



By Duncan Glaholt

PERSONAL PROPERTY SECURITY ACT V. CONSTRUCTION LIEN ACT PROTECTING YOUR RIGHTS THROUGH REGISTERED FIXTURE INTERESTS

The Ontario Court of Appeal is soon expected to release its decision in *Kennedy Electric Ltd. v. Rumble Automation Inc.* The majority of the Divisional Court in that case had held that the installation a massive assembly line bolted into a factory specifically built to house it did not give rise to a lien since it could neither be considered part of an integrated construction improvement nor a freestanding, independent improvement. This decision has caused many in the mechanical contracting industry to examine forms of security other than the Construction Lien Act. In this regard, the Personal Property Security Act, R.S.O. 1990, c. P.10 ("PPSA") is worth another look.

Suppliers of services and materials in a construction setting often assume that all materials supplied become incorporated into the improvement and that the lien remedy is the only appropriate remedy. This is not always so. In fact, it may be better for certain suppliers of construction materials to retain title to unpaid goods, perfect their security interest by timely registration under the PPSA, and then enforce payment by repossession, if necessary, free of holdback restrictions, trust fund complexities and the burdensome class action provisions of the Construction Lien Act.

On the face of it, the PPSA expressly excludes building materials that have been affixed to real estate from the scope of the Act. Items have been held to be building materials if they are "integral parts of the whole construction" and are "so closely interlinked and identified with other materials generally described as building materials that they must for all practical purposes be considered as building materials". In other words, material such as lumber or concrete would clearly be building material, while furnaces or stand-alone air conditioning units would not be.

Suppliers of materials or equipment other than building material may look to s. 34(1) of the PPSA. This section provides them with a security interest that attaches before the goods become a fixture, with priority over the claim of any person who has an interest in the real property. If the security interest attaches after the goods became a fixture, it has priority only over subsequently acquired interests in the real estate.

Section 34(2) of the PPSA provides that this security interest is subordinate to the interest of subsequent purchasers for value of an

interest in the real property or creditors with a prior encumbrance of record, to the extent that such creditor make subsequent advances, but only if the subsequent purchase or subsequent advance was made or contracted for without knowledge of the s. 34(1) security interest and before notice of the security interest is registered.

"Fixture" is not a defined term under the Act, so that the time at which an item changes from a chattel to a fixture remains to be determined by the common law. Chattels even slightly affixed to the

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land may be considered fixtures unless the circumstances show that they were intended to continue as chattels.

In light of the recent case law dealing with access to the Construction Lien Act, suppliers and installers of stand-alone heating, ventilation and air conditioning units, component parts of manufacturing, processing or packaging equipment, items of interior decoration or recreational use such as pools, saunas or gymnasium equipment, safes or security systems, irrigation or drainage systems, portable or modular structures such as sheds, barns, garages, and even schoolrooms and trailers in some cases, might be better off reserving title, registering the fixture interest under the PPSA and electing to repossess rather than sue for their price.

Provided the statute applies and such persons effect valid registration of their fixtures interest in the Land Registry Office before any of the other parties mentioned in s. 34 acquire their interests, they should rank in priority over those interests. **B**

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