



No. S1813807
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF 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**

NOTICE OF APPLICATION

Names of applicants: 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**")
Hatsumi Kinoshita ("**Kinoshita**")
The Resolution and Collection Corporation ("**RCC**")
(together, the "**Application Respondents**")

The Office of the Superintendent in Bankruptcy (the "**OSB**")

TAKE NOTICE that an application will be made by the applicants to the Honourable Justice Francis at the courthouse at 800 Smithe Street, Vancouver, BC, V6Z 2E1 on August 16, 2022, at 2:00 p.m. for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order, in the form of the draft order attached as **Schedule "A"** to this Notice of Application:
 - (a) that service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been

served with notice of this Application, and time for service of this Application is abridged to that actually given.

- (b) authorizing distribution of the net proceeds of the proceedings to the Trustee for the benefit of the Foreign Main Proceedings in Japan, including but not limited to any amounts held by the Receiver, and any amounts held by the Receiver's counsel in trust;
- (c) approving the Receiver's Activities;
- (d) terminating these receivership and bankruptcy proceedings;
- (e) discharging the Receiver; and
- (f) discharging the Trustee as the Foreign Representative in the bankruptcy proceedings.

Part 2: FACTUAL BASIS

Background

1. Nishiyama is a citizen of Japan that has been adjudged bankrupt in multiple countries, who carried on business both in his own name and through a number of corporations.
2. Nishiyama is a party to three proceedings relevant to this Application: (1) the Japanese Bankruptcy Proceedings; (2) the BC RCC Proceedings; and (3) the Canadian Bankruptcy Proceedings.

The Japanese Bankruptcy Proceedings

3. 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 (approximately CAD \$394 million) plus interest and costs.
4. 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 (approximately CAD \$38.30 million) plus interest.
5. 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**").
6. On March 11, 2016, RCC also commenced an action against Nishiyama in the Supreme Court of British Columbia (the "**BCSC**"), action No. 162298, seeking a Mareva injunction against Nishiyama in respect of the property of Nishiyama (the "**BC RCC Proceedings**").

7. 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.
8. 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.
9. The Japanese Bankruptcy Proceedings are ongoing.

The BC RCC Proceedings

10. 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**").
11. On August 30, 2016, the Mareva Injunction was amended to explicitly include the prohibition of Nishiyama of disposing of or dealing with or diminishing the value of real property located in Vancouver, British Columbia, bearing parcel identifier 028-447-263 (the "**Condo**").
12. 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.
13. 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

14. 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**").
15. 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 legally or beneficially owned by Nishiyama in Canada, including all proceeds, in order to realize on the assets in Canada on behalf of the Trustee.

16. On July 19, 2019, this Court 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**”).
17. On February 12, 2020, the Receiver filed an application seeking court approval of the sale of the Condo and certain personal property of Nishiyama (the “**Personal Property**”). Nishiyama and Kinoshita had notice of, were present at, and made submissions at this application.
18. On February 24, 2020, the BCSC approved the court-ordered sale (the “**Sale Order**”) of the Condo from the Receiver on behalf of the Trustee to Yongling Duan for \$4,330,000 (the “**Condo Sale**”) and the Mercedes from the Receiver on behalf of the Trustee to Maynards Industries Canada Ltd.
19. The Condo Sale closed on March 9, 2020. \$2,704,256.36 of the net proceeds have been remitted to the Trustee to be disbursed the creditors in the bankruptcy. \$1,446,645.96 of the net proceeds have been paid for taxes or are held as a holdback by the Receiver in respect of tax claims.
20. On March 30, 2020, Nishiyama filed a Notice of Appeal in respect of the Sale Order. On July 7, 2020, Nishiyama filed a Notice of Abandonment and abandoned his appeal of the Sale Order.
21. Prior to the Condo Sale, Nishiyama claimed that he assigned beneficial ownership of the Condo to Kinoshita, his romantic partner that lived in Japan, in an undocumented and unregistered transfer, in or around January of 2015 (the “**Alleged Kinoshita Transfer**”). The Trustee and the Receiver have challenged the validity and *bona fides* of the Alleged Kinoshita Transfer.
22. Also prior to the Condo Sale, Nishiyama and Kinoshita filed the Outstanding Applications that allege Kinoshita was the beneficial owner of the Condo.
23. Justice Voith, the justice seized of this matter at that time, was aware of the Alleged Kinoshita Transfer when he ordered the Sale Order.
24. Throughout the Canadian Bankruptcy Proceedings, Nishiyama and Kinoshita have failed to comply with orders made by this Court. Most notably, Nishiyama and Kinoshita have failed to provide full and frank disclosure with this Court, the Trustee, and the Receiver, as required by Order of this Court on January 13, 2020, requiring Nishiyama and Kinoshita to properly disclose all relevant records to the Trustee, as well as to be examined by the Trustee.
25. Nishiyama and Kinoshita had two outstanding applications filed with this Court in October and November of 2019 (the “**Outstanding Applications**”). The relief sought in the Outstanding Applications is substantially similar to one another, with some variations and contradictions.

26. The Outstanding Applications were brought by Nishiyama and Kinoshita essentially to ask this Court to:
- (a) order a stay of execution on the Condo and Personal Property in the Canadian Bankruptcy Proceedings;
 - (b) set 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.
27. 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.
28. On April 22, 2022, this Court dismissed the Outstanding Applications and declared them to be an abuse of process, with special costs awarded to the Receiver.
29. To-date, the Receiver is not aware of any appeals filed by Kinoshita in the Kyoto District Courts.

Summary of the Receiver's Activities

30. Since the Second Report, the activities of the Receiver have included the following:
- (a) reviewing draft Court application materials in consultation with the Trustee's legal counsel;
 - (b) reviewing and reconciling cash receipts and disbursements of the trust accounts of the Receiver;
 - (c) updating the Receiver's Website with pertinent information relating to the Receivership Proceedings;
 - (d) preparing for a final distribution to the Trustee; and
 - (e) preparing information for and corresponding with the Trustee and its legal counsel to assist with various matters in the Receivership Proceedings and the Japanese Bankruptcy Proceedings.

Fees and Disbursements of the Receiver and Receiver's Counsel

31. In accordance with the terms of the Receivership Order, the fees of the Receiver and those of the Receiver's counsel have been approved by the Trustee.

Part 3: LEGAL BASIS

1. The Receivership Order made in these Proceedings;
2. The Receiver relies generally on the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and particularly Part XIII and sections 147, 243, 246, 247 and 249
3. The Receiver has acted with good faith throughout these proceedings and has complied with the statutory requirements of Receivers as set out in the BIA, and the orders issued by this Court from time to time.
4. Accordingly, the Receiver is of the view that it is appropriate for this Honourable Court to issue an order terminating the receivership proceedings upon the issuance of the Receiver's Certificate on notice to the Service List and filed with the Court registry.
5. Section 147 of the BIA requires that a levy be payable to the Receiver General on "all payments...made by the trustee by way of dividend or otherwise on account of the creditor's claims." The Receiver is of the view that the levy is not payable on the distribution to the Trustee in these circumstances. Out of an abundance of caution, the Receiver and the Trustee are seeking a declaration that the levy is not payable on the distribution to the Trustee and, to that end, have served the OSB with this application.
6. It is the Receiver's view that Part XIII of BIA on cross-border insolvencies does not require that the levy be remitted on distributions up to foreign main proceedings as it is not a 'dividend or payment on account of a creditor's claim' that would attract the levy. Charging the levy in this foreign non-main proceeding would erode the value of the estate in the foreign main proceeding and should not be charged. Further, charging and remitting such a levy would be inconsistent with:
 - (a) the purposes of Part XIII as set out in BIA s. 267; and
 - (b) the obligations imposed by BIA s. 275 for Canadian courts and authorities to cooperate to the maximum extent possible with the Trustee as the Foreign Representative
7. The Receiver proposes that this Honourable Court grant an order on notice to the Application Respondents, that:
 - (a) authorizes distribution of the net proceeds of the estate to the Trustee;
 - (b) approves the activities of the Receiver;
 - (c) discharges the Receiver and Trustee; and
 - (d) terminates the within proceedings.

Part 4: MATERIAL TO BE RELIED ON

1. Third Report of the Receiver, dated July 11, 2022; and
2. Any such further materials as this Honourable Court will permit.

The applicants estimate that the application will take 2 hours.

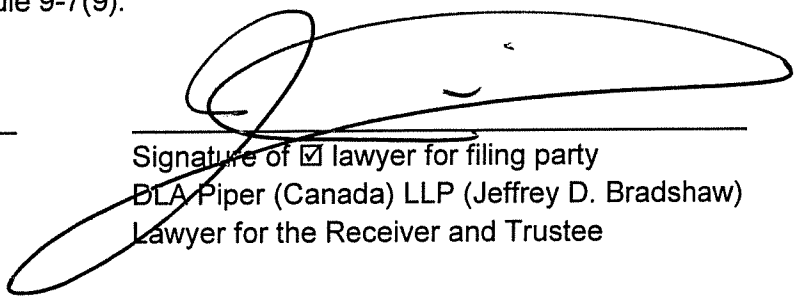
- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master and Justice Francis is seized of this matter.

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).

July 24, 2022
Dated


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

CONTACT DETAILS FOR HEARING BY TELEPHONE

Name of Lawyer attending: Jeffrey Bradshaw

Telephone: 604.643.2941

Email: jeffrey.bradshaw@dlapiper.com

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

SCHEDULE "A"

No. S1813807
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ORDER MADE AFTER APPLICATION

	)		)
	)		)
BEFORE	)	THE HONOURABLE JUSTICE	)
	)	FRANCIS	)
	)		)

August 16, 2022

ON THE APPLICATION of 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**") coming on for hearing at 800 Smithe Street, Vancouver, BC V6Z 2E1 on August 16, 2022, and on hearing Jeffrey D. Bradshaw, lawyer for the Receiver and Trustee and no one else appearing although duly served; AND ON READING the Receiver's Third Report dated July 11, 2022, filed herein;

THIS COURT ORDERS that:

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this Application, and time for service of this Application is abridged to that actually given.

ACTIVITIES OF THE RECEIVER APPROVAL

2. The activities of the Receiver from February 12, 2020, to July 11, 2022, as set out in the Third Report, are hereby approved.

DISTRIBUTION

3. The Receiver is authorized to pay out to the Foreign Representative, Hiroshi Morimoto, the net proceeds from the estate, less amounts to be reserved by the Receiver to fund the costs associated with the Receiver's discharge including final Receiver's fees and legal fees, including but not limited to any amounts held by the Receiver, or those amounts held by counsel to the Receiver and the Trustee in trust, to the benefit of those certain proceedings pursuant the *Bankruptcy Act of Japan*, undertaken in the Kyoto District Court against Masahiko Nishiyama, as recognized by this Court by Order of the Honourable Justice Maisonneville made on December 21, 2018 (the "**Recognition Order**"), as a foreign main proceeding pursuant to sections 269 and 270 the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**").

TERMINATION OF PROCEEDINGS

4. Upon the service by the Receiver of an executed certificate in substantially the form attached hereto as **Schedule "A"** (the "**Receiver's Termination Certificate**") on the Service List, by email, certifying that, to the knowledge of the Receiver, all matters to be attended to in these proceedings have been completed, these proceedings commenced under Part XIII of the *BIA*, shall be terminated without any further act or formality (the "**Termination Time**"), provided that nothing herein impacts the validity of any Orders made in these proceedings or any action or steps taken by any individual, firm, partnership, corporation, governmental body or agency, or any other entity pursuant thereto.
5. The Receiver is hereby directed to file a copy of the Receiver's Termination Certificate with the Court as soon as practicable following service thereof on the Service List.
6. The Receiver is hereby directed to post a copy of the filed Receiver's Termination Certificate on the Receiver's website.

DISCHARGE OF RECEIVER

7. Effective at the Termination Time, Alvarez & Marsal Canada Inc., shall be and is hereby discharged from its duties as the Receiver and shall have no further duties, obligations, liabilities, or responsibilities as Receiver from and after the Termination Time, provided that, notwithstanding its discharge as Receiver, Alvarez & Marsal Canada Inc. shall have the authority to carry out, complete or address any matters in its role as Receiver as are ancillary or incidental to these proceedings following the Termination Time as may be required.

8. Notwithstanding any provision of this Order, the Receiver's discharge or the termination of these proceedings, nothing herein shall affect, vary, derogate from, limit or amend, and the Receiver shall continue to have the benefit of any of the rights, approvals and protections in favour of the Receiver at law or pursuant to the *B/A*, the Receivership Order, any other Order of this Court in these proceedings or otherwise, all of which are expressly continued and confirmed following the Termination Time, including in connection with any actions taken by the Receiver following the Termination Time with respect to Masahiko Nishiyama.
9. No action or other proceeding shall be commenced against the Receiver in any way arising from or related to its capacity or conduct as Receiver except with prior leave of this Court on not less than fifteen (15) days' prior written notice to the Receiver.

DISCHARGE OF FOREIGN REPRESENTATIVE

10. Effective at the Termination Time, Hiroshi Morimoto, shall be and is hereby discharged from his duties as the Foreign Representative in these proceedings and shall have no further duties, obligations, liabilities, or responsibilities as Foreign Representative from and after the Termination Time, provided that, notwithstanding its discharge as Foreign Representative, Hiroshi Morimoto shall have the authority to carry out, complete or address any matters in his role as Foreign Representative as are ancillary or incidental to these proceedings following the Termination Time as may be required.
11. Notwithstanding any provision of this Order, the Receiver's discharge or the termination of these proceedings, nothing herein shall affect, vary, derogate from, limit or amend, and Hiroshi Morimoto shall continue to have the benefit of any of the rights, approvals and protections in favour of a Foreign Representative at law or pursuant to the *B/A*, the Recognition Order, any other Order of this Court in these proceedings or otherwise, all of which are expressly continued and confirmed following the Termination Time, including in connection with any actions taken by Hiroshi Morimoto as Foreign Representative in Canada following the Termination Time with respect to Masahiko Nishiyama.
12. No action or other proceeding shall be commenced against Hiroshi Morimoto in any way arising from or related to its capacity or conduct as Foreign Representative except with prior leave of this Court on not less than fifteen (15) days' prior written notice to Hiroshi Morimoto.

GENERAL

13. Any party affected by this order may apply to the Court as necessary to seek further orders and directions to give effect to this Order.
14. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Receiver

and the Foreign Representative and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative or the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Foreign Representative or the Receiver and their respective agents in carrying out the terms of this Order.

15. Endorsement of this Order by counsel or any unrepresented party appearing on this application, other than counsel to the Receiver, is hereby dispensed with.

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

BY THE COURT

REGISTRAR

SCHEDULE "A"

RECEIVER'S TERMINATION CERTIFICATE

No. S1813807
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RECEIVER'S TERMINATION CERTIFICATE

- A. By Order pronounced on December 21, 2018, (the "**Recognition Order**") by Justice Maisonville of the Supreme Court of British Columbia, Hiroshi Morimoto was recognized as the Foreign Representative under Part XIII of the *Bankruptcy and Insolvency Act* ("**BIA**") for those certain proceedings pursuant the *Bankruptcy Act of Japan*, undertaken in the Kyoto District Court against Masahiko Nishiyama, (the "Foreign Proceedings"), a foreign main proceeding pursuant to sections 269 and 270 of the *BIA*.
- B. By Order pronounced on February 14, 2019, (the "**Receivership Order**") by Justice Voith of the Supreme Court of British Columbia, Alvarez and Marsal Canada Inc. was appointed as the Receiver of the assets, undertakings and property of Masahiko Nishiyama in Canada (and in such capacity, the "**Receiver**").
- C. Pursuant to an order of the Court dated June ____, 2022 (the "**Termination Order**"), the Court authorized these within proceedings be terminated and the Receiver be discharged by delivery of a Receiver's Termination Certificate by way of email on the Service List.
- D. Unless otherwise indicated herein, capitalized terms have the meanings set out in the Termination Order.

THE RECEIVER HEREBY CERTIFIES the following:

1. The within proceedings are terminated.

This Certificate was delivered by the Receiver at [TIME] on _____ 2022.

Alvarez and Marsal Canada Inc., in its
capacity as the Receiver of Masahiko
Nishiyama and not in its personal capacity:

Per: _____

Name

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AND

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ORDER MADE AFTER APPLICATION

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File No.: 105288-00001

JDB/day

No. S1813807
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NOTICE OF APPLICATION

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