



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 MASAHIKO NISHIYAMA,
BANKRUPT UNDER THE LAWS OF JAPAN**

SECOND REPORT OF THE RECEIVER

ALVAREZ & MARSAL CANADA INC.

MARCH 18, 2022



ALVAREZ & MARSAL

TABLE OF CONTENTS

1.0	INTRODUCTION	- 1 -
2.0	PURPOSE OF REPORT	- 2 -
3.0	TERMS OF REFERENCE	- 2 -
4.0	BACKGROUND ON THE DEBTOR'S RESIDENCY IN VANCOUVER.....	- 3 -
5.0	CITY OF VANCOUVER – VACANCY TAX	- 3 -
6.0	PROVINCE OF BC – SPECULATION AND VACANCY TAX	- 5 -
7.0	DISMISSAL OF OUTSTANDING APPLICATIONS	- 6 -
8.0	RECEIVER'S ACTIVITIES.....	- 7 -
9.0	RECEIVER'S INTERIM STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS....	- 8 -
10.0	RECEIVER'S CONCLUSION AND RECOMMENDATIONS.....	- 9 -

1.0 INTRODUCTION

- 1.1 On December 21, 2018, the Supreme Court of British Columbia (the “**Court**”), granted an order (the “**Recognition Order**”) pursuant to sections 269 and 270 of the *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*, as amended (the “**BIA**”) recognizing in British Columbia (the “**Canadian Bankruptcy Proceedings**”) the following:
- a) the bankruptcy proceedings of Masahiko Nishiyama (“**Nishiyama**” or the “**Debtor**”) commenced in the Kyoto District Court in Japan on February 10, 2016 (the “**Japanese Bankruptcy Proceedings**”) as the foreign main proceedings (the “**Foreign Proceedings**”); and
 - b) Hiroshi Morimoto, the trustee over the bankruptcy estate of Nishiyama in Japan (the “**Trustee**”), as the foreign representative in respect of the Foreign Proceedings.
- 1.2 On February 14, 2019, upon application of the Trustee, Alvarez & Marsal Canada Inc. was appointed as Receiver (“**A&M**” or the “**Receiver**”) pursuant to an order (the “**Receivership Order**”) granted by the Court in respect of all the assets, undertakings and property legally or beneficially owned by the Debtor in Canada, including all proceeds (the “**Property**”) pursuant to subsection 272(1) of the BIA. These proceedings are hereinafter referred to more generally as the “**Receivership Proceedings**”.
- 1.3 On July 19, 2019, the Court granted an order (the “**Corporate Veil Order**”), which provided that the assets and property of Sun Moon Management Ltd. (“**Sun Moon**”) including a condominium unit located in Vancouver, British Columbia bearing parcel identifier 028-447-263 (the “**Condo**”), and a Mercedes S550 vehicle bearing VIN WDDNG8GB0AA343089 registered to Hatsumi Nakajima (the “**Mercedes**”), represent Property of the Debtor.
- 1.4 On February 24, 2020, the Court granted an order (the “**SAVO**”) which approved the court-ordered sale of the Condo and certain personal property to Yongling Duan (the “**Condo Purchaser**”) for \$4.33 million, which subsequently closed on March 9, 2020 (the “**Condo Sale**”) and the Mercedes to Maynards Industries Canada Ltd. for \$16,000, which subsequently closed on March 5, 2020.
- 1.5 Concurrent with this Receiver’s second report (the “**Second Report**”), the Receiver intends to file applications (the “**April 6 Applications**”) seeking the following orders:
- a) an order (the “**Vacancy Tax Exemption Order**”) granting, among other things, an exemption from the vacancy tax assessed on the Condo for the tax year 2019 pursuant to the

City of Vancouver's (the "**City**") Vacancy Tax By-law 11674 (the "**Vacancy Tax By-law**") under section 3.7;

- b) an order (the "**Speculation Tax Exemption and Interim Distribution Order**") granting, among other things, (i) an exemption from the tax (the "**Speculation Tax**") assessed pursuant to the *Speculation and Vacancy Tax Act*, S.B.C. 2018 c. 46 (the "**Speculation Tax Act**") under section 22(2) for the years 2018 to 2020 on the Condo; and (ii) approving and authorizing the Receiver to make an interim distribution to the Trustee of the holdback of the proceeds from the Condo Sale held by the Receiver in favour of the Province of British Columbia in relation to the Speculation Tax; and
- c) an order (the "**Dismissal Order**") dismissing certain outstanding applications in these Receivership Proceedings.

1.6 Further information regarding the Receivership Proceedings including copies of the court materials are posted on the Receiver's website at www.alvarezandmarsal.com/nishiyama (the "**Receiver's Website**").

1.7 All references to dollars in this Second Report are in Canadian currency, unless otherwise indicated.

2.0 PURPOSE OF REPORT

2.1 The purpose of the Second Report is to provide this Honourable Court with information with respect to the following:

- a) the Receiver's application for the Vacancy Tax Exemption Order;
- b) the Receiver's application for the Speculation Tax Exemption and Interim Distribution Order;
- c) the Receiver's application for the Dismissal Order;
- d) a summary of the activities of the Receiver since the first report of the Receiver dated February 12, 2020 (the "**First Report**"); and
- e) the interim statement of receipts and disbursements for the period from February 14, 2019 to March 8, 2022;

3.0 TERMS OF REFERENCE

3.1 In preparing this report, A&M has necessarily relied upon unaudited financial and other information provided by the Trustee, the Trustee's agents and other third parties. Although this information has been subject to review, A&M has not conducted an audit or otherwise attempted to verify the information's accuracy or completeness. Accordingly, A&M expresses no opinion

and does not provide any other form of assurance on the accuracy and/or completeness of any information contained in this report, or otherwise used to prepare this report.

4.0 BACKGROUND ON THE DEBTOR'S RESIDENCY IN VANCOUVER

- 4.1 The Debtor acquired and lived in the Condo as his residence in Canada from 2012 until his arrest on October 26, 2015. The Debtor has deposed that: (i) he would still be living primarily in Vancouver had he not been arrested in Japan in October of 2015; and (ii) after he was granted parole in Japan on July 26, 2018, he would have returned to Vancouver, but for the Japanese courts preventing him from travelling or moving back to Vancouver.
- 4.2 The Condo remained vacant from the time that Nishiyama was arrested on October 26, 2015 in Japan, to the closing date of the Condo Sale on March 9, 2020.
- 4.3 After his parole was granted, Nishiyama applied twice to the courts in Japan for permission to return to Canada to live in the Condo, but the Japanese court rejected Nishiyama's first application, which rejection was affirmed twice on appeal, as well as Nishiyama's second application, which rejection was again affirmed on appeal.
- 4.4 Nishiyama obtained status as a permanent resident of Canada in 2012 and his permanent resident card was valid until April 2021. Nishiyama also held a valid British Columbia driver's license which expired in 2018.

5.0 CITY OF VANCOUVER – VACANCY TAX

- 5.1 Under the Vacancy Tax By-law, a residential property will be considered unoccupied or vacant and subject to tax if such property is not lived in by anyone for more than six months in a calendar year. The tax rate under the Vacancy Tax By-law is 1% of the taxable assessed value of a parcel of taxable property (the "**Vacancy Tax**").
- 5.2 The City assessed Vacancy Tax against the Condo for the tax year 2019. This became known to the Receiver after the date of the Condo Sale, as the tax was assessed and attributed to the Condo's tax folio at a date that was after the Condo Sale completed.
- 5.3 Pursuant to section 3.7 of the Vacancy Tax By-Law: *"vacancy tax is not payable...if the vacancy reference period [was] solely because of a court order, court proceedings or order of a governmental authority prohibit[ing] its occupancy..."*
- 5.4 The Receiver is of the view that the Vacancy Tax assessed for the 2019 calendar year should be exempt pursuant to section 3.7 of the Vacancy Tax By-Law for the following reasons:

- a) the primary creditor in these proceedings, the Resolution and Collection Corporation, formerly the Housing Loan Administration Corporation, (“**RCC**”) commenced an action against Nishiyama in this Court on March 11, 2016, action No. 162298 seeking a Mareva injunction against Nishiyama in respect of the Debtor’s property, which was granted by the Court (the “**Mareva Injunction**”). On August 30, 2016, the Mareva Injunction was amended to explicitly prohibit Nishiyama from dealing with or diminishing the value of the Condo. The Mareva Injunction remained in effect until the sale of the Condo;
- b) the Court granted RCC an order that stopped any person from dealing with the Condo (the “**Restricted Dealing Injunction**”) which was registered on title to the Condo under CA7073370. The Restricted Dealing Injunction remained in effect until the sale of the Condo;
- c) the Receivership Order and Corporate Veil Order prohibited Nishiyama from dealing with the Condo, including entering into tenancy agreements with prospective tenants; and
- d) the Debtor was prevented from occupying the Condo by orders in the Japanese bankruptcy court as detailed in section 4.3 of this report.

5.5 Accordingly, pursuant to the Mareva Injunction, the Restricted Dealing Injunction, Receivership Order, Corporate Veil Order, and orders of the Japanese bankruptcy court, Nishiyama was prevented from occupying the Condo and entering into tenancy agreements with prospective tenants and as a result, the Condo remained vacant.

5.6 The Condo Purchaser has recently notified the Receiver’s legal counsel that their ability to sell the Condo is being hindered by the Vacancy Tax charge on title. To assist with the matter, on August 16, 2021, the Receiver filed with the City a request for an exemption of the 2019 Vacancy Tax as assessed on the Condo (the “**Request for Review**”); however, the Receiver did not receive a response despite numerous attempts of follow-up, including:

- a) on August 24, 2021, the Receiver followed up via email with the City’s Vacancy Tax department regarding the Request to Review submission to which a representative of the City advised that the Request for Review should be submitted via the City’s online portal, which the Receiver promptly submitted on the same day bearing reference no. RC-2021-00088, as instructed;
- b) on September 7 and 21, 2021, the Receiver contacted the City’s Vacancy Tax department via email for an update on the Request for Review with no response received for either emails;
- c) on November 8, 2021, the Receiver called the City’s general enquiries line and a City representative advised that although there was no direct phone line to the Vacancy Tax

department, the representative will submit an inquiry bearing case no. 154 96 494 to request the Vacancy Tax department to return the Receiver's call, which should occur within 7 business days; however, no call back was received;

- d) on November 30, 2021, the Receiver called the City's general enquiries line twice and both times were advised of lengthy wait times; and
- e) on December 2, 2021, the Receiver called the City's general enquiries line and a City representative submitted an expedited follow-up on behalf of the Receiver to the Vacancy Tax department; however, no response has been received by the Receiver to date.

5.7 Accordingly, the City has failed or neglected to respond to the Receiver's request after multiple attempts to follow up with the relevant department at the City, thereby necessitating this application to resolve the matter.

6.0 PROVINCE OF BC – SPECULATION AND VACANCY TAX

6.1 As part of the SAVO, at the request of the Attorney General's office, the Receiver was asked to retain a holdback of funds from the proceeds of the Condo Sale in respect of claims of the Province of British Columbia (the "**Province**") under the Speculation Tax Act until written agreement or further order of this Court (the "**Holdback**").

6.2 The Condo Sale closed on March 9, 2020, and the Holdback was held by the Receiver in accordance with the agreement between the Receiver and the Province.

6.3 The Speculation Tax Act, pursuant to section 22, provides for an exemption for bankrupts for the calendar year, if (i) at the end of the last day of the calendar year, the interest in the residential property is held by a trustee in bankruptcy; or (ii) the owner's interest in the residential property is vested in a trustee in bankruptcy for a period of at least 60 consecutive days in the calendar year or at the end of the last day of that calendar year.

6.4 The Receiver is of the view that the Condo is exempt from the Speculation Tax Act under section 22 for the tax years of 2018 to 2020 for the following reasons:

- a) all of Nishiyama's property vested in the Trustee in the Japanese bankruptcy proceedings in March of 2016;
- b) by virtue of the Recognition Order, as ordered on December 21, 2018, continuing through to the present day;
- c) by virtue of the Corporate Veil Order ordered on July 19, 2019, vesting the Condo in the Receiver;

- d) there being no policy reason for the Speculation Tax to apply to the Condo for the years 2018 to 2020; and
 - e) the purpose of the Speculation Tax is to target foreign and domestic speculators who own residential property in British Columbia, but do not pay taxes in the province, including those who leave their properties sitting vacant and satellite families. Nishiyama was not speculating on the Condo for the reasons detailed in section 4.0 of this report and the Receiver, on behalf of the Debtor, filed the Debtor's 2020 tax return and remitted the appropriate withholdings (25% of gross proceeds of the Condo Sale or \$1,082,500) to the Receiver General for Canada pursuant to subsection 116(3) of the *Income Tax Act* (the "**ITA**"). A tax refund of \$906,024 was received by the Receiver on March 7, 2022.
- 6.5 Accordingly, there is no legal or policy basis for the Speculation Tax to apply to the Condo and the Condo should be exempt from the Speculation Tax Act under section 22 for the tax years of 2018 to 2020 and the Holdback should be released and distributed to the Trustee.
- 6.6 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. The Province has failed or neglected to respond to the letters of the Receiver, thereby necessitating this application to release the Holdback.

7.0 DISMISSAL OF OUTSTANDING APPLICATIONS

- 7.1 At present, there are two applications filed in these Receivership Proceedings that remain outstanding (collectively, the "**Outstanding Applications**") which include notices of application filed on October 9, 2019 and on November 5, 2019 by Nishiyama and his associate, Hatsumi Kinoshita ("**Kinoshita**") seeking, *inter alia*, a stay of execution of the Canadian Bankruptcy Proceedings and a stay of execution in Resolution and Collection Corporation v. Nishiyama, Vancouver Supreme Court No. S-162298 (the "**BC RCC Proceedings**").
- 7.2 The two Outstanding Applications remain to be set down for hearing, despite being filed with this Court in October and November of 2019. The relief sought in the Outstanding Applications is substantially similar to one another, with some variations, and include:
- a) seeking an order to stay the sale of the Condo and Personal Property in the Canadian Bankruptcy Proceedings;
 - b) setting aside all orders in both the Canadian Bankruptcy Proceedings and the BC RCC Proceedings, effectively attempting to re-litigate the entirety of both proceedings; and

- c) to make orders or directions in the Japanese Bankruptcy Proceedings and the BC RCC Proceedings, of which this Honourable Court does not have the jurisdiction to order.
- 7.3 Both Nishiyama and Kinoshita have failed to set a date with this Honourable Court for the hearing of the Outstanding Applications since they were filed in October and November of 2019.
- 7.4 It is the Receiver's view that the Outstanding Applications should be dismissed for the reasons stated in the April 6 Applications, which are not repeated herein.

8.0 RECEIVER'S ACTIVITIES

- 8.1 The Receiver's activities since the First Report include the following:
 - a) reviewing draft Court application materials in consultation with the Trustee's legal counsel;
 - b) attending to the closing of the sale of the Condo and the Mercedes and related matters;
 - c) conducting and administering a claims process for personal property located at the Condo and Mercedes including holding various discussions with a claimant's legal counsel and facilitating the transfer of certain property to a claimant;
 - d) reviewing invoices and preparing payments as necessary as well as reconciling cash receipts and disbursements of the trust accounts of the Receiver;
 - e) issuing notices to and following-up with third parties who may hold property, documents, records or other information relating to the Property or affairs of the Debtor including financial institutions, service providers and other parties as well as reviewing and sharing information received with the Trustee, Trustee's legal counsel, and/or RCC and its legal counsel;
 - f) vacating a secured off-site storage unit for certain contents of the Condo including retrieving furnishings for the Purchaser's benefit and disposing of remaining items;
 - g) cancelling insurance coverage for the Condo and its contents stored on- and off-site;
 - h) reviewing and considering tax matters pertaining to the sale of the Condo and Mercedes including property taxes, sales taxes, and personal tax implications for the Debtor under municipal, provincial, and federal regulations;
 - i) filing the Debtor's 2020 personal tax return (the "**Tax Return**") and applying for a clearance certificate relating to the disposition of the Condo (the "**Clearance Certificate**") with the assistance of KPMG LLP, as well as remitting the appropriate withholdings to the Receiver General of Canada under the ITA;
 - j) various correspondence and follow-up with Canada Revenue Agency regarding the assessment of the Tax Return and processing of the Clearance Certificate;

- k) various correspondence and follow-up with the City regarding the review of the Vacancy Tax matter as described in section 5.0 of this report;
- l) updating the Receiver's Website with pertinent information relating to the Receivership Proceedings; and
- m) holding discussions and attending meetings with the Trustee and its legal counsel to assist with various matters.

9.0 RECEIVER'S INTERIM STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

9.1 The Receiver's interim statement of cash receipts and disbursements for the period February 14, 2019 to March 8, 2022, is summarized below:

Masahiko Nishiyama - in Receivership	
Receiver's Interim Statement of Cash Receipts and Disbursements	
For the period February 14, 2019 to March 8, 2022	
Receipts	
Cash collected from safety deposit box	\$ 116,145
Cash collected from Koffman Kalef LLP	13,938
Income tax refund	906,024
Proceeds from sale of vehicle	16,000
Reimbursements of Receiver's costs for condo	60,372
Bank interest	1,430
Funds held in trust	119,470
Total receipts	1,233,379
Disbursements	
Strata fees	43,212
Utilities and services	11,228
Insurance	648
Bank fees	203
Other disbursements	20,817
GST paid	1,433
Total disbursements	77,541
Net cash flow	1,155,837
Closing cash balance*	\$ 1,155,837
* Closing cash balance includes approximately USD \$16,800 translated into CAD at the FX rate of 1.2867	

9.2 To date, total receipts collected are \$1.2 million and consist primarily of the following:

- a) cash collected from the Debtor's safety deposit box in the amount of \$116,100;
- b) cash collected from Koffman Kalef LLP, the legal counsel for Sun Moon, of \$13,900;

- c) a refund from the CRA of \$906,000 pertaining to the personal tax return filed on behalf of the Debtor by the Receiver;
- d) proceeds of \$16,000 from the sale of the Mercedes;
- e) funds of \$60,400 from the proceeds of the sale of the Condo to reimburse the Receiver for costs incurred to secure and market the Condo and other personal property of the Debtor; and
- f) funds of \$119,500 held from the proceeds of the Condo Sale in favour of the Province in relation to the Speculation Tax;

9.3 Total disbursements of \$77,500 consist primarily of the following:

- a) strata fees of \$43,200 for arrears and monthly fees until the closing of the Condo;
- b) utilities and services of \$11,200 relating to securing the Condo and costs incurred to prepare the Condo for the sales process including cleaning and marketing of the unit; and
- c) other disbursements of \$20,800 including fees for engaging KPMG to prepare the Tax Return and apply for the Clearance Certificate, as well as obtaining appraisals, insurance and off-site storage for the Condo and other personal property.

9.4 At present, the Receiver has liquidated and/or disposed of all assets in its possession and does not anticipate any further realizations to occur.

10.0 RECEIVER'S CONCLUSION AND RECOMMENDATIONS

10.1 Based on the forgoing, the Receiver respectfully recommends that this Honourable Court grant the Vacancy Tax Exemption Order, the Speculation Tax Exemption and Interim Distribution Order, and the Dismissal Order referenced herein.

All of which is respectfully submitted to this Honourable Court this 18th day of March 2022.

Alvarez & Marsal Canada Inc.,
in its capacity as court-appointed Receiver of
Masahiko Nishiyama and not in its personal capacity



Per: Anthony Tillman
Senior Vice President



Vicki Chan
Vice President