

Winter 2015

## In this Issue...

Things to Know About Standard Form Contracts	1
This Issue's Tip: What is the biggest lie in the world?	3
About this Newsletter	4
About the Author	4

# Things to Know About Standard Form Contracts

Nobody wants to reinvent the wheel—especially members of the Motor Dealer Association of Alberta. Standard form contracts (“SFC”) are common in most businesses, including yours. When I refer to SFCs, I mean your standard lease agreement, or your standard service form. A customer walks into your showroom, or into your service bay, wanting to exchange money for either a new vehicle, or to have work done on an existing vehicle. Your employees are not starting from scratch on a blank pad to lease a truck. Your employees aren’t calling a lawyer to draft a contract for Ms. Jones or Mr. Smith to have new tires installed and the vehicle detailed. High volume businesses, like yours, need pre-printed form contracts that facilitate sales.

This shouldn’t surprise you, but there is power in getting to be the one who creates this agreement. When it comes the SFCs where *you* are selling a vehicle or selling the act of servicing a vehicle, you (or ideally your lawyer—don’t try this at home, kids!) drafted it. There is always a strong correlation between the party that drafted the SFC

and the party that benefits from the SFC. Of course, not all of the SFCs that your business has entered into were drafted by you (or again, ideally, your lawyer). I’m sure that you only sell or lease trucks using your own SFCs. But I’m also sure that you don’t get to use your own SFC when you hire a service provider, whether it’s a uniform provider, a plumber or a commercial lender.

Let’s back up for a moment. As you may remember from previous newsletters, a contract requires three things: an offer, acceptance and consideration. Let’s take the most basic contract there is—buying a cup of coffee. The signage over the counter tells you what coffee costs. That’s an offer. When you order the coffee, you are accepting the offer. Consideration means something of value changes hands, in this case money for that cup of coffee. Easy enough, isn’t it?

Of course, a lot of transactions are more complicated. In those cases, the parties' intentions need<sup>1</sup> to be fleshed out and committed to paper. When that happens, there are two basic approaches: starting from scratch or starting with a precedent from a similar transaction.

You don't want to hire a lawyer (or try yourself) to start from scratch. Re-inventing the wheel is more expensive than copying an existing wheel. Worse, when it comes to contracts, starting from scratch is almost always a recipe for disaster. We have about 1,000 years of Anglo-Canadian court decisions, which are great learning tools—especially if you aren't the person who lost. As a result of this history contracts have continually evolved to address new issues. Aside from the cost issues, starting from scratch assumes significant risk that someone can think of everything that should be included. Even in a case where the nature of the contract is completely novel—something that happens in the energy industry more than in the automotive industry—there is still a benefit to including all of the boilerplate terms and conditions that have evolved over time.

What sort of things are included in an SFC? A lot of important issues that don't necessarily come to mind. If your customer buys a vehicle and drives it to his place in Mexico, you probably don't want to be subject to a lawsuit there. SFCs will confirm the jurisdiction where disputes are heard. General SFCs also include limitations of liability, indemnities in the event of lawsuits by third parties, confirmation that the written document is the

entire agreement (and only subject to amendment in writing) and an entitlement to recover legal fees in the event of a dispute.

Another key point in your SFCs is what happens in the event the customer breaches it? It is much better for you to rely on a prescribed contractual formula (that the customer already agreed to!) for calculating damages when a lease is breached. The alternative is trying to come up with one after the fact, and have the customer be able to offer alternative methods for calculating your damages. You should have a SFC for any part of your business that generates a high volume of similar transactions.

Finally, what are some things to consider when you are faced with someone else's SFC? As noted above, hopefully you can limit the number of plumbers or electricians that you have to hire. But you probably do need certain service providers on a regular basis, whether it's a uniform company or a cleaning company. While we always recommend seeking legal advice before entering into a contract, here are two important things to consider: how can the contract end and who is responsible for what when it does? Many SFCs contain automatic renewals unless the customer cancels it, and even then, notice may be required. It's also important to make sure that there aren't gaps between what your insurance coverage protects you from and what a SFC excludes from that service provider's potential liability. As an example, if a delivery truck backs into your showroom window, is damage to a potential customer's vehicle covered?

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<sup>1</sup> Aside from selling land, a contract doesn't *have* to be in writing. But it should be. Verbal contracts are legal, but as noted in past newsletters, our legal system isn't equipped to deal with what happened; it's equipped to deal with what someone *can prove* happened. You don't want to try and prove that a verbal contract was formed, trust me.

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## This Issue's Tip: What is the biggest lie in the world?

There are a lot of answers to that question that can't be printed here. But one that can be is "I have read and understand all of the terms and conditions. . ." If the contract you are entering into is for an XL double-double, you can relax. When you are agreeing on a SFC, take a moment to think about how important this bargain is and what your key objectives are. Make sure that the SFC didn't anticipate what you need, and contain provisions that do the opposite.

### Questions?

Send your questions or topic suggestions for upcoming newsletters to:

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## About this Newsletter

The McMillan Automotive Law e-newsletter is a quarterly publication designed to keep new vehicle Owners, Presidents, Vice-Presidents, Dealer Principals, General Managers and Sales Managers in the know about legislative changes that may affect your business, as well as updates and developments relevant to your industry, and general legal tips associated with running a busy automobile dealership, such as:

- Litigation matters – what to do when legal issues arise or when faced with a lawsuit.
- Legislation or regulatory changes – to avoid legal pitfalls and minimize your risk.
- Other issues affecting your dealership.

I hope you find this e-newsletter useful. To sign up or if you have any feedback, topic suggestions or questions you'd like to submit in a future issue, please feel free to send me an email at: [andrew.stead@mcmillan.ca](mailto:andrew.stead@mcmillan.ca). As well, feel free to forward this to your friends or colleagues that you think this may interest!

Thanks for reading!

Andrew Stead

## About the Author



**Andrew Stead** is a lawyer at McMillan LLP practicing in commercial dispute resolution and regulatory law. He is a member of McMillan's automotive group and has acted for a number of car dealerships and manufacturers, including contractual disputes, product liability claims and employment matters. McMillan is a national business law firm with considerable experience providing the automotive industry with advice on topics from competition, cross-border trade to financial products, and also dispute resolution.

### a cautionary note:

This newsletter provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.