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***Kennedy Electric Limited v. Dana Canada Corporation,* [2007] O.J. No. 3657 (C.A.)**

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On September 27, 2007, the Ontario Court of Appeal dismissed the lien claimants' appeal in Kennedy Electric Limited v. Dana Canada Corporation. The trial judgment in this case was initially reported in L.U.C. #41. The trial judge (Justice Killeen) had ruled against the seven lien claimants (see (2004), 73 O.R. (3d) 530), finding that the services and materials they supplied for the installation of an automotive assembly line within a new industrial building addition owned by Dana Canada Corporation did not amount to a lienable "improvement" under the Ontario Construction Lien Act, R.S.O. 1990, c. C.30.

Three of the lien claimants appealed Justice Killeen's ruling to the Ontario Divisional Court, which dismissed the appeal in a 2:1 decision released March 14, 2006 (see [2006] O.J. No. 972). The majority of the Divisional Court (O'Driscoll and Wilson JJ.) found that the trial judge had applied the proper law to the facts, as he found them, and that there was no basis in fact or law to disturb the trial judgment.

In a lengthy dissent, Justice Chapnik, of the Divisional Court found otherwise, concluding that the learned trial judge had proceeded on a wrong principle and had misapplied the laws to the facts in reaching the conclusions he did. Chapnik J.'s summary of some of the salient facts, however, conflicted with the very findings of the trial judge that were not challenged on the appeal. She also questioned the case law cited by the trial judge in support of his ruling.

The Ontario Court of Appeal, in a judgment written by Armstrong J.A. (Associate Chief Justice Dennis O'Connor, and Justice R.J. Juriansz concurring) unanimously dismissed the appeals of Kennedy Electric Limited and Cassidy Industrial Contractors Ltd. The other lien claimants at trial did not join in the appeal. The Ontario Court of Appeal was not prepared to interfere with the trial judge's finding of facts in the absence of a palpable and overriding error. In that regard, the Court noted the Divisional Court's observation that "the appellants did not challenge any of the trial judge's findings of fact" stating:

In my view, the finding of portability is a finding of fact and therefore on appellate review subject to a standard of palpable and overriding error. I do not agree that the trial judge committed palpable and overriding error in making this finding. There was evidence to support the finding. The assembly line had been built and disassembled before being transported to St. Marys for installation. The assembly line could be readily disconnected from the addition to the plant with no damage to the plant or its services. Moreover, Dana had a history of moving assembly lines from one plant to another. While a different judge may have come to another conclusion on the issue of portability, I am satisfied that it was open to the trial judge to reach the conclusion that he did.

I also wish to address the dissenting judge's observation that the trial judge may well have ignored important factors tending to show that the P221 project was viewed by the parties as an integrated whole. I do not agree. The trial judge's reasons were thorough. He referred to factors that both favoured the finding that the building addition and the assembly line were an integrated project and those that pointed in the other direction. In the end, he concluded that the two were not part of a single project. I am satisfied that this finding was open to him on the evidence.

It is important for readers to recognize that the trial judgment followed several days of trial and the examination and cross-examination of eleven witnesses called on the behalf of the lien claimants, and a couple of witnesses for the defendants. The trial judge had an opportunity to weigh that evidence and reserved his decision for more than ten months before releasing his judgment. Following the trial decision, the defendant, Rumble Automation Inc., which had the direct contract with the plant owner, Dana, for the design, build and installation of the assembly line, and which in turn, subcontracted with the lien claimants, became a bankrupt. As a consequence, the subcontractors and suppliers were faced with the prospect of no commercial recovery of their debt once their lien rights were extinguished.

On the law, while the Court of Appeal parted ways, somewhat, with the trial judge's application of the Hubert v. Shinder, [1952] O.J. No. 23, [1952] O.W.N. 146 (C.A.) case, it concludes:

what emerges from the brief reasons of the Hubert case is that a mechanics' lien will not arise where the work and materials have been applied in respect of an installation that is movable (i.e. portable) and not an integral part of the building. A movable installation does not improve the building in which it is located as it does not become a part of the building.

In a further cautionary note, the Court of Appeal adds:

I would hesitate to derive from Hubert the general proposition articulated by the trial judge. I think it is too broad. Each case will depend on its facts. In most cases, the installation or repair of machinery used in a business operated in a building, particularly where the machinery is portable, will not give rise to lien rights under the CLA. On the other hand, where machinery is installed in a building for the use of a business and is completely and permanently integrated into the building, a lien claim will arise. However, based on the findings of fact made by the trial judge in this case, it was open for him to find that no lien claim arose.

Counsel involved in the prosecution and defence of lien claims in Ontario and the other Provinces are well advised to review the decisions from all three levels of courts in the Kennedy Electric case. Ultimately, as the Ontario Court of Appeal points out, the cases on the issue of lienability, while involving questions of mixed fact and law, are fact-driven.