MEMO TO: John Kenward
FROM: Legal
DATE: August 21, 2008
RE: Liability Exposure in Green Labeling

SUMMARY

Elementary legal components of any green labeling or rating system for building include:

- A Trade Mark with goodwill;
- Evaluation with credible criteria (selection, measurement, compilation/interpretation), and credible evaluators (trained, certified, unbiased);
- Quality assurance procedures;
- Accurate portrayal of what the green label means;
- To be demonstrably unbiased and properly administered (data collection/entry, privacy);
- Appeal procedures and alternatives to court.

Missing elements expose *all* participants – Builders, designers, architects, Trade Mark Holders, administrators, evaluators, and supervisors – to lawsuit. In the U.S., disputes over green buildings have even spawned a new branch of the arbitration industry.

Written contracts are essential self-defense, including contracts between:

- Trade Mark Holders and Administrators (for training, certification, advertising, supervision, propriety, dispute);
- Administrators and Evaluators (for nature of services, treatment of data, dispute);
- Evaluators and Property-Owners (for nature of services, treatment of data, appeals, dispute);
- Builders and their Designers and/or Architects (for nature of services, dispute);
- Builders and Consumers (explaining the green label, dispute).

Risk can be reduced by insurance, disclaimers, and "Hold Harmless" clauses; but these are sometimes difficult.

Recommendations:

For Builders

- 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 green label/rating, which must avoid creating false expectations.
- The Builder should also determine effects on:
  - Warranty, and
  - Insurance.
- *Caveat emptor*: not all evaluators are the same; nor are all green labels.

For Associations

- Associations considering participating in a green 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 green administration, for self-protection and to avoid conflict of interest.

Builders and HBAs also need to educate third parties – not just evaluators, but including the public and officials (notably in municipalities) – that all green systems are not the same, and about the importance of a methodical and transparent process.

1. BACKGROUND AND CONTEXT

Canada has been attaching "green" labels and/or ratings to houses, at least since the "Super Energy Efficient Housing" of the early 1980's. There have also been longstanding efforts to put the subject onto a sound legal footing. This is an area where Builders, and their associations, are encountering both opportunities and risks.

Initiatives for "green building" are having a significant impact on the industry:

- they are attracting greater numbers of Builders every day;
- furthermore, several industry organizations have become directly engaged in the administration and delivery of green label/rating systems.

The CHBA has been monitoring and advising on the organizational dimensions of such initiatives for several years. The following memo expands on earlier CHBA work (2002) concerning R-2000 and EnerGuide.[1]

This memo is being produced at this time for two reasons:

- The subject-matter has evolved substantially since 2002, with new issues coming to the fore; and
- In particular, its importance has escalated, since some governments (provincial and municipal) started introducing green labeling/rating systems into the *regulatory* apparatus of their building codes.

The following information is addressed primarily:

To Builders, to help them identify

1. the *legal factors* to consider, in advance of participating in a green label/rating program,
2. the *contracts* to have at their disposal, and
3. the steps to undertake, to *minimize risk*; and

To industry associations, to address the same three factors.

It is hoped that this information will also assist third parties, like evaluators and others among the many participants in green label/rating systems. Municipalities, in particular, have shown a growing interest in promoting green building within their boundaries. Another key constituency is insurers and warranty providers.

2. "THE BIG PICTURE" IN GREEN BUILDING

To be viable, green labels for construction require systems that are

(a) methodical,
(b) scientific,
(c) transparent,
(d) accessible, and
(e) legally coherent.

This memo focuses on (a) and (e), namely the importance for a green labeling system to be methodical and legally coherent.

The first question, of whether a label's system is methodical, depends on whether it reflects a thought-out approach to what is to be achieved.

That issue is challenging – particularly for systems that evolved incrementally. It also has new urgency, partly because some systems are being incorporated in government requirements (codes, or public sector specs), and partly because of the upsurge in public demand. Many municipalities are expressing particular interest. It is also increasingly clear, however, that if some green labeling/rating systems were expanded to meet the full potential of market demand, they would break. Some are arguably broken already.

Green labeling systems can break down when fundamental components of their infrastructure are missing.

The fundamental components of a construction labeling/rating system are relatively straightforward, and can be summarized as follows:

A Trade Mark with goodwill: Green labels, like any other Trade Marks, are based on the idea of a "brand" which connotes qualities desired by the public (goodwill). These Trade Marks are the property of Trade Mark Holders, who have a vested interest in defending the reputation, credibility, and hence ongoing attractiveness of the Trade Mark/label.

In Canada, some green labels are the property of governments (e.g., EnerGuide, R-2000), whereas others belong to private organizations.

The message to the public, underlying green labels, is that a given brand denotes a desirable level of environmental performance.

Evaluation: All green labels hinge on a system for evaluating the performance prospects for buildings. The credibility of that evaluation, in turn, hinges on three factors:

(a) **Credibility of the *grounds* for evaluation:** The science underpinning a given green label must be sound. This means that there must be a credible foundation for

- (a) the *selection of criteria,*
- (b) data *measurement,* and
- (c) data *compilation* and *interpretation*.
- (d) Furthermore, that credibility must be *provable*, via a transparent process.

(b) **Credibility of the *evaluator(s)*:** The person(s) who *determine* whether a project meets the criteria for a green label must be credible. This means that

(a) they must have credible *training*, and
(b) they must be able to *prove* it, with some appropriate certification and documentation.
(c) They must also be demonstrably *unbiased*.

(c) **Understanding the *follow-up*:** All evaluation systems, for new houses, study *blueprints*; but they do not all have the same follow-up:

a) Some, but not all, double-check the work of the evaluators;
b) Some, but not all, *test* the finished product.

There is nothing wrong with those different approaches, as long as they are *understood*; but problems could arise, if the *impression* were conveyed that project analysis was more exhaustive than it actually was.

Quality Assurance: Trade Mark Holders typically insist on a detailed quality assurance system, to help protect the reputation of their label.

- Sometimes, that is managed by the Holder itself;
- Sometimes, it is managed by an independent third party, accountable to the Holder.

Correct Portrayal: Green labels are intended to be communicated to the public (owners and buyers). Sometimes, this is done

- *Before* completion of the finished product (e.g., at the pre-leasing or pre-sale stage: "Our project *will* achieve…"). This is intrinsically risky, if there is a chance that the *finished* product might fall short.
- Alternatively, communication of evaluation results can occur *after* the building is substantially completed.

In all cases, however, this communication must be *accurate*. Any misrepresentation is vulnerable to lawsuit.

Diligent administration: The system must have a proper administrative infrastructure. This includes four key features:

(a) There must be a fully reliable system of *data collection and data entry*. Any shortcomings in those areas may skew evaluations.
(b) The system must be demonstrably capable of ensuring the privacy of *confidential* information.
(c) The system must be *visibly* free of *bias* or *conflict of interest*.
(d) As alluded to above, all aspects of the system (including administration) must be subject to a quality assurance program.

Evaluation Appeals: Any system should specifically provide for the possibility of disputes over an evaluation, at two levels:

(a) An appeal procedure, to obtain a *second opinion* on the evaluation itself, and
(b) An *alternative to court*, if the dispute persists.

The former, i.e. the appeal process, must also be credible, and *demonstrably* unbiased. The latter, i.e. dispute resolution provisions, can include:

- Mediation, and/or
- Arbitration.

Shortcomings in any of the above areas will create significant legal risks.

That is the case, regardless of whether the green labels are

- *Public* (with governmental supervision, at least to some extent), or
- *Private* (owned, operated, and supervised by a non-governmental entity).

That is also the case, regardless of whether the green labels are

- *Voluntary*, or
- *Obligatory* (e.g., in codes, or under what some groups call "green by-laws" or the like[2]).

There are also different nuances distinguishing

- Green labels applied to *new* buildings, from
- Green labels applied to *existing* buildings (usually as part of a renovation or retrofit process).

Despite those distinctions, the following legal principles apply.

3. BASIC EXPOSURE

The co-participants in the above systems are:

i) The Builder of the building being evaluated;
ii) The designer/architect of the building;
iii) The Holder of the Trade Mark for the green label to be attached (including, in some cases, governments);
iv) The system's administrative organization;
v) The evaluators;
vi) The parties who trained the evaluators, and/or who certified their competence;
vii) The parties who were responsible for reviewing the evaluator's work;
viii) The parties who vouched for the reliability of the system;
ix) The insurers for all of the above;
x) The warranty providers for Builders; and
xi) The end-use buyer/consumer.

As the public demand for environmentally-sensitive buildings increases, so will the demand for green labels, and evaluations for same; and as those numbers increase, so will the opportunities for mistakes, and hence lawsuits.

The stakes can be high – not only for the party directly involved, but also for an insurer and (in the case of Builders) a warranty-provider. If the building is over-rated by the green label, but fails to perform as expected, the end-user might sue for damages. Inversely, if a house is under-rated, it might be unjustly deprived of a government grant to which it was otherwise entitled; at the very minimum, a low rating could upset a Builder's sales campaign.

Those stakes are multiplied, if a given green label or rating becomes a code requirement. An evaluation mistake could mean that the building is treated as non-compliant, with large monetary implications.

There are several levels at which a mistake could occur:

Shortcomings in Standards: Several disputes over alleged shortcomings in scientific underpinnings, for the methodology of green systems, are currently before U.S. courts[3]. Similar controversies have arisen from time to time in Canada.[4] Any resulting legal exposure is beyond the immediate control of Builders, evaluators and regional delivery organizations. Fortunately, such instances are relatively rare – but do underline the importance of systems that are scientifically grounded, and subject to objective peer review and due process.

Errors by Evaluators: This category would include any error in conducting the evaluation.

Builder Responsibilities: This category would include any error in performing the construction work. Sometimes, there is no actual fault in the Builder's performance: the fault may lie in a product or service delivered by a supplier, but for which the Builder must take legal responsibility.

Errors in Administration: This would include errors in data compilation or data entry, erroneous delivery or withholding of certifications, and improper treatment of confidential information.

Misrepresentation: This could occur at any level – the Builder, the delivery organization, the evaluator, even the Government.

Failure to Disclose: Sometimes, parties are held liable for failing to disclose information (e.g. about side effects), as described later.

If a mistake occurs, then normally, the initial legal responsibility belongs to the party that committed the mistake. However, there are three reasons why a lawyer for a plaintiff, in the case of a disputed evaluation, would be tempted to ***sue all*** **co-participants**:

a) It may not be clear, at least initially, *who* was at fault.

b) It is also possible that *more than one* co-participant bore some responsibility: it could be not only the party that made the mistake, but also his/her employer (or, in the case of an agent, his/her principal; in the case of a subcontractor, his/her contractor); and/or it could be the supervising party that failed to spot the mistake, and/or whoever vouched for the work. Many lawyers would typically *make them all co-defendants*, "and let the chips fall where they may", i.e., let the co-defendants argue among themselves as to which one was liable.
c) Furthermore, for many lawyers, the prospect of "shaking the tree" is tempting, simply because once a lawsuit is launched against one defendant, the marginal cost of adding *extra* co-defendants is usually low.

Furthermore, there is a legal possibility that a lawsuit could occur *even in the absence of a mistake* in evaluation or construction work. The scenario is the following.

Measures can have adverse side effects. "Professionals" and "experts" are typically expected to *inform* the receiving party; and failure to inform can lead to litigation.

- *If* evaluators and Builders of green projects were similarly treated as "experts" and "professionals" – *as they are sometimes called in green publicity* [5] – then the consumer might similarly be *entitled to be forewarned* of possible trade-offs – e.g., that a "green" heating/cooling system might allow higher temperature fluctuations, that a recirculating water system might have discoloration, or simply that the economic payback wasn't always guaranteed.
- *Failure to provide that advice* could lead to litigation, even if the evaluation and the work met all applicable standards.

If that scenario materialized, then the lawsuit could target all those who "*could* have informed the recipient, but failed to do so" – notably the Builder, the evaluator, the delivery agent, and the green system itself.

4. PROSPECTS FOR THE FUTURE

One does not need to look far, to see the above principles in operation. Although it is not *always* the case that controversies in the U.S. spill over into Canada, it happens often enough that the American experience is usually enlightening.

In the June 2008 issue of *Builder News*[6], an article entitled "Green Building Disputes Arise" contends that:

> There certainly will be many disputes related specifically to Green building in the future. These Green disputes will not necessarily center on construction issues but rather on the efficiency and performance of the structure related to energy, air quality, water efficiency and similar Green issues.
>
> In addition…, making Green claims in your advertising, on your website or in your construction contract subjects you to false advertising, breach of contract and even fraud if those Green promises do not materialize…. You may have attained sufficient points for the (highest Green) level prior to construction; however, if the finished product does not meet the established performance levels of Green, you will be subject to several legal claims by your customer....

> The new and fast growing Build Green program will have disputes between builders and certifying agencies, between contractors and subcontractors, material suppliers and service providers, and of course, between owners and builders/remodelers. In addition, when a dispute is handled through litigation, it is not unusual for all parties to be named in the suit — raters, certifiers, Green designers and anyone else associated with the design and construction of that Green building will undoubtedly be named in the dispute. If arbitrators, judges or juries with no Green knowledge handle Green disputes, it is likely that the awards or verdicts will be outlandish and unfair. I anticipate that insurance companies may charge very high premiums, exclude Green building issues from coverage, or worse, not offer insurance to any Green builder or remodeler.

The author of the article, Peter G. Merrill, went on to offer two main recommendations:

(a) That all participants in green building initiatives (notably Builders, designers, architects, and evaluators) arm themselves with written contracts that are as impervious as possible; and

(b) That these contracts contain a standard clause specifying that in case of dispute, the matter would be submitted to arbitration[7].

Mr. Merrill's company has also produced standard-form contracts for that purpose, posted on its Web site[8] (see Attachment 1). That Web site adds the following advice:

> These disputes will most likely relate to indoor air quality, the proper utilization and costs related to energy usage of the building, the utilization and sustainability of natural resources, such as water conservation and the recapture and use of gray water and other similar performance based issues. It is not only the contractor who may be the defendant in a green-related construction dispute, but will most likely also involve the building designer or architect, HERS Rater, the Green Verifier, Energy Star Rater and other individuals who perform the green related ratings and tests such as blower door, moisture and thermal testing. When people sue each other, anyone and everyone gets named in the suit ….
>
> Through proper contract language, a green professional or contractor can cover themselves as to exactly what they are providing to a customer. Misleading statements or misleading or inaccurate advertising claims that can't be backed up or proven to a customer may be viewed by the courts as not only false advertising but may also be construed as fraud, which in itself is usually considered a felony…
>
> Any information that you publish on your website, use in advertising or that you write in your contracts or agreements should be reviewed and approved by your attorney…. Green construction is still a new and evolving industry and the perceptions of one person as to the meaning of green will most likely be interpreted differently by different people. Adding clarity through proper contract provisions can only assist the green professionals and their clients in having a better understanding of the roles and responsibilities of the green professional. One of the… (standard-form) contract clauses is designed for the Rater or Verifier, one is written for the designer or architect and one is written for the contractor or subcontractor who will be doing the actual construction of the green building…. Your attorney should be able to assist you in developing the proper clauses for your contract to protect yourself from future green-related disputes developing.

5. SELF-DEFENSE: THE ROLE OF WRITTEN CONTRACTS

5.A. Introduction

The amount of a party's exposure to lawsuit will depend on what it had undertaken to do, either overtly or tacitly.

A party's undertakings are often reflected in a written contract. However, there are other possibilities, like oral contracts (e.g., in person or by telephone). The challenge with oral contracts is in being precise about what was promised.

A party may also make some kinds of binding commitments via other communications, like public statements and advertising. This is where inadvertent and/or misleading comments can be very problematic.

5.B. Levels of Contractual Relations

In a green labeling/rating system, one would normally expect written contracts, *at least* as follows:

Between Trade Mark *Holder* and *Administrator*: This contract is usually called a Trade Mark Licence, to permit *use* of the green label. If the Holder was *not* administering the system itself, then it could authorize someone else to manage the system on its behalf, e.g. on a regional level. This layer is unnecessary, if the Holder does its own administration; inversely, there may be *several layers* of administration (i.e. several layers of intermediaries), in which case each layer would need its own legal agreement. For the protection of the Trade Mark's goodwill, this working arrangement would presumably include:

(a) Provisions detailing how evaluators are *trained*;
(b) Provisions detailing how evaluators are *certified*, and what *statements* are made about the evaluators' status, both in (i) the certification document itself and (ii) other public statements and advertising;
(c) Other provisions on how the system is advertised, and what can or cannot be said by either party;
(d) Fail-safe provisions outlining how the Holder *monitors* the use of its Trade Mark, and how this fits into an overall quality assurance system;
(e) Provisions to assure that the administrator maintains a *visibly unbiased* position (i.e., that there is no hint of favouritism or conflict of interest, either in *fact*, or in terms of *optics*).
(f) Provisions covering insurance;
(g) Provisions addressing the possibility of disputes between the parties and from third parties (further described later).

Between *Administrator* and *Evaluator*:

This contract outlines the responsibilities of the administrator and the evaluator to each other, including:

(a) Provisions outlining the nature of their relationship (employee, agent, subcontractor or other);
(b) Provisions on how the system is communicated to other parties including owners, and what can or cannot be said by either party;
(c) Provisions covering insurance and bonding;
(d) Provisions concerning the compilation and use of data, along with data entry;
(e) Fail-safe provisions outlining how the administrator *monitors* the work, and how this fits into an overall quality assurance system;
(f) Provisions addressing the possibility of disputes between the parties, and from third parties.

Between *Evaluator* and *Property-Owner*:

The property-owner who calls upon an evaluator is usually a *Builder*, but may sometimes be an *individual consumer*, notably in the case of renovation projects. This is a key contract.

- In most cases, if the evaluator is working as an "independent contractor", the agreement will be *directly* between the property-owner and the evaluator;
- Alternatively, it is conceivable that the property-owner may arrange for the evaluation *via* the administrator, which then *sends* the evaluator to the project. If that is the case, then the respective roles of the evaluator and the administrator would need to be made clear in the agreement with the property-owner.

In either case, the agreement with the property-owner should include:

(a) Provisions accurately describing the nature of the evaluator's services;
(b) Provisions concerning the compilation, use and confidentiality of data;
(c) The procedure for appeal;
(d) Other provisions addressing the possibility of disputes between the parties, and from third parties.

Between *Builder* and *Designer and/or Architect*:

The designer/architect, who is assigned to devise blueprints to obtain a specific green label, will be in a contractual relationship with the Builder. That contract should include:

(a) Provisions accurately describing the nature of the designer/ architect's services;
(b) Provisions describing the sequence of events, if the targeted label is not achieved (or achieved only in part), and clearly specifying how to determine whether the shortfall is attributable to the design, or to other factors such as

construction;
(c) Provisions covering insurance;
(d) Other provisions addressing the possibility of disputes between the parties, and from third parties.

Between *Builder* and *Consumer*: The Builder who uses a green label, as part of selling to consumers, will want:
(a) A provision specifying what the label means, and what it does not;
(b) A provision to clarify whether or not the performance level, covered by the green label is a firm deliverable;
(c) (If so, the Builder will want to know – separately – whether that performance level is covered in its own warranty, and as part of the third-party warranty program);
(d) Provisions addressing the possibility of disputes between the parties.

5.C. Contractual Arrangements Concerning Risk

Traditionally, there are several legal ways of addressing the possibility of disputes between the parties, and from third parties. These include:

Insurance: Although most entrepreneurs assume that they (and those with whom they do business) have liability insurance, that is not always the case. Coverage needs to be double-checked, and is often made a prerequisite in contracts in other fields. However, that presupposes that coverage is obtainable.

Disclaimers: Disclaimers in contracts are provisions which disavow legal responsibility for various mishaps. They are common. However, they are controversial: they are unpopular with consumers, and courts routinely try to circumvent them.

"Hold Harmless" Clauses: "Hold Harmless" clauses in contracts provide that "Party A" will protect/indemnify "Party B" ("hold harmless"), if "Party B" is sued, (e.g. "Party A" will try to have "Party B" removed from the lawsuit, pay its expenses, and cover any damage awards against "Party B").

These methods are all used in green labeling/rating contracts. It is not unusual, for example, in Trade Mark Licence agreements for the Holder to insist on a Hold Harmless clause, requiring the Licensee (e.g. the administrator) to indemnify the Holder in case the Holder is made a co-defendant in a lawsuit. Disclaimers are also used, e.g. in the standard-form contracts from the U.S., at Attachment 1 of this memo.

In theory, it is in the self-interest of all parties to pursue obvious strategies, notably:

a) To obtain and maintain proper insurance coverage (and to demand the same of everyone with whom one does business);
b) To use carefully-worded disclaimers (i.e., drafted with the help of the firm's lawyer);
c) To attempt to negotiate agreements where one is *held* harmless (by someone else who is well-insured), while not *holding* anyone else harmless.

In reality, however, achieving those objectives can be very difficult.

It is therefore important to add further strategies:

- To use **all possible measures to *reduce the likelihood of lawsuit***, by reducing the likelihood of mistake – via intensified training, more rigorous certification procedures, ongoing quality assurance programs etc.
- To pursue a diligent and transparent communications policy, which not only avoids any misrepresentations, but which ***actively dispels unrealistic expectations*** and informs all concerned of pros and cons, including risks of adverse side effects.
- **To *distance* oneself from parties vulnerable to lawsuit**. For example, an organization which takes over the administration of a green label may wish to ***set up a separate corporation*** to do the administering, so that if there are lawsuits, they will not sap the resources of the core organization.
- To acknowledge that the principle of ***caveat emptor*** **also applies to both green rating systems themselves, and to individual evaluators**. Some may be *more susceptible to mistakes* than others. However, knowledgeable comparison of green rating systems requires a reasonable base of information.

6. CONCLUSION

6.A. General

Green labels are enjoying an upsurge in public interest; but with an increasing number of projects comes an increasing risk of mistakes, with attendant risk of lawsuits. Furthermore, the infrastructure of some label/rating systems is not complete yet; in the meantime, **if firms or groups wish to participate, they must take their own measures to mitigate risk.**

Good contracts are an obvious starting-point. For years, the CHBA and professional builders have been consistent in their insistence that, in this industry, *all* work should be based on proper written contracts. That advice is particularly apt in this area.

The CHBA and professional builders have also been consistent, in urging firms and associations to remain vigilant about what commitments they make (consciously or not), in their publicity and other communications. That advice is again particularly apt, in the area of green building.

In short, being enthusiastic about green buildings is no substitute for being methodical. The following measures are proposed.

6.B. Recommendations to Builders

1. Builders considering participation in a green label/rating system should be prepared to consult their legal advisors on several fronts.
2. Builders may be approached by other parties – label/rating organizations, or other participants in such systems – and urged to sign standard-form contracts. That is hazardous: many such documents are at best incomplete, and some can involve exposure to significant legal risk. The Builder should discuss them with the firm's lawyer before any are signed.
3. In due course, a Builder who wishes to attach a given green label or rating to a building will need to address distinct contracts at several levels, notably:
   a) With the *administrator* of the green label or rating, outlining the procedures to be followed.
   b) With the *designer/architect* of the proposed building.
   c) With the party responsible for *assessing whether the project meets the criteria*. That contract *may* be in the same category as (a), or it may be separate, as in the case of evaluators who are "independent contractors".
   d) With the *consumer*, if the label or rating is being referenced in a sales contract.
4. All of the above *contracts should be reviewed* by the Builder's lawyer, with an eye to the elements outlined at Section 5.B. of this memo (e.g. right of appeal, confidentiality of data, dispute resolution etc.).
5. The Builder's lawyer should also be consulted about the *publicity/communications* which the Builder proposes to attach to the green label/rating.
6. The Builder should determine how any undertakings concerning green labeling/rating will affect its own *warranty*, and its coverage in the third-party warranty program.
7. The Builder should consult its insurer, to confirm that there are no significant gaps in its coverage for such initiatives.
8. The Builder should be selective about *which* green label/rating it aspires to. Not all are the same; nor are their respective systems. Criteria to consider include which system is likely to remain the most credible, and which is the most likely to function efficiently and error-free.
9. The same caution should be applied to selection of an evaluator. In particular, the Builder should check credentials, references, and information on the evaluator's insurance.

10. The Builder is justified in asking other co-participants, with whom it is doing business in a green building venture, to provide assurances that they are fully insured.

6.C. Recommendations to Associations Serving as Administrators

1. Builders' associations, which are considering becoming administrators in a green label/rating system, should similarly be prepared to consult their legal advisors on several fronts.
   - They too should consult their lawyers before signing any standard-form contracts;
   - They should consult their lawyer about the *publicity/communications* to attach to the green label/rating.
   - They should consult their insurer.
   - They should be selective about *which* green label/rating system(s) to participate in.

2. An association, in consultation with its lawyer, will also need to address distinct contracts at several levels, notably:
   a) With the *Trade Mark Holder* of the green label/rating;
   b) With the *trainers* and/or *certifiers* of evaluators, unless those arrangements have already been finalized by the Holder;
   c) With the *evaluators*;
   d) With *Builders*, unless all arrangements for evaluations are done through the evaluators themselves – in which case, the association may still wish to ensure that proper contracts are being used (e.g, by drafting template contracts for the evaluators' use).

   That review should again consider the factors at Section 5.B. of this memo (e.g. right of appeal, confidentiality of data, dispute resolution etc.).

3. An association will need to review its quality assurance system, both in consultation with the Trade Mark Holder and on its own. Ideally, quality assurance would be independent (third party).

4. The association will need to consider, on an urgent basis, the prospect of setting up a separate "purpose-built" corporation to do the administration – which, if sued, will not drag down the core association. A separate corporation may also be important to avert any appearance of conflict of interest, if the Builders' association could be perceived as deciding on the status of its own Members[9].

6.D. Educating Third Parties

Builders and HBAs also have a key role in their communities. It is in their essential self-interest to assure not only

- that *evaluators are well-educated*, but also
- that the *community's* response to the issues of green building is *more and better than a knee-jerk reaction.*

This means familiarizing the public – and public officials, at the provincial and particularly the municipal level – with the fact that

- *all green systems are not the same*, and
- *a methodical and transparent process is essential.*

ATTACHMENT 1: Standard-form Agreements from the U.S.A.

[The following proposed template agreements are drawn from the Website of Construction Dispute Resolution Services LLC, of Santa Fe, New Mexico. These are proposed contracts for "raters and verifiers" (evaluators, and those who check their work), "designers and architects", and "builder, contractor and subcontractor" (to be signed by their customer). These templates are offered as examples only, notably of *disclaimers* and provisions for *dispute resolution*. It is not suggested that they offer an exhaustive profile of contractual provisions that might be appropriate in a Canadian context, or in the context of the proposals advanced earlier in this memo.]

RATERS AND VERIFIERS

The services provided by ________________ company (your name) relate only to rating (verifying) the building according to the rating system as provided by ___________________________ (Energy Star, Resnet, LEED, NAHB, etc.) The rating that we (I) will provide is calculated according to the aforementioned rating system and we (I) do not guaranty that the residence will be built to the guidelines, standards or codes as specified by the designer, architect, builder or municipality. In addition, ___________________ company (your name) does not guaranty any performance of the building related to the rating that we (I) have determined for the building. In addition, ________________company (your name) assumes no responsibility for the accuracy of the rating as the rating system allows for some flexibility and the rating for your building will be calculated based only on the information provided by the builder, designer or architect. If any dispute related to our (my) services should occur, the dispute shall be settled through binding arbitration as provided by and according to the Arbitration Rules and Procedures of Construction Dispute Resolution Services, LLC, a National/International construction dispute firm who has developed a special "National Green Panel" to specifically handle green-related disputes. The cost for the arbitration shall be shared equally by the parties although personal attorneys, experts or other personal expenses shall be paid directly by the party utilizing those special services. The parties acknowledge that they are giving up their right to utilize the court system to settle any disputes. The arbitration award shall be binding upon the parties and may be enforced in any court of competent jurisdiction.

DESIGNERS AND ARCHITECTS

The drawings, plans, and other technical documents supplied by ______________ (your name) Company were designed or drawn utilizing the green-related information provided by the ______________________ green organizations (Energy Star, USGBC, NAHB, RESNET, etc). ______________________company (your name) does not guaranty that the green building will meet the expected level of green construction that is indicated according to the green rating as planned for this building. In addition, ________________company (your name) assumes no responsibility for the accuracy of the rating as the rating system allows for some flexibility and the rating for your building will be calculated based only on the information provided related to the construction of the building. If any dispute related to our (my) services should occur, the dispute shall be settled through binding arbitration as provided by and according to the Arbitration Rules and Procedures of Construction Dispute Resolution Services, LLC, a National/International

construction dispute firm who has developed a special "National Green Panel" to specifically handle green-related disputes. The cost for the arbitration shall be shared equally by the parties although personal attorneys, experts or other personal expenses shall be paid directly by the party utilizing those special services. The parties acknowledge that they are giving up their right to utilize the court system to settle any disputes. The arbitration award shall be binding upon the parties and may be enforced in any court of competent jurisdiction.

BUILDER, CONTRACTOR, OR SUBCONTRACTOR

__________________________ company (your name) will attempt to build the building as specified by the plans, drawings and other documents provided for the construction of the building by a designer, architect or other individual or entity. As to the green aspects of the building, _________________ company (your name) will utilize the materials specified and will endeavor to have the building perform as expected as a result of the green construction specified for this building. _______________________ company (your name) can not guaranty that the building will perform as expected as the green performance of a building depends on several other issues other than the construction of the building. If any dispute related to our (my) services should occur, the dispute shall be settled through binding arbitration as provided by and according to the Arbitration Rules and Procedures of Construction Dispute Resolution Services, LLC, a National/International construction dispute firm who has developed a special "National Green Panel" to specifically handle green-related disputes. The cost for the arbitration shall be shared equally by the parties although personal attorneys, experts or other personal expenses shall be paid directly by the party utilizing those special services. The parties acknowledge that they are giving up their right to utilize the court system to settle any disputes. The arbitration award shall be binding upon the parties and may be enforced in any court of competent jurisdiction.

ENDNOTES

[1] Entitled "Review of R-2000 Builder Licensing Agreement" (June, 2002) and "Review of Licensing Agreement for EnerGuide" (July 2002).

[2] The Web site of the West Coast Environmental Law Environmental Law Research Foundation, for example, contains a "Smart Bylaws" Section proposing the following:

> The US Green Building Council (USGBC), representing all segments of the buildings industry, created the LEED Green Building Rating System as an international standard... a consensus on what sustainable building design entails. Developers can voluntarily adopt the LEED standard to obtain recognition that a project has met the sustainability standards set out in the LEED system. LEED provides a complete framework for assessing building performance and meeting sustainability goals....
>
> In 2007, the US Green Building Council launched a Pilot Program to test concepts associated with its new LEED for Neighbourhood Development Rating System which integrates smart growth, green building and new urbanism concepts into neighbourhood design. Twenty-one Canadian projects are participating in the pilot involving more than 200 projects. Also in 2007, the Canada Green Building Council commenced work to develop Canadian LEED-Neighbourhood Development draft standards, in partnership with the City of Langford. The City of Langford's Westhills development is a comprehensive development zone-mixed use development that requires LEED certification for all commercial and multi-family residential buildings and Built Green standards to be met by residential buildings that do not fall within LEED certification.

[3] See *Don't Let Green Design Cause Red Ink, by* Frank Musica. American Institute of Architects Convention, 05/03/2007.

[4] E.g., the historic controversy over insulation with ureaformaldehyde foam (UFFI).

[5] For example, NRCan's Web site describes EnerGuide 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". *Who Are EnerGuide rating service Energy Advisors?* NRCan Website.

[6] "Green Building Disputes Arise", by P.G. Merrill, *Builder News,* June 2008, p. 79.

[7] In this case by Mr. Merrill's company in New Mexico.

[8] Construction Dispute Resolution Services LLC, Santa Fe, New Mexico.
http://www.constructiondisputes-cdrs.com/Suggested%20Green%20Contract%20Language.htm
As for the standard-form contracts, the site specifies: "Please do not utilize any of the suggested contract provisions without first having them approved by your attorney".

[9] There are concerns about optics. In some cases, Trade Mark Holders have licensed builders' associations to be their administrators. That is perhaps appropriate if there is no perception of *conflict of interest*; but that could change quickly. For example, if a given green label became part of a code requirement, that would mean that the association could find itself issuing notifications, to its own members, that their buildings were not code-compliant. That kind of regulatory function is not something that the association might have anticipated; and even if it did, and were capable of remaining unbiased in *fact*, it would still have to be mindful of the *appearance* to the general public, of an industry body regulating itself.