

LEGAL IMPLICATIONS OF USING SOCIAL MEDIA

Do You Know Who You're Sharing With?

**David Alli**

Amanda has arthritic pain in her knees and is claiming short-term disability from her employer. The insurance company denies her claim because pictures on Amanda's Facebook profile show her jumping on a trampoline. She then deletes many pictures from her profile.

All age groups from kindergarteners to senior citizens are using Facebook, Twitter, and LinkedIn to connect with others. In so doing, many people unknowingly give the world an all-access pass to their lives. Employers routinely check Facebook and LinkedIn during the hiring process and at various other times.

Since 2007 (*Kourtesis v. Joris*, [2007] O.J. No. 2677), Canadian courts have held that social media content is admissible as documentary evidence under the *Rules of Civil Procedure*. In *Kourtesis*, the plaintiff claimed that her injuries in a car accident greatly limited her activities, but the judge permitted Facebook photographs showing her enjoying a wide range of activities to be admitted as evidence. Since then, there is an obligation to produce such evidence if it is relevant in a proceeding. Knowing this, it may be tempting to modify or even delete specific content from social media websites, as in the fictitious example above. This is not without risk: the content in question qualifies as documents and the tampering or spoliation of documents can lead to severe penalties.

Not all social media content is automatically considered to be admissible as evidence. There is debate about whether social media content displayed under privacy settings is admissible. In 2007 (*Murphy v. Perger* [2007] O.J. No. 5511), the Ontario Superior Court of Justice decided that since the plaintiff, who was claiming damages for injuries suffered in a car accident, had used photographs published on Facebook in support of her claim, the photographs published only to her 366 "friends" could be admitted into evidence. A judicial consensus has since emerged that "private" documents (i.e. social media content) will be ordered for production only if it can be reasonably inferred from "public" content that



"private" content may well be relevant to the case at hand. In the example above, since Amanda is claiming short-term disability from her employer for arthritic pain in her knees and her public display pictures shows her jumping on a trampoline, the employer could reasonably infer that the private portion of her profile may contain such relevant documents as other pictures showing her being physically active. Courts have further held that there is no reasonable privacy interest where access is granted to a large number of "friends" online.

The use of social media is expanding into every facet of our lives and its presence in litigation cannot be ignored. As we continue to grow our online social media presence, we must keep in mind the changing legal landscape where one's private online presence can become a matter of public record. Production of social media evidence depends on the circumstances of each case: courts will continue to weigh the privacy interests of the individual against the desire for an open and transparent litigation process. Lawrences' Litigation Group can assist if you have questions about the use of online content in legal proceedings.



David Alli is a member of Lawrences' Litigation Group, where he is developing a broad area of practice in civil litigation, with particular emphasis on contractual disputes, construction liens, enforcing orders and judgments, collections matters, and employment-related issues. He can be reached at 452-6872 or [dalli@lawrences.com](mailto:dalli@lawrences.com).

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## FRANCHISE LAW PART 3

# Fatal Flaws in Disclosure Documents



If you are currently franchising your business or thinking about it, it is essential to consult a lawyer familiar with franchise law to prepare a proper disclosure document or to verify that your disclosure document is not fatally flawed.

### Louis Vouloukos

In previous issues we have described the situation of Mr. and Mrs. Singh, who own the franchisor SHD Inc., which franchises five “Singh’s Healthy Diner” locations in Ontario. One location is operated by Mr. Howard, who signed a franchise agreement 23 months ago. Through his lawyer, Mr. Howard claims that he did not receive the disclosure document he was entitled to receive under Ontario’s franchise law, the Arthur Wishart Act (“the Act”) and that he is rescinding the agreement. The Singhs maintain they *did* provide Mr. Howard with a disclosure document. However, they had omitted one requirement: their signatures on the certificate of disclosure.

Under Section 6 of the Act, if a franchisor does *not* provide a disclosure document, the franchisee is entitled to rescind the franchise agreement within *two years* of signing it. If the disclosure document is provided, but it is found to be deficient, the franchisee can rescind the franchise agreement only within *60 days* of signing it. After being served with a notice of rescission, the franchisor is obligated under the Act to refund to the franchisee all monies paid to it, buy back from the franchisee all inventory and equipment, and compensate the franchisee for *any* losses incurred in acquiring, setting up or operating the franchise.

In our fictitious example, the Singhs believe that since they provided a disclosure document, and since Mr. Howard signed his franchise agreement 23 months ago, he cannot rescind the franchise agreement, as the 60-day period for rescission noted above has passed. However, Mr. Howard’s position is that the absence of a signed certificate was such a material deficiency that he did not actually receive a disclosure document. Therefore, Mr. Howard claims that the two-year rescission period applies, rather than the 60-day rescission period. The courts have tended to agree with Mr. Howard.

In *Sovereignty Investment Holdings Inc. v. 9127-6907 Quebec Inc.*, the applicant argued that there were 19 alleged deficiencies with the disclosure document it received. The main issue before the court was whether any of the deficiencies were sufficiently material to enable the court to conclude that the franchisor failed to deliver a disclosure document as required under the Act. The Court found that there were four such fatal deficiencies:

1. No financial statements
2. No statement specifying the basis for the earnings projections and the assumptions underlying these projections
3. The disclosure document was not a single document delivered at one time
4. No signed certificate

The Court concluded that the franchisor failed to provide a disclosure document. Equally important, the court stated that each deficiency *on its own* is fatal to the assertion that the franchisor delivered a disclosure document. Consequently, the two-year rescission period applied in this case and the franchisor was liable to the franchisee for an amount exceeding \$1 million.

If you are currently franchising your business or thinking about it, it is essential to consult a lawyer familiar with franchise law to prepare a proper disclosure document or to verify that your disclosure document is not fatally flawed. Not doing so can prove very costly. At Lawrences, we help many franchisors navigate the often choppy waters of franchising a business, avoiding the rocks on which some businesses can founder.



Louis Vouloukos is an associate in Lawrences’ Business Law Group. In addition to corporate and commercial work for the firm’s business clients, he also practises franchise law, providing all necessary legal services to franchisors and franchisees. Louis can be reached at (905) 452-6883 or [lvouloukos@lawrences.com](mailto:lvouloukos@lawrences.com).

# Buying a Home from a Builder

## Maja Mitrovic

Buying a new house, condominium or townhouse directly from the builder can be confusing, especially for a first-time purchaser. The builder will usually require you to sign the builder's form of agreement of purchase and sale (the "Agreement"). Because these Agreements are lengthy and drafted strongly in the builder's favour, it is very important to have a real estate lawyer review the Agreement before you sign it. You can make your purchase conditional on your solicitor's review of the Agreement. This article outlines some of the issues with builder's Agreements.



## Reviewing the Agreement

If you are purchasing a new condominium, you can rescind the Agreement and receive a full refund of your deposit, with interest, within 10 days from the date you received copies of the accepted Agreement and Disclosure Statement. The notice of rescission must be in writing and received by the builder or the builder's lawyer within the 10-day period. You should have a real estate lawyer review the Agreement and Disclosure Statement to advise you of your legal obligations and recommend appropriate changes to the Agreement. The Disclosure Statement includes important information about the proposed condominium project, including the proposed budget and common expenses.

There is no 10-day rescission period when purchasing a freehold home. Many home builders insist that you sign an Agreement on the spot to secure your sale price or lot selection. If you cannot avoid this situation, you should insist on adding a clause to the Agreement making your purchase conditional on your solicitor's review and approval of the Agreement.

## Closing Costs

Hidden extra costs payable on the closing date, such as fees for connecting utility services, development charges and mortgage discharge fees, can amount to hundreds or even thousands of dollars. These closing costs are listed in the Agreement as adjustments to the purchase price and are usually estimated figures at the time of signing the Agreement. On reviewing the Agreement, your lawyer can try to negotiate a cap on certain closing adjustments and seek to have others removed.

## Important Dates

The Agreement includes such critical dates as the occupancy and closing dates. The occupancy date is the builder's estimate of when the property will be ready for you to move in. The closing date is the date that title to the property is transferred to the purchaser. If a builder requires an extension, the purchaser can either agree and seek compensation, or get out of the deal. You should seek legal advice whenever a builder asks to delay a critical date.

## HST Rebate

HST is charged on new homes or new condominiums. Typically, builders will add the HST to the purchase price less any applicable rebates, which the builder will require to be assigned to it on closing. Purchasers may qualify for one of the two distinct HST rebate programs. The HST New Housing Rebate is limited to buyers of new or substantially renovated homes and condominiums as their primary place of residence. The HST New Residential Rental Property Rebate is available to those buying a new home or new condominium as an investment. A real estate lawyer can help you determine whether you qualify for a rebate.

Lawrences' Real Estate Group has extensive experience in reviewing new home Agreements and closing new home purchases. We can advise you of your obligations under an Agreement, help you negotiate some of the terms and complete your purchase.



Maja Mitrovic is an associate in Lawrences' Business Law and Real Estate groups. She can be reached at (905) 452-6892 or [mmitrovic@lawrences.com](mailto:mmitrovic@lawrences.com).

You can make your purchase conditional on your solicitor's review of the Agreement.



## Life at Lawrences®

*Lawrences®' lawyers lead active lives in the profession and in the community. Here are some of their latest achievements.*

### Many Happy Returns!

Lawrences is delighted to welcome two returning colleagues to our Litigation Group.



**Sahar Cadili** has returned to Lawrences' Litigation Group after spending almost three years at the largest litigation boutique in Winnipeg, where she practised commercial litigation. She is excited to be back at Lawrences, where she is focusing on corporate/commercial litigation, injunctions

and emergency applications, real estate litigation, and estates litigation. Sahar can be reached at (905) 452-6888 or [scadili@lawrences.com](mailto:scadili@lawrences.com).



**David Alli** has returned to Lawrences' Litigation Group as an associate after articling with the firm and being called to the bar in 2013. David's practice is focused on contractual disputes, construction liens, enforcing orders and judgments, collections matters, and employment-related issues. Since

joining Lawrences, David has represented clients in several levels of court. David can be reached at (905) 452-6872 or [dalli@lawrences.com](mailto:dalli@lawrences.com).

### In the Community



Lawrences lawyers are much in evidence at the Brampton and Caledon Community Foundation (BACCF), a local charitable foundation that provides grants to many Brampton organizations. Lawrences' associate **Chris Markou** joined the Board of Directors as of January 1,

2014, and sits on the Fund Development and Grant Making Committees. Lawrences' partners **Mike Prsa** and **Michael**

**Luchenski** are members of the BACCF Advisory Board. Lawrences donates to the BACCF through the Robert J. van Kessel Memorial Fund.



### At the Podium



Lawrences' Business Law associate **Louis Vouloukos** is much in demand as a speaker for his expertise in franchise law. Louis recently made a presentation to the Royal Bank of Canada Small Business Group and will also be on the program of RBC's upcoming Small Business Week.

He was also on the faculty of the Peel Law Association's continuing education program "Fundamental Principles of Ontario Franchise Law".

### On the Council



Congratulations to Lawrences' associate **Kiran Gill**, who was recently elected to the Council of the Ontario Bar Association to represent the Central West Region. The OBA is the Ontario branch of the Canadian Bar Association and exists to represent the legal profession,

both by offering continuing legal education programs for members and improving access to justice. Kiran is also on the Executive Committees of the Trusts & Estates Law Section and the Young Lawyers Division.

## THE LAWRENCES® LETTER

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