

Do dealership agreements really last forever?



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When a dealer enters into an agreement with an automaker, it may be contemplating a forever, “till death do us part” kind of relationship. In the early stages of the relationship, both parties are inevitably optimistic and likely expect that they will carry on happily ever after. The end of the relationship is understandably not one of the first things on either party’s mind. But it should be. As we all know, things do not always play out as expected.

Before entering into a dealership or retailer agreement, both dealers and automakers should carefully consider the terms governing the duration of their relationship as well as the circumstances which could lead to the termination of the agreement. Oftentimes, dealer agreements will automatically renew after a set period of time, so long as certain conditions are met. In those instances, if neither party breaches the agreement, the relationship may continue indefinitely.

This brings us to a discussion of indefinite term contracts containing what are commonly referred to as “evergreen” clauses. An indefinite term contract is an agreement that does not have an “expiry date”. An “evergreen” clause entails

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the automatic renewal of the agreement year after year. What does this mean in practice? Well, in most cases, if both parties are acting in accordance with the terms of the agreement, the relationship may continue indefinitely. However, what if one party wants out in circumstances where there have been no events of default entitling the innocent party to terminate the agreement?

In some instances, indefinite term contracts may be terminated on reasonable notice in the absence of any clause permitting such right. Courts have been willing, in some cases, to find an implied term which permits the termination of a contract without cause.

The Ontario Court of Appeal has stated that when the term of a contract is not fixed and there is no provision for the termination of the contract on reasonable notice, a court may treat a contract as either perpetual in nature or as an indefinite term contract with an implied unilateral termination right on reasonable notice. In other words, in the latter instance, either party to the agreement can terminate the contract if they give the other party reasonable notice. How the court determines what is ‘reasonable’ is largely dependent on the facts of each particular situation. In order to make this determination, the court must consider the following:

- A. the relationship between the parties;
- B. the specific terms of the contract; and
- C. all surrounding circumstances.

A. Type of Relationship:

Some types of contracts which depend upon mutual trust between the parties naturally give rise to an implied right to terminate upon reasonable notice. For example, distributorship agreements are generally of a class of agreements that can be terminated upon reasonable notice without cause.

This is because distributorship agreements are the type of contract that involve mutual trust, and each party should have the right to terminate the contract unilaterally on

notice, in the event there is a breakdown of that trust. In other words, trust between the parties is so important in this type of relationship that the absence of it is sufficient grounds for either party to end the contract. Similarly, franchise relationships depend upon mutual trust between the contracting parties, which will generally be found to contain an implied right to terminate upon reasonable notice in situations where the dealer agreement does not contain terms related to termination.

Given that dealers and automakers are in a franchise relationship with each other, there is the strong likelihood that an implied right to terminate upon reasonable notice would be found to exist, although final determination must be balanced against other factors, as described below.

B. Specific Terms:

There may be specific terms within the dealer contract which either point towards or away from an implied right to terminate without cause on reasonable notice. For example, if an agreement stipulates that it can only be terminated by mutual agreement or for a material breach of contract, then likely only in those two circumstances mentioned could the parties actually terminate the agreement. When an agreement contains specific terms which set out when termination may occur, it is more difficult to establish an implied right to terminate on reasonable notice without cause. In the context of an agreement with numerous termination provisions, an additional implied right to terminate would arguably be inconsistent with the intention of the parties.

C. Surrounding Circumstances:

In addition to the nature of the relationship and specific terms in the contract, the surrounding circumstances help determine whether there is an implied right to terminate on reasonable notice. These factors include:

- the level of sophistication of the parties;
- whether the parties were strangers at the time they entered into the agreement;
- whether the parties had done prior business together;
- whether the relationship involved the need for trust, confidence, and satisfaction; and
- the amounts invested by each party pursuant to the agreement.

Maybe Not Forever

What appears to be a long-term, endless relationship may not be forever.

Before moving forward with a dealer agreement, think about the kind of relationship you want to have with your dealers or your automaker. Are you prepared to offer your dealers automatic renewals year after year? Are you prepared to enter into an agreement that allows your automaker to terminate you without any cause on 60 days’ notice? What will happen to the dealer’s investment if the agreement is terminated? No one expects a relationship to end on unhappy terms, but it happens, and it is better to contemplate termination scenarios at the beginning of the relationship, rather than at the end. **AVI**

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