UNITED STATES OF AMERICA V. SHIELD DEVELOPMENT CO. AND ANYOX METALS LTD., (2005), 74 O.R. (3D) 595 (C.A.), AFF'G (2005), 74 O.R. (3D) 583 (S.C.J.).

United States of America v. Shield Development Co.
[Indexed as: United States of America v. Shield Development Co.]
74 O.R. (3d) 595

[2005] O.J. No. 2040

Docket: C42849

Court of Appeal for Ontario

Catzman, Labrosse and Moldaver JJ.A.

May 20, 2005

Conflict of laws — Foreign judgments — Enforcement — Defences — Breach of natural justice — Public policy defence — United States judgment ordering defendants to pay costs incurred in removing hazardous substances from copper mine — Motion for summary judgment granted — Defendants failing to show triable issue about breach of natural justice or public policy defence.

NOTE: The catchlines above relate to a judgment and costs endorsement of Herman J. of the Superior Court of Justice; **2004 CanLII 66345 (ON SC)**, 74 O.R. (3d) 583. An appeal of these decisions to the Court of Appeal for Ontario (Catzman, Labrosse and Moldaver JJ.A.) was dismissed on May 20, 2005. The endorsement of the court was as follows:
James C. Orr and Angela Yadav, for appellants.

H. Scott Fairley and John R. Archibald, for respondent.

[1] BY THE COURT:– The appellants appeal the granting of summary judgment to the respondent to enforce a judgment it obtained in the United States against the appellants.
[2] The application judge rejected the appellants' submissions that summary judgment should not be granted on the basis of a denial of natural justice and/or as being against public policy. She gave detailed and clear reasons in rejecting these submissions on the basis that there had been no denial of natural justice and that there was no evidence that the respondent improperly targeted the appellants. We see no error in her conclusions.
[3] As stated by the respondent, the real essence of this matter is that the appellants had received adequate notice of the U.S. proceeding and had adequate opportunity to raise any defence of fact and law before the U.S. District Court. In effect, they now plead the consequences of their decision to walk away from the [page596] U.S. proceeding, to which they attorned, in an attempt to create a triable issue. Moreover, when the appellants learned of the U.S. judgment, neither appellant appealed nor moved to have the judgment set aside.
[4] Accordingly, the appeal is dismissed, with costs fixed, inclusive of disbursements and GST, in the amount of the moneys currently standing in court to the credit of this action pursuant to the order of MacPherson J.A., dated March 30, 2005 (i.e. $20,000 plus accumulated interest).

United States of America v. The Shield Development Co. Ltd. et al.
[Indexed as: United States of America v. Shield Development Co.]
74 O.R. (3d) 583

[2004] O.J. No. 5840

Court File No. 04-CV-266938CM2

Ontario Superior Court of Justice,
Herman J.

December 1, 2004

*The Court of Appeal dismissied an appeal of this judgment on May 20, 2005. please see p. 595; post fpr the court's endorsement.

Conflict of laws — Foreign judgments — Enforcement — Defences — Breach of natural justice — Public policy defence — United States judgment ordering defendants to pay costs incurred in removing hazardous substances from copper mine — Motion for summary judgment granted — Defendants failing to show triable issue about breach of natural justice or public policy defence.

Pursuant to the Comprehensive and Environmental Response, Compensation and Liability Act ("CERCLA"), the United States of America ("U.S.A.") incurred costs in removing hazardous substances from a copper processing site in Utah. The Shield Development Co. Ltd. ("Shield") and Anyox Metals Ltd. ("Anyox"), both Canadian corporations, had ownership interests in the site, but they alleged that they had not caused the environmental pollution. They alleged that it had been caused by an American corporation, which had subleased the site and operated it from 1971 to 1974.

U.S.A. began proceedings in the United States District Court in Utah to recover the costs it had incurred, and it was granted summary judgment in the amount of US$242,614.93 plus costs. U.S.A. commenced an action in Ontario to enforce its Utah judgment and moved for a summary judgment. Shield and Anyox resisted the motion and submitted that there were two triable issues: (1) whether the steps taken by U.S.A. to obtain judgment in Utah amounted to a breach of natural justice because there had not been proper service on the defendants of several court documents; and (2) whether U.S.A.'s decision to sue two Canadian corporations and not the American corporation responsible for the environmental pollution was contrary to public policy.

Held, the motion for summary judgment should be granted.

The Utah judgment met the test in Canadian law for the recognition and enforcement of a foreign judgment. Neither of the two defences raised triable issues. The defence of a breach of natural justice was unsustainable. Proceedings are not regarded as contrary to natural justice merely because of a procedural irregularity on the part of the foreign court provided that the party affected was given an opportunity to present its case. Shieldand Anyox were aware of the legal proceedings and had retained counsel in Utah. Their counsel had filed documents in court on their behalf and had advised the court that the defendants' address was the corporate address, where Shield and Anyox maintained a mailbox. Although two documents were sent to the wrong address, the notification of the hearing date and a copy of the judgment were sent to the correct address. [page584]

The public policy defence was also unsustainable. Shield and Anyox did not challenge the American law; rather, they challenged how that law had been applied in circumstances where U.S.A. had sought its recovery from two Canadian corporations, which had not caused the environmental pollution, rather than against the American corporation that had perpetrated the harm. This challenge went beyond the public

policy defence articulated by the Supreme Court of Canada in Beals v. Saldanha, and the Ontario Court of Appeal in UnitedStates of America v. Ivey had recognized that for liability under American environmental legislation, it is not necessary to prove that the owners of the subject property directly caused the environmental harm. Shield and Anyox did not provide any evidence that U.S.A. had improperly targeted them. Accordingly, there should be summary judgment for U.S.A.
MOTION for summary judgment.

Cases referred to Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, 234 D.L.R. (4th) 1, 314 N.R. 209, 113 C.R.R. (2**d) 189**, **2003 SCC 72** (CanLII), 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1; Boardwalk Regency Corp. v. Maalouf (1992), **1992 CanLII 7528 (ON CA)**, 6 O.R. (3d) 737, [1992] O.J. No. 26, 88 D.L.R. (4th) 612 (C.A.); Guarantee Co. of North America v. Gordon Capital Corp., **1999 CanLII 664 (SCC)**, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, 178 D.L.R. (4th) 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [2000] I.L.R. para. 1-3741, 39 C.P.C. (4th) 100; Hi-Tech Group Inc. v. Sears Canada Inc. (2001), **2001 CanLII 24049 (ON CA)**, 52 O.R. (3d) 97, [2001] O.J. No. 33, 11 B.L.R. (3d) 197, 4 C.P.C. (5th) 35 (C.A.); Slough Estates Canada Ltd. v. Federal Pioneer Ltd. (1994), **1994 CanLII 7313 (ON SC)**, 20 O.R. (3d) 429, [1994] O.J. No. 2147, [1995] I.L.R. Â1-3129 (Gen. Div.); United States of America v. Ivey (1996), **1996 CanLII 991 (ON CA)**, 30 O.R. (3d) 370, [1996] O.J. No. 3360, 139 D.L.R. (4th) 570, 27 B.L.R. (2d) 243 (C.A.) [Leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 582, 218 N.R. 159n], affg (1995), **1995 CanLII 7241 (ON SC)**, 26 O.R. (3d) 533, [1995] O.J. No. 3579, 130 D.L.R. (4th) 674, 27 B.L.R. (2d) 221 (Gen. Div.) Statutes referred to Comprehensive Environment Response, Compensation and Liability Act, 42 U.S.C. (1980) **Courts of Justice Act, R.S.O. 1990, c. C.43**, **s. 121Environmental Protection Act, R.S.O. 1990, c. E.19**, **s. 97(1)** [as am.] Rules and regulations referred to District of Utah Civil Rule, Rule 83-1.4 Federal **Rules of Civil Procedure** [**U.S.**], **rules 5**(b), **60**(b) **Rules ofCivil Procedure, R.R.O. 1990, Reg. 194**, **rule 20.04(2)** [as am.] Authorities referred to Castel, J.G., and J. Walker, Canadian Conflict of Laws, 5th ed. (Toronto: Butterworths, 2002) Castel, J.G., Canadian Conflict ofLaws, 3rd ed. (Markham: Butterworths, 1994)
H. Scott Fairley and John Archibald, for plaintiff.

James C. Orr and Angela Yadav, for defendants.

[1] HERMAN J.:– The plaintiff, the United States of America, seeks summary judgment to enforce a judgment it obtained against the defendants, The Shield Development Co. Ltd. and Anyox Metals Ltd. [page585] [2] The judgment is for the recovery of costs the plaintiff incurred in removing hazardous substances from the Essex Copper Processing Site in Milford, Beaver County, Utah pursuant to the Comprehensive Environment Response, Compensation and Liability Act, 42 U.S.C. (1980) ("CERCLA"). The plaintiff seeks these costs from Shield and Anyox on the basis that Shield held title to the site and, at one time, operated a copper processing facility there and that Anyox held an ownership interest in the site.
[3] A hearing date to deal with the matter was scheduled for April 12, 2000, in the U.S. District Court. Neither Shield nor Anyox appeared at the hearing or responded in any way. Judge Stewart granted summary judgment to the United States against Shield and Anyox in the amount of **US**$242,614.93 plus any costs incurred. It is that judgment that the United States now seeks to enforce in this court.
[4] Shield and Anyox submit that there are triable issues and that summary judgment should therefore not be granted. They rest their argument on two grounds: that there was a breach of natural justice; and that the enforcement of the judgment is contrary to public policy.
Summary Judgment

[5] **Rule 20.04(2)** of the **Rules of Civil Procedure, R.R.O. 1990, Reg. 194** provides that the court shall grant summary judgment if it is satisfied that there is no genuine issue for trial. The United States submits that the only genuine issue to be determined is a question of law and that is whether the judgment in the United Statesmeets the applicable test in Canadian law for the recognition and enforcement of foreign judgments. It is its position that there are no factual issues for the court to decide and no genuine issues for trial.
[6] Shield and Anyox submit that there are two triable issues: whether the steps taken by the **U.S.** government to obtain judgment amount to a breach of natural justice due to lack of proper

service; and whether the decision to pursue two Canadian companies that were not responsible for the environmental pollution while not pursuing the American company that was, is contrary to public policy such that it should not be recognized in Canada.
[7] The defendants further submit that, while it may be that at trial the burden of establishing either of these two defences rests with them, that is not the case in a summary judgment motion. They cite the decision of the Ontario Court of Appeal in Hi-Tech Group Inc. v. Sears Canada Inc. (2001), **2001 CanLII 24049 (ON CA)**, 52 O.R. (3d) 97, [2001] O.J. No. 33 (C.A.), at p. 105 O.R., as authority for the proposition that the legal burden to establish that there is no genuine issue for trial rests on the moving party and does not shift. However, [page586] that principle does not relieve the party opposing summary judgment of the need to demonstrate that there is "a real chance of success" (Guarantee Co. of North America v. Gordon Capital Corp., **1999 CanLII 664 (SCC)**, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, at para. 27).
Recognition of Foreign Judgments
[8] The Supreme Court of Canada affirmed in Beals v. Saldanha, **2003 SCC 72 (CanLII)**, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, that foreign judgments are to be recognized and enforced in Canada where the Canadian court is satisfied that there is a "real and substantial connection" between the jurisdiction of the foreign court giving judgment and the action on which that judgment is based. Major J. outlined the applicable principle, at p. 439 S.C.R.:
The "real and substantial connection" test requires that a significant connection exist between the cause ofaction and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.
[9] The jurisdiction of an Ontario Court to enforce a judgment obtained in the United States pursuant to CERCLA was recognized by the Ontario Court (General Division) and affirmed by the Ontario Court of Appeal in United States of America v. Ivey (1995), **1995 CanLII 7241 (ON SC)**, 26 O.R. (3d) 533, [1995] O.J. No. 3579 (Gen. Div.), affd (1996), **1996 CanLII 991 (ON CA)**, 30 O.R. (3d) 370, [1996] O.J. No. 3360 (C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 582. The facts of that case are similar to the instant case in that it involved the enforcement of two judgments for the reimbursement of costs in relation to a waste disposal site.
[10] Shield and Anyox do not dispute that there is a real and substantial connection for the purpose of this summary judgment motion. Shield operated a processing facility on the site under a lease from 1969 to 1971. In 1971, Shield subleased the facility to Essex who operated it from 1971 to 1974. In 1979, ownership of the property was transferred to Shield. In 1984, Shield sold the property to Anyox pursuant to a power of sale. The transfer was not registered and Shield remained as the registered titleholder. John Patrick Sheridan is the president of both Shield and Anyox.
Defences

[11] Major J. noted in Beals, at p. 441 S.C.R., that once the court establishes that there is a "real and substantial connection", it then needs to examine the available defences. Three defences have been [page587] recognized: fraud, lack of natural justice and public policy. It is the latter two that the defendants claim are applicable in this case.
(i) Natural justice

[12] As noted by Major J. in Beals, the court must ensure that the defendants were granted a fair process. If the procedures were not in accordance with Canada's concept of natural justice, then the foreign judgment will not be enforced. The defendants submit that the procedures that were followed in this case contravene natural justice.
[13] The relevant events and dates are as follows:
(i) In 1992, the Utah Department of Environmental Quality, Division of Environmental Response and Remediation ("DERR") inspected the Essex site and took samples.
(ii) DERR reported the results to Mr. Sheridan, president of both Shield and Anyox, by letter dated April 5, 1993, and requested that Shield and Anyox enter into an agreement to perform a complete assessment of the threats associated with the site.

(iii) Shield and Anyox did not respond and DERR sent a second letter on December 22, 1993. Neither company responded to the second letter.
(iv) DERR notified the U.S. Environmental Protection Agency
("EPA") of its findings on February 28, 1994.
(v) The EPA conducted its own investigations on May 26, 1994, as a result of which it requested funds to perform "time critical removal action".
(vi) The EPA sent Mr. Sheridan, as president of Shield, a "Notice of Potential Liability and Request for Information" dated January 6, 1995, by registered mail. The Notice informed Shield that it was potentially liable for clean-up costs. It sent a "Notice of Potential Liability" dated February 28, 1995, to Mr. Sheridan, as president of Anyox.
(vii) The EPA begin its removal action on March 3, 1995. It cleaned up and disposed of large volumes ofcontaminants.
(viii) The EPA sent a "Second Issuance of General Notice and Information Request" to Mr. Sheridan as president of Anyox, dated March 22, 1995. [page588]
(ix) Mr. Sheridan responded to the Request for Information on April 19, 1995 and May 2, 1995, on behalf ofAnyox and Shield respectively.
(x) The EPA sent Mr. Sheridan a "Demand for Payment" for the removal costs in the amount of **US**$103,353.69. Mr. Sheridan did not respond. The EPA sent a second demand for payment to Mr. Sheridan on July 1, 1996, and advised him that the costs now totalled $162,935.00 plus **US**$14,653.78.
(xi) The U.S. began its proceedings in the United States District Court in Utah on May 26, 1999. It served Shield and Anyox by personally serving Mr. Sheridan at his home at 14 Parklane Circle, Don Mills, Ontario, with a "Summons in a Civil Action" and a copy of the Complaint (similar to a Statement of Claim in Ontario) on July 13, 1998.
(xii) On July 27, 1998, Ontario counsel for Shield and Anyox wrote the U.S. Department of Justice. He confirmed that the process server had served the Complaints and Summons on Mr. Sheridan at his home at 14 Parklane Circle (home address). He stated that the corporations had vacated their business address at 150 York Street (corporate address) and that Mr. Sheridan now operated from his home.
(xiii) Shield and Anyox retained counsel in Utah. They filed Answers to the Complaint (similar to a Statement ofDefence), through their Utah counsel on August 26, 1999. Neither defendant contested the jurisdiction of the U.S. District Court.
(xiv) On November 23, 1998, the United States submitted its Initial Disclosures and on December 2, 1998, the defendants' Utah counsel submitted their Initial Disclosures. The defendants' Disclosures indicate that the defendants' address is 150 York St., Toronto, that is, the corporate address.
(xv) On September 3, 1999, Utah Counsel filed a motion to withdraw as counsel on the basis that they had not received payment and that Mr. Sheridan had not communicated with them. The motion was served on the defendants by mailing them a copy to the corporate address. The motion materials indicate that the defendant's address is the corporate address.

(xvi) On September 9, 1999, the United States served its "First Set of Requests for Admissions" on Shield and Anyox by serving their Utah counsel and by mistakenly sending it to the defendants at 150 New York St., instead of York St. [page589]
(xvii) On September 10, 1999, the U.S. District Court granted the motion of Utah counsel to withdraw, to be effective on September 14, 1999. A copy of that order was mailed to Shield and Anyox at the corporate address.
(xviii) On December 16, 1999, the United States filed a Motion for Summary Judgment. It sought summary judgment on the basis that Shield and Anyox had failed to respond to the Request for Admissions and were therefore deemed to have admitted the Requests. A copy of that motion was also mistakenly sent to 150 New York St.
(xix) Neither Shield nor Anyox filed a response to the Motion for Summary judgment.
(xx) On February 5, 2000, Judge Stewart of the U.S. District scheduled a hearing date of April 12, 2000. Copies of the order setting the hearing date were sent to Shield and Anyox at the correct corporate address.
(xxi) The defendants did not appear at the hearing or respond in any way. Judgment was granted on June 19, 2000. A copy of the order was mailed to Shield and Anyox at the correct corporate address. Neither Shield nor Anyox appealed the order nor moved to set it aside.

[14] The defendants submit that there was a breach of natural justice on the basis that: (i) documents should have been served on Mr. Sheridan's home address as of July 27, 1999, when Ontario counsel advised the Department of Justice that the corporate address was no longer operative; and (ii) two sets of documents, the First Set of Requests for Admissions and the Motion for Summary Judgment and supporting memorandum were sent to a non-existent address, that is 150 New York Street, Toronto.
(a) Home or corporate address?

[15] The defendants' Ontario counsel advised the Department of Justice in July 1998, that Anyox and Shieldhad vacated the corporate address and that Mr. Sheridan now operated from home. However, Utah counsel subsequently provided the corporate address as the defendants' address. Although the companies had stopped operating out of their corporate address in 1998, they maintained a mailbox at that address until summer of 2003. That address is also the registered corporate address of Anyox in Ontario.
[16] Mr. Sheridan, in his affidavit, states that the first time he saw the judgment was when the lawsuit was brought in Canada. [page590] The plaintiff's evidence is that no mail sent to the defendants was returned as undeliverable or forwarding address unknown.
[17] Mr. Homiak, senior attorney at the U.S. Department of Justice, in cross-examination on his affidavit, was asked what he would have done had he known about the letter from the Ontario counsel. He indicated that he probably would have contacted the defendants' counsel for clarification of the proper address. He further indicated that, in the absence of a party being represented by counsel, he would have served both locations.
[18] Rule 5(b) of the U.S. Federal **Rules of Civil Procedure** provides that service on a party represented by an attorney is made on the attorney unless ordered otherwise. Rule 83-1.4 of the District of Utah Civil Rules provides that where an attorney withdraws or is removed or otherwise ceases to act as attorney of record, the party must notify the clerk of the appointment of another attorney or of his or her decision to represent himself or herself within 20 days. If the party is retaining new counsel, he or she must provide the clerk with contact information. A party who is proceeding on his or her own, must provide an address and telephone number. The defendants did not do this after their counsel was removed.
[19] Although it might have been desirable to serve the defendants at both the home and corporate addresses, the Rules do not appear to have required it. The defendants' Utah counsel gave the corporate address as the correct address. They would presumably have received that address from their clients. Once the defendants were no longer represented by their Utah counsel, the onus was on them to advise the court of either the address of their new counsel or their own address. They did not do so.
(b) The wrong address

[20] Two sets of documents were sent to the incorrect address of 150 New York St.: the First Set of Requests for Admissions and the Motion for Summary Judgment. 150 New York St., Toronto is a non-existent address.
[21] The first document was also served on the Utah counsel, on a date that was after they had filed a motion to withdraw as counsel, but before their motion was granted and before the order was effective. It is the second document, that is, the Motion for Summary Judgment that is more pertinent, since it initiated the process that ultimately resulted in the judgment being granted.
[22] The plaintiff submits that since the incorrect address had the correct postal code of the corporate address, it would have gone to the corporate address. In his affidavit, Robert Homiak, senior attorney at the U.S. Department of Justice, states that he [page591] was advised by a courier at the post office sorting station that mail addressed to 150 New York Street with the correct postal code would have been delivered to 150 York Street. The defendants object to this evidence as hearsay. However, Rule 20 relaxes the general rule against the admissibility of hearsay evidence in that an affidavit may be made on information and belief. This is subject to the safeguards that cross-examination on the affidavit is available (Slough Estates Canada Ltd. v. Federal Pioneer Ltd. (1994), **1994 CanLII 7313 (ON SC)**, 20 O.R. (3d) 429, [1994] O.J. No. 2147 (Gen. Div.)) and that an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge. I am, however, mindful of the fact th at the issue of whether the documents were properly served is a key factual issue in contention and am therefore of the view that relatively little weight should be given to this evidence.

[23] What is critical, in my opinion, is that notice of the hearing date was sent to the correct corporate address. Therefore, assuming that service on the corporate address is correct service, then it could have been assumed that the defendants were on notice that the matter was proceeding to summary judgment, although they might not have received service of the motion itself.
(c) Available remedy

[24] A copy of the judgment was also sent to the correct corporate address so that assuming that that was the proper address for service and that service had been effected, it would have been open to the defendants to move to set aside the judgment on the basis that they had not received service of the original motion. They have not done so. Neither have they tried to set aside the judgment in the United States once they received notice of it in the context of this motion.
[25] The plaintiff, in its materials, provides an opinion from Marge Gallegos, Paralegal Specialist, U.S. Department of Justice. Ms. Gallegos' opinion is that "the judgment is voidable if the Defendants can show good cause; such as, acceptable justification, inadvertence, mistake or excusable neglect, for the failure to defend responsively and legally, in accordance with Fed. R. Civ. P. 60(b)".
[26] Rule 60(b) of the Federal **Rules of Civil Procedure** provides for relief from a final judgment in a variety ofsituations including "(1) mistake, inadvertence, surprise, or excusable neglect". The rule provides that motions to obtain relief under **Rule 60**(b)**(1)** must be made within one year after the judgment was entered or taken. The defendants submit that they are therefore precluded from moving to set aside the judgment, since they were not aware of the judgment until after the one year had passed. [page592] [27] The plaintiff argues, however, that the defendants could seek a remedy under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment". The time limitation for that provision is not one year, but is "within a reasonable time".
(d) Conclusion regarding natural justice

[28] Major J. in Beals, at p. 448 S.C.R., defines fair process in the context of foreign judgments:
Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.

[29] Major J. further notes, at p. 449 S.C.R., that natural justice includes the right of the defendants to be given adequate notice of the claim against them and the opportunity to defend.
[30] However, proceedings are not regarded as contrary to natural justice merely because of a procedural irregularity on the part of the foreign court, provided that the unsuccessful party was given an opportunity to present her or his case (J.G. Castel, Canadian Conflict of Laws, 5th ed. (Toronto: Butterworths, 2002), at pp. 14-27).
[31] The allegation of a breach of natural justice cannot in my view, be sustained in this case. The defendants were aware of the legal proceedings in the United States and had retained Utah counsel. Their counsel had filed documents in court on their behalf and, as part of this, advised the court that the defendants' address was the corporate address. They would have received that information from the defendants. The defendants continued to maintain a mailbox at that address. Although two items were sent to the wrong address, the notification of the hearing date and a copy of the judgment were sent to the correct corporate address.
[32] Utah counsel obtained an order to remove themselves from the record because the defendants had not paid their bills and had not communicated with them. The defendants did nothing further although they were aware that there was ongoing litigation. Their actions suggest that they made a choice to walk away from the proceedings.
[33] Whether the defendants would be successful in setting aside the judgment in the United States would be a matter for the American courts to decide, but the existence of such a remedy is further support for the proposition that there has not been a breach of natural justice.
(ii) Public policy

[34] Shield and Anyox contend that the United States has not gone after the company that caused the environmental problem, [page593] Essex Group International ("EGI"). Rather, the **U.S.** government went after Canadian corporations that did not cause the problem. They suggest that if it can be established at

trial that the decision to obtain judgment from them was made in order to extract costs from foreign corporations instead offrom an American corporation, then it would be contrary to public policy.
[35] Shield and Anyox point to the “Letter Report for Essex Copper Site” as evidence that it was Essex Group that caused the damage. The Report refers, for example, at p. 13, to an individual who worked at the site having reported that hazardous substances were left when Essex abandoned the site in 1975. The Report further states, at p. 18, that “EGI is the only generator of hazardous waste that was disposed at the Site” and “The wastes removed by the EPA are consistent with the wastes generated by EGI during the copper leaching operations.”
[36] There is no direct evidence to show that the EPA decided to go after foreign corporations instead ofAmerican corporations. CERCLA, like the Ontario **Environmental Protection Act**, R.S.0. 1990, c. E.19, provides that the owner of the property may be liable for the costs of removal (CERCLA section 9607; **Environmental Protection Act**, **s. 97(1)**).
[37] The public policy defence operates so as to prevent the enforcement of a foreign judgment that is contrary to the Canadian concept of justice. The defence of public policy has rarely been successfully invoked and “has been construed narrowly” (J.G. Castel, Canadian Conflict of Laws, 3rd ed. (Markham: Butterworths, 1994), at p. 164).
[38] Carthy J.A. dealt with the defence of public policy in Boardwalk Regency Corp. v. Maalouf (1992), **1992 CanLII 7528 (ON CA)**, 6 O.R. (3d) 737, [1992] O.J. No. 26 (C.A.), at p. 743 O.R.:
The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.
[39] Castel in Canadian Conflict of Laws, 5th ed. states, at pp. 14-18, that “A foreign judgment will not be recognized or enforced in Canada if its recognition or enforcement would be contrary to public policy”. In his discussion of the public policy defence in Beals, Major J. states, at p. 452, that “The public policy defence turns on whether the foreign law is contrary to our view of basic morality.” Major J. underlined the word “law”.
[40] Shield and Anyox acknowledge that the United States of America v. Ivey is authority for the proposition that enforcement of a judgment pursuant to CERCLA is not, in itself, contrary to [page594] public policy. In that case, the court was also dealing with a summary judgment motion to enforce judgments obtained against the defendants in the United States pursuant to CERCLA. In rejecting the public policy defence, Sharpe J. noted, at p. 554 O.R., the similarity between CERCLA and the Ontario **Environmental Protection Act** and concluded:
While the measures chosen by our legislature do not correspond precisely with those chosen by the Congress of the United States, they are sufficiently similar in nature to defeat any possible application of the public policy defence.
[41] Shield and Anyox do not challenge the law itself as contrary to public policy. Rather, they contend that the decision to seek judgment against Canadian companies who did not cause the damage instead of proceeding against an American company that did cause the problem may be contrary to public policy and is a triable issue. Such an assertion, however, does not challenge the law but, rather, challenges the way in which the law has been applied. That, in my opinion, goes beyond the scope of the public policy defence as articulated in Beals.
[42] In United States of America v. Ivey, the American courts had held the defendants accountable for environmental harm that they had caused. However, the Ontario Court of Appeal noted, at p. 373 O.R. that, “this finding is not essential for American liability or Canadian enforcement, because liability under the relevant **U.S.** environmental legislation depends on ownership or operation at the time of disposal, and it is not necessary to prove that the defendants caused the harm”.
[43] The Ontario Court of Appeal in United States of America v. Ivey has acknowledged that causation is not a precondition for enforcement in Canada. It is not necessary, therefore, to assess the evidence as to who might have directly caused the harm. The defendants have not provided any evidence that the United Statesimproperly targeted them. While the burden is on the plaintiff to establish that there are no genuine issues for trial, the defendants must show that there is a “real chance of success”. The defendants have not, in my opinion, been able to do this.
[44] For these reasons, the public policy defence as asserted by Shield and Anyox cannot, in my opinion, be sustained.
Conclusion

[45] The judgment in question meets the test in Canadian law for the recognition and enforcement of a foreign judgment. Neither of the two defences can, in my opinion, be sustained in this case. As such, there are no triable issues. Summary judgment is therefore granted for the amount in Canadian currency necessary [page595] to purchase **US**$242,614.03, in accordance with **s. 121** of the **Courts of Justice Act, R.S.O. 1990, c. C.43**, plus prejudgment interest from the date of the judgment in the United States District Court and postjudgment interest in accordance with the **Courts of Justice Act**.

[46] If the parties are unable to come to an agreement as to costs, they may make written submissions to me. The plaintiff's submissions are to be provided within 15 days of the release of this decision and the defendants' submissions are to be provided within 15 days thereafter.

Judgment accordingly.