

Looking ahead: Succession planning for your dealership



Andy Seretis and Jason Brisebois
LEGAL ANALYSTS

Dealer principals, much like many successful entrepreneurs, being eternal optimists, often fail to properly plan for the succession of their dealership. Understandably, dealer principals tend to focus on the here and now of their business, rather than planning for their eventual exit from the dealership business. But properly planning for the succession of your dealership is essential in case an unexpected life event occurs, such as illness or death.

There are many reasons why a succession plan may not be put in place. The dealer principal may be too young to fully appreciate the necessity of a succession plan; the potential successors may not be interested in the business or have the skills and knowledge needed to run the dealership successfully; and lastly, dealer principals may want to avoid the legal and accounting costs of creating the plan. Nevertheless, having an exit plan for the dealership that has manufacturer approval is crucial to ensure that the family's investment will remain secure. This exit plan could take many different forms, including transferring the dealership to a family member, or the eventual sale of the dealership to an outside party such as a manager of the business or neighbouring dealer.

For many dealer principals, they are building a legacy that they intend to eventually pass on to their children. Children may have been involved in the dealership since their earliest days, and the dealer principal may be grooming them to eventually become its next owner. Without a proper succession plan in place, however, the dealership business and the family's investment are at risk of being lost or revoked by the manufacturer if an unforeseen event occurs. This is because most dealer agreements give the manufacturer the right to terminate the agreement within 30 days upon the death of the specific dealer principal outlined in the agreement. As a result, having a succession plan in place is critical to ensuring that the family's investment is not lost for less than its fair market value. Moreover, a succession plan to the next generation could also avoid family disputes when the time for succession occurs.

A proper succession plan needs to list the steps to be taken in effecting the transfer of the dealer's ownership, together with the deadlines to meet them. The plan should determine the ideal scenario for the owner's departure. It should also identify the field of potential successors and decide how the roles are to be shared amongst them. A business valuation should be required to be obtained soon after the triggering event in order to determine the value of the transfer of the dealership.

In terms of implementing the plan, the dealer principal, in conjunction with professional advisors, must have regard to the tax implications and how to reduce them. This may involve preliminary steps, including corporate reorganizations or estate freezes, that need to be carried out once the suc-

cession plan has been finalized.

Finally, whether the succession plan will involve the transfer to heirs or the eventual sale to non-family members, manufacturer approval is a critical and necessary component to any succession plan. The dealer agreement typically sets out how manufacturer approval can be obtained for succession plans and gives manufacturers vast power in deciding who may eventually buy or inherit the business. Important factors that manufacturers consider in approving successors are their: (i) personal, business, and financial qualifications; (ii) experience in the automotive industry; and (iii) experience running all aspects of a dealership.

Although the successor may already work at the dealership, or have experience in the automotive industry, there is no guarantee that they will be approved by the manufacturer. In creating a succession plan, the dealer principal needs to identify potential successors who meet the basic personal, business, and financial qualifications of the manufacturer. The dealer principal will then need to prepare and send a proposal to the manufacturer, asking them to consent to the individuals described. The manufacturer will want to ensure that the proposed change of control will see the dealership continue to enjoy competent management, sufficient unencumbered and adequate operating capital, and the provision

principal's unique characteristics and competencies. Nonetheless, most automotive dealerships are unquestionably franchisees under the laws of all provinces in Canada that have franchise legislation. Regardless of the name given to the dealership agreement, or the framing language used in the agreement, it will be viewed by our courts as a franchise agreement, requiring the manufacturer to exercise its discretionary powers fairly and in accordance with commercially reasonable standards when judging potential successors.

Engaging with manufacturers early on a proposed succession plan is a crucial step in preparing for any untimely events or future unpredictability. Even after the succession plan is approved, it should be reviewed periodically to ensure that the proposed candidate continues to meet the manufacturer's criteria as well as current dealer's estate planning objectives.

Prudent dealer principals should consider and put in place a personalized succession strategy that is tailored to meet their specific needs and circumstances. Dealer principals should retain experienced legal and accounting professionals to assist them in finalizing and implementing a succession plan that attains the dealer principal's goals. At the end of the day, a dealer can rest assured that their wishes will be honoured by having a well-thought out succession plan in place. **CAW**



of ongoing satisfactory sales and service. Lastly, the manufacturer will want to know that the terms of a proposed agreement that is acceptable to the manufacturer have been agreed upon between the current dealer and the proposed owner.

Even if the proposed successor appears to make the grade on paper, the manufacturer can still exercise substantial discretion in determining whether a candidate is acceptable. This is because manufacturers will often include language in the dealership agreement 'deeming' the agreement to be a 'personal service contract' entered into by the manufacturer with the dealer principal as a result of the dealer prin-

Andy Seretis, Sotos LLP

Andy Seretis is an associate with Sotos LLP in Toronto, Canada's largest franchise law firm. Andy practices commercial litigation with a focus on franchising and automotive disputes. Andy can be reached directly at 416.572.7312 or aseretis@sotosllp.com.

Jason Brisebois, Sotos LLP

Jason Brisebois is an associate with Sotos LLP. He practices business law with a focus on franchising, distribution, and licensing. Jason can be reached directly at 416.572.7323 or jbrisebois@sotosllp.com.