

April 29, 2021

Subject: DSSA Considerations Regarding COVID-19

Good morning,

Given the recent rise in COVID-19 cases that we have been experiencing in Canada over the last month we thought it might be helpful to reissue the following memo prepared last year for your assistance.

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Recently CADA received questions regarding Dealer Sales and Service Agreements with respect to suspending Dealership Operations. We have prepared the following memo on the subject which you can read below and which we hope is helpful.

The impact of Covid-19 has been a rapidly evolving matter. Canadian businesses and industries are having to react quickly to dramatic changes to their markets and work environments. The duration of these changes is uncertain. There is a potential that dealerships may have to shut down some or all of their operations for an extended period of time due to government directives, health and safety factors and/or economic considerations as a result of the pandemic.

In the event that an extended suspension of operations is required, dealers should be aware of the following considerations:

1. Most dealer agreements give manufacturers the right to terminate the agreement in the event a dealer fails to operate as a going concern for a consecutive period of time (typically between 7 to 10 days);
2. Some dealer agreements provide an exception to the manufacturer's right to terminate where the suspension of operations is the result of factors beyond the dealer's control. However, many dealer agreements do not have such an express exception;
3. Dealers, or dealer councils, should seek written confirmation from their manufacturer that any contractual right of termination the manufacturer may have will not be relied upon in the event a dealer needs to suspend its operations due to health and safety concerns or government directives related to the Covid-19 pandemic or business concerns;

4. If a manufacturer does not act reasonably and fails to provide dealers with a written assurance that they will not be terminated because of having to suspend operations then the dealer should clearly document and notify the manufacturer that the suspension is the result of factors beyond the dealer's control related to the Covid-19 pandemic. If a dispute arises then the dealer may seek to stay and oppose a termination under the National Automobile Dealer Arbitration Program;
5. For dealers with agreements that are silent as to whether the manufacturer can terminate when there has been a continuous suspension of operations due to circumstances beyond a dealer's control, the National Automobile Dealer Arbitration Program Rules ("NADAP Rules") may offer recourse in the event a manufacturer tries to terminate the dealership agreement as a result of the Covid-19 pandemic. NADAP Rule 5(g) provides that the NADAP Rules and dispute resolution process apply to disputes involving "the termination by the MANUFACTURER of that DEALER'S DEALER AGREEMENT based on the failure of the DEALER to resume operations at the DEALERSHIP within a reasonable time following its closure for at least 7 days when the closure was for reasons beyond the control of the DEALER."
6. For dealers who have not signed on to the NADAP Rules, it may be possible to challenge a termination in the courts. Dealer may be able to argue that a manufacturer that terminates a dealer because of a suspension of operations caused by the Covid-19 pandemic has breached its duties of good faith and fair dealing, among other arguments. Presently, many courts across Canada are limiting their operations to hearing only urgent matters so consulting with your own legal advisor will be essential.

This memo is not intended as legal advice and should not be construed as such. Each individual dealer's circumstance is unique and a dealer should consult with his own legal advisors with regard to its circumstances and the contents of this memo.

Best regards

CADA