

06-Jul-21

REGISTRY

Force Filed

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 located at 800 Smithe Street, Vancouver, British Columbia, on the 13th day of July, 2021, 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 "Third Interim Distribution Order"), including orders:
 - a. abridging the time for service of this Notice of Application, such that the application is properly returnable on Tuesday the 13th day of July 2021

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

- b. authorizing and directing the Receiver to make a distribution of \$500,000 from the Company assets to Brian Johnson and James McManes Holdings Ltd. (together referred to as “BJJM Holdings”) to partially pay out the Company’s secured obligations.

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 had been appointed (on March 9, 2020) proposal trustee of the Company (in accordance with 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. On September 3, 2020 Madam Justice Devlin made an order in the Proposal Proceedings approving the sale of the Dealership (the “Sale Transaction”) and ancillary orders (the “Approval and Vesting Order”).
7. The Sale Transaction was scheduled to complete on September 8, 2020 but did not complete on that date and the Company was deemed to have made an assignment into bankruptcy on September 10, 2020. In addition to its appointment as Receiver, McEown & Associates Ltd. is the trustee in bankruptcy of the Company.

8. The September 8, 2020 Order appointing the Receiver expressly recognized and adopted as an Order in these proceedings, the Approval and Vesting Order thereby authorizing the Receiver to complete the Sale Transaction.
9. On September 9, 2020 the Sale Transaction completed and the Receiver received the sum of \$7,175,498.50 representing the sale proceeds from the Sale Transaction (the "Sale Proceeds").

Secured Claims

10. As at the date of the September 8, 2020 Order and completion of the Sale Transaction various security interests were registered against the assets of the Company pursuant to the *Personal Property Security Act* RSBC 1996, Chapter 359 ("PPSA"). The security registrations were generally 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 Bank of Nova Scotia ("BNS");
 - ii. Base Registration No. 994381K registered August 30, 2018 in favour of Roynat Inc. ("Roynat"); and
 - iii. Base Registration No. 997933K registered August 31, 2018 in favour of BJJM Holdings;
 - b. serial number registrations for specific motor vehicles in favour of:
 - i. BNS;
 - ii. Roynat;
 - iii. the Company;
 - iv. Alberta Auto House Ltd.; and
 - v. Fraser City Motors Ltd.

(together referred to as the "Security Registrations")

11. Particulars of the Security Registrations are appended to the Receiver's First Report dated October 19, 2020 (the "First Report").
12. At completion of the Sales Transaction vehicle inventory lists were prepared (the "Inventory Lists"). The Receiver reviewed the Inventory Lists and determined that none of the vehicles which had serial number registrations in favour of Alberta Auto House Ltd. or Fraser City Motors Ltd. were sold in the Sales Transaction or were retained by the Company. Based on that review the Receiver was of the view that the third party serial number security in favour of Alberta Auto House Ltd. and Fraser City Motors Ltd. did not attach to any of the funds realized by the Receiver in these proceedings.
13. The Receiver and its counsel have also received and reviewed copies of the security documents supporting the general security agreement Security Registrations as a result of which the Receiver is of the view:
 - a. that BNS had a first priority security interest in the Company assets;
 - b. Roynat had a second priority security interest in the Company assets; and
 - c. BJJM Holdings have a third priority security interest in the Company assets.
14. By Orders made October 23, 2020 and December 10, 2020 the Receiver was authorized and directed to distribute funds realized from the Company assets to the BNS and Roynat as a result of which, the Company's indebtedness to those secured creditors is now extinguished.

Brian Johnson and James McManes Holdings Ltd.

15. On or about September 30, 2020 BJJM Holdings filed a Proof of Claim (together with supporting documentation) for \$969,752.98 in the Bankruptcy proceedings.

16. The Receiver is of the view that the BJJM Holdings debt has priority over unsecured claims as a result of the general security agreement registered in its favour.
17. As of June 30, 2021 the amount due and owing to BJJM Holdings is \$1,015,137.55 with *per diem* interest occurring at a rate of \$158.50 per day.

Other Claims

18. Based on the Receiver's investigations, in addition to the secured indebtedness as at September 8, 2020 Order the Company was also indebted to the Canada Revenue Agency ("CRA") and the Ministry of Finance, British Columbia for the following dates:
 - a. CRA-payroll source deductions.
 - b. CRA – GST; and
 - c. Ministry of Finance – PST/EHT.
19. As previously reported the Province is not claiming a right of priority for its PST or EHT claims.
20. The Canada Revenue Agency ("CRA") has recently completed an audit of the Company's payroll source deduction excise tax obligations (the "Audit"). As a result of the Audit CRA has advised that it will be filing an amended Proof of Claim which the Receiver understands will include both secured claims (advanced pursuant to a statutory deemed trust) and unsecured claims the particulars of which are expected to be as follows:

Account	Amount	Remarks
<u><i>Unsecured Claim</i></u>		
GST RT0001	136,048.72	Principal + penalties & interest
Corp. Tax RC0001	56,067.67	Principal + penalties & interest
Payroll RP0001	8,437.79	Penalties & Interest (non- deemed trust)
Payroll RP0002	52,613.27	Principal Tax Owing
Payroll RP0002	18,701.00	Penalties & Interest (non- deemed trust)
Total Unsecured Claim	271,868.45	
<u><i>Property Claim</i></u>		
Payroll RP0002	188,085.82	Deemed Trust (Property Claim)
Total CRA Claim	459,954.27	

21. As a result of the Bankruptcy the Receiver is of the view that the CRA claim for GST does not have priority over the secured creditor claims and that the priorities set out above are likely to be correct.

Activities of the Receiver since the Second Report

22. Since the Second Report the Receiver has undertaken a variety of activities including:

- a. pursuing collection of the Company's outstanding receivables which has resulted in further collections totaling approximate \$54,000;
 - b. arranging final payout of Bank of Nova Scotia and Roynat secured debt;
 - c. arranging for the preparation, and delivery, of employee T-4's and T-4 Summaries;
 - d. communicating with CRA and providing information requested by CRA in connection with the payroll and excise tax audits;
 - e. preparing and filing of Receiver reports with the Office of the Superintendent of Bankruptcy; and
 - f. preparing of the 3rd Receiver's Report to Court.
23. The Receiver has prepared and produced (**Appendix "B"** to its Third Report dated July 6, 2021) a Statement of Receipts and Disbursements as at June 30, 2021.

Proposed distribution to BJJM Holdings

24. On August 31, 2018 BJJM Holdings registered a Financing Statement in the British Columbia Personal Property Registry (the "BJJM Holdings Registration"). At the request of the Receiver BJJM Holdings provided documents, including the following, supporting the BJJM Holdings Registration:
- a. promissory note dated August 31, 2018 with a principal amount of \$2,000,000.00 issued by Lemieux Auto Inc. in favour of BJJM Holdings;
 - b. guarantee dated August 31, 2018 of the Note; and
 - c. general security agreement dated August 31, 2018 between BJJM Holdings (as secured party) and the Company (as debtor) (the "BJJM Holdings GSA").

25. The promissory note, guarantee and BJJM Holdings GSA arose as a result of a vendor take back loan at the time that the Dealership was acquired.
26. Based on the Receiver's (and its counsel) review of the BJJM Holdings security documents the Receiver is of the view that:
- i. BJJM Holdings has a perfected security interest over the Company assets including the net sale proceeds; and
 - ii. as a result of the payments made to the BNS and Roynat the BJJM Holdings GSA has priority over the balance of the claims against the Company other than the CRA's deemed trust claim for payroll source deductions and the administration costs of the receivership.
27. In addition to the Company, the obligations to BJJM Holdings were also guaranteed by Guy Lemieux (the former director of the Company) and Suckdev Manhas. As a result of the failure of the Company, Mr. Lemieux has made a personal assignment in bankruptcy and BJJM Holdings is in the process of pursuing recovery from Mr. Manhas.
28. The debt to BJJM Holdings is continuing to accrue interest and other costs.
29. As of June 30, 2021 the Receiver held the sum of \$927,126.14 in trust accordance with the terms of the September 8, 2020 Order. In the event that the orders sought are granted the Receiver will continue to hold approximately \$427,000 which the Receiver is of the view is more than sufficient to cover the CRA's deemed trust claim presently estimated to be \$188,085.82 (which appears to be the only claim with priority over BJJM Holdings) and the administration costs to the end of the receivership.

Part 3: LEGAL BASIS

30. The Receiver relies on the:
- a. Supreme Court Civil Rules;
 - b. *Bankruptcy and Insolvency Act*; and
 - c. Order made September 8, 2020.
31. 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).
32. The Approval and Vesting Order 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

33. 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 BJJM Holdings are secured creditors of the Company and have priority over all other claims other than the CRA’s deemed trust claim.
34. Based on the Receiver’s present calculations, after making the proposed distribution to BJJM Holdings it will continue to hold approximately \$427,000 which the Receiver is of the view should be more than sufficient to pay the:

- a. administration costs of the receivership; and
- b. CRA's deemed trust claim.

Tax liabilities

Payroll source deductions

35. Section 67(3) of the BIA provides that certain deemed trusts are deemed valid notwithstanding bankruptcy including deemed trusts under s. 227(4.1) of the *Income Tax Act*. Section 227(4) of the *Income Tax Act* creates a deemed trust in favour of the Crown over any amounts deducted under the Act and the deemed trust is given priority over any security interests.
36. Accordingly, the estimated \$188,085.82 in payroll source deductions due and owing by the Company will likely be impressed with a deemed trust in favour of the Crown which will have priority over secured creditors including BJJM Holdings.

GST

37. 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.
38. Section 222(1.1) provides that the deemed trust 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.
39. As a result, it is likely that the deemed trusts in favour of the Crown for GST are not effective as a result of the Company's bankruptcy and the Crown is an

unsecured creditor in respect of the unremitted GST liability.

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

Part 4: MATERIAL TO BE RELIED ON

- 40. Order Made after Application, September 8, 2020;
- 41. Order Made after Application, October 23, 2020;
- 42. Order Made after Application, December 10, 2021;
- 43. Receiver's First Report dated October 19, 2020;
- 44. Receiver's Second Report dated November 30, 2020;
- 45. Receiver's Third Report dated July 6, 2021; and
- 46. Such further and other materials as counsel may advise.

The Applicant estimates that the Application will take 20m.

- 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: July 6, 2021

 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 <input type="checkbox"/> Judge <input type="checkbox"/> Master	

[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>Trustee / 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>Nixon Wenger LLP 301-2706 30th Avenue Vernon, BC V1T 2B6</p> <p>Andrew A. Powell Andrew.powell@nixonwenger.com Tel: 250-542-5353</p>	<p>Brian Johnston and James McManes Holdings Ltd.</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 13th DAY OF JULY, 2021
)
)

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 13th day of July 2021 by teleconference 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. The time for service of the Notice of Application dated July 6, 2021 is abridged such that the application is properly returnable on Tuesday July 13, 2021.
2. Service upon any interested party other than those parties on the service list maintained by the Receiver in this matter is hereby dispensed with.

3. That the Receiver is authorized and directed to distribute the sum of \$500,000 from the Company assets to Brian Johnson and James McManes Holdings Ltd.
4. Approval of counsel as to form listed in **Schedule "A"** hereto, except counsel for the Receiver, 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.