

The legal risks of green innovation in design and construction

LEED-related litigation has so far not been excessive, but industry participants should be on guard



BY NORM STREU AND CHRISTOPHER HIRST

The LEED juggernaut continues to take over the world of design, construction and development.

Leadership in Energy and Environmental Design (LEED) is a widely popular green building certification program. What began with a committee of six volunteers has grown to 120,000 staff, volunteers and professionals, applying standards to 85,000 certified projects worldwide, covering some 14 billion square feet of construction. Given the vast scope of LEED, associated litigation in the U.S. and Canada has so far not been excessive. However, LEED does create substantial potential for disputes, and industry participants are well advised to keep such risks top of mind when approaching LEED projects.

The LEED system provides for four possible levels of certification: LEED Certified, Silver, Gold and Platinum. The certification level achieved is based upon a project or a building scoring a minimum threshold of possible points that are obtained by meeting certain specified prerequisites. The actual ability of a project or a building to achieve a desired LEED certification is not certain at the time of design.

Certification at a particular level will depend on a number of factors, including the design and materials used, the skill of the contractors and the quality of the supporting documentation.

Here are five ways in which LEED creates new project risk:

1. New technologies are being used, and old methods are being used in new ways. This creates new liability risks, as we do not have the same engineering data to ensure these technologies and methods will not give rise to unforeseen problems. In other words, unforeseen risks may be created by designing buildings using different products and by using new methods that are designed to make the buildings more efficient.

2. A developer that promises a certain level of green certification that is subsequently not achieved may have exposure to misrepresentation claims. In the U.S. case of Keefe vs. Base Village Owner, condominium owners brought suit against the developer, alleging among other things that the building did not meet the LEED standard promised. In that case, the owners argued they were entitled to rescission of their purchase contracts. In *Gidumal vs. Site 16/17 Development LLC et al.* (2010, New York), a lawsuit was filed based on the failure of a development in

Battery Park City to meet LEED standards. Though the building was built to LEED Gold standards, occupants argued that issues including cold drafts and heating problems indicated that the building did not meet the standard advertised.

3. A developer that retains its own LEED consultant will bear the risk of the recommendations of this consultant. For instance, if the recommendations of the consultant during construction result in increased costs, questionable-quality materials or construction delays, the owner may well end up defending contractor claims for additional compensation resulting from such recommendations.

4. Architects and other design professionals may also face exposure in the LEED process. Given that the ultimate LEED certification cannot always be predicted in advance, architects who contractually commit to a certification level that is not achieved at completion may face claims from their clients as a result. An additional risk faced by such design professionals is the extent to which such claims may be covered by their errors and omissions insurance policies.

5. Finally, general and trade contractors may face exposure to claims if they fail to take the steps agreed to in the LEED

process and the owner suffers damages from the loss of a promised LEED certification. If a developer is counting on a certain level of LEED certification and the level is missed because of some act or omission in construction, you can expect that developer to bring a claim for loss of profits.

As with most risk in the design and construction process, the best way to minimize exposure to LEED risk is through careful consideration at the outset of a project as to the allocation of risks associated with LEED compliance. Careful contractual allocations of risk and well-drafted clauses minimizing LEED responsibility should be your first line of defence. You should also consult your insurance broker to ensure that your organization is insured with respect to the risks associated with LEED compliance. Fortunately, there has not yet been extensive LEED litigation, but that does not mean you should lower your guard to the inherent risks associated with the LEED certification program. ■

Norm Streu is president and chief operating officer of the LMS Reinforcing Steel Group. Christopher Hirst is managing partner and leader of the construction and engineering group at Alexander Holburn Beaudin + Lang LLP.

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CAREERS: VRCA OUTREACH PROGRAM EDUCATES YOUTH

Volunteer-led initiative has engaged more than 5,500 students from 21 schools

BY DAVID WEIR

It is ironic that, for an industry that relies on innovation, new technologies and best-practice procedures, construction struggles to attract young talent. Currently in the throes of a skilled labour shortage that, according to **BuildForce Canada**, is forecast to be as many as 25,000 unfilled construction jobs across B.C. by 2028 (and 12,100 unfilled jobs in the Lower Mainland by 2021), the industry attracts only one in 45 high school graduates into its construction trades programs.

The increasingly globalized and competitive business environment, tight labour market and advances in knowledge and technology are creating new pressures for construction companies to innovate, differentiate, improve their reputations and attract the next generation of talent. Added pressure comes in the form of some deep-rooted myths that must be countered with facts if the industry is to improve the one-in-45 ratio and attract young talent in the future. Those myths include:

Myth No. 1: A career in construction is a “second-best” choice compared with one that requires a university degree.

The industry does a poor job at promoting itself. While working in bad weather on site is inevitable for some, our industry is far more sophisticated and reliant on technology to drive innovation and productivity than is perhaps understood. In fact, trades professionals today require excellence in math, physics and technology to install state-of-the-art mechanical and electrical systems, operate equipment and keep multimillion-dollar projects on track.

Myth No. 2: The construction industry offers a limited career path.

Our industry is multi-faceted and allows apprentices to pursue their chosen trade for life or to be entrepreneurial and own their own business as early as their mid-30s. A skilled trades professional can climb the corporate ladder toward a senior executive position and/or pursue rewarding career opportunities across



Volunteers with VRCA's school outreach program talk to students about careers in construction | VRCA

the country or the world.

Myth No. 3: A career in construction doesn't pay well.

The industry is full of good-paying jobs. The average annual salary of a B.C. construction worker is \$61,202. Compare that with the average student debt in B.C. after a four-year degree of \$35,000, the highest in Canada, and it's easy to see the math works.

Today's youth have an essential role to play in the future of the construction industry, not only to fill the 2028 projected shortfall but also to help the industry be technologically smart,

innovative, productive and competitive at home and overseas.

It's why, in late 2015, the **Vancouver Regional Construction Association (VRCA)** engaged counsellors and students from schools across the Lower Mainland to identify ways in which we can work together to promote construction as an attractive and viable career path.

Those conversations gave rise to our school outreach program, a volunteer-led initiative designed to help educate youth about the opportunities associated with a career in construction. Four years later, and with the help of counsellors, teachers and 90

volunteers – many of whom are tradeswomen and female project managers and estimators – we have engaged 5,666 students from 21 schools. We've also collected some interesting data: 33% of students polled before a presentation said they would consider a career in construction. When the question was asked again post-presentation, approximately one-third of those who initially said “No” or “Maybe” now said they wanted to learn more.

While our school outreach program will not resolve the skilled labour shortage immediately, we are heartened by its early results and believe it has the potential to reduce the forecasted shortage in the years to come. It's why VRCA is now in the preliminary stages of evolving the program to have greater impact and debunk the myths about careers in construction once and for all, so that the industry is recognized as an employer of choice, keen to attract a diverse, skilled and tech-savvy workforce. ■

David Weir is manager, industry and government relations, at the Vancouver Regional Construction Association.