SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-041322-112

DATE : December 8, 2011

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE RECEIVERSHIP OF AND IN THE MATTER OF THE FOREIGN BANKRUPTCY OF :

GEORGES MARCIANO
Debtor/Petitioner
And
JOSEPH FAHS
STEVEN CHAPNICK
ELIZABETH TAGLE
Creditors/Respondents
And
PRICEWATERHOUSECOOPERS INC.
Interim receiver
And
DAVID GOTTLIEB
Foreign Representative
And
MICHEL BENSMIHEN, es qualité of trustee to the C.K.S.M. Trust
9204-7570 QUÉBEC INC.
9211-9882 QUÉBEC INC.
9213-4568 QUÉBEC INC.
Co-Petitioners

JUDGMENT

JS 1319

INTRODUCTION

[1] What effect should be given by a Canadian court to the following :

1. a foreign civil judgment rendered by default by a California jury condemning defendant to pay many millions of dollars for non-pecuniary damages when the judgment is enforceable yet still subject to an appeal;

2. a foreign bankruptcy judgment also subject to an appeal, placing the defendant in bankruptcy given his failure to satisfy the civil judgment referred to above?

FACTS

[2] Georges Marciano (« Marciano ») was one of the co-founders of Guess Jeans. The multimillion dollar sale of his interest in that company in 1993 allowed him to invest in many different assets and ventures comprising real estate, art, jewelry and automobiles amongst others.

[3] In August of 2007, Marciano instituted proceedings in his home city of Los Angeles against the Creditors/Respondents herein, Joseph Fahs, Stephen Chapnick and Elizabeth Tagle (« Fahs et al ») together with two other former employees (hereinafter collectively the Fahs Judgment Creditors) involved in accounting, administrative and technology duties for Marciano. He accused them of theft, misappropriation, and fraud. The Fahs Judgment Creditors defended the proceedings and filed cross-complaints claiming damages for defamation and emotional distress arising from the proceedings as more fully set forth hereinafter.

[4] In June of 2008, Marciano also initiated related proceedings against his former accountant Gary Itzkowitz and related parties, all of whom also filed cross-complaints for emotional distress and defamation.

[5] Marciano's conduct of the California litigation was lacking, to say the least. He changed attorneys multiple times and failed to submit to discovery depositions or to provide documentary evidence on discovery in support of his claims. His multitude of failures to comply with court orders and his abuse of procedure in such regard finally gave rise in January and February 2009 to orders by the case management judge sanctioning his behavior. The effect of this was ultimately to dismiss his actions and permit the cross complaints to proceed against him by default. At the time of these sanction orders the quantum of damages sought in virtue of the cross complaints had not yet been alleged as permitted by California law.

[6] Following the sanction orders, specific amounts of damages allegedly suffered by the cross-complainants were asserted. These amounted to hundreds of millions of dollars in the aggregate. Hearings before a jury were held from which Marciano was excluded (except for one session when he was examined), though his attorney was present albeit with observer status.

[7] The outcome of these hearings were jury awards which exceeded the amounts claimed by the cross complainants . Accordingly, the judge reduced the amounts so that the following civil condemnations (« Civil Judgments ») were finalized against Marciano in California on October 2, 2009:

Joseph Fahs	$55,000,000
(Jury awarded	$74,044,000)
Steven Chapnick	$25,000,000
(Jury awarded	$74,044,000)
Elizabeth Tagle	$15,300,000
(Jury awarded	$74,044,000)
Miriam Choi	$55,000,000
(Jury awarded	$74,044,000)
Camille Abat	$55,000,000
(Jury awarded	$74,044,000)

[8] At the same time, Ipskowitz was awarded $45 million by the judge sitting without a jury. His two co-cross-claimants were awarded $5 million each.

[9] These awards included for Tagle (by way of example) the following :

$14,044,000	Future economic loss
$5,000,000	Past mental suffering and physical pain
$15,000,000	Future mental suffering and physical pain
$17,500,000	General damages for injury to reputation
$17,500,000	Shame, mortification or hurt feelings
$5,000,000	Punitive damages

[10] The amounts and breakdown for the other Fahs Judgment Creditors are similar.

[11] Marciano appealed the judgments. California law requires the posting of security equivalent to the amount of the judgments (which in this case was slightly in exces of $260 million in the aggregate), failing which judgments are enforceable notwithstanding appeal. His efforts to obtain a judicial stay of the judgments were unsuccessful.

[12] Not having succeeded in collecting anything of significance on account of the Civil Judgments, the judgment creditors (or some of them) petitioned Marciano into bankruptcy. David Gottlieb (« Gottlieb ») was eventually named as trustee. Despite Marciano's defense of the bankruptcy proceeding, it was held on March 10, 2011 that since the unsatisfied debts arose from enforceable judgments he did not have a good faith defense to the bankruptcy petition (the so-called « *per se* rule »). This ruling (« Bankruptcy Judgment ») was upheld by a Bankruptcy Appelate Panel in December 2010 but is still subject to an appeal before the United States Court of Appeals for the Ninth Circuit.

[13] In 2003 Marciano met a young woman who was originally hired as an *au pair* to care for his four children. A romance began. The young woman, Ms. Sasha Romer, is a Montréal native and on a visit to Montréal with her in 2006, Marciano was favorably impressed with the city and acquired his first building in its historic city centre. Over the next three years he acquired 16 other buildings in the historic centre including an operating hotel. The aggregate acquisition price of these buildings was approximately $80 million. All of these buildings were purchased through corporations controlled indirectly by Marciano.

[14] He also began moving property to Montreal including his formidable art collection much of which has been exhibited at the hotel.

[15] While this transfer of assets to Montréal may have accelerated after the Civil Judgments it appears to have been an ongoing process. Following the Civil Judgments, in October of 2009, the 17 buildings were transferred to three corporate entities (9204-7570 Québec Inc., 9211-9882 Québec Inc. and 9213-4568 Québec Inc.) which are controlled by the CKSM Family Trust, the beneficiaries of which are Marciano and his four children (the three companies and the trust are hereinafter referred to as the « Intervenants »).

[16] On September 14, 2011, Fahs, Tagle, Chapnick, Gottlieb and PWC presented three motions, on an *ex parte* basis, before the Commercial Division of the Superior Court, District of Montréal, Justice Chantal Corriveau, presiding, namely :

i) a « Motion to Obtain the Recognition of a Main Foreign Proceedings (section 272 of the Bankruptcy and Insolvency Act (« BIA »)) », dated September 13, 2011 (hereinafter the « Motion for Recognition »). In this motion Gottlieb and PWC sought recognition of the Bankruptcy Judgment as a foreign main proceeding under the BIA and of Gottlieb as the foreign representative. Also, orders were sought to allow for the examinations of various persons including Marciano. PWC was named as receiver pursuant to section 272 BIA with various powers over the assets of Marciano, the Intervenants and other corporate and trust entities;

ii) a « Motion to Appoint an Interim Receiver (section 46 of the Bankruptcy and Insolvency Act) », dated September 13, 2011 (hereinafter the « Motion for Interim Receiver ») in virtue of which PWC was named as Interim Receiver under the BIA with respect to Marciano's assets.

iii) 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 (« BIA »)) », dated September 13, 2011 (hereinafter the « Motion for Search Warrant ») in virtue of which the search of various premises was sought with the power to seize property found therein belonging to Marciano, the Intervenants and other corporate and trust entities.

[17] At the same time, a Petition for Receiving Order seeking a declaration of bankruptcy against Marciano under the BIA was issued. This petition has not as yet been heard by the Court.

[18] An amended Motion for Search Warrant seeking permission to search additional premises was presented on the second day of the hearing (September 15, 2011) before Justice Corriveau.

[19] All three motions were granted and orders substantially as sought were issued by Justice Corriveau.

[20] Gottlieb, PWC and Fahs et al (the « Creditors ») then proceeded to search and seize and take possession of assets at various locations and to take possession of the hotel located at 262, St-Jacques West, Montreal.

[21] Also included in the search and seizure process was the private residence of Marciano located on the top floor of the hotel property.

[22] In all, millions of dollars worth of art, watches, jewelry, gemstones, cars, real estate, cash, computers and documents were seized. The movable property was removed to storage over the following days.

[23] On September 28, Marciano filed a Motion to Review, Rescind and Vary Various Orders Rendered Pursuant to the Bankruptcy and Insolvency Act (« Marciano Motion to Review ») in virtue of which Marciano sought various orders and conclusions with respect to the aforementioned orders issued by Justice Corriveau including and particularly that the orders be rescinded and that the seizures be quashed.

[24] Similarly on the same date, Michael Bensmihen (in his quality as trustee of the C.K.S.M. Trust) as well as 9204–7570 Québec Inc., 9211–9882 Québec Inc. and 9213–4568 Québec Inc. (hereinafter collectively the Intervenants) filed a Motion to Quash the Issuance of the Search and Seizure Warrants and to rescind the Orders («Intervenants' Motion to Quash ») issued by Justice Corriveau.

[25] After a case management hearing before Lalonde, j.c.s. wherein it was provided that witnesses would be heard out-of-court, a hearing was scheduled and subsequently proceeded before the undersigned on October 14, 15 and 17, 2011. The only witness heard *viva voce* before the undersigned was Ms. Sasha Romer. All other witnesses were heard out-of-court and the Court proceeded on the basis of the transcripts, as well as the affidavits and documentary evidence.

[26] At the end of the hearing and based on the consent of the parties, certain safeguard orders were issued by the undersigned with regard to the operations of the hotel business and the *modus operandi* between the parties while the undersigned was deliberating.

[27] On November 25, 2011 a motion to reopen the hearing was granted, for the sole purpose of filing certain additional documentary evidence by way of current proceedings and orders in the US bankruptcy file. The motion was granted and in addition to the proceedings and orders sought to be filed, additional proceedings were filed by consent and will be referred to hereinbelow.

ISSUES

[28] The Creditors dispute the Marciano Motion to Review and the Intervenants' Motion to Quash taken under section 187(5) BIA as the appropriate recourse in the circumstances.

2. Did the Creditors make full and frank disclosure of the material facts and relevant provisions of law during the *ex parte* hearing before Justice Corriveau ? If they did not, what is the consequence?

3. What is the impact of the pending appeals in the United States of the Civil Judgments and the Bankruptcy Judgment? Can the judgments be recognized or enforced in this jurisdiction?

4. Given the circumstances in which they were obtained and the amounts awarded for non-pecuniary damages, is the recognition of the Civil Judgments contrary to public order?

5. Was Marciano's right to be heard infringed in the California civil court in the process leading up to the Civil Judgments ? If so, what is the impact on the recognition and enforcement of the Civil Judgments in this jurisdiction?

6. Is a warrant for search and seizure under section 189 BIA available prior to a bankruptcy occurring pursuant to the BIA?

7. To what extent can the property of third parties be seized under a section 189 BIA warrant? Can documents, irrespective of the identity of their owner, be seized under section 189 BIA?

8. Was there sufficient urgency on the face of the motions presented to Justice Corriveau to justify proceeding *ex parte*? Was there sufficient need for protection of the assets to justify the appointment of an interim receiver under section 46 BIA?

DISCUSSION

[29] At the commencement of the hearing before the undersigned, counsel for the Creditors submitted that the Marciano Motion to Review and the Intervenants' Motion to Quash must be supported by *viva voce* evidence and that the document filings, affidavits and out-of-court depositions were not sufficient proof to support the motions.

[30] Since the orders of Justice Corriveau were granted *ex parte* and had such an enormous impact on Marciano and the Intervenants, it was imperative that a review hearing be held rapidly.

[31] Against this backdrop and based on the rule of proportionality, article 151.6 CCP dealing with case management orders and article 2 CCP (providing for the flexibility of procedure), Justice Lalonde ordered out-of-court examinations

of Gottlieb, Fahs, Chapnick, Tagle and Brooks as well as Marciano. Other witnesses were examined pursuant to the order of Justice Corriveau.

[32] The order of Justice Lalonde was not the subject of any appeal.

[33] Accordingly in this record, transcripts of the depositions of the following persons were filed as evidence together with accompanying exhibits :

- Marciano
- Bradley Brook (« Brook ») the US Bankruptcy attorney of the Fahs Judgment Creditors
- Marc Rubin, a local real estate attorney who acted for Marciano
- Michael Reznick (« Reznick »), a US Attorney of Marciano
- Christian Bourque, representative of PWC
- Michel Bensihmen, a real estate agent and trustee of the C.K.S.M. Trust

[34] There are dozens, if not hundreds of objections made during the out of court examinations which have not been adjudicated upon. The undersigned has reviewed all of the above and it appears that the answers to the questions which are the subject of objections and indeed much of the depositions conducted by the Creditors were without significance to this judgment and would have no impact on the result. Moreover, in large measure the questions put by counsel to the Creditors can be summarized as efforts to seek information on the assets of Marciano, the Intervenants and other corporate and trust entities referred to in the proceedings. This information is not relevant for the present purpose other than perhaps as justification for the necessity to appoint an interim receiver to protect the debtor's assets. Again, and as will become evident, this information would have no impact on these reasons.

[35] Gottlieb was never deposed. Apparently, there was a mixup with the availability of the stenographer and Gottlieb's subsequent lack of availability made it impossible to depose him before the hearing before the undersigned. Marciano and the Intervenants' counsel wished to proceed as rapidly as possible and so proceeded without the deposition of Gottlieb.

[36] The transcripts of all of the aforementioned examinations are filed in the record and make proof. Moreover the copies of the foreign proceedings and judgments filed in this record make proof of their contents (article 2822 CCQ).

[37] The odd aspect of counsel's submission is that (with two minor exceptions)[1] there was no *viva voce* evidence before Justice Corriveau. All of the motions were presented based on affidavits containing two paragraphs (i.e. the identity of the affiant and that all of the allegations in the motions were true and correct.

[38] If the undersigned were to rule that Marciano's Motion to Rescind and the Intervenants' Motion to Quash could only be sustained with *viva voce* evidence then I would surely have to come to the same conclusion with respect to the Motion for Interim Receiver, Motion for Recognition and the Motion for Search Warrant; the standard of evidence could be no less or no different. Accordingly, I would have to rescind on such ground alone.

[39] The Creditors' submission in this regard is rejected.

1. Section 187 (5) recourse

[40] Marciano and the Intervenants have moved that the orders issued *ex parte* by Justice Corriveau be rescinded pursuant to section 187 (5) BIA which reads as follows :

> « 187. (1) [...]
>
> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction. »

[41] This subsection permits a judge to deal with continuing matters in an insolvency file and not to be bound by earlier decisions where circumstances have changed[2] or fresh evidence is brought forward[3].

[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 Intervenants constitutes a new circumstance (unless perhaps any such fact or argument was already raised and fully discussed at the *ex parte*

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1 Justice Corriveau requested evidence from : i) the US attorney of Gottlieb (Jeremy Richards) who was present at the hearing before her to demonstrate that certain accounting documents emanating from Marciano were not the subject of any privilege and ii) the representative of the interim receiver, Mr. Christian Bourque regarding the measures put in place to safely seize the works of art.

2 L.W. HOULDEN, G.B. MORAWETZ and Jannis P. SARRA, *Bankruptcy and Insolvency law of Canada,* 4th ed. vol.3, Toronto, Carswell, 1922, loose leaf, updated in September 2011, p. 846 et fol.

3 *Id.*

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[4]. None of the arguments upon which the undersigned has relied were put before Justice Corriveau – either not at all or not fully.

[43] The proposition put forward by counsel for the Creditors to the effect that any new circumstance brought forward must be material and substantial is a truism in the present context[5]. Every element brought forward by Marciano and the Intervenants which was not raised before Justice Corriveau and upon which the undersigned has relied is material and substantial.

[44] Counsel for the Creditors also argues that section 187(5) BIA is not to be used as a substitute for an appeal. However counsel relies on case law dealing with the application of section 187(5) BIA to judgments arising from contested matters[6]. Again, this Court reiterates that on rescinding the decisions the undersigned has relied on facts before the Court and legal argument presented to the undersigned that were not put before Justice Corriveau. Had such facts and arguments been properly presented to her, as they were here, it would seem clear that, none of the orders presently under review would have been issued.

[45] Counsel for the Creditors indicates that Marciano filed appeals from the Corriveau orders. Counsel for Marciano indicated at the hearing before the undersigned that these appeals were filed de *bene esse* as a cautionary measure in order to comply, if necessary, with the 10 day delay to appeal stipulated in the BIA. However, no such reference occurs on the face of the appeal documents. In any event, the argument is moot since the Motion to Quash filed by Intervenants is in itself sufficient to adjudicate on the substantive grounds discussed in these reasons.

[46] Nevertheless the authorities establish that appeals and motions under section 187(5) BIA can coexist provided that the recourse under section 187(5) BIA does not become a disguised appeal[7]. Again, the authority relied upon arises from contested proceedings. The present proceedings were *ex parte*. The context completely changes the argument. The motions based on section 187(5) BIA before the undersigned can hardly be said to be disguised appeals when Marciano and the Intervenants were not invited to be present in the « court of first instance ».

[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

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4 *Re MacCulloch Estate*, 13 C.B.R. (3d) 201 NSSC par. 24.
5 *Re C.F.G. Construction*, 2011 QCCS 434, par. 22-27.
6 *Id.*; *Re Northlands Cafe Inc.*, 1996 CanLII 10525 (Alta QB).
7 *Id.*, note 6.

during the hearing before her, Justice Corriveau states that there will be a review or « comeback » hearing with opposing counsel present[8].

[48] It should also be mentioned with respect to the Intervenants that they were not made parties to the motions presented before Justice Corriveau, although they were affected by the conclusions. For this reason alone, their recourse in rescission under section 187(5) BIA can hardly be said to be a disguised appeal.

2. Full and frank disclosure

[49] As stated above, all three motions the revision of which is sought herein were brought *ex parte*. A litigant seeking an *ex parte* order has the duty to make full and frank disclosure to the court of all relevant facts and law.

[50] *U.S.A.* v. *Friedland*[9] is the leading case on the subject :

> **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. [...]
>
> **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 and 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.
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> **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

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8 Transcript DP-4 Sept. 15, 2011, pp. 47,49, 129 and 139.

9 [1966] O.J. No 4399 at p. 26 et fol. (Ont. Ct. of J.) (QL/LN); see also *Sharelson* v. *I & I Worldwide Inc.* [1998] O.J. No 635 (Ont. C.A.) (QL/LN).

> 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.
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> **29** These principles are so well established in the law that it is hardly necessary to cite supporting authority. [...]
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> 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.
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> 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 ».

[51] This notion of full and frank disclosure is well established in Common Law jurisdictions and is recognized as forming part of the law of Québec.[10] The notion has been applied in Québec to Mareva injunctions[11] and initial orders[12] obtained under the Companies' Creditors' Arrangement Act[13]. The doctrine of full and frank disclosure has also been applied to applications to obtain *ex parte* orders recognizing foreign main proceedings in insolvency matters and the appointment of a foreign representative in Canada as provided by section 267 and fol. BIA[14].

[52] It is immaterial whether the notion is borrowed from the Common Law (when applying Common Law remedies such as injunctions or the appointment of interim receivers) or from the obligation to exercise rights reasonably and in good

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10 *Microcell Solutions Inc.* v. *Telus Communications*, [2004] J.Q. No 1438, par. 15 (C.S.) (QL/LN).
11 *Cinar Inc.* v. *Weinberg* [2005] J.Q. No 10405 par. 15 (C.S.) (QL/LN).
12 *Re Groupe de Scierie G.D. Inc.* [2006] J.Q. No 14114, par. 36 (C.S.) (QL/LN).
13 R.S.C., 1985, c. C-36.
14 *Stanford International Bank*, 2009 QCCS 4106.

faith (articles 6 and 7 CCQ and article 4.1 CCP) or from the Court's power to sanction abuse (articles 54.1 CCP and fol.).

[53] *U.S.A.* v. *Friedland* deals with a Mareva injunction obtained on an *ex parte* basis. The rationale of Sharpe j. to put the disclosure of counsel under close scrutiny certainly applies to the case at bar. The Mareva is an exceptional remedy resulting in defendant's assets being tied up before his day in court.[15] The proceedings herein had precisely this goal and an effect all the more draconian since assets were removed from the possession of the Intervenants and other corporate parties as well as from Marciano and perhaps from Romer. The rationale of the full and frank disclosure rule should apply to this case *a fortiori*.

[54] In the case at bar, Marciano and Intervenants assert that there were a number of significant facts which were not disclosed or inadequately disclosed at the hearing before Justice Corriveau by counsel to the Creditors.

[55] No mention was made before Justice Corriveau that the Civil Judgments were essentially rendered on an *ex parte* basis. The written proceedings refer to the sanction orders but the latter are not produced[16]. The judgments of the presiding judge finding Marciano liable to the Fahs Judgment Creditors, do contain a passing reference to a « default proveup hearing »[17].

[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[18].

[58] During an *ex parte* hearing taking place over two days on three motions including an aggregate of approximately 400 paragraphs (albeit with a degree of duplication between the motions) and in excess of 100 exhibits, this is the only mention of the fact that appeals had been filed.

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15 *U.S.A.* v. *Friedland*, *op. cit.*, note 9, par. 32-35.
16 Motion for Recognition, par. 7.
17 Exhibit R-3 to the Motion for Interim Receiver.
18 Transcript DP-4, September 14, 2011, p.39.

[59] The notices of appeal on the merits of the Civil Judgments were not produced at all before Justice Corriveau though 30 other US proceedings were produced as exhibits.

[60] Perhaps more significantly, the transcript of the proceedings before Justice Corriveau are replete with references to the executory nature of the judgments without saying (with the sole exception referred to above) that the Civil Judgments were subject to appeal. It appears from counsel's representations as well as the US proceedings and judgments filed in evidence, that under California law, judgments are enforceable notwithstanding appeal unless sufficient security is posted or a court of appeal exercises discretion to stay execution.

[61] There is no doubt that Justice Corriveau was led to believe that the Civil Judgments were final.

[62] At the September 14, 2011 hearing before Justice Corriveau reference was made to the slight reduction by the trial Judge of the jury award to $260 million[19]. Justice Corriveau then states : « Then it becomes final judgment throughout » and Me Boucher replies : « That's correct ».

[63] The judgment of the Bankruptcy Review Panel[20] of September 15, 2010 had not yet been issued on the date of the drafting of the motions presented to Justice Corriveau. No mention was ever made that the parties were awaiting this judgment. Moreover, now that this judgment has been issued, it is subject to appeal. Indeed, an appeal was filed by Marciano on October 5, 2011 and the document is filed as Exhibit DP-8.

[64] On the second day before Justice Corriveau, counsel for the Creditors announced that the judgment of the Bankruptcy Review Panel (Exhibit DP-8) in California had just been issued and that Marciano's appeal of the Bankruptcy Judgment was dismissed. From the transcript it does not appear that a copy was remitted to Justice Corriveau. This is telling because the judgment (itself not final) contains strong dissenting reasons which put into serious question the Bankruptcy Judgment and the California Civil Judgments.

[65] On the contrary, the message transmitted by counsel for the Creditors to Justice Corriveau was clearly that the judgment declaring Marciano bankrupt was final and no longer subject to or susceptible of appeal.

[66] Regarding the Bankruptcy Judgment, the exchange between counsel for the Creditors and Justice Corriveau on September 15 is also telling. In referring to the Bankruptcy Judgment, Justice Corriveau states that procedurally the foreign main proceeding should be recognized in Canada and then the foreign

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19 Exhibit DP-4, September 15, 2011 - lines 4-12.
20 Exhibit GM-2 to the out of court examination of Marciano on October 12, 2011.

representative can make applications in such capacity to the Canadian Court. She underlines that there is no « debtor » in Canada but rather only in the USA and then Justice Corriveau adds : « Le seul jugement qui a été rendu, le jugement final, c'est aux États-Unis. Ici on n'a pas de jugement... »[21]. Counsel makes no effort to correct this misapprehension that Justice Corriveau is dealing with a final judgment. However, the Bankruptcy Judgment in the United States is not final.

[67] As in any other voluminous and complex *ex parte* application, Justice Corriveau was relying on counsel. If this was not obvious, she explicitly tells counsel that she has not had the time to even open the boxes containing the binders of exhibits let alone take cognizance of them and was relying on counsel to guide her through them[22].

[68] During the October 14, 2011 examination of Bradley Brook, the US bankruptcy attorney of Fahs et al, the witness is asked with reference to the Civil Judgments: « ... Did I review correctly the exhibits that you filed along with your affidavit when I say that those appeals are nowhere to be found? »[23]. Counsel replies : « That's correct... The appeals were not filed before Justice Corriveau. What is stated in the motion is that the judgments were executory ».

[69] The written pleadings are equally misleading. For example paragraph 12 of the Motion for the Recognition refers to appeals filed on August 4, 2009 from the Civil Judgments. No further mention is made of the appeals until paragraph 21 which states : « The Revised Fahs Judgments are enforceable and Marciano has exhausted all attempts to stay the enforcement of same ».

[70] Paragraphs 50 and 51 are similarly misleading in that they refer to dismissals by the Court of Appeal without making it clear that the dismissals apply to applications for a stay of execution and not the merits of the appeal.

[71] This failure to inform Justice Corriveau of the appeals and the obvious attempt to « spin » the facts by emphasizing that the judgments were enforceable were crucial.

[72] The lack of finality is an obvious weak link in a motion seeking recognition and enforcement of a foreign judgment. Full and frank disclosure must mean putting forth petitioner's weakest point on a fundamental premise. The present situation cannot be characterized as a mere imperfection in an affidavit or omission of an inconsequential fact, to use the language of Justice Sharpe in *U.S.A.* v. *Friedland*.

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21 Exhibit DP-4, September 15, 2011, p. 65.
22 Exhibit DP-4, September 14, p. 3.
23 p. 38 – Transcript of examination of Bradley Brook, October 14, 2011.

[73] This is the onus petitioner places on itself when seeking an *ex parte* order. The Civil Judgments date back to October 2009 and the Bankruptcy Judgment to December 2010. There is evidence in the record that Canadian counsel was contacted at least as early as February 2011. The evidence further discloses that it took two weeks and considerable manpower to remove the assets from the possession of Marciano when the Canadian seizures were executed. If in this context, counsel decided that it was necessary to present its motions *ex parte* so as not to risk Mr. Marciano « fleeing » Montréal as he did allegedly from California, then Gottlieb and Fahs et al accepted the burden to fully and frankly disclose. They must also accept the consequences of their failure to do so.

[74] Counsel should have clearly put to Justice Corriveau in the written pleadings and oral presentation that both the Civil Judgments and the Bankruptcy Judgment, though enforceable in accordance with US law, were subject to appeals on the merits and as such, may be reversed or revised by a court of appeal having jurisdiction. Counsel could then have made its argument for recognition and enforcement as it did before the undersigned.

[75] The failure to fully and frankly disclose justifies the dismissal of the proceeding in question. The argument that had the facts or law been disclosed the result would not have been any different is not open to the party who has failed to fully and frankly disclose[24].

[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. However, to dispel any doubt on the final outcome and in the event that a

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[24] *U.S.A.* v. *Friedland*, *op. cit.*, note 9, par. 28.

different conclusion should be drawn from the consequences arising from the failure to fully and frankly disclose, this Court will also analyze and rule on other substantive grounds asserted by Marciano and the Intervenants.

3. Enforceability of the foreign judgments

[79] The Civil Judgments are not final - appeals are pending. The Bankruptcy Judgment is not final - an appeal was pending at the time the motions were presented before Justice Corriveau and the judgment of the Bankruptcy Appeal Panel of the Ninth Circuit was rendered on September 15, 2011. An appeal was lodged by Marciano from that judgment to the United States Court of Appeals, Ninth Circuit on October 5, 2011.

[80] It was admitted by Canadian counsel to Gottlieb et al and by the US bankruptcy attorney of the Fahs Judgment Creditors, Bradley Brook, during his examination, that the judgments are not final[25].

[81] Marciano and the Intervenants argue that article 3155 (2) CCQ precludes this Court from recognizing or declaring enforceable either the Civil Judgments or the Bankruptcy Judgment because they are :

> « [...] subject to ordinary remedy or [are] not final or enforceable at the place where [they were] rendered; »

[82] The text of article 3155 (2) CCQ is clear. Nevertheless, the Quebec Court of Appeal has dispelled any possible doubt. In CM v. C.A.S[26] the enforcement of foreign alimony orders was sought. The Court of Appeal discussed the rationale behind article 3155 (2) CCQ and illustrated the prohibition against the recognition or enforcement of foreign judgments subject to appeal with the hypothetical example of an American jury's award of $100 million which, though in appeal, is enforceable in accordance with US law. Such judgment should not be recognized or enforced in Québec. This example is particularly fitting to the case at bar.

[83] Marciano and the Intervenants advance the argument that before relying on the Civil Judgments for purposes of either a bankruptcy petition or, in this instance, the appointment of an interim receiver, the Fahs Judgment Creditors must first seek to have their judgments recognized before the courts of this province sitting in civil matters through a recognition or enforcement proceeding

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25 Transcript of Examination of Bradley Brook of October 14, 2011, pp. 28, 29, 31, 34 and 38.

26 2005 QCCA 12; see also *Notiplex Sécurité Incendie Inc.* v. *Honeywell International Inc.* 2010 QCCA 1028.

(also called exemplification) prior to relying on the judgment for purposes of appointing an interim receiver in the Court sitting in bankruptcy matters.

[84] The undersigned cannot retain that argument in the present case. The Fahs Judgment Creditors could rely on a US judgment as proof of a debt to appoint an interim receiver. However, in so doing they cannot escape the prohibition of article 3155 (2) CCQ. The civil law is suppletive in bankruptcy matters (section 72 BIA). Moreover, section 284 BIA (part of the new provisions of the BIA dealing with foreign insolvencies), provides that legal and equitable rules governing recognition of insolvency awards and assistance to foreign representatives continue to apply.

[85] In short, though Fahs et al need not have prefaced their proceedings before this Court sitting in bankruptcy matters with civil proceedings to recognize the Civil Judgments, they cannot escape the prohibition against the recognition or enforcement of a foreign judgment which is under appeal.

[86] The Creditors rebutt saying that at least with respect to the bankruptcy judgment, the fact that it is under appeal is not a bar *per se* to its recognition. section 281 BIA, permits recognition of a foreign bankruptcy judgment which is not yet final.

[87] In the opinion of this Court the very existence of section 281 BIA underscores the rule against the recognition or enforcement of judgments which are not final. This is the rule at Common Law as well as under the *Québec Civil Code*.

[88] The argument that section 281 BIA permits recognition of a foreign bankruptcy judgment even if not final might save the recognition of the foreign main proceeding but certainly not the motion for the appointment of an interim receiver. The latter relies on the Civil Judgments. Section 281 BIA does not permit their recognition.

[89] Counsel also argues that since the appointment of the interim receiver is sought, not merely by Fahs et al, but also by Gottlieb (as foreign representative) and PWC (as receiver under section 272 BIA) then this Court need not rely on the Civil Judgments but simply on the Bankruptcy Judgment. This argument is sophistry. One cannot by any legal or intellectual acrobatics avoid the fact that the Civil Judgments are not final and are the basis of the Bankruptcy Judgment.

[90] Moreover, section 281 BIA is permissive by way of exception to the Common Law (and Civil Law) rule. This is not an appropriate case to recognize a foreign insolvency which is subject to an appeal. It might make some sense to recognize a foreign main proceeding that was under appeal where the foreign insolvency proceeding in question relates to a business reorganization. If a

Canadian subsidiary or a Canadian place of business were involved and intimately linked to the US business, the recognition of a US stay order pending appeal might be appropriate. It might well be necessary to maintain the status quo of the Canadian enterprise in such example.

[91] The Bankruptcy Judgment in this case is in the nature of the compulsory execution of the Civil Judgments. The Canadian recognition is in furtherance of that goal, i.e. the confiscation and liquidation of property to ultimately satisfy the Civil Judgments. Such a foreign bankruptcy judgment should not be recognized or enforced before it is final. This applies even more strongly where the Civil Judgments which give rise to the debt upon which the Bankruptcy Judgment is based are not themselves final.

[92] Lest it be forgotten, none of the foregoing was presented to Justice Corriveau. The omission to do so is in itself fatal.

[93] However to dispel any doubt, the foreign judgments whose recognition and enforcement were sought under the three motions before Justice Corriveau were not and are not final and as such cannot be enforced here either directly or through the Canadian bankruptcy proces. Moreover it is not permissible in the circumstances to rely on the foreign bankruptcy order as a foreign main proceeding because it is not final and it seeks to enforce civil condemnations which themselves are not final.

[94] Counsel added the argument that Gottlieb as Trustee has now received revenue claims of the US tax authorities. Accordingly, it is submitted that the US Bankruptcy seeks not only the enforcement of the Civil Judgments. These revenue claims were apparently received after the hearing before Justice Corriveau.

[95] Even if the undersigned were to consider this evidence, the revenue claims are not recognized or enforced under the Civil Law. Article 3155(6) prohibits the recognition or enforcement of « obligations arising from the taxation laws of the foreign country ».

[96] Moreover, the Common Law precludes a Canadian court from enforcing the tax laws of a foreign country directly or indirectly (by giving effect to a judgment enforcing those foreign tax laws)[27].

[97] This principle has been applied to a situation where a foreign trustee has sought recognition of a bankruptcy whose sole creditor was the foreign taxation authority. The House of Lords refused to recognize a liquidation whose sole

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[27] *United States of America* v. *Harder,* [1963] S.C.R. 366.

creditor was the tax authority even where the debtor's assets had been fraudulently removed from the jurisdiction of the foreign taxing authority[28].

[98] Accordingly, the existence of the revenue claims in the US bankruptcy of Marciano cannot be relied upon, in the circumstances for the Motion for Recognition.

[99] After the hearing before the undersigned, the Creditors were granted permission to reopen the hearing on November 25, 2011 for the sole purpose of filing additional proceedings and orders from the US bankruptcy file which did not yet exist at the termination of the hearing before the undersigned (Exhibits R-97 to R-103). At the same time, an additional exhibit (DP-9) to complete the picture was filed by consent by Marciano and then, in rebuttal, Exhibit R-104 was filed by the Creditors. Thus the series of proceedings and orders from the United States bankruptcy file disclosing transfers of assets by Marciano after the Civil Judgments, repeated but now cured failures of Marciano to declare his assets to Gottlieb and a declaration by Marciano of a relative dearth of personally held assets.

[100] Counsel for the Creditors asserts that this is further evidence that Marciano has been playing cat and mouse with the Fahs Judgment Creditors, has no or little respect for the judicial process and should thus be the subject of the strictest measures to put his assets under the control of the judicial system and within the reach of his creditors.

[101] Exhibit DP-9 filed by Marciano before the undersigned is an order of the US Bankruptcy Court dated November 17, 2011 granting retroactive relief from the automatic stay order in favor of Fahs et al. The order allows them to institute the proceedings which Fahs et al have already instituted before this Court (the Motion for Recognition, Motion for Search Warrant and Motion to Appoint the Interim Receiver). It appears from Exhibit DP-9 that at the time of the hearing before Justice Corriveau, all creditors of Marciano would as a matter of law have been subject to a stay of proceedings prohibiting them from instituting proceedings to enforce their claims outside of the US bankruptcy context. This prohibition would encompass the three proceedings instituted before Justice Corriveau.

[102] Thus, not merely were the Civil Judgments and Bankruptcy Judgment not final but US Bankruptcy law precluded enforcement of the Civil Judgments outside of the US Bankruptcy context including by way of recognition of the Civil Judgments outside of the United States.

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[28] *Peter Buchanan Ltd* v. *McVey*, [1955] A.C. 516.

[103] Counsel for the Creditors submits that any defect has now been remedied by the order of the U.S. Bankruptcy Court, Exhibit DP-9.

[104] The undersigned disagrees. Exhibit DP-9 does not remedy any defects in the Canadian proceedings. It is one thing to institute proceedings in contravention of a stay order and to obtain authorization lifting the stay before the hearing or at least before the judgment on such proceeding. That is not what occurred here. Justice Corriveau has already rendered a judgment. Exhibit DP-9 might remedy a defect in the proceeding but the proceeding has already been adjudicated upon. Exhibit DP-9 cannot remedy the judgment. Moreover it should be added that there has been no request for the recognition by this Court of the foreign judgment, Exhibit DP-9. It is merely filed as a fact to be considered.

[105] What is of significance to the undersigned is whether Canadian counsel for the Creditors was aware of the stay order and its effects at the time of the proceedings before Justice Corriveau. Perhaps he was not. However US bankruptcy counsel signed an affidavit in support of those proceedings and US bankruptcy counsel was present in the court room and even testified before Justice Corriveau. US counsel instructing Canadian counsel was surely aware, and if they were not aware they should be presumed to have been aware, of this provision of US law.

[106] Thus, not only did proceeding before Justice Corriveau to seek recognition of the Civil Judgments constitute a violation of the stay order under US bankruptcy law (and as such the judgments were not enforceable), but the failure to disclose that situation to Justice Corriveau constitutes yet another significant failure on the part of Creditors to fully and frankly disclose material facts and law in an *ex parte* proceeding before this Court. Not only did they fail to disclose this to Justice Corriveau, but they continued that failure before the undersigned. In fact, it was Marciano (and not the Creditors) who filed Exhibit DP–9.

[107] The undersigned has already concluded that the fact that the Civil Judgments and the Bankruptcy Judgment were subject to appeal is fatal to the three motions as originally presented to Justice Corriveau. The failure to have fully and frankly disclosed that fact is equally fatal to such applications. However, it now appears that the Civil Judgments were not even enforceable at the time of the hearing before Justice Corriveau, despite counsel's repeated insistence before Justice Corriveau to the contrary.

4. **Public Policy**

[108] Counsel for Marciano and the Intervenants strongly urged that the Civil Judgments should not be recognized or enforced based on considerations of public policy. The excessive amounts awarded to the Fahs Judgment Creditors

were for punitive damages and for « mental suffering », damages to « reputation », as well as « shame, mortification or hurt feelings ». Thus, the awards are for non-pecuniary damages. Given this and given that the amounts are so exaggerated when compared to what might be granted by a Canadian court, in the submission of Marciano and the Intervenants the Civil Judgments can only be labeled as arbitrary and contrary to public order.

[109] The statutory underpinning of this objection is found in both the BIA and CCQ.

[110] Section 284 BIA reads as follows :

> « 284. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
>
> **Public policy exception**
>
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy. »

[111] Article 3155(5) CCQ precludes recognition or enforcement where :

> 5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

[112] In Canada non-pecuniary damages in personal injury matters are subject to a $100,000 ceiling adjusted for inflation. This amount was established in *Andrews* v. *Grand Toy Alberta Ltd*[29] when the victim of a road accident who was rendered a quadriplegic was awarded $100,000 as compensation for « physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life »[30]. The « cap » has since been confirmed by the Supreme Court[31].

[113] However, in *Hill* v. *Church of Scientology of Toronto*[32], the Supreme Court of Canada refused to extend the cap to defamation cases. Defamation, while not an all-encompassing description of the damages awarded to the Fahs Judgment Creditors is a proximate legal notion. The Supreme Court refused to apply the cap because in personal injury (unlike defamation) the pecuniary aspects of the

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29 [1978] 2 S.C.R. 229.

30 This award was in addition to his pecuniary losses for past and future medical care, cost of equipment and loss of earning capacity.

31 *Ter Neuzen* v. *Korn* [1995] 3 S.C.R. 674; *Lindal* v. *Lindal* [1981] 2 S.C.R. 629.

32 [1995] 2 S.C.R. 1130.

injury (loss of earnings, medical expenses, etc.) are fully compensated. As well, unlike the Supreme Court assessment of the number and quantum of personal injury awards, defamation cases had not become a problem for society as a whole. In non-pecuniary personal injury claims, the damages had been observed to vary widely from province to province and indeed between districts within a province. Also, because of the prevalence of claims arising from motor vehicle accidents and the amount of awards, insurance rates had been affected which in turn impacted on the cost of carrying on a business in this country.

[114] Both the prevalence of defamation cases and the amount of awards was not seen by the Supreme Court to be a problem. Particularly in the Hill case, which was at the time amongst the highest amounts on record for a defamation case, the amount of the jury award was $800,000, excluding punitive damages[33].

[115] Indeed in this jurisdiction, damage to reputation receives minimal compensation. In *Lafferty* v. *Parizeau*[34], the leader of the provincial parliamentary opposition and the leader of a significant federal political party and former cabinet minister were defamed by likening them to Hitler. The Québec Court of Appeal said that it was hard to imagine a person more despicable, yet the award for moral damages was $75,000.

[116] Accordingly, Marciano and the Intervenants submit that the Civil Judgments are so exorbitant that they are arbitrary and as such should not be enforced in this country because of the public policy exception.

[117] Counsel for the Creditors submits that the amount of the civil judgments is not a bar to their recognition and enforcement. In *Facebook* v. *Guerbuez*[35] this Court recognized for enforcement purposes a judgment exceeding $1 billion for violation of anti-spamming laws in the United States. However the damages were specifically provided by statute as a function of the number of violations of the statute. Accordingly the determination of the award was essentially statutory and arithmetic. It could not be said that such judgment was arbitrary or excessive nor that its recognition was contrary to public policy.

[118] Counsel for the Creditors also points, more significantly, to the judgment of the Supreme Court of Canada in *Beals* v. *Salhana*[36]. In that case a Florida lawsuit concerning an $8000 land transaction resulted in a $210,000 jury award for compensatory damages and $50,000 for punitive damages.

[119] The Supreme Court dismissed the argument that recognition and enforcement should be denied on the application of the Common Law public

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33 *Hill* v. *Church of Scientology of Toronto*, *op. cit.*, note 32, par. 167-173.
34 *Lafferty, Harwood & Partners* v. *Parizeau* [2003] R.J.Q. 2758 (C.A.).
35 2010 QCCS 4619; 2001 QCCA 268.
36 [2003] 3 S.C.R. 416.

policy exception. It was argued that the public policy exception should apply when the outcome of the foreign proceedings (i.e. the excessive amount of the jury award) is so egregious that it shocks the conscience of the reasonable Canadian[37]. This would apply to a case such as *Beals* where a grossly excessive amount for lost profits was awarded absent a causal connection between the acts giving rise to liability and the damages suffered.

[120] The Supreme Court disagreed and held that at Common Law the courts' analysis in considering a public policy defense is limited to the issue of whether the foreign law is contrary to the Canadian view of basic morality. Just because the same claim made in a Canadian court would not yield a comparable damage verdict is not a reason to refuse recognition stated the Supreme Court. Mr. Justice Major writing for the majority added that:

> « 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 reevaluate the amount of the award[38]. »

[121] There was no evidence in *Beals* that the Florida proceeding would offend the Canadian concept of justice, other than perhaps the outcome.

[122] In *Beals* expert evidence of the business losses suffered had been presented such that the jury's conclusion could not be characterised as arbitrary.

[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.[39] 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[40]. 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[41] is an exercise in embarrassing and shaming Marciano. No cross-examination by Marciano's counsel was permitted[42]. Michael Resnick in his testimony in this record raises serious

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37 *Beals*, préc., note 36, par. 73.
38 Id., par. 76.
39 Transcript of proceedings before the Superior Court of California, August 26, 2009, Exhibit MR-11 to the deposition of Michael Reznick on October 11, 2011.
40 Transcript of Examination of Michael Reznick, Nov. 11, 2011, p. 55.
41 Ibid, Exhibit MR-10.
42 Ibid p. 101.

questions about the integrity of the process as a whole and specifically the so-called « proveup » hearing with regard to damages[43].

[124] The Civil Law approach to the public policy exception is different from that described in *Beals.* The Civil Law provides that the judge look at whether the outcome in the foreign proceeding is offensive to our community norms. The question that the undersigned must ask of himself is whether the Civil Judgments fit within the framework of possible outcomes in a similar hypothetical case before a Québec court[44].

[125] The Québec norm need not be proved. It is not the actual judgments rendered in comparable circumstance which are the yardstick but rather the societal norm. The notion is similar to the view of model behavior of the « reasonable man » in determining norms of behavior for civil liability[45].

[126] At Common Law as well as in the Civil Law system, the judge has discretion to define the standard in any given case as to what constitutes public policy[46].

[127] In the present case, the jury awards are clearly excessive on their face from the point of view of any possible outcome in a Quebec or Canadian court. This case is an extreme example of a systemic phenomenon for non-pecuniary jury awards in the United States that have no or little connection with any actual loss suffered by a plaintiff as a Canadian would understand. If these awards are permissible in such cases under California law, then that law should be considered contrary to public policy as understood in Canada and in Québec.

[128] Indeed, the only rationale of the jury awards that one can surmise is that given Marciano's egregious behavior in the litigation as well as his stated objective to « ruin » the Fahs Judgment Creditors[47] and given his enormous wealth, the jury decided to punish him by redistributing that wealth. Canadian society finds this type of retribution offensive. It denigrates the legal system by likening legal proceedings to lottery tickets.

[129] If the social good is the redistribution of wealth, then Canadian public policy does not view the court system as an appropriate instrument for such task. Canadians use the tax system and the social safety legislation enacted by Parliament to address redistributions of wealth. No litigant, including the rich

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43 Ibid.

44 *Society of Lloyd's* v. *Longtin*, JE 2005-1676 (C.S.); *McKinnon* v. *Polisuk*, 2009 QCCS 5778.

45 Gérald GOLDSTEIN, *De l'exception d'ordre public aux règles d'application nécessaire : étude du rattachement substantiel impératif en droit international privé canadien,* Montréal, Éditions Thémis, 1996, p. 157.

46 G. GOLDSTEIN, préc., note 45, p. 391.

47 See the judgment of the United States Bankruptcy Appeal Court Panel of September 15, 2011, Exhibit GM-2 to the examination of Marciano, October 12, 2011.

(either individuals or corporations), should fear an appearance before the courts for risk of having their assets stripped by arbitrary, excessive awards.

[130] Section 284 BIA refers merely to « public policy ». The text of article 3155(5) adds the word « manifest » and the notion of « international relations » to the equation. In virtue of article 3155(5) the foreign judgment must be offensive to fundamental notions of the domestic legal system and not merely different from what the outcome would be upon the applicaton of some internal law albeit of compulsory application (i.e. a matter of « public order »)[48]. In other words the reference to « international relations » and « manifest » were inserted by the legislator to restrict the public order exception to serious situations where the solution of the foreign legal system is different in a manner which is offensive to local values[49].

[131] In the circumstances of this case, the recognition of the Civil Judgments would be manifestly contrary to public order as provided by article 3155(5) and section 284 BIA.

[132] Counsel for Creditors submitted that this Court need only recognize the Civil Judgments to the extent of $1000 which is the threshold amount of the minimum debt needed to qualify for the filing of a petition for receiving order under the BIA. If the Civil Judgments are contrary to public order then they are not recognized. This Court does not have the jurisdiction to reduce the condemnations of the Civil Judgments as that would be tantamount to sitting in appeal.

5. The Right to be Heard

[133] Marciano and the Intervenants submit as a further ground, that the Civil Judgments should not be recognized or enforced because they were rendered in contravention of fundamental principles of procedure as provided by article 3155 (3) CCQ. Specifically and curtly, it is argued that Marciano's right to be heard was violated.

[134] As set forth above, following numerous defaults to be deposed and to file documents and particulars, the presiding judge in the California civil suits issued a series of sanction orders in January and February 2009.

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48 Gérald GOLDSTEIN, *Droit International privé*, vol. 1, coll. « Commentaires sur le Code civil du Québec (DCQ) », Montréal, Éditions Yvon Blais, 2011, p. 58 et fol..

49 Jeffrey TALPIS and J.G. CASTEL, « Interprétation des Règles du droit international privé » dans textes réunis par le Barreau du Québec et la Chambre des notaires du Québec, *La Réforme du Code civil*, vol. 3, Sainte-Foy, Les Presses de l'Université Laval, 1993, p. 825.

[135] The result of these sanction orders was that Marciano was effectively excluded from the civil proceedings. He had no opportunity to prove his case or to present evidence in rebuttal of the counterclaims. He lost his right to discover on the amount of damages sought in the counter claims. He was physically excluded from the courtroom during the « prove-up » hearing before the jury on the amount of the claims againts him. As well, his lawyer was refused the right to cross-examine witnesses at that hearing and was only given the right to object on grounds of solicitor client privilege.

[136] Moreover, in the uncontradicted testimony in the record of this Court of Mr. Resnick, one of Marciano's attorneys, the presiding judge allowed counsel for the opposing parties to refer to Marciano before the jury as a « snake » and referred to Marciano's counsel as an « eel ».

[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. »[50]. (emphasis added)

[138] Unfortunate as the result may have been for Marciano and though the choice of epithets by the judge and counsel appear thoroughly inappropriate, the fact that the Civil Judgment arose from an *ex parte* hearing was a function of Marciano's uncooperative conduct in the civil litigation over a long and sustained period of time. The application to that conduct of sanctions provided by California law cannot be said to have denied him the right to be heard. He had the right but was ruled to have forfeited it because of procedural abuse. Whether those sanctions were applied appropriately or not will be reviewed by the California Court of Appeal.

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[50] pp. 67-68, dissenting reasons of Markell, J., in Marciano v. Fahs, et al; United States Bankruptcy Appellate Panel, 9th Circuit, September 15, 2011.
GM-2 to the examination of Marciano, October 12, 2011.

[139] There exist similar provisions of law in this jurisdiction. Articles 54.1 to 54.6 of the CCP allow for sanctions to be imposed against litigants for abusive procedure. Article 93 CPC provides for the dismissal of a proceeding supported by an affidavit where the affidavit refuses to be deposed. Accordingly sanctions for imposed for inappropriate conduct in civil litigation are hardly unknown in this jurisdiction and so their imposition by a foreign tribunal, can hardly be characterized as a denial of fundamental procedure.

[140] The result of the application of the sanctions in Mr. Marciano's case in California were particularly harsh because of the amount involved and because of the California system whereby he was not yet cognizant of such amounts at the time of the imposition of the sanctions against him.

[141] Justice Corriveau was made aware of this. The Bankruptcy Judgment[51] was submitted and referred to at length by counsel to Gottlieb, particularly the description of Marciano's conduct which led to the imposition of the sanctions in the civil litigation in California[52].

[142] The judge's and opposing counsel's choice of epithets out of Marciano's presence, while unfortunate and perhaps subject matter for review of another kind, do not allow the undersigned in the circumstances to conclude that because of this ground alone the right to fundamental principles of procedure was infringed.

6) Section 189 BIA warrant

[143] PWC, once appointed as interim receiver moved for the issuance of a warrant of search and seizure pursuant to section 189 BIA. Marciano and the Intervenants request that the search warrant be quashed because section 189 BIA has no application given that Marciano is not a « bankrupt » within the meaning of the BIA.

Section 189 BIA reads as follows:

> « 189.(1) Where on *ex parte* 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

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51 See Exhibit R-26, Motion for Recognition.
52 DP-4, Transcript September 14, 2011, pp. 17-18, 28-37, 38-39.

> place or premises and to seize the property of the bankrupt, subject to such conditions as may be specified in the warrant.

[144] Marciano's argument is based on the text of section 189 BIA, i.e. that the section applies only to the seizure of a bankrupt's property and thus to a situation where a bankruptcy has occurred.

[145] Gottlieb, as foreign representative, might have moved for orders under section 272 BIA, but counsel for the Creditors thought that inadequate as it would not empower his client to search and seize, and he so informed Justice Corriveau.[53] Counsel further pleaded before Justice Corriveau that the order could extend to allow the seizure of the property of the corporate entities or the trust alledgedly controlled by Marciano. For this assertion counsel relied on the cases of Re *Chocolat Cinq Étoiles*[54] and *Volailles Régal Inc.*[55].

[146] In both of those cases there was a bankruptcy under the BIA.

[147] Section 189 BIA exists in order to give effect to the duty of a bankrupt to deliver all of his property to the trustee. That duty is set forth in sections 16 and 17 BIA[56].

[148] Counsel for the Creditors dismisses the interpretation that restricts the use of section 189 BIA to situations after the occurrence of a bankruptcy because it strips any meaning from the entitlement of an interim receiver to obtain a warrant.

[149] This is not the case. Upon the appointment of an interim receiver under sections 46, 47 or 47.1 BIA, the interim receiver may take possession of all of the debtor's property if so permitted by the terms of the judgment appointing him. The appointment ends not upon bankruptcy according to those sections but upon « the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed ». Thus it is not the mere occurrence of the bankruptcy which ends the appointment of the interim receiver. It is easily conceivable that an interim receiver is appointed at the instance of a secured creditor and takes possession of all or some of the debtor's property. Upon the bankruptcy and the subsequent appointment of a trustee, the latter may determine that the security of the secured creditor is valid and affects all of the debtor's property and that there is no equity for the mass given the apparent value of such property and the indebtedness of the bankrupt. Accordingly the trustee correctly decides in such scenario not to take possession of the bankrupt's property. In such instance, if the interim receiver had information that

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53 Transcript Exhibit DP-4, September 14, 2011, p. 45.
54 2008 QCCS 4993; 2009 QCCA 51.
55 EYB 1996-87688 (C.S.).
56 see also *Re MacDonald,* 31 C.B.R. (4th) 54 (Ont. S.C.).

property of the bankrupt was hidden in a certain location, then the interim receiver could obtain a warrant pursuant to section 189 BIA.

[150] Accordingly, since section 189 BIA applies only after bankruptcy and the petition for receiving order in the present file is still pending, section 189 BIA was not available to PWC as interim receiver. Consequently, the order and warrant should be quashed on this ground alone.

[151] It should be noted that this was not presented to Justice Corriveau by counsel for the Creditors.

[152] Counsel for the Creditors did argue before Justice Corriveau that the seizure of property should extend to the properties of the companies and the trusts because they were « prête-noms » of Marciano.

[153] Counsel for the Creditors also attempted to argue before the undersigned that Marciano's status in the United States qualifies him as a bankrupt within the meaning of section 2 BIA. This is clearly incorrect. No bankruptcy order has been made against him within the meaning of the BIA. The order in the United States is not a bankruptcy order within the meaning of section 2 BIA so as to constitute Marciano a bankrupt. If this were the case then sections 271 and following of the BIA would in large measure be obviated. Moreover, and as discussed herein, the Bankruptcy Judgment in the United States is not a final judgment.

7. Property seized

[154] In addition to pleading that : i) section 189 BIA does not apply because Marciano is not a bankrupt; ii) that the seizure was issued on incomplete and misleading representations and iii) based on a foreign bankruptcy judgment which is not final, Marciano and the Intervenants have attacked the search warrant on a number of other grounds.

7.1 Immovables

[155] All of the 17 buildings seized belong to one of three Québec companies. The transfers to these companies were made by Chloe M ULC or 1305066 Alberta Inc. ULC on October 6, 2009.

[156] Thus, the transfers were made in the days following the finalization of the Civil Judgments (October 2, 2009)[57]. The consideration for the transfers was the same as that paid by Chloe and Alberta Inc. to acquire the buildings.

[157] Without going into the specific date of each acquisition shown on each of the deeds filed by the Intervenants as Exhibit P-9, en liasse, all 17 buildings were purchased between October 6, 2006 and July 2009. The purchases were on an arms length basis and pre-dated the Civil Judgments in all instances. In some respects, the first purchases even predated : i) the proceedings instituted by Marciano which gave rise to the counter claims of the Fahs Judgment Creditors (2007); ii) the counter claims in June and November of 2008; iii) the filing of the motions for sanctions (December 2008) and iv) the actual allegations of amounts claimed by the Fahs Judgment Creditors (January and February 2009).

[158] Before Justice Corriveau much emphasis was put on the fact that the two entities which originally purchased the real estate were controlled ultimately by Marciano.

[159] Paragraphs 97 and 98 of the Motion for the appointment of the interim receiver allege that the buildings were originally bought by Chloe and Alberta Inc. with funds « likely » provided by Marciano.

[160] Also, counsel for the Creditors put emphasis on Exhibit R-12 to the Motion for Recognition. This document is a declaration of Marciano's accountant, Mr. Michael Milam. To this declaration is annexed an accounting document entitled « GM consolidated/combined compilation and FMV analysis-intercompany loans not shown... ». This latter document is essentially a consolidated balance sheet of Georges Marciano. The document was prepared by Milan and used in the United States to demonstrate before the California courts that Georges Marciano did not have sufficient net worth to file security so as to stay execution of the Civil Judgments.

[161] The Canadian real estate is listed on the document, R-12. At one point during the proceedings before Justice Corriveau, she asked counsel if the assets on this consolidated balance sheet are « personal assets »[58], to which counsel, replied « Yes, exactly, though some are owned through various corporations, I will show you later ».

[162] Later during the hearing before Justice Corriveau[59], Counsel states that Mr. Marciano filed statements before the US court (i.e. the Milam document Exhibit R-12) asserting that he was the owner of the assets on that document.

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57 They were originally rendered by the jury in July, 2009 but later revised by the presiding Judge because the jury actually awarded more money than was demanded by the Plaintiffs.

58 Transcript, September 14, 2011, p. 22.

59 Transcript, September 14, 2011, p. 77.

The document R-12 is not a title document. It is a statement of net worth, on a consolidated basis and does not disclose all of the corporate and trust entities that may be the actual owners of assets and in which Mr. Marciano may have some interest, total or partial, direct or indirect. Counsel's characterization was inaccurate and misleading. Opposing counsel was not present to correct him. Again, this is not full and frank disclosure.

[163] It must be noted that the parties to the proceedings as instituted by PWC, Gottlieb and Fahs et al do not include any of the companies, past or present which were registered owners of the 17 buildings. Nor do these proceedings seek to set aside either the October 2009 transfers or the original purchases or to lift the corporate veil of the corporate entities which originally purchased the 17 buildings or otherwise seek a judicial declaration that Marciano was or is the owner. Moreover, there is no allegation with regard to the original purchases that would permit lifting the corporate veil. Indeed, it does not appear from the record that Marciano had any creditors between 2006 and 2009 when these buildings were purchased.

[164] It is probably no coincidence that the October 3, 2009, transfers of the buildings took place immediately following the Civil Judgments. If the Fahs Judgment Creditors or the foreign representatives felt that such transfers were made in fraud of their rights they could have instituted proceedings against the transferee companies. However, as at the date of the hearing before the undersigned, no such proceedings had been instituted[60].

[165] Gottlieb and counsel were clearly aware of the chain of title of the immovables. They did produce the indexes from the registry office with respect to each immovable. This is public information, as are the actual title deeds.

[166] Counsel for the Creditors relied on *Chocolat 5 Étoiles*[61] to justify the issuance of a seizure against an asset not belonging to the « bankrupt ». The case is not helpful to the position of the Creditors. As noted above, that case applied section 189 BIA to a bankrupt. Marciano is not a bankrupt within the meaning of BIA. Moreover, in that case there was a transfer of property owned by the bankrupt immediately preceding the bankruptcy to the bankrupt's spouse. Here we have property never in the bankrupt's patrimony which is transferred to another corporate entity two years ago. No proceedings have been instituted to set aside any of these transactions and recover the real estate as an asset of Marciano.

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60 It is noteworthy that in California, Gottlieb as trustee has instituted proceedings in order to gain title to real estate purchased by the Marciano trust or corporations in which Marciano is alleged to be the controlling interest (Exhibit DP-7).

61 2009 QCCA 51 and 2008 QCCS 4993.

[167] Accordingly with the benefit of the proof and argument made by counsel to Marciano and the Intervenants before the undersigned, the seizures of the immovable properties were irregular on their face. This constitutes yet another ground to set aside the seizures, at least with respect to the real estate.

7.2 Movable property

[168] Marciano and the Intervenants have argued that persons or entitities other than Marciano own the movable property seized. Here, the record is less clear. Title to movable property is not always as objectively ascertainable as is the case with immovable property.

[169] On the face of the record before the undersigned it is difficult to come to a conclusion as to the title of the movable property seized and more specifically as to whether any given piece of property was owned by Marciano or by another person or corporation, what degree of control Marciano had over the latter and when transfers were made. Much of the art work was purchased by Beverly Hills Antiques Inc., which Gottlieb alleges is the alter ego of Marciano, but the purchases appear to pre-date the Civil Judgments. While it appeared that the art-work on display at the hotel belonged to Marciano personally[62], he has declared otherwise in the US Bankruptcy[63]. The $16 million diamond[64] was originally purchased by Marciano personally and was in his possession when seized. However, Marciano has now declared that the diamond is held for his daughter[65].

[170] Moreover in terms of the notions of jeopardy and need for protection, movable property elicits a more favorable hearing from the court when a seizure or appointment of an interim receiver is sought. It moves more readily than real estate.

[171] Accordingly, the undersigned cannot conclude that the seizures regarding the movable property should be quashed merely on the basis of any argument related to the actual title of the property seized although this does not of course preclude any third party from coming forward to assert a claim to ownership of any of the movable property seized to the exclusion of the parties to this litigation. Again, the Court underlines that the seizure will be quashed for other reasons given above but not for any argument related to the title to the movable property with the exception of the considerations concerning documents seized.

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62 Motion for Search Warrant and Affidavit, par. 34 et fol..
63 See Exhibit 102, Marciano's Declaration of assets in the US Bankruptcy.
64 Examination of Marciano, October 12, 2011, p. 187.
65 Exhibit 102, préc., note 63.

7.3 Documents

[172] The situation of the mass of documents, books and records including records in electronic form that were seized is different from the other movable property.

[173] Section 189 BIA if it were otherwise to apply (i.e. for a bankruptcy) allows for the seizure of « property » of the bankrupt.

[174] Property of the bankrupt is defined in section 2 BIA. Section 67 BIA excludes from the definition, amongst other things, that which is unseizable under provincial law. Article 553(5) CPC declares unseizable :

> « books of account, titles of debt and other papers in the possession of the debtor… »

[175] In *McDonald*[66], it was decided that « property » in section 189 BIA includes documents. However this case was not decided in the Province of Québec and as such article 553 CCP was not germane to the analysis.

[176] The trustee has the duty to take possession of the books, records and documents as well as all property of the bankrupt (section 16(1) BIA). To do so the trustee has the recourses and remedies of section 16(3) and section 164 BIA. He has the right to enter any premises where the books and records may be kept and he has the power to require a person to produce any such document. However a trustee cannot rely on section 189 BIA to perform a seizure of the bankrupt's documents. Moreover, the trustee certainly cannot seize documents belonging to a third-party[67].

[177] Counsel to the Creditors was aware that he could have sought orders pursuant to section 272 BIA to obtain possession of property and documents but he preferred a seizure under section 189 BIA[68]. PWC also has powers under the interim receivership order issued by Justice Corriveau regarding the business operations of Marciano, including the power to gain possession of certain documents. The seizure asserted here was of documents in the possession of Marciano or entities and persons allegedly controlled by Marciano with a view, not to controlling a business in furtherance of the receivership order but locating assets upon which to ultimately levy execution.

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66 *Op.cit.*, note 56.
67 Re *Chocolat Cinq Étoiles*, préc., note 54.
68 Transcript, September 14, 2011, p. 45.

[178] In civil matters the Court of Appeal has stated that a seizure under article 733 CCP is not available for documents[69] and has stated that to gain possession of documents a litigant should use the procedure of the Anton Pillar order as this provides the appropriate safeguards to the parties, i.e. the appointement of an independent attorney to supervise execution of the Court order.

[179] In summary, the seizure of documents, absent any other argument, was not available under section 189 BIA, as documents are not property within the meaning of the BIA. The rationale goes beyond mere mechanical statutory interpretation. The use of section 189 BIA allowed PWC and Gottlieb to sidestep the type of procedural safeguards that would have been put in place had an Anton Pillar procedure been used. It is noteworthy that following the seizures claims of privilege have been made, disputes have arisen over the manner to proceed and accusations are rife.

[180] It was also argued before the undersigned by Marciano and the Intervenants that the documents seized illegally, and particularly the documents belonging to third parties (such as Ms. Romer), could not be adduced in evidence because such use (i.e. of illegally seized evidence) tends to bring the administration of justice into disrepute (article 2858 CCQ). In the circumstances, because the undersigned is of the view that the seizures were illegal, this argument is appropriate, particularly with respect to parties other than Marciano. In any event the evidence in question has not been of any help to the Creditors in overcoming the legal arguments upon which the undersigned has otherwise based the decision to quash the seizures and the other orders signed by Justice Corriveau.

8. The Need to protect assets

[181] Marciano and the Intervenants question whether there was sufficient urgency on the face of the motions to justify proceeding *ex parte*. Such inquiry would be an appeal because the undersigned cannot rescind that decision and Marciano and Intervenants have now been heard[70].

[182] Fahs et al and Gottlieb sought the appointment of PWC as interim receiver because they argued that the assets required protection within the meaning of section 46 BIA.

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69 *Expo Foods Inc.* v. *Sogelco International Inc.* [1989] R.J.Q. 2090 (C.A.).

70 It should be added regarding the Motion for Search Warrant, that section 189 BIA specifically provides that the application be made *ex parte*, contrary to the situation for the other two motions.

[183] They offered as justification (i) the movement of assets to Montréal after the Civil Judgments were rendered; (ii) the transfer of real estate in Montréal after the Civil Judgments were rendered; (iii) Marciano's refusal to accede to civil proceedings for the enforcement of the Civil Judgments and his refusal (following the Bankruptcy Judgment) to provide Gottlieb with a declaration of his assets; and (iv) Marciano's statement made to the Montréal media that his judgment creditors would never be paid.

[184] Given the opportunity to reply before the undersigned, Marciano and the Intervenants assert that contrary to the characterizations by the Creditors :

> (i) Marciano did not « flee » the United States but continued after 2009 a process of establishing himself in Montréal which began in 2006 with the purchase of real estate;
>
> (ii) Marciano holdings in Montréal real estate and publicly displayed art collection and the purchase of a valuable diamond publicized in the media, are not concealed but are rather in the public eye;
>
> (iii) the nature of Marciano's and the Intervenant's assets are such (i.e, real estate, valuable delicate artwork, 84 - carat diamond) that he could hardly « flee » Montréal with the assets in tow overnight. It took over a dozen people approximately 10 days (together in some instances with the help of a crane) to complete the seizure and remove the movable property.

[185] There is no doubt that the connection to Montréal of Marciano began in 2006, well before the Civil Judgments rendered in 2009. However, the process appears on the whole of the evidence to have intensified and accelerated after September 2009 when the Civil Judgments were rendered.

[186] If the undersigned were otherwise of the opinion that the orders herein were properly obtained and that the Civil Judgments and Bankruptcy Judgment should be recognized, then absent the considerations with regard to the search warrant and section 189 BIA, I would agree that objectively the rights of the creditors would require some protection with regard to Mr. Marciano's assets only. I would be inclined to order a non-invasive type of protection over Marciano's assets through the interim receiver while the Petition for Receiving Order was pending. However, in the circumstances and given the conclusions herein, the issue is moot.

SUMMARY

[187] Because of the serious and substantial grounds not to recognize or enforce the Civil Judgments or the Bankruptcy Judgment and the failure to disclose those grounds to Justice Corriveau at the *ex parte* hearing, what was done should be undone.

[188] The Civil Judgments and the Bankruptcy Judgment are not final but rather subject to appeal. The Civil Judgments were not even enforceable because they were subject to a stay. Even if final and enforceable, the recognition of the Civil Judgments is offensive to Canadian public policy.

[189] If the foreign judgments had been final and enforceable and not subject to public policy concerns, the issuance of a search warrant under section 189 BIA was nevertheless improper because no bankruptcy had occurred under the BIA. The use of the warrant to seize property not belonging to Marciano in the circumstances of this case was wrong as was the seizure of documents.

[190] The undersigned should not in any way be taken to approve the type of conduct of Marciano before the courts in California described in the exhibits filed in this record. However that conduct is not in issue before the undersigned.

[191] It is not because Marciano has on previous occasions shown lack of regard, even contempt for the legal system and other litigants that he loses the benefit of fundamental procedural safeguards or that his opposing party litigant before this Court benefits from a lower standard to meet in obtaining authorization to exercise remedies against him. Fundamental procedural rights of parties before this Court are not suspended because others may consider any such party a scoundrel.

PROVISIONAL EXECUTION

[192] Marciano and the Intervenants seek provisional execution of the judgment rendered herein, notwithstanding appeal.

[193] Section 195 BIA does not provide any substantive grounds under which an order of provisional execution may be issued. The law of the province is suppletive with regard to both substantive (section 72 BIA) and procedural provisions (Rule 3 Bankruptcy and Insolvency General Rules)[71].

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[71] C.R.C., 1978, c. 368.

[194] Under article 547(j) CCP, provisional execution applies, unless suspended, regarding « judgments with regard to an improper use of procedure ». The failure to fully and frankly disclose described above is such an improper use of procedure. Therefore provisional execution applies. I see no reason to exercise discretion to order otherwise.

[195] Moreover, provisional execution can be ordered by a judge in his or her discretion in cases of urgency. The appointment of an interim receiver and the issuance *ex parte* of search warrants are by their nature granted when there is urgency. Rescinding such orders should be treated with no less urgency. The situation is all the more egregious where the orders were issued to enforce judgments which were not final in California, such that the whole underpinning of the orders is shattered. Accordingly, and absent the rule in article 547 (j) CCP, the Court exercises its discretion and will order provisional execution in the circumstances because of the urgency of redressing the situation created by the orders issued herein.

[196] **FOR ALL OF THE ABOVE REASONS, THE COURT :**

[197] **GRANTS** 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** 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 and 16, 2011 :

Namely :

1. Order (Recognition of a main Foreign Proceeding).

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

3. Order (Interim Receiver).

4. Order (Issuance of a second search warrant and the autorization to seize property of the Debtor).

5. Amended Order (Issuance of a second search warrant and the authorization to seize property of the Debtor).

[200] **DISMISSES** the Motion to Obtain the Recognition of a Main Foreign Proceeding (section 272 of the Bankruptcy and Insolvency Act (« BIA »)) », dated September 13, 2011;

[201] **DISMISSES** the Motion to Appoint an Interim Receiver (section 46 of the Bankruptcy and Insolvency Act) , dated September 13, 2011;

[202] **DISMISSES** the 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 (« BIA »)), dated September 13, 2011;

[203] **QUASHES** 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 all seizures made in virtue of such warrants;

[204] **GRANTS** mainlevée of all of the seizures practiced in the present record of all movable and immovable property and more specifically, with regard to immovable property, of 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. »

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

[206] **ORDERS** PriceWaterhouseCoopers Inc. upon receipt of the present judgment to return, at its expense, to Georges Marciano, the C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. or 9213-4568 Québec Inc., as the case maybe, any and all movable property and documents seized at the place from which such property was seized and removed;

[207] **ORDERS** any and all guardians of movable property seized in the present case to forthwith deliver to Georges Marciano, C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. or 9213-4568 Québec Inc., as the case maybe (at the expense of PriceWaterhouseCoopers Inc., David Gottlieb, Joseph Fahs, Steven Chapnick and Elizabeth Tagle) the property in their possession;

[208] **ORDERS** PriceWaterhouseCoopers Inc., David Gottlieb, 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;

[209] **ORDERS** the executing bailiffs to assist in carrying out the orders herein, any costs to be borne by PriceWaterhouseCoopers Inc., David Gottlieb, Joseph Fahs, Steven Chapnick and Elizabeth Tagle, solidarily;

[210] **ORDERS** the garnishees to give mainlevée and release any property in their possession;

[211] **ORDERS** PriceWaterhouseCoopers Inc. to return to Georges Marciano, C.K.S.M. Trust, 9204-7570 Québec Inc., 9211-9882 Québec Inc. or 9213-4568 Québec Inc., as the case may be, any and all cash seized or appropriated and to return all sums received on account of fees or disbursements;

[212] **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;

[213] **ORDERS** that all of the orders herein extend to PriceWaterhouseCoopers, David Gottlieb, Joseph Fahs, Steven Chapnick and Elizabeth Tagle and their employees, representatives, agents, mandataries and contractors, including but not limited to :

- Art Solution
- Garda Security
- SIS Services Inc.
- Alain Lacoursière
- Michel Rivest
- Alain Brunelle
- Levi & Sinclair
- Phil Levi
- Martin Dumont
- André Hébert
- Fabrice Lobascio
- Fernand Rose

[214] **RESERVES** the rights and recourses of Georges Marciano, Michel Bensmihen es qualité 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;

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

[216] **THE WHOLE** with costs against PriceWaterhouseCoopers Inc., David Gottlieb, Joseph Fahs, Steven Chapnick and Elizabeth Tagle, solidarily.

MARK SCHRAGER, j.s.c.

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