

KENNEDY ELECTRIC LTD. V. RUMBLE AUTOMATION INC.

A Case Comment by Charles G.T. Wiebe
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In 1963, the Supreme Court of Canada released its landmark decision on the interpretation of lien legislation. In *Clarkson Co. Ltd. v. Ace Lumber Ltd.* (1963 S.C.R. 110), the court held that while the lien statute merited a liberal interpretation with respect to the rights it conferred upon those to whom it applied, it had to be given a strict interpretation in determining whether a lien claimant was a person to whom a lien was given. In other words, it was going to be hard to get in, but once you were in, you would be treated with compassion. *Kennedy Electric Ltd. v. Rumble Automation Inc.* (2004 O.J. No. 5091 (S.C.J.)) is one of the numerous decisions that used the Supreme Court's decision to deny a potential lien claimant the right to lien.

The facts in *Kennedy Electric* were straightforward. Dana contracted with Ford to build frames for the Ford F150 pickup truck. Dana developed a two-stage process for the contract, the first step being the construction of a building addition, which would house the assembly line; the second being the design, construction and installation of the line itself. The addition was built by a separate contractor. Rumble Automation entered into a contract with Dana for the design, building and installation of an assembly line for manufacturing the truck frames. The installation itself was to be done in two stages as well. The line would be built and tested in Oakville and Mississauga, then disassembled, shipped and reassembled at the new plant in St. Mary's. The plaintiff, Kennedy, was hired to disassemble the line, ship it on 165 trucks, develop a layout plan and install the line at St. Mary's. It was for this work that Kennedy and its subcontractors tried to lien. The key components of the line were 100 mezzanine platforms and 165 robots. The final line covered about 100,000 square feet, was about 20 feet tall and weighed approximately half a million tons.

Kennedy argues that the entire project, i.e. the building addition and the assembly line, constituted one integrated project within the meaning of the Construction Lien Act. In support of its argument that the line constituted an improvement under the Act, Kennedy emphasized its sheer size and weight, the fact that the line was to remain in place for at least eight years, that it was affixed to the floor by a complex system of about 3,000 mechanical and chemical bolts, that the vast majority of the line was hard-wired into the building's own services, and that the building addition was designed for the specific purpose of housing the line. These facts, Kennedy submitted, clearly constituted the line an improvement that benefited and enhanced the value of the property.

Rumble and Dana responded that the building addition was a separate and independent construction project and that while the addition was clearly an improvement for the purposes of the Act, the line was clearly not. They argued that the line could at any time be disassembled and taken elsewhere, and consequently did not become part of the addition.



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The court reviewed the pertinent case law in some detail. As early as 1952, the Ontario Court of Appeal held that the installation of machinery used in a business operated inside a building did not give rise to a lien (*Hubert v. Shinder* (1952) O.J. No. 23 (C.A.)). The machinery in question



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was laundry equipment. The New Brunswick Court of Appeal disallowed a lien for the installation of a corrugated paper machine weighing 2,500,000 pounds, holding that the machine, including its concrete foundation, was not sold as a component of the building. In that case, too, the building was specifically designed to house the machine. In another Ontario decision, a large water tower installed on the roof of a manufacturing plant was held not to be an improvement (*Baltimore Aircoil of Canada Inc. v. Process Cooling Systems Inc.* (1993), 16 O.R. (3d) 324 (Gen. Div.); reversed on other grounds 30 O.R. (3d) 159 (C.A.)). Two British Columbia decisions that had been relied upon by *Kennedy* were distinguished because unlike its Ontario counterpart, the definition of “improvement” in the British Columbia Act stressed “attachment” to land.

Based on the case law and the evidence in this case, Justice Killeen concluded that the assembly line, being manufacturing equipment, could not be considered as part of an integrated construction improvement within the building addition, nor could it be considered as a freestanding, independent improvement giving rise to a lien. He held that *Kennedy* had no lien. The decision is under appeal.

What, then, can suppliers of such equipment do to secure payment? Pending the appeal in *Kennedy*, they can lien away, hoping the appeal will succeed. This is risky, as the weight of lower court decisions, at least in Ontario, is that the fabrication and installation of such equipment

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does not give rise to lien rights. Should the *Kennedy* appeal fail, the court will likely find that you have no lien rights. One can enhance one's chances of having liens upheld by including references in the underlying contract to aspects of the lien remedy, such as holdbacks and trust obligations. Justice Killeen relied upon such contractual references to the lien remedy to assist in his determination. But, by no means are such references conclusive of the issue.

One can alternatively choose to secure one's claim to payment under the *Personal Property Security Act (PPSA)*. This Act does not apply to fixtures in land. A detailed discussion of the PPSA is beyond this note; however, where your contract conveys to you some form of "security interest" in the property installed, such as the retention of title until payment clause, you should explore with your lawyer the PPSA option. Such an interest can be secured under the PPSA as a "purchase-money security interest" which, if secured in a timely way, has priority to any other security interest in the collateral. The risk of course is if the *Kennedy* appeal succeeds. Once you choose the PPSA option, you

cannot then choose to lien. The owner will in any event argue that your supply is a lienable supply whatever the outcome of the *Kennedy* appeal.

Perhaps, in light of this uncertainty, the best course of action is to simply require a substantial down payment as a condition of your supply. With money in hand, the risk of non-payment is reduced accordingly. In addition, you should exercise all your contractual remedies to cease working as soon as there is non-payment of periodic payments. The customer should be advised that your rigorous approach has been made necessary by the uncertain state of the law. In this way, customers will be kept as current as possible on their accounts, and the scope of any dispute, regardless of what option you choose to fight it on, will be minimized.

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