a franchisee's right to receive full, complete and proper disclosure and the timing of their rights and remedies under the Act. Similarly, lawyers acting for a franchisor are well advised to prepare a detailed summary of what must be disclosed to a potential franchisee, the risk the franchisor faces if the disclosure documents are determined to be inadequate, as well as the personal risk that the signatories to the disclosure document face if the disclosure document contains misrepresentations that may be grounds for a claim for rescission and damages.

It would also be wise for lawyers to confirm, in writing, that they are not providing financial advice and that all financial statements should be reviewed by an accountant.

With regard to disclosure, the list of what must be included in disclosure documents is lengthy and beyond the scope of this article. As well, the definition of what constitutes a "material fact" is somewhat of a moving target and has been broadly expanded by the case law, creating further challenges for lawyers advising franchisees and franchisors. For example, in one case, the Court of Appeal found that the failure to provide the franchisee with a copy of the head lease or sublease amounted to material non-disclosure.

Defending claims against lawyers in the current climate is an uphill battle: Franchisees are often treated by the courts almost as a "protected class" as judges seem to strive to make findings in their favour in disputes with franchisors over disclosure. Indeed, to some this has created an impression of near absolute liability in favour of franchisees when it relates to disclosure.

As well, the uncertainty regarding what a court may find "material" creates significant risk for lawyers acting for both franchisors and franchisees. Ensuring, at the very least, that clients are aware of this uncertainty in the law, in writing, may serve to avoid or avert a potential negligence claim in the future.

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Buyer beware:

Title insurers' policy sublimits create new risks for lawyers

The increasing popularity of title insurance in Ontario over the past 15 years has created some new risks for lawyers. LawPRO has seen claims against lawyers for not recommending title insurance to clients and for obtaining title insurance without fully informed consent.

As Ontario title insurers get a better understanding of their exposure under their existing title insurance policies, some are changing the terms of those policies. Those changes present significant potential risks to lawyers.

A title insurer may, for example, add to its policy a sublimit on the amount of coverage for a specific issue and/or a specific geographical area. For example, an insurer may put a sublimit of $25,000 for issues related to conservation authority compliance in a specific geographical area.

Assuming that a lawyer does not want to assume the risk for losses over such a sublimit, he or she needs to address two questions:

- Is there an alternative policy available that does not have such a sublimit (although obtaining it for the client may mean additional due diligence)? and/or
- Would the client be better off if the lawyer did the appropriate searches that would enable him or her to give an opinion on the relevant issue?

Either way, the lawyer should always advise the client about the sublimit and what the lawyer is (or is not) doing about it.

The Residential Real Estate Transactions Practice Guidelines, released by the Law Society in January 2007 (see page 23), address the risks related to the use of title insurance in a transaction. A lawyer should aim to have the client's informed consent to the use of title insurance to assure title. If the policy does not entirely satisfy the client's risk in a given area, and the lawyer is not addressing the risk through the traditional method of making searches and opining on the results, the lawyer should obtain the client's agreement that neither the policy nor the lawyer are able to offer protection on the subject issue.

Real Estate Practice Guidelines (excerpts)

Guideline 1 – Client/Lawyer relationship states the following in relation to Communication:

- The lawyer should advise the client of the options available to assure title in order to protect the client's interests and minimize the client's risk. In this regard, the lawyer shall comply with his or her obligations regarding title insurance and real estate conveyancing pursuant to subrules 2.02(10) - 2.02(13) of the Rules. If the client selects title insurance, the lawyer should advise the client about the searches that the lawyer will not be performing and the type of information that these searches would reveal about the property such as zoning, encroachments or survey issues. Where title insurance is not being used, the lawyer should advise the client about the post closing protections provided by title insurance which the client is not receiving (e.g. regarding post-closing encroachments onto the property and fraud).
- Where title insurance is being used, the lawyer should communicate with the client to determine whether the client has any adverse knowledge about the property that could give rise to the insurer relying on the "knowledge" exclusion if the matter is not disclosed and "insured over" pre-closing.

Guideline 2 – Due Diligence states the following in relation to the use of title insurance:

- Where title insurance is being relied upon to close a transaction where registration is delayed, there should be an express obligation on the part of the title insurer as part of the binder/commitment pre-closing, addressed to the insured-client(s), to provide coverage to the client for any adverse registrations which occur between releasing the closing proceeds and registration of the title document(s). This obligation may be satisfied by obtaining a draft policy from the title insurer in the name of the insured clients including an endorsement or policy terms providing the coverage described.
- The lawyer should review the draft title insurance policy or binder/commitment, to ensure the following:
    - Is the insured named correctly?
    - Is the legal description correct? Since only the lands described are insured, there may be off-site lands that should be included in the description, so that easements or rights-of-way located on other properties, but benefiting the subject property, and encroachments from the subject property onto other lands, will be covered by the insurance.
    - Are there other title issues, not apparent from the insurance commitment, of which the client should be warned? For example, problems may have been found when the search was conducted but the title insurer has not entered them on the Schedule to the policy because those problems are removed from coverage by the standard, pre-printed exceptions.
    - In the alternative, have problems emerged with respect to the title that it would be preferable for the owner to have resolved under the terms of the agreement of purchase and sale?
    - What coverage is excluded from the commitment/policy?
- The lawyer should issue the title insurance policy as soon as possible after closing, to insure that an issued policy exists should the insured-client(s) need to make a claim, and to minimize the risk of the client's being obliged to disclose adverse information obtained between closing and the issuance of the policy.
- The issued policy should be compared carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.