

## Clairtrell Concrete



HOWARD MANDEL/APERTURE IMAGING

Workers get a bucket ready to hoist up at Twenty One Clairtrell condominiums in Toronto, Ont. Owner/construction manager the Rockport Group has completion of the seven-storey, 218-unit project scheduled for late 2012 and it will include a private dining room, lounge area, outdoor terrace, and a guest suite. The project was designed by Kirkor Architects and consultants are: Read Jones Christoffersen Ltd. (structural) and M.V. Shore Associates (1993) Ltd. (mechanical/electrical). Subtrades include: Roni Excavating; Premform Ltd. (formwork); Salit Steel (rebar); CBM (concrete); Mapleview Electric Co. Ltd.; and Marli Mechanical.

## A guide to construction liens in Ontario: Part Two

HARVEY J. KIRSH & MATTHEW R. ALTER  
SPECIAL TO THE DAILY COMMERCIAL NEWS

The purpose of lien legislation is to provide an informal, inexpensive, expeditious, yet formidable, remedy for enforcing construction claims by contractors and subcontractors. The current version of the Construction Lien Act, for example, decrees that the procedure for enforcing a lien "shall be as far as possible of a summary character..." and penalizes litigants in costs "where the least expensive course is not taken..." This sounds simple and obviously desirable, but over the years a complex body of construction lien law has grown up in the courts and through the sometimes tortuous process of legislative change, resulting in a field which is filled with traps for the unwary.

A comprehensive account of construction lien law's development and current state is given in the new, 3d edition of Kirsh and Alter: *A Guide to Construction Liens in Ontario* (LexisNexis, 2011). The following is the second part of their two-part special for DCN.

### Repealing the Requirement for Affidavits of Verification

The Open for Business Act, 2010 also includes a change to the form and content of a lien, with the repeal of provisions requiring each claim for lien to be verified by an affidavit in a particular form.

This amendment to the Act appears to be a legislative response to the practical considerations that have arisen since the advent of the electronic land registration system in Ontario and the conflict between the Land Registration Reform Act and the Construction Lien Act. The recent amendments to the Construction Lien Act not only repeal the requirement for an affidavit of verification, but also expand the class of individuals who may be cross-examined on a claim for lien, to include: (i) the lien claimant, (ii) the agent or assignee of the lien claimant, and (iii) a trustee of the workers' trust fund, where applicable. The required form for a claim for lien may now be signed by

the "claimant or agent", but the legislation does not specify whether cross-examination is restricted to the agent who signed the claim for lien, or may be conducted on some other officer, director or representative of a corporation.

### Responding to Concerns with the "Sheltering" Lien Statement

With the introduction of the electronic registration system in Ontario, regulations required lawyers who were obtaining orders to vacate a lien to certify either that no other claims for lien had been registered on title, or that no other registered claim for lien was sheltering under the certificate of action, the registration of which was being vacated. In response to concerns raised by members of the bar, a recommendation was adopted to eliminate the requirement for this "sheltering" statement. This recommendation resulted an amendment the Construction Lien Act to permit a lien claimant, whose lien is sheltered under a lien that is the subject of a vacating order, to proceed with an action to enforce the sheltered lien as if the order had not been made.



Matthew R. Alter

The evolving realm of construction liens is filled with subtle legal and practical nuances. Lien claimants and their lawyers must be careful to ensure that they follow the requirements of the Act, as mistakes can be both easy to make and costly.

The new edition of *Kirsh and Alter* provides up-to-date guidance on the multitude of issues associated with liens for anyone involved in the construction and building industries

in Ontario. About the authors:

**Harvey J. Kirsh is Counsel to Glaholt LLP and an arbitrator and mediator with the Global Engineering and Construction Group of JAMS (Judicial Arbitration and Mediation Services). He is certified by the Law Society of Upper Canada as a specialist in construction law.**

**Matthew R. Alter is a Partner at Cassels Brock & Blackwell LLP and a member of the firm's Construction, Infrastructure and Advocacy Groups. He is certified by the Law Society of Upper Canada as a specialist in construction law.**

## Inquest to be held into construction site death of Kenneth Martins

TORONTO  
An inquest will be held into the death of Kenneth Martins who died on May 28, 2010 after collapsing at a construction site at the age of 22.

An inquest is mandatory under the

Coroners Act. The inquest will examine the events surrounding Martins' death. The jury may make recommendations aimed at preventing similar deaths.

The inquest is expected to last three

days and to hear from about seven witnesses.

The inquest will begin at 9 a.m. on May 8 at the John Sopinka Court House, 45 Main St. E., Hamilton, Ont.

DCN NEWS SERVICES

## Sticker price versus criteria

By virtue of their commitment to open, fair and competitive bidding, governments and their agencies have come to place greater emphasis on the sticker price then virtually any other type of customer.

Municipal procurement bylaws and policies of a good is the amount that the vendor must be paid, in order to transfer property in the good from the vendor to the customer. Such an approach ignores the fact that the sticker price is only one component of the overall cost of the product.

With the property in the goods come a variety of attendant risks, each of which has a cost associated with it over the long term every customer can be expected to pay. The failure to take into account the full-life cost of an asset, as compared to the sticker price initial capital outlay associated with the purchase of the asset has been a major shortcoming in Canadian public procurement since its inception.

The question is how far the municipality should go in considering cost factors beyond the sticker price. Two basic approaches have evolved to date. The first involves a broader price-related evaluation — the effort to work out the full-life cost of a given source of supply. The second is even broader. It seeks to work out which of two (or more) sources of supply offers the best value for money.

In addition to the problems previously considered, the practice of focusing entirely on price ignores the ability of a supplier to bury hidden costs in other terms of the contract. As we have seen, tenders are effective only where the product (or service) supplied by any given supplier is interchangeable — that is a natural and acceptable substitute for the products of any other supplier.

In dealing with this question, it is important to bear in mind the distinction between equivalent products (that is products which are the same in every material respect) and comparable products (this is products which generally possess the same performance characteristics). Aside from the requirements for fungible goods, a

price focus is justified only where the following conditions are met:

The term of the trade offered by the supplier must be essentially the same (i.e., the scope and duration of warranty coverage).



Procurement  
Stephen Bauld

The products offered by the competing suppliers must be available in the same quantity and at the same time.

There can be no exceptional circumstances related to the supplier (i.e., the supplier is not in receivership or liquidation, in which case there may be reasonable doubt expressed as to whether it will be able to honour its warranty and other ongoing contractual commitments).

In other words, not only must the goods and services be fungible (i.e., interchangeable) but so must the terms of the contract. The agreement for focusing entirely on price is less clear in other circumstances. It is the need for identical terms of contract that leads to the near invariable practice of (a) specifying that the bidders must offer to supply in accordance with a prescribed form; and (b) the prohibition against any variation to the form or qualification of the bid. If each bidder is essentially allowed to vary from the standard form, the offers of each bidder become for all intents and purposes non-comparable, and the competitive mechanism of the award of a contract by tender is frustrated.

The problem with the best value concept is that while the sticker (or bid) price associated with an item is a hard number, the same is not true of either the full-life cost or the best value. Although this general subject is described using the language of a true tender, we will also consider the same issues from the perspective of an RFP.

**Stephen Bauld, Canada's leading expert on government procurement, is a member of the Daily Commercial News editorial advisory board. He can be reached at [stephenbauld@bell.blackberry.net](mailto:stephenbauld@bell.blackberry.net).**