COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-022220-115
(500-11-041322-112)

DATE: October 23, 2012

CORAM: THE HONOURABLE ANDRÉ ROCHON, J.A.
PIERRE J. DALPHOND, J.A.
NICHOLAS KASIRER, J.A.

IN RE: GEORGES MARCIANO

JOSEPH FAHS
STEVEN CHAPNICK
ELIZABETH TAGLE
APPELLANTS – Creditors/Respondents

DAVID GOTTLIEB
APPELANT – Foreign Representative/Respondent

PRICEWATERHOUSECOOPERS INC.
APPELLANT – Receiver/Interim Receiver
v.

GEORGES MARCIANO
MICHEL BENSMIHEN, in his capacity as Trustee for the CKSM Family Trust
9204-7570 QUÉBEC INC.
9211-9882 QUÉBEC INC.
9213-4568 QUÉBEC INC.
RESPONDENTS – Co-Petitioners

JUDGMENT

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[1] On appeal from a judgment of the Superior Court, District of Montreal, rendered on December 8, 2011 (the Honourable Mr. Justice Mark Schrager) granting respondents' motions to review, rescind and vary various orders rendered *ex parte* under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[2] For the reasons of Dalphond, J.A., with which Rochon and Kasirer, JJ.A. agree;

THE COURT:

[3] **ALLOWS** the appeal, without costs;

[4] **SETS ASIDE** paras. 197 to 216 and replaces them by the following:

> [197] **GRANTS** in part the Motion to Review, Rescind and Vary Various Orders Rendered pursuant to the *Bankruptcy and Insolvency Act* of Georges Marciano;
>
> [198] **GRANTS** in part the Motion to Quash the Issuance of a Search Warrant and Authorization to Seize the Property of the Debtor, to Rescind and Dismiss Orders and for the Issuance of Safeguard Orders of Michel Bensmihen, ès qualités of trustee of the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc.;
>
> [199] **RESCINDS** the following orders, issued by Justice Chantal Corriveau dated September 15, 2011 :
>
> 1. Paras. 9, 10 and 13 of the judgment on the motion for the Recognition of a main Foreign Proceeding and replaces paras. 11 and 12 by the following:
>
> > [11] **APPOINTS** PWC as interim receiver of Georges Marciano's property located in Canada;
> >
> > [12] **EMPOWERS** PWC to seize any moveable assets that belong or could have been under the control of Marciano and that could easily be moved or otherwise disposed of, and **RESERVES** to PWC the right to apply to this Court for any further orders that may be necessary or appropriate to protect the rights of Marciano's creditors;
>
> 2. Paras. 8 and 9 of the judgment on the motion for the Issuance of a search warrant and the authorization to seize property of the Debtor;
>
> 3. All orders made further to the motion for an Interim Receiver.
>
> [200] **QUASHES** all seizures of immovables made in virtue of the Warrant of Search and Seizure dated September 15, 2011, the Second Warrant of Search and Seizure dated September 16, 2011 and the Amended Second Warrant of Search and Seizure dated September 16, 2011 and;

[201] **GRANTS** mainlevée of all of the seizures practiced in the present record of all immovable property and more specifically, with regard to the following:

« a) La fraction de l'immeuble détenu en copropriété divise ayant front sur la rue St-Jacques, en la ville de Montréal, province de Québec, comprenant :

- La partie privative (unité résidentielle) connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SEPT (3 412 757) du cadastre du Québec, circonscription foncière de Montréal;

- La quote part afférente à ladite partie privative dans la partie commune et connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SIX (3 412 756) du cadastre du Québec, circonscription foncière de Montréal.

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 13 061 075.

Avec la bâtisse dessus érigée portant le numéro **262, Saint-Jacques, Montréal, province de Québec, H2Y 1N1**. »

b) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT DIX-NEUF (1 181 819) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses dessus érigées notamment celle portant le numéro **320, rue Notre-Dame Est, Ville de Montréal, province de Québec, H2Y 1C7**. »

c) « Un certain emplacement ayant front sur la Place d'Armes dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-ET-UN (1 180 941) et de la moitié indivise (1/2) du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT TRENTE-NEUF (1 180 939) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **501-507, Place d'Armes, Ville de Montréal, province de Québec H2Y 2W8**. »

d) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT TRENTE-HUIT (1 181 638) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **444-454 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3C3**. »

e) « Un certain emplacement situé sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT ONZE (1 181 811) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **281 et 295 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1H1**. »

f) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE NEUF CENT QUATRE (1 181 904) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **262 et 264 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1G9**. »

g) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT QUARANTE (1 181 640) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **438 à 442 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**. »

h) « Un certain emplacement ayant front sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant les lots numéros UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT CINQUANTE-HUIT (1 180 958) et TROIS MILLIONS DEUX CENT QUARANTE QUATRE MILLE SIX CENT QUATRE-VINGT-SEPT (3 244 687) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant l'adresse **11 – 21, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S5**. »

i) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-ET-ONZE (1 181 271) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble dessus érigé portant les numéros **109, 111, 115, 117 et 119, rue de la Commune Ouest et 115, rue de la Capitale, Ville de Montréal, province de Québec H2Y 2C7**. »

j) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-TROIS (1 181 263) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **133, rue de la Commune Ouest, Ville de Montréal, province de Québec H2Y 2C7**. »

k) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE SEPT CENT QUATRE-VINGT QUATORZE (1 180 794) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant les numéros **200-212, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1T3**. »

l) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-HUIT (1 181 788) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **428 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

m) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SIX (1 180 946) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant le numéro **60 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

n) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SEPT (1 180 947) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses ci-dessus érigées notamment celle portant les numéros **54 et 56 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

o) « Un certain emplacement ayant front sur la rue Saint-Jacques ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le

lot numéro UN MILLION CENT QUATRE-VINGT MILLE SIX CENT TRENTE-SEPT (1 180 637) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigée portant les adresses **249-251, rue Saint-Jacques, Ville de Montréal, province de Québec H2Y 1M6**

p) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-SEPT (1 181 787) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **422 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

q) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-NEUF (1 181 789) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **424 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

[202] **ORDERS** the cancellation of all inscriptions of such immovable seizures from the Index of Immovables;

[203] **ORDERS** Joseph Fahs, Steven Chapnick and Elizabeth Tagle to return any and all documents and computer hard discs seized in any form, and not to retain copies of any such documents or computer records, in any form;

[204] **ORDERS** PricewaterhouseCoopers Inc. to render account of any and all receipts and disbursements of any business interests in their possession or under their control or surveillance as Interim Receiver in this file since September 15, 2011;

[205] **RESERVES** the rights and recourses of Georges Marciano, Michel Bensmihen ès qualités of Trustee to the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc. to return to this Court for supplemental orders as may be necessary to give effect hereto;

[206] **ORDERS** provisional execution of this judgment notwithstanding appeal;

[207]**THE WHOLE** with costs against Joseph Fahs, Steven Chapnick and Elizabeth Tagle, solidarily.

ANDRÉ ROCHON, J.A.

PIERRE J. DALPHOND, J.A.

NICHOLAS KASIRER, J.A.

Mtre Bernard Boucher
Mtre Réal A. Forest
Mtre Caroline Dion
BLAKE, CASSELS & GRAYDON
For the appellants (Joseph Fahs, Steven Chapnick, Elizabeth Tagle and David Gottlieb)

Mtre Martin Desrosiers
Mtre Alexandre Fallon
OSLER, HOSKIN & HARCOURT
For the appellant (Pricewaterhousecoopers inc.)

Mtre Jean-Yves Fortin
Mtre Hubert Sibre
Mtre Mélanie Martel
DAVIS
For the respondent Georges Marciano

Mtre Mortimer G. Freiheit
Mtre Marion Soumagne
FREIHEIT LEGAL INC.
For the respondent Michel Bensmihen

Mtre C. Jean Fontaine
Mtre Pierre-Paul Daunais
STIKEMAN ELLIOTT
For the respondents (9204-7570 Québec inc., 9211-9882 Québec inc. and 9213-4568 Québec inc.)

Date of hearing: March 28, 2012

REASONS OF DALPHOND, J.A.

[5] These reasons deal with an appeal by three US creditors, a US trustee and a Canadian receiver from a judgment rendered by Mr. Justice Mark Schrager of the Quebec Superior Court on December 8, 2011, granting respondents' motions to review, rescind and vary various orders rendered *ex parte* by Madam Justice Chantal Corriveau under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA).

[6] This appeal raises the issues of the conduct of a party applying for an order *ex parte* and of the power of the Superior Court to review and rescind its orders under the BIA, as well as the effect in Canada of foreign civil judgments condemning a party to pay millions of dollars in non-pecuniary damages that are enforceable notwithstanding appeal and of a foreign bankruptcy judgment obtained to compel the execution of these civil judgments.

THE FACTS

[7] Respondent Georges Marciano is a wealthy businessman. He estimates his net worth at about US$175,000,000. Marciano's *de facto* spouse is a Montreal native. Between 2006 and 2009, he acquired 18 buildings in Old Montreal, including a boutique hotel. Currently a Montreal resident, he has brought with him from California various moveable items, such as luxury cars worth $3,225,000, a collection of jewellery and watches worth $30,736,821, and an art collection (paintings and sculptures) worth $36,205,953.

[8] In August 2007, while a California resident, he sued five former employees, in Los Angeles Superior Court including the appellants Joseph Fahs, Steven Chapnick and Elizabeth Tagle ("Fahs et al."), for embezzlement and related claims (L.A. Sup. Ct Case No. BC375824). He also filed complaints against them with the local police, the FBI and the tax authorities. He claimed from them about US$400,000,000 in total. The employees filed cross-complaints in which they claimed damages for defamation and intentional infliction of emotional harm. During the proceedings, Marciano often changed attorneys and failed to comply with various discovery obligations. At one point, a judge concluded that he had committed an abuse of process, which led to the summary dismissal of his complaint and of his answers to all of the cross-complaints and the authorization to cross-complainants to proceed by default (called in California "terminating sanctions"). An *ex parte* prove-up hearing took place in front of an advisory civil jury which in July 2009 rendered five identical verdicts of US$74,000,000 for future economic loss, moral and punitive damages, significantly in excess of the amounts sought, totalling US$370,000,000. Later, the awards were reduced as follows by the trial

judge so as to not exceed the amounts claimed by the cross-complainants in their proceedings:

Joseph Fahs	US$55,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Steven Chapnick	US$25,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Elizabeth Tagle	US$15,300,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Miriam Choi	US$55,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)
Camille Abat	US$55,000,000 (instead of US$74,044,000 including US$5 million in punitive damages)

These Los Angeles Superior Court judgments total US$205,300,000.

[9] In separate proceedings instituted in 2008, Marciano also sued his former tax accountant, Gary Iskowitz and two related parties for considerable amounts. The defendants later filed cross-complaints for emotional harm and defamation (L.A. Sup. Ct Case No. BC384493). On August 26, 2009, Marciano's claim was summarily dismissed and subsequently the cross-complainant Iskowitz was awarded US$45,000,000 (including US$5,000,000 for loss of professional and personal reputation, 10,000,000 for emotional harm and US$10,000,000 on for hurt feelings the whole without expert evidence of emotional harm), and the two other co-cross-claimants were awarded US$5,000,000 each.

[10] The total amount of the awards against Marciano is a little over US$260,000,000 ("Civil Judgments"). Most of the amounts awarded are not related to economic losses, but rather to emotional distress, harm to reputation, hurt feelings and punitive damages, all granted without the benefit of fully contested evidentiary hearings.

[11] Marciano appealed the Civil Judgments. According to California law, a bond of an amount of one and a half times the amounts awarded must be posted for the judgments not to be enforceable notwithstanding appeal, unless appellant obtains a judicial stay pending appeal, called "*supersedeas*". Marciano's attempts to obtain a stay were unsuccessful, including a majority decision by a panel of the California Court of Appeal. Despite his considerable wealth, Marciano was unable to post the required statutory bond. Accordingly the Civil Judgments remained enforceable despite the appeal proceedings, a situation that the creditors, including the appellants, decided to act upon to their advantage, as will be further explained below.

[12] Concurrently, Marciano caused the transfer of his 18 Montreal buildings to three companies: 9204-7570 Québec inc., 9211-9882 Québec inc. and 9213-4568 Québec inc. that are now controlled by the CKSM Family Trust the beneficiaries of which are Marciano and his four children. Michel Bensmihen is the representative of the three companies and the trustee of the family trust, which are together designated as the "Interveners".

[13] Unable to seize any property of significance, some of the US creditors, including the appellants, decided to petition Marciano into bankruptcy in October 2009. Despite the fact that appeals were pending that might drastically reduce the awards, a California bankruptcy judge declared Marciano bankrupt on December 28, 2010. For a time, Marciano remained in possession of his assets as "debtor-in-possession" until he failed to comply with specific orders of the Bankruptcy Court. David Gottlieb was then named as trustee and took control of Marciano's Californian assets evaluated at about US$50,000,000, including his L.A. residence estimated at US$25,000,000.

[14] On September 15, 2011 the bankruptcy judgment was upheld by a majority of a Bankruptcy Appellate Panel. The dissenting judge strongly objected to the use of bankruptcy proceedings in such a context.

[15] On September 14, 2011 the legal saga moved to Montreal where Marciano now lives. That day, Fahs et al., Gottlieb and PricewaterhouseCoopers inc. (PWC) filed four motions:

> i) a "Motion to Obtain the Recognition of a Main Foreign Proceedings (section 272 of the Bankruptcy and Insolvency Act)", dated September 13, 2011. In this motion Gottlieb sought recognition of the bankruptcy judgment as a foreign main proceeding under the BIA and of him as the foreign representative. Orders were also sought to allow for the examinations of various persons including, Marciano, and the appointment of PwC as receiver pursuant to s. 272(1)(d) BIA with various powers over the assets of Marciano, the interveners and other corporate and trust entities;

ii) a "Petition for a Receiving Order" under s. 43 BIA, dated September 13, 2011 filed by Fahs et al. in order to have Marciano declared bankrupt in Canada, presentable October 4, 2011;

iii) a "Motion to Appoint an Interim Receiver (section 46 of the Bankruptcy and Insolvency Act)", dated September 13, 2011 filed by Fahs et al. pursuant to which PwC was to be appointed as interim receiver under the BIA with respect to Marciano's Canadian assets and those of various related entities;

iv) a "Motion to Obtain the Issuance of a Search Warrant and the Authorization to Seize the Property of the Debtor (section 189 of the Bankruptcy and Insolvency Act)", dated September 13, 2011 filed by PwC pursuant to which an authorization to search various premises was sought with the power to seize property found therein belonging to Marciano and related corporate and trust entities.

[16] The very same day, these proceedings, save for the Petition for a Receiving Order, were presented *ex parte* to the Commercial Division of the Superior Court, supported by thirteen binders of exhibits. The following day, September 15, 2011, Corriveau J. granted the three motions. Her judgments are in fact endorsements of draft judgments prepared by the petitioners with extremely brief reasons. The first declares that the United States bankruptcy proceeding is a foreign main proceeding, recognizes that Gottlieb is entitled to act as a foreign representative, orders that the administration and realization of all Marciano's Canadian assets shall be carried out by PWC acting as a receiver and gives PWC a number of powers. The second appoints PWC as an interim receiver pursuant to s. 46 BIA and grants it all powers provided by law. The third issues a warrant authorizing PWC to enter and search several premises and to seize any item of Marciano's property. On September 16, 2011, an additional search warrant order was granted *ex parte* by Corriveau J. at the request of PWC.

[17] In the following hours, the full might of the law was made manifest and the events made headlines in the local media. PWC proceeded with searches and seizures at various locations. Seven hundred paintings, prints and sculptures, 375 watches, an 84.37 carat diamond worth over $16,000,000, 16 cars (including 10 Ferraris, 2 Rolls-Royces, 2 Mercedes), 18 buildings, cash, computers and various documents belonging to Marciano and related entities (corporations or trusts) were seized. PWC assumed control of the hotel, posted guards there and removed art works, in some instances having to use a crane.

[18] On September 26, 2011, Montreal lawyers acting for Marciano filed Notices of Appeal against the appointing orders and the search orders. Judgments in these appeals are being rendered concurrently with the judgment in this appeal.

[19] On September 28, 2011, Marciano filed a motion to review, rescind and vary the various orders rendered *ex parte* (Marciano's Motion). Other lawyers did likewise on behalf of the family trust and the three Quebec corporations (Interveners' Motion).

[20] On October 5, 2011, Marciano appealed the judgment of the Appellate Panel before the United States Court of Appeals, Ninth Circuit.

[21] That same day, the Quebec Superior Court (Lalonde J.) granted in part a motion of PWC to authorize the payment of its judicial costs up to an amount of $554,796.56 and a provision for costs of $250,000. Unable to ascertain whether the fees dedicated to the execution of the orders of Corriveau, J. were reasonable and considering that PWC as receiver must be compensated for the costs incurred, the motions judge granted PWC the sum of $556,636.98 to pay its judicial costs up to an amount of $56,636.98, the balance ($500,000) being only a provision for costs. The funds come principally from accounts held by the numbered companies; these companies and the family trust filed an appeal against that order and a judgment released concurrently deals with it.

[22] On October 14, 15 and 17, 2011, the motions to rescind of Marciano and the Interveners were heard by Schrager J.

[23] In the course of the US bankruptcy appeal, the creditors were invited to mediate their claims with the trustee. Between October 17 and 19, 2011, a mediation took place presided by Cruz Reynoso, a former judge of the California Supreme Court. The judgment creditors agreed to resolve their claims for US$8,625,00 each to Fahs, Chapnick, Tagle and Abat, US$9,625,000 to Choi, US$17,250,000 to Gary Iskowitz, and US$2,250,000 to Theresa Iskowitz, plus interest. The total amount due to civil creditors for bankruptcy purposes would then be around US$63,625,000, which means the Civil Judgments would be reduced to an amount slightly more than the value of Marciano's Californian assets. According to the representations made by counsel for the appellants at the hearing before this Court, this settlement agreement is not enforceable because the bankruptcy judge, Madam Justice Kaufman, has decided to wait for the judgments of the California Court of Appeal in the civil appeals. Schrager J. was informed of the results of the mediation in California.

[24] On December 8, 2011, Schrager J. granted Marciano's Motion as well as the Interveners' Motion. PWC as receiver/interim receiver was dismissed and ordered to return all property seized at its own costs.

[25] On December 28, 2011, the Interveners filed a motion for contempt of court against Gottlieb before the Quebec Superior Court alleging that some documents seized were not remitted on time.

[26] On January 12, 2012, the Interveners filed an action in damages in the Quebec Superior Court asking for the condemnation of Fahs et al. in the amount of $3,200,000 for what they consider to be abusive seizures.

[27] On January 13, 2012, a judgment was rendered by the US Bankruptcy Court condemning Marciano for contempt of court and ordering the issuance of a warrant for his arrest.

[28] On March 6, 2012, the hearing of the civil appeal in the related action of Iskowitz et al. took place in the California Court of Appeal (*Marciano v. Iskowitz*, 2d Cir. No. B216029, 219558). At the opening of the hearing, the panel issued the following tentative ruling:

> We do not think there was an abuse of discretion in the imposition of the terminating sanctions, which resulted in the entry of Marciano's default. But, the amount of damages, which were awarded on the default prove up, we felt were excessive. What we plan to do, short of listening to counsel here today, is to reverse the judgment and remand the matter for a new prove up before a different judge. I don't think it's fair to send this thing back to the judge who felt really put upon by this fact situation and by Mr. Marciano.

[29] During the exchange that followed, the Court pointed to the lack of evidence of ongoing treatment or of economic loss and said that the amounts of damages awarded were often duplicative. In reply to a question from the Court, Gottlieb's attorney suggested that it would have been fair to award Iskowitz about $1,000,000 for all emotional harm, exclusive of punitive damages.[1] Counsel for Iskowitz replied that the amount should not be less than 50% of the amounts granted by the Superior Court. The case is now under advisement and it is not clear if the Court of Appeal will suggest numbers or just remand. It bears noting that Iskowitz agreed during the mediation in the bankruptcy file to an amount of US$17,250,000. In all likelihood, he will be awarded less than that at the end of the day from the civil courts.

[30] In a brief filed on March 23, 2012 in the civil appeal dealing with the first five former employees, including the three respondents before us, Gottlieb's attorney, acting on behalf of Marciano as bankrupt, wrote that the L.A. Superior Court judgments "lack sufficient evidentiary support and are internally duplicative", "appear to result from passion and prejudice, rather than from a reasoned analysis based upon compensatory or constitutional law" and "the trial court abused its discretion by imposing terminating sanctions rather than other serious sanctions that would, nonetheless, have permitted Marciano's counsel to participate in the determination of damages". The conclusion to this brief states that these judgments "should be reversed and vacated".

[31] From the latest developments, it appears that the argument over what amounts should be awarded to all the defendants/cross-plaintiffs is to resume before the L.A. Superior Court, unless settlements are reached, and that the civil awards eventually to be awarded will most likely be considerably less than the initial ones. It is even possible that Marciano's US Chapter 11 estate will be solvent in the end unless the US trustee fees and disbursements prevent it (the latter amounting to over US$12,000,000 thus far).

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[1] Marciano's and Interveners' motions to be authorized to adduce new evidence, March 22, 2012. We are told that in California punitive damages may range between 8 to 16 times compensatory damages.

THE JUDGMENT UNDER APPEAL

[32] Schrager J., held that Marciano's Motion and the Interveners' Motion is not a disguised appeal but a set of new circumstances or fresh evidence because the orders under review were made on an *ex parte* basis:

> [42] In the view of the undersigned, given that the orders under review were made on an *ex parte* basis, virtually every argument and fact brought forward by Marciano and the Interveners constitutes a new circumstance (unless perhaps any such fact or argument was already raised and fully discussed at the *ex parte* hearing). This Court has a broad discretion under section 187(5) BIA and this is particularly so where the initial orders were granted on an *ex parte* basis. None of the arguments upon which the undersigned has relied were put before Justice Corriveau – either not at all or not fully.
>
> [44] (...) Again, this Court reiterates that on rescinding the decisions, the undersigned has relied on facts before the Court and legal arguments presented to the undersigned that were not put before Justice Corriveau. (...)

He therefore concluded that it was within his power to rescind the orders issued by Corriveau J.

[33] Once his jurisdiction established, he found as a first ground to rescind the fact that Corriveau J. may have believed that the Civil Judgments were final, notably because the notices of appeal were not produced at all (this factual premise is erroneous since the binders given to Corriveau J. included copies of these notices). In his opinion, the appellants should have clearly told Corriveau J. that the Civil Judgments and the bankruptcy judgment were subject to pending appeals even though they were enforceable under American law. According to him, this failure to disclose fully and frankly that the Civil Judgments were not final justified the rescinding of all the orders:

> [76] In the case before the undersigned and as more fully set forth hereinafter, the failure to disclose in this case is fatal not merely because of such failure *per se* but because the information which was not disclosed was fatal to the applications, even on a contested basis.
>
> [77] In summary, an *ex parte* hearing cannot be used as an opportunity by the moving party to obtain a strategic advantage. The moving party has the obligation to disclose all material points of fact and law and particularly those which might militate in favor of the absent party and even the possible dismissal of the applications. In the case at bar the failure to disclose that the judgments for which recognition and enforcement was sought were not final but rather subject to appeal was highly material and not subject to any debate. From the review of the facts above there can be no other conclusion than that the moving parties

> and their attorneys chose to conceal the existence of the appeals and to give the impression that the Civil Judgments and the Bankruptcy Judgment were final because they were enforceable.
>
> [78] The failure to fully and frankly disclose to Justice Corriveau that the Civil Judgments and Bankruptcy Judgment were not final is sufficient to rescind the orders. (...)

[34] Nevertheless Schrager J. dealt with the other substantive grounds raised by the respondents and adjudicated them in order to dispel any doubt on the final outcome. In his reasons, he wrote that the foreign judgments whose recognition were sought could not be enforced directly or indirectly through the Canadian bankruptcy process because they were not final. According to him it was impermissible to rely on the foreign bankruptcy order as a foreign main proceeding because it was not final; moreover it merely sought to enforce civil damage awards which were themselves not final and enforceable at the time of the hearing before Corriveau J.

[35] He also addressed issues of public policy. According to him, the damages awarded in the Civil Judgments were arbitrary and clearly excessive from a Quebec or Canadian point of view. Therefore, their recognition would be contrary to public order as provided in the C.C.Q. and the BIA.

[36] With regard to the search warrants, he wrote that s.189 BIA applies only after a bankruptcy judgment is made by a Canadian court. Since Marciano is not a bankrupt under the BIA, the search warrants should be quashed. He also concluded that the seizures of the immovables and documents were illegal considering that they belong to third parties and not to Marciano. With regard to movable property, he did not conclude that the seizures were to be quashed solely on the basis of arguments relating to the title of the property seized, but he would nevertheless annul the order on other grounds.

[37] As a result, Schrager J. rescinded all the orders rendered by Corriveau J., granted a release from all the seizures of property owned by Marciano and the Interveners and ordered PWC to return, at its expense, the movable property and documents seized as well as cash seized and amounts received on account of fees and disbursements. Finally, he ordered provisional execution of his judgment.

[38] On December 8, 2011, a joint notice of appeal on behalf of the US trustee, the US creditors and PWC was filed by the same law firm (on December 16, 2011, PWC retained its own counsel that filed a separate amended notice of appeal[2] and later a brief, and made representations before us). On December 22, 2011, a judge of this Court dismissed a motion to suspend the provisional execution Schrager J. had ordered and referred the appellants' motion for the issuance of a safeguard order to a panel. On

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[2] A re-amended notice of appeal was filed on February 24, 2012. It is contested by the US creditors. For the reasons given below, there is no need to rule on this re-amended notice.

February 3, 2012, a panel of this Court dismissed the motion for a safeguard order and suspension of provisional execution as well as a motion by Marciano for security for costs.

ISSUES IN DISPUTE

[39] The issues raised in this appeal can be summarized as follows :

- The conduct of an applicant during an *ex parte* hearing;

- The scope and extent of the power to review and rescind under s. 187(5) BIA;

- The enforceability of the Californian judgments in Quebec;

- The meaning of the word "bankrupt" in s. 189 BIA and the right to seize assets belonging *prima facie* to third parties;

- The right of the receiver to be paid for the searches and seizures of Marciano and Interveners' assets.

ANALYSIS

I. The conduct of a party applying for an order *ex parte*

[40] The adversary nature of the proceedings before our courts is considered to be a safeguard against injustice and arbitrariness. The rights of a person should not be affected unless he or she has been provided an opportunity to be heard and present proof and arguments before a neutral decision-maker, preferably with the assistance of a counsel. This partakes of the essence of our judicial system.

[41] However, there are some exceptions to the requirement of a contested hearing in rare circumstances, such as in cases where there is a likelihood that without an *ex parte* order property or documents will disappear or be destroyed (e.g., seizure before judgment, *Mareva* injunction, *Anton Piller* order) or irreparable harm will occur (e.g., some provisional injunctions; some initial orders under the *Companies' Creditors Arrangement Act*, R.S.C.1985, c. C-36 (CCAA) in exceptional situations). Even there, the judge will grant only temporary conclusions or conclusions subject to review.

[42] In Ontario, the courts have held that a party seeking an *ex parte* order has a duty of full and frank disclosure. In *United States of America v. Friedland*, 1996 O.J. No. 4399 (Sup. Ct.), a case where a *Mareva* injunction freezing US$152,000,000 worth of shares owned by the defendant Friedland was issued *ex parte*, Sharpe J., as he then was, sitting on a motion to renew, wrote:

26. It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The Judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:

> There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.[3]

27. For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

28. If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

29 These principles are so well established in the law that it is hardly necessary to cite supporting authority. They find expression in the Rules of Court. Rule 39.01(6) provides:

> Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

30 The principle has been affirmed and reaffirmed by judicial decision. In the leading Ontario case on Mareva injunctions, *Chitel v. Rothbart* (1982) 39 O.R. (2d) 513, a judgment of the Court of Appeal, Associate Chief Justice MacKinnon stated, at page 519:

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[3] *Watson v. Slavik*, [1996] B.C.J. No. 1885, paragraph 10.

> There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an *ex parte* interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and continue the injunction.

31 The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. *Ex parte* applications are almost by definition brought quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See *Mooney v. Orr*, (1994) 100 B.C.L.R. (2d) 335; *Rust Check v. Buchowski* (1994) 58 C.P.R. (3d) 324.

32 On the other hand, a Mareva injunction is far from a routine remedy. It is an exception to the basic rule that the Defendant is entitled to its day in court before being called upon to satisfy the Plaintiff's claim or to offer security for the judgment. This is clear from the decision in *Chitel v. Rothbart*, supra. It was emphasized by the decision of the Supreme Court of Canada in *Aetna Financial Services v. Feigelman* [1985] 1 S.C.R. 2, where Justice Estey referred to what he described as "the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial".

33 Justice Estey went on to say:

> There is still ... a profound unfairness in a rule that sees one's assets tied up indefinitely pending a trail of an action which may not succeed, and even it does succeed, which may result in an award far less than the caged assets.

34 Justice Estey stated as well:

> A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the Lister rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons cannot afford to await the ultimate vindication after trial.

35 For this reason, it has been said that respect for the duty of full and frank disclosure is especially important with respect to Mareva injunctions because, by their very nature, they are liable to cause substantial prejudice to the defendant. (See the leading English text, Gee, *Mareva Injunctions and Anton Piller Relief* (3d Edition 1995 at p. 97).

> 36 It is also clear from the authorities that the test of materiality is an objective one. Again to quote the Gee text at page 98:
>
> > ... The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.
>
> 37 This principle is affirmed by decisions in Canada. (See *Leung v. Leung* (1993) 77 B.C.L.R. (2d) 305 at 313; *Canadian Pacific Railway v. United Transportation Union* (1970) 14 D.L.R. (3d) at 497; and *Panzer v. The Queen* (1990) 74 O.R. (2d) 130.

[43] These principles are now part of *Rule 4 Relationship to the Administration of Justice*, of the *Rules of Professional Conduct* adopted by the Law Society of Upper Canada. In the commentary under *Rule 4.01 The Lawyer as Advocate*, it is stated:

> When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations where the full proof and argument inherent in the adversary system cannot be achieved, the lawyer must take particular care to be accurate, candid, and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[44] In other common law provinces, the same attitude prevails. For example, Justice Green, as he then was, of the Newfoundland and Labrador Court of Appeal stated in *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld. & P.E.I.R. 203 at para. 18:

> On any ex parte application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances.

(A thorough review of the situation in the Federal Courts and in the Common Law provinces is found in Professor Robert J. Currie, "Nobody Expects the Spanish

Inquisition: A Primer on the Use (and Abuse) of *Ex Parte* Proceedings in Civil Cases" (2009) *Annual Review of Civil Litigation*, 443).

[45] In Quebec, the case law reflects the principle that *ex parte* orders can be made only in exceptional circumstances and must be limited to what is absolutely necessary (see for ex.: *Wilhelmy c. Radiomutuel inc.*, J.E. 93-354 (C.A., motions' judge)).

[46] In *Microcell Solutions Inc. c. Telus Communications Inc.*, J.E. 2004-738 (Sup. Ct.), Dufresne J., then at the Superior Court, dealing with two motions to strike orders for contempt made *ex parte*, echoing the *Friedland* judgment, stated:

> [16] Malgré que ces principes aient été énoncés dans le cadre d'une injonction *Mareva* qui, en soi, a un caractère bien exceptionnel et malgré l'existence d'une règle de pratique de l'Ontario Court of Justice (General Division), règle qui ne trouve pas son équivalent dans nos règles de procédure, l'obligation de divulgation complète et franche peut trouver néanmoins application en matière d'autorisation ou d'ordonnance obtenue *ex parte*, en l'absence de l'autre partie.
>
> [17] Cette obligation découle du caractère exceptionnel d'une ordonnance ou d'une autorisation obtenue dans pareille condition. (...)
>
> [18] L'obligation de divulgation franche et complète (« full and frank disclosure ») existe et est d'autant plus grande que le remède recherché en est un d'exception. Une requête pour demander l'émission d'une citation à comparaître pour outrage au tribunal présentée *ex parte* à un juge est nécessairement une procédure d'exception, la règle étant la procédure contradictoire.
>
> [19] La partie qui obtient une autorisation d'un juge à la suite d'une demande entendue *ex parte* s'expose à voir sa demande rejetée subséquemment s'il devait être démontré que des faits significatifs pour la décision du juge d'émettre l'autorisation avait fait l'objet d'omission délibérée ou stratégique de la part de celui qui recherchait l'autorisation. L'omission doit évidemment être flagrante.
>
> [20] Bien que cette obligation peut nécessiter l'allégation de faits qui pourraient être favorables à la défense, cette obligation ne va toutefois pas jusqu'à obliger la partie qui recherche une autorisation d'inclure dans sa requête les moyens de défense que pourrait faire valoir la partie visée par l'autorisation. L'omission reprochable porte essentiellement sur des faits déterminants et connus de la partie qui recherche l'autorisation.
>
> [Emphasis added]

[47] I fully agree with my colleague Justice Dufresne in *Microcell*. As a general rule, an obligation of full and frank disclosure applies in Quebec in connection with any *ex parte* orders because counsel for the applicant is asking the judge to engage in a

procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard. In my view, it follows that in cases where opposing interests are certain to exist, the moving party "is under a super-added duty to the court" (*Canadian Paraplegic Association*, *supra*) to state its own case fairly and to inform the Court of any points of fact or law known to it which favour the other side that may have a bearing on the outcome of the application. This obligation should be considered according to an objective standard: what would a reasonably qualified lawyer have done in the same circumstances?

[48] This was the substance of Schrager J.'s view in the instant case and I find there to be no error of law. The attorneys for the US creditors nevertheless argue that the trial judge erred in fact by concluding that they did not meet that obligation and in making harsh comments on their conduct in the *ex parte* proceeding held before Corriveau J.

[49] One may well understand that it is a sensitive issue for them. However, as the Court points out in its February 3, 2012 judgment (2012 QCCA 256), Schrager J.'s judgment should not be read as concluding that these attorneys chose to conceal material facts, namely that the civil and bankruptcy judgments were subject to appeals, but rather that they did not adequately disclose the nature of the appeals (under the direction of Gottlieb before the California Court of Appeal and under the direction of Marciano before the ninth Circuit Court of Appeals) and the fact that neither the Civil Judgments nor the bankruptcy judgments were final:

> [24] Sans minimiser la portée et la valeur de cet argument, il convient de noter que M. le juge Schrager n'a pas exactement conclu que *PWC, Gottlieb* et le *groupe Fahs* avaient caché à Mme la juge Corriveau l'existence des appels interjetés par M. Marciano en Californie. Il a plutôt indiqué qu'à son avis ceux-ci n'avaient pas adéquatement ou objectivement dévoilé ce fait à Mme la juge Corriveau. Il écrit :
>
> > [56] By far the most striking omission which is of sufficient importance by itself to rescind the orders, is the failure to adequately disclose to Justice Corriveau that both the Civil Judgments and the Bankruptcy Judgment, were subject to appeal. They were not final at the time of the hearing before Justice Corriveau nor were they final at the time of the hearing before the undersigned.
> >
> > [57] Counsel for the Creditors points to one verbal mention to Justice Corriveau at one point on the second day of his presentation (September 16, 2011). At that time, he mentioned almost « en passant » that appeals had been filed, putting the emphasis however on the fact that all judgments were enforceable.

[Emphasis added by the panel]

[50] Without attributing any intent to mislead Corriveau J. by the attorneys acting then for both the US creditors and the US trustee, it remains, considering some comments made by the *ex parte* judge,[4] that she did not properly understand the true status of the civil and bankruptcy judgments, namely that none was final and that there was a genuine likelihood that the amounts awarded by the California Superior Court would be significantly reduced on appeal or upon negotiation (a fact that Gottlieb and his counsel could reasonably not ignore).

[51] It was then up to the lawyers for the moving parties under their super-added duty to the court to correct her misapprehension of these important aspects of the file. As stated above, an attorney acting in an *ex parte* proceeding has an obligation to disclose all relevant material facts including those favouring the absent adversely affected party, especially when, as is the case here, the appeal procedures are different from those with which the judge is familiar and bear distinctive consequences (the bankruptcy appeal decision relied upon was from a panel of the trial court; existence of a right of appeal from that decision before the ninth circuit US Court of Appeals; a civil appeal does not suspend execution under the *California Code of Civil Procedure* and the need to post a statutory bond for an uncommon amount failing a *supersedeas* order; position of the US trustee in the civil appeals strongly contesting the rights of the creditors; etc).

[52] In case of insufficient disclosure, in the common law jurisdictions the case law provides for two distinct judicial approaches, that are described by Antonio F. Azevedo in "The duty to disclose on motions without notice for injunctive relief ", (2000) 23 Advocates Quarterly 499, at p. 503 as the "punitive approach" and the "discretionary approach"; see also Robert J. Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition, Canada Law Book, at. paras 2.40 and 2.45.

[53] Under the first approach, the failure to disclose a material or relevant fact, even inadvertently, causes a judgment setting aside or dissolving the *ex parte* injunction possibly with solicitor and client costs and even damages. Under the second, the courts

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[4] Justice Corriveau warned the appellants that she had not had time to look at the documents so that she was counting on the attorney to point out all relevant documents (Fahs et al.'s factum, vol. 10, DP-4 Transcripts of the hearing of September 14 and 15, 2011, p. 3650). She also made comments that could be read as indicative of a certain confusion about the final character of the bankruptcy judgment and the enforceability of the civil judgments:
THE COURT:
On s'entend? Le seul jugement qui a été rendu, le jugement final, c'est aux Etats-Unis. Ici, on n'a pas de jugement. On a un débiteur aux Etats-Unis, on n'a pas un débiteur canadien. C'est pour ça que c'est la logique de faire reconnaître la procédure étrangère, je crois, avant de dire: "Maintenant, on a
...
Me BERNARD BOUCHER:
Oui.

found that notwithstanding material non-disclosure there was a residual discretion to continue the injunction.

[54] In England, two Court of Appeal decisions adopted the second approach: *Brink's-Mat Ltd v. Elcombre* [1988] 3 All E. R. 188 and *Memory Corporation PLC v. Sidhu (No.2)* [2000] 1 W.L.R. 1443. The rationale for it is explained as follows in *Brink's-Mat* by Lord Justice Slade:

> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, *ex parte* applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making *ex parte* applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom *ex parte* injunctions have been granted, or of their legal advisers, to rush to the *Rex v. Kensington Income Tax Commissioners* (1917) 1 K.B. 486 principle as *a tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.
>
> Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J., I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such nondisclosure, to refuse to continue the injunction granted by Roch J. on 9 December 1986.

[55] In Canada, so also held the Alberta Court of Appeal in *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* [1994] A.J. No. 138, the Manitoba Court of Appeal in *Pulse Microsystems Ltd. V. Safesoft Systems Inc.* (1996), 134 D.L.R.(4th) 701 and the British Columbia Court of Appeal in *Girocredit Bank A.G v.Bader* [1998] B.C.J. No. 1516 and in *Bank of Credit and Commerce International (Overseas) Ltd. (Liquidator) v. Akbar*, 2001 BCCA 204.

[56] In my view the second approach should be adopted in Quebec as well. When there is material non-disclosure, the following factors should be considered by the judge hearing a motion to rescind or annul an *ex parte* order:

- the importance of the omitted facts to each of the issues decided by the judge;

- whether the omission was inadvertent, its relevance was misconstrued or whether the omission was made with the intent to mislead the judge;

- the prejudice occasioned to the party affected by the *ex parte* order;

- whether the order reviewed could be granted again on the basis of a corrected record.

In the end, this analysis shall in no way excuse counsel who did not discharge his or her heavy duty of candour and care. In fact, failure to comply with the obligation of full and frank disclosure is a serious breach by a court officer calling for discipline by the Court and/or the Bar.

[57] To sum up, in the present case there are two opposite ways of thinking about the situation. On the one hand, some of the unusual features of the various US proceedings were not fully brought to the attention of Corriveau J., an omission that may justify rescinding orders, as explained below. On the other hand, some features of the foreign proceedings may not have been fully understood by her, a situation that may justify redress in appeal, as explained in the concurrent judgments in files no. 500-09-022041-115 and 500-09-022040-117.

II. The power to review and rescind under the BIA

[58] It cannot be seriously disputed that *ex parte* orders can be made under the BIA in appropriate circumstances, such as the issuance of a search warrant (see s. 189(1) BIA; L.W. Houlden, G.B. Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. rev. looseleaf, (Toronto: Carswell, 2009) vol. 3 at p. 7-61 and following).

[59] Normally in cases where an *ex parte* order may be obtained, the applicable law provides for a means by which the affected party may challenge, suspend or review the *ex parte* order by the issuing court (for ex.: art. 757 (injunction), art. 738 (seizure before judgment) C.C.P.). Even when the rules are silent, a superior court has the inherent power to rescind or annul an order made *ex parte* when appropriate.

[60] The power of the Quebec Superior Court to review orders made under the BIA is provided at s. 187(5) BIA, which reads as follows:

187 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.	187 (5) Tout tribunal peut réviser, rescinder ou modifier toute ordonnance qu'il a rendue en vertu de sa juridiction en matière de faillite.

[61] A motion pursuant to s. 187(5) BIA, rather than an appeal, should be preferred in a situation such as the present one for various reasons. First, fresh evidence may be adduced as of right, whereas leave is necessary to do so on appeal. Second, a court of appeal is ill-equipped to deal with fact-finding. Third, the appeal procedure and process is more complex and expensive (for example transcripts in seven copies) than the hearing of a motion by a single trial judge. Without excluding the possibility of an appeal, all these elements favour the use of s. 187(5) BIA.

[62] It should also be resorted to when there is a change in circumstance or discovery of significant evidence that was unknown at the time of the issuance of the previous order, even if made after having heard all the parties, and which might have led to a different result. In *Elias v. Hutchison* (1981), 14 Alta. L.R. (2d) 268, the Alberta Court of Appeal wrote:

> While the language of this section is broad, it seems to me that it is designed to permit of a judge to deal with continuing matters in the bankruptcy so as not to be [b]ound by an earlier decision if faced by changing circumstances.

[63] A motion under s. 187(5) BIA can be produced even if an appeal is pending.[5] However, it cannot be brought as a substitute for an appeal in situations where all the parties were heard and the losing one merely seeks a reversal, alleging an error of law or fact; in such a case, an appeal is the only suitable procedure. In *Ontario (Motor Vehicle Dealers Act, Registrar) v. A. Farber & Partners Inc.*, 2008 ONCA 390, 293 D.L.R. (4th) 455, the Court of Appeal of Ontario recalled that the power to rescind or review is unique and not a substitute for an appeal:

> 27 It has been said that s. 187(5) is unique to insolvency in that it allows the court to review and rescind or vary an order made by a court of co-ordinate jurisdiction, and applies to any order made in the exercise of bankruptcy jurisdiction: *Fitch v. Official Receiver*, [1996] 1 W.L.R. 242 (C.A.), discussing s. 375(1) of the English *Insolvency Act 1986*, which is virtually identical to s. 187(5) of the *BIA*. However, unlike rule 37.14(1), no conditions apply before resort can be had to s. 187(5). As I will explain, a motion under s. 187(5) cannot be brought as a substitute for an appeal, such as when the time to appeal has expired. An appeal is brought when it is believed that there is reversible error in the court below. A motion under s. 187(5) is essentially different. As the English Court of Appeal states in *Fitch* at p. 246, for the provision to apply, there must be a fundamental change in circumstances, between the original hearing and the time of the motion to vary, or evidence must have been discovered that was not known at the time of the original hearing and which could have led to a different

[5] *Re Richelieu Oil Co.* (1946), 28 C.B.R. 110 (Qué. C.A.); *Re Northlands Cafe Inc.* (1996), 44 C.B.R. (3d) 170 (Alta Q.B.).

> result. Or, as the leading Canadian case has put it, the court should not hear a motion under s. 187(5) if its only purpose it to obtain an opportunity to appeal where the time to appeal has elapsed: *Re Catalina Exploration and Development Ltd.* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), rev'g (1980), 35 C.B.R. (N.S.) 30 (Alta. Q.B.). By this motion and the appeal, the Registrar asks that the court rehear the trustee's motion for directions and make another order in the place of the one already made, drawn up, entered and acted upon. This, of course, the court cannot do.
>
> [Emphasis added]

[64] Schrager J. correctly applied these rules when he asserted his jurisdiction to review:

> [42] In the view of the undersigned, given that the orders under review were made on an *ex parte* basis, virtually every argument and fact brought forward by Marciano and the Interveners constitutes a new circumstance (unless perhaps any such fact or argument was already raised and fully discussed at the *ex parte* hearing). This Court has a broad discretion under section 187(5) BIA and this is particularly so where the initial orders were granted on an *ex parte* basis. None of the arguments upon which the undersigned has relied were put before Justice Corriveau – either not at all or not fully.

[65] Schrager J. also based his decision to rescind the orders on the fact that it was understood by Corriveau J. that her orders would be subject to review, at it is usual for initial *ex parte* orders made by the commercial division of the Superior Court in CCAA proceedings. He wrote at para. 47:

> [47] The arguments seeking to limit the scope of review by the undersigned are also somewhat specious in that it was understood that there would be a review of the orders issued by Justice Corriveau. On a number of occasions during the hearing before her, Justice Corriveau states that there will be a review or « comeback » hearing with opposing counsel present.

In such a context, the moving parties cannot seriously argue that the only recourse against the *ex parte* orders should be an appeal.

[66] In conclusion, Schrager J. did not err regarding his authority to entertain motions to review and rescind under s. 187(5) BIA in the case at bar.

III. The enforceability of the US bankruptcy judgment in Canada

[67] The motion of the US Trustee was a proceeding in relation to a foreign bankruptcy proceeding. The US creditors' petition for a receiving order was an attempt

to have Marciano declared bankrupt under the BIA for failing to have paid the Civil Judgments.

[68] Marciano's lawyers argue that since the appellants proceeded *ex parte*, they were prevented from showing that not only the Civil Judgments were not final but they offended Canadian public order by their sheer magnitude and the circumstances under which they were obtained (by default/*ex parte* according to them). So too was the case of the related bankruptcy judgment in their opinion. Therefore Corriveau J. should have dismissed the orders sought and Schrager J. was right to rescind them.

[69] Part XIII, *Cross-Border Insolvencies*, ss. 267-284 of the BIA, added in 1997, specifically provides mechanisms for dealing with foreign bankruptcy judgments aiming amongst other things, at promoting cooperation between authorities and to protect the value of the debtors' property (s. 267 BIA). For Part XIII to apply, "a debtor must have 'property in Canada'; it is unnecessary for the debtor to be a Canadian resident" (Houlden, Morawetz and Sarra, *supra*, at p. 7-377).

[70] Under s. 269, a foreign representative such as Gottlieb was entitled to petition the Superior Court of Quebec, the Canadian province where Marciano owns directly or indirectly substantial assets, for a recognition of the US bankruptcy judgment even if not final since s. 281 BIA provides that the foreign proceeding does not have to be final:

281. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.	281. Le fait qu'une instance étrangère fait l'objet d'un appel ou d'une révision n'a pas pour effet d'empêcher le représentant étranger de présenter toute demande au tribunal au titre de la présente partie; malgré ce fait, le tribunal peut, sur demande, accorder des redressements

The fact that under art. 3155 C.C.Q. a foreign civil judgment cannot be enforceable if it is not final is not relevant since s. 281 BIA prevails over the C.C.Q. when there is a conflict: *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

[71] However, as pointed out by Schrager J., a foreign representative's application for recognition may be denied if considered contrary to public policy in Canada, a situation specifically contemplated by s. 284(2):

284. (...)	284. (...)
(2) Nothing in this Part prevents the	(2) La présente partie n'a pas pour

court from refusing to do something that would be contrary to public policy.

effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public

[Emphasis added]

[72] Since s. 284 BIA is included in Part XIII of the BIA dealing with foreign bankruptcy proceedings, we must construe the "public policy" (*ordre public*) exception in the context of private international law.[6] It follows that the teachings of our Supreme Court in *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, become very relevant. In *Beals*, an action was brought in a Florida court over the sale of a land valued at US$8,000 and a jury awarded US$210,000 in compensatory damages and US$50,000 in punitive damages. The Supreme Court of Canada considered a defence to counter the enforcement of this judgment in Ontario based on the notion of public policy, at paras. 71-77:

The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:

> ... the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts. . . .

Le troisième et dernier moyen de défense est fondé sur l'ordre public. Ce moyen de défense empêche l'exécution d'un jugement étranger contraire à la notion de justice canadienne. Il s'agit de savoir si le droit étranger est contraire à nos valeurs morales fondamentales. Comme l'affirment Castel et Walker, *op. cit.*, p. 14-28 :

> [TRADUCTION] . . . le moyen de défense traditionnel fondé sur l'ordre public paraît axé sur la notion de lois répugnantes et non sur la notion de faits répugnants...

How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment

Quelle est l'utilité de ce moyen de défense pour le défendeur qui veut empêcher l'exécution d'un jugement étranger? Il sert notamment à interdire l'exécution d'un jugement étranger fondé sur une loi contraire aux valeurs morales fondamentales du régime juridique canadien. De même, le moyen de défense fondé sur l'ordre public empêche l'exécution du

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[6] In fact, the proper interpretation must refer to what is manifestly inconsistent with public order, as it is understood in international relations like for art. 3155(5) CCQ.

rendered by a foreign court proven to be corrupt or biassed.
[...]

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.

jugement d'un tribunal étranger indubitablement corrompu ou partial.
[...]

Le recours au moyen de défense fondé sur l'ordre public pour contester l'exécution d'un jugement étranger signifie que l'on attaque la validité de ce jugement en dénonçant la loi étrangère sur laquelle il est fondé. Ce moyen de défense ne doit pas être invoqué à la légère. Rien ne justifie d'en élargir la portée de manière à pouvoir l'invoquer pour remédier à des injustices perçues qui ne heurtent pas notre sens des valeurs. Le moyen de défense fondé sur l'ordre public devrait continuer d'être appliqué d'une manière restrictive.

Le montant des dommages-intérêts accordés par le jury de la Floride ne fait pas entorse à nos principes. Malgré l'ampleur qu'elles ont prise, les sommes en question ne justifient pas, à elles seules, un refus d'exécuter le jugement étranger au Canada. Même s'il était possible, dans une autre affaire, d'invoquer l'ordre public pour faire valoir que le montant accordé est arbitraire, rien dans le dossier soumis en l'espèce n'autorise le tribunal canadien à réévaluer le montant accordé. Le moyen de défense fondé sur l'ordre public n'est pas destine à empêcher l'exécution du jugement d'un tribunal étranger ayant un lien réel et substantiel avec la cause d'action, pour le seul motif que la demande présentée dans ce ressort étranger ne donnerait pas lieu à des dommages-intérêts comparables au Canada.

There was no evidence that the Florida procedure would offend the Canadian concept of justice. I disagree for the foregoing reasons that enforcement of the Florida monetary judgement would shock the conscience of the reasonable Canadian.	Rien ne prouvait que la procédure suivie en Floride était contraire à la notion de justice canadienne. Pour les motifs qui précèdent, je ne suis pas d'accord pour dire que l'exécution du jugement rendu en Floride choquerait la conscience des Canadiens et des Canadiennes raisonnables.

[Emphasis added]

[73] The right to seek damages for harm to one's reputation and related consequences under California law cannot be said to be a law contrary to the fundamental morality of the Canadian legal system. On the contrary, it is a remedy well recognized under both legal traditions of this country, civil law and common law.

[74] The same is true of the possibility for a court to control abuses of process by dismissing the abusive party's claim or restricting otherwise his rights. Before the California Superior Court, a foreign court not proven to be corrupt or biased, Marciano's behaviour was depicted as abusive. His refusal to provide certain information, his erratic answers on key facts, such as his financial worth, and the firing of his acting attorneys on 16 occasions are all indications that the finding of the California Superior Court may be well founded. It is not up to us to decide that but to the California Court of Appeal; suffice to say that the decisions to exclude Marciano and to reject summarily his claims do not appear contrary to the fundamental morality of the Canadian legal system.

[75] What was apparently shocking the trial judge is the size of the civil awards. Schrager J. wrote:

> [123] In the case at bar, one of the judgment creditors who is not a party to the Canadian litigation, Mr. Iskowitz, proceeded to prove his damages before a judge alone and there is evidence in this record of the actual proof that was made of damages suffered by Itzkowitz to his reputation and his accounting practice. However with respect to the five Fahs Judgment Creditors (including the three seeking recognition in this Court) the record before the undersigned of that which was placed before the jury underscores that the damage awards were arbitrary on the face of the record : Chapnick was an administrative assistant, Tegal a bookkeeper and Fahs an IT specialist. They earned $35,000 to $50,000 annually. One ill imagines the reputation and lost earning potential of such individuals to be in the magnitude of the jury awards. The jury awards were identical to the dollar for each party. The examination of Marciano by the attorney of judgment creditors Choi and Abat is an exercise in embarrassing and shaming Marciano. No cross-examination by Marciano's counsel was permitted. Michael Resnick in his testimony in this record raises serious questions about the integrity of the

> process as a whole and specifically the so called « prove-up » hearing with regard to damages.
>
> [...]
>
> [137] The dissenting judge on the Bankruptcy Appeal Panel in addressing whether the debt allegedly due by Marciano was the subject of a *bona fide* dispute before the Bankruptcy Court, characterized the civil process referred to above as follows :
>
> > « The massive judgment against Marciano is not a judgment on the merits of petitioning creditors' claims, but rather an unprecedented sanction for Marciano's conduct with respect to the determination of those claims. The only reason that there is no dispute is that the state court precluded Marciano from defending himself by striking his answer and entering judgment as if he had made no appearance at all. Simply put, Marciano undisputedly disputes the claim; it is just that the state court muzzled him. [...] if ever there were a case in which the debtor could claim a dispute, this would be it. ». (emphasis added)

[76] It is quite true that the final civil awards made by the California Superior Court are well beyond what a Canadian court would likely grant in similar circumstances. However it should not be forgotten that Marciano himself was claiming very substantial amounts against the defendants/cross-plaintiffs who, as the trial judge pointed out, were earning $35,000 to $50,000 annually. In appearance, the Civil Judgments are commensurate with Marciano's claims and should not be considered in themselves a basis to refuse enforcement in Canada. Considering that the defence of public policy should have a narrow application, it could not be invoked to refuse to recognize the US bankruptcy judgment. Gottlieb's motion to obtain the recognition of the US bankruptcy judgment could not be denied on grounds of public policy.

[77] Could it then be granted *ex parte*?

[78] In my view, the order could be granted *ex parte* given the tenor of the allegations made by Gotlieb, a US court officer, concerning Marciano's past behaviour: "left his creditors in the lurch by leaving the United States", "brought with him all the assets he could easily transport, including his art collection", "is attempting to frustrate his creditors by transferring his assets to companies", " has the option, if advised of the U.S. Trustee's attempts to file the present motion, to once flee Canada taking as many assets with him as he can, as he has already done once", "has demonstrated his contempt for judicial process", "publically (sic) declared that he did not intend to pas a single penny to his creditors". In these circumstances, Corriveau J. did not abuse of her discretion in proceeding *ex parte*.

[79] Once she decided to recognize the US bankruptcy proceeding, Corriveau J.had to specify whether it was a foreign "main" proceeding or a foreign "non-main" proceeding. In her judgment on Gotlieb's motion rendered on September 15, 2011, she declared that the US bankruptcy proceeding was a foreign main proceeding pursuant to s. 270(2) BIA.

[80] Under s. 272(1) BIA, once the foreign judgment recognized, Corriveau J. was empowered to make any order that she considered appropriate for the protection of the debtor's property or the interests of the creditors:

272. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order	272. (1) Si l'ordonnance de reconnaissance a été rendue, le tribunal, sur demande présentée par le représentant étranger demandeur, peut, s'il est convaincu que la mesure est nécessaire pour protéger les biens du débiteur ou les intérêts d'un ou de plusieurs créanciers, rendre toute ordonnance qu'il estime indiquée, notamment pour :
(*a*) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(*a*) to (*c*) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;	*a*) s'il s'agit d'une instance étrangère secondaire, imposer les interdictions visées aux alinéas 271(1)*a*) à *c*) et préciser, le cas échéant, à quelles exceptions elles sont subordonnées, par l'effet du paragraphe 271(3);
(*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;	*b*) régir l'interrogatoire des témoins et la manière de recueillir les preuves et de fournir des renseignements concernant les biens, affaires, dettes, obligations et engagements du débiteur;
(*c*) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and	*c*) confier l'administration ou la réalisation de tout ou partie des biens du débiteur situés au Canada au représentant étranger ou à toute autre personne;
(*d*) appointing a trustee as receiver of all or any part of the debtor's property	*d*) nommer, pour la période qu'il estime indiquée, un syndic comme

in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,	séquestre à tout ou partie des biens du débiteur situés au Canada et ordonner à celui-ci :
(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and	(i) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination et d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré d'emprise que le tribunal estime indiqué,
(ii) to take any other action that the court considers appropriate.	(ii) de prendre toute autre mesure que le tribunal estime indiquée.
(2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.	(2) Si, au moment où l'ordonnance de reconnaissance est rendue, une procédure a déjà été intentée sous le régime de la présente loi contre le débiteur, l'ordonnance prévue au paragraphe (1) doit être compatible avec toute ordonnance qui peut être rendue dans le cadre de cette procédure.
(3) The making of an order under paragraph (1)(*a*) does not preclude the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act* or the *Winding-up and Restructuring Act* in respect of the debtor.	(3) L'ordonnance rendue au titre de l'alinéa (1)a) n'a pas pour effet d'empêcher que soit intentée ou continuée, contre le débiteur, une procédure sous le régime de la présente loi, de la Loi sur les liquidations et les restructurations ou de la Loi sur les arrangements avec les créanciers des compagnies.
[Emphasis added]	

[81] Since a judge may go as far as appointing a trustee as receiver for all of the debtor's property located in Canada with the power to exercise full control over them,

including their realization, the issue then becomes what kind of *ex parte* orders were appropriate in the circumstances for the protection of the interests of the creditors.

[82] I have no hesitation in concluding, based on the facts alleged, that Corriveau J. was right to appoint a person to assist the US representative in order to protect either the debtor's property or the interest of the US creditors.

[83] However, before determining the extent of the powers to be granted *ex parte* to such a person, she had to take into consideration not only the apprehension expressed by the US trustee and his allegations about Marciano past behaviour, but also the following:

> - the claims of the creditors were not yet final. As said by the dissenting judge of the appeal panel of the Bankruptcy Court, "if ever there were a case in which the debtor [Marciano] could claim a dispute, this would be it";
>
> - the likelihood that the Civil Judgments will be considerably reduced by the California Court of Appeal and the fact that Marciano had substantial assets in California;
>
> - once she had recognized the US bankruptcy proceeding as a foreign main proceeding, s. 271 BIA provides for an automatic stay of proceedings in Canada and an interdiction for Marciano to sell or otherwise dispose of any property;
>
> - the fact that there was no allegation that Marciano was running his business in Montreal in an inadequate manner and that his Canadian creditors were not paid in due course or their interests at risk.

[84] In my view, in these circumstances, the person appointed should have been the equivalent of an interim receiver under the BIA. The powers granted *ex parte* should have been limited to the search and seizure of movable property that could be easily disposed of or transferred. There was no need to authorize *ex parte* examination of Marciano and third parties, seizure of 18 buildings located in Montreal, management and control over Marciano's assets by the receiver, including the hotel, and removal of valuable paintings and piece of arts exposed in the hotel or nearby, a public place that could easily be monitored pending the next step of the Quebec proceedings. These overreaching aspects of the initial orders could also be annulled in the appeals filed by Marciano against the Corriveau's orders.

[85] I am also of the view that Schrager J. could rescind the excessive seizure orders made under the foreign representative's motion once he had concluded that Corriveau J. was not sufficiently informed about the nature of the US proceedings, including their lack of finality. However, he had no reason to rescind the recognition order and the consequential orders, including: stay of proceedings, prohibition to sell or dispose of property, appointment of PWC and search and seizure of valuable items that could

easily be moved. The failure to explain sufficiently the lack of finality of the Civil Judgments could justify some criticism and a rescission of the orders related to this failure, but not a total rejection of the foreign representative's motion who was in other respects proceeding properly under the BIA, especially considering the purpose of Part XIII of the BIA to promote cooperation and protect the interests of creditors, as expressed at s. 267.

IV. The US creditors' motion :

[86] Pursuant to s. 362(d)(1) of *Chapter 11* (US bankruptcy law), the US creditors were prohibited from commencing proceedings to enforce their claims outside the US bankruptcy context, unless duly authorized by the US bankruptcy court. At the time, they did not have such authorization, a fact undisclosed to Corriveau J. since the moving parties' lawyers seemed to be unaware of it. In fact, an authorization was obtained only on November 17, 2011, though with retroactive effect. It remains that in September 2011, the US creditors were not legally entitled to petition the Montreal Superior Court to have Marciano declared a bankrupt under the BIA (s. 43 BIA) and to have an interim receiver appointed in the interim under s. 46 BIA. If Marciano had been represented at the hearing, this lack of authorization would most likely have been raised.

[87] In any case, nothing justified the US creditors to proceed *ex parte* on the motion to appoint an interim receiver once the foreign main proceeding recognition order was issued, including the limited accessory orders described above. Their motion could wait for a full and contradictory hearing where Marciano would have argued that the claims of these creditors were not yet final, that it was likely that they would be significantly reduced and that he had committed no act of bankruptcy in Canada.

[88] Marciano's appeal with regard to the orders issued at the request of the US creditors should be granted.

[89] I also am of the view that after having heard the arguments of Marciano and taken cognizance of the new facts disclosed in connection with the claims of the US creditors, Schrager J. was correct to rescind the orders made under their motion to appoint an interim receiver.

[90] I will now consider PWC's motion for a search warrant.

V. The interpretation of s. 189 BIA

[91] S. 189 BIA provides that the Superior Court may issue a warrant authorizing the interim receiver to enter and search a place where there is property of the bankrupt and to seize it:

189. (1) Where on *ex parte*	189. (1) Sur demande *ex parte* du

application by the trustee or interim receiver the court is satisfied by information on oath that there are reasonable grounds to believe there is in any place or premises any property of the bankrupt, the court may issue a warrant authorizing the trustee or interim receiver to enter and search that place or premises and to seize the property of the bankrupt, subject to such conditions as may be specified in the warrant.	syndic ou du séquestre provisoire, le tribunal peut, s'il est convaincu, sur la foi d'une dénonciation sous serment, qu'il y a des motifs raisonnables de croire à la présence de biens du failli en un endroit quelconque, délivrer un mandat l'autorisant, sous réserve des conditions éventuellement fixées, à y perquisitionner et à y saisir les biens du failli.
(1.1) In executing a warrant issued under subsection (1), the trustee or interim receiver shall not use force unless the trustee or interim receiver is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.	(1.1) Le syndic ou le séquestre provisoire ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.
(2) Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient.	(2) Lorsque le tribunal fait incarcérer quelqu'un, l'incarcération peut s'opérer dans telle prison convenable que le tribunal juge appropriée.
[Emphasis added]	

[92] Justice Schrager decided that s. 189 BIA only applied to the property of a "bankrupt" as defined by s. 2 BIA:

2. In this Act, [...]	2. Les définitions qui suivent s'appliquent à la présente loi. [...]
"bankrupt" *« failli »*	« failli » *"bankrupt"*
"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person;	« failli » Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation

[...] juridique d'une telle personne.
[...]

According to him, Marciano does not fit this definition because no bankruptcy order has been made against him under the BIA; so s. 189 BIA was not available to PWC.

[93] This interpretation seems inconsistent with what Houlden, Morawetz and Sarra, *supra*, at p. 7-87, describe as the scope of s. 189 BIA:

> In *Re Kadri Food Corp.* (1996), 41 C.B.R. (3d) 272, 1996 CarswellNS 312, Nathanson J. of the Nova Scotia Supreme Court held that s. 189 does not authorize a warrant to be issued against any person other than a bankrupt. If this is a correct interpretation of s. 189, then the provision for an interim receiver to apply for a warrant contained in s. 189 is difficult to understand, since an interim receiver is appointed when a debtor is not in bankruptcy. On the basis of *Re Kadri*, an interim receiver would be unwise to apply for a warrant under s. 189 unless he or she had adequate indemnity from the applicant creditor.

Thus, according to these learned authors, s. 189 BIA could apply to a debtor who is not a bankrupt. I share this interpretation; otherwise, the words "interim receiver" found at s. 189 are in meaningless.

[94] Moreover, pursuant to s. 272 BIA, once a recognition order made, the Superior Court can, if satisfied that it is necessary for the protection of the interests of the creditors, issue any order that it considers appropriate. This could readily include the issuance of search warrants *ex parte* when necessary to preserve assets.

[95] However, the scope of s. 189 BIA cannot be extended to authorize a trustee, an interim receiver or a court-appointed officer under Part XIII to search and seize the property of third parties. As Houlden, Morawetz and Sarra, *supra*, write at p.7-87:

> Section 189 is restricted to the issuance of a search warrant with respect to property of the bankrupt; it is not wide enough to include property of a third party. Thus a search warrant may be issued to seize the books, records and documents of the bankrupt, but a search warrant may not be issued to seize the books, records and documents of a third party.

[96] This should not be read as meaning that an immovable belonging to a third party in which debtor's asset may possibly be found may not be searched but rather that the search must be designed only to retrieve the debtor's assets in order to seize them.

[97] In PWC's motion to obtain the issuance of a search warrant and the authorization to seize, the four premises to be searched are well-defined as places where Marciano either lives or stores his property and the items to be seized therein are movable

alleged to belong to him. As pointed out by Schrager J., it was difficult to ascertain allegedly belonging ownership of these items so that the seizures relating to them could not be quashed on the basis of arguments relating to title of property. In these circumstances, the orders authorizing search of these premises and seizure of any movables that belong or could be under the control of Marciano's currently located therein complied with s. 189 BIA and should not have been rescinded.

[98] As for the eleven bank accounts for which an authorization to seize was granted, it was alleged that they contain funds belongings to Marciano.

[99] However, PWC should not have been authorized to seize the immovables since, according to the registry office, they belonged to numbered companies. Seizure would only be valid if Corriveau J. had been convinced that these entities were mere *alter ego* of Marciano and that there was a serious risk of an attempt to dispose of them before a contradictory hearing, a conclusion she did not express in her judgments.

[100] As for Marciano's documents found in the designated premises to be searched, described above, Schrager J. wrote that their seizure is not permitted under s. 189 because the seizure of documents is not available under provincial law. I disagree and prefer to hold that s. 189 BIA allows for the seizure of documents as Duval Hesler J., as she then was, wrote in *Volailles Montréal inc. (Syndic de)*, [1996] R.J.Q. 2705 (Sup. Ct.). This opinion is confirmed by s.16 (3.1) BIA that specifically refers to the obligation for the trustee to obtain a search warrant under s. 189 in order to enter premises occupied by a third party to gain access to books, records and documents of the bankrupt.

[101] To sum up, Schrager J. erred regarding the application of s. 189 BIA in the context of a cross-border bankruptcy. Moreover, his decision to rescind and quash was based on the erroneous conclusion that a foreign bankruptcy judgment, which is not final and itself based on civil judgments that are not final, is not enforceable under the BIA. He should not have rescinded the orders made under the PWC's motion, except for the part dealing with the seizure of the 18 described immovables.

VI. The right of PWC to obtain payment of its fees and disbursements

[102] Schrager J. ordered PWC to return at its expense the movable property and documents seized as well as cash seized and sums received on account of fees and disbursements, the whole notwithstanding appeal. PWC did comply after a failed attempt to have the provisional execution suspended. It is now claiming $1,223,855.24.

[103] Who should bear PWC's fees and disbursements? To what extent?

[104] PWC contends that because it is an officer of the court, it should not have been stripped of all the rights and protections afforded to it by Corriveau J. in the appointing orders and upon which it relied to accept the appointment and to carry out its duties. It

adds that it had no independent duty to investigate the merits of the assertions made by the US creditors and the US Trustee; so it should not bear the consequences of the improper conduct of Fahs et al. and Gottlieb, if any. PWC also pleads that Schrager J. ruled *ultra petita* by:

> - ordering PWC to return movable property and documents at its expense;
>
> - ordering PWC to bear the expense of the return by guardians of the property in their possession;
>
> - ordering PWC to bear the expense of any assistance by executing bailiffs;
>
> - ordering PWC to pay to Marciano and one of the third Parties the sum of $582,028.74;
>
> - condemning PWC to costs.

[105] The texts of the motions to rescind and to quash themselves indicate that Schrager J. has ruled partly *ultra petita*. Relevant excerpts of Marcinao's motion to review, rescind and vary various orders (PWC being designated as a respondent and interim receiver/receiver) read as follows:

> **ORDER** PricewaterhouseCoopers to, upon pronouncement of the judgment to intervene herein, return any and all assets, moveable or immoveable, to the Petitioner, along with a detailed listing of assets seized since the issuance of the Orders that belong to the Petitioner;
>
> **ORDER** the Respondents to provide an undertaking to be responsible and abide by any Order that the Court may make as to damages sustained by the Petitioner by reason of the appointment of the Interim Receiver, or in the event the Petition for a receiving order is dismissed, including as to repayment of all fees and disbursements paid to PricewaterhouseCoopers inc. and Blakes, Cassels & Graydon LLP from the Petitioner's property;
>
> [...]
>
> **THE WHOLE WITH COSTS.**

The Interveners' motion to quash contains similar conclusions. Thus the *ultra petita* argument has some validity, especially with the parts of the judgment that mean that PWC must return at its expenses the property seized and bear the expenses incurred in the execution of Corriveau J.'s orders.

[106] Moreover, I agree with PWC that it was not incumbent upon PWC to conduct an independent assessment of the claims of the US creditors or of the validity of the US

bankruptcy judgment. As held by the late Chief Justice Brenner of the Supreme Court of British Columbia in *Re Down* (2003), 46 C.B.R. (4th) 58 at para. 10:

> There is no duty on an interim receiver to review or comment on the strengths or weaknesses of a petitioner's case in a bankruptcy proceeding. It is not the role of an intended receiver to conduct an independent assessment of a claim. Prior to its appointment, an interim receiver has no real status in the proceedings except to comment on the form of the order and any arrangements which the order seeks to authorize the interim receiver to enter into.

[107] In the present case, there is no evidence of bad faith or wilful blindness. PWC could rely on the situation described in the motions prepared by Gottlieb and the US creditors as conclusive about the need to urgently seize the assets that could easily be displaced and moved out of the reach of the Superior Court. In these circumstances, it was neither inappropriate nor unreasonable for PWC to ask for search warrants and seizure orders. In my view, PWC is entitled to be paid its reasonable fees and expenses incurred in discharging its duties an officer of the Court.

[108] I will now address the liability for the fees and disbursements.

[109] In *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp*. (1972), 29 D.L.R. (3d) 373 (Man. C.A.), and in *Deloitte, Haskins & Sells Ltd. v. P.R.D. Travel Investments Inc.* (1984),10 D.L.R. (4th) 572 (B.C. C.A.), it was held that the receiver's remuneration must come out of the assets under the control of the Court. In *Braid*, writing for the Manitoba Court of Appeal, Dickson J.A. (as he then was) wrote:

> The disposition of this appeal does not present any difficulty if one bears in mind that a receiver appointed by the Court is the receiver of the Court, not the receiver of the parties who sought the appointment: *Boehm v. Goodall*, [1911] 1 Ch. 155, followed by the British Columbia Court of Appeal in *Johnston v. Courtney*, [1920] 2 W.W.R. 459. In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice, be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that at the time of the appointment the Court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B.D. 67.

[110] The notion of assets under the control of the court has been interpreted widely enough to include any assets subject to the administration of the court officer, including assets held in trust for third parties: *Ontario Securities Commission v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 386 (Ont. C.A.).

[111] I see no reason to detract from these principles. I wish to add that in a case of an *ex parte* application, the receiver or interim receiver may be wise to ask for an alternative proviso at the time of the appointment.

[112] In the case at bar, the fact that Corriveau J.'s orders could be rescinded, in part or in totality, cannot retroactively deprive an officer of the court that acted accordingly of the rights and protections granted upon its appointment. By trying to give retroactive effect to the rescinding order, Schrager J. overstepped his proper authority. The entitlement of a court officer to appropriate compensation for fees and expenses incurred under the auspices of, and during the currency of a court order, cannot be affected by the ultimate validity of such a court order: *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp*. (1993), 106 DLR (4th) 132 (Ont. C.A.).

[113] Moreover, for the reasons indicated above, I am of the view that Corriveau J. was right to grant in part Gottlieb's motion for recognition of the US bankruptcy judgment as a foreign main proceeding and to appoint PWC, though not as receiver of the Canadian assets but rather as an interim receiver. The fact that she should have refused to grant to this court officer extensive powers does not alter the fact that PWC was properly appointed and acted according the terms of the orders issued.

[114] In these circumstances, Schrager J. should only have terminated this appointment or reduced the powers granted to PWC. Under both scenarios, PWC remains entitled to its fees and disbursements.

[115] In a document entitled "Second Interim Report" filed on October 31, 2011, PWC indicated that $414,754.32 has been used to pay for its disbursements and $109,121.92 for its fees and that $699,979 in fees and disbursements remained owing (for a total of $1,223,855.24).

[116] Are part of the fees and disbursements excessive? This issue is best decided later in the course of a contradictory hearing on PWC's accounts, which is the usual procedure under the BIA.

[117] The reasonable disbursements and fees to be paid to PWC as a court officer appointed at the request of the US Trustee "shall form a first charge" on Marciano's Canadian assets, including the assets owned or controlled by him indirectly, including the trust and the numbered companies, as per the appointing order made by Corriveau J.

[118] If at the end of the day, the US bankruptcy proceedings are invalidated or considered abusive, excessive or something similar by the US bankruptcy courts or the Court of Appeal for the 9th circuit, the reasonable amounts to be granted to PWC should be considered as a consequential damage suffered by Marciano as a result of the various proceedings initiated by the US creditors, to be offset from any amount due to them by him under the final Civil Judgments.

VII. A pragmatic solution

[119] Since Schrager J. dismissed PWC while I propose to confirm the appointment of PWC made by Corriveau J., though with limited powers, what is the best manner to proceed?

[120] Considering all the new facts brought to the attention of this Court and the likely content of the impending judgments of the California Court of Appeal, it should be left to the US trustee, if he considers it appropriate, to petition again the Quebec Superior Court to have PWC or another entity appointed with the necessary powers to protect Marciano's creditors. The file is open and a contradictory debate could be held shortly.

[121] The best solution no doubt remains a settlement out of court, an option that would be the best means of bringing an end to a legal saga for which both Marciano and the US creditors bear responsibility.

CONCLUSION

[122] For these reasons, I propose allow the appeal, without costs, to set aside the judgment of the Superior Court dated December 8, 2011 and to replace its paras. 197 to 216 by the following:

> [197] **GRANTS** in part the Motion to Review, Rescind and Vary Various Orders Rendered pursuant to the *Bankruptcy and Insolvency Act* of Georges Marciano dated September 28, 2011;
>
> [198] **GRANTS** in part the Motion to Quash the Issuance of a Search Warrant and Authorization to Seize the Property of the Debtor, to Rescind and Dismiss Orders and for the Issuance of Safeguard Orders of Michel Bensmihen, es qualité of trustee of the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc. dated September 28, 2011;
>
> [199] **RESCINDS** the following orders, issued by Justice Chantal Corriveau dated September 15, 2011 :
>
> Namely :
>
> 1. Paras. 9, 10 and 13 of the Order (Recognition of a main Foreign Proceeding) and replaced paras. 11 and 12 by the following:
>
> > [11] **APPOINTS** PWC as interim receiver of Georges Marciano's property located in Canada;

[12] **EMPOWERS** PWC to seize any moveable assets that belong or could have been under the control of Marciano and that could easily be moved or otherwise disposed of, and **RESERVES** to PWC the right to apply to this Court for any further orders that may be necessary or appropriate to protect the rights of Marciano's creditors;

2. Paras. 8 and 9 of the Order (Issuance of a search warrant and the authorization to seize property of the Debtor);

3. Order (Interim Receiver).

[200] **QUASHES** all seizures of immoveable made in virtue of the Warrant of Search and Seizure dated September 15, 2011, the Second Warrant of Search and Seizure dated September 16, 2011 and the Amended Second Warrant of Search and Seizure dated September 16, 2011 and;

[201] **GRANTS** mainlevée of all of the seizures practiced in the present record of all immovable property and more specifically, with regard to the following:

« a) La fraction de l'immeuble détenu en copropriété divise ayant front sur la rue St-Jacques, en la ville de Montréal, province de Québec, comprenant :

- La partie privative (unité résidentielle) connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SEPT (3 412 757) du cadastre du Québec, circonscription foncière de Montréal;

- La quote part afférente à ladite partie privative dans la partie commune et connue et désignée comme étant le lot numéro TROIS MILLIONS QUATRE CENT DOUZE MILLE SEPT CENT CINQUANTE-SIX (3 412 756) du cadastre du Québec, circonscription foncière de Montréal.

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 13 061 075.

Avec la bâtisse dessus érigée portant le numéro **262, Saint-Jacques, Montréal, province de Québec, H2Y 1N1**. »

b) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT DIX-NEUF (1 181 819) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses dessus érigées notamment celle portant le numéro **320, rue Notre-Dame Est, Ville de Montréal, province de Québec, H2Y 1C7**. »

c) « Un certain emplacement ayant front sur la Place d'Armes dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-ET-UN (1 180 941) et de la moitié indivise (1/2) du lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT TRENTE-NEUF (1 180 939) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **501-507, Place d'Armes, Ville de Montréal, province de Québec H2Y 2W8**. »

d) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT TRENTE-HUIT (1 181 638) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **444-454 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3C3**. »

e) « Un certain emplacement situé sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE HUIT CENT ONZE (1 181 811) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **281 et 295 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1H1**. »

f) « Un certain emplacement ayant front sur la rue Saint-Paul est dans la Ville de Montréal, province de Québec, connu et désigné comme composé du lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE NEUF CENT QUATRE (1 181 904) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse de cinq étages dessus érigée portant les numéros **262 et 264 rue Saint Paul est, Ville de Montréal, province de Québec H2Y 1G9**. »

g) « Un certain emplacement situé sur la Place Jacques Cartier, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SIX CENT QUARANTE (1 181 640) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant les numéros **438 à 442 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**. »

h) « Un certain emplacement ayant front sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant les lots numéros UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT CINQUANTE-HUIT (1 180 958) et TROIS MILLIONS DEUX CENT QUARANTE QUATRE MILLE SIX CENT QUATRE-VINGT-SEPT (3 244 687) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant l'adresse **11 – 21, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S5**. »

i) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-ET-ONZE (1 181 271) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble dessus érigé portant les numéros **109, 111, 115, 117 et 119, rue de la Commune Ouest et 115, rue de la Capitale, Ville de Montréal, province de Québec H2Y 2C7**. »

j) « Un certain emplacement situé sur la rue de la Commune Ouest, dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE DEUX CENT SOIXANTE-TROIS (1 181 263) du cadastre du Québec, circonscription foncière de Montréal, avec la bâtisse dessus érigée portant le numéro **133, rue de la Commune Ouest, Ville de Montréal, province de Québec H2Y 2C7**. »

k) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE SEPT CENT QUATRE-VINGT QUATORZE (1 180 794) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant les numéros **200-212, rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1T3**. »

l) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-HUIT (1 181 788) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **428 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

m) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SIX (1 180 946) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigé portant le numéro **60 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

n) « Un certain emplacement situé sur la rue Notre-Dame ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE NEUF CENT QUARANTE-SEPT (1 180 947) du cadastre du Québec, circonscription foncière de Montréal, avec les bâtisses ci-dessus érigées notamment celle portant les numéros **54 et 56 rue Notre-Dame ouest, Ville de Montréal, province de Québec H2Y 1S6**. »

o) « Un certain emplacement ayant front sur la rue Saint-Jacques ouest dans la Ville de Montréal, province de Québec, connu et désigné comme étant le lot numéro UN MILLION CENT QUATRE-VINGT MILLE SIX CENT TRENTE-SEPT (1 180 637) du cadastre du Québec, circonscription foncière de Montréal, avec l'immeuble ci-dessus érigée portant les adresses **249-251, rue Saint-Jacques, Ville de Montréal, province de Québec H2Y 1M6**

p) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-SEPT (1 181 787) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **422 Place Jacques Cartier, Ville de Montréal, province de Québec, H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

q) « La fraction de l'immeuble détenu en copropriété divise situé dans la Ville de Montréal (Arrondissement Ville-Marie) comprenant :

- La partie privative connue et désignée comme étant le lot numéro UN MILLION CENT QUATRE-VINGT-UN MILLE SEPT CENT QUATRE-VINGT-NEUF (1 181 789) du cadastre du Québec, circonscription foncière de Montréal, correspondant à l'appartement dont l'adresse est le **424 Place Jacques Cartier, Ville de Montréal, province de Québec H2Y 3B3**;

- La quote part afférente à ladite partie privative dans les parties communes connues et désignées comme étant les lots numéros UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-NEUF (1 285 169), UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-DIX (1 285 170) et UN MILLION DEUX CENT QUATRE-VINGT-CINQ MILLE CENT SOIXANTE-ET-ONZE (1 285 171) du cadastre du Québec, circonscription foncière de Montréal,

Le tout tel qu'établi à la déclaration de copropriété publiée au bureau de la publicité des droits de la circonscription foncière de Montréal sous le numéro 3 913 667 telle qu'amendée aux termes de l'acte publié à Montréal sous le numéro 5 242 571. »

[202] **ORDERS** the radiation of all inscriptions of such immovable seizures from the Index of Immovables;

[203] **ORDERS** Joseph Fahs, Steven Chapnick and Elizabeth Tagle to return any and all documents and computer hard discs seized in any form, and not to retain copies of any such documents or computer records, in any form;

[204] **ORDERS** PriceWaterhouseCoopers Inc. to render account of any and all receipts and disbursements of any business interests in their possession or under their control or surveillance as Interim Receiver in this file since September 15, 2011;

[205] **RESERVES** the rights and recourses of Georges Marciano, Michel Bensmihen es qualités of Trustee to the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc. to return to this Court for supplemental orders as may be necessary to give effect hereto;

[206] **ORDERS** provisional execution of this judgment notwithstanding appeal;

[207]**THE WHOLE** with costs against Joseph Fahs, Steven Chapnick and Elizabeth Tagle, solidarily.

PIERRE J. DALPHOND, J.A.