

16-Oct-20

REGISTRY

No. S-209076
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BANK OF NOVA SCOTIA

PETITIONER

AND:

KAMLOOPS CHRYSLER DODGE JEEP RAM LTD.

RESPONDENT

**IN THE MATTER OF THE RECEIVERSHIP OF
KAMLOOPS CHRYSLER DODGE JEEP RAM LTD.**

NOTICE OF APPLICATION

Name of applicant: McEown & Associates Ltd., in its capacity as the court appointed Receiver of Kamloops Chrysler Dodge Jeep RAM Limited (the "Company")

**c/o: 1200 – 1075 West Georgia Street
Vancouver, BC V6E 3C9**

Email: jwest@watsongoepel.com

Tel: 604-642-5684

To: The Service List, attached as Schedule "A"

TAKE NOTICE that an application will be made by telephone by the applicant, McEown & Associates Ltd. (the "Receiver") in its capacity as the court appointed Receiver of the Company to the presiding Judge at the courthouse 800 Smithe Street, Vancouver, British Columbia, on the 23rd day of October, 2020, at 9:45 a.m. or as soon thereafter as counsel may be heard, for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order, substantially in the form attached hereto as **Schedule "B"** (the "Interim Distribution Order"):
 - a. abridging the time for service of this Notice of Application, such that the application is properly returnable on 23rd day of October, 2020 and

dispensing with service upon any interested party other than those parties on the service list maintained by the Receiver;

- b. authorizing and directing the Receiver to make interim distributions from the Company assets to:
 - i. the Bank of Nova Scotia (“BNS”) pursuant to its registered security instruments the particulars of which are addressed herein; and
 - ii. Roynat Inc. (“Roynat”) pursuant to its registered security instruments the particulars of which are addressed herein.
- c. authorizing and directing the Receiver to continue to hold the sum of no less than \$1,000,000 from the Company’s assets;

- 2. Such further and other orders as the court deems just.

Part 2: FACTUAL BASIS

- 3. By Order made September 8, 2020 McEown & Associates Ltd. (the “Receiver”) was appointed receiver, without security, of all of the assets, undertakings and property of the Company (the “September 8, 2020 Order”).
- 4. At all material times the Company operated a motor vehicle dealer dealership in Kamloops British Columbia (the “Dealership”).
- 5. Prior to the September 8, 2020 Order the Receiver was appointed (on March 9, 2020) proposal trustee of the Company (in accordance with s. 50.4 of the *Bankruptcy and Insolvency Act* (the “BIA”)) in proceedings commenced in the Supreme Court of British Columbia In Bankruptcy, Vernon Registry, Court No. 56401 (the “Proposal Proceedings”).
- 6. During the course of the Proposal Proceedings:

- a. various extensions of the time for filing a proposal and the stay of proceedings were granted to the Company; and
 - b. the Company, with the oversight of the Proposal Trustee and its senior secured creditors, took steps to secure an offer to purchase substantially all of its assets.
7. On September 3, 2020 Madam Justice Devlin made an order in the Proposal Proceedings approving the sale of the Dealership by the Company (the “Sale Transaction”) and ancillary orders (the “Approval and Vesting Order”).
8. The Sale Transaction contemplated by the Approval and Vesting Order was scheduled to complete on September 8, 2020, the day before the Company was required to file a proposal pursuant to the provisions of the BIA and the stay of proceedings was scheduled to expire. The Company was not in a position to file a proposal on September 9, 2020 as a result of which, it was ultimately deemed to have made an assignment into bankruptcy on September 10, 2020. As a result of the deemed assignment, in addition to its appointment as Receiver, McEown & Associates Ltd. is also the trustee in bankruptcy of the Company.
9. The Sale Transaction was unable to complete on September 8, 2020 as a result of an outstanding payment due in respect of one of the Company’s licenses which was to be conveyed pursuant to the Approval and Vesting Order.
10. In the face of the impending bankruptcy, and in order to allow the Sale Transaction (contemplated by the Approval and Vesting Order) to complete, the BNS commenced these proceedings.
11. In addition to appointing the Receiver, the September 8, 2020 Order (at paragraph 2) expressly recognized and adopted as an Order in these proceedings, the Approval and Vesting Order thereby authorizing the Receiver to complete the Sale Transaction.

12. On September 9, 2020 the Sale Transaction completed and the Receiver issued, and filed in these proceedings, a Receiver's Certificate certifying:
 - a. that the purchaser had paid, and the Receiver had received, the purchase price;
 - b. the conditions to be complied with at or prior to closing (as provided for in the Sale Transaction) had been satisfied or waived; and
 - c. the purchase and sale of the Dealership had been completed pursuant to the terms of the Sale Transaction.

13. On September 9, 2020 the Receiver received the sum of \$7,175,498.50 representing the sale proceeds from the Sale Transaction (the "Sale Proceeds"). In accordance with paragraph 6(a) of the Approval and Vesting Order (adopted and recognized in the September 8, 2020 Order) the Receiver effected payment of the sum of \$157,500 to the Tim Lamb Group representing the Company's brokerage fee obligations.

14. After receiving the Sale Proceeds the Receiver attended to payment of certain statutory employee obligations with the agreement and consent of secured creditors.

15. In addition to the Sale Proceeds the Receiver is taking steps to recover the following assets of the Company:
 - a. accounts receivable which were due and owing to the Company and at which did not form part of the purchased assets in the Sales Transaction;
 - b. funds held by the Company as at the date of the September 8, 2020 Order; and
 - c. other assets of the Company.

16. Based on the conservatory steps taken by, and investigations of, the Receiver it appears that the assets of the Company, including the Sale Proceeds, are as follows:

Cash in Company's Bank Account		\$ 282,000
Cash in Receiver's Trust Account		6,926,149
Trustee's Retainer Funds		24,827
Receivables		
Customer Receivables	\$200,661	
FCA Receivable	80,000	
Wage Subsidy Claim	<u>90,000</u>	
		370,661
Other Asset		
ICBC Insurance Refund	unknown	
ICBC Claim - Stolen Vehicle	\$ <u>50,000</u>	
		<u>50,000</u>
Total Assets		<u>\$ 7,653,637</u>

Proposed interim distribution

17. The Receiver presently holds the sum of \$6,871,918.70 in trust accordance with the terms of the September 8, 2020 Order.
18. As at the date of the September 8, 2020 Order and completion of the Sale Transaction various security interests were registered pursuant to the *Personal Property Security Act* [RSBC 1996] Chapter 359 ("PPSA"). The security registrations can generally be divided into two separate categories being:
- a. general security agreements registered in the following priority:
 - i. Base Registration No. 96776K registered August 17, 2018 in favour of the BNS;
 - ii. Base Registration No. 994381K registered August 30, 2018 in favour of Roynat; and

23. In order to complete the Sales Transaction various adjustments were made to account for motor vehicles which were sold and documents entitled New and Used Inventory Lists (the "Inventory Lists") were prepared for those purposes and approved on completion. The Receiver has reviewed the Inventory Lists and determined that none of the vehicles which have serial number registrations in favour of Alberta Auto House Ltd. or Fraser City Motors Ltd. were sold in that transaction. Therefore, the Sale Proceeds do not include funds realized on the sale of vehicles over which Alberta Auto House Ltd. or Fraser City Motors Ltd. had serial number registrations.
24. Based on that review the Receiver is of the view that the third party serial number security in favour of Alberta Auto House Ltd. or Fraser City Motors Ltd. does not attach to the Sale Proceeds.
25. The Receiver and its counsel have received and reviewed copies of the security documents supporting the BNS and Roynat Security Registrations as a result of which the Receiver is of the view:
- a. that BNS has a first priority security interest in the Company assets including the Sale Proceeds; and
 - b. Roynat has a second priority security interest in the Company assets including the Sale Proceeds.
26. The Receiver has yet to receive or review the underlying security documents for the Base Registration No. 997933K registered in favour of Brian Johnson and James McManes Holdings Ltd. on August 31, 2018. Based on the PPSA registration and subject to the receipt and review of the underlying security documents, the Receiver is of the view that Brian Johnson and James McManes Holdings Ltd likely have a third priority security interest in the Company assets including the Sale Proceeds.

27. In addition, the Receiver has yet to receive or review the underlying security documents for the serial number registrations in favour of Alberta Auto House Ltd. and Fraser City Motors Ltd. In those circumstances the Receiver is not presently in a position to determine whether those companies have enforceable security or in the event that do, what assets (if any) that security attaches to.

Proposed distributions

28. The secured loan facilities in favour of the BNS and Roynat are continuing to accrue interest and other costs and, based on the Receiver's investigations, have first and second priority security over the Company's assets and the Sale Proceeds.
29. The Receiver is seeking directions to make interim distributions to the BNS and Roynat from the assets of the Company. It is anticipated that the proposed interim distributions will:
- a. retire the entirety of the monies due and owing to the BNS, the secured creditor with first priority over the assets of the Company; and
 - b. retire a significant portion of the monies due and owing to Roynat, the secured creditor with second priority over the assets of the Company.
30. In order to ensure that there are sufficient funds available in the estate pending resolution of various outstanding issues including the claims of the CRA, the Ministry of Finance, British Columbia, the serial number security holders and any other potential secured creditor, the Receiver proposes distributing all of the funds presently held by it save for the sum of \$1,000,000 (the "Holdback").
31. If the proposed interim distributions are approved the Receiver intends to:

- a. continue in its efforts to recover secure the assets of the Company:
and
- b. take steps to resolve outstanding claims against the Company; and
- c. seek directions from the Court with respect to the distribution of
the balance of the Company's assets.

Part 3: LEGAL BASIS

32. The Receiver relies on the:
 - a. Supreme Court Civil Rules:
 - b. *Bankruptcy and Insolvency Act*; and
 - c. Order made September 8, 2020.

33. The September 8, 2020 Order authorizes the Receiver to:
 - a. collect and hold monies realized in the receivership (paragraph 13); and
 - b. to apply to the court for advice and directions (paragraph 36).

34. The Approval and Vesting which was expressly recognized and adopted in these proceedings (at paragraph 2 of the September 8, 2020 Order) specifically provides:
 - a. that the Sale Proceeds would be held by the Receiver; and
 - b. the Sale Proceeds would stand in the place and stead of the assets disposed of in the Sale Transaction as security for any and all security interests, hypothesis, mortgages, trusts or deemed trusts, liens, executions, levies, charges, or other financial or monetary claims (the "Claims")

Schedule "B" to the September 8, 2020 Order

35. Based on the Receiver's review of the Claims presently known to it and the security registrations particularized herein, the Receiver is of the view that BNS and Roynat are the first and second secured creditors of the Company.
36. The Receiver has sufficient funds to pay the Company's secured indebtedness to the BNS and a significant portion of the Company's secured indebtedness to Roynat.
37. By retaining the sum of \$1 million the Receiver is of the view that there are more than sufficient funds to secure any potential claims which might subsequently be determined to have priority over the Claims of BNS or Roynat.

Tax liabilities

Payroll source deductions

38. Section 67(2) of the BIA renders all deemed trusts created by federal or provincial legislation for Crown claims invalid except those that would be valid in the absence of such legislation and except those set out in s. 67(3).
39. Pursuant to s.67(3) of the BIA, certain deemed trusts are deemed valid notwithstanding the provisions of s.67(2), including deemed trusts under s. 227(4.1) of the *Income Tax Act*. Section 227(4) of the *Income Tax Act*, provides that every person who deducts any amount under the Act is deemed to hold the amounts so deducted or withheld in trust for Her Majesty and the deemed trust is given priority over any security interests.
40. Accordingly the estimated \$135,000.00 in payroll source deductions due and owing by the Company may be impressed with a deemed trust in favour of the Crown which will have priority over secured creditors.

GST

41. Section 222(1) of the *Excise Tax Act* (ETA) creates a deemed trust in favour of the Crown for GST that is collected but not yet remitted.
42. Section 222(1.1) provides that subsection 222(1) does not apply at or after the time a person becomes a bankrupt within the meaning of the BIA for any amounts that were collected or became collectible before that time and s.86(1) of the BIA confirms that the Crown is only an ordinary creditor in a bankruptcy.
43. As a result it is likely that the deemed trusts in favour of the Crown for GST are not effective in bankruptcy and the Crown ranks in priority behind secured creditor in respect of the unremitted amounts giving rise to the deemed trusts.

Canada v. Callidus Capital Corporation, 2015 FC 977 (aff'd 2018 SCC 47) para 20.

PST

44. Section 184 of the *Provincial Sales Tax Act* (British Columbia) also creates a deemed trust for PST collected but not yet remitted to the government.
45. However s.67(2) and 67(3) of the BIA provides that any deemed trust over PST collected but not yet remitted is extinguished upon the bankruptcy of the Company.

“ notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.”

46. As a result it is likely that the deemed trusts in favour of the Minister of Finance for PST are not effective in bankruptcy and the Province ranks in priority behind secured creditor in respect of the unremitted amounts giving rise to the deemed trusts

Part 4: MATERIAL TO BE RELIED ON

47. Affidavit #1 of Blair McRadu sworn September 8, 2020;
48. Order Made after Application, September 8, 2020;
49. Affidavit #1 of Chelsey Cochrane sworn October 16, 2020;
50. Receiver's First Report dated; and
51. Such further and other materials as counsel may advise.

The Applicant estimates that the Application will take 30m.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application:

- (a) file an application response in Form 33;
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: October 16, 2020

Signature of Jeremy D. West
Counsel for McEown & Associates Ltd., in
its capacity as the court appointed Receiver
of the Company and not in its personal or
corporate capacity

To be completed by the court only:	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this notice of application
<input type="checkbox"/>	with the following variations and additional terms:

Date: _____	_____
	Signature of [] Judge [] Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial

- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

SCHEDULE "A"**SERVICE LIST**

<p>Whitelaw Twining Law Corporation 2400 - 200 Granville Street Vancouver, BC V6C 1S4</p> <p>John Fiddick Email: JFiddick@wt.ca Tel.: 604-891-7259</p> <p>Joseph Romanoski Email: JRomanoski@wt.ca Tel.: 604-891-7220</p>	<p>Counsel for the Respondent, Kamloops Chrysler Dodge Jeep Ram Ltd.</p>
<p>McMillan LLP 1500 - 1055 W. Georgia Street Vancouver, BC V6E 4N7</p> <p>Vicki Tickle Email: Vicki.tickle@mcmillan.ca Tel.: 236-826-3022</p>	<p>Counsel for the Petitioner, The Bank of Nova Scotia</p>
<p>McEown & Associates Ltd. 1140 - 800 West Pender Street Vancouver, BC V6C 2V6</p> <p>John McEown Email: jmceown@boalewood.ca Tel.: 604-558-8012</p>	<p>NOI Trustee / Proposed Receiver</p>
<p>Watson Goepel LLP 1200 - 1075 West Georgia Street Vancouver, BC V6E 3C9</p> <p>Jeremy West Email: jwest@watsongoepel.com Tel.: 604-642-5684</p>	<p>Counsel for the Receiver</p>
<p>Bryan & Co. LLP 2900, 10180 - 101 Street Edmonton, Alberta, T5J 3V5</p> <p>Attention: Erin D. Oor Telecopier No. 780-428-6324 Email: edoor@bryanco.com</p>	<p>Counsel for the Purchaser, 1261441 B.C. Ltd.</p>

<p>Brian Johnston and James McManes Holdings Ltd.</p> <p>c/o:</p> <p>Brian Johnston: bj@johnstonautomotivegroup.ca Jim McManes: jmcmannes@eastsidechrysler.ca</p>	<p>Secured Creditors</p>
<p>CRA- Tax- Pacific</p> <p>Surrey National Verification and Collection Centre 9755 King George Blvd Surrey BC V3T 5E1</p> <p>Fax No. (866) 219-0311 Email: cra-arc_tax-fisc_ins_t-f_g@cra-arc.gc.ca</p>	<p>Canada Revenue Agency</p>
<p>Ministry of Finance - PST - British Columbia Station Provincial Government PO Box 9445 Victoria BC V8W 9V5</p> <p>Email: rmbtaxpayerinquiries@gov.bc.ca</p>	<p>British Columbia Ministry of Finance</p>
<p>Office of the Superintendent of Bankruptcy Service</p> <p>Email: ic.osbservice-bsfservice.ic@canada.ca</p>	<p>Office of Superintendent of Bankruptcy</p>
<p>Fraser City Motors, DBA Langley Chrysler 19418 Langley By-Pass Surrey, BC V3S 7R2</p>	
<p>Alberta Auto House Ltd. 70 25015 TWP 544A Sturgeon County, AB T8T 0B9</p>	

Schedule "B"

No. S-209076
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BANK OF NOVA SCOTIA

PETITIONER

AND:

KAMLOOPS CHRYSLER DODGE JEEP RAM LTD.

RESPONDENT

**IN THE MATTER OF THE RECEIVERSHIP OF
KAMLOOPS CHRYSLER DODGE JEEP RAM LTD.**

ORDER MADE AFTER APPLICATION

BEFORE) THE 23rd DAY OF OCTOBER, 2020
)
)

ON THE APPLICATION of McEown & Associates Ltd., in its capacity as the court appointed Receiver of Kamloops Chrysler Dodge Jeep RAM Limited (the "Company") coming on for hearing at Vancouver, British Columbia on the 23rd day of October 2020 by videoconference and on hearing Jeremy D. West, counsel for the Receiver, and those other counsel listed on Schedule "A" hereto, AND UPON READING the material filed herein for the purposes of this application, AND pursuant to the to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and Section 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, as amended (the "LEA"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS that:

1. Terms and expressions not defined in this Order shall have the meanings attributed to them in the Order of this Court pronounced on September 8, 2020.
2. The time for service of the Notice of Application dated October 16, 2020 is abridged such that the application is properly returnable on Friday, October 23, 2020.

3. Service upon any interested party other than those parties on the service list maintained by the Receiver in this matter is hereby dispensed with.

4. Authorizing and directing the Receiver to make interim distributions from the Company assets to:
 - a. the Bank of Nova Scotia (“BNS”) pursuant to its registered security instruments the particulars of which are addressed herein; and
 - b. Roynat Inc. (“Roynat”) pursuant to its registered security instruments the particulars of which are addressed herein.

5. Authorizing and directing the Receiver to continue to hold the sum of no less than \$1,000,000 from the Company’s assets;

6. Approval of counsel as to form listed in **Schedule “A”** hereto, except counsel for the Petitioner, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Jeremy West
Solicitor for the McEown & Associates Ltd.,
in its capacity as the court appointed Receiver of
Kamloops Chrysler Dodge Jeep RAM Limited

By the Court.

Registrar

Schedule "A" - List of Counsel Appearing

Jeremy D. West	Counsel for the Receiver, McEown and Associates Ltd.
Vickie Tickle	Counsel for the Bank of Nova Scotia and Roynat Inc.