

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BETWEEN:

KW CAPITAL PARTNERS LIMITED

Applicant

- AND -

VERT INFRASTRUCTURE LTD.

Respondent

**FACTUM OF THE APPLICANT
(APPLICATION TO APPOINT A RECEIVER RETURNABLE JUNE 16, 2020)**

June 12, 2020

GARFINKLE BIDERMAN LLP
1 Adelaide Street East,
Toronto, ON M5C 2V9

Jeffrey Spiegelman (LSUC #312990)
Tel: 416.869.7609

Lawyers for the Applicant,
KW Capital Partners Limited

TO: VERT INFRASTRUCTURE LTD.
605-369 Terminal Ave.
Vancouver, BC V6A 4C4

Attention: Abbey Adbiye
Email: Abbey@telus.net

AND TO: ELITE VENTURES GROUP, LLC
277 Kingsbury Grade
Lake Tahoe, NV 98449

Attention: David Baker
Email: david@kettle-river.com

AND TO: MYM NUTRACEUTICALS INC.
250 – 1095 West Pender St.
Vancouver, BC

Attention: Elizabeth Liu
Email: elizabeth.liu@mym.ca

AND TO: ABACA INVESTMENTS USA, LLC
11 S. Swinton Ave.
Delray Beach, FL 33444
V7S1P3

Attention: Howard Steinberg
Email: howard.steinberg@me.com

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BETWEEN:

KW CAPITAL PARTNERS LIMITED

Applicant

- AND -

VERT INFRASTRUCTURE LTD.

Respondent

FACTUM OF THE APPLICANT

(APPOINTMENT OF RECEIVER)

PART I - OVERVIEW

1. The Applicant seeks the following relief:
 - (a) to the extent necessary, an order abridging the time for service and filing of the Notice of Application and the Application Record herein such that this Application is properly returnable on June 16, 2020 and that further service thereof is dispensed with;
 - (b) an order (the "**Receivership Order**") appointing KSV Kofman Inc. ("**KSV**") as receiver and manager (the "**Receiver**") over all of the property, assets and undertaking of Vert Infrastructure Ltd. pursuant to section 101 of the

Courts of Justice Act (Ontario) (the "**CJA**") and section 243 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"); and

- (c) such further and other relief as counsel may advise and this Court may permit.

2. As more particularly described below, Vert Infrastructure Ltd. ("**Vert**" or the "**Respondent**") and the Guarantor Group (as defined below), are indebted to the Applicant, as agent on behalf of the Secured Lenders (as defined below), in the principal amount of approximately \$5,190,000 (the "**Secured Obligations**") on a secured basis pursuant to certain secured convertible debentures issued by Crop Infrastructure Corp. ("**Crop**"), the predecessor to the Respondent, and related guarantees provided by the members of the Guarantor Group. The Respondent is in default of its obligations under such debentures and the Applicant has demanded repayment of amounts owing thereunder and delivered a notice of intention to enforce its security under section 244(1) of the BIA. Interest and costs continue to accrue on the Secured Obligations.

3. The appointment of a receiver is necessary in order to protect the value of the Respondent's assets as it is in a liquidity crisis. Additionally, there is reason to believe that the Respondent has transferred money to its most significant subsidiary, Elite Ventures Group LLC ("**Elite**"), for the purpose of leasing and developing certain real property interests in Nye County, Nevada, including the water rights associated therewith (the "**Nye County Property**"); however, Elite may have transferred the funds intended for the development of the Nye County Property to related parties of Elite, specifically Aleph One LLC ("**Aleph**") and David Baker, the former Managing Member of the Respondent's

American subsidiaries (together with Aleph, the “**Related Parties**”). The Applicant does not hold security over the assets of either of the Related Parties. The Related Parties used the monies to purchase the Nye County Property (the “**Elite Asset Transaction**”).

4. The Applicant is seeking the appointment of a receiver to, (i) if determined appropriate upon investigation by the Receiver, unwind the Elite Asset Transaction, (ii) protect any further disposal of the Respondent’s assets and (iii) commence a realization process for the Respondent’s business and assets, and the assets subject to the Applicant’s security. It is in the best interests of all stakeholders that the Receivership Order be made as, among other things, it will protect the value of the Respondent’s business by preventing any further dissipation of the Respondent’s assets and it will allow for a realization process of the Respondent’s assets to be commenced under the jurisdiction of this Court and in proceedings to be commenced by the Receiver in various State courts in the United States.

5. Following the appointment of the Receiver, the Receiver intends to seek its appointment in the United States as the receiver of Elite and one or more of the Guarantor Group.

PART II - FACTS

6. The relevant facts of this Application are set out in the affidavit of Yisroel Weinreb affirmed June 1, 2020, filed in support of this Application. The following is a high level summary of the facts of this Application.

Overview of Vert and the Guarantor Group

7. Vert's main purpose is to raise capital to incorporate and fund subsidiaries in the United States with the corporate purpose of operating licenced cannabis and hemp growth, extraction and retail businesses.¹

8. Currently, Vert owns equity interests in the following entities:

- (a) Elite, a corporation formed under the laws of the State of Nevada;
- (b) Wheeler Park Properties, LLC, which wholly owns Wheeler Corridor Business Park, LLC, both of which were formed under the laws of the State of Washington;
- (c) Humboldt Holdings, LLC, a corporation formed under the laws of the State of California;
- (d) Ocean Green Management LLC, a corporation formed under the laws of the State of California;
- (e) DVG LLC, a corporation formed under the laws of the State of Washington (together with the corporations in items (a) – (d), the “**Guarantor Group**”);
and

¹ Affidavit of Yisroel Weinreb, affirmed June 1, 2020 (“**Weinreb Affidavit**”), para 14, Application Record, Tab 2, p. 22.

- (f) Oklahoma Ventures Group LLC, a corporation formed under the laws of the State of Oklahoma.²

9. Vert owned minority equity interests in such above-noted subsidiaries, which in most cases have been converted into majority equity interests following the exercise of Vert's options in each entity.³

10. The primary assets of Vert are its 83% interest in, and 100% voting control over Elite and Vert's 70% interest in, and 100% voting control over Wheeler Park Properties, LLC and its affiliated entities. Vert also may hold a 49% equity interest in Aleph.⁴

11. Vert is a publicly held company organized and existing under the laws of the Province of British Columbia with its registered head office located at the premises municipally known as #605-369 Terminal Avenue, Vancouver, British Columbia. Vert is the successor to Crop pursuant to a certificate of name change filed with the Registrar of Companies on January 15, 2020.⁵

12. Vert is a reporting issuer in Ontario, Alberta and British Columbia. The common shares of Vert are listed for trading on the Canadian Securities Exchange under the

² Weinreb Affidavit, para 10, Application Record, Tab 2, pp. 20-21.

³ Weinreb Affidavit, para 14, Application Record, Tab 2, p. 22.

⁴ Weinreb Affidavit, para 17, Application Record, Tab 2, p. 23.

⁵ Weinreb Affidavit, para 7, Application Record, Tab 2, pp. 19-20.

symbol “VVV”, on the OTC in the United States under the symbol “CRXPF”, and on the Frankfurt exchange under the symbol “2FR.”⁶

13. While Vert’s corporate head office is located in Vancouver, British Columbia, no commercial activity takes place in British Columbia, Vert owns no tangible assets of any significant value in British Columbia, there are no employees in Canada other than a few contract executives and none of its material creditors reside in British Columbia.⁷

The Convertible Debt Financing

14. On February 8, 2019, and June 11, 2019, Crop issued certain secured convertible debenture certificates (the “**Debentures**”) in favour of KW, Plazacorp Investments Limited and Jesse Kaplan (collectively, the “**Secured Lenders**”) in the aggregate principal amount of \$5,250,000 and 17,500,000 common share purchase warrants.⁸

15. Pursuant to an Agency and Interlender Agreement dated February 8, 2019, as amended on June 11, 2019, KW was appointed as collateral agent for the Secured Lenders in respect of the obligations owed by Vert to the Secured Lenders.⁹

16. As security for the payment of the principal and interest outstanding under the Debentures, Crop and the members of the Guarantor Group entered into a series of documents (collectively, the “**Security Documents**”) pursuant to which they granted a

⁶ Weinreb Affidavit, para 8, Application Record, Tab 2, p. 20.

⁷ Weinreb Affidavit, paras 13, 18, Application Record, Tab 2, pp. 22, 23-24, .

⁸ Weinreb Affidavit, paras 21-22, Application Record, Tab 2, pp. 24-25.

⁹ Weinreb Affidavit, para 23, Application Record, Tab 2, p. 25.

security interest in favour of KW, as agent on behalf of the Secured Lenders, over all of their real and personal property. The general security agreement entered into by Vert in favour of KW (the “**Ontario GSA**”) is governed by Ontario law. KW has perfected its security interest under the *British Columbia Personal Property Security Act*.¹⁰

The Elite Asset Transaction

17. Vert provided monies to Elite to fund Elite’s lease and development of the Nye County Property, which is adjacent to real property presently owned by Elite in Nye County, Nevada. On receipt of these funds, Elite transferred them to the Related Parties, who used them to purchase the Nye County Property. 49% of the equity of Aleph may have been recently transferred to Vert from Nick Horsley and Hani El Rayess, representatives of Vert, or from an organization believed to be controlled by them.¹¹

18. KW has senior ranking security against Elite but no security over the assets of the Related Parties. KW’s security does not attach to the Nye County Property and the majority interest in Aleph is beneficially owned by David Baker, the other Related Party. KW’s security would cover the Nye County Property however, if it had been purchased by Elite.¹²

¹⁰ Weinreb Affidavit, paras 24-25, Application Record, Tab 2, pp. 25-26.

¹¹ Weinreb Affidavit, para 30, Application Record, Tab 2, p. 29.

¹² Weinreb Affidavit, para 31, Application Record, Tab 2, p. 29.

Events of Default

19. Vert is currently in default under the Debentures for defaulting on quarterly interest payments on the Debentures when due (the “**Events of Default**”). Upon the occurrence of any event of default under the Debentures, which remains unremedied for a period of 15 days, KW has the right to declare all of the Debentures to be immediately due and payable.¹³

20. The Security Documents permit KW, upon the occurrence and continuance of an event of default under the Debentures to appoint a receiver.¹⁴

The Financial Situation of Vert

21. As at May 27, 2020, Vert was indebted to the Secured Lenders in the principal amount of \$5,190,000 on a secured basis, together with all interest, fees, costs and other allowable charges accrued thereon and continuing to accrue (collectively, the “**Indebtedness**”). There are no other creditors who have priority over the Secured Lenders with respect to the collateral of Vert.¹⁵

22. On October 7, 2019 and May 27, 2020 KW sent separate default notices to Vert advising of the Events of Default and demanding repayment of the Indebtedness, as it then was.¹⁶

¹³ Weinreb Affidavit, para 34, Application Record, Tab 2, p. 30.

¹⁴ Weinreb Affidavit, para 38, Application Record, Tab 2, p. 31.

¹⁵ Weinreb Affidavit, paras 3, 41, Application Record, Tab 2, pp. 18, 32.

¹⁶ Weinreb Affidavit, paras 36, 39, Application Record, Tab 2, pp. 30-31.

23. The Events of Default have not been cured and are continuing and the Indebtedness remains outstanding. On May 27, 2020, KW served Vert with a demand letter and notice of intention to enforce its security under the Debentures pursuant to subsection 244(1) of the BIA (the "**Enforcement Notice**").¹⁷

24. Vert is suffering from a liquidity crisis and has acknowledged in its unaudited financial statements that it has incurred losses since its inception, has no sources of revenue and does not generate cash flows from operating activities. Vert has also acknowledged that its ability to continue as a going concern is dependent on its ability to raise adequate financing through future equity issuances and short term borrowing. In the absence of such funding, which has failed to materialize, Vert notes in its Management Discussion and Analysis that it may be required to curtail or reduce its operations to continue as a going concern.¹⁸

25. Vert's unaudited financial statements, dated January 24, 2020, indicate a nominal cash balance of \$1,796. With the unpaid interest owed pursuant to the Quarterly Payments is factored in, the unaudited financials statements demonstrate that Vert had a negative cash balance immediately following November 30, 2019.¹⁹

¹⁷ Weinreb Affidavit, paras 39-40, Application Record, Tab 2, p. 31.

¹⁸ Weinreb Affidavit, paras 45, 47-49, Application Record, Tab 2, pp. 33-34.

¹⁹ Weinreb Affidavit, para 45, Application Record, Tab 2, p. 33.

The Receivership

26. KW is seeking the appointment of KSV as the Receiver to enable it to take steps to protect the business and preserve the value of the assets of Vert and the Guarantor Group by (i) unwinding the Elite Asset Transaction, if appropriate, (ii) preventing any further disposal of Vert's assets and (iii) commencing a realization process for Vert's business and assets and the assets subject to KW's security.

27. KW has agreed to provide the Receiver with financing to fund the receivership through receiver certificates. A condition to the financing of the receivership is that the receiver certificates have priority over the claims of Vert's secured creditors. This charge would rank behind the administrative charge and any priority payables (i.e. obligations of Vert secured by statutory deemed trusts or liens ranking in priority to KW's existing security).

PART III - ISSUES

28. There are two issues on this Application:

- (i) whether the Court should make an order pursuant to section 101 of the CJA and section 243 of the BIA appointing KSV as the Receiver; and
- (ii) whether this Court has the jurisdiction to make the receivership order.

PART IV - LAW AND ARGUMENT

(i) Whether the Court should make an order pursuant to section 101 of the CJA and section 243 of the BIA appointing KSV as the Receiver

I. The Test for Appointing a Receiver under the BIA and the CJA

29. Section 243(1) of the BIA and section 101 of the CJA authorize a court to appoint a receiver where such appointment is just or convenient to do so, and on such terms as it considers just.

Bankruptcy and Insolvency Act, RSC 1985, c. B-3, s. 243(1).

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101(1).

30. In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property.

Bank of Nova Scotia v. Freure Village on Clair Creek, [1996] O.J. No. 5088 at para. 10 (Gen. Div.), Book of Authorities, Tab 1 [Freure Village].

31. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver upon default. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd., 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]), Book of Authorities, Tab 2 [Textron Financial];

Freure Village, supra at para. 12, Book of Authorities, Tab 1;

***Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]), Book of Authorities, Tab 3 [*Canadian Tire*];**

***Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]), Book of Authorities, Tab 4 [*Carnival National Leasing*];**

***Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] OJ No 330 at paras. 2-6 (Gen. Div.), Book of Authorities, Tab 5 [*Farallon*].**

32. In such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

- (a) the potential costs of the receiver;
- (b) the relationship between the debtor and the creditors;
- (c) the likelihood of preserving and maximizing the return on the subject property; and
- (d) the best way of facilitating the work and duties of the receiver.

***Freure Village, supra* at paras. 10-12, Book of Authorities, Tab 1;**

***Canadian Tire, supra* at para. 18, Book of Authorities, Tab 3;**

***Carnival National Leasing, supra* at paras. 26-29, Book of Authorities, Tab 4.**

33. In addition, the fact that it cannot reasonably be anticipated that the debtor will be able to secure refinancing weighs in favour of appointing a receiver.

***Canadian Tire, supra* at para. 21, Book of Authorities, Tab 3.**

II. Application of the Just and Convenient Test

34. It is just and convenient to appoint KSV as the Receiver in the circumstances of this case. As described above, Vert has defaulted on its obligations under the Debentures. The Events of Default are continuing and have not been remedied as of the date of this Application. This has given rise to KW's rights under the Ontario GSA to appoint a receiver by instrument in writing and to institute court proceedings in Ontario for the appointment of a receiver.

35. KW has provided Vert with notice of the Events of Default, demanded payment of the Indebtedness and served the Enforcement Notice. Ten days has lapsed since the sending of the Enforcement Notice and KW is now entitled to enforce its security against Vert.

36. KW is not requesting an extraordinary equitable remedy; it is simply seeking to enforce an express term of relief provided for in the Ontario GSA. As such, KW can meet its burden that it is "just or convenient" to appoint KSV as the Receiver by simply establishing that it is in the interests of all concerned to have the Receiver appointed by the Court.

37. It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint KSV as the Receiver for the reasons that follow.

(a) Costs of the Receivership

38. As outlined above, the costs of the receivership will be borne by KW through receiver certificates, or recoveries on the assets subject to its security interests. As the

majority of the assets of Vert and the Guarantor Group are located in the United States, it is not anticipated that the Canadian receivership will be complex or costly, but will greatly facilitate the realization process in the United States. Therefore, the costs of the receivership weigh in favour of appointing KSV as the Receiver.

(b) Relationship between Vert and its Creditors

39. As agent on behalf of the Secured Lenders to whom Vert owes approximately \$5,190,000 as of May 27, 2020, together with interest, fees, costs and other allowable charges accrued thereon and continuing to accrue, KW is a stakeholder with a significant economic interest in Vert's proposed receivership.

40. Vert has only two other secured creditors with subordinate security interests to the Secured Lenders and no unsecured creditors of Vert will be adversely affected by a receivership because they will be in the same relative priority position after the appointment of the Receiver. It therefore cannot be said that the relationship between Vert and any of its creditors will be negatively impacted if KSV is appointed as the Receiver; indeed they are requesting and not opposing the appointment.

(c) Preserving Vert's Business and Maximizing Value

41. Vert is insolvent and unable to pay its debts as they come due. In light of the Elite Asset Transaction, there is a risk that Vert has disposed of certain of its property and that it may continue to dispose of its assets if KSV is not appointed as the Receiver. Management of Vert appears to be wholly unresponsive.

42. Vert does not have the means to fund its operations in the coming months. The appointment of KSV as the Receiver will preserve the assets of Vert and will minimize the risk of further dissipation of the assets of Vert and the Guarantor Group, thereby protecting the value of Vert's assets and those of the Guarantor Group to the benefit of all stakeholders.

(d) Facilitating the Work of the Receiver

43. KSV is prepared to act as the Receiver of all of the property, assets and undertaking of Vert. As described above, KSV will investigate, and if appropriate, unwind the Elite Asset Transaction and realize on the security of the Secured Lenders. The best way to ensure KSV is able to undertake this work is to provide it with access to the books and records of Vert and provide KW, as agent for the Secured Lenders, with regular status updates and the results of its investigation on an ongoing basis. The appointment of KSV is the best way to implement the investigation of the Elite Asset Transaction and the realization of the Secured Lenders' security, thereby facilitating the work of the Receiver.

(e) Failed Attempts to Refinance

44. Vert has attempted to source additional financing through a non-brokered private placement; however, such proposed private placement was subsequently cancelled. To date, Vert's attempts to raise funds through sale and financing efforts have been unsuccessful. In the circumstances, it is clear that there are no viable financing alternatives available to Vert to permit it to meet its working capital obligations as they come due.

45. As described above, Vert is currently suffering from a liquidity crisis and cannot fund its operations. Given Vert's insolvency and its inability to secure additional financing, it will not be able to continue operations.

(ii) Whether this Court has the jurisdiction to make the receivership order.

I. The Law with Respect to the Proper Jurisdiction for Bringing a Receivership Application

46. Section 243(5) of the BIA allows an application for the appointment of a receiver to be filed in a court having jurisdiction in the “judicial district of the locality of the debtor.”

Bankruptcy and Insolvency Act, RSC 1985, c. B-3, s. 243(5)

47. The “locality of the debtor” is defined under the BIA as “the principal place
- (a) where the debtor has carries on business during the year immediately preceding the date of the initial bankruptcy event,
 - (b) where the debtor has resided during the term immediately preceding the date of the initial bankruptcy event, or
 - (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;”

Bankruptcy and Insolvency Act, RSC 1985, c. B-3, s. 2.

48. The onus is on the applicant to show that the place where the application has been presented is in the locality of the debtor.

***Solloway, Re*, 1938 CarswellOnt 81, 4 D.L.R. 12 at para 22 (Ont. Sup. Ct., In Bankruptcy), Book of Authorities, Tab 6; affirmed in *Solloway, Re*, 1939 CarswellOnt 70, [1939] O.R. 295 (Ont C.A.), Book of Authorities, Tab 7.**

49. Canadian courts have considered the following factors when determining the principal place a debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event:

- (a) The location of the head office of the debtor company;
- (b) The jurisdiction of incorporation;
- (c) The location of the auditors of the company;
- (d) The residence of the directors and officers of the company;
- (e) The location of the majority of the creditors of the company;
- (f) The location of the assets of the company;
- (g) The governing law of the credit agreements of the company; and
- (h) Whether the balance of convenience weighs in favour of bringing the application in the jurisdiction in which it is being brought.

***Eagle River International Ltd, Re*, 2001 SCC 92, 3 S.C.R. 978 at paras 23-24, Book of Authorities, Tab 8;**

***Rotenberg, Re*, 1941 CarswellOnt 58, 22 C.B.R. 433 at paras 11-15 (Ont. Sup. Ct., In Bankruptcy), Book of Authorities, Tab 9;**

***Flax Investment Ltd., Re*, 1979 CarswellOnt 248, 3 A.C.W.S. 807 at paras 5-15 (Ont. Sup. Ct., In Bankruptcy), Book of Authorities, Tab 10;**

***Malartic Hygrade Gold Mines Ltd., Re*, 1966 CarswellOnt 30, 10 C.B.R. (N.S.) 34 at paras 35-38 (Ont. Sup. Ct., In Bankruptcy), Book of Authorities, Tab 11.**

II. Application of the Jurisdictional Factors

(a) Vert Carries on Business in Ontario

50. While Vert's head office is in British Columbia, it has no significant assets in British Columbia, nor creditors, nor employees. Vert's only real connection to British Columbia is its registered head office, which is at 605-369 Terminal Ave., Vancouver, British Columbia, V6A 4C4. Vert's sole business is to generate capital to fund cannabis-related ventures in the United States through incorporated subsidiaries.

51. As Vert's sole business is the generation of capital, the jurisdiction in which Vert sought and received such capital ought to weigh heavily in determining Vert's "locality" given that its connection to British Columbia is essentially *de minimus*.

52. The Secured Lenders and the collateral agent under the Debentures are located in Ontario, the Agency and Interlender Agreement is governed by Ontario law and the Ontario GSA is also governed by Ontario law.²⁰ In short, Vert sourced its first ranking credit, which makes up the majority of its debt, from Ontario. To the extent that Vert operates any other business, that business is in the United States through its subsidiaries. The only business Vert actually engages in Canada is raising capital, a significant portion of which was raised in Ontario, including the amounts owing to the Secured Lenders.

²⁰ Weinreb Affidavit, Exhibits "C" and "D", Application Record, Tab 2, pp. 283, 315.

(b) The Balance of Convenience

53. The balance of convenience weighs in favour of bringing this Application in Ontario.

54. The appointment of the Receiver in Ontario pursuant to section 101 of the CJA is the enforcement route contemplated by the Ontario GSA. The balance of convenience however also weighs in favour of the appointment of the Receiver pursuant to section 243(1) of the BIA.

55. The first ranking secured creditors and their counsel are located in Ontario. Only one subordinate secured lender is located in British Columbia and it is unopposed to this Application.²¹ The Receiver and the Receiver's counsel, Davies Ward Phillips & Vineberg LLP, are located in Ontario.

56. As Vert holds no assets in British Columbia and all of Vert's first ranking secured creditors are located in Ontario, as are the Receiver and the Receiver's counsel, the administration of Vert's estate will most efficiently be conducted in Ontario, in this Court. By allowing this Application to be brought in Ontario, this Court will prevent unnecessary delay, costs and the requirement to retain additional and alternative British Columbia counsel, to the detriment of all of the stakeholders in Vert's estate. Finally, bringing this Application in Ontario is more efficient and cost effective for the Secured Lenders, as the primary financial stakeholders, than bringing the same application in British Columbia.

²¹ Weinreb Affidavit, Exhibit "M", Application Record, Tab 2, p. 581.

(c) Policy Objectives Satisfied

57. Finally, the issuance of the receivership order requested in this Application is in line with the policy objectives underpinning the enactment of Section 243(5) in 2009. The use of a national receiver appointed in the jurisdiction of the “locality” of the debtor was designed to prevent jurisdiction shopping by large creditors to the detriment of smaller creditors.

L.W. Houlden & Geoffrey B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed, Part XI (ss. 243-252) at 1, Book of Authorities, Tab 12.

58. The totality of first ranking priority lenders are located in Ontario. While certain subordinate lenders are located in other jurisdictions, they are unopposed to this Application, and the Notice of Application contemplates a hearing by Zoom which can be readily attended by any of Vert’s creditors, anywhere in the world, without suffering prejudice. Vert holds no real assets in Canada, so there are no jurisdictional issues with respect to enforcing security, the substantive remedies for which are contained in the Ontario GSA. As a result, none of Vert’s creditors will be prejudiced by a receiver appointment order issued by this Court, fulfilling the policy objective of Section 243(5).

59. For all of the reasons provided above, the appointment of a Receiver by this Court is permitted pursuant to Section 243(5) of the BIA and is to the benefit of all of the stakeholders in the estate of Vert.

PART V - ORDER REQUESTED

60. The Applicant seeks the following relief:

- (a) an order validating the manner of service of the Application Record in respect of the relief sought herein and declaring that the time for service be abridged so that the relief sought herein is returnable on June 16, 2020 and that further service thereof is dispensed with;
- (b) an order appointing KSV as the Receiver of all of the property, assets and undertaking of Vert pursuant to section 243 of the BIA and section 101 of the CJA; and
- (c) such further and other relief as counsel may advise and this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of June 2020.

Garfinkle Biderman LLP

SCHEDULE "A" – AUTHORITIES

TAB	AUTHORITY
1.	<i>Bank of Nova Scotia v. Freure Village on Clair Creek</i> , [1996] O.J. No. 5088 (Gen. Div.)
2.	<i>Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.</i> , 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers])
3.	<i>Canadian Tire Corp. v. Healy</i> , 2011 ONSC 4616, [2011] O.J. No. 3498 (S.C.J. [Commercial List])
4.	<i>Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited</i> , 2011 ONSC 1007, [2011] O.J. No. 671 (S.C.J. [Commercial List])
5.	<i>Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.</i> , [1992] OJ No 330 (Gen. Div.)
6.	<i>Re Solloway</i> , 1938 CarswellOnt 81, 4 D.L.R. 12 (Ont. Sup. Ct., In Bankruptcy)
7.	<i>Re Solloway</i> , 1939 CarswellOnt 70, [1939] O.R. 295 (Ont C.A.)
8.	<i>Re Eagle River International Ltd.</i> , 2001 SCC 92
9.	<i>Re Rotenberg</i> , 1941 CarswellOnt 58, 22 C.B.R. 433 (Ont. Sup. Ct., In Bankruptcy)
10.	<i>Re Flax Investments Ltd.</i> , 1979 CarswellOnt 248, 3 A.C.W.S. 807 (Ont. Sup. Ct., In Bankruptcy)
11.	<i>Re Malartic Hygrade Gold Mines Ltd.</i> , 1966 CarswellOnt 30, 10 C.B.R. (N.S.) 34 (Ont. Sup. Ct., In Bankruptcy)
12.	L.W. Houlden & Geoffrey B. Morawetz, <i>Bankruptcy and Insolvency Law of Canada</i> , 4 th ed, Part XI (ss.243-252)

SCHEDULE "B"

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s. 243

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

Courts of Justice Act, R.S.O. 1990, c. C.43

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

KW CAPITAL PARTNERS LIMITED and **VERT INFRASTRUCTURE LTD.**

Applicant

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No: CV-20-00642256-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

FACTUM

GARFINKLE BIDERMAN LLP

1 Adelaide Street East,
Toronto, ON M5C 2V9

Jeffrey Spiegelman (LSUC #312990)

Tel: 416.869.7609

Lawyers for the Applicant,
KW Capital Partners Limited