

## Receiver gets Rapped A Case Comment on Jaycap Financial Ltd v Snowdon Block

February 13, 2019

In [\*Jaycap Financial Ltd v Snowdon Block Inc\*](#), 2019 ABCA 47 [*Jaycap*], the Alberta Court of Appeal recently reminded Receivers that they have a duty to be transparent and provide the Court with evidence to meet the burden of proof to the requisite standard for each application it brings. The Court also went to great lengths to reiterate that a Receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking - not simply to the first secured creditor. Lastly, the granting of a sealing order is not merely a rubber stamping process and parties must discharge their burden pursuant to the *Sierra Club* test.

In *Jaycap*, the Receiver obtained a sale approval and vesting order approving the sale of property to the secured creditor for a credit bid, and vacating an earlier vesting order which approved a first purchase and sale agreement between the Receiver and secured creditor on the basis of mutual mistake as to the purchase price. The debtor's obligations had been guaranteed by individual guarantors. While under the first purchase and sale agreement the guarantors had no liability, as a result of the termination of the first agreement and subsequent agreement and vesting order the guarantors faced a \$1.3 million liability. The guarantors appealed the granting of the second vesting order.

The Court of Appeal granted the appeal, set aside the second vesting order and directed that the matter be reheard before a different judge. In particular, the Court found that the trial judge had committed a palpable and overriding error by finding mutual mistake on the evidence before her. Before the Court of Appeal, the secured creditor was unable to explain the difference between the calculations in purchase price nor how the deficiency of \$1.3 million was calculated. The Court of Appeal stated that "as the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the \$1.3 million difference *cried out for an explanation* before this Court and the court below."

The Court of Appeal also found that it was an error to conclude that the Receiver had satisfied the *Soundair* principles with respect to its sales process. Given the lack of evidence put forth by the Receiver and lack of transparency in the process, the Court had "serious concerns about the efficacy, fairness and integrity of the process". The Court noted that the perception of the Receiver's independence was further compromised by the fact that both the secured creditor and the Receiver were jointly represented before it.

Lastly, the Court of Appeal criticized the approach taken to sealing orders in the proceedings below, noting that "the parties failed to file a sealing order, failed to file an affidavit they undertook to file, and failed to ensure that the Receiver's certificate met the

requirements to release the bans and restore public access to the proceedings..." The Court cautioned that sealing orders are not merely a rubber stamping process and parties should be mindful of discharging their onus as established by the *Sierra Club* test, meaning parties must demonstrate that there is commercially sensitive information requiring protection and the proposed sealing is the least restrictive means of such protection.

*Jaycap* is a cautionary tale for Receivers regarding the duties they owe both to the Court as a Court officer, as well as to all of a debtor's interested stakeholders. In applications before the Court, a Receiver should present all relevant and material evidence to the Court, and not simply conclusions of law based on advice of its legal counsel. Further, the time sensitive nature of insolvency proceedings does not relieve a Receiver from "its basic obligations to the parties and the Court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application it brings." Lastly, a Receiver must always remain independent and remember that it is a fiduciary to all of a debtor's interested stakeholders - not simply the secured creditor.

By

[Jessica Cameron](#), [Josef Krüger](#), [Robyn Gurofsky](#), [Miles F. Pittman](#)

Expertise

[Insolvency & Restructuring](#)

---

## BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

[blg.com](http://blg.com)

## BLG Offices

### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

### Montréal

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.