



A Primer in Agricultural Dealer and Consumer Protection Law

Agriculture and Farm Law Seminar

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INTRODUCTION

- Worked with Ag Dealer and Consumer protection laws in Western Canada (Alberta, Saskatchewan and Manitoba) from a dealer and manufacturer perspective.
 - Governs dealer \leftrightarrow manufacturer relationship
 - Protects consumer \leftrightarrow dealer relationship
- Goals
 - Primer in Ag Dealer and Consumer Protection Laws: Be aware they exist!
 - Summary of Key Provisions/Protections
 - Practical Considerations and Pitfalls
 - Consumer Protections



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Brief Legislative Overview – Specific Legislation

- Western Canada is largely similar... except for Saskatchewan. Although we will focus on Saskatchewan, important to be aware of other jurisdictions.
- All legislation has similar concepts and goals, mainly to protect unequal bargaining power in these unique relationships:
 - Protect dealers from Big Bad Manufacturers;
 - Protect customers from Big Bad Dealers;
 - Requires dealer and manufacturer licensing with Provincial Regulatory Agencies;
 - Prescribed sales forms form for dealer to consumer sales; and
 - Sets out consumer claim process and claim fund.
- Saskatchewan
 - *The Agricultural Equipment Dealerships Act*, SS 1999, C A-9.1 (“AEDA”)
 - *The Agricultural Implements Act*, RSS 1978, C A-10 (“AIA”)
 - *The Agricultural Implements Regulations, 2019*, C A-10 Reg 2 (the “Regulations”)

Brief Legislative Overview – Specific Legislation

- It is important to be aware of Dealer and Consumer Protection Legislation in other Provinces as well.
- Alberta Legislation
 - *Farm Implement and Dealership Act*, RSA 2000, C F-7
 - *Farm Implement Regulation*, Reg 204/1983
- Manitoba Legislation
 - *The Farm Machinery and Equipment Act*, CCSM C F40
 - *The Farm Machinery and Equipment Regulations*, Reg. 110/99
- Ontario Legislation
 - *Farm Implements Act*, RSO 1990, c. F.4
 - *Regulation 369 General RRO 1990*
 - *Dealership Agreements Regulations 123/06*

Legislative Overview – Scope of Legislation

- Who does it apply to?
 - Physical presence vs online presence:
 - In Saskatchewan, applies to dealers that sell, offer for sale, lease, or offer for lease, or enter any lease purchase contracts in Saskatchewan. Saskatchewan application form requires a physical location for dealers. Manufacturers need a Saskatchewan physical presence distributor.
 - In contrast, Alberta confirmed that only physical presence dealers require licence. Consumers purchase from unlicensed dealers at their own risk.
 - In Alberta and Manitoba, this legislation applies to all dealers, manufacturers and distributors of farm equipment and implements.
 - “Equipment or implemented intended for use in farming operations”
 - Saskatchewan treats types of manufacturers differently, however, has the same definition of a farm “implement”.

Legislative Overview – Scope of Legislation

- Unlike other Provinces, Saskatchewan has separate legislation which carves out a large number of dealership agreement provisions. Alberta, Manitoba and Ontario do not have such a carve out.
- AEDA vs AIA:
 - AEDA regulates dealer and manufacturer relationship as “carve out” legislation. Not the same in other jurisdictions.
 - AIA regulates dealer and consumer relationship with some obligations on all implement manufacturers.
- Mainline manufacturers vs. Shortline manufacturers
 - “mainline manufacturer” means a manufacturer or distributor of both new tractors with engine capacity of 100 horsepower or more and new combines
 - “shortline manufacturer” means a manufacturer that manufactures or distributes one type of mainline equipment but not both
- In Saskatchewan, the AEDA provides contractual restrictions on dealership agreements that are applicable only to mainline manufacturers. In other jurisdictions, no such distinction exists. There was a clear policy decision made in Saskatchewan to allow such an exception.



Legislative Overview – Licensing and Standard Forms

- Each Province (except for Manitoba) requires manufacturers and dealers to carry an annual licence.
- Licensing process is managed by government regulatory bodies, typically an “office” or a “board” created via farm implement legislation:
 - Farmers Advocate Office (Alberta);
 - Agricultural Implements Board (Saskatchewan); and
 - Manitoba Agricultural Boards: All licensing in Manitoba was repealed in early 2021. Consumer protection legislation appears to be replacing their legislation
- In Saskatchewan, the licence application is relatively straight forward and inexpensive (\$100.00). It does require the following information:
 - A physical location but the AIA is unclear whether dealer must have Saskatchewan physical location, although a manufacturer/distributor must have a physical location in Saskatchewan; and
 - List of manufacturers/distributors for whole goods and parts (for dealer).

Legislative Overview – Licensing and Standard Forms

- In addition to licensing, the AIA also requires dealers to use prescribed standard forms for the sale of new and used implements to consumers.
- These standard forms are relatively simple and, in my opinion, may not address complexities of purchasing a high value asset. In addition, the AIA is not clear as to the extent modifications, if any, are allowed to the standard form, but these forms:
 - have basic provisions that allow additional attachments for security agreements, cash purchases, or a promissory note;
 - allow for additional warranty, provided it minimally meets the statutory warranties;
 - contain the AIA statutory warranties as a schedule; and
 - are unclear the extent amendments to the form are allowed and enforced by the Agricultural Implements Board, but you may be able to slip provisions into security agreement.
- Dealer branding of form is allowed.

Legislative Overview – Compensation Funds

- Legislation creates a Compensation Funds for consumer claims. It appears this is another avenue of collection for consumers.
- In Saskatchewan, it is available for individuals that have “incurred a lose due to an unreasonable delay in the availability of a repair” or a “breach of warranty” may make a claim.
- In Saskatchewan, the maximum claim amount is \$50,000.00.
- In addition, the Legislation also contains statutory warranties a dealer must comply with. A “breach of warranty” includes a breach of the statutory warranties.
- If a claim is started, notice must be given to the Agricultural Implements Board, dealers, distributor and manufacturer.
- Appears to be an oral hearing, however, the AIA is thin on procedures of such compensation claim.

General Framework: Dealer ↔ Manufacturer

- The AEDA provides general dealer protections from manufacturers. These protections are needed for the following reasons:
 - Product and jurisdiction exclusivity;
 - Assumed unequal bargaining power;
 - High value inventory and cost of doing business; and
 - Unequal treatment among manufacturer's dealers.
- Legislation interferes with contractual dealings by prohibiting certain actions by a manufacturer.
- Legislation also bridges the gap between consumers and dealers, specifically regarding manufacturer warranty ensuring manufacturers are responsible for their products warranty.
- Protections are largely dealer favoured and impose obligations/ restrictions on manufacturer powers.
- Remember the Saskatchewan Exception. In other jurisdictions, these protections typically extend to all manufacturers.

How are Dealers Protected?

- Manufacturer Termination Without Cause is Prohibited:
 - Manufacturer cannot directly or indirectly terminate without cause.
 - The term “terminate” includes fail to renew or extend the dealership agreement or substantially change the competitive circumstances of the dealership agreement.
 - If a manufacturer terminates for “cause”, they must obtain a court order to terminate.
- What constitutes “cause” under the AEDA?
 - Bankruptcy, dissolution or liquidation;
 - Default under a security agreement;
 - Dealer failed to operate in normal course of business for 14 consecutive days;
 - Dealer has plead guilty or convicted of an offence affecting the contractual relationship; or
 - **Dealer has failed to substantially comply with the essential and reasonable requirements under the dealership agreement.**
- What does not constitute “cause”?
 - Change of management or ownership of dealership;
 - Refusal of dealer to purchase or accept delivery of equipment or services unless necessary for the agricultural implement; or
 - The mainline manufacturer’s desire for further market penetration (while recognizing right to require a reasonable sales performance level).



How are Dealers Protected?

- The AEDA prohibits the unequal treatment of a manufacturer's dealers:
 - A manufacturer cannot impose substantially different terms on other similarly situated dealers. This requires consistent review and amendment of dealership agreements.
 - In addition, a manufacturer cannot discriminate in prices charged for dealer projects. Likely extends to dealer promotions, etc.
- Legislation expressly prohibits certain contractual provisions:
 - Termination without cause (as discussed).
 - Any provision requiring a dealer to carry on exclusive dealings of a mainline manufacturer as to prevent a dealer from carrying on business with a shortline manufacturer. Note this does not prohibit exclusivity of mainline.
 - Any provision that limits, modifies or abrogates any benefit or remedy pursuant to the AEDA or AIA.
- So my manufacturer breached the AEDA/AIA, there are certain remedies for dealers as set out in the AEDA and AIA:
 - Order awarding damages to dealer for any loss resulting from manufacturer's contravention of this Act;
 - Order enjoining mainline manufacturer from doing or continuing any act that contravenes this Act; or
 - An order directing manufacturer to **reinstate** a dealership agreement or restore any rights.



How are Dealers Protected?

- The AIA also places certain obligation on the “supplier” (manufacturer or distributor). A major requirement is the obligation to repurchase inventory upon dealership termination.
- If a dealership agreement terminates, the “supplier” is required to repurchase the dealer’s inventory in accordance with the AIA which sets out prices and types of repurchased inventory.
- Repurchase will be made at the supplier’s invoice price, which includes commissioning costs and transport costs. Some unused but old inventory may also be required to be repurchased at discounted prices.
- Within 90 days from termination, supplier must give dealer written notice of its intention to purchase inventory in accordance with AIA.
- Applies to:
 - unused implements (any equipment or implement or machine intended for use on a farm);
 - parts, signs, computer hardware and computer software required to be used or purchased by the supplier; and
 - any special tools and services manuals obtained from or required by the supplier.



How are Dealers Protected?

- Key Points for Manufacturer Clients:
 - Be careful signing dealers! Once a dealer relationship is created, it is difficult to properly terminate.
 - Written dealership agreements are very important to establish “cause”.
 - Ensure equal opportunity for all manufacturer’s dealers, including pricing, standards and access to promotions. Be aware of legacy problems in old dealership agreements or outdated pricing.
 - Spend time crafting specific and detailed dealer financial performance measures, business goals, and other key performance indicators in the dealership agreement.
- Key Points for Dealer Clients:
 - Be aware of your rights and push back on “standard form” dealer agreements.
 - Watch out for exclusivity, aggressive inspection/audit rights, or financial/performance requirements.
 - Remember the Saskatchewan Exception! The AEDA applies to mainline manufacturers and not shortline.

General Framework: Consumer ↔ Dealer

- From a high level, the AIA governs the dealer to consumer relationship in the following areas:
 - Form of sales contracts for new and used equipment;
 - Statutory warranties on sale of equipment;
 - Repair and return obligations; and
 - Require dealer to maintain a certain amount of inventory.
- The AIA and the Regulations require dealers to use a prescribed form of sales contract.
 - The prescribed form is available in the Regulations and is very skinny. For example, it does not include general contract provisions.
 - There are separate standard contracts for new and used equipment. Used equipment does not have the same statutory warranties.
 - Not entirely clear if dealer can add additional provisions that do not conflict or modify the AIA.
- Record Keeping
 - Every dealer shall keep one copy of every sales contract for an implement for at least 2 years.

Consumer ↔ Dealer: Consumer Protections

- The AIA sets out consumer protection statutory warranties that apply to all new implement purchasers.
- These warranties are joint and several warranties of dealer and supplier. This ties manufacturer warranties to dealer warranties.
- The minimum statutory warranty period is the longer of one year from the date of “first use” or any other period provided by the AIA or set out in the sales contract. First use is “the date an implement is first used is deemed to be the date of first use in the season of use.”
- For a new implement purchase, the sales contract includes a warranty that the purchased equipment, if properly used and operated, will perform well the work for which it is intended.
- In addition, a purchaser may return equipment if, in the first 10 days of use or first 50 hours of use, the purchased equipment does not perform well for the work for which it was intended.



Consumer ↔ Dealer: Consumer Protections

- In addition, each sales contract includes the following additional statutory warranties:
 - Any new implement will be durable if used under fit and suitable conditions and kept with proper care.
 - Defective parts will be replaced free of charge on return of defective parts to dealer's place of business.
 - If there are defective parts and the purchaser takes the implement to the dealer's business, parts installation will be free of charge.
 - All parts replaced within warranty period are durable for the duration of the warranty period or for 90 days from the date of installation, whichever is longer.
- The AIA also contains 10 year warranty commencing from the date of sale that all necessary parts for the purchased implement will kept by a distributor in Saskatchewan. A purchaser shall also be able to obtain all necessary parts within a reasonable time at a distributor's place of business.

Consumer ↔ Dealer: Consumer Protections

- The AIA also requires dealers to maintain an inventory, easy access, and the ability to repair or provide replacement of implements in “emergencies”.
- If equipment breaks down during “season of use” within 10 years of date of sale, this is considered an emergency. If an emergency exists, the dealer shall provide emergency par/repair services for the implement.
- If parts are needed for an emergency, they must arrive within 72 hours after such parts order is made.
- If repair services will not be conducted within the AIA time requirements, or parts not made available, a dealer can supply a replacement implement that is suitable and capable of performing properly. In such a situation, a dealer may charge a rental fee equal to one half of the normal rental rate.
- Dealer and distributor are jointly responsible for emergency services.

Consumer ↔ Dealer: Consumer Protections

- Key Points for dealer clients:
 - Sales contracts must be in the prescribed form but general branding and attachment of security agreements are acceptable.
 - Dealer specific warranties should be carefully reviewed. Be aware of “first use” warranty period in AIA.
 - Dealer should be advised to maintain a sufficient inventory of parts and inventory and be prepared to respond to emergency repairs during “season of use”.
 - Be generally aware of statutory warranties when dealing with complaining customers for risk mitigation.
- Key Points for Consumers
 - Remember the Compensation Fund as alternative avenue to remedy for breach of warranties.
 - If in an emergency situation arises, recognize right for quick repairs or rental of implement at half charge.
 - Be aware of minimum warranty periods and note the date of first use.



Dealer Agreements: Pitfalls and Traps

- As mentioned, the AIA and AEDA restrict/exclude certain common contractual provisions in a dealership agreement. These restrictions attempt to address the historical unequal bargaining power between manufacturers and dealers.
- Prior to a dealer agreement, manufacturer clients should carefully review and consider a dealer's current business, surrounding market, and long term plans due to the AEDA's termination restrictions.
 - Since termination may be difficult, due diligence, especially financial and business performance, is very important.
 - Manufacturers should also consider a dealer's reputation to protect its own reputation from harm.
 - In addition, manufacturers should consider whether other more competitive dealers should be signed up.
- From a business perspective, manufacturers should ensure there are proper controls to ensure dealers are not signed up "willy nilly" without due consideration.

Dealer Agreements: Pitfalls and Traps

- As mentioned previously, the AEDA places several restrictions on the content of dealer agreements. Below are some of the more important ones.
- *Termination for convenience clauses*: These are not enforceable on manufacturers without mutual termination. Thus, they should not be included in dealer agreements.
- *Termination for cause*: This is possible, however, a manufacturer should be prepared to prove cause to a court. If a dealership agreement contains clear financial covenants and performance measures, a manufacturer can use these to terminate an underperforming dealer.
- *Repurchase obligations*: From a dealer's perspective, remember that the manufacturer has a repurchase obligation upon termination. Effect of termination clauses should be drafted acknowledging such right.

Dealer Agreements: Pitfalls and Traps

- *Consistent treatment:* Dealers must be treated consistently, thus, a standard form dealership agreement is advisable.
 - Contractual legacy issues could cause unequal treatment.
 - Manufacturers should limit negotiations and unequal treatment in price, discounts or performance measures.
 - Any bonuses, price reductions, or promotions should be extended to all dealers in a particular area and based on objective measures.
- *Exclusivity:* Manufacturer clients cannot require dealers to exclusively deal their products in a manner that excludes shortline manufacturers. In addition, manufacturer's should be careful offering jurisdiction exclusivity due to the difficulty to terminate a dealership agreement.
- *Use of Logos and Trademarks:* Manufacturer's should ensure there are appropriate trademark and logo protection provisions in the dealership agreement. Without such provisions, unauthorized or improper use of such logos or trademarks may not be sufficient cause for termination.

Dealer Agreements: Termination

- Since termination for “cause” may be difficult, termination by mutual agreement is typically preferable. Manufacturer clients should consider potential legal cost, time and risk associated with unilateral termination vs. mutual termination.
- If mutual termination is possible, manufacturers should consider settling the following points:
 - Repurchase of inventory;
 - Transition period for dealers to shut down operations;
 - Use and return of dealer logos, trademarks and confidential information; and
 - Settlement funds top motivate an amicable termination and appropriate releases.
- Although we discussed the termination for cause issues, what common situations likely do not constitute cause?
 - Poor performing dealer, however, there is no written performance standard or financial covenants in a written dealer agreement.
 - A better dealer exists in a poor performing dealer’s area.
 - A dealer was haphazardly signed up by an employee without a formal agreement.
 - Change in control of a dealer.

Pitfalls and Traps for Dealers

- As the AIA and AEDA typically protect dealers, their focus should be on the form, content, and requirements of a dealership agreement. Although these protections exist, there is still some inequality of bargaining power.
- Specifically, dealers should carefully review any performance requirements, financial covenants, repurchase obligations and termination provisions in a proposed dealership agreement. In addition, dealers should consider requesting exclusivity in certain jurisdictions or locations.
- For the dealer – consumer relationship, common pitfalls and traps include the following:
 - Commonly, a dealer’s warranty period is not calculated in the same manner as the statutory warranty period. Dealers should be aware of the “first use” requirement to commence the statutory warranty period.
 - Be careful advising or drafting standard form purchase contracts for dealers. As the AIA requires a dealer to use the prescribed forms, any modifications are restricted/ potentially in contravention of the AIA.
 - Ensure a dealer and manufacturer cooperate to ensure sufficient inventory of repair parts and consider provisions dealing with emergency repairs/replacements.

Conclusion

- Remember that the AEDA and AIA exist! If a client falls under their scope, their business may be affected. In addition, be aware that these exist in addition to consumer protection laws.
- Manufacturers or distributors and dealers are required to be licensed in Saskatchewan.
- The AEDA which restricts the contents of a dealership agreement applies to mainline manufacturers. Other jurisdictions do not have a similar carve out.
- Get those dealership agreement in writing with clear financial/performance measures!
- In certain jurisdictions, such legislation appears to be fading out in light of better consumer protection legislation.



Questions?



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