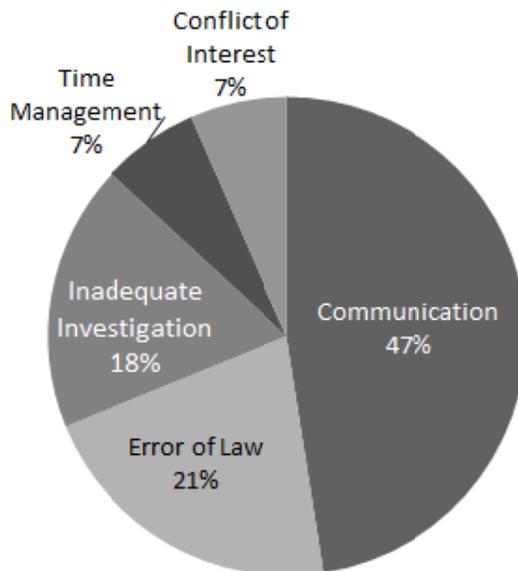


### Quick stats\*

Average **11** claims per year  
 Average cost: **\$1.3 million** per year  
 Average cost per claim: **\$113,000**

### Common errors



Acting on franchise matters can be particularly risky for lawyers. While some franchisors are large multinationals, many are small, relatively unsophisticated businesses. They are running a “mom-and-pop-style” family business; they are usually financially (and more importantly, emotionally) invested in the business, and they have scraped together their life savings to open the franchise. These characteristics frequently result in “sympathetic” claimants.

The greatest area of risk involves the onerous disclosure requirements imposed upon a franchisor by the governing statute, the *Arthur Wishart Act*. Inadequate disclosure entitles a franchisee to rescind the franchise agreement within two years and to extensive damages, including the return of its investment in franchise fees, inventory and equipment costs, as well as compensation for any losses incurred by it in acquiring, setting up and operating the franchise business.

Faced with such a heavy damages claim, a franchisor will often claim against the lawyer, alleging that the lawyer either drafted an inadequate disclosure statement or failed to warn the franchisor of the consequences of inadequate disclosure.

See the reverse page for more steps that can be taken to reduce your exposure to a franchise-related claim.

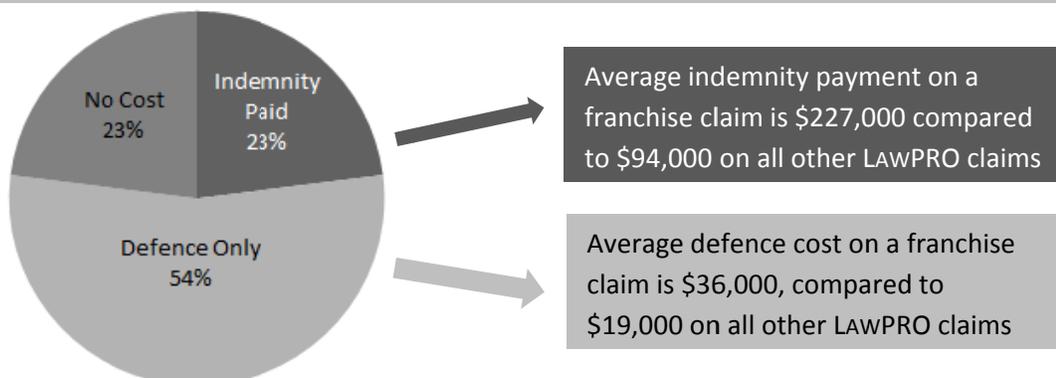
### Speakers and resource materials

- We can provide knowledgeable speakers who can address claims prevention topics. Email [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca)
- Visit [practicepro.ca](http://practicepro.ca) for resources including LAWPRO Magazine articles, checklists, precedents and practice aids.

### Additional reading at [AvoidaClaim.com](http://AvoidaClaim.com)

- Franchise law tenet - Disclosure! Disclosure! Disclosure!
- Practice Pitfalls – Franchise law
- Surprise! You have a franchise

### Resolution of franchise claims



## Risk management tips

### **Familiarize yourself with the disclosure requirements of the *Arthur Wishart Act***

Lawyers acting for franchisors or franchisees should ensure that their clients are aware of the disclosure obligations which the *Act* (and the courts) place on franchisors. Inadequate disclosure entitles a franchisee to rescind the franchise agreement within two years and to receive extensive damages.

### **Do not dabble in franchise law**

Franchise law is a very complex area of law. Lawyer's doing work in this area should have sufficient expertise to handle that work, and if not, they should refer the matter to someone that has franchise law expertise. The client should also retain a chartered accountant familiar with franchises. The detailed financial disclosure requirements can be beyond the scope of a lawyer's expertise.

### **Beware of 'franchises in disguise'**

A lawyer might fail to identify a commercial transaction as a franchise arrangement when dealing with a new franchise – when the party behaving as a franchisor is not yet fully aware that they are creating a franchise. This goes back to the point about not dabbling – as anyone knowledgeable in the area would immediately recognize a franchise agreement, regardless of what it's called.

### **Avoid limited retainers**

Limited retainers, even if they are reduced to writing, tend to be ineffective in franchise cases. In the context of a franchisee to franchisee purchase in particular, lawyers who think they are just acting on the "closing" may not deal with the franchise aspects of the case, which can lead to disaster. You can't treat a franchise like a typical asset purchase.

### **Carefully document instructions and advice**

Many of the LAWPRO's larger franchise claims have involved allegations that a lawyer failed to advise the franchisor or franchisee regarding proper disclosure. Regrettably, lawyers' files often have little or no documentation that the statutory provisions of the *Act* and the consequences of non-compliance were explained to the client. As a result, liability is often a foregone conclusion or turns on a credibility contest, which commonly favours the client.

## Most common malpractice errors

### **Communication-related errors (47%)**

- Failing to inform a franchisor client about the disclosure requirements under the *Arthur Wishart Act*, and the severe consequences of inadequate disclosure.
- Failing to document in writing that a client instructed the lawyer to take a course of action that was different from the one the lawyer recommended.
- Retainer did not clearly specify work that was to be done by the lawyer and/or outside expert (e.g., accountant or tax expert).

### **Error of law (21%)**

- Failing to provide proper advice to the franchisee with regards to the information disclosed by the franchisor pursuant to the requirements under the *Arthur Wishart Act*.
- Failing to be sufficiently aware of the disclosure requirements under the *Arthur Wishart Act*.

### **Inadequate investigation (18%)**

- Failing to adequately review a disclosure document.
- Failing to do due diligence that might discover encumbrances, liens or outstanding debts.
- Overlooking or failing to advise clients properly as to their rights of rescission.

### **Consider Excess insurance**



Given the potentially significant damages involved in a franchise claim, lawyers who practise in this area should seriously consider carrying excess insurance. Find out more at [lawpro.ca/excess](http://lawpro.ca/excess).