

Update

Construction Law

October 2, 2007

Ontario Court of Appeal Rules on *Kennedy Electric Ltd. v. Dana Canada Corporation and Rumble Automation Inc.*

By Howard Wise

On September 27, 2007, the Ontario Court of Appeal released its judgment in the matter of *Kennedy Electric Ltd. v. Dana Canada Corporation and Rumble Automation Inc.* We commented on the Divisional Court decision which upheld the trial decision in our March 31, 2006 Update. <http://www.goodmans.ca/index.cfm?cm=Doc&ce=deta ils&primaryKey=493>.

The facts of the case, briefly stated were as follows: In October, 2000, Dana Canada Corporation (“Dana”) entered into an agreement with Ford to build frames for the F150 pickup truck. A new assembly line was required to produce these frames and Dana contracted with Rumble Automation Inc. (“Rumble”) to design, build and install it. Given the size and complexity of the proposed assembly line, Rumble could not do all of the work itself and subcontracted a portion of its scope of work to Kennedy Electric Ltd. (“Kennedy”), who in turn engaged subcontractors to complete the work. After a dispute arose in December, 2002, construction liens were registered against Dana’s plant

The issue at trial was whether these assembly lines, which were manufactured off-site and then transported to the plant constituted an “improvement” under the *Construction Lien Act* (“CLA”). If the work was found to be an “improvement”, Kennedy and its subtrades would

have validly registered liens against the property.

At trial, the judge interpreted the rights to a statutory lien narrowly and as such, ultimately held that this assembly line was not an “improvement” under the CLA.

The Divisional Court, the first appellate court in this matter, decided by a 2-1 majority that the trial judgment was correct.

The case was then appealed to the Court of Appeal.

The Court of Appeal, in upholding the trial judge’s decision, concluded, that while they may not have agreed with the trial judge’s articulation of the law, they could not conclude that he made a reversible error.

The Court of Appeal held that as a result of the trial judge making specific findings of fact as to whether or not the assembly line in question met the definition of an “improvement” under the CLA, they were not prepared to interfere with the decision made at trial.

In reading the Court of Appeal decision, two things become clear. First, judicial deference was made by the court to the “findings of fact” made by the trial judge. While the court did not necessarily agree with the categorization of those findings, as a result of the trial judge’s findings, the Court of Appeal was not prepared to deal with a review of the facts at the appeal level. Secondly, and as a result of non-disturbance of the facts, there was no basis to support an argument of reversible error at law. The Court did acknowledge that they did not necessarily agree with all aspects of the trial decision.

The Decision and its Aftermath

The debate, which will now ensue as a result of the decision, is to what extent the supply of certain types of machinery, assembly lines and process equipment, are lienable. Another question which invariably will be asked is what, if any, other steps can or should be taken to protect one’s interest when working on a large

Goodmans^{LLP} Update

construction project where part of the scope of work includes the installation of machinery, assembly lines, or process equipment.

In reviewing the decision, one issue which has not been highlighted, is the fact that the parties to the contract governed themselves as if the CLA was applicable. Holdback was maintained from progress draws and was to be released in accordance with the CLA..

This is not uncommon and in many contracts of this nature, holdback is retained, publication of substantial performance in accordance with the CLA is required, and the parties carry out the project based on the provisions of the CLA. If these types of contracts are no longer governed by the CLA and there are no longer lien rights in respect of this type of contract, then the issue of maintaining holdback becomes significant. Should the owner still withhold 10% for each progress draw? If the project is not “lienable”, is there any statutory right to maintain a holdback?

Furthermore, if the work includes both the supply of equipment and improvements to the building, is a portion of the work lienable? It appears that if work is performed under two separate and distinct contracts, one for the supply and installation of the equipment and one for the modifications to the base building, or if the contract work is clearly divisible along these lines, there may be an argument to be made for the distinction between “lienable” and “non-lienable” work.

It is important to note that the Court of Appeal’s decision was based on the facts of the particular case and the Court has not ruled that the supply and installation of assembly lines, as a matter of law, are not lienable. They further left open the possibility that certain “base building” work would be lienable although they did not reach that conclusion based on the facts of this case.

The Court of Appeal has reaffirmed that these types of issues must be looked at on a case-by-case basis. However, regardless of where one fits on the construction pyramid, one must be mindful of the nature of the contract and attempt to determine whether or not, based

on the facts surrounding each contract, the supply of labour, services and materials are lienable, as this will inevitably affect how the project is administered.

In light of the Court of Appeal’s decision, I do not think we have heard the last word on dealing with these types of contracts.

If you have any questions with respect to the foregoing, please do not hesitate to contact:

Ira Berg iberger@goodmans.ca	416.597.4105
Joseph Cosentino jcosentino@goodmans.ca	416.597.4245
Ken Crofoot kcrofoot@goodmans.ca	416.597.4110
Jennifer Leitch jleitch@goodmans.ca	416.597.5157
Derek McBean dmcbean@goodmans.ca	416.597.4130
Joseph K. Morrison jmorrison@goodmans.ca	416.597.4203
Carla Salzman csalzman@goodmans.ca	416.597.4150
Jerry P.K. Topolski jtopolski@goodmans.ca	416.597.5907
Howard Wise hwise@goodmans.ca	416.597.4281

All Updates are available at www.goodmans.ca. If you would prefer to receive this client Update by e-mail, require additional copies or would like to inform us of a change of address, please e-mail: updates@goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice. © Goodmans LLP, 2007.