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Canadian
Home Builders'
Association



Association canadienne
des constructeurs
d'habitations

To: CHBA Members

From: Richard Lind, CHBA President

Date: March 11, 2008

RE: "GREEN" LIABILITY ISSUES AND BUILDER RISK MANAGEMENT

This Red Alert brings to your direct attention critically important information about potential liability that builders should address when considering contracts linked to "green" building initiatives.

As consumer and government interest in green building continues to grow, a range of liability concerns are emerging. For new home builders, renovators and developers considering involvement in green building projects, awareness of these risks, and of how to best manage them, is very important.

The CHBA has reviewed a number of recent articles and papers that focus on the risks that can arise when a green building project is undertaken. The report on these cases provides a good overview of the specific sources of green-building litigation to date. Links to download this, and other relevant documents and articles, can be found at the end of this alert.

Most of these materials address litigation that has been initiated in the U.S., but which could foreshadow similar actions in Canada.

In terms of the Canadian situation, a report entitled, *LEED® Us Not into Temptation*, produced by Pro-Demnity Insurance Company should be carefully reviewed if your firm is currently involved in, or plans to become involved in, a LEED®-enrolled project.

Pro-Demnity is the provider of professional liability insurance coverage to Ontario architects through the Ontario Architects Association, and has considerable expertise in this area.

Clearly, while green building provides real opportunities for our industry, it also poses some new challenges in terms of builder risk and risk management. As builders, we need to be aware of these risks.

Attached Document:

- 1) CHBA Red Alert: Managing Risks with "Green Buildings"

Related Documents: (click on title to access)

- 2) [CHBA: Background Materials on Liability and "Green Buildings"](#)
- 3) [LEED® Us Not into Temptation, Pro-Demnity Insurance](#)
- 4) [The Legal Risks of Green Building, Custom Home Magazine](#)
- 5) [Don't Let Green Design Cause Red Ink, American Institute of Architects](#)

RED ALERT: Managing Risks with “Green Buildings”

March 11, 2008

Summary: “Building green” is good – but inflated promises are not. In the U.S., “green” projects have triggered a growing number of court cases. The American LEED® system, now being promoted in Canada, is at the centre of several such suits. These disputes involve both building performance and also what happens when a LEED® application fails to obtain the certification level intended.

Recommendations:

1. Don't promise what you don't *know* you can deliver (like a given level of performance).
2. Achieving “points” to qualify a building under the terms of a green building initiative is no substitute for diligent construction practices, and no defence if there are shortcomings.
3. Contracts among contractors/professionals should specify *who* bears the risk, if the intended level of certification does not materialize.
4. There can be risk of delay when specifying new “green” building products that are not readily available in Canada.

As noted in a recent Canadian insurance publication called *LEED® Us Not Into Temptation* (distributed by Pro-Demnity Insurance Co., which provides coverage for Ontario architects), there are many excellent reasons to “build green”, but there are also additional risks. Builders and developers need to be aware of these risks and take appropriate steps to manage them.

The LEED® initiative has been cited in published information concerning builder risks associated with green building. LEED® (Leadership in **E**nergy and **E**nvironmental **D**esign) is an American certification system for green buildings, promoted in Canada by a non-governmental organization, the Canada Green Building Council (CaGBC).

The February 15, 2008, issue of *Custom Home Magazine* in the U.S. reported on *The Legal Risks of Green Building*. This article also noted that a number of green projects have triggered lawsuits.

A recent presentation by lawyers to the American Institute of Architects, entitled *Don't Let Green Design Cause Red Ink*, enumerated a number of risks related to green building:

- **Overstated performance claims** (indoor air quality, energy savings etc.), leading to lawsuits for breach of contract;
- Inability to secure LEED® certification, leading to **negligence lawsuits against those assigned to obtain certification**;
- Selection of “green products” that failed, were inadequately tested, or were not in stock (leading to lawsuits for ensuing delays).

Canadian contract law is similar to U.S. law, so in principle, lawsuits for inflated promises could happen here as well. For good measure, Canada's *Competition Act* makes it an offence to issue performance claims not based on proper tests.

The overall Canadian code framework is also important:

- “**Building to code**” means participating in a credibly-developed system, with clear objective benchmarks. This predictability is key to avoiding mistakes and hence *managing risk*. For example, if a builder is sued over a building, it is usually sufficient (at law) for the builder to reply that the building conforms to applicable codes and standards.
- “**Building beyond code**” while laudable in principle, is a departure from established benchmarks, and inherently less predictable. In particular, anyone *venturing into alternative standards*, developed by a private organization, **must be vigilant of the variables**, including not only how those standards originated and were tested, but most importantly how they work *compared* to other options, and how they are *enforced*. If the builder is sued over the building, it is **not a sufficient legal defense** to reply that the building conforms to that private organization’s point system.

If Canadian builders wish to avoid the same kind of litigation as in the U.S., the following basic principles apply to green building initiatives:

1. Do not promise what you do not *know* you can deliver. In particular, do not echo performance claims, unless you are *fully* satisfied that those claims can withstand a challenge.
2. Green building “point” systems are *no substitute for your own know-how* and due diligence. If a project feature later encounters legal problems, the fact that it earned points will be no defense in a lawsuit. Above all, it is hazardous to choose one construction option for the sake of points, if another would have been more appropriate for that specific project.
3. Contracts among contractors/professionals should clearly specify *who* takes responsibility for point certification – who is accountable, and who bears the risk if the anticipated level of certification does not materialize.
4. There are also hazards in selecting goods and services that are not readily available in Canada, as any resulting delays in the project can give rise to litigation.