Regent Park Pools

WILLIAM CONWAY/PROGRESS PHOTOGRAPHY

Construction is ongoing for the Regent Park Aquatic Centre in Toronto, Ont. General contractor for the single-storey centre is The Atlas Corporation and completion is expected in spring 2012. The centre will include leisure and training pools, a water slide, warm water therapy tank, change rooms, classrooms for lifeguard training and office space. The owner is the City of Toronto and the project was designed by MacLennan Jaunkalns Miller Architects Ltd. Consultants are: Blackwell Bowick Partnership (structural); LKM Consulting Engineers Inc. (mechanical/electrical); A W Hooker Associates Ltd. (cost); Dillon Consulting Ltd. (civil) and PMA Landscape Architects.

Wood use guide released

PATRICIA WILLIAMS
STAFF WRITER

In a move designed to facilitate increased use of wood-frame construction in low-rise educational buildings in the province, Ontario Wood Works! has published a 64-page reference guide.

Produced for the North Bay-based organization by Patrice Tardif Consulting, the document makes the case for wood construction as a "strategic" option. It includes case studies as well as a detailed review by Morrison Hershfield of Ontario Building Code (OBC) requirements pertaining to wood use.

"The purpose is to make it easier for architects and others to use more wood in schools," said Marianne Berube, executive director of Ontario Wood Works! "The guide is also intended to help school boards in decision-making."

Wood construction systems and their components available for use in low-rise school buildings in the province are introduced in the recently released guide. Site-built and pre-fabricated options, including the cross-laminated timber system, are outlined.

The report said unsprinklered, one-and two-storey school buildings up to 2,400 square metres in size can be built entirely with wood construction systems, provided certain requirements are met. Adding sprinklers to these buildings brings the maximum area up to 4,800 square metres.

"With the use of firewalls to compartmentalize a larger building into a series of connected smaller buildings, this maximum area can be considerably increased."

The report said a requirement for non-combustible construction "does not necessarily imply" that school buildings must miss out on the benefits of wood construction systems, such as heavy timber roof systems or wood interior elements and finishes.

"There are also alternative options for complying with OBC requirements which allow for the use of developing wood technologies."

The guide contains a detailed appendix that documents applications of the Ontario Building Code that are relevant to the use of wood in educational buildings. Limitations, conditions or restrictions are identified.

In addition, opportunities for alternative solutions or changes to future editions of the code are explored. A new edition is expected to be published in 2012.

Berube, whose organization was set up 12 years ago to promote use of wood in nonresidential construction, said one of the hurdles when it comes to school projects has been navigating code requirements.

She said the analysis done by Morrison Hershfield will make it easier for design professionals to understand such requirements and thus potentially make more use of wood in low-rise educational buildings.

"We've had great feedback already from architects and engineers on this," she said.

Construction Lien Act

A guide to construction liens in Ontario: Part One

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.

Harvey J. Kirsh

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 first of two parts of their review for DCN.

The first mechanics' lien legislation was enacted in Maryland in 1791, apparently inspired by the desire of Thomas Jefferson and James Madison to stimulate and encourage the rapid building of the City of Washington as the permanent seat of the government of the United States.

That legislation granted a lien in favour of "'master builders', bricklayers, carpenters, joiners, 'undertakers' or 'workers' on the house and the ground on which the same is erected" in order to encourage builders "to undertake the building and finishing houses within the said city, by securing to them a just and effectual remedy for their advances and earnings."

Lien legislation was subsequently enacted by other state legislatures, perhaps as an acknowledgment that, in a young and growing country, not only was it important to foster mechanical, commercial and industrial pursuits, but it was also manifestly equitable to provide security for the payment for labour and materials which enhanced the value of the lands into which they were incorporated.

The first mechanics' lien legislation in Ontario, An Act to establish Liens in favour of Mechanics, Machinists and Others, was enacted in 1873. It restricted the right to lien to those persons who contracted directly with the owner of the land, but provided subcontractors with the right to establish a "charge" against any moneys owing by the owner to the contractor. Lien rights in the land were soon extended to subcontractors.

The modern form of the legislation in Ontario, the Construction Lien Act, 1983, came into force on April 2, 1983, and applied to all contracts, and to all subcontracts arising under those contracts, entered into on or after that date. The legislation has been amended many times, even since 1983. The most recent set of amendments are found in the the Open for Business Act, 2010 and became effective in July of this year.

These amendments, which have been described as "the first substantive changes to the legislation in 20 years", include the following significant provisions.

Change to the Definition "Improvement"

The Open for Business Act, 2010 expands the key definition of "improvement" (on which a construction lien claim will turn) to include:

the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works.

The impetus for this amendment appears to come from the decisions in Kennedy Electric Ltd. v. Dana Canada Corp. by three levels of court over the course of 2004-07. The Kennedy Electric case involved several construction liens that had been registered by electrical and mechanical subtrades against an automotive manufacturing plant in relation to the installation of a manufacturing assembly line in a new building at the plant.

The issue was whether these installation trades had supplied services or materials to an "improvement" within the meaning of the Act. The trial judge ordered the discharge of the liens, finding on the evidence that the claimants' services and materials could not be considered as part of integrated construction within the building addition that gave rise to lien rights, nor did they amount to a freestanding "improvement".

Matthew R. Alter

Further appeals by the lien claimants were dismissed, leading to an initiative by the Council of Ontario Construction Associations to have the right to lien extended to installations of the nature that were denied in the Kennedy Electric case. It would appear that the amendment to the definition of "improvement" under the Open for Business Act, 2010 is a direct consequence of that initiative.

Amendments Affecting Condominiums

Registering a claim for lien against a condominium property presents its own challenges. Lien claimants who do not preserve liens before a condominium project is registered and the units are transferred to third-party purchasers who qualify as "home buyers" under the Construction Lien Act face the potential loss of enforceable lien rights. In addition, the registration of a condominium requires lien claimants to search title in the Land Registry Office for each of the units in the condominium to determine which units, if any, remain in the ownership of the developer of the project.

The Open for Business Act, 2010 introduces a new provision in an effort to address these timing concerns. Owners of land intended to be registered under the Condominium Act, 1998 are now required to publish notice of the intended registration in a construction trade newspaper at least five and not more than 15 days before the description is submitted for approval under the legislation.

An owner who fails to publish such a notice is liable to any person entitled to lien who suffers damages as a result. The intention of this change is presumably to expose condominium developers to damages incurred by those suppliers of services and materials who fail to preserve liens before a condominium is registered and units are transferred to home buyers. It remains to be seen how lien claimants will avail themselves of this provision.

The new edition of *Kirsh and Alter* provides updated guidance on the multitude of issues associated with liens for 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.