



No. S1813807
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PART XIII OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-6,
AS AMENDED

AND

IN THE MATTER OF THE MASAHIKO NISHIYAMA
BANKRUPT UNDER THE LAWS OF JAPAN

NOTICE OF APPLICATION

Name of applicant: Alvarez & Marsal Canada Inc., in its capacity as the Court appointed receiver over all of the assets, undertakings and property owned or beneficially owned by Masahiko Nishiyama in Canada (the "**Receiver**"), and Hiroshi Morimoto, trustee over the bankruptcy estate of Masahiko Nishiyama (the "**Trustee**")

To: Masahiko Nishiyama ("**Nishiyama**")
To: Hatsumi Kinoshita ("**Kinoshita**")
To: The Resolution and Collection Corporation ("**RCC**")
To: The Province of British Columbia (the "**Province**")

(collectively, the "**Application Respondents**")

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, BC, V6Z 2E1 on April 6, 2022 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An order granting an extension to the appeal periods under the *Speculation and Vacancy Tax Act*, S.B.C. 2018 c. 46 (the "**Speculation Tax Act**") to the date of this Application;
2. an order that the real property located in Vancouver, British Columbia, bearing parcel identifier: 028-447-263 (the "**Condo**") is exempt from the tax assessed pursuant to the *Speculation Tax Act*, under section 22(2) for the years 2018 and 2019;

3. an Order approving and authorizing the Receiver to make an interim distribution to the Trustee of the holdback of the proceeds of the sale of the Condo held by the Receiver in favour of the Province of British Columbia (the "**Holdback**");
4. costs; and
5. such further and other relief as this Honourable Court may order.

Part 2: FACTUAL BASIS

Background

1. The Holdback that is subject of this application relates to a speculation and vacancy tax pursuant to the Speculation Tax Act, that the Province applied to the Condo between 2018 - 2020 (the "**Speculation Tax**").
2. The beneficial owner of the Condo for the tax years of 2018, 2019, and part of 2020, was Nishiyama.
3. Nishiyama is a bankrupt and citizen of Japan who carried on business both in his own name and through a number of corporations.
4. Nishiyama is involved in three proceedings relevant to the relief sought in this application for the distribution of the Holdback: (1) the Japanese Bankruptcy Proceedings; (2) the BC RCC Proceedings; and (3) the Canadian Bankruptcy Proceedings.

The Japanese Bankruptcy Proceedings

5. RCC commenced legal action against Nishiyama and was granted judgment by the Kyoto District Court on February 9, 2012, in the amount of ¥40.7 billion plus interest and costs.
6. In parallel, RCC commenced legal action against Nishiyama for concealing and hiding assets in corporations and with family members and RCC was granted judgment by the Kyoto District Court on October 29, 2013 in the amount of ¥3.96 billion plus interest.
7. Nishiyama continued to fail to repay the debts to RCC, leading to RCC filing a petition for bankruptcy against Nishiyama on February 10, 2016, in the Kyoto District Court; the Kyoto District Court issued a Bankruptcy Commencement Order on March 15, 2016 (the "**Japanese Bankruptcy Proceedings**").
8. Around this time, RCC also commenced an action against Nishiyama in the Supreme Court of British Columbia (the "**BCSC**") on March 11, 2016, action No. 162298, seeking a Mareva injunction against Nishiyama in respect of the property of Nishiyama (the "**BC RCC Proceedings**").

9. On June 17, 2016, the Court in Japan found Nishiyama criminally guilty of acts under the *Penal Code* in Japan, such as obstructing justice for purposely concealing assets and conspiring to remove assets out of Japan. As a result, Nishiyama served approximately two years in prison in Japan and was granted parole on July 26, 2018.
10. Under the Japanese Bankruptcy Proceedings, the Trustee obtained foreign recognition from the courts of Canada, Singapore, Hong Kong and the United States of America to assist in preserving, recovering and administering assets of the bankruptcy estate located in these jurisdictions.
11. To-date, the Japanese Bankruptcy Proceedings are ongoing.

The BC RCC Proceedings

12. In the BC RCC Proceedings, on March 11, 2016, the Honourable Justice Voith granted an injunction against Nishiyama in respect the property of Nishiyama (the “**Mareva Injunction**”).
13. On August 30, 2016, the Mareva Injunction was amended to explicitly include the prohibition of Nishiyama of disposing of, dealing with, or diminishing the value of the Condo.
14. The Condo was originally registered in the name of Sun Moon in 2012. Sun Moon is a company registered under the laws of British Virgin Island and wholly owned by Nishiyama.
15. On September 18, 2018, the BCSC granted RCC an order that stopped any person from dealing with the Condo (the “**Restricted Dealing Injunction**”). The Restricted Dealing Injunction was registered in the New Westminster Land Title Office as a charge on title to the Condo under CA7073370.

The Canadian Bankruptcy Proceedings

16. The Canadian Bankruptcy Proceedings started on December 21, 2018, when the BCSC granted an order pursuant to section 269 and 270 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), recognizing the Japanese Bankruptcy Proceedings as the foreign main proceedings, and Hiroshi Morimoto as the trustee over the bankruptcy estate of Nishiyama in Japan (the “**Canadian Bankruptcy Order**”).
17. On February 14, 2019, Alvarez & Marsal Canada Inc. (the “**Receiver**”) was appointed in the Canadian Bankruptcy Proceedings as receiver over all the assets, undertakings, and property of the bankrupt, Nishiyama, in order to realize on the assets in Canada on behalf of the Trustee.

18. On July 19, 2019, the BCSC ordered that the assets and property of Sun Moon represent property of Nishiyama (the "**Corporate Veil Order**"), including the Condo and a Mercedes S550 vehicle (the "**Mercedes**").
19. On February 12, 2020, the Receiver filed an application, seeking court approval of the sale of the Condo and certain property of Nishiyama. Nishiyama and Kinoshita had notice of this application, were present, and made submissions.
20. On February 24, 2020, the BCSC approved the court-ordered sale (the "**Sale Order**") of:
 - (a) the Condo and certain personal property (the "**Condo Sale**") from the Receiver on behalf of the Trustee to Yongling Duan for \$4,330,000; and
 - (b) the Mercedes from the Receiver on behalf of the Trustee to Maynards Industries Canada Ltd.

The Holdback and Applicable Speculation Tax

21. As part of the Sale Order, at the request of the Attorney General's office, the Receiver was asked to retain the Holdback from the proceeds of the Condo Sale in respect of claims of the Province of British Columbia under the Speculation Tax Act until written agreement or further order of this Court.
22. The Condo Sale closed on March 9, 2020, and funds were held by the Receiver in accordance with the agreement between the Receiver and the Province.
23. The Receiver wrote to the Province on October 20, 2020, February 12, 2021 and April 1, 2021, requesting that the Province agree to the release of the Holdback.
24. The Province has failed or neglected to respond to the letters of the Receiver, thereby necessitating this application.

The History of Nishiyama in Vancouver

25. Nishiyama acquired and lived in the Condo as his residence in Canada from 2012 until his arrest on October 26, 2015.
26. Nishiyama did not appear to have the intention of re-selling the Condo at any point. Further, Nishiyama has deposed that:
 - (a) he would still be living primarily in Vancouver had he not been arrested in Japan in October of 2015; and
 - (b) after he was granted parole in Japan on July 26, 2018, he would have returned to Vancouver, but for being prevented by Japanese courts from travelling or moving back to Vancouver.

27. The Condo was vacant from the time that Nishiyama was arrested on October 26, 2015, in Japan, to the date of the Condo Sale on March 9, 2020.
28. After his parole was granted, Nishiyama applied to the courts in Japan for permission to return to Canada to live in the Condo, but the Japanese Court rejected Nishiyama's application, which rejection was affirmed twice on appeal.
29. Nishiyama made a second application to return to Canada and the Condo, which was again rejected; he again appealed and was again denied.
30. Since Nishiyama's parole was granted, Nishiyama has never applied for permission to leave Japan for any other country except Canada.
31. From 2012 to 2020, Nishiyama obtained status as a Permanent Resident of Canada; his Permanent Resident card was valid until April 2021. Nishiyama also held a valid British Columbia driver's licence which expired in 2018.

Part 3: LEGAL BASIS

1. The Receiver relies upon the following:
 - (a) The Receivership Order;
 - (b) The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;
 - (c) The *Speculation and Vacancy Tax Act*, S.B.C. 2018 c. 46;
 - (d) Rules 8-1 and 13-1 of the Supreme Court Civil Rules;
 - (e) The inherent jurisdiction of this Honourable Court; and
 - (f) Such further or other grounds as counsel may advise and this Honourable Court may deem just.

The Condo is exempt from the Speculation Tax Act

2. The Condo is exempt from the Speculation Tax Act under section 22 for the tax years of 2018 and 2019.
3. Section 22 of the Speculation Tax Act states:

Exemption for bankrupts

- 22 (1) An owner of a residential property is, for a calendar year, exempt from tax in respect of the owner's interest in the residential property if the owner is, at the end of the last day of the calendar year, a

person whose interest in the residential property is held as a trustee in bankruptcy.

- (2) An owner of a residential property is, for a calendar year, exempt from tax in respect of the owner's interest in the residential property if the owner's interest in the residential property is vested in a trustee in bankruptcy

(a) for a period of at least 60 consecutive days in the calendar year,

or

(b) at the end of the last day of that calendar year.

4. All of Nishiyama's property vested in the Trustee in the Japanese Bankruptcy Proceedings in March of 2016. As a result, the Condo is exempt from the Speculation Tax Act under section 22 for the tax years of 2018 - 2020.
5. In the alternative, the Condo is exempt from the Speculation Tax under section 22 for the tax years of 2018 - 2020 by virtue of the Canadian Bankruptcy Order, ordered on December 21, 2018, continuing through to the present day.
6. In the further alternative, the Condo is exempt from the Speculation Tax under section 22 for the tax year of 2019 and 2020 by virtue of the Corporate Veil Order, ordered on July 19, 2019, vesting the Condo in the Receiver.
7. In the further alternative, there is no policy reason the Speculation Tax should apply to the Condo for the tax years of 2018, 2019 or 2020.
8. The purpose of the Speculation Tax is to target foreign and domestic speculators who own residential property in British Columbia, but don't pay taxes here, including those who leave their units sitting vacant and satellite families.

Bacon v British Columbia (Minister of Finance), 2020 BCSC 578 at para 14.

9. The purpose of the Speculation Tax does not capture the facts as they relate to Nishiyama and the Condo. In particular, the following facts, *inter alia*, demonstrate that Nishiyama was in no way speculating on the Condo:
 - (a) from 2012 to 2020, Nishiyama obtained status as a Permanent Resident of Canada; his Permanent Resident card was valid until April 2021;
 - (b) Nishiyama deposed that he was living in the Condo from 2012 until his arrest, and that he would still be living primarily in the Condo had he not been arrested in Japan in October of 2015;
 - (c) once Nishiyama was arrested, he was unable to live in the Condo;

- (d) once Nishiyama was arrested, he was unable to legally deal with the Condo in any way, as a result of
 - (i) his detention in Japanese prison; and
 - (ii) the Condo was subject to the Mareva Injunction; and
 - (e) Nishiyama deposed that after he was granted parole in Japan on July 26, 2018, he would have returned to Vancouver, but for being prevented by Japanese courts from travelling or moving back to Vancouver.
10. As a result of the above, there are no legal or policy reasons that the Speculation Tax should apply to the Condo for the tax years of 2018, 2019 or 2020.

Part 4: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Wen-Shih Yang , made March 22, 2022;
- 2. Affidavit #2 of Wen-Shih Yang, made March 22, 2022; and
- 3. Second Report of the Receiver dated March 18, 2022.

The applicants estimate that the application will take 1 hour.

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

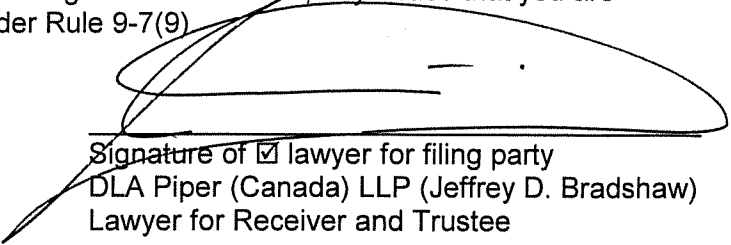
TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (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)

March 22, 2022

Dated


Signature of ☒ lawyer for filing party
DLA Piper (Canada) LLP (Jeffrey D. Bradshaw)
Lawyer for Receiver and Trustee

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1
of this notice of application

☐ 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:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ oral matters concerning document discovery
- ☐ 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
- ☐ none of the above

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DLA Piper (Canada) LLP
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7
Tel. No. 604.687.9444
Fax No. 604.687.1612

File No.: 105288-00001

AGM/day