

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicant

- and -

**MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION**

Respondents

**FACTUM OF THE RECEIVER
(Omit Tax Claims)**

Returnable June 4, 2024

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PART I - OVERVIEW

1. This Factum is filed by KSV Restructuring Inc., (“**KSV**”) in its capacities as Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Mahal Venture Capital Inc. (“**Mahal VC**”) and Golden Miles Food Corporation (“**Golden Miles**” and, together with Mahal VC, the “**Companies**”), and as licenced insolvency trustee of the Companies (in such capacity, the “**Trustee**”, and KSV collectively in its capacities as Receiver and Trustee, the “**Court Officer**”).

2. This Factum is filed in support of the Court Officer’s motion (the “**Motion**”) seeking an order (i) that the Receiver, KSV in its personal capacity, KSV in its capacity as Trustee, and Mahal VC are not, and shall not be, liable or otherwise obligated to pay 12175622 Canada Ltd. (the “**Purchaser**”) or the City of Brantford (the “**City**”) on account of the Omit Tax Claims (defined below) and (ii) authorizing the Receiver to distribute the Omit Tax Reserve (defined below) to Skymark Finance Corporation, acting by its receiver Alvarez & Marsal Canada Inc. (the “**Skymark Receiver**”), and KLN Holdings Inc. (“**KLN**”).

3. The question for the Court on this motion is who, as among the Court Officer, the Purchaser and the City, is properly liable for approximately \$1.09 million (plus interest) in property taxes that were retroactively assessed by the City against real property after the closing of a sale of that real property by the Receiver to the Purchaser.

4. If the Court Officer and/or the Mahal VC estate is not liable, it follows that the amounts reserved by the Receiver on account of the Omit Tax Claims should be distributed by the Receiver to the Skymark Receiver and KLN.

5. In the Court Officer's view, the Court Officer is not liable for the Omit Tax Claims. This position is informed by:

- (a) the plain language of the APA (defined below) between the Receiver and the Purchaser, pursuant to which the real property giving rise to the Omit Tax Claims was sold by the Receiver to the Purchaser, which clearly provides for the Omit Tax Claims to be "Assumed Liabilities" of the Purchaser;
- (b) the plain language of the Sale Approval Order (defined below) that approved the transaction contemplated by the APA, which clearly provides that any encumbrances securing the Omit Tax Claims were not vested out of the property currently owned by the Purchaser;
- (c) the agreement between the Receiver and the Purchaser to limit re-adjustments for any post-closing tax reassessments to 45 days;
- (d) the fact that the Purchaser was on notice of the possibility of the very reassessment that gave rise to the Omit Tax Claims occurring post-closing; and

(e) the Purchaser's behaviour following closing of the transaction, including in particular its decision to appeal the Omit Tax Claims (without notice to the Court Officer), and then withdraw that appeal.

6. The Receiver accordingly recommends that the Court grant the relief sought by the Court Officer.

PART II - FACTS

A. BACKGROUND ON THESE PROCEEDINGS

Receivership and Bankruptcy Proceedings

7. KSV was appointed Receiver of the Companies pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on October 1, 2021 (the "**Receivership Order**").¹ The resulting receivership proceedings are referred to herein as the "**Receivership Proceedings**".

8. On November 15, 2021, the Receiver filed an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended on behalf of the Companies pursuant to Paragraph 3(r) of the Receivership Order. KSV was appointed the Trustee of the Companies.²

Real Property Sale

9. On April 11, 2022, the Court granted an order in the Receivership Proceedings (the "**Sale Approval Order**") approving the sale of a non-operational flour mill (the "**Mill**") built by Golden Miles on real property owned by Mahal VC at 155 Adams Blvd., Brantford, Ontario (the "**Real**

¹ Fifth Report of the Receiver and Second Report of the Trustee, dated August 15, 2023 ("**Fifth Report**") at para 1.0(2).

² Fifth Report at para 1.0(3).

Property” and together with the Mill, the **“Property”**), to the Purchaser, pursuant to an agreement of purchase and sale dated March 18, 2022 (as amended by the Asset Purchase Agreement Amending Agreement dated April 7, 2022 (the **“Amending Agreement”**)³ the **“APA”**).⁴

10. The Purchaser is owned and controlled by Santokh Mahal, who is also the principal and owner of Mahal VC (the vendor of the Real Property, acting by the Receiver) and the party that attempted to develop the Property for several years.⁵

11. The sale transaction contemplated by the APA (the **“Transaction”**) closed on May 18, 2022. The aggregate net proceeds received were \$18.47 million (the **“Sale Proceeds”**).⁶

12. In connection with the closing of the Transaction, the Receiver’s counsel obtained tax certificates from the City (the **“Tax Certificates”**), which disclosed that a total of \$167,560 was due and owing in respect of property taxes, water arrears, interest and penalties on the Real Property as of the anticipated closing date of the Transaction (the **“Outstanding Closing Taxes”**).⁷

13. The Tax Certificates are explicit that, among other things, the taxes in the Tax Certificate do not include subsequent supplementary taxes that may be levied and added under the *Assessment Act* (Ontario) (the **“Assessment Act”**), and that supplementary tax bills for new buildings and additions/improvements to existing buildings may be issued.⁸

³ The Amending Agreement is attached to the Supplement to the Third Report to Court of KSV Restructuring Inc., dated April 8, 2022 (the **“Third Report”**), as Appendix “C”.

⁴ Fifth Report at para 1.0(5).

⁵ Third Report at para 4.0(1)(a).

⁶ Fifth Report at para 1.0(7).

⁷ Second Supplement to the Sixth Report to Court of KSV Restructuring Inc. and Second Supplement to the Third Report to Court of KSV Restructuring Inc., dated May 10, 2024 (the **“Second Supplement”**) at para 2.0(4)(a) and Appendix “B”.

⁸ Second Supplement at Appendix “B”.

14. Copies of the Tax Certificates were delivered to the Purchaser's counsel on April 28, 2022 and May 17, 2022.⁹

15. The Receiver paid the Outstanding Closing Taxes on the closing of the Transaction (adjusted to \$167,402 as of the closing date), and obtained confirmation from the City that such amounts had been paid in full.¹⁰

16. Also in connection with the closing of the Transaction, the Receiver provided the Purchaser with an undertaking to re-adjust all items on the statement of adjustments that was delivered on closing (which included municipal property tax), for a period of up to 45 days from the closing of the Transaction (the "**Receiver's Undertaking to Readjust**").¹¹ The Purchaser also provided an undertaking to re-adjust for up to 45 days.¹²

Omit Tax Claims

17. On February 24, 2023, over 9 months after the Transaction closed, counsel to the Purchaser notified the Court Officer that the City was seeking payment from the Purchaser of reassessed property tax on the Real Property, and provided the Court Officer with three "omit" tax bills for 2020, 2021 and 2022, totaling \$1,091,423 (such tax claims being the "**Omit Tax Claims**"). Each of the three omit tax bills are dated November 25, 2022 (approximately 6 months after the closing of the Transaction), but were not brought to the Court Officer's attention until February 24, 2023.¹³

⁹ Second Supplement at paras 2.0(4)(a) and 2.0(4)(c).

¹⁰ Second Supplement at para 2.0(4)(i) and Appendix "J".

¹¹ Second Supplement at para 2.0(4)(e) and Sixth Report to Court of KSV Restructuring Inc. and Third Report of KSV Restructuring Inc., dated March 26, 2024 (the "**Sixth Report**") at para 5.2(2)(c)(ii).

¹² Second Supplement at para 2.0(4)(g) and Appendix "G".

¹³ Fifth Report at para. 9.0(1).

18. The Court Officer understands that the Omit Tax Claims are based on a retroactive reassessment of the Real Property by the Municipal Property Assessment Corporation (“MPAC”), which had not been taxed at a rate that reflected the value of the construction of the Mill or the reassessment of the property designation triggered by the Mill.¹⁴

19. The Court Officer understands that the Purchaser appealed the Omit Tax Claim in March 2023, but withdrew the appeal before a hearing was scheduled.¹⁵ This appeal was brought without notice to the Court Officer, who learned about the appeal for the first time in the Telfer Affidavit, filed in response to the within motion.

20. In August 2023, the Receiver sought and obtained the Court’s authorization to reserve from the Sale Proceeds the amount of \$1,500,000, pending a final determination of the Omit Tax Claims (the “**Omit Tax Reserve**”).¹⁶

21. The Court Officer advised the Purchaser’s counsel on September 25, 2023 and October 18, 2023 that if the Purchaser believed that the Court Officer was liable for the Omit Tax Claims (which had been made by the City against the Purchaser), it should bring a motion in the Receivership Proceedings for an order directing the Receiver to pay the amounts claimed by the City.¹⁷ No such motion was ever brought by the Purchaser, and on March 27, 2024, the Court Officer brought the within motion, which was originally returnable on April 5, 2024.

¹⁴ Affidavit of Patrick Telfer, sworn May 2, 2024 (the “**Telfer Affidavit**”) at paras 4 and 5.

¹⁵ Telfer Affidavit at para 18.

¹⁶ Fifth Report at para 10.0(2)(c) and the Order of Mr. Justice Cavanagh, dated August 23, 2023, in the Receivership Proceedings.

¹⁷ Sixth Report at para 5.2(3).

Receivership of the Purchaser

22. On April 1, 2024, the Court Officer was advised by the City that an order appointing MNP Ltd. as receiver and manager of the Purchaser (in such capacity, the “**Purchaser Receiver**”) had been issued on January 18, 2024, and became effective on March 5, 2024.¹⁸ As the Purchaser Receiver only had a few days notice of the Court Officer’s motion with respect to the Omit Tax Claims, the motion was adjourned to June 4, 2024, on consent of the Court Officer, the Purchaser Receiver and the City.

PART III - ISSUES

23. This Factum addresses the following issues:

- (a) Is the Purchaser liable for the Omit Tax Claims?
- (b) Should this Court authorize the Receiver to distribute the Omit Tax Reserve to the creditors of Mahal VC having priority to such amounts?

24. For the reasons that follow, the Court Officer submits that each of the above questions should be answered by this Court in the affirmative.

PART IV - THE LAW AND DISCUSSION

A. LIABILITY FOR THE OMIT TAX CLAIMS

25. Liability for the Omit Tax Claims was explicitly contemplated by the APA, the Receiver’s Undertaking to Readjust, the Tax Certificates and the Sale Approval Order, each of which are

¹⁸ Supplement to the Sixth Report of the Receiver and Supplement to the Third Report of the Trustee, dated April 3, 2024 (“**Supplement to the Sixth Report**”) at para 2.0(2).

consistent that in the event of a post-closing reassessment of municipal taxes, it would be the Purchaser, and not the Court Officer or the Mahal VC estate, that would be liable. The Purchaser's post-closing behaviour, including in particular its appeal of the Omit Tax Claims, is consistent with the Court Officer's position that it has no liability for the Omit Tax Claims.

1. The APA¹⁹

26. Liability for the Omit Tax Claims is explicitly provided for in the APA, and that liability clearly lies with the Purchaser. The Omit Tax Claims are "Assumed Liabilities" as defined in the APA, and are not excluded from the "Purchased Assets" by virtue of the definition of "Excluded Assets". The Purchaser accordingly agreed to take liability for the Omit Tax Claims by the clear language in the APA.

27. The APA provides at Section 2.2 that [emphasis added]:

2.2 At the Closing Time, on and subject to the terms and conditions of this Agreement, the Purchaser shall assume and agree to pay when due and perform and discharge in accordance with their terms, the Assumed Liabilities. Notwithstanding any other provision of this Agreement, the Purchaser shall not assume any Liabilities other than the Assumed Liabilities, except as required under Applicable Law.

28. The APA defines "Assumed Liabilities" to include: "all Liabilities relating to the Purchased Assets or Related to the Business arising on or after the Closing Date."

29. The Omit Tax Claims are clearly "relating to the Purchased Assets", given that they are tax liabilities assessed against the Real Property (a Purchased Asset) as a result of the construction of the Mill (a Purchased Asset), and they are clearly "arising on or after the Closing Date" of May

¹⁹ A complete copy of the APA can be found as Appendix "G" to the Sixth Report.

18, 2022, given that they were made in November 2022, over 6 months after closing. While the Omit Tax Claims are for tax liability for a pre-closing period, in the Court Officer's view there can be no dispute that they *arose* post-closing.

30. Neither are the Omit Tax Claims (nor any encumbrance that secures them) claims that were vested out of the Real Property. The APA provides at Section 2.1 that:

2.1 At the Closing Time, on and subject to the terms and conditions of this Agreement, the Sale Procedure and the Approval and Vesting Order, the Vendor shall sell to the Purchaser, and the Purchaser shall purchase from the Vendor, all of the Debtors' and the Vendor's right, title and interest, if any, in and to the Purchased Assets, which shall be free and clear of all Encumbrances other than Permitted Encumbrances, to the extent and as provided for in the Approval and Vesting Order.

31. "Purchased Assets" is defined as "collectively, those Assets of each of the Vendor or the Debtors as set out in Schedule 'D'". Schedule "D" of the APA provides that the "Purchased Assets" are made up of "all assets, undertakings and properties of the Debtors other than the Excluded Assets, including, without limitation, either Debtors' right, title and interest, if any, in" certain enumerated classes of assets.

32. "Excluded Assets" is defined in the Amending Agreement to mean "(i) all Excluded Tax Refunds, (ii) the Excluded Claims, and (iii) the 2020 Caterpillar 259D3 skidsteer loader bearing Serial #CAT0259DVCW906863". None of these excluded assets includes anything related to the Omit Tax Claims.

33. Finally, the APA defines "Permitted Encumbrances" to include [emphasis added]: "Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested".

34. The Omit Tax Claims, and any corresponding encumbrances securing them, were “not yet due or [were] not in arrears” as of the May 18, 2022 closing of the Transaction; indeed, the Omit Tax Claims were not even made until November 25, 2022, over 6 months after the closing date, and not communicated to the Court Officer until February 24, 2023, over 9 months after the closing date. The Omit Tax Claims (and any lower-case “e” encumbrances that secure them) are thus clearly captured by the “Permitted Encumbrances” as that term is used in the APA, and thus not vested out of the Real Property.

35. Accordingly, because the Omit Tax Claims are “Assumed Liabilities” that are not excluded by the definition of “Excluded Assets”, and because any encumbrances that secure the Omit Tax Claims are “Permitted Encumbrances”, the APA is clear that the Purchaser assumed liability for the Omit Tax Claims.

2. The Sale Approval Order²⁰

36. The terms of the Sale Approval Order are consistent with the terms of the APA, and are clear that any lien (statutory or otherwise) that secures the Omit Tax Claims is not vested off of the Real Property by operation of the Sale Approval Order.

37. Paragraph 4 of the Sale Approval Order provides [emphasis added]:

4. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver’s certificate to the Purchaser substantially in the form attached as Schedule “A” hereto (the “**Receiver’s Certificate**”), all of the Receiver’s and the Companies’ right, title and interest in and to the Purchased Assets described in the APA shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed

²⁰ A complete copy of the APA can be found as Appendix “H” to the Sixth Report.

and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice McEwen dated October 1, 2021; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule “B” hereto (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule “C”) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets and are non-enforceable and non-binding as against the Purchaser.

38. Schedule “C” of the Sale Approval Order explicitly includes (emphasis added):

(a) Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case **are not yet due or are not in arrears** or, if due and in arrears, the validity of which is being contested.

39. “Taxes” are defined in the APA to include “property taxes” and “other taxes of any kind whatsoever imposed or charged by any Governmental Authority and any instalments in respect thereof of another taxpayer or entity, together with any interest, penalties, or additions with respect thereto and any interest in respect of such additions or penalties”.

40. Finally, Paragraph 6 of the Sale Approval Order provides:

6. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver’s Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

41. As discussed in paragraph 34, above, it bears repeating that the Omit Tax Claims, and any corresponding “Encumbrances” securing them, were “not yet due or [were] not in arrears” as of the May 18, 2022 closing of the Transaction. Any lower-case “e” encumbrances that secure the Omit Tax Claims are accordingly clearly captured by the “permitted encumbrances” as that term

is used in the Sale Approval Order, and therefore were not vested out of the Real Property. For the same reason, the Omit Tax Claims cannot and do not attach to the Sale Proceeds pursuant to paragraph 6 of the Sale Approval Order.

42. The Sale Approval Order was required to be “in form and content acceptable to the Parties”, pursuant to the APA definition of “Approval and Vesting Order” (which is the APA term for the Sale Approval Order). Thus not only are the terms of the Sale Approval Order binding orders of the Court, which are well beyond any appeal period, but they were prospectively agreed to by the Purchaser.

43. By virtue of the plain language of the Sale Approval Order, which was agreed to by the Purchaser, the City’s claim for the Omit Tax Claims do not attach to the Sale Proceeds.

3. Receiver’s Undertaking to Readjust²¹

44. The APA does not explicitly require the Receiver to pay outstanding municipal property taxes on the Real Property, however it provides at Section 7.2(1) that the Receiver would deliver a statement of adjustments “reflecting customary adjustments for a transaction similar to the transaction contemplated by this agreement (a “**Statement of Adjustments**”)”.²²

²¹ A complete copy of the Receiver’s Undertaking to Readjust can be found as Appendix “F” to the Sixth Report.

²² Second Supplement at para 2.0(4)(c) and Appendix “D”.

45. The Receiver also gave the Purchaser an undertaking to pay realty tax arrears, water arrears, penalties and interest.²³ As described above, the Receiver paid the \$167,402 of outstanding property tax and utilities in arrears on closing.²⁴

46. Section 7.2(2) of the APA requires the Receiver to provide the Receiver's Undertaking to Readjust, which was an undertaking by the Receiver to "readjust all items on the Statement of Adjustments within 45 days from the Closing Date, upon written request by the Purchaser". Section 7.3(4) of the APA requires the Purchaser to deliver a corresponding undertaking to readjust in favour of the Receiver, on the same terms as the Receiver's Undertaking to Readjust, which the Purchaser in fact provided.

47. The undertakings to readjust were the mechanism by which the parties agreed to allocate the risk of any changes to the amounts in the Statement of Adjustments. This was a negotiated business term of the Transaction, and reflects the parties' agreement regarding how the possibility of a post-closing reassessment of property taxes would be addressed: if there was a property tax reassessment within 45 days of closing, the Receiver would be liable to pay any increased taxes, and to recover any reduced taxes. The risk was allocated, and agreed to by the parties: a post-closing reassessment could be beneficial or detrimental to each party, depending on whether it was an increase or a decrease in assessed taxes. That was the business deal.

48. The length of the undertakings to readjust was also a negotiated term of the Transaction. The parties agreed that for 45 days post-closing, the risk of a reassessment that increased pre-

²³ Second Supplement at para 2.0(4)(e) and Appendix "F".

²⁴ Second Supplement at para 2.0(4)(i) and Appendix "J".

closing taxes would be the Receiver's risk. The parties further agreed that any reassessment that increased pre-closing taxes occurring after 45 days post-closing would be the Purchaser's risk.

49. The undertakings to readjust were therefore mutually beneficial to the Receiver and the Purchaser, providing finality on the Transaction, and limiting the look-back period during which the Receiver may be required to use Sale Proceeds to pay additional taxes. In the context of a receivership, where the proceeds of a transaction will inevitably be distributed to creditors, this finality is critical. In the present case, were it not for the considerably complicated priority issues related to the real property charges and the motion by Mr. Mahal for declarations regarding his entitlement to Sale Proceeds of the personal property sold in the Transaction,²⁵ each of which delayed distributions, it is entirely possible that the Receiver could have distributed all of the Sale Proceeds before the Omit Tax Claims were even made and obtained its discharge.

4. Tax Certificates and Notice of Reassessment

50. The Purchaser was on notice that a reassessment of precisely the type that resulted in the Omit Tax Claims was possible.

51. The Tax Certificates are explicit, among other things, that [emphasis added].²⁶

- (a) The Tax Levy to date does not include subsequent supplementary taxes that may be levied and added under Section 33 or 34 of the Assessment Act, R.S.O. 1990, c.A.31, as amended, nor does it include adjustments that may be made under

²⁵ See the Fifth Report for an explanation of the complex Real Property priorities analysis and Mr. Mahal's security claim.

²⁶ Complete copies of the Tax Certificates can be found as Appendix "B" to the Second Supplement.

Section 357, 358, and 359 of the Municipal Act, and Section 39.1 and 40 of the Assessment Act; and

- (b) Supplementary tax bills for new buildings and additions/improvements to existing buildings, etc., have various due dates depending on when the billing is issued.

They are normally payable in two installments within 21 days notice.

52. The Receiver understands that the reassessment that gives rise to the Omit Tax Claims was done pursuant to Section 33 of the *Assessment Act* (such statutory section being specifically referred to in the Tax Certificates), which provides, in relevant part:

33 (1) The following rules apply if land liable to assessment has been in whole or in part omitted from the tax roll for the current year or for all or part of either or both of the last two preceding years, and no taxes have been levied for the assessment omitted:

1. The assessment corporation shall make any assessment necessary to correct the omission.
2. If the land is located in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes that would have been payable if the assessment had not been omitted.
3. If the land is located in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes that would have been payable if the assessment had not been omitted.

53. The Telfer Affidavit includes correspondence between the City and the Receiver, wherein the City advised the Receiver in October 2021 that MPAC had been requested in “the Spring” to reassess the Real Property, and that the City had followed up with MPAC, reiterating the request to reassess.²⁷ The Receiver does not dispute that it was so advised, and the Receiver does not claim that this correspondence with the City was provided to the Purchaser.

²⁷ Telfer Affidavit Exhibit “A”.

54. However, in the Receiver's view, it was neither necessary nor prudent to provide the Purchaser with the correspondence from the City, because exactly the same information is explicitly set out in the Tax Certificates: as excerpted in paragraph 51, above, the Tax Certificates are clear that they do not include any possible future reassessment under s. 33 of the *Assessment Act* (which is the statutory provision under which the reassessment leading to the Omit Tax Claims was made), and specifically advised that supplementary taxes for new buildings or improvements were possible.

55. The advice to the Receiver from the City was that a reassessment was requested by the City in the spring of 2021 based on the assessment of the Real Property as "Industrial Vacant Land (IX)". The Receiver understands that the reassessment would have been motivated by the construction of the Mill that was started by Mr. Mahal in 2016²⁸ and partially completed in 2019 or 2020. The ultimate Omit Tax Claim was not made until November 2022 – approximately 17 months after the reassessment was requested by the City.

56. Accordingly, the information provided to the Receiver about the reassessment did not provide materially more detail or certainty than what was included in the Tax Certificates, such that the correspondence ought to have been disclosed to any bidder, or the Purchaser. Moreover, the Purchaser is owned and controlled by Mr. Mahal, the principal of Mahal VC (the former owner of the Real Property) who was instrumental in the construction of the Mill in the first place, and

²⁸ The CCDC 5B Construction Management Contract for Services and Construction between Vicano and Golden Miles, which is attached to the Fifth Report as Appendix "L" is dated May 18, 2016. This contract was for the construction of the Mill, and is being used by the Receiver as an approximate indicator for when the construction process commenced.

who had first-hand knowledge of the Real Property's assessment status and extensive dealings with the City.

57. The possibility of a reassessment was therefore disclosed to the Purchaser in the Tax Certificates, and the Purchaser agreed to a 45 day reassessment period post-closing. The Purchaser accordingly accepted the risk of a reassessment occurring more than 45 days post-closing.

58. Moreover, the APA is explicit that only very limited representations and warranties were given by the Receiver in connection with the Transaction as is commonly the case in an insolvency situation, and certainly no representations or warranties were given by the Receiver with respect to the assessment of the Real Property for tax purposes.

59. Section 5.3 of the APA contains extensive "as is, where is" provisions regarding the Purchased Assets and Assumed Liabilities, including in particular subsection 5.3(2), which provides [emphasis added]:

5.3 As is, Where is. Notwithstanding any other provision of this Agreement, the Purchaser acknowledges, agrees and confirms that: ... (2) it has conducted to its satisfaction such independent searches, investigations and inspections of the Purchased Assets, the Business and the Assumed Liabilities as it deemed appropriate, and based solely thereon, has determined to proceed with the transactions contemplated by this Agreement.

60. The Receiver relied on this representation from the Purchaser (who it bears repeating was non-arms length with Mahal VC, the owner of the Real Property in the hands of the Receiver) in connection with accepting the Purchaser's bid and closing the Transaction.

5. Purchaser's Post-Closing Appeal of Omit Tax Claims

61. The Court Officer understands, based on the Telfer Affidavit, that the Purchaser appealed the Omit Tax Claims on or about March 5, 2023 (well before the appointment of the Purchaser

Receiver), with the reason for appeal cited as “assessment too high”. The appeal record indicates that the appeal was brought under *Assessment Act* Sections 33 (cited above and referred to in the Tax Certificates) and 40 (which provides for appeals to the Assessment Review Board).²⁹

62. The Court Officer notes that subsection 40(9) of the *Assessment Act* provides that:

40(9) Where the appeal concerns the assessment of another person, (a) the notice of appeal shall state a name and address where notices can be given to the person; and (b) the appellant shall deliver or mail a copy of the notice of appeal to the person within the time limited by subsection (6), (7) or (8), as the case may be.

At no point was the Court Officer provided with any copies of the Purchaser’s notice of appeal.

63. The Court Officer further understands that the appeal was withdrawn by the Purchaser on or about July, 2023, prior to a hearing of the appeal being scheduled.³⁰

64. The Purchaser’s decision to appeal the Omit Tax Claims is entirely inconsistent with the Purchaser’s position that the Court Officer or the Mahal VC estate is liable for the Omit Tax Claims. The Purchaser cannot at the same time appeal the Omit Tax Claims, fail to comply with subsection 40(9) of the *Assessment Act*, withdraw that appeal before it is adjudicated, and take the position that the liability for the Omit Tax Claims lies with the Receiver.

6. Conclusion Regarding Liability for Omit Tax Claims

65. The Court Officer is not liable for the Omit Tax Claims. The Omit Tax Claims are clearly “Assumed Liabilities” under the APA, for which the Purchaser is liable. Both the APA and the Sale Approval Order are explicit that any encumbrances securing the Omit Tax Claims are “permitted encumbrances”, which are not vested out of the Real Property. The risk of the Omit

²⁹ Telfer Affidavit Exhibit “K”.

³⁰ Telfer Affidavit at para 18.

Tax Claims arising post-closing was clearly contemplated by the parties, and both parties agreed to a 45 day readjustment period as a means of allocating such risk. The Purchaser was on notice of the possibility of the very reassessment that gave rise to the Omit Tax Claims, and the Purchaser's decision to appeal the Omit Tax Claims (without notice to the Court Officer) is both clearly consistent with the Court Officer's position on this issue, and dispositive of the Purchaser's allegation that the Court Officer or the Mahal VC estate is liable.

B. Proposed Distributions

66. Should this Court conclude that the Court Officer and the Mahal VC estate are not liable for the Omit Tax Claims, then the Omit Tax Reserve should be distributed to the secured creditors of Mahal VC with an entitlement to such reserve. The Receiver has determined that the Skymark Receiver is entitled to 82.82% of the Omit Tax Reserve, and KLN is entitled to 17.18%, for the reasons set out in the Sixth Report.³¹

67. Orders authorizing a receiver to make an interim distribution to stakeholders are commonly granted in insolvency proceedings, and the Court reviews any stakeholder prejudice, validity and enforceability of the relevant security, interest savings, and liquidity of the debtor after making the distribution as considerations in determining whether to exercise its discretion to make such an order.³²

³¹ See Sixth Report at para 6.0(9) and footnote 7 thereof.

³² See [Re Abitibiwater Inc., 2009 QCCS 6461, at para. 75](#); the [Ancillary Relief Order of Justice Steele, dated July 19, 2022](#), in the Receivership Proceeding of 2244039 Ontario Inc. and 1526400 Ontario Inc; the [Approval and Vesting Order of Justice Cavanagh, dated December 20, 2022](#) in the Receivership Proceeding of Brant Instore Corporation; and [the Interim Distribution Order of Justice Penny, dated March 3, 2022](#) in the Receivership Proceeding of 33 Yorkville residences and 33 Yorkville Residences Limited Partnership.

68. The proposed interim distribution of the Omit Tax Reserve to the Skymark Receiver and KLN does not give rise to any prejudice, pursuant to the priority analysis conducted by the Receiver and set out in detail in the Fifth Report.

69. The factors contemplated in *AbitibiBowater, (Re)* are satisfied in this case. The Receiver has reviewed each of the 2017 Skymark Charge and the associated transfers, and has confirmed that each registered interest is valid, enforceable, and properly perfected, as applicable.³³

PART V - CONCLUSION

70. For the reasons set out above, the Receiver respectfully requests that this Court grant the relief sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2024.



Chris Burr
Lawyer for the Court Officer

³³ Fifth Report at paras 6.1(1)(b) and (d).

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Case</u>	
1.	<u>Re Abitibiwater Inc., 2009 QCCS 6461</u>
2.	<u>Receivership Proceeding of 2244039 Ontario Inc. (Ancillary Relief Order of Justice Steele, dated July 19, 2022)</u>
3.	<u>Receivership Proceeding of Brant Instore Corporation (Approval and Vesting Order of Justice Cavanagh, dated December 20, 2022)</u>
4.	<u>Receivership Proceeding of 33 Yorkville residences and 33 Yorkville Residences Limited Partnership (Interim Distribution Order of Justice Penny, dated March 3, 2022)</u>

SCHEDULE “B”

TEXT OF RELEVANT STATUTES AND REGULATIONS

Assessment Act, R.S.O. 1990, c.A.31

Change re land omitted from tax roll

33 (1) The following rules apply if land liable to assessment has been in whole or in part omitted from the tax roll for the current year or for all or part of either or both of the last two preceding years, and no taxes have been levied for the assessment omitted:

1. The assessment corporation shall make any assessment necessary to correct the omission.
2. If the land is located in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes that would have been payable if the assessment had not been omitted.
3. If the land is located in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes that would have been payable if the assessment had not been omitted.

(1.1) Repealed: 2020, c. 36, Sched. 3, s. 6 (1).

Definition

(2) For the purposes of this section,

“omitted” includes the invalidation or setting aside of an assessment by any court or assessment tribunal on any ground except that the land is not liable to taxation. R.S.O. 1990, c. A.31, s. 33 (2).

Change re incorrect exemption from tax

(3) The following rules apply if land liable to taxation has been entered on the tax roll for the current year or for all or part of either or both of the last two preceding years as exempt from taxation, and no taxes have been levied on that land:

1. The assessment corporation shall make any assessment necessary to correct the omission. However, no change shall be made if a court or tribunal has decided that the land is not liable to taxation.
2. If the land is in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes that would have been payable if the land had been entered in the tax roll as being liable to taxation.
3. If the land is in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes that would have been payable if the land had been entered in the tax roll as being liable to taxation.

Prescribed exceptions

(3.1) The Minister may make regulations providing that subsection (1) or (3) does not apply with respect to specified land during the period and in the circumstances set out in the regulations.

Managed forests, conservation land

(4) Subsection (5) applies with respect to,

- (a) land in the managed forests property class;
- (b) land that is conservation land for the purposes of paragraph 25 of subsection 3 (1).
- (c) Repealed: 2005, c. 28, Sched. A, s. 3.

Reassessment re managed forests, conservation land

(5) The following rules apply if land described in clause (4) (a) or (b) ceases to be described by any of those clauses:

1. The assessment corporation shall make any change to the assessment and classification required as a result. However, any change to the assessment and classification shall not affect a taxation year that ends more than four years before the assessment and classification is made.
2. If the land is in a municipality, the clerk of the municipality shall alter the tax roll upon receiving notice of the change, and the municipality shall levy and collect the taxes payable for the years affected by the change.
3. If the land is in non-municipal territory, the Minister shall alter the tax roll upon receiving notice of the change, and shall collect the taxes payable for the years affected by the change.

Changes to next assessment roll

(6) If the assessment corporation makes an assessment or classification under this section, the appropriate changes shall be made on the assessment roll for the next year, even if the day as of which land is valued for the next year is the same as for the current year.

...

Appeal to Assessment Review Board

40 (1) Any person, including a municipality, a school board or, in the case of land in non-municipal territory, the Minister, may appeal in writing to the Assessment Review Board,

- (a) on the basis that,
 - (i) the current value of the person's land or another person's land is incorrect,
 - (ii) the person or another person was wrongly placed on or omitted from the assessment roll,
 - (iii) the person or another person was wrongly placed on or omitted from the roll in respect of school support,

- (iv) the classification of the person's land or another person's land is incorrect, or
 - (v) for land, portions of which are in different classes of real property, the determination of the share of the value of the land that is attributable to each class is incorrect; or
- (b) on such other basis as the Minister may prescribe.

Appeal requirements, fee

(2) A notice of appeal shall be delivered or mailed to the Assessment Review Board on or before the applicable deadline under this section, shall state a name and address where notices can be given to the appellant and shall be accompanied by any fee required by the Board.

Precondition of appeal

(3) If a property is in the residential, farm or managed forests property class, or in such other circumstances as the Minister may prescribe, no appeal may be brought to the Assessment Review Board under subsection (1) by a person who is entitled to make a request for reconsideration under section 39.1 in respect of the property, if the person has not made the request within the time required under that section.

Same

(3.1) For 2017 and subsequent taxation years, if a person has made a request for reconsideration in respect of a property under section 39.1 within the time required under section 39.1, whether or not the person is required to do so as a precondition of appeal under subsection (3), no appeal may be brought to the Assessment Review Board under subsection (1) unless either of the following circumstances exist:

1. The person has received a notice of reconsideration under subsection 39.1 (7) or (8).
2. The person has not received a notice of reconsideration under subsection 39.1 (7) or (8) and the deadline by which it should have been mailed under the applicable subsection has passed.

Extenuating circumstances

(4) If, in the Board's opinion, there are extenuating circumstances explaining why a request for reconsideration in respect of a property was not made within the time required under section 39.1 by a person who was required to do so as a precondition of appeal under subsection (3), the Board may, on an application by the person during the taxation year, extend the deadline for making a request under that section.

Last day for appealing, if request made under s. 39.1

(5) For 2017 and subsequent taxation years, if a person has made a request for reconsideration in respect of a property under section 39.1, whether or not the person is required to do so as a precondition of appeal under subsection (3), the last day for the person to appeal for a taxation year is as follows:

1. If the assessment corporation has mailed a notice of reconsideration required under subsection 39.1 (7) or (8), 90 days after the issuance date printed on the notice mailed by the assessment corporation.

2. If the assessment corporation has not mailed a notice of reconsideration within the time required under subsection 39.1 (7) or (8), 90 days after the notice should have been mailed by the corporation under those subsections.

Last day for appealing, 2015 and 2016 taxation years

(5.1) For the 2015 and 2016 taxation years, if a person has made a request for reconsideration in respect of a property under section 39.1, whether or not the person is required to do so as a precondition of appeal under subsection (3), the last day for the person to appeal for a taxation year is 90 days after the notice by the assessment corporation under subsection 39.1 (7.1) or (8) has been mailed.

Last day for appealing, if precondition under subs. (3) does not apply

(6) If a person has not made a request for reconsideration in respect of a property under section 39.1 and is not required to do so as a precondition of appeal under subsection (3), the last day for the person to appeal for a taxation year is March 31 of the taxation year.

Exception, if time for returning roll is extended

(7) Despite subsection (6), if the assessment corporation extends the time for returning the assessment roll for a taxation year after 2016, the last day for appealing in respect of a property for a person who has not made a request for reconsideration in respect of the property under section 39.1 and is not required to do so as a precondition of appeal under subsection (3) is 120 days after the return of the assessment roll.

Same, 2016 taxation year

(7.1) Despite subsection (6), if the assessment corporation extends the time for returning the assessment roll for the 2016 taxation year, the last day for appealing in respect of a property for a person who has not made a request for reconsideration in respect of the property under section 39.1 and is not required to do so as a precondition of appeal under subsection (3) is 90 days after the return of the assessment roll or March 31 of the taxation year, whichever is later.

Omitted or supplementary assessment

(8) If a notice of assessment has been mailed under subsection 35 (1) for a property, the last day for appealing for a taxation year after 2016 for a person who has not made a request for reconsideration in respect of the property under section 39.1 and is not required to do so as a precondition of appeal under subsection (3) is 120 days after the issuance date printed on the notice.

Same, 2015 and 2016 taxation years

(8.1) If a notice of assessment has been mailed under subsection 35 (1) for a property, the last day for appealing for the 2015 or 2016 taxation year for a person who has not made a request for reconsideration in respect of the property under section 39.1 and is not required to do so as a precondition of appeal under subsection (3) is 90 days after the notice is mailed or March 31 of the taxation year, whichever is later.

Where appeal concerns another person

(9) Where the appeal concerns the assessment of another person,

(a) the notice of appeal shall state a name and address where notices can be given to the person; and

(b) the appellant shall deliver or mail a copy of the notice of appeal to the person within the time limited by subsection (6), (7) or (8), as the case may be.

Copy to assessment corporation

(10) When the Assessment Review Board receives a notice of appeal, it shall forthwith transmit a copy to the assessment corporation.

Parties

(11) The following persons are parties to an appeal:

1. The assessment corporation.
2. All persons appealing and all persons whose assessment is the subject of the appeal.
3. The municipality in which the land is located or, if the land is located in non-municipal territory, the Minister.

(12) Repealed: 2008, c. 19, Sched. A, s. 8 (2).

Disclosure

(13) The Minister may make regulations governing the disclosure of information by parties to an appeal.

Adding party

(14) If, before or during the hearing, it appears that another person should be a party to the appeal, the Board shall add the person as a party; if the hearing has already begun, the Board shall adjourn it if necessary and give the person notice of the hearing.

Closing statement

(15) At any hearing, the person or persons whose assessment is the subject of the appeal shall be given the opportunity to make a closing statement after all other parties have made their submissions.

Time for determination of school support

(16) Liability in respect of public or separate school support shall be determined in accordance with the circumstances existing at the time the appeal was brought.

Burden of proof

(17) For 2009 and subsequent taxation years, where value is a ground of appeal, the burden of proof as to the correctness of the current value of the land rests with the assessment corporation.

Same, non-co-operation

(18) Despite subsection (17), the burden of proof as to the correctness of the current value of the land rests with the appellant where he or she fails or refuses,

- (a) to give the assessment corporation reasonable opportunity to inspect the property under section 10; or
- (b) to comply with a request for information and documentation under section 11.

Board to make determination

(19) After hearing the evidence and the submissions of the parties, the Board shall determine the matter.

Alteration of assessment roll, municipality

(20) If the land is located in a municipality, the Board shall forward its decision to the clerk of the municipality and the clerk shall forthwith,

- (a) alter the assessment roll in accordance with the decisions of the Board from which no further appeal is taken;
- (b) indicate on the roll that the alteration has been made; and
- (c) complete the roll by totalling the amounts of the assessments in the roll and inserting the total.

Same, non-municipal territory

(21) If the land is located in non-municipal territory, the Board shall forward its decision to the Minister and the Minister shall alter the assessment roll in accordance with the decisions of the Board from which no further appeal is taken, indicate on the roll that the alteration has been made and complete the roll by totalling the amounts of the assessments in the roll and inserting the total.

Power to determine law and fact

(22) The Assessment Review Board, as to all matters within its jurisdiction under this section, has authority to hear and determine all questions of law or of fact and a decision of the Board under this section is final and binding unless it is appealed under section 43.1.

Rights of way

(23) With respect to land referred to in subsection 3 (4) or (5), the only matter that may form the basis of an appeal to the Assessment Review Board under this section is the correctness of the number of acres or other measure showing the extent of the land.

Deemed appeals, 2006, etc.

- (24) If an appeal relates to the 2006 taxation year, the appellant shall be deemed to have brought the same appeal,
- (a) in relation to assessments under sections 33 and 34 for the 2006 taxation year;
 - (b) in relation to the assessment, including assessments under sections 33 and 34, for the 2007 taxation year if the 2006 appeal is not finally disposed of before the last day for appealing with respect to the 2007 taxation year; and

(c) in relation to the assessment, including assessments under sections 33 and 34, for the 2008 taxation year if the 2006 appeal is not finally disposed of before March 31, 2008 or, if an assessment has been made under section 33 or 34, before the 90th day after the notice of assessment was mailed.

Deemed appeals, 2007, etc.

(25) If an appeal relates to the 2007 taxation year and subsection (24) does not apply, the appellant shall be deemed to have brought the same appeal,

(a) in relation to assessments under sections 33 and 34 for the 2007 taxation year; and

(b) in relation to the assessment, including assessments under sections 33 and 34, for the 2008 taxation year if the 2007 appeal is not finally disposed of before March 31, 2008 or, if an assessment has been made under section 33 or 34, before the 90th day after the notice of assessment was mailed.

Deemed appeals, 2009 and subsequent years

(26) For 2009 and subsequent taxation years, an appellant shall be deemed to have brought the same appeal in respect of a property,

(a) in relation to the assessments under sections 32, 33 and 34 for the year; and

(b) in relation to the assessment, including assessments under sections 32, 33 and 34, for a subsequent taxation year to which the same general reassessment applies, if the appeal is not finally disposed of before March 31 of the subsequent taxation year or, if an assessment has been made under section 32, 33 or 34, before the 90th day after the notice of assessment was mailed.

Deemed appeals, notice requirement

(27) If the appeal concerns the assessment of another person, the appellant is required to comply with subsection (9) only at the time of bringing the original appeal, not each time the appeal is deemed to be brought again.

Change of ownership

(28) For the purposes of subsections (24), (25) and (26), if an appeal is brought in respect of a property, the appellant is the owner of the property and there is a change of ownership before the appeal for the year is finally disposed of, the reference to the appellant in the subsection shall be deemed to be a reference to the owner of the property at the relevant time.

SKYMARK FINANCE CORPORATION
Applicant

- and -

MAHAL VENTURE CAPITAL INC., et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

FACTUM OF THE RECEIVER & TRUSTEE
(Omit Tax Claims)

Returnable June 4, 2024

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