

MEMO TO: John Kenward
FROM: Legal
DATE: August 21, 2008
RE: EnerGuide's Contractual Exposure

SUMMARY

There are many stakeholders in the EnerGuide rating system for houses, including NRCan, other governments, HBAs (some being *regional providers* of EnerGuide services, called "Proponents"), Builders (seeking EnerGuide ratings for their houses), EnerGuide evaluators, and consumers.

In the case of an inaccurate EnerGuide evaluation or certification, Builders would be at the centre of litigation. Participating HBAs could be too. Furthermore,

- If an evaluation is not "full" and/or doesn't comply with program criteria, the *evaluator is in breach of contract* with the Proponent, and can be sued by it.
- An erroneous evaluation might also constitute a "misrepresentation", leading to a lawsuit by those who relied on it to their detriment, like a **Builder or consumer**.
- An alleged error in evaluation/rating, however, might also result in lawsuits adding the **HBA/Proponent and/or NRCan as co-defendants** – the Proponent, on the ground that the evaluator acted as the Proponent's "*agent*"; and NRCan, on the ground that it "**monitored**" and "**ensured**" the evaluation/rating, mishandling same.
- If the HBA/Proponent and/or NRCan are sued, the evaluator is supposed to indemnify ("**hold harmless**") the Proponent – and the Proponent is supposed to do likewise for NRCan – but doing so can involve significant legal expense.

The above gives rise to the following questions:

- How can the evaluation process become increasingly reliable and less legally vulnerable?
- Have all parties to contracts, notably Builders and HBAs, reviewed them with their respective lawyers? Do all parties (including evaluators and Builders) even *have* a written contract?
- Is evaluator training geared to reduce error, as much as reasonably possible?
- How are evaluations checked? And what is the HBA/Proponent's quality assurance system? Does it fit with NRCan's expectations?
- What do HBA/Proponents say to customers and the public about evaluators and their credentials? What do they do when asked for credentials?
- What are insurance requirements and needs for evaluators? For HBA/Proponents? For Builders? Does that insurance provide coverage for the house being mis-rated?
- Is that insurance enough to cover all requirements to indemnify/hold harmless the HBA/Proponent and/or NRCan?
- Has all advertising/literature been reviewed, to reduce language vulnerable to lawsuit? Has NRCan done so? Or the HBA/Proponent? Or the Builder?
- Is the HBA/Proponent's data treatment as risk-proof as reasonably possible?
- How do the Builder's obligations concerning energy ratings fit with its own warranty, and with its coverage under the third-party warranty program?
- When can new arm's length entities take over EnerGuide administration from HBAs?
- If, for example, a house is mis-rated, how can one obtain a prompt second opinion? Appeal?
- What are the alternatives to lawsuit?
- If EnerGuide ratings become an obligatory part of code compliance, how would that affect third-party warranty programs?

1. PURPOSE

The following memo, based on contracts and other documents concerning EnerGuide¹, provides a program-specific case study of generic principles further outlined in the memo, *Liability Exposure in Green Labeling* (August, 2008). In this case study, the primary focus is on EnerGuide for New Houses (EGNH), though it is understood that EnerGuide can also apply to existing buildings.

Analyzing EnerGuide's specific legal implications is becoming urgent, as some jurisdictions consider inserting EnerGuide ratings into building codes. B.C., for example, has already moved in that direction. If a given EnerGuide rating becomes a code requirement, then a building's **apparent code compliance could depend on an EnerGuide evaluator's opinion**. This would escalate the legal implications of any mistake by the evaluator.

However, various legal relationships *already* exist. EnerGuide evaluations are conducted in a context of multiple contractual/legal relationships:

- At the centre of the process are **Builders**. Evaluations are done on a site belonging to the property-owner – usually a Builder, though very occasionally an individual consumer.
- If the evaluation is done for a Builder, it is typically for one or more properties to be sold to **consumers** – who, if dissatisfied, typically target the Builder.
- The EnerGuide Trade Mark itself belongs to **Government of Canada**, represented by Natural Resources Canada (NRCan).
- Through licensing agreements, it has arranged for *delivery agents (called "Proponents"* in NRCan's Licensing agreements, and "*service organizations"* in some other NRCan documentation) to deliver EnerGuide services in various regions. Some of those Proponents are **Home Builders' Associations (HBAs)**, referred to in this memo as "HBA/Proponents". Proponents handle EnerGuide evaluations and Certifications regionally.
- Sometimes, there are intermediaries between the Government of Canada and the Proponent(s), e.g., a Provincial government.
- The Proponent trains the *evaluators* (sometimes called "*energy advisors*"), and enters into agreements with evaluators (described later).

This means that there are several contractual relationships, notably:

- Between NRCan and the Proponent (including an HBA);
- Between the Proponent and the evaluator;
- Between the Builder and the Proponent;
- Between the Builder and the evaluator;
- Between the Builder and the homebuyer;
- There may be additional contractual rights belonging to the consumer.

The following memo is therefore intended to assist Builders, to help them identify the *legal questions* to consider in the EnerGuide program. That is an essential stepping-stone in *understanding and minimizing the risk of lawsuit*, primarily in two categories:

- **Error**, and
- **Misrepresentation**.

This information should also be helpful to industry associations, for the same reasons. It is also hoped that this information will also assist third parties, like evaluators and others.

2. THE POTENTIAL FOR LEGAL DIFFICULTIES

EnerGuide evaluators are not infallible.

NRCan describes³ evaluators as “independent experts in energy efficiency for homes” who are “professionals... well-versed in the application of energy-related systems, assemblies and components for improved residential energy efficiency”. They are also described as “proven” and “certified”; the NRCan Web site also calls them “experts”⁴. The Toronto *Star*’s description⁵, however, was less florid: “To be certified, auditors must take a week-long course..., score at least 75 percent on a Natural Resources test, and then do six to eight practice audits”.

The *Star* did an investigative piece on EnerGuide evaluations of an existing house. It found that “After auditing the same Toronto house, four different companies came up with four different energy ratings – ranging from 37 to 46 out of 100 – and called for renovations ranging from \$3,000 to \$25,000”.

A nine-point spread in this rating system is considerable, suggesting the possibility of error. Granted, in the *Star* example, the rating for an existing house (for a renovation project) appears to carry more risk of error than for new construction (because of possible unknowns in an existing building); but controversies can occur in new construction as well.

- If the house is over-rated but fails to perform as expected, who has a legal recourse, and what is it?
- Inversely, what happens if a house is under-rated, and is deprived of a government grant or market recognition to which it was otherwise entitled?
- Or if a low rating changes a Builder’s sales campaign?
- And if a given EnerGuide rating becomes a code obligation, what happens if the evaluator says the building is not code-compliant in that respect?

In short, what is the contractual responsibility of:

- The Builder?
- The HBA/Proponent?
- The evaluator?
- The government of Canada/NRCan?

The following memo looks specifically at what the *existing contractual* documents say on that subject. There are also other legal dimensions:

If a product has been “**misrepresented**”, the buyer would normally have a legal recourse against the seller.

- If any errors were committed in the certification/rating process, the person who suffered damage from those errors would normally have a legal recourse against the person(s) who *committed* them,
- and often against those who *vouched* for the process.

In the case of EnerGuide, many representations are being made – by many parties – so there are multiple legal relationships, and multiple opportunities for things to go wrong.

3. WHO CAN BE SUED

3.A. Contractual Obligations of EnerGuide Evaluators

The evaluator will have a contractual relationship with the property-owner of the building being evaluated. That is typically a Builder, though exceptionally, an evaluation might be done for an individual consumer. There must be an understanding (preferably *written*) concerning the nature of services, time and place of delivery, and payment.

However, there are accounts of entire regions of Canada, where written contracts for that purpose are said to be the exception, not the rule: the evaluators are said to “work on the basis of a phone call”, without committing to writing their arrangements with the property-owner.

Working without a written contract is hazardous to them both, particularly as it allows ambiguity concerning their respective obligations. This leads to further questions:

- Should template contracts be prepared for evaluators to use with Builders and other property-owners?
- Have evaluators been fully trained in their *legal* responsibilities?

If a mistake occurs in the evaluation, then normally, the initial legal responsibility belongs to whoever was responsible for that mistake. In the case of a faulty EnerGuide evaluation or certification, that would presumably be the evaluator. It is difficult to predict the *amount* of damages which would likely be claimed. The extent of the evaluator's contractual liability also depends on the wording of the evaluator's contract(s).

First, there is the evaluator's contract with the party that commissioned the evaluator's services – the property-owner, mentioned above.

There is also the evaluator's contract with the regional provider (Proponent). One example is EnerQuality Corp. (EnerQuality), a Proponent operating in Ontario with HBA participation. [N.B. EnerQuality will be used as an example – but there is *no certainty that the wording of its contracts is identical to that of other Proponents.*]

The contract between EnerQuality and the evaluator describes the latter's legal obligations – very briefly. It says the evaluator may “only issue Certifications to new homes if the new home:

- (a) has been *fully evaluated* by the Evaluator in compliance with all of the evaluation criteria and technical specifications required for the applicable Certification; and
- (b) has been found by the Evaluator to be in *full compliance* with all such evaluation criteria and technical specifications”.⁶

It follows that **if the evaluation was not (a) “full”, and/or (b) “in compliance”, there is a breach of contract.**

This criterion of "full compliance with evaluation criteria" appears relatively open-ended, in the sense that anyone who disagreed with the outcome of an evaluation would be likely to claim that the criteria had not been complied with, and demand a step-by-step re-analysis as part of a lawsuit.

If a court ever found that the evaluation fell short of being "full" or "in compliance", would the evaluator have a defense against liability? In legalese,

- Would the liability be "absolute", i.e. automatic and irredeemable, *even if the evaluator used reasonable efforts?*
- In answer, it *appears* that under the EnerQuality contract, the evaluator *might* have a defence, if the evaluation was made "in a good, workmanlike and conscientious manner in accordance with industry standards".⁷ However, there is a low likelihood that that the exact extent of liability, and this defence, could be resolved without litigation.

In short, an EnerGuide evaluation or certification which was "incomplete", or which did not fully comply with the established evaluation criteria, would likely be a breach of the evaluator's contract with the regional provider. It might also constitute a "misrepresentation", leading to potential lawsuit by those who relied on that information to their detriment – which could include the Builder and/or consumer.

The above gives rise to the following questions:

- What measures can be reasonably foreseen, to make the evaluation process *increasingly reliable?*
- Are the standards for evaluator training consistent, and sufficiently rigorous to reduce the risk of error to a reasonable minimum?
- What *proof* is there, that an evaluator has achieved the desired standard? Are the certifications and other credentials of evaluators consistent, well-documented, and accessible by potential users of the evaluator's services?
- How is the work of evaluators checked? By verifiers? By tests?
- What impartial system of quality assurance is in place?
- What measures exist, to support confidence not only in the evaluators' competence, but in their ethics, and the avoidance of conflict of interest (real or perceived)?
- Are evaluators bonded?
- If, for example, a house appears mis-rated, what are the procedures to obtain an expeditious *second opinion* – i.e., appeal?
- What are the *alternatives to lawsuit?*
- What are the *insurance requirements for evaluators?*
- Do such insurance policies *fully cover* situations where a party alleges that the house is mis-rated?

3.B. Protection Against Error?

Some of the above questions are addressed in an NRCAN document entitled *EnerGuide for New Houses: Administrative and Technical Procedures*.⁸ That document *appears* to outline NRCAN's intent; but there are two problems in interpreting it.

The first is that it is unclear what the document *is*, or how reliable it is. It is not drafted as a contract or similar document with legal intent. Indeed, it is prefaced by a vigorous disclaimer (advising *against* relying on its "suitability", "accuracy" or "fitness"), casting doubt on what it was intended to be or do.⁹

The second concern is that even if the document were a reliable statement of intent, it is hit-and-miss. Although it does attempt to address key measures to reduce the possibility of error and hence risk, via

- training and
- quality assurance,

those efforts are ***not hands-on***:

- First, the document *assigns* "the recruitment, training and certification of energy advisors" to the Proponent service organization.¹⁰
- Next, as for NRCAN's "quality assurance program", most of that program is also delegated to the Proponent service organizations.¹¹ NRCAN's role is essentially to send in "quality assurance auditors" from time to time,¹² and perhaps do a telephone survey.¹³

In 2005, NRCAN claimed to be preparing further documentation on that subject, to be entitled *EnerGuide for New Houses: NRCAN Quality Assurance Guidelines*. Those guidelines were supposed to provide details of NRCAN's quality assurance procedures. However, there does not appear to be any record of them on the Internet.

As for other topics related to protection against error, such as insurance, appeals or alternatives to lawsuit, these subjects are apparently not addressed in the NRCAN documentation.

3.C. Co-defendants Along With the Evaluator – The "Proponent"/Regional Provider

The next question is: if there were an allegedly faulty evaluation or certification, and the evaluator were sued, would the plaintiff be likely to add any *other* co-defendants? Like the Proponent?

The answer is yes. The reasons, which often lead lawyers to add as many co-defendants as possible, were described in the memo *Liability Exposure in Green Labeling*.

On this subject, there are three levels at which a Builder can have a legal relationship with the Proponent:

- Depending on the practices in the region, the Builder may have asked the Proponent to *send* an evaluator – in which case, the Builder has established a direct contact with the Proponent, which may also have direct contractual consequences.
- Even if the Builder contacted the evaluator directly, without going through the Proponent, the evaluator may be the *agent* of the Proponent, in which case the Builder has a legal relationship with the Proponent, as the agent’s principal. This legal relationship can also exist, even if the evaluator is *not* the Proponent’s agent, if the Proponent allows the evaluator to *appear* to be.
- Finally, the Builder has a legal relationship with the Proponent concerning the proper use of the Builder’s data and other information, including confidential information. That dimension will be discussed later.

Any shortcoming in the evaluation could lead to a legal claim not only against the evaluator, but against the Proponent. That prospect is aggravated by some of the wording used by Proponents. EnerQuality's contract with its evaluators (which might be demanded in evidence, in case of a lawsuit) leaves the clear impression that the evaluator acts on EnerQuality's behalf, which in turn conveys the *impression that EnerQuality would be legally responsible for the evaluator's shortcomings*, either on the principle of vicarious liability, or on the principle that the **evaluator was acting as EnerQuality's agent**. For example,

- The contract between EnerQuality and evaluators refers to evaluators certifying compliance with EnerGuide for New Houses programs “*on behalf of the Corporation*”,¹⁴.
- Indeed, the phrase “on behalf of the Corporation” also reappears later in the contract¹⁵, where it says that evaluators “issue Certifications on behalf of the Corporation”.
- Although the contract between EnerQuality and the evaluator specifies that “the Evaluator is an independent contractor, and (shall not be) construed as an *employee* of the Corporation”,¹⁶ it makes no such denial as to whether the Evaluator is an *agent* of EnerQuality.

Granted, the evaluator (in many cases) is under a contractual obligation to **indemnify (or “hold harmless”)** the Proponent, i.e. to defend it or get it “off the record”. The contract between EnerQuality and the evaluator says that the evaluator “shall indemnify, defend and hold harmless the Corporation”.¹⁷ This extends to holding EnerQuality harmless of any claims concerning “Evaluations or the Certifications”.¹⁸

This presupposes, however, that the evaluator and/or his/her insurance policy has the wherewithal to fight that legal battle.

The above gives rise to the following questions:

- Is the evaluator's insurance *sufficient to cover* all possible requirements to indemnify/hold harmless the Proponent?
- How does the above *harmonize* with the Proponent's own insurance? Are there inconsistencies or gaps?
- Has the Proponent's *advertising and literature* been reviewed, to reduce any language that would make it vulnerable to lawsuit?

As indicated above, the Proponent might inadvertently create risk for itself in its own publicity. Another potential source of risk is its own administration:

- How reliable is the Proponent's system of data compilation and data entry?
- What measures exist, to support confidence not only in the Proponent's due diligence, but in its freedom from bias, and the avoidance of conflict of interest (real or perceived)?
- Has the Proponent taken other necessary measures, e.g., to protect confidential data?
- What impartial system of quality assurance is in place?

3.D. Co-defendants Along With the Evaluator – The Government

The Government of Canada also purports to protect itself against being added as a co-defendant. It too has a “hold harmless clause” – in its contract with *Proponents*, so it is the *Proponent which would have to defend NRCan*, if the latter were sued over a problematic certification or evaluation. NRCan's Agreement with Proponents similarly says that “The Proponent shall indemnify and save harmless Canada... from any and all claims... resulting from or related to any wilful misconduct or negligent act or omission of the Proponent or its employees *and agents*”. This extends to “any claim in respect of materials or *services provided by a third party* to the Proponent or to a *subcontractor* of the Proponent”.

The above would *appear* to place NRCan in a protected position, in the event that an evaluation triggered a lawsuit in which NRCan were named as a co-defendant.

For good measure, the government's Agreement with Proponents *attempts* to pre-empt the possibility that any third party would even *think* of adding them as a co-defendant. The Agreement says that “Nothing contained in this Agreement shall create the relationship of principal and agent, employer and employee, partnership or joint venture between the Parties”. Furthermore, “the Proponent shall not make any representation that could reasonably lead any member of the public to believe that the Proponent or its contractors are agents of Canada”.

For further clarity, NRCan's document *EnerGuide for New Houses: Administrative and Technical Procedures* ("Administrative and Technical Procedures") specifies that there should be no suggestion that a rating can be mistaken for a home inspection¹⁹ or "stamp of approval".²⁰ Another document, the *EnerGuide for New Houses: Messaging and Code of Ethics* says that "the EGNH service does not quality assure construction".²¹ NRCan's separate document describing EnerGuide reports²² also contains a vigorous disclaimer, disavowing any "warranty, expressed or implied, with respect to the energy consumption figures included in this report".²³

All these measures were presumably intended to deter lawsuits against NRCan, in the event of an erroneous report or certification. However, matters are not that simple.

Having attempted to distance itself from view, in terms of potential lawsuit, the federal government then puts itself squarely back into the picture – and potentially *into a disgruntled third party's sights as a likely target*:

- The same government Web site²⁴ that calls evaluators "professional", "proven" and "certified" also says that notwithstanding their status as "independent experts",
 - "quality assurance personnel from Natural Resources Canada monitor the efforts of all EnerGuide rating service energy advisors,
 - to ensure that their work conforms to the strict requirements of the EnerGuide rating service",
 i.e. **announcing to the world not only that evaluators were being "monitored" by NRCan, but also that NRCan "ensured" that the evaluators' "work conformed"**.
- The *EnerGuide for New Houses: Messaging and Code of Ethics* says that "Messaging shall also integrate some or all of the following themes.... (The service can help to solve home comfort problems..., help to reduce home energy bills..., (and) can increase a home's resale potential...."²⁵
- Similarly, the document "Administrative and Technical Procedures" specifies that the Proponent's publicity *must* mention that EnerGuide "is a service developed by NRCan and/or the Government of Canada".²⁶ The document adds that "*it shall be clear that NRCan and/or the Government of Canada ensures quality assurance of the EGNH service and its personnel is performed*".²⁷
- The same document says that "When communicating with the public about NRCan's intentions..., it should be made clear that it was created... to provide *expert, third-party, unbiased advice* to homeowners, homebuilders, and home buyers about how to improve the energy efficiency of their home (and) to support the development of a body of energy experts capable of providing advice... to the general public and to *building professionals*."²⁸ If the program is about assembling "**experts**" capable of educating "**building professionals**", then the public could infer that the standards for evaluators were set *very* high.
- For a lawyer suing an evaluator, such language would make the temptation to add NRCan as a co-defendant (on the argument that NRCan **failed in its "monitoring/ensuring" role**) almost irresistible.

- In short, there is a relatively high likelihood that NRCan would be added as a co-defendant, thereby **escalating the possible legal costs for the Proponent** which must hold NRCan harmless.

For good measure, typical correspondence also runs the risk of inadvertently suggesting federal responsibility that would make NRCan a target as a co-defendant. For example, in a sample letter from CHBA-NB,²⁹ the HBA/Proponent responded to an enquiry from a Builder, about a house that did not achieve the desired rating:

- The evaluator's rationale for the rating was merely called "comments". It was not clear from the letter that *the evaluator* was actually responsible for the *decision* on the rating.
- Indeed, the letter concluded: "*On behalf of the Government of Canada, Natural Resources Canada, we thank you for participating in the EnerGuide for New Houses Program*".

This wording conveyed the impression that the response was on behalf of the HBA *and* NRCan, and *not* the evaluator, when the reality was the diametric opposite.

In short, there is ample plausible wording from which an outside observer might infer that evaluations and certifications were not only "on behalf of" both the Proponent and NRCan, but also funded by them, and "monitored" by them.

That would be **amply sufficient, for many lawyers, to add both the HBA/Proponent and NRCan as co-defendants, in the event of litigation** arising from an evaluation or certification.

The above gives rise to the following questions:

- Since HBA/Proponents are legally responsible for defending NRCan if it is sued, has NRCan's *advertising and literature* been reviewed, to reduce the language that is likely to make it vulnerable to lawsuit?
- For example, how much risk is being created, by NRCan publicity suggesting that evaluators are "experts", on the basis of a one-week course, and an exam with a 25% margin of error?
- How much further risk is also being created, by references to NRCan vouching for the system though its "monitoring" and "ensuring that work conforms"?
- Does the evaluator's insurance cover not only the requirement to indemnify the Proponent if the Proponent is sued, but also (by extension) *cover the Proponent's costs in indemnifying NRCan* if NRCan is sued?

4. CONTRACTUAL SITUATION OF HBA PROPONENTS

Some of the HBA/Proponent's obligations have already been mentioned, notably to hold NRCan harmless.

Independently of the obligations mentioned earlier, the EnerGuide agreements with Proponents are drafted by the federal government on a common model. The Agreement with NRCan³⁰ says that the HBA/Proponent will, among other things:

- “Maintain and implement *quality assurance procedures* to ensure the integrity of house data collected for each house that receives a label or certification as a result of the Proponent’s Project tasks;
- *Resolve* technical issues and questions, address problem house files, *investigate* consumer/Builder complaints, and respond to quality assurance issues raised by NRCan, as a result of third-party audit, in a timely manner;
- Ensure timely and accurate entry of ERS and R-2000 house files to the national database for the purpose of NRCan’s national quality assurance activities such as statistical analysis; and
- Provide accurate and timely labeling of energy efficient houses”.

Any shortcoming in the above duties would arguably be a breach of contract.

Another document³¹ (which is not *called* a contract, but which may have contractual effects under certain circumstances) says that the Proponent “will send the Builder a copy of the Plan Evaluation Report with the proper information in regards to the insulation value, window type, etc... to meet an EnerGuide 80 or higher rating”. It follows that if the information is not “the proper information” to meet that rating, the HBA/Proponent would be at fault.

The above gives rise to questions, some of which have already been asked in the context of evaluators. In addition,

- How do the above obligations, for HBA/Proponents, harmonize with the Proponent's own insurance? Are there inconsistencies or gaps?
- What capacity-building needs to be undertaken by and for HBA/Proponents, to reduce the risk of litigation?
- If the Proponent is taking responsibility for training evaluators, are the standards appropriate? Are they consistent, and sufficiently rigorous to reduce the risk of error to a reasonable minimum?
- What does (and should) the Proponent say to the public, notably to prospective users of evaluators’ services, about the credentials of evaluators?
- What impartial system of quality assurance does the Proponent have in place? How does it fit with NRCan expectations?
- What measures exist, to support confidence not only in the Proponent’s competence, but in the avoidance of conflict of interest (real or perceived)?
- Does the Proponent have a system of appeal?
- What are the Proponent’s *alternatives to lawsuit*?

Any overview of legal relationships must also address potential conflicts of interest. The most serious potential in that category occurs in locations where EnerGuide ratings have been made an obligatory component of the applicable building code. Under its contribution agreement with NRCan, the HBA undertakes legal obligations to the EnerGuide system. If a given EnerGuide rating becomes a code requirement, then at that point the HBA becomes an administrative part of the regulatory process for its own Members: the evaluators (whom the HBA has trained), who may also be its agents, will be reporting data to the HBA to determine whether the Members' houses are code-compliant.

In short, HBAs will become part of the sign-off on their own Members' code compliance.

In practical terms, that scenario – which is already in place in some parts of Canada – opens the door to several potential dilemmas:

- If a Builder took issue with an evaluation – whether because of a supposed evaluation mistake, or a data entry problem, or accidental release of confidential information – then this would create an awkward situation for the Builder's relationship with the HBA, which administers the system. Matters would be particularly awkward if that Builder was also on the HBA Board of Directors.
- If the dissatisfaction escalated to a lawsuit, then the HBA might be sued by its own Member.
- If the complaint is from a consumer, that too is likely to make its way to the HBA.
- If the Membership wanted to take an advocacy position concerning EnerGuide-related aspects of codes, then the HBA could find itself lobbying about the very subjects it was administering.

There is also the question of optics. The arrangement could convey the impression, to the public, that the industry is taking on regulatory responsibilities over itself. Some observers might get the impression that the situation is not much different than if HBAs were to go into the home inspection business.

That kind of question is not new. A generation ago, the industry was instrumental in helping establish home warranty systems across Canada; but to improve public confidence in the impartiality of the system – as well as to avoid embarrassing disputes over potential conflict of interest – the industry insisted on the creation of arm's length entities to do the administration. This had the added important advantage of meaning that claims would be addressed to the latter entities – instead of to the industry and its associations.

In short, it is one thing to *support* a system; it is another to be *responsible* for it. This leads to a further question:

- What are the prospects for creating arm's length entities, to administer EnerGuide, starting with those locations where EnerGuide ratings are becoming a code requirement?

5. CONTRACTUAL OBLIGATIONS OF BUILDERS

Builders also have contractual relationships, if the Builder wishes to *refer* to the rating. According to one contract between Builders and a government agency which administers the program in one province, the Builder shall:

- “be responsible to *build all homes in accordance* with the pre-evaluation report”;³² and
- “*ensure that the home attains the EnerGuide 80 or R-2000 standard with the post evaluation*”;³³

That means that if the evaluator then says that the building falls short,

- it is the Builder who is in apparent breach of contract with that agency.
- Again, if the Builder has also made statements about his prospective EnerGuide rating, those statements might constitute "misrepresentations";
- and if those statements were in contracts with consumers, they might lead to a lawsuit for breach of contract.

The above gives rise to the following questions:

- Does the Builder's insurance fully cover this possibility?
- What statements has the Builder made about its expected EnerGuide rating? Could any of these be construed as a firm deliverable?
- How do the Builder's obligations concerning energy ratings fit with its own warranty, and its coverage under the third-party warranty program?
- If EnerGuide ratings become an obligatory part of code compliance, how would that affect third-party warranty programs?
- Has the Builder provided for an alternative to lawsuit?

6. CONCLUSION

Doing business today involves constant vigilance to the exposure to lawsuit. EnerGuide is no exception, and needs to be analyzed as such, by stakeholders at every level of the process.

The memo *Liability Exposure in Green Labeling* included the following advice concerning all “green” label/rating systems:

- **Builders**, in *consultation with their lawyers*, should review
 - All of their “green” contracts (with designers/architects, evaluators and consumers), with an eye to elements like right of appeal, confidentiality of data, dispute resolution etc.; and
 - The Builder’s *publicity/communications* on the label/rating.

- The Builder should also determine effects on:
 - Warranty, and
 - Insurance.
- *Caveat emptor*: not all evaluators are the same.
- **HBA**s considering participating in a label/rating system should similarly review their contracts and communications, in consultation with their lawyers.
- They should also review their insurance.
- They will need a quality assurance system, preferably independent.
- They will need to consider the prospect of a separate “purpose-built” corporation to do administration, for self-protection and to avoid conflict of interest.

In light of the risk factors discussed in this memo, it appears that the above recommendations are equally valid in the context of EnerGuide.

Endnotes

¹ *Certified Energy Evaluator Agreement; Efficiency NB Builder Kit Check List; Builder Agreement with Efficiency NB; Step-by-Step with Efficiency NB; Efficiency NB Financial Incentive Transfer Form; Efficiency NB Marketing Support / Co-op Advertisement; sample letter from CHBA-NB, March 30, 2008; EnerGuide Energy Efficiency Evaluation Report; miscellaneous e-mails; Energy Programs for New Homes Request for Service; EnerGuide Rating Service – Natural Gas (also Electric Heat); NB Energy Efficient New Homes Program; Department of Natural Resources Efficiency and Alternative Energy Program Non-Repayable Contribution Agreement; Service Organizations User Guide; Electronic File Transfer for EnerGuide for Houses; EnerGuide for New Houses: NRCan Quality Assurance Guidelines; EnerGuide for New Houses: Administrative and Technical Procedures; Who Are EnerGuide rating service Energy Advisors?; EnerGuide for Houses: Energy Advisor Workshop Manual; EnerGuide for Houses: Evaluation Procedures Using HOT2® XP; EnerGuide for Houses: Maps of Climate Data; EnerGuide for New Houses: Data Collection Form; EnerGuide for New Houses: Design Directives and Licensee Requirements; Description & Order Form for the CHBA Builder's Manual; EnerGuide for New Houses: Messaging and Code of Ethics; "Home Energy Audits Flawed" (Toronto Star, July 21, 2007); and miscellaneous correspondence.*

² *EnerGuide for New Houses: Administrative and Technical Procedures*, NRCan, 2005.

³ *Who Are EnerGuide rating service Energy Advisors?* NRCan Website.

⁴ NRCan's *EnerGuide for Houses* Internet site opens with the words: "For comfort and savings, call in an expert".

⁵ "Home Energy Audits Flawed" (Toronto Star, July 21, 2007).

⁶ Certified Energy Evaluator Agreement, par. 3.

⁷ The EnerQuality contract says: "The Evaluations and Certifications will be performed in a good, workmanlike and conscientious manner in accordance with industry standards". This implies a standard of care which, while high, is not absolute, and if the evaluator had acted "in accordance with industry standards", he/she *may* escape liability.

⁸ NRCan, 2005.

⁹ "Her Majesty the Queen in Right of Canada, represented by the Minister of Natural Resources ("Canada"), makes no representations about the suitability for any purpose of the information (the "Information") contained in this document. All such Information is provided on an "as is" basis, and Canada makes no representations or warranties respecting the Information, either expressed or implied, arising by law or otherwise, including but not limited to effectiveness, completeness, accuracy or fitness for a particular purpose."

¹⁰ Par. 1.6., 5.4.

¹¹ Par. 7.2 and following.

¹² Par. 7.7 and following.

¹³ Par. 7.15.

¹⁴ Certified Energy Evaluator Agreement, par. 2.

¹⁵ Certified Energy Evaluator Agreement, par. 5.

¹⁶ Certified Energy Evaluator Agreement, Schedule "B", par. 5.

¹⁷ Certified Energy Evaluator Agreement, Schedule "B", par. 1.

¹⁸ Certified Energy Evaluator Agreement, Schedule "B", par. 1.

¹⁹ Par. 4.6.1 and par. 4.6.1a. The same provision appears at par. 5.1 of *EnerGuide for New Houses: Messaging and Code of Ethics*.

²⁰ Par. 4.6.2. See also par. 4.6.3 concerning disclaimer on "air quality". The same provision appears at par. 5.2 of *EnerGuide for New Houses: Messaging and Code of Ethics*.

²¹ "The EGNH service does not quality assure either the construction or the retrofits of a home. It confirms the energy efficiency upgrades undertaken, not the workmanship involved". Par. 5.1(1).

²² *EnerGuide for New Houses Energy Efficiency Evaluation Report*, NRCan, 2005.

²³ "The annual energy consumption figures indicated in Table 1 of this report and on the EGNH rating label are estimates only. They are based on a number of assumptions and depend on factors beyond the control of Natural Resources Canada (NRCan). NRCan makes no warranty, expressed or implied, with respect to the energy consumption figures included in this report".

²⁴ *Who Are EnerGuide rating service Energy Advisors?*

²⁵ Par. 4, 4.3, 4.4, 4.6.

²⁶ Par. 4.4.1.

²⁷ Par. 4.5.8. The same provision (with different acronyms) appears at par. 4.13 of *EnerGuide for New Houses: Messaging and Code of Ethics*.

²⁸ Par. 4.7, 4.71, 4.73.

²⁹ Sample letter from CHBA-NB, March 30, 2008, par. 4.

³⁰ Department of Natural Resources Efficiency and Alternative Energy Program Non-Repayable Contribution Agreement, Schedule A, Task 3.

³¹ Step-by-Step with Efficiency NB, par. 3.

³² Builder Agreement with Efficiency NB, par. 2, bullet 2.

³³ Builder Agreement with Efficiency NB, par. 2, bullet 2.