

# New construction will bring "LEED-igation"

Sustainable building is changing the legal landscape

PETER KENTER  
CORRESPONDENT

Sustainable building is transforming the Canadian construction industry. However, new construction techniques and new contract terms may be creating legal risks around liability, insurance and project certification that have not yet been fully explored.

"We haven't seen a lot of cases involving LEED-igation or sustainable building projects, but we know they're coming," says Danielle Stone, an associate with Blaney McMurtry LLP and a member of the firm's commercial litigation group. "In the United States since 2007, there have been about 13 cases related to sustainable building."

Two U.S. cases in particular have garnered interest in legal circles.

In *Bain v. Vertex Architects* (Illinois, U.S.A.), the plaintiff claimed that the architect "failed to pursue and obtain for the Project certification from the USGBC LEED for Homes Program" for a farmhouse renovation, when the stated objective of the architectural contract was to "create a sustainable green modern single family home." The question raised: who is liable for failure to obtain LEED certification?

In *Shaw Development v. Southern Builders* (Maryland, U.S.A.), the developer contracted with a general contractor, who was not responsible for the building design, to construct a project to LEED Silver certification standards.

Shaw filed a US\$1.3-million lawsuit alleging the contractor failed to finish the building in a timely fashion and failed to build it in accordance with LEED standards by state deadlines required to receive a green building tax credit of US\$635,000. The question raised: can a contractor be liable if it was not responsible for designing the building?

"LEED requirements are changing all of the time," notes Stone. "If you read the material two years ago and say 'I'm good,' you're really not."

Stone advises builders to keep up to date with LEED requirements and

to retain counsel who can address the following issues:

- Determine which party is responsible for administering the LEED certification process.

- Determine who is responsible if a project fails to achieve LEED certification and what sort of damages may result from such a failure.

"Appeal is a costly process, about \$750 for each credit you're appealing, so it can really add up," says Stone.

- Determine any ongoing obligations relating to the operation and maintenance of buildings.

- Define who bears responsibility for the loss of certification from third parties.

"Anyone can appeal the certification at any time," says Stone.

"Even 10 years down the road. If you build a condo that turns out to be not as energy-efficient as it was promised to be, who can be liable for that? That should be in your contract."

- Confirm that there is adequate insurance coverage, including professional liability insurance for design professionals, that takes into account the "green" nature of the project.

"A lot of insurance companies are hesitant to give coverage for these types of projects because they don't know what the risks are," says Stone. "For example, what are the risks of green roof building?"

Check warranty and guarantee language to confirm that new green construction procedures or installation materials and/or techniques do not void the warranty of guarantee for a product.

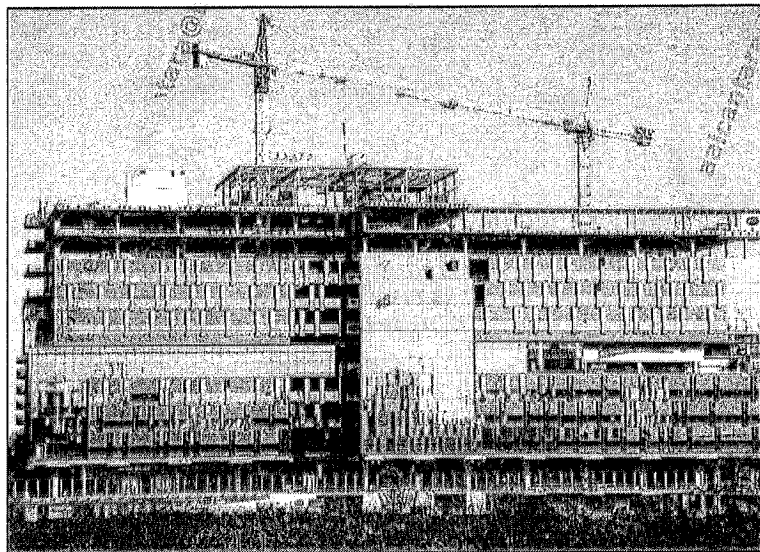
"Make sure that your sub-contractors know exactly what they're doing," says Stone.

Determine if intellectual property infringements will result from utilizing new green techniques or equipment and who is responsible for dealing with infringements that may arise.

"However, it all starts with a contract that must be very clear and specific with regards to everyone's duties and obligations," says Stone.

Stone spoke at a presentation of Blaney McMurtry's Architectural, Construction, Engineering Services (ACES) Group.

## Campus of Care



WILLIAM CONWAY/PROGRESS PHOTOGRAPHY

Work has reached the top floor on the Bridgepoint Health Campus of Care at the Bridgepoint Hospital in Toronto, Ont. PCL Constructors Canada Inc. have completion of the 10-storey, design-build project with over 500-beds scheduled for March 2013. The project also includes restoration and some demolition at the historic Don Jail site. The project aiming for LEED certification was designed by HDR Architecture Associates Inc./Diamond and Schmitt Architects Inc. Consultants are: Halsall Associates Ltd. (structural); Smith and Andersen Consulting Engineering (mechanical/electrical). Subcontractors include: Matt's Excavating; Priestly Demolition Inc.; Clifford Restoration (Don Jail site); Anchor Shoring & Caissons Ltd.; Harris Rebar; Alliance Forming; CBM (concrete); Oakdale Drywall; Limen Masonry; Modern Niagara Toronto Inc. (mechanical); Plan Electric; Bothwell-Accurate Co. Ltd. (roofing/siding); Sota Glazing (glass) and ThyssenKrupp Elevator Ltd.

## Opinion

### Effective condo maintenance essential

THOMAS MARKS  
COLUMNIST

In a prior column, I mentioned some of the financial programs that exist in condominiums in the Province of Ontario.

When existing components or systems in a condominium such as carpeting, roofing, or wall covering, etc. require replacement, the funds are drawn from the condo's reserve fund. When a new component or system not previously in existence in the condominium, is desired by the board of director and owners, the funds must come from either the operation fund or from a contingency fund. This component might be something like a hot house, fountain, patio, etc.

The Southampton, a condominium located in the west end of Toronto, wished to add a gazebo to the barbecue area, but the operating budget did not have sufficient funds to permit the project to be undertaken. The residents formed a committee with the purpose of raising sufficient funds to complete the project. The committee was so successful that the patio chairs were also replaced.

Dr. Gary Hunt, board of directors' president, strongly believes that the success of the Southampton Community of Residents lay in the committee's setting of priorities. The first priority was their commitment to developing a strong feeling of community amongst the owners and the working staff (superintendent, security personnel and the property management team). The Southampton, now in its 19<sup>th</sup> year, through its community involvement has maintained such a fresh appearance that it might lead a visitor to believe that the building was brand new.

The board of directors and owners have undertaken, over the years, many projects that directly contribute to the high level of excellence in building maintenance. Since 2002 following major projects have been accomplished:

- 2002, the front lobby was totally refurbished. The existing flooring was replaced with imported Italian marble. The lobby furniture was reupholstered and the lobby accessories were upgraded.

- 2007/8, the front entrance was replaced by Graemore Contracting.

- 2008/9, the hallways of the 12-storey building were upgraded with the installation of new carpeting, new wall covering was applied, and new lighting fixtures were installed. The board of directors, with the assistance of a resident committee, worked with the design consultants, Tanner Hill Design and Lar Condominium Refurbishment Specialists.

- 2009, the party room received a new kitchen addition. The work was carried out by Peter Chown, a resident, assisted by Scott Bradley, the condominium's superintendent. Lar was retained to refurbish the guest suites and new hardwood flooring, furniture and upgraded accessories were installed.

- 2011, Lar also was involved in the 'Somerset Lounge (dining room, library, billiard and games room) upgrades which included new wallpaper, restoration of some flooring and replacement of some furniture and reupholstering of some existing furniture.

The Southampton has a number of committees that focus on different aspects of condominium living. One of these committees is the 'technical committee'. This committee undertook and completed the replacement of the make up air units and the refit and upgrade of the chiller. Today the committee is launching a phased program of boiler replacement.

During the 19 years that this condominium corporation has been in existence, it has been able to maintain the building and its grounds in exceptional condition. This has required thousands of dollars, budgeted carefully over a number of years.

The residents of The Southampton are geared to spend additional funds with an eye to maintaining their building in outstanding condition and those dollars spent very carefully and wisely.

There is very much a sense of pride in living in the Southampton and this pride is filtered through all of the owners, staff and their property management company.

As Dr. Hunt stated, "Why not? It's my home".

Thomas Marks is a former associate editor of the Daily Commercial News and is currently a candidate member of the Association of Condominium Managers of Ontario. Emails can be sent to editor@dailycommercialnews.com

## Samsung deal required more consultation: report

Continued from Pg. 1

The report highlights that the deal, which will pay a consortium of Korean companies \$110 million over 20 years and the attractive FIT prices, in exchange for \$7 billion in investment was done with economic analysis or business case "to determine whether the agreement with the consortium was economically prudent and cost-effective, and neither the OEB nor the OPA was consulted about the agreement," said the report.

The report also points to the debt

retirement charge, which Ontarians have been paying on their electricity bills since 2002 to retire a portion of the debt of the old Ontario Hydro. McCarter points out that the Minister of Finance never said how much of the debt remains.

"More than \$8 billion has been collected over nearly 10 years to retire what was originally a \$7.8 billion residual stranded debt left from the restructuring of Ontario's electricity sector in 1999," he said in a statement.