

Court File No. CV-21-00664778-00CL

**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

**RESPONDING FACTUM OF SANTOKH MAHAL**

**(Omit Tax Claims)**

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## **RESPONDING FACTUM OF SANTOKH MAHAL (Omit Tax Claims)**

### **INTRODUCTION**

1. This Factum is filed by Santokh Mahal (“Mahal”), guarantor of the Purchasers’ debt obligations to FCC.
2. Mahal adopts the defined terms in the KSV Factum.
3. This Factum is filed in opposition to the Court Officer’s motion for an order 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 the Purchaser or the City on account of the Omit Tax Claims.
4. The question for the Court on this motion is who, as among the Receiver, the Purchaser and the City, is properly liable for \$1.09 million in retroactive property taxes for tax years prior to the May 18, 2022, closing of the Transaction due under the Omit Tax Bills issued by the City after closing of the Transaction.
5. The Omit Tax Claims are based on a retroactive reassessment of the Real Property by 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.<sup>1</sup>

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<sup>1</sup> Factum of the Receiver para 18 (Affidavit of Patrick Telfer at paras 4 and 5).



6. Section 2.1 of the APA provides that the Receiver shall sell the Real Property to the Purchaser "...free and clear of all Encumbrances other than Permitted Encumbrances..."<sup>2</sup>

7. Section 2.2 of the APA provides that the Purchaser shall not assume any Liabilities other than the Assumed Liabilities. The APA defines "Assumed Liabilities" to include "all Liabilities relating to the Purchased Assets... arising on or after the Closing Date."<sup>3</sup>

8. Accordingly, liability for the Omit Tax Claim turns on this Court's determination on two narrow issues:

- i) Did liability for the Omit Tax Claim arise before closing or on or after closing? If it arose before the closing date, it is the Receiver's liability. If it arose on or after the closing date, it is the Purchaser's liability.
- ii) Is the Omit Tax Claim a Permitted Encumbrance within the meaning of the APA and Schedule "C" of the Sale Approval Order? If it is, it does not alter the Receiver's obligation to pay the liability under section 2.2 of the APA. If it is not, then it is vested out by the Sale Approval Order and is non-enforceable and non-binding as against the Purchaser.

9. It is Mahal's submission that liability for the Omit Tax Claim arose before closing and is not a Permitted Encumbrance. Mahal says the Receiver is liable for the Omit Tax Claims for these reasons:

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<sup>2</sup> Appendix G to 6<sup>th</sup> Report Caselines E-128

<sup>3</sup> Appendix G to 6<sup>th</sup> Report Caselines E-128

- (a) The reassessment process that led to the Omit Tax Claim and consequent liability was triggered by an increase in value to the Real Property resulting from the construction of the Mill. Under section 34 of the *Assessment Act*, the MPAC assessor may then make the further assessment to reflect the change, and upon receiving notice of the further assessment, the clerk of the municipality shall enter a supplementary assessment on the tax roll and the amount of taxes to be levied thereon shall be the amount of taxes that would have been levied after the change occurred if the assessment had been made in the usual way.<sup>4</sup>
- (b) Section 307(3) of the *Municipal Act* provides that taxes imposed for a year (in this case, for the years 2020, 2021 and 2022) shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise. [emphasis added] There is no evidence that the City's bylaw provides otherwise so the Omit Tax Claims were due on January 1, 2020, January 1, 2021, and January 1, 2022.
- (c) The omitted Assessment issued by MPAC was effective January 1, 2020, January 1, 2021, and January 1, 2022 for each of those tax years.<sup>5</sup>
- (d) Jurisprudence from the Ontario Court of Appeal which addresses the very issue in dispute on this Motion rejects the proposition that the liability consequential to a reassessment made subsequent to closing for periods prior to closing arises after closing. Those taxes are properly characterized as a future claim for realty taxes

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<sup>4</sup> [Assessment Act, RSO 1990, c A.31 S34\(1\)\(a\)](#).

<sup>5</sup> Affidavit of Patrick Telfer at para 17 and Exhibit "J" (email from Salvatore Ferrante (MPAC) to Mr. Telfer (City of Brantford))

that existed at the time of closing but remained to be quantified. Liability for the increased taxes to the date of closing had crystallized prior to the date of closing.<sup>6</sup>

- (e) Nor does the “Permitted Encumbrances” language in the APA or Schedule “C” of the Sale Approval Order assist the Receiver in escaping the plain language of section 2.2 of the APA that the Purchaser shall not assume any Liabilities other than the Assumed Liabilities. As noted above, liability for the Omit Tax Claim was due as of January 1, 2020, January 1, 2021, and January 1, 2022,<sup>7</sup> but simply remained to be quantified. Because the Omit Tax Claim existed and was due as of the May 18, 2022, closing of the Transaction, though it had not yet been quantified and communicated to either the Receiver or the Purchaser, it is not an Assumed Liability payable by the Purchaser. Whether or not the Omit Tax Claim is a “Permitted Encumbrance” does not alter the Receiver’s contractual obligation to pay all liabilities other than Assumed Liabilities..

10. For those reasons, Mahal respectfully submits that the Court determine that the Receiver is liable for payment of the Omit Tax Bills.

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<sup>6</sup> [Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc.](#), 2008 ONCA 167 (CanLII) at paras 27 and 30.

<sup>7</sup> [Municipal Act, 2001, S.O. 2001, c. 25, s. 307\(3\).](#)

## SUMMARY OF FACTS

### A. BACKGROUND ON THESE PROCEEDINGS

#### *Receivership and Bankruptcy Proceedings*

11. Mahal agrees with the facts set out in paragraphs 7 and 8 of the Receiver's Factum.

#### *Real Property Sale*

12. Mahal agrees with the facts set out in paragraphs 9 to 16 of the Receiver's Factum

#### *Omit Tax Claims*

13. Mahal agrees with the facts set out in paragraphs 17 to 22 of the Receiver's Factum.
14. Schedule "C" of the Vesting Order, items 'unaffected by the Vesting Order' at paragraph (a) relates to encumbrances related to Taxes ... [which] are not yet due or not in arrears or, if due or in arrears, the validity of which is being contested.
15. The Receiver concedes that they had received correspondence in October 2021 that MPAC had been requested to reassess the Real Property and the City had followed up with MPAC reiterating the request to reassess.<sup>8</sup> The Receiver has known since this October 27, 2021, email from the City that there were unpaid property taxes for the Real Property which was not properly assessed and that the City had requested MPAC to value and assess it properly. The Receiver was

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<sup>8</sup> Factum of the Receiver para 53.

told that “This will result in additional taxes being added to the property and omitted tax notices being issued”.<sup>9</sup>

16. The Receiver did not provide the City’s correspondence to the Purchaser nor otherwise advise the Purchaser that the Omit Tax Claim process was underway.<sup>10</sup>

17. The Tax Certificate that the Receiver did provide to the Purchaser indicates that supplementary taxes *may* be levied and added under Section 33 or 34 of the Assessment Act. (Emphasis added) Further the Tax Certificate indicates that Taxes may be levied for new buildings and additions or improvements to existing buildings.<sup>11</sup>

18. The Receiver was made explicitly aware by the City that a reassessment of the Real Property as “Industrial Vacant Land” was motivated by the construction of the Mill.<sup>12</sup>

19. The Receiver paid the Outstanding Closing Taxes on the closing of the Transaction, which it knew did not include the Omit Tax Claim and received confirmation that such amounts had been paid.<sup>13</sup>

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<sup>9</sup> Factum of the Receiver para 53 and Affidavit of Patrick Telfer at para 5 and Exhibit “A” (email from Mr. Telfer (City of Brantford) to Mr. Tallat (KSV)).

<sup>10</sup> Factum of the Receiver para 53.

<sup>11</sup> Factum of the Receiver para 51

<sup>12</sup> Factum of the Receiver para 55.

<sup>13</sup> Factum of the Receiver paras 14 and 15.

## STATEMENT OF ISSUES, LAW & AUTHORITIES

### *Did liability for the Omit Tax Claim arise before closing or on or after closing?*

20. On October 27 and 28, 2021 Mr. Telfer, Manager of Revenue/Tax Collector for The Corporation of the City of Brantford, informed KSV that there were unpaid taxes with respect to the Property and that omitted tax notice would be issued after MPAC properly assessed the Property.<sup>14</sup>

21. Mr. Telfer, in his email on October 28, 2021 to KSV, indicated that he requested from MPAC that the assessment be issued before “they close off assessment changes for 2021”, and that the reassessment “will result in additional taxes being added to the property and omitted tax notices being issued.”<sup>15</sup>

22. In January of 2022 KSV emailed Mr. Telfer on the status of the assessment changes. In their email KSV acknowledges that “the property is still incorrectly classified as Industrial Vacant Land’ and requested an approximate assessment value range.

23. Moreover, in February of 2022 MPAC confirmed their assignment to assess the Property, however, were unable to due to a “freeze” on inspections (due to COVID restrictions).<sup>16</sup>

24. Ultimately, on October 28, 2022, Mr. Ferrante (MPAC) issued an email to Mr. Telfer indicating that the assessment was complete and an Omit for the new building and structures were

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<sup>14</sup> Affidavit of Patrick Telfer at para 5.

<sup>15</sup> Affidavit of Patrick Telfer at para 5 and Exhibit “A” (email from Mr. Telfer (City of Brantford) to Mr. Tallat (KSV))

<sup>16</sup> Affidavit of Patrick Telfer at para 9 and Exhibit “E” (email from Levy Wilson (MPAC) to Mr. Telfer (City of Brantford))

being issued back to 2020. Mr. Ferrante further identified the “Effective Date” in each calendar year as January 1 of 2020, 2021, and 2022.<sup>17</sup>

25. The APA section 1.1 defines through the Approval and Vesting Order that all encumbrances, other than the Permitted Encumbrances which include Taxes not yet due, will be free and clear to the Purchaser and Vendor.

26. The *Municipal Act* provides that “Taxes imposed for a year shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise”.<sup>18</sup> There is no evidence of a City by-law providing otherwise. Accordingly, liability for the Omit Tax Claim was due prior to closing of the Transaction.

27. Furthermore, the Omit Tax assessment was triggered by the increase in value which resulted “from the erection, alteration, enlargement or improvement of any building, structure, machinery, equipment or fixture or any portion thereof that commences to be used for any purpose,”<sup>19</sup> which also occurred prior to the closing of the Transaction.

28. Ultimately, the Property’s change in use from vacant land to mill, KSV’s advance knowledge of the pending reassessment in October 2021, and the defined effective dates of the reassessment by MPAC demonstrates that although the quantum of the assessment had not been determined, the liability for the pending adjustment arose before closing and is not, therefore, an Assumed Liability as defined in the APA.

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<sup>17</sup> Affidavit of Patrick Telfer at para 17 and Exhibit “J” (email from Salvatore Ferrante (MPAC) to Mr. Telfer (City of Brantford))

<sup>18</sup> [Municipal Act, 2001, S.O. 2001, c. 25, s. 307\(3\).](#)

<sup>19</sup> [Assessment Act, RSO 1990, c A.31 S34\(1\)\(a\).](#)

29. The Court in *Credit Union Central Ltd. v Heritage Proper*, held that the broad language in the Vesting Order captured the realty tax issue, stating, “Those taxes are properly characterized as a future claim for realty taxes that existed at the time of closing but remained to be quantified. As such, it cannot be said to be "contingent" because liability for the increased taxes to the date of closing had crystallized prior to the date of closing.”<sup>20</sup>

30. Because, the Omit Tax Claim liability existed and crystallized prior to closing, it did not arise on or after the closing. As such, the Omit Tax Claim is not an Assumed Liability as defined in section 2.2 of the APA and the Purchaser did not assume any liability for it.

31. Hence, liability to pay the Omit Tax Claim lies with the Receiver.

***Is the Omit Tax Claim a Permitted Encumbrance within the meaning of the APA and Schedule “C” of the Sale Approval Order?***

32. Section 307(3) of the Municipal Act provides that taxes imposed for a year (in this case, for the years 2020, 2021 and 2022) shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise. There is no evidence that the City’s bylaw provides otherwise so the Omit Tax Claims were due on January 1, 2020, January 1, 2021, and January 1, 2022.

33. The APA defines “Permitted Encumbrances “to include Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities

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<sup>20</sup> [Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc.](#), 2008 ONCA 167 (CanLII) at para 27.



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".<sup>21</sup>

34. The Omit Tax Claim was due, in arrears and the validity of it was not being contested as of the date of closing of the Transaction. Accordingly, the Omit Tax Claim is not a Permitted Encumbrance.

35. Even if the Omit Tax Claim is a permitted encumbrance if this court determines that the liability arose prior to the date of closing, the Receiver is still contractually obliged to pay that amount by virtue of section 2.2 of the APA.

**ORDER REQUESTED**

36. For the reasons set out above, the Respondents request that the Court order the Receiver to pay the Omit Tax Claim from the proceeds of sale of the Real Property, and to pay Mahal costs of this motion on a partial indemnity basis.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27<sup>th</sup> day of May, 2024.



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<sup>21</sup> Appendix G to 6<sup>th</sup> Report Caselines E-128

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. [Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc.](#), 2008 ONCA 167 (CanLII)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [Assessment Act, RSO 1990, c A.31](#)

#### Supplementary assessments to be added to tax roll

**34** (1) If, after notices of assessment have been given under [section 31](#) and before the last day of the taxation year for which taxes are levied on the assessment referred to in the notices,

- (a) an increase in value occurs which results from the erection, alteration, enlargement or improvement of any building, structure, machinery, equipment or fixture or any portion thereof that commences to be used for any purpose;
- (b) land or a portion of land ceases,
  - (i) to be exempt from taxation,
  - (ii) to be farm lands the current value of which is determined in accordance with [subsection 19 \(5\)](#),
  - (iii) to be conservation land the current value of which is determined under [subsection 19 \(5.2\)](#),
  - (iii.1) to be land in the managed forests property class the current value of which is determined under [subsection 19 \(5.2\)](#) or [\(5.2.1\)](#),
  - (iv) to be land the current value of which is based on current use under regulations made under [subsection 19 \(2\)](#), or
  - (v) to be classified in a subclass of real property;
- (c) Repealed: 1997, c. 5, s. 22 (1).
- (d) a pipeline increases in value because it ceases to be entitled to the reduction provided for in [subsection 25 \(9\)](#),

the assessor may make the further assessment that may be necessary to reflect the change, and upon receiving notice of the further assessment, the clerk of the municipality or, in the case of land in non-municipal territory, the Minister shall enter a supplementary assessment on the tax roll and the amount of taxes to be levied thereon shall be the amount of taxes that would have been levied for the portion of the taxation year left remaining after the change occurred if the assessment had been made in the usual way. R.S.O. 1990, c. A.31, s. 34; 1997, c. 5, s. 22 (1);

1997, c. 29, s. 18 (1); 1998, c. 3, s. 8 (1); [2002, c. 17](#), Sched. F, Table; [2005, c. 28](#), Sched. A, s. 4; [2006, c. 33](#), Sched. A, s. 24 (1).

### **Supplementary classification**

(2) If, during the taxation year or the period after June 30 in the preceding taxation year, a change event, within the meaning of subsection (2.2), occurs that would change the class or subclass of real property that a parcel of land or a part of such a parcel is in, the assessor may change the classification accordingly, and, upon receiving notice of the change, the clerk of the municipality or, in the case of land in non-municipal territory, the Minister, shall enter it on the tax roll and the tax levied for the taxation year shall be determined in accordance with the new classification. [2018, c. 8](#), Sched. 1, s. 8 (1).

### **Limitations**

(2.1) The following apply with respect to subsection (2):

1. Subsection (2) does not affect the tax levied for the taxation year in respect of a part of the taxation year preceding the change event.
2. Paragraph 1 does not apply to a change event described in clause (c) of the definition of “change event” in subsection (2.2).
3. Repealed: [2000, c. 25, s. 9](#).

1998, c. 3, s. 8 (2); [2000, c. 25, s. 9](#).

### **“change event”**

(2.2) For the purposes of subsections (2) and (2.1),

“change event” includes,

- (a) a change in the use of all or part of the parcel of land,
- (b) an act or omission that results in all or part of the parcel of land ceasing to be in a class or subclass of real property, and
- (c) the opting, by a council of a single or upper tier municipality, to have a class or subclass of real property apply or cease to apply within the municipality. 1998, c. 3, s. 8 (2); [2002, c. 17](#), Sched. F, Table; [2018, c. 8](#), Sched. 1, s. 8 (2).

(2.3) Repealed: [2006, c. 33](#), Sched. A, s. 24 (3).

### **Re-classification**

(3) If subclause (1) (b) (ii) or (v) apply with respect to land or a portion of land, the assessment corporation, in addition to making a further assessment, may also change the classification of the land. 1997, c. 29, s. 18 (2); [2006, c. 33](#), Sched. A, s. 24 (4).

### **Changes to next assessment roll**

(4) If the assessment corporation makes an assessment or classification under this section, or could have done so but did not, 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. 1998, c. 3, s. 8 (3); [2006, c. 33](#), Sched. A, s. 24 (5).

## **2. [Municipal Act, 2001, S.O. 2001, c. 25](#)**

### **Taxes to be levied equally**

**307** (1) All taxes shall, unless expressly provided otherwise, be levied upon the whole of the assessment for real property or other assessments made under the [Assessment Act](#) according to the amounts assessed and not upon one or more kinds of property or assessment or in different proportions. 2001, c. 25, s. 307 (1).

### **Tax ratios**

(2) If, in this or any other Act or any by-law passed under any Act, taxes, fees or charges are expressly or in effect directed or authorized to be levied upon rateable property of a municipality for municipal purposes, unless expressly provided otherwise,

- (a) such taxes, fees or charges shall be calculated as percentages of the assessment for real property in each property class; and
- (b) the tax rates and the rates to raise the fees or charges shall be in the same proportion to each other as the tax ratios established under [section 308](#) for the property classes are to each other. 2001, c. 25, s. 307 (2).

### **Deemed imposition**

(3) Taxes imposed for a year shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise. 2001, c. 25, s. 307 (3).

SKYMARK FINANCE CORPORATION

Applicant

-and- MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD CORPORATION  
Respondents

Court File No. CV-21-00664778-00CL

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

Proceeding commenced at Toronto

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**File Number: 102037**

RCP-F 4C (September 1, 2020)