, namely federal enactments. As can be inferred from *R. v. Hay*, 2010 SCC 54, [2010] 3 S.C.R. 206 at para. 4 and *British Columbia Ferry Corp. v. M.N.R.*, 2001 FCA 146, [2001] 4 F.C. 3 at para. 13, for the rule in paragraph 15(2)(*b*) of the *Interpretation Act* to apply, the enactments need not relate to an identical subject-matter so long as there is sufficient similarity among their subject-matters. Such similarity exists here. Therefore, the definition of "enactment" in the *Interpretation Act* should be applied to interpret the term as it is used in the Reproduction of Federal Law Order.

[39] For the same reasons set out above in the context of the *Statutory Instruments Act*, the CSA Electrical Code is not a regulation and, consequently, not an enactment within the meaning of the *Interpretation Act* and the Reproduction of Federal Law Order.

[40] This interpretation is shared by the federal government. As noted by the respondent, the federal Department of Innovation, Science and Economic Development has indicated on its website that the Reproduction of Federal Law Order "does not apply to any materials that have been copyrighted privately or separately by a third party, and that happen to have been included with, added to, or referred to in the Government of Canada legislation, statute, regulation and/or decision". (https://www.ic.gc.ca/eic/site/icgc.nsf/eng/07415.html#p3.2)

(2) Provincial and Territorial

[41] Most provinces and territories have dealt with these issues in a similar fashion and require that the Queen's Printer (or equivalent official) publish original statutes and regulations and allow for the publication of consolidations: *Queen's Printer Act*, R.S.B.C. 1996, c. 394, ss. 5, 7; *Regulations Act*, R.S.B.C. 1996, c. 402, s. 5(1); *Queen's Printer Act*, R.S.A. 2000, c. Q-2, s. 3; *Regulations Act*, R.S.A. 2000, c. R-14, s. 3(1); *Queen's Printer Act*, R.S.S. 1978, c. Q-3, ss. 3-4; *Regulations Act, 1995*, S.S. 1995, c. R-16.2, s. 6(1); *Statutes and Regulations Act*, C.C.S.M., c. S207, ss. 5, 16, 23; *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F., ss. 15(1), 25(1); *An Act respecting the Centre de services partagés du Québec*, C.Q.L.R., c. C-8.1.1, s. 41; *An Act respecting the Compilation of Québec Laws and Regulations*, C.Q.L.R., c. R-2.2.0.0.2; *Regulations Act*, C.Q.L.R., c. R-18.1, s. 15; *Queen's Printer Act*, R.S.N.B. 2011, c. 214, ss. 3(2), 6(1), (3); *Communications and Information Act*, R.S.N.S. 1989, c. 79, ss. 6, 7(1); *Regulations Act*, R.S.N.S. 1989, c. 393, s. 4(1); *Queen's Printer Act*, R.S.P.E.I. 1988, c. Q-1, s. 4(1); *Statutes and Subordinate Legislation Act*, R.S.N.L. 1990, c. S-27, ss. 7, 8(1), 11(1); *Public Printing Act*, R.S.Y. 2002, c. 180, s. 5; *Regulations Act*, R.S.Y. 2002, c. 195, s. 3(1); *Public Printing Act*, R.S.N.W.T 1988, c. P-15, ss. 2, 3; *Statutory Instruments Act*, R.S.N.W.T. 1988, c. S-13, s. 9(1);

Public Printing Act, R.S.N.W.T. (Nu.) 1988, c. P-15, ss. 2, 3; *Statutory Instruments Act*, R.S.N.W.T. (Nu.) 1988, c. S-13, s. 1(1).

[42] Most provinces and territories also exempt standards incorporated by reference into regulations from the usual publication requirements that apply to regulations: British Columbia *Regulations Act*, s. 1 (definition of "regulation"); Alberta *Regulations Act*, para. 1(2)(*d*) (definition of "regulation"); Saskatchewan *Regulations Act, 1995*, s. 2 (definition of "regulation"); Manitoba *Statutes and Regulations Act*, para. 8(2)(*b*); Ontario *Legislation Act, 2006*, para. 62(4)(*a*) (by implication); Quebec *Regulations Act*, s. 16(1); Nova Scotia *Regulations Act*, para. 3(5)(*c*); Prince Edward Island *Queen's Printer Act*, para. 4(1)(*a*) (by implication); Newfoundland and Labrador *Statutes and Subordinate Legislation Act*, para. 9(1)(*e*); Yukon *Regulations Act*, s. 1 (definition of "regulation") (by implication); Northwest Territories *Statutory Instruments Act*, s. 9(3); Nunavut *Statutory Instruments Act*, s. 9(3).

[43] Some provinces and the territories also allow for reproduction of statutes and regulations (but not copyrighted material incorporated by reference in them) in a fashion analogous to that provided for in the Reproduction of Federal Law Order: British Columbia *Queen's Printer Licence* (http://www.bclaws.ca/standards/2014/QP-License_1.0.html); Alberta (http://www.qp.alberta.ca/copyright.cfm); Saskatchewan (http://www.publications.gov.sk.ca/freelaw/index.cfm?fuseaction=content.display&id=78D82F52-0E92-4934-9C5521C6046079BF); Manitoba (https://www.gov.mb.ca/legal/mb_laws.html); Ontario (https://www.ontario.ca/page/copyright-information-c-queens-printer-ontario#section-1); Quebec (http://www.droitauteur.gouv.qc.ca/en/copyright.php); New Brunswick

(http://www2.gnb.ca/content/gnb/en/departments/attorney_general/acts_regulations/content/disclaimer_and_copyright.html); Prince Edward Island (https://www.princeedwardisland.ca/en/information/executive-council-office/website-disclaimer-and-copyright-policy); Nova Scotia (https://nslegislature.ca/legal/copyright); Newfoundland and Labrador (https://www.assembly.nl.ca/CopyrightPrivacyStatement.aspx); Yukon *Reproduction of Yukon Law Order*, O.I.C. 2000/52; Northwest Territories (https://www.justice.gov.nt.ca/en/legislation/#gn-filebrowse-0:/); Nunavut (https://www.nunavutlegislation.ca/).

[44] Alberta, Newfoundland and Labrador, Ontario and Yukon expressly require that the CSA Electrical Code, as amended, be made available to the public in some form: *Safety Codes Act*, R.S.A. 2000, c. S-1, s. 65(7); *Public Safety Act*, S.N.L. 1996, c. P-41.01, s. 34(4); Ontario *Electrical Safety Code*, s. 3; Ontario *Legislation Act, 2006*, s. 62(4); Yukon *Electrical Protection Act Regulation, 1992*, O.I.C. 1992/017, s. 19. There is seemingly no equivalent statutory requirement in the other provinces and territories.

II. The Decision Below

[45] With this background in mind, I turn now to review the decision of the Federal Court. In its Reasons, the Federal Court found that copyright subsisted in the 2015 version of the CSA Electrical Code, that the CSA owned that copyright and that Knight Co. could not rely on the defences of fair dealing or licence.

[46] The Federal Court began its analysis by considering the question of whether copyright subsisted in the 2015 version of the CSA Electrical Code. It discounted the CSA's certificate of registration as presumptive evidence, viewing as suspicious the fact the 2015 registration had not occurred until three days after the commencement of the CSA's application. However, the Federal Court did not mention the evidence that indicated that the CSA had likewise obtained a registration in 2012 with respect to the previous version of the CSA Electrical Code.

[47] Despite rejecting the certificate of registration, the Federal Court found that the CSA was entitled to the presumptions of ownership and validity created by paragraph 34.1(2)(*a*) of the *Copyright Act*, which provides that if the name of the author is indicated on the work in the usual manner, there is a presumption that the author owns valid copyright. In so concluding, the Federal Court did not discuss the fact that the CSA is a corporate entity and that contributions to the 2015 CSA Electrical Code were made by individual members of the committee, the majority of whom were employees of organizations other than the CSA.

[48] The Federal Court then moved on to reject the appellants' arguments that the CSA did not exercise sufficient skill and judgment in compiling the works of others and that the Code is not sufficiently original to justify copyright protection, holding that the CSA Electrical Code "does in fact involve significant skill and judgment", concluding that considerable time and effort was expended to produce it.

[49] Next, the Federal Court rejected the appellants' argument that the Crown owned the copyright by reason of the fact that the Code is incorporated by reference into provincial and

federal statutes and regulations and the argument that public policy militated against law being copyrighted. In so concluding, the Federal Court referred to the fact that the CSA is independent of government and that the CSA Electrical Code is a voluntary standard that legislators incorporate by reference into law at their own discretion. In addition, the Federal Court referred to the above-mentioned statements from the Minister of Industry and concluded that there was no evidence that the federal Crown or any provincial Crown claimed copyright in the CSA Electrical Code. In concluding on this issue, the Federal Court stated that:

> […] in light of the fact that the CSA has undertaken significant effort and expense [to] produce and publish the CSA Code, it would be contrary to a purposive construction of the *Copyright Act* to strip the CSA of its rights in the 2015 CSA Code simply because certain provinces have incorporated it into law.
>
> (Reasons, para. 40)

[50] Having found that copyright subsists in the 2015 Code, the Federal Court next considered whether the CSA owned that copyright. Since the CSA is a corporation, the appellants argued the CSA could own copyright only to the extent it had obtained valid assignments from the authors. The appellants invited the Federal Court to draw an adverse inference from the fact the only evidence of assignments adduced by the CSA was in the form of a general statement in the affidavit filed by a representative of the CSA. The Federal Court declined to draw the inference, noting that the CSA had obtained executed assignments from authors who contributed to improvements in the 2012 and 2015 editions, which evidence was provided to the appellants during discovery in the pending action before the Federal Court. The Federal Court thus agreed with the CSA that the appellants had failed to produce any credible evidence to dispute the CSA's ownership.

[51] The Federal Court then turned to the question of whether the appellants had a valid defence. It first considered whether the appellants had a licence to reproduce the 2015 version of the CSA Electrical Code and rejected the appellants' submission that the correspondence between the parties in the 1960's amounted to a subsisting perpetual licence to reproduce the CSA Code, concluding that the letters (i) were addressed to a non-party, Peter Knight; (ii) did not purport to confer on Peter Knight the right to assign the permission to the appellants; (iii) pertained to a booklet made in 1969, not a copy-cat Code made in 2015; (iv) at best, provided a permission to quote from CSA's 1969 Code, not copy the entirety of the 2015 Code while passing it off as the appellants' work; and (v) the 1969 letters could not be read as a perpetual and non-revocable licence in light of the fact that the CSA provided express notice of termination in both 2007 and 2011.

[52] The Federal Court next considered whether the appellants could avail themselves of the defence of fair dealing and concluded that the exception could not apply because "[w]hen 100% of a work is copied, the dealing cannot be fair" (Reasons, para. 59). The Federal Court also found there was no merit to the argument that the Knight Co. version of the CSA Electrical Code was for educational purposes, as it was a competitive commercial undertaking by the appellants to compete with the 2015 version of the CSA Electrical Code. It therefore concluded that Knight Co. had infringed CSA's copyright and granted the remedies detailed above.

III. The Issues in these Appeals

[53] Having outlined the foregoing background, I now move to detail the various arguments made by the parties in these appeals.

[54] The appellants first submit that the Federal Court erred in concluding that the CSA Electrical Code can be the subject of copyright. Because it is incorporated into various statutes and regulations, the appellants say that the CSA Electrical Code is law and, relying principally upon American case law, say that there cannot be any copyright in the law. The appellants also assert public policy reasons why CSA cannot own the copyright in the CSA Electrical Code, submitting that the rule of law requires that the Code be available to all Canadians. Closely connected to this argument, the appellants submit, in the alternative, that if the CSA Electrical Code may be the subject of copyright, such copyright belongs to the Crown, either by virtue of the Crown's prerogative rights and privileges outside the *Copyright Act* or by virtue of section 12 of the *Copyright Act*, which provides that:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.	Sous réserve de tous les droits ou privilèges de la Couronne, le droit d'auteur sur les œuvres préparées ou publiées par l'entremise, sous la direction ou la surveillance de Sa Majesté ou d'un ministère du gouvernement, appartient, sauf stipulation conclue avec l'auteur, à Sa Majesté et, dans ce cas, il subsiste jusqu'à la fin de la cinquantième année suivant celle de la première publication de l'œuvre.

[55] The appellants further say that copyright cannot subsist in the 2015 CSA Electrical Code because it lacks the originality necessary for copyright, is a collaborative product, created through a consensus process more analogous to a legislative committee than an individual author and is, as law, "a matter of fact and evidence to be determined by the Judge" and, accordingly,

cannot be copyrighted as copyright cannot apply to facts (appellants' memorandum of fact and law, at paras. 98-103).

[56] In response to these arguments, the CSA submits that the appellants did not raise these arguments in their notice of appeal and are therefore foreclosed from making them. Subsidiarily, the CSA contends that the American case law relied upon by the appellants is inapplicable in Canada, that copyright in this country is a creature of statute and that, under section 5 of the *Copyright Act*, the CSA Electrical Code is capable of being the subject of copyright. The CSA also says that Crown prerogative does not extend to the CSA Code, underscoring the position taken by the federal Minister of Industry. As for section 12 of the *Copyright Act*, the CSA asserts that the CSA Electrical Code was not prepared under the direction or control of the Crown and therefore submits that the section is inapplicable.

[57] The appellants next argue, in the further alternative, that in the event the CSA Electrical Code may be the subject of copyright and such copyright is not owned by the Crown, the Federal Court erred in holding that the CSA could rely on paragraph 34.1(2)(*a*) of the *Copyright Act* because the presumption in that paragraph cannot apply to a corporation. They also say that, in the absence of the presumption, the burden fell on the CSA to establish it owned the copyright, which it did not and could not do in the absence of production of the assignments from the individuals who developed the CSA Electrical Code. As the authors of the 2015 Code were employees of government and private companies, whose contributions were made within the ambit of their employment, the appellants say that the CSA had the onus of proving that the authors were capable of assigning their copyright, given the subsisting interest of their employers

in the copyright. In failing to include the written assignments of copyright in evidence, the appellants claim that the CSA failed to discharge its onus.

[58] The CSA, for its part, says that the Federal Court committed no reviewable error in concluding that the CSA established assignment of copyright in the 2015 version of the CSA Electrical Code in light of the uncontested affidavit evidence of Mr. Morton, who deposed that the CSA members and other contributors who authored the 2015 CSA Electrical Code assigned copyright interests to the CSA. It also says that the Federal Court ought to have relied on the certificate of registration produced by the CSA in respect of the 2015 version of the CSA Electrical Code, particularly in light of the evidence that it followed the earlier registration of the 2012 version of the Code, which had been registered well before the application was commenced.

[59] The appellants next argue, in the yet further alternative, that the Federal Court erred in its treatment of the defence of fair dealing and in concluding that Peter Knight was not granted a perpetual licence that operated to the benefit of the Knight Co., which they say allow it to distribute its identical copy of the 2015 version of the CSA Electrical Code.

[60] On the former point, the appellants contend that the Federal Court erroneously conflated separate portions of the test for fair dealing and that, contrary to what the Federal Court held, copying the entirety of a work may constitute fair dealing and did in fact constitute such dealing in the instant case.

[61] As concerns the licence given to Peter Knight, the appellants say that the Federal Court erred in failing to recognize that the licence was a perpetual one, which could not be revoked except in accordance with its express terms, none of which allowed for revocation. The appellants also say that the conduct of the CSA between 1969 and 2012, including its attempt to purchase Knight Co. in 2004, demonstrates that the CSA accepted their dissemination of the Code and provided its implied consent to the assignment of benefits of the licence from Peter Knight to Knight Co.

[62] In response, the CSA contends that all these points involve matters of fact or of mixed fact and law and that the appellants cannot point to any reviewable error having been made by the Federal Court in respect of any of them in light of several factors, including, most particularly, the appellants' "blatant and competing commercial acts" in copying and seeking to sell a complete copy of the 2015 CSA Electrical Code and the fact that the licence granted to Peter Knight in the 1960's pertained to the ECS, a completely different and much abridged work (CSA's memorandum of fact and law, at paras. 47, 90, 92).

[63] Finally, the appellants contest the Federal Court's costs award, arguing that the CSA failed to lead evidence that could support the quantum awarded. The CSA in response says that the decision of this Court in *Nova Chemicals Co. v. Dow Chemical Co.*, 2017 FCA 25 (*Nova Chemicals*) indicates that their evidence was sufficient and that the costs award therefore ought not be disturbed.

IV. Analysis

[64] I do not believe that any of the various arguments raised by the appellants warrants intervention by this Court.

A. *Did the Federal Court err in finding that copyright subsists in the CSA Electrical Code?*

[65] Turning first to the issue of whether the Federal Court erred in concluding that copyright subsists in the CSA Electrical Code, contrary to what the CSA claims, I believe that the principal argument raised by the appellants regarding the subsistence of copyright was sufficiently set out in their amended notice of appeal and memorandum of fact and law to allow this Court to consider it. In their amended notice of appeal, the appellants set out as their first ground of appeal that the Federal Court erred in finding that they had infringed the CSA's copyright in the CSA Electrical Code because the Code is the law and citizens have the right to unimpeded access to the law. They developed this argument at length in their memorandum of fact and law and considerable time was devoted to it before the Federal Court. The CSA is therefore in no way surprised by the appellants' reliance on this argument and the related arguments regarding Crown prerogative and section 12 of the *Copyright Act*. It is therefore appropriate for this Court to consider these arguments.

(1) Is the CSA Code incapable of being the subject of copyright by reason of its incorporation into statute and regulation?

[66] Moving on to the merits of the argument regarding the non-subsistence of copyright in the CSA Electrical Code due to its incorporation by reference into statutes or regulations, the

appellants make three separate and inter-related points, all of which hinge on the assertion that there cannot be any copyright in the law.

[67] More specifically, the appellants first say that because the CSA Electrical Code is incorporated into a number of regulations, it is the law. In support of this assertion they rely on *Ontario v. St. Lawrence Cement Inc*. (2002), 60 O.R. (3d) 712, 162 O.A.C. 363 (C.A.) at para. 18, which held that the Crown need not formally prove standards incorporated by reference into regulations. The appellants also refer to *R. v. Sims* at para. 33, which concluded that the text of a standard incorporated by reference into regulations need not itself be published before the regulations can be enforced. They also rely on the *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212 at p. 230, 133 N.R. 88 (the *Manitoba Language Rights Reference*), in which the Supreme Court of Canada concluded that materials incorporated by reference into a legislative instrument are an integral part of the instrument. In the case of standards developed by a non-governmental standard setting body, however, the Supreme Court explained that, in most instances, such standards need not be translated in a jurisdiction like Manitoba where the law must be bilingual because there is a *bona fide* reason for not doing so, given the technical and voluminous nature of such standards (pp. 230-231).

[68] The appellants secondly assert that no copyright subsists in the law and in support of this proposition rely on the judgment of the Supreme Court of the United States in *Banks v. Manchester*, 128 U.S. 244 (1888) (which held that no copyright subsists in the opinions of judges), the judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, in *Veeck v. Southern Building Code Congress International Inc.*, 293 F.3d 791 (5th Cir. 2002),

(*Veeck*) (which held that no copyright subsists in a building code that was developed by a third party standards organization and incorporated by reference into law in several U.S. states) and the judgment of the United States Court of Appeals for the First Circuit in *Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) (to similar effect). After these appeals were heard, with the Court's permission, the appellants made additional submissions concerning the judgment of the United States Court of Appeals for the Eleventh Circuit in *Code Revision Commission v. Public Resource. Org Inc.*, No. 17-11589, slip. op. (11th Cir., October 19, 2018) (which held that no copyright subsists in annotations on Georgia law prepared by an office supporting the Georgia General Assembly).

[69] Finally, the appellants invoke public policy in support of their position, asserting that the rule of law requires that there be no copyright in the CSA Electrical Code because citizens have the right to unimpeded access to the law.

[70] I agree with the CSA that the American precedents regarding the lack of copyright in the law are of no relevance in Canada, given the difference in copyright legislation in the two countries and the important historical and constitutional differences that exist between Canada and the United States. As the Supreme Court of Canada explained in *Society of Composers, Authors and Musical Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 (*SOCAN*), that Court has often "cautioned against the automatic portability of American copyright concepts into the Canadian arena, given the 'fundamental differences' in the respective legislative schemes" (para. 25).

[71] Under the American *Copyright Act*, there can be no copyright in federal statutes or regulations as the United States Court of Appeals for the Fifth Circuit noted in *Veeck* at p. 496. More specially, by virtue of the *Copyright Act*, there is no "copyright protection […] for any work of the United States Government", which is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties": 17 U.S. Code § § 101, 105.

[72] There is no similar prohibition in Canada. Under section 5 of our *Copyright Act*, copyright subsists "in every original literary, dramatic, musical and artistic work", subject to certain residency or citizenship requirements that are irrelevant to these appeals. The Act further provides in section 2 that the phrase "every original literary, dramatic, musical and artistic work" includes:

> […] every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science.

[73] Thus, so long as it is original, any writing may be the subject of copyright in Canada. This would include laws and regulations.

[74] That law and regulations may be the subject of copyright is indeed recognized by section 12 of the *Copyright Act*, which, as noted, provides:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any	Sous réserve de tous les droits ou privilèges de la Couronne, le droit d'auteur sur les œuvres préparées ou publiées par l'entremise, sous la direction ou la surveillance de Sa

government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.	Majesté ou d'un ministère du gouvernement, appartient, sauf stipulation conclue avec l'auteur, à Sa Majesté et, dans ce cas, il subsiste jusqu'à la fin de la cinquantième année suivant celle de la première publication de l'œuvre.

[75] The phrase "rights or privileges of the Crown" in section 12 of the *Copyright Act* preserves "the Crown's rights and privileges of the same general nature as copyright", as this Court concluded in *Manitoba v. Canadian Copyright Licensing Agency (Manitoba v. Access Copyright)*, 2013 FCA 91, [2014] 4 F.C.R. 3 at para. 34; see also *Fox on Canadian Law of Copyright*, Section 18:3(a). By preserving the Crown's rights and privileges outside the *Copyright Act* and, indeed, outside any other statute, this provision functions as an exception to the general principle in section 89 of the *Copyright Act* that:

No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament […].	Nul ne peut revendiquer un droit d'auteur autrement qu'en application de la présente loi ou de toute autre loi fédérale […].

[76] As is more fully discussed below, these rights or privileges include the right to publish statutes, orders-in-council and proclamations.

[77] The remainder of section 12 of the *Copyright Act* provides an additional basis for Crown ownership of copyright in statutes, regulations and the like, which are all published by or under the direction or control of Her Majesty or a government department. For purposes of these appeals it is not necessary to consider whether such materials are also in all circumstances prepared by or under the direction or control of Her Majesty or a government department.

[78] Although the *Copyright Act* does not define "Her Majesty", subsection 35(1) of the federal *Interpretation Act* defines the "Crown" as being synonymous with "Her Majesty", the latter of which, as the Supreme Court explained in *Alberta Government Telephones v. (Canada) Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225 at p. 274, 98 N.R. 161, "embraces the Crown in right of a province as well as the Crown in right of Canada" in the context of a similar use of the term in a federal statute; see also *Syndicat professionnel des ingénieurs d'Hydro-Québec v. Hydro-Québec*, [1995] 3 F.C. 3, 184 N.R. 291 (C.A.); Peter W. Hogg, Patrick J. Monahan and Wade K. Wright, *Liability of the Crown*, 4th Edition (Toronto: Carswell, 2011) at pp. 444-455. Given this interpretation of the term Her Majesty, there would seem no reason to limit the term "government department" in section 12 of the *Copyright Act* to federal government departments.

[79] Subparagraph 2.2(1)(*a*)(i) of the *Copyright Act* provides that "[f]or the purposes of th[e] [*Copyright Act*], *publication* means (*a*) in relation to works, (i) making copies of a work available to the public, […]" [emphasis in original]. Subsection 33(3) of the *Interpretation Act* provides that "[w]here a word is defined, other parts of speech and grammatical forms of the same word have corresponding meaning". Since the word "publish" is a verbal form of "publication", it correspondingly means to make a copy of a work available to the public: *Keatley Surveying Ltd. v. Teranet Inc.*, 2017 ONCA 748 at para. 31, leave to appeal to the Supreme Court of Canada granted, 37863 (June 21, 2018) (*Keatley v. Teranet*).

[80] As described above, statutes and regulations are made available to the public by or under the direction or control of federal, provincial and territorial government departments. Statutes and regulations therefore fall within the ambit of section 12 of the *Copyright Act*.

[81] It therefore follows that the American precedents relied on by the appellants are inapplicable as the law in Canada may be and indeed is the subject of copyright. Thus, if the CSA Electrical Code constitutes the law (a proposition that I do not accept for the reasons detailed below), it nonetheless could still be subject to copyright in this country.

[82] The public policy arguments advanced by the appellants do not mandate a different conclusion for several reasons.

[83] First, the appellants are in no position to invoke these arguments as they seek to protect their commercial interest in selling a copy-cat version of the 2015 CSA Electrical Code. Thus, the public policy concern they invoke does not arise in this case, which involves the competing interests of two parties that seek to generate income from the sale of the 2015 version of the CSA Electrical Code.

[84] Second, to the extent there is a concern about ordinary citizens acquiring access to the portions of the CSA Electrical Code that they might need to know to perform the types of electrical maintenance and installations that they are legally permitted to perform, the information they require is not the entire CSA Electrical Code that is at issue in these appeals

but, rather, only the sort of information contained in the abbreviated ECS, which is the subject of the pending action before the Federal Court.

[85] Provincial and territorial statutes generally only allow a limited range of work to be done by a homeowner without a permit and a wider range of work to be done by homeowners who do not hold a licence, but obtain a permit (see, for example, *Electrical Safety Regulation*, B.C. Reg. 100/2004, s. 2, para. 4(1)(*d*), ss. 17, 18; *Electrical Inspection Act, 1993*, S.S. 1993, c. E-6.3, s. 2(*w*); *Electrical Inspection Regulations*, R.R.S., c. E-63, Reg. 1, s. 19(1); *Manitoba Electrical Code*, Man. Reg. 76/2018, Sched., ss. 3(2), (3); *Licensing of Electrical Contractors and Master Electricians*, O. Reg. 570/05, s. 2; *General Regulation*, N.B. Reg. 84-165, ss. 2, 24; *Electrical Installation and Inspection Act*, R.S.N.S. 1989, c. 141, s. 3). Thus, it would appear that ordinary citizens have no need to access the entirety of the CSA Electrical Code as opposed to merely those portions of it that concern residential installations, which is at issue in the pending action before the Federal Court, but not in these appeals.

[86] Third, anyone faced with prosecution for violation of a law based on non-compliance with a regulation or statute that incorporates the CSA Electrical Code might well have a defence if the Code were truly inaccessible due to the cost associated with purchasing it.

[87] At the federal level, a statutory defence is available to those who are charged with infringing provisions incorporated by reference into legislation if those provisions are inaccessible. Section 18.6 of the *Statutory Instruments Act* protects against a person’s being penalized for contravening a provision that incorporates an inaccessible document by reference:

A person is not liable to be found guilty of an offence or subjected to an administrative sanction for any contravention in respect of which a document, index, rate or number — that is incorporated by reference in a regulation — is relevant unless, at the time of the alleged contravention, it was accessible as required by section 18.3 or it was otherwise accessible to that person.	Aucune déclaration de culpabilité ni aucune sanction administrative ne peut découler d'une contravention faisant intervenir un document, indice, taux ou nombre — incorporé par renvoi dans un règlement — se rapportant au fait reproché, sauf si, au moment de ce fait, le document, l'indice, le taux ou le nombre était accessible en application de l'article 18.3 ou était autrement accessible à la personne en cause.

[88] Likewise, in Quebec, subsection 16(2) of the *Regulations Act* establishes a similar statutory defence:

No person may be convicted of an offence under a text that has not been published in the *Gazette officielle du Québec* and that is referred to by a regulation unless it is proved that the text has been published otherwise and that the persons to whom the text may be applicable were in a position to acquaint themselves with it before the offence was committed.	[…] une personne ne peut être condamnée pour une infraction commise à l'encontre d'un texte non publié à la *Gazette officielle du Québec* et auquel renvoie un règlement, à moins qu'il ne soit prouvé que ce texte a été autrement publié et que les personnes susceptibles d'être visées par celui-ci pouvaient en prendre connaissance avant la commission de l'infraction.

[89] Although there is seemingly no equivalent statutory defence in the other provinces or in the territories, there may well be a defence available at common law. In his concurrence in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 189 N.R. 1 (*Jorgensen*), Lamer C.J. recognized that although ignorance of the law is not a valid defence, "[a]n accused is excused when the law she was charged under was impossible to gain knowledge of because it has not been published" (para. 6). In *Corporation de l'École Polytechnique v. Canada*, 2004 FCA 127, 325 N.R. 64, this Court adopted Lamer C.J.'s reasoning in *Jorgensen* on this point and explained that showing an "invincible mistake of law" is a defence available when "[…] it is impossible to avoid [making a

mistake] because it is impossible for the person charged [with an offence] to know the law, either because it has not been promulgated or because it was not published in a satisfactory way so that its existence and contents could be known" (para. 39); see also *Makhija v. Canada (Attorney General)*, 2010 FCA 342, 414 N.R. 158 at para. 6 to similar effect. Thus, if an accused were charged with a breach of a statute or regulation that incorporated the CSA Electrical Code by reference and were able to establish that it was impossible to gain knowledge of it, there would likely be a defence available to the accused.

[90] Finally, to the extent that it is appropriate for this Court to consider public policy issues in these appeals, it seems to me that on these facts public policy militates in favour of recognizing the CSA's copyright in the CSA Electrical Code. The collaborative process for developing the Code, which is then extended through incorporation by reference into statutes and regulations at the federal, provincial and territorial levels, is an example of cooperative federalism at its best: see generally *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 at paras. 132-133; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras. 16-19. An important component of this process is the CSA's ability to sell the Code and to use the funds so generated to help finance the maintenance of this and other national standards: Federal Court's reasons at para. 42. Impairing the CSA's ability to continue to generate revenue in this way might well negatively impact the continued existence of common national standards in areas where consistency is important, as is the case with electrical maintenance and installation.

[91] In the *Manitoba Language Rights Reference*, as noted, the Supreme Court recognized the need for a flexible national standards system by concluding that such standards need not be translated when they are incorporated into statutes or regulations that must, as a constitutional matter, be bilingual (pp. 229-231). Likewise, there is a strong public policy argument to be made in the instant case in favour of the respondent's position that similarly favours the maintenance of a national standards system.

[92] Thus, the principal argument advanced by the appellants for why copyright should be found to not subsist in the CSA Electrical Code fails.

(2) Is the CSA Code incapable of being the subject of copyright by reason that it lacks originality and was developed by a committee?

[93] Turning now to the subsidiary arguments advanced by the appellants regarding lack of originality and development by committee, the CSA is correct in noting that neither of these arguments was raised by the appellants in their amended notice of appeal, no matter how generously it is read. While this is a sufficient basis for disposing of these arguments, I also believe that neither point has any merit.

[94] Insofar as concerns the alleged lack of originality, the appellants can point to no error committed by the Federal Court in its assessment of this issue. Contrary to what the appellants say, the Federal Court did not misinterpret the test for originality laid out by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004]

1 S.C.R. 339 (*CCH*). There, the Supreme Court held at paragraph 16 that, for a work to be original within the meaning of the *Copyright Act*:

> […] it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

[95] In so holding, the Supreme Court rejected the notion that mere expenditure of effort, or the so called "sweat of the brow" test, is sufficient to establish the originality required for copyright.

[96] The appellants submit that the Federal Court erred because it premised its originality finding solely on the fact that time and effort were expended to produce the 2015 version of the CSA Electrical Code, pointing to paragraph 33 of the Federal Court's reasons, where the Federal Court made its originality finding and stated:

> The evidence of [the CSA's affiant] is that thousands of hours went into the production of the latest edition of the CSA Code. This constitutes a substantial undertaking of skill and judgment.

[97] I agree that the foregoing passage is not as carefully worded as it might have been but disagree that the Federal Court erred in concluding that the 2015 version of the CSA Electrical Code possessed the requisite originality to found copyright. While the mere fact that time and

effort is expended to produce a work is insufficient to constitute originality under the test elaborated in *CCH*, the Federal Court had evidence before it to establish the requisite originality. More specifically, the parties filed a copy of the 2015 CSA Electrical Code, in its entirety. A review of it, coupled with the evidence of the time and effort expended to produce the amendments that were included in the 2015 version of the Code, establish that much more than minimal skill and judgment were expended to produce this version of the CSA Electrical Code. Given the content of the Code, it is incontrovertible that skill and judgment were required, among other things, to determine which portions of the Code needed revision, to adapt them to then current industry practices and needs and to determine how the sections should be appropriately arranged. Thus, the Federal Court did not err in concluding that the 2015 version of the CSA Code possessed originality.

[98] Nor does the fact that the amendments to the 2015 CSA Code were developed by committee prevent the 2015 version of the Code from being copyrighted as the *Copyright Act* extends copyright to compilations. As noted, section 5 of the *Copyright Act* extends copyright to original literary works. These are defined in section 2 of that Act as "includ[ing] tables, computer programs, and compilations of literary works". Section 2 of the *Copyright Act* defines compilations of literary works, in relevant part, as including "a work resulting from the selection or arrangement of data". Further, subsection 2.1(2) of the *Copyright Act* provides:

The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.	L'incorporation d'une œuvre dans une compilation ne modifie pas la protection conférée par la présente loi à l'œuvre au titre du droit d'auteur ou des droits moraux.

[99] In light of the forgoing, the appellants' assertions regarding the collaborative nature of the 2015 version of the CSA Electrical Code are without merit. Accordingly, the Federal Court did not err in concluding that copyright subsists in the 2015 version of the CSA Electrical Code.

B. *Did the Federal Court err in finding that the Crown does not own the copyright in the CSA Electrical Code?*

[100] I turn next to the issue of whether the Federal Court erred in concluding that the Crown does not possess copyright in the CSA Electrical Code. As already indicated, under section 12 of the *Copyright Act*, Crown copyright may arise either by virtue of the rights or privileges of the Crown outside the *Copyright Act*, which section 12 preserves, or by virtue of a work's having been "prepared or published by or under the direction or control of Her Majesty or any government department".

(1) The CSA Electrical Code is Not Prepared or Published by or under the Direction or Control of Her Majesty or any Government Department

[101] The second of these bases for Crown ownership of the copyright at issue may be dispensed with relatively quickly because the Federal Court did not err in finding that there was an absence of any such control or direction over the preparation and publication of the CSA Electrical Code. As the Federal Court noted, there was no evidence of any such control or direction as the CSA is independent of government, there was no evidence of any *de facto* control exercised by any level of government over the CSA or over the process of developing CSA standards and no evidence that any province or territory other than Ontario publishes or exerts control over the publication of the CSA Electrical Code (and Ontario acknowledges the

CSA's copyright). Moreover, no government claims ownership of the copyright in the standards developed by the CSA. Similarly, there was no evidence before the Federal Court to indicate any degree of control being exercised by the Crown or any government department over the Standards Council.

[102] Nor can such control or direction be extrapolated from the statutory scheme.

[103] The CSA is a private corporation and the Standards Council is neither an emanation of the Crown nor a government department. Sections 16 and 17 of the *Standards Council Act* provide that, except for purposes of *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5, "[t]he Council is not an agent of Her Majesty and […] members and the executive director and other officers and employees of the Council are not part of the federal public administration."

[104] As a non-agent Crown corporation, the Standards Council is not equivalent to the Crown and cannot be said to be under the direction or control of the Crown merely because it is a Crown corporation. As Hogg, Monahan & Wright note, "[…] public corporations, even if they are performing 'governmental' functions, are not agents of the Crown, unless they are controlled by a minister or expressly declared by statute to be an agent of the Crown." (p. 13).

[105] The recent decision of the Ontario Court of Appeal in *Keatley v. Teranet* provides useful guidance on this issue. There, the Court considered whether the Crown in right of Ontario possesses copyright by virtue of section 12 of the *Copyright Act* in plans of survey registered

under the provincial *Electronic Land Registration Services Act*, 2010, S.O. 2010, c. 1, Sched. 6 (the *ELRSA*). That Act provides details as to how plans, prepared by surveyors, are to be prepared for registration and requires that the private sector operator of the electronic land registration system provide copies of registered plans of survey to anyone who requests them, upon payment of a fee. The Ontario Court of Appeal held that the plans in issue could not be said to have been prepared under the direction or control of the Crown, even though they were in a form contemplated by and subsequently registered under the *ELRSA* (para. 30). However, the Court concluded that the statutory scheme supported the conclusion that the surveys were published under the control of the Crown. The Ontario Court of Appeal described that scheme in the following terms at paragraph 43 of its reasons for judgment:

> […] The statutory scheme, considered in its entirety, goes far beyond simply authorizing the Crown to impose terms on the content and form of documents to be registered or deposited, or to copy plans of survey deposited or registered in the ELRS. The provisions oblige the Crown to maintain possession and custody of all registered plans of survey. The Crown must provide access to those plans upon request. The surveyor cannot place any marking on the plan claiming any kind of copyright. The surveyor cannot make any change to the plan once it is registered or deposited, without the permission of the Examiner of Surveys. The Examiner, on the other hand, can make changes even without the permission of the surveyor. Finally, of course, the Crown is statutorily obliged to provide certified copies upon request.

[106] The situation in the instant case, as concerns the preparation of the CSA Electrical Code, resembles that discussed in *Keatley v. Teranet* and similarly evinces a lack of direction or control by either the Crown or a government department. As noted by the trial judge in *Keatley Surveying v. Teranet*, 2016 ONSC 1717 at para. 32, the *ELRSA* required that the plans of survey "conform to certain statutorily prescribed guidelines". Even with this, though, the plans were found to not have been prepared by or under the direction or control of Her Majesty or any government department for purposes of section 12 of the *Copyright Act*. In the instant case,

neither the Crown nor any government department sets any guidelines about the form the CSA Electrical Code is to take. Thus, there is even less basis than there was in *Keatley v. Teranet* to conclude that the CSA Electrical Code was prepared by or under the direction or control of Her Majesty or any government department. (See also to similar effect *Copyright Agency Limited v. State of New South Wales*, [2007] F.C.A.F.C. 80, 240 A.L.R. 249, at paras. 121-126, rev'd on other grounds [2008] H.C.A. 35, 248 A.L.R. 590).

[107] However, the situation in the instant case, as concerns publication, is entirely different from that discussed in *Keatley v. Teranet*. Here, unlike there, neither the Crown nor a government department possesses any of the various *indicia* of control that exist under the *ELRSA* and the mere fact of incorporation by reference does not require that the CSA Code be published. Moreover, there was no evidence before the Federal Court to indicate that the CSA Code is published by any jurisdiction, other than Ontario. And Ontario specifically acknowledges the CSA's copyright in its publication. Therefore none of the *indicia* of control that were present in *Keatley v. Teranet* can be said to exist in this case.

[108] I thus conclude that the CSA Electrical Code cannot be said to be published by or under the direction or control of the Crown or a government department.

(2) Copyright in the CSA Electrical Code Does not belong to the Crown by virtue of its Rights or Privileges

[109] The foregoing conclusion requires that I move to next consider the issue of Crown prerogative.

[110] The *Copyright Act* binds the federal and provincial Crowns by necessary implication, but the opening words of section 12 of the *Copyright Act* preserve the federal and provincial Crowns' rights and privileges outside the *Copyright Act* that are of the same general nature as copyright: *Manitoba v. Access Copyright* at paras. 34, 47.

[111] A typical defendant in an action for copyright infringement can raise as a defence that the plaintiff does not own the copyright or otherwise have an interest in it: see *Copyright Act*, ss. 34(1), 35(1), 38(1), 41.23(1) (all referring to the "owner" of copyright and, in the last subsection, to a "person […] deriving any right, title or interest by assignment or grant in writing from the owner").

[112] However, the Crown's unique rights and privileges in the nature of copyright do not lend themselves to being raised as a defence by someone other than the Crown itself because only the Crown may assert its prerogative. In *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 (*Khadr*) the Supreme Court noted that "[…] it is for the executive and not the courts to decide whether and how to exercise […] prerogative powers" (at para 36). Neither the federal Crown nor any provincial Crown has asserted a right or privilege over the CSA Electrical Code, and the appellants cannot do so in the Crown's place. Thus, the claim based on Crown prerogative must fail.

[113] This determination is sufficient to dispose of the Crown prerogative issue. However, if it were necessary to examine the issue of Crown prerogative further, I would conclude that, although the Crown has a common law right akin to copyright that allows it to print and publish

certain works of a legislative nature, that right does not extend to works incorporated by reference, including the CSA Electrical Code.

(a) *General Principles*

[114] The Crown has unique rights and privileges recognized at common law. These include Crown prerogatives, which are a "limited source of non-statutory administrative power": *Khadr* at para. 34, as well as Crown immunities, which modify the application of the general law to the Crown: see, for example, *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184 at paras. 16 and 23 (*Thouin*).

[115] The Crown's rights and privileges at common law were received from English law into the law of each colony in what became Canada: *McAteer v. Canada (Attorney General)*, 2014 ONCA 578 at para. 51, 121 O.R. (3d) 1, leave to appeal to the Supreme Court of Canada refused 36120 (February 26, 2015) (*McAteer*); J.E. Cote, "The Reception of English Law" (1977) 15(1) Alberta L.R. 29 at p. 61.

[116] The Constitution generally preserves the Crown's rights and privileges at common law. Section 129 of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, provides that:

> [e]xcept as otherwise provided by [the *Constitution Act, 1867*], all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union […] shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made […] subject nevertheless […] to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under [the *Constitution Act, 1867*]. [emphasis added]

The term “Laws” refers not only to pre-Confederation statutes, but also to the common law, and therefore section 129 preserves the Crown’s rights and privileges: *McAteer* at para. 51. This is equally true for Quebec as its public law is based on the common law: Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th Edition (Cowansville, QC: Éditions Yvon Blais, 2014) at para I.71.

[117] Although section 129 of the *Constitution Act, 1867* only applies directly to Ontario, Quebec, New Brunswick and Nova Scotia, it also applies indirectly to British Columbia, Manitoba and Prince Edward Island. The federal Act and imperial orders-in-council by which the latter three provinces joined Canada ensure that the provisions of the Constitution that applied to all existing provinces at the time they joined would also apply to the new province: *Manitoba Act, 1870*, S.C. 1870, 33 Victoria, c. 3, s. 2, reprinted in R.S.C. 1985, App. II; *British Columbia Terms of Union*, Term 10, reprinted in R.S.C. 1985, App. II; *Prince Edward Island Terms of Union*, Term 15, reprinted in R.S.C. 1985, App. II. Since section 129 applied to all provinces in 1867, as these three provinces joined Canada, section 129 extended to apply to them as well.

[118] Section 129 of the *Constitution Act, 1867* does not apply to Alberta, Newfoundland and Labrador and Saskatchewan. The federal and imperial Acts by which these three provinces joined Canada ensure that the provisions of the Constitution that applied to all existing provinces at the time they joined would also apply to the new province “except in so far as varied” by the Acts themselves: *Alberta Act*, S.C. 1905, c. 3, s. 3, reprinted in R.S.C. 1985, App. II; *Saskatchewan Act*, S.C. 1905, c. 42, s. 3, reprinted in R.S.C. 1985, App. II; *Newfoundland Act*, 12 & 13 Geo. VI, c. 22 (U.K.), Schedule, Term 3, reprinted in R.S.C. 1985, App. II. Since the

Alberta Act, the *Saskatchewan Act* and the Newfoundland Terms of Union (the latter of which were given effect by section 1 of the *Newfoundland Act* and form the Schedule to the Act) contain a provision that covers the same ground as section 129, using nearly identical language, section 129 does not apply: *Alberta Act*, s. 16(1); *Saskatchewan Act*, s. 16(1); *Newfoundland Act*, Term 18(1). As with section 129, however, the effect of these constitutional provisions is to continue the common law and, by extension, the Crown's existing rights and privileges in Alberta, Saskatchewan and Newfoundland and Labrador: for example, *R. v. Whiskeyjack*, 1984 ABCA 336 at para. 25, 16 D.L.R. (4th) 231.

[119] The common law, including the Crown's rights and privileges, also extends to the Northwest Territories, Nunavut and Yukon. There is no express provision concerning the application of the common law in the current versions of the *Northwest Territories Act*, enacted by the *Northwest Territories Devolution Act*, S.C. 2014, c. 2, s. 2, and *Yukon Act*, S.C. 2002, c. 7. The previous versions of these Acts, which the current versions repealed, expressly provided for the application of "the laws of England relating to civil and criminal matters", subject to repeal or amendment and compatibility with territorial circumstances: *Northwest Territories Act*, R.S.C. 1985, c. N-27, s. 22(1); *Yukon Act*, R.S.C. 1985, c. Y-2, s. 23(1) (referring to the "laws relating to civil and criminal matters […] in force in the Northwest Territories" when Parliament created Yukon as a separate territory in 1898). However, the common law continues to apply in those territories and it is routinely applied by their courts: *R. v. Nehass*, 2016 YKSC 63 at para. 29 ("The common law of England, as it existed in 1870, was incorporated into Yukon by virtue of *The North-West Territories Act*, [S.C. 1886, c. 25]"). For its part, subsection 29(4) of the *Nunavut Act*, S.C. 1993, c. 28 expressly provides for the common law's application:

[t]he laws in force or having effect in the Northwest Territories on [April 1, 1999] […] [other than laws enacted by the Northwest Territories legislature whose application is provided for in subsection 29(1)] […] continue to be in force or have effect in Nunavut to the extent that they can apply in Nunavut and in so far as they are not after that time repealed, amended, altered or rendered inoperable in respect of Nunavut. [emphasis added]	[l]es règles de droit […] en vigueur dans les Territoires du Nord-Ouest [le 1er avril 1999] […] [sauf les lois édictées par la législature des Territoires du Nord-Ouest dont l'application découle du paragraphe 29(1)] […] continuent de s'appliquer au Nunavut, dans la mesure où elles peuvent s'y appliquer et ne sont pas par la suite abrogées, modifiées ou rendues inopérantes pour celui-ci. [mon soulignement]

[120] The Crown in right of Canada's rights and privileges also form part of the federal common law. Although it is true that the Supreme Court of Canada has held that, as a general matter, there is no federal common law, that Court has nevertheless recognized that there are specific categories of public law in which there is federal common law, as is the case with the law of Aboriginal title: *Roberts v. Canada*, [1989] 1 S.C.R. 322 at p. 340, 92 N.R. 241; *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 49, 202 N.R. 161. The common law concerning the federal Crown forms another category of federal common law, as is implicit in this Court's conclusion in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para. 58, 379 D.L.R. (4th) 737 that the Federal Courts' jurisdiction extends to "review[ing] exercises of jurisdiction or power rooted solely in federal Crown prerogative".

[121] As a result, the Crown's historic rights and privileges generally exist in Canada and, broadly speaking, have the same scope as they did in England: *The Queen v. The Bank of Nova Scotia* (1885), 11 S.C.R. 1 at p. 18; *Liquidators of the Maritime Bank v. The Queen* (1888), 17 S.C.R. 657 at p. 661, aff'd [1892] A.C. 437 (P.C.). In *The Queen v. Operation Dismantle Inc.*, [1983] 1 F.C. 745 at p. 780, 49 N.R. 363 (C.A.), aff'd [1985] 1 S.C.R. 441, 59 N.R. 1, Marceau

J.A., dissenting, but not on this point, took the view that "the royal prerogative […] exists in Canada in the same way as in England, and [the *Constitution Act, 1867*], did not detract from or in any way affect its content and extent".

[122] There are two exceptions to this rule. First, some of the Crown's rights and privileges have been put on constitutional footing. As the Federal Court (*per* Rennie J. (as he then was)) clarified in *Galati v. Canada (Governor General)*, 2015 FC 91, [2015] 4 F.C.R. 3, for instance, the "[t]he provenance of the power to grant or withhold [royal] assent lies in the royal prerogative, but that power is now embedded in section 55 of the *Constitution Act, 1867*" (para. 56). This implies that, unlike a common law right or privilege, a constitutional right or privilege cannot be abolished or limited absent a constitutional amendment: see, for example, *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 777, 59 N.R. 321 (royal assent requirement in sections 55 and 90 of the *Constitution Act, 1867* cannot be set aside without an amendment proclaimed in accordance with paragraph 41(*a*) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11). Second, those Crown rights and privileges that have not taken on a constitutional character may have been abolished or limited by subsequent legislation.

[123] The Crown's rights and privileges can be exercised by the federal Crown in relation to matters that fall under Parliament's jurisdiction and by each provincial Crown in relation to matters that fall under their provincial legislature's jurisdiction: *Bonanza Creek Gold Mining Co. v. The King*, [1916] A.C. 566 at p. 580, 26 D.L.R. 273 (P.C.) (*Bonanza Creek*); *The Queen in*

Right of Canada v. The Queen in Right of Prince Edward Island, [1978] 1 F.C. 533 at p. 549, 83 D.L.R. (3d) 492 (C.A.).

[124] Within their respective jurisdiction, Parliament and the provincial legislatures can abolish or limit any Crown right or privilege by enacting a statute that does so either expressly or by necessary implication: see, for example, federal *Interpretation Act*, s. 17; see also *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 at para. 54 (*Ross River*) (describing the manner in which the Crown prerogative can be either limited or abolished); *Thouin* at paras. 19-21 (reviewing the principles applicable to the lifting of Crown immunity).

[125] The position is different in the territories. Since Parliament has plenary authority to make laws in relation to the territories under section 4 of the *Constitution Act, 1871*, 34 & 35 Vict., c. 28 (U.K.), reprinted in R.S.C. 1985, App. II; *Reference re of the Alberta Act*, [1927] S.C.R. 364 at pp. 371-372, [1927] 2 D.L.R. 993; *Canada Labour Relations Board et al. v. Yellowknife*, [1977] 2 S.C.R. 729 at p. 731, 14 N.R. 72, it follows that, under the rule in *Bonanza Creek*, the federal Crown can exercise all of the Crown's existing rights and privileges in relation to the territories: Hogg, Monahan & Wright at p. 16. As this Court succinctly explained in *Commissioner of the Northwest Territories v. Canada*, 2001 FCA 220 at para. 39, 274 N.R. 1, "Her Majesty the Queen, in the Territories, is Her Majesty the Queen in right of Canada".

[126] Courts determine the existence and extent of the Crown's rights and privileges: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 at para. 26, 54 O.R. (3d) 215 (C.A.);

Khadr at para. 36. Courts cannot, however, broaden the Crown's existing rights or privileges nor can they recognize new ones: Hogg, Monahan & Wright at pp. 20-21.

(b) *Crown Rights and Privileges in the Nature of Copyright*

[127] With these general principles in mind, I turn now to the Crown's specific rights and privileges in the nature of copyright.

[128] In England, at common law, the Crown had the right to print and publish certain works, including Acts of Parliament, orders-in-council and proclamations: *Basket v. University of Cambridge* (1758), 1 Black W. 106, 96 E.R. 59 at pp. 65-66 (K.B.); *Baskett v. Cunningham* (1762), 1 Black W. 371, 96 E.R. 208 (Ch.); *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201 at p. 215 (K.B.). (In the United Kingdom, the right to print and publish Acts has since been put on statutory footing under the *Copyright, Designs and Patents Act 1988* (U.K.), c. 48, s. 164.)

[129] There are two traditional explanations for the origins of the Crown's right to print and publish. The first is that since the preparation of such works is financed by the Crown (albeit drawing on parliamentary appropriations), as is their printing and publication, the Crown acquires a kind of property right to the works in the nature of a copyright: Harold G. Fox, "Copyright in Relation to the Crown and Universities with Special Reference to Canada" (1947) 7 U. Toronto L.J. 98 at pp. 112-115; Paul von Nessen, "Law Reporting: Another Case for Deregulation" (1985), 48 Mod. L. Rev. 412 at pp. 414-417. The second explanation is that because the Crown is, as the Supreme Court put it in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 at para. 28, "the head of executive authority",

the Crown has a duty to ensure that such works are accurately reproduced and disseminated, which, among other things, allows these works to be relied upon for official purposes, including as evidence in judicial proceedings: Fox at pp. 112-115; von Nessen at pp. 414-417. Accordingly, the Crown's right to print and publish these works allows it to fulfill one of its fundamental executive duties.

[130] The Crown's right to print and publish was received into federal, provincial and territorial common law: see *R. v. Bellman*, [1938] 3 D.L.R. 548, 13 M.P.R. 37 (N.B.C.A.), and preserved by section 129 of the *Constitution Act, 1867* and its equivalents.

[131] Although the rule in *Bonanza Creek* is usually understood to mean that a given right can be exercised by *either* the federal or the provincial Crown, there are rights that are relevant to both the federal and provincial Crowns. The right to print and publish is such a right since Parliament and the provincial legislatures make Acts in much the same manner as did the English Parliament, and the Governor in Council and lieutenant governors in council make orders and authorize or make proclamations in much the same manner as did the English Privy Council. It follows that both the federal and provincial Crowns have the right to print and publish federal and provincial Acts, orders-in-council and proclamations, respectively.

[132] Moreover, as the Supreme Court of New South Wales laid out in *The Attorney-General for New South Wales v. Butterworth & Co. (Australia) Ltd.* (1938), 38 S.R. (N.S.W.) 195 at pp. 247-253, this interpretation is compatible with both traditional explanations for the Crown's right to print and publish. The federal and provincial Crowns, respectively, finance the printing

and publication of all public Acts, orders-in-council and proclamations, providing the basis for a kind of property right. Likewise, the federal and provincial Crowns head the executive at the federal and provincial level and as such, they respectively have an interest and duty to ensure the accurate publication of all Acts, orders-in-council and proclamations.

[133] By virtue of the rule in *Bonanza Creek*, since Parliament has plenary legislative authority in relation to the territories, the federal Crown also has the common law right to print and publish the territorial legislatures' Acts and the territorial commissioners' orders-in-council and proclamations. In practice, the territorial governments exercise the federal Crown's rights for their respective territory.

[134] Parliament and the provincial and territorial legislatures have enacted legislation that governs the printing and publication of Acts, orders-in-council and proclamations, as well as other instruments. None of these statutes expressly abolishes the Crown's common law right nor would it seem that they do so by necessary implication. Instead, these statutes are better understood as regulating the manner in which the Crown exercises its right: see, for example, *Ross River* at paras. 58-61.

[135] The federal *Publication of Statutes Act*, perhaps the most restrictive among these statutes, serves as a good example of how they can tightly regulate the Crown's right without fully displacing it. Sections 10 and 11 of the Act specify that all Acts of Parliament shall be printed by the Queen's Printer, in both official languages and in a particular form, as is meticulously detailed in the *Publication of Statutes Regulations*, C.R.C., c. 1367. These provisions limit how

the federal Crown must exercise its right to print and publish statutes: the Crown cannot, for instance, choose to publish certain statutes and not others. But the source of the Crown's authority to print and publish remains its common law right.

[136] It is not necessary for the purposes of these appeals to detail any further the precise extent of the Crown's common law right to print and publish, including whether it encompasses, as in England, the right to print and publish judges' reasons, as well as certain works associated with the Church of England, including the Authorized Version of the Bible. Nor is it necessary to catalogue the constitutional, statutory and common law limits to which the Crown may be subject in exercising its right to print and publish. Such questions are better left to be decided if they arise in a future case in which a court can have the benefit of submissions on them.

(c) *The Situation of the CSA Electrical Code*

[137] At the federal level and in all provinces, the CSA Electrical Code is incorporated by reference into regulations, rather than into an Act, an order-in-council or a proclamation. Although regulations undoubtedly share certain characteristics with statutes, orders-in-council and proclamations, they are a new legal concept that did not exist when the Crown's right to print and publish was recognized at common law and therefore fall outside the scope of the Crown's common law right. As the House of Lords (*per* Lord Reid) noted in *Burmah Oil Company (Burma Trading) Ltd. v. Lord Advocate*, [1965] A.C. 75 at p. 108, [1964] 2 W.L.R. 1231, "the prerogative […] should not […] be regarded as any wider today than it was three centuries ago".

[138] Even if the Crown's common law right extends to regulations and in jurisdictions where the CSA Electrical Code is incorporated by reference into a statute, the appellants' claim that the Crown's common law right to print and publish certain works extends to any works so incorporated, thereby depriving the copyright holder of the "sole right" to reproduce the work and authorize its reproduction under subsection 3(1) of the *Copyright Act*, would amount to an impermissible broadening of the Crown's right.

[139] The English case of *Universities of Oxford and Cambridge v. Eyre & Spottiswoode Ltd.*, [1964] Ch. 736, [1963] 3 W.L.R. 645 considered a very similar issue. There, Eyre & Spottiswoode argued that the Crown's right to print and publish the Authorized Version of the Bible, which the Crown allowed the publisher to exercise on its behalf, also allowed Eyre & Spottiswoode to print and sell a new English translation of the Bible over which the Universities held copyright without their permission and without paying them any royalties. The Chancery Division of the High Court rejected the publisher's argument, concluding that "[t]he [Crown's] prerogative [to print and publish the Authorized Version] does not […] cover the right to print or to authorise others to print any material the printing of which would be a breach of copyright" (p. 752 (cited to Ch.)).

[140] Thus, the Crown's common law right to print and publish does not enable the Crown (much less someone in the appellants' position) to deprive those in the CSA's position of their statutory rights under the *Copyright Act*.

[141] When one considers what the appellants argue, it is clear that their claim goes far beyond allowing for technological development, as must inevitably be done for common law rights initially recognized hundreds of years ago: George Winterton, *Parliament, the Executive, and the Governor-General: A Constitutional Analysis* (Melbourne: Melbourne University Press, 1983) at pp. 120-121. The technology used for printing has evolved significantly since the Crown's right to publish certain materials was first recognized, as has that of publishing. Today, the Crown can, for instance, exercise its right by dispensing with printing and publishing Acts online. This approach is consistent with the technological neutrality with which the *Copyright Act* itself is interpreted and applied: *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para. 66.

[142] By contrast, incorporation by reference is an entirely new legal concept, not a mere technological development. In my view, documents so incorporated cannot become subject to the Crown's common law right without considerably broadening it.

[143] I also underscore that there is no indication in the instant case that any Crown wishes to see its rights broadened in the manner the appellants assert. Moreover, even if a Crown did desire to broaden the scope of its common law right, no court would be able to accept that it could do so, for, as Diplock L.J. (as he then was) observed more than a half-century ago, "[i]t is 350 years and a civil war too late for the Queen's courts to broaden the prerogative": *British Broadcasting Corporation v. Johns (Inspector of Taxes)*, [1965] Ch. 32 at p. 79, [1964] 2 W.L.R. 1071 (C.A.).

[144] For all of these reasons, the claim that any Crown, much less 11 of them, acquired a common law right to print and publish the CSA Electrical Code by virtue of its incorporation by reference into federal, provincial and territorial statutes or regulations must fail. The Federal Court therefore did not err in concluding that the Crown does not hold copyright in the CSA Electrical Code.

C. *Did the Federal Court err in finding that, in the absence of Crown copyright, CSA owns the copyright in the CSA Electrical Code?*

[145] I turn next to the appellants' contentions regarding the inapplicability of paragraph 34.1(2)(*a*) of the *Copyright Act* and their challenge to the determination that the CSA established that the individual contributors had assigned their copyright in the 2015 CSA Electrical Code to the CSA.

[146] I agree that the Federal Court erred in finding that the presumption in paragraph 34.1(2)(*a*) of the *Copyright Act* was applicable. It provides that:

(*a*) if a name purporting to be that of	*a*) si un nom paraissant être celui de l'auteur de l'oeuvre, de l'artiste-interprète de la prestation, du producteur de l'enregistrement sonore ou du radiodiffuseur du signal de communication y est imprimé ou autrement indiqué, de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur […].
(i) the author of the work […]	
is printed or otherwise indicated thereon in the usual manner, the	

> person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author, performer, maker or broadcaster […].

[147] The term "author" is not defined in the *Copyright Act*, but it undoubtedly refers to a natural person. Copyright subsists for "the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that year": *Copyright Act*, s. 6 [emphasis added]. As a corporation, capable of only metaphorical life and death, the CSA cannot benefit from the presumption in paragraph 34.1(1)(*a*) of the *Copyright Act*.

[148] However, the Federal Court's error is of no consequence because the presumption in the following paragraph of the Act applies to the CSA. Paragraph 34.1(2)(*b*) provides in relevant part:

(*b*) if	*b*) si aucun nom n'est imprimé ou indiqué de cette façon, ou si le nom ainsi imprimé ou indiqué n'est pas le véritable nom de l'auteur, de l'artiste-interprète, du producteur ou du radiodiffuseur, selon le cas, ou le nom sous lequel il est généralement connu, et si un nom paraissant être celui de l'éditeur ou du titulaire du droit d'auteur y est imprimé ou autrement indiqué de la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué est, jusqu'à preuve contraire, présumée être le titulaire du droit d'auteur en question;
(i) no name is so printed or indicated, or if the name so printed or indicated is not the true name of the author, performer, maker or broadcaster or the name by which that person is commonly known, and	

> (ii) a name purporting to be that of the publisher or owner of the work, performer's performance, sound recording or communication signal is printed or otherwise indicated thereon in the usual manner,
>
> the person whose name is printed or indicated as described in subparagraph (ii) shall, unless the contrary is proved, be presumed to be the owner of the copyright in question; and

[149] While the CSA cannot be considered the Electrical Code's "author", it can certainly be its "publisher or owner" for the purposes of paragraph 34.1(2)(*b*). After all, the term "person", as defined by subsection 35(1) of the *Interpretation Act*, "includes a corporation" and there is no sign that Parliament intends that this term take a different meaning in the *Copyright Act*. The CSA's name being printed on the CSA Electrical Code, it is presumed by virtue of paragraph 34.1(2)(*b*) of the *Copyright Act* to be the owner of the copyright in the Code.

[150] In addition, in light of the evidence regarding the CSA's registration of the copyright in the 2012 version of the CSA Electrical Code, I agree with the CSA that the Federal Court ought to have found that the registration of the 2015 version of the Code was done in the ordinary course of business, thereby providing an alternate presumption of the CSA's ownership of the copyright in the 2015 version of the CSA Electrical Code under subsection 53(2) of the *Copyright Act*.

[151] The Federal Court therefore did not err in concluding that CSA was presumed to be the owner of the copyright in issue. Nor did it err in finding that the appellants had not rebutted this

presumption in light of the lack of evidence filed by the appellants and the statements made in Mr. Morton's affidavit, filed by the CSA.

[152] Moreover, contrary to what the appellants argue, the fact that no evidence was filed to show that assignments were made by contributors to the CSA Electrical Code prior to 2010 is irrelevant to the instant case, as the appellants have copied the entirety of the 2015 version of the CSA Electrical Code (including the amendments made by committee members in 2015). They have therefore infringed copyright in the amendments, which is sufficient for the CSA to be entitled to relief. Thus, even if the CSA had not been entitled to rely on the statutory presumptions of ownership of the copyright in the 2015 version of the CSA Code, proof of the assignments made by the committee members in 2015 would have been sufficient to entitle the CSA to the relief the Federal Court awarded.

[153] The Federal Court, therefore, did not err in concluding that the CSA owns valid copyright in the 2015 version of the CSA Electrical Code.

D. *Did the Federal Court err in finding that the appellants had not established the defence of fair dealing?*

[154] I turn next to the appellants' arguments regarding fair dealing and likewise conclude that the Federal Court has not made any error on this issue that warrants intervention. That said, I agree with the appellants that the Federal Court may have conflated separate portions of the test for the defence of fair dealing, but once again am of the view that this does not provide the basis

for intervention as the Federal Court reached the only possible conclusion on these facts, namely, that the appellants' use of the CSA Electrical Code was not fair.

[155] In *SOCAN*, the Supreme Court of Canada reiterated the test for the fair dealing defence under section 29 of the *Copyright Act*, which was first set out in *CCH*. To successfully assert the defence, a person must prove, first, that the dealing was for an allowable purpose and, second, that the dealing was fair: *SOCAN* at para. 13; *Manitoba v. Access Copyright* at para. 12.

[156] As *SOCAN* emphasizes, the two steps are distinct; "[u]nder the test set out in *CCH*, 'fairness' is not considered until the second step of the test for fair dealing" (para. 26). Because the threshold for establishing that the dealing was for an allowable purpose is "relatively low", the "analytical heavy-hitting is done in determining whether the dealing was fair" (para. 27).

[157] At the time *SOCAN* was decided, there were two allowable purposes for fair dealing "research" and "private study". To these, Parliament added three additional allowable purposes to section 29 of the *Copyright Act* when it enacted section 21 of the *Copyright Modernization Act*, S.C. 2012, c. 20: "education", "parody" and "satire".

[158] Only research, private study and education are at issue in this case, as there is no sense in which the appellants' work is either parody or satire of the CSA Electrical Code.

[159] Fair dealing is, as *CCH* put it, a "user's right", so each allowable purpose is understood from the end user's perspective: *SOCAN* at paras. 29-30; *Alberta (Education) v. Canadian*

Copyright Licensing Agency (Access Copyright), 2012 SCC 37, [2012] 2 S.C.R. 345 at para. 22 (*Alberta v. Access Copyright*). The copier's perspective is not relevant at the first stage of the analysis: *SOCAN* at para. 28. Moreover, each allowable purpose is to be given a "large and liberal interpretation": *SOCAN* at para. 15.

[160] Research need not have a creative purpose, "can be piecemeal, informal, exploratory, or confirmatory" and can be driven by "personal interest" alone: *SOCAN* at paras. 21-22, 27. Research is "not limited to non-commercial or private contexts": *Alberta v. Access Copyright* at para. 19. Likewise, private study need not be undertaken in "splendid isolation" and can be "engaged in with others or in solitude": *Alberta v. Access Copyright* at para. 27.

[161] Education, as an allowable purpose, has not been authoritatively interpreted and need not be for the purposes of these appeals. However, following the reasoning in *Alberta v. Access Copyright*, education would seem at least to include research and study for educational purposes, though, as John S. McKeown points out, this need not be in the context of a formal educational institution: *Fox on Canadian Law of Copyright* at pp. 23-18.4.

[162] A person might use the appellants' work for any of these allowable purposes, such as by researching or studying the standards applicable to electrical work, even for commercial ends, as might an electrician, or as part of a program of education about how to safely perform electrical work. Thus, the appellants meet the first step of the fair dealing test because the dealing was, at least partly, for an allowable purpose.

[163] However, the appellants in no way met the second part of the test as their dealing was not fair. In *SOCAN*, the Supreme Court reiterated the six factors that *CCH* identified as being relevant to determining whether dealing was fair: "the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work" (para. 14).

[164] As this Court observed in *Canadian Copyright Licensing Agency (c.o.b. Access Copyright) v. British Columbia (Ministry of Education)*, 2017 FCA 16, 148 C.P.R. (4th) 13, quoting Rothstein J.'s dissent in *Alberta v. Access Copyright*, although "'useful for purposes of the fair dealing analysis, the factors are no statutory requirements'" (para. 44); this Court added that "not all the fairness factors are relevant in all cases nor is any one factor usually determinative" (para. 46).

[165] With those observations in mind, I consider each factor in turn.

[166] **Purpose of the dealing**: This involves "mak[ing] an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work": *CCH* at para. 54. As *Alberta v. Access Copyright* makes clear, at this stage of the analysis, these factors can be assessed from both the end user's perspective and the copier's perspective, so that "the copier [cannot hide] […] behind the shield of the user's allowable purpose in order to engage in separate purpose" (para. 22). The end user's purposes in using the CSA Electrical Code may be manifold and include education, private study and research. The appellants' purpose, however, is commercial; moreover, the appellants seek to replace the 2015 CSA Electrical Code by selling a

cheaper copy-cat version of the Code. Thus, there is no question here of putting "reasonable safeguards" in place to "prevent […] replacing the work", as had been done on the facts in *SOCAN* (paras. 35-36). This factor therefore weighs heavily in favour of the dealing's not being fair.

[167] **Character of the dealing**: "In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair": *CCH* at para. 55. Here, Knight Co. intended to widely distribute multiple copies of the CSA Electrical Code, which also indicates that the dealing was not fair.

[168] **Amount of the dealing**: As the Supreme Court clarified in *SOCAN*, this factor involves examining "the proportion of the excerpt used in relation to the whole work" (para. 41). Here, the appellants are not simply seeking to distribute excerpts of the CSA Electrical Code; they are planning on distributing the whole work, again indicating that the dealing was not fair.

[169] **Alternatives to the dealing**: "If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. […] it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose": *CCH* at para. 57. There is no evidence that there exists a non-copyrighted alternative to the CSA Electrical Code, but it is hard to see how copying the entire Code was reasonably necessary to achieve users' ends in consulting the Code for the purposes of research, private study or education. This factor likewise points to the dealing's not being fair.

[170] **Nature of the work**: This factor requires that a court "examin[e] whether [a] work is one which should be widely disseminated": *SOCAN* at para. 47. The CSA Electrical Code is incorporated by reference into statutes and regulations, which require that it be complied with to undertake certain forms of electrical work, including that undertaken by homeowners. It may be that the portions of the CSA Electrical Code that concern that sort of work should be widely disseminated, but it far from clear that this holds for the entire CSA Electrical Code. This factor is therefore neutral at best.

[171] **Effect of the dealing**: As the Supreme Court noted in *CCH*, "[i]f the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair" (para. 59). Although this factor normally requires the support of evidence, a court can make an inference about the likelihood of competition, as the Supreme Court did in *Alberta v. Access Copyright* at para. 36. Given the manner in which the appellants advertised, their intention was undoubtedly to compete in and indeed capture the market for the CSA Electrical Code. This factor also favours the conclusion that the dealing was not fair.

[172] Weighed together, these factors overwhelmingly support the conclusion that the appellants' dealing was not fair. Although the Federal Court did not distinguish between its analysis at the two distinct stages of the fair dealing test as clearly as it might have, it reached the only available conclusion on these facts. The Federal Court therefore did not err in finding that the appellants did not establish the elements required to make out the defence of fair dealing.

E. *Did the Federal Court err in concluding that the licence granted to Peter Knight did not pertain to the appellants' copying and intended publication of the 2015 version of the CSA Electrical Code?*

[173] Nor did the Federal Court err in rejecting the defence of licence. Even if the appellants are correct in asserting that the 1969 permission to Gordon Knight to quote from the Code was capable of being assigned to Knight Co., a matter I express no view on as it is central to the action pending before the Federal Court, that permission could in no way extend to authorize the actions of Knight Co. at issue in these appeals, which involved the wholesale copying of the entire CSA Electrical Code. The permission given to Gordon Knight was merely to accurately quote, with attribution, selected sections of the Code in the context of an abbreviated and simplified version of the Code. Thus, the appellants' arguments regarding the licence are wholly devoid of merit.

F. *Did the Federal Court err in awarding costs on a lump sum basis?*

[174] Finally, I see no basis for interfering with the Federal Court's costs award. In *Nova Chemicals*, this Court rejected the submission that the evidentiary record before a trial judge asked to award a lump sum must provide a level of detail akin to that which would be required in an assessment conducted by an assessment officer unfamiliar with the proceeding. Instead, the Court held that all that was required "is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of litigation" (at para. 18).

[175] The evidence filed by CSA on which the Federal Court relied to fix costs meets this threshold. The quantum awarded is certainly defensible in light of the complexity and number of issues raised by the appellants. Thus, the Federal Court did not err in fixing costs on a lump sum basis in the amount awarded.

V. Proposed Disposition

[176] In light of the foregoing, I would dismiss these appeals, with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Donald J. Rennie J.A."

WEBB J.A. (Dissenting Reasons)

[177] I have read the reasons of my colleague Justice Gleason, however, I am unable to agree with respect to the application of Crown prerogative in this case.

[178] The issue in this case is whether a person, other than the Crown, who authors a document or who otherwise acquires the copyright in a document, retains the right to prevent another person from publishing that document after it has been incorporated into the laws of Canada. As noted, the *Canadian Electrical Code Part I, Safety Standard for Electrical Installations* (the Code) created by the Canadian Standards Association (CSA) has been incorporated into various regulations adopted by the federal and all of the provincial governments, either as written or with some amendments. Section 3 of the *Copyright Act*, R.S.C. 1985, c. C-42 provides that "copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever". If the CSA retains the copyright in the Code then the CSA would have the sole right to produce or reproduce the Code and could prevent any person (including the Crown) from producing or reproducing the Code. Even if both the Crown and the CSA have copyright in the Code, then the CSA could still prevent publication of the Code since any publication would have to be done with the consent of both parties not just one (*Pinto v. Bronfman Jewish Education Centre*, 2013 FC 945 at paras. 136-140). The existence of a right to prevent the Crown from publishing the law would be incompatible with Crown prerogative.

[179] As noted in the reasons of Justice Gleason, Crown prerogative exists in relation to the publication of certain works, including Orders in Council. This is confirmed by the New

Brunswick Supreme Court, Appeal Division in *The King v. Bellman*, [1938] 3 D.L.R. 548, 13 M.P.R. 37:

> **12** In the famous copyright case of *Millar v. Taylor*, (1769), 4 Burr. 2303, 98 E.R. 201, it is said (p. 2329): "It is settled, then, that the King is owner of the copies of all books or writings which he had the sole right originally to publish; as Acts of Parliament, Orders of Council, Proclamations, the Common-Prayer Book. These and *such like* are his own works, as he represents the State. So likewise, where by purchase he had the right originally to publish; as the Latin Grammar, the Year Books, etc.," and at p. 2401 we find: "It is, and has all along been admitted, that 'by the common law, the King's copy continues after publication; and that the unanimous judgment of this Court, in the case of *Baskett and the University of Cambridge*, (2 Burr. 661, 97 E.R. 499), is right'." In which case (p. 2404) "We rested upon property from the King's right of original publication." *Millar v. Taylor* also decides that Crown copies do not become open as a gift to the public by printing and publication (p. 2331).
>
> (underlining added)

[180] Therefore, the Crown is the owner of any Order in Council. Just as this Crown prerogative existed prior to Confederation, so did the delegation of legislative power in Canada. As noted by Denys C. Holland and John P. McGowan in their text *Delegated Legislation in Canada* (Toronto: Carswell, 1989), at page 7, “[t]he delegation of legislative power is a far from modern phenomenon in Canada”. As support for this proposition the authors refer to various statutes including the *Post Office Act*, C.S.C. 1859 (22 Vic.), c. 31 which provided in section 14 that the “Governor in Council may make orders and regulations for” certain purposes. Therefore, the making of regulations by the Governor in Council predated Confederation.

[181] In this case, the Code was incorporated by reference into the *Canada Oil and Gas Installations Regulations*, SOR/96-118 (the *Regulations*) that were adopted under the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7. Section 14 of this Act, provides, in part, that:

14(1) The Governor in Council may, for the purposes of safety, the protection of the environment, and accountability as well as for the production and conservation of oil and gas resources, make regulations	**14(1)** Le gouverneur en conseil peut, à des fins de sécurité, de protection de l'environnement, de responsabilisation ainsi que de production et de rationalisation de l'exploitation du pétrole et du gaz, par règlement :
…	[…]
(*b*) concerning the exploration and drilling for, and the production, processing and transportation of, oil or gas in any area to which this Act applies and works and activities related to such exploration, drilling, production, processing and transportation;	*b*) régir la recherche, notamment par forage, la production, la transformation et le transport du pétrole et du gaz dans la zone d'application de la présente loi, ainsi que les activités connexes;
…	[…]
(2) Unless otherwise provided in this Act, regulations made under subsection (1) may incorporate by reference the standards or specifications of any government, person or organization, either as they read at a fixed time or as amended from time to time.	**(2)** Sauf disposition contraire de la présente loi, les règlements d'application du paragraphe (1) peuvent inclure par renvoi une version déterminée dans le temps ou la dernière version modifiée des normes ou spécifications adoptées par des personnes physiques ou morales, de droit privé ou de droit public.

[182] Subsection 14(2) of this Act was added by the *Canada Petroleum Resources Act*, R.S.C. 1985 (2nd Supp.), c. 36, s. 122 prior to the enactment of the *Regulations*. Subsection 14(2) of the *Canada Oil and Gas Operations Act* sanctions the incorporation by reference of the standards of any person or organization and provides that the *Regulations* may incorporate such standards as amended from time to time.

[183] The *Regulations* were adopted under the authority of section 14 of the *Canada Oil and Gas Operations Act* and the Order in Council (P.C. 1996-167, C. Gaz. 1996.II.927) adopting

these regulations was published in the *Canada Gazette* Part II on February 13, 1996. The Order in Council sets out the full text of the *Regulations*. Subsections 2(3) and 11(1) of the *Regulations* provide, in part, that:

2(3) A reference to a standard or specification shall be considered to be a reference to that standard or specification as amended from time to time.	**2(3)** Le renvoi à une norme ou à une spécification est réputé se rapporter à celle-ci compte tenu de ses modifications successives.
…	[…]
11(1) Subject to subsections (2) to (4), all electric motors, lighting fixtures, electric wiring and other electrical equipment on an installation shall be designed, installed and maintained in accordance with	**11(1)** Sous réserve des paragraphes (2) à (4), les moteurs électriques, les appareils d'éclairage, le câblage électrique et autre appareillage électrique d'une installation doivent être conçus, installés et maintenus :
(*a*) in the case of an onshore installation, Canadian Standards Association Standard C22.l-l990, *Canadian Electrical Code Part I, Safety Standard for Electrical Installations*; and	*a*) dans le cas d'une installation à terre, conformément au document C 22.1-1990 de l'Association canadienne de normalisation intitulé *Code canadien de l'électricité, Première partie, Norme de sécurité relative aux installations électriques*;
…	[…]

[184] Subsections 11(2) and (4) of the *Regulations* apply to offshore installations and therefore do not modify or restrict paragraph 11(1)(*a*). As a result of section 2 of the *Regulations*, the reference to the 1990 Code in paragraph 11(1)(*a*) will be read as a reference to the version of the Code that is applicable to the period in question. This reference to the Code would have been to the 2015 version of this Code when this version was adopted by the CSA. This is the version that is in issue in this case.

[185] The consequences that could arise as a result of a failure to comply with the *Regulations* are set out in section 60 of the *Canada Oil and Gas Operations Act*:

60(1) Every person is guilty of an offence who	**60(1)** Commet une infraction quiconque :
(*a*) contravenes this Act or the regulations;	*a*) contrevient à la présente loi ou aux règlements;
…	[…]
(2) Every person who is guilty of an offence under subsection (1) is liable	**(2)** Quiconque commet une infraction visée au présent article encourt, sur déclaration de culpabilité :
(*a*) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or	*a*) par procédure sommaire, une amende maximale de cent mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines;
(*b*) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years, or to both.	*b*) par mise en accusation, une amende maximale d'un million de dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.

[186] As a result of these provisions, a failure to comply with the Code could have very serious ramifications, including the possibility of a term of imprisonment of five years. Other regulations that adopt the Code in whole or in part would also provide sanctions for non-compliance. For example, in Ontario, the *Electrical Safety Code* (O. Reg. 164/99) adopts the Code subject to certain amendments. Section 113 of the *Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A, provides that any person who neglects to comply with the regulations (which incorporates the Code as amended), could be subject to a maximum fine of $50,000 ($1,000,000 for a corporation), imprisonment for a maximum of one year or both. Although the standards were first developed as voluntary standards, given the serious consequences that could arise for failing

to adhere to the Code (as adopted by the federal government or the various provincial governments) it would appear that they should no longer be considered to be voluntary standards.

[187] Since the Code has been incorporated by reference into the *Regulations* with significant consequences for a failure to comply with it, the Code, in my view, is part of the laws of Canada.

[188] Although the provisions of the Code are not set out in full in the *Regulations*, they are incorporated by reference.

[189] In *Her Majesty the Queen v. St. Lawrence Cement Inc.*, 60 O.R. (3d) 712, the Ontario Court of Appeal stated that:

> **18** A helpful discussion of the legislative device of incorporation by reference is to be found in F. Bennion, Statutory Interpretation, 3rd ed. (London: Butterworths, 1997) at pp. 585-91. It enables the legislative draftsman to include provisions of earlier statutes or other documents into statutes or regulations without actually reproducing the language of the statute or document. As Bennion points out, incorporation by reference is a common device of legislators in accordance with the maxim verba relata hoc maxime operantur per referentiam rit it eis inesse videntur (words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them). The effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation.
>
> **19** In a case not unlike this appeal, the British Columbia Court of Appeal held that incorporation by reference was complete without publication of the text of the incorporated documents in the Canada Gazette: *R. v. Sims* (2000), 148 C.C.C. (3d) 308. The court held that it was unnecessary to publish a regulatory standard incorporated by reference together with the regulation before a prosecution based on contravention of the standard could be pursued. It further held at p. 318 C.C.C. that incorporation by reference does not require that the text of the incorporated [page720] document be reproduced in the incorporating statute or regulation. See, also, *Re Denison Mines Ltd. and Ontario Securities Commission* (1981), 32 O.R. (2d) 469, 122 D.L.R. (3d) 98 (Div. Ct.).

> **20** I would adopt and apply the following statement of the law of Rowles J.A. in *Sims* at p. 315 C.C.C.:
>
> > When material is incorporated by reference into a statute or regulation it becomes an integral part of the incorporating instrument as if reproduced therein. In that regard, see *Mainwaring v. Mainwaring*, [1942] 2 D.L.R. 377 (B.C.C.A.), in which McDonald, C.J.B.C., referred to the effect of referential legislation in relation to the incorporating statute, at p. 380:
> >
> > > …Legislation by reference…has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: [citations omitted.] The effect of such legislation is as though the extrinsic law referred to was written right into the Act.
>
> (underlining added)

[190] The result is that when the Code was incorporated by reference it was to be considered as part of the text of the *Regulations*. It became an integral part of the *Regulations* as if it had been reproduced in full in the *Regulations*. The potential penalty for a breach of a provision of the Code is not altered because the Code was incorporated by reference rather than being set out word for word in the *Regulations*. There should also be no difference with respect to the application of the Crown's right to publish between incorporating the Code by reference or copying and pasting the entire Code into the *Regulations*. Because the implications of a failure to comply with the Code are the same whether the Code is set out in full in the *Regulations* or incorporated by reference, Crown prerogative should apply to the entire Code. The Crown, and not a separate organization, should have the right to determine how and by whom the Code is published.

[191] This would be the same result, for example, if a person were to write an article in which that person proposed certain changes to an act or an entire new act that the government should adopt. If, based on the article, the government chose to adopt the proposed changes or the new act, the individual who wrote the article would not be able to prevent the Crown from publishing that act. Once it is incorporated into the law, Crown prerogative would apply and the Crown would have the sole right to determine who could publish that law. The private citizen should not have the right to prevent the Crown from publishing the law.

[192] Section 12 of the *Copyright Act* preserves the existing rights and privileges of the Crown which would include the right of the Crown to publish Acts of Parliament and Orders in Council (*Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91, [2014] 4 F.C.R. 3, at para. 34). Any right that may be granted under the *Copyright Act* would be subject to this right. Since Crown prerogative is a right at common law, it can only be altered or taken away by an Act of Parliament – it cannot be altered or waived by any statements of a Minister or by any waiver or assignment signed by any employee of the government. Once the Crown adopted the Code, by incorporating it by reference into the *Regulations*, the Crown and not the CSA would have the sole right to determine who could publish this work.

[193] In *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, 88 D.L.R. 4th 385, the Supreme Court also confirmed, at paragraph 33, that the incorporation of a document by reference would mean that it becomes “an integral part of the primary instrument as if reproduced therein”.

[194] In that case, the Supreme Court of Canada noted in paragraph 31 that the Attorney General of Manitoba was seeking to limit the documents that would have to be translated. One of the questions posed was whether the Province of Manitoba would have to translate various standards that been incorporated into the laws of Manitoba. In relation to these standards, the Supreme Court noted that:

> **37** Another situation where incorporation without translation is likely to be bona fide is one which involves the incorporation of standards set by a non-governmental standard setting body, for example, safety standards developed by a national or international body. Here it is usually legitimate for the legislature to rely on the technical expertise of such bodies. Specific examples provided to this Court in evidence included the incorporation in the Manitoba Highway Traffic Act of "Standards respecting motorcycle helmets" developed by the British Standards Institute and the incorporation in the Steam and Pressure Plants Regulation of "American National Standards Institute Safety Requirements for the Storage and Handling of Anhydrous Ammonia".
>
> **38** In cases such as those described in the paragraph above, translation is impracticable because of the fact that these standards are continually revised by the standard setting bodies. It would be difficult for a legislature to maintain an authoritative translation in the face of this practice. Sometimes in cases where international or national standards are used, translations are already available. But where they are not, it would defeat the purpose of incorporating an outside document to require translation in compliance with s. 23 and, in any event, it is unlikely that translation would guarantee accessibility to materials which are, practically speaking, inaccessible to the majority of citizens because of their technical nature.
>
> (underlining added)

[195] There is no mention of copyright and whether the organization that created particular standards would retain the copyright in those standards and, therefore, would have to consent to the translation of those standards. Paragraph 3(1)(*a*) of the *Copyright Act* provides that:

3(1) For the purposes of this Act, copyright, in relation to a work, means	**3(1)** Le droit d’auteur sur l’oeuvre comporte le droit exclusif de produire

the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right	ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :
(*a*) to produce, reproduce, perform or publish any translation of the work,	*a*) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

[196] If the organization that had developed the particular standards had retained the copyright to such standards after they were incorporated into the laws of Manitoba, then that organization and not the Province of Manitoba would have had the sole right to publish a translation of the standards. Since there was no discussion of whether the Province of Manitoba had the right to translate these standards, it could be implicit that it was assumed that the Province of Manitoba had the right to translate them. The Province could presumably only be obligated to do something that it had the right to do.

[197] In this case, the *Canada Oil and Gas Operations Act* delegated to the Governor in Council the authority to make regulations for the purposes of safety in relation to certain works. The Governor in Council acted under this authority in adopting the *Regulations* which were set out in the Order in Council. Therefore, the Crown prerogative applies to the *Regulations*.

[198] The *Canada Oil and Gas Operations Act* specifically sanctioned the incorporation by reference of standards of any organization and, therefore, the adoption of the Code was also done under the authority of this Act. The Governor in Council could have developed its own electrical

safety standards but instead chose to use the existing Code. Since the Code was incorporated by reference into the *Regulations*, the Code is to be considered part of the text of the *Regulations* (and this would include the Code as amended from time to time). As a result, Crown prerogative would also apply to the Code.

[199] The 2015 Code was part of the *Regulations* with severe penal consequences for noncompliance. Public policy would dictate that each and every person in the country who may be subject to the *Regulations* should have the right to access the Code to ensure that they comply with the *Regulations*. The CSA should not have the right to prevent P.S. Knight Co. Ltd. from publishing the Code any more than it should have the right to prevent the Crown from publishing it. In this case, P.S. Knight Co. Ltd. simply wanted to publish the Code and make it accessible to everyone at a reduced price from that charged by the CSA. Having greater access to the law at a reduced price cannot be considered to be contrary to public policy.

[200] The *Reproduction of Federal Law Order*, SI/97-5 allows the copying of federal enactments. I agree that a regulation would be an enactment and, therefore, the *Regulations* are covered by this Order. In my view, because the result of incorporating the Code by reference into the *Regulations* is that it is to be considered part of the text of the *Regulations*, this order would allow P.S. Knight Co. Ltd. to publish the Code.

[201] In my view, P.S. Knight Co. Ltd. has the right to raise this issue of Crown prerogative in this case. In *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44, the issue was whether Mr. Khadr was entitled “to the remedy of an order that Canada request of the United

States that he be returned to Canada" (para. 27). In paragraph 35, the Supreme Court noted that "the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations". The comments in paragraph 36 were, therefore, in relation to a prerogative right that had not been exercised and whether a person other than the Crown could cause the Crown to exercise these rights.

[202] However, in this case P.S. Knight Co. Ltd. is not asking the Crown to exercise any prerogative right. What is in issue in this case is the right to publish certain works that have become part of the laws of Canada. The Order in Council that adopted the *Regulations* was published in the *Canada Gazette* Part II on February 13, 1996. Therefore, the Crown prerogative to publish this Order in Council has been exercised. Since the Code was considered as part of the text of the *Regulations* when it was incorporated by reference, it is the same as if it had been reproduced in full in the *Regulations* and, therefore, is part of the *Regulations*. Since the *Reproduction of Federal Law Order* permits any person to copy any enactment, the Crown has already granted P.S. Knight Co. Ltd. the right to copy the Code.

[203] As a result, I would allow the appeal.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	RENNIE J.A.
DISSENTING REASONS BY:	WEBB J.A.
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