Enforcing Foreign Summary/Default Judgments: The Damoclean Sword Hanging Over *Pro Se* Canadian Corporate Defendants?

The United States of America v. Shield Development Co.

*Antonin I. Pribetic**

Following the much-anticipated Supreme Court of Canada decision in *Beals v. Saldanha*,[1] the "real and substantial connection" test established in *Morguard Investments Ltd. v. De Savoye*[2] was extended to apply equally to the recognition of foreign judgments.[3] Thus, the principles of comity, reciprocity and order and fairness were held to apply to originating actions commenced in Canada involving foreign litigants (either as plaintiff or defendant).[4] Moreover, the *Beals v. Saldanha* decision confirmed that where jurisdiction *simpliciter* is otherwise established (*i.e.* consent-based jurisdiction, presence-based jurisdiction or assumed jurisdiction)[5] the only available defences to a domestic defendant seeking to have a Canadian court refuse enforcement of a foreign judgment are fraud, natural justice and public policy.[6] Some commentators have expressed concern that the *Beals v. Saldanha* decision will potentially expose Canadian defendants to exorbitant U.S. jury awards, which often include treble and punitive damages which far exceed comparable Canadian damage assessments.[7] In the wake of *Beals v. Saldanha*, the scope and applicability of the defences of natural justice and public policy were recently appraised by the Ontario Superior Court of Justice and Court of Appeal in *The United States of America v. Shield Development Co.*[8]

In *USA v. Shield*, the U.S. Department of Justice (Environmental Enforcement Section, Environment and Natural Resources Division) ("USA") sought to recover environmental clean-up costs in removing hazardous substances from the Essex copper processing site in Milford, Beaver County, Utah originally owned by two Canadian corporations, The Shield Development Co. Ltd. ("Shield") and Anyox Metals Ltd. ("Anyox"). Shield operated a processing facility on the site under a lease from 1969 to 1971. In 1971, Shield subleased the facility to Essex Group International ("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. Both Shield and Anyox denied they had caused the environmental pollution

Exécution des jugements étrangers par défaut ou sommaires : L'épée de Damoclès pend-elle au-dessus des personnes morales canadiennes poursuivies *pro se*?

Par suite de la décision rendue par la Cour suprême du Canada en 2003 dans l'affaire *Beals* c. *Saldanha*, lorsque la compétence *simpliciter* est établie autrement (par ex. sur la base d'un accord, selon la présence ou de façon présumée), les seuls motifs d'invalidation existant pour l'exécution d'un jugement étranger sont la fraude, l'ordre public et la justice naturelle. La décision rendue en l'Ontario en 2005 dans l'affaire opposant *les États-Unis d'Amérique à Shield Development Co*, permet d'analyser de façon critique le moyen de défense fondé sur la justice naturelle par une juxtaposition du droit procédural américain et canadien. Le *fonctionnalisme stratégique* est une nouvelle théorie qui suppose que la *forme* (tactique qui s'appuie sur les règles de procédure et de preuve) dépend du *fond* (stratégie qui s'appuie sur les principes juridiques substantiels, l'ordre public national, international et transnational et sur les intérêts du client) et de la *procédure* applicable (contentieux, arbitrage ou médiation). Ainsi, la *forme* des règles de jugement par défaut doit être fonction du *fond* contenu dans les principes de droit international de « courtoisie », de

« réciprocité » et d'« ordre et équité », qui sous-tendent le système juridique canadien dans l'ordre juridique international privé. Bien que l'arrêt *É-U* c. *Shield* fournisse des renseignements sur l'argument de l'ordre public, l'étude de la Cour de l'Ontario sur le moyen de défense fondé sur la justice naturelle demande à être examinée pour trois raisons. Premièrement, ce moyen de défense est le pivot entre les principes d'ordre et d'équité et constitue la base de l'exécution d'un jugement étranger. Deuxièmement, les faits et les preuves de l'espèce ainsi que l'historique procédural de l'affaire *É-U* c. *Shield* démontrent tous deux que les normes de procédures régulières américaines et celles d'équité procédurale canadienne diffèrent significativement par rapport aux jugements par défaut ou sommaires. Troisièmement, et c'est sans doute le point le plus important, les droits de notification et de comparution devant les tribunaux fédéraux et étatiques américains, pour les personnes morales poursuivies non représentées (*pro se*), sont sensiblement différents de ceux en vigueur dans l'ensemble du Canada, et en Ontario en particulier. Les commentaires sur l'arrêt comprennent une analyse comparative des Règles fédérales américaines de procédure civile, des Règles locales de l'État de l'Utah et des Règles de procédure civile de l'Ontario. Ils arrivent à la conclusion que le moyen de défense fondé sur

and alleged that it had been caused by Essex.[9] The USA then commenced proceedings in the United States District Court in Utah under federal jurisdiction,[10] seeking declaratory judgment against Shield and Anyox for the USA's environmental clean-up costs pursuant to section 107 of the *Comprehensive Environmental Response, Compensation and Liability Act* ("CERCLA").[11]

Following a labyrinthine procedural history,[12] the USA eventually obtained "summary judgment" jointly and severally against Shield and Anyox in the amount of US$242,614.93 plus costs. The USA then commenced an action in Ontario to enforce its Utah judgment and moved for summary judgment before Herman, J. Shield and Anyox resisted the motion and argued 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 due to ineffective or improper service on the defendants of a number of court documents; and (2) whether the USA's decision to sue two Canadian corporations and not the American corporation responsible for the environmental pollution was contrary to public policy.

Herman, J. rejected the defences of natural justice and public policy and granted summary judgment against Shield and Anyox.[13] In a brief endorsement, the Ontario Court of Appeal dismissed Shield and Anyox's appeal stating in part:

> [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 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.[14]

Based upon a functionalist paradigm,[15] I argue that the defence of natural justice mandates that "form ever follows function".[16] *Strategic functionalism* is a new theory which posits that the *form* (tactics based upon procedural and evidentiary rules) is a function of the *content* (strategy based upon substantive legal principles, domestic/international/transnational public policy and client-centred interests) and the applicable *process* (i.e. litigation, arbitration or mediation). Hence, the *form* of default judgment rules must be a function of the *content* of international law principles of "comity", "reciprocity" and "order and fairness" underpinning the Canadian legal system within the private international law order. Although *USA v. Shield* is also informative in respect of the public policy defence,[17] the Ontario court's analysis of the defence of natural justice begs scrutiny for three reasons.

First, the defence of natural justice is the fulcrum between the principles of order and fairness that forms the basis for foreign judgment enforcement. The judicial distemper

exhibited in the majority and dissenting opinions in *Beals v. Saldanha* was no less muted in the divided court's analysis of the defence of natural justice. Justice Major, writing for the six-to-three majority,[18] disagreed generally with Justice Lebel's "purposive and flexible" approach[19] to the traditional defences and downplayed the significance of lack of notice and unfamiliarity with foreign legal procedure. According to Major, J., the defence of natural justice requires the enforcing court to determine whether the defendant was granted fair process by the foreign legal system when the foreign court granted judgment. Fair process is one that "reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system." It also includes a requirement that the defendant be given adequate notice of the claim and an opportunity to defend. Major, J. further noted that this "assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts."[20] Justice Major defined the defence of natural justice as follows:

> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.[21]

Justice Major further noted:

> In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend....
>
> LeBel J. would expand the defence of natural justice by interpreting the right to receive notice of a foreign action to include notice of the legal steps to be taken by the defendant where the legal system differs from that of Canada's and of the consequences flowing from a decision to defend, or not defend, the foreign action. Where such notice was not given, he would deny enforcement of the resulting judgment. *No such burden should rest with the foreign plaintiff. Within Canada, defendants are presumed to know the law of the jurisdiction seized with an action against them. Plaintiffs are not required to expressly or implicitly notify defendants of the steps that they must take when notified of a claim against them. This approach is equally appropriate in the context of international litigation. To find otherwise would unduly complicate cross-border transactions and hamper trade with Canadian parties. A defendant to a foreign action instituted in a jurisdiction with a real and substantial connection to the action or parties can reasonably be expected to research the law of the foreign jurisdiction...*[22]

la justice naturelle doit être amélioré et proposent six éléments supplémentaires que les tribunaux canadiens devront appliquer à l'heure de l'étudier lorsqu'il est question d'exécution d'un jugement étranger par défaut.

Antonin I. Pribetic, Baccalauréat ès lettres. (Hons.) (York, 1987), Baccalauréat en droit (Osgoode Hall, 1991), candidat à la Maîtrise en droit (Osgoode Hall, 2008). Courriel : apribetic@smhilaw.com. M. Pribetic est avocat plaidant pour le cabinet Steinberg Morton Hope & Israel s.r.l., située à Toronto, en Ontario, au Canada, où il exerce dans les domaines des litiges commerciaux et des contentieux transnationaux. Il a publié divers articles sur le droit international privé et sur les lois relatives à la vente internationale. Il souhaite remercier Me H. Scott Fairley, de Theall & Associates, qui a agi en qualité de coconseiller auprès des États-Unis lors du procès, pour avoir fourni une copie du dossier d'appel et du recueil de lois ce qui a considérablement facilité ses recherches pour commenter cet arrêt. Me Pribetic remercie également Me Dennis Flynn, avocat pour le cabinet juridique Winder & Haslam, situé en Utah, pour ses remarques pertinentes sur la procédure civile tant à l'échelon fédéral des États-Unis qu'à celui de l'État de l'Utah, et enfin il tient à adresser ses remerciements à un pair examinateur anonyme pour ses commentaires très utiles. L'avis exprimé et les erreurs ou les omissions lui appartiennent exclusivement.

Conversely, Justice Le Bel argued that the defence of natural justice "concerns the procedure by which the foreign court reached its decision."[23] If a defendant can establish that the process by which the foreign judgment was obtained was contrary to the Canadian conception of natural justice, then the foreign judgment should not be enforced.[24] Furthermore, Le Bel, J. suggested that adequate notice should include "alerting the defendant to the consequences of any procedural steps taken or not taken . . . as well as to the allegations that will be adjudicated at trial."[25] In a separate dissent, Binnie, J. voiced similar concerns:

> *Proper notice is a function of the particular circumstances of the case giving rise to the foreign default judgment. In this case, in my view, there was a failure of notification amounting to a breach of natural justice. In these circumstances, the Ontario courts ought not to give effect to the Florida judgment.*
> ...
> When a Canadian resident is served with a legal process from within his or her own jurisdiction, he or she is presumed to know the law and the risks attendant with the notice. There can be no such presumption across different legal systems.
>
> As the basis of the respondents' judgment is *default of pleading*, this lack of notification goes to the heart of the present appeal.[26]

The defence of natural justice is essentially a restatement of the well-established legal principle of *"audi alteram partem"* or "hear the other party" requiring that the parties to a dispute be given adequate notice and an opportunity to be heard.[27] Put another way, without procedural justice, order trumps fairness.

Professor Lawrence Slocum further adumbrates the defence of natural justice in his article "Procedural Justice" when he states:

> The Participation Principle requires that the arrangements for the resolution of civil disputes be structured to provide each interested party with a right to adequate participation. The Accuracy Principle requires that the arrangements for the resolution of civil disputes should be structured so as to maximize the chances of achieving the legally correct outcome in each proceeding. Together, the two principles provide guidance where guidance is needed, both for the architects of procedural design and reform and for judges who apply general procedural rules to particular cases.[28]

Second, the factual and evidentiary record and procedural history in *USA v. Shield* both demonstrate that the standards of American due process and Canadian procedural fairness differ in material respects vis-à-vis default and/or summary judgments.

Finally, and perhaps most importantly, the rights of unrepresented (*pro se*)[29] corporate defendants to notice and right of appearance in U.S. federal and state courts are markedly different than those in Canada generally, and in Ontario, specifically. Therefore, a comparative analysis of the U.S. Federal Rules of Civil Procedure, local Utah State Rules and the Ontario Rules of Civil Procedure will identify the need for further refinement and potential factors in applying the defence of natural justice in the context of foreign default judgment enforcement.

Factual Background

From June 1st to June 3rd, 1992, the Utah Department of Environmental Quality, Division of Environmental Response and Remediation ("DERR") inspected the Essex site and took samples. By letter dated April 5, 1993, DERR reported the results to Mr. Sheridan, president of both Shield and Anyox, and further requested that Shield and Anyox enter into an agreement to perform a complete assessment of the environmental threats associated with the site. DERR sent a follow-up letter on December 22, 1993 but Shield and Anyox failed to respond to either letter. On February 28, 1994, DERR notified the U.S. Environmental Protection Agency ("EPA") of its findings. On May 26, 1994, as a result of its own investigations, the EPA requested funds to perform "time critical removal action". On January 6, 1995, the EPA sent a "Notice of Potential Liability and Request for Information" by registered mail to Shield's registered corporate address at 150 York Street, Suite #1614, Toronto (to Mr. Sheridan's attention as president of Shield) informing Shield that it was potentially liable for clean-up costs. Interestingly, the essentially identical Notice of Potential Liability was faxed to Mr. Sheridan, on behalf of Anyox, on

February 28, 1995, but the USA conceded that it was sent by registered mail to an incorrect address (#7 King Street East, #1404, Toronto).[30]

On March 3, 1995, the EPA began its removal, cleanup and disposal of the onsite contaminants.[31] On March 22, 1995, the EPA then sent a "Second Issuance of General Notice and Information Request" to Mr. Sheridan as president of Anyox, to which Mr. Sheridan responded on April 19, 1995 and May 2, 1995, on behalf of Anyox and Shield, respectively. The EPA then sent a "Demand for Payment" letter to Mr. Sheridan, as President of Anyox, dated September 26, 1995 for the removal costs of US$103,353.69, to which 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 US$162,935.00 plus US$14,653.78. Notably, although the EPA also sent the same "Demand for Payment" letters to Essex, apparently without reply, it elected to sue only Shield and Anyox under the CERCLA environmental legislation.[32]

Utah District Court Procedural History

The following is a factual chronology leading to the Utah District Court judgment:

May 26, 1998 — USA commenced an action against Shield and Anyox in the United States District Court in Utah.[33]

July 13, 1998 — The Complaint was served on Shield and Anyox through personal service on Mr. Sheridan at his home at 14 Parklane Circle, Don Mills, Ontario, by leaving a copy of a "Summons in a Civil Action". A copy of the Complaint (similar to a Statement of Claim in Ontario) was also left with Marjorie Sheridan, Mr. Sheridan's spouse pursuant to Rule 4(h)(1) of the United States Federal Rules of Civil Procedure [hereinafter "Fed. R. Civ. P."][34]

July 27, 1998 — Ontario counsel agent retained by the U.S. Department of Justice wrote a letter confirming 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 vacated their business address at Suite 1614, 150 York Street Toronto [corporate address] in mid-April/early May 1998 and Mr. Sheridan now operates from his home."[35]

August 26, 1998 — Shield and Anyox retained counsel in Utah who filed Answers to the Complaint (similar to a Statement of Defence). Neither of the corporate defendants contested jurisdiction of the U.S. District Court, albeit not initially conceding choice of venue.[36] [37]

November 23, 1998 — The USA submitted its Initial Disclosures.[38]

December 2, 1998 – Defendants' Utah counsel submitted their Initial Disclosures which incorrectly stated that the defendants' corporate address is 150 York St., Toronto.[39]

September 3, 1999 – Defendants' 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 corporate defendants were served with the motion by mail at their corporate address. The motion materials indicated that the defendants' address was the corporate address.[40]

September 9, 1999 — The USA served its "First Set of Requests for Admissions"[41] on Shield and Anyox pursuant to Rule 36(a) of the Fed. R. Civ. P. by serving their Utah counsel and by mistakenly sending it to the defendants at "150 New York St.", a non-existent Toronto address, instead of 150 York St., the former corporate address which Shield and Anyox abandoned in 1998 but at which they maintained a mailbox until 2003.[42]

September 10, 1999 — The U.S. District Court granted Utah counsel's motion to withdraw pursuant to Rule 83-1.4(a)(2) of the Rules of Practice for the United States District Court for the District of Utah [the local Fed. R. Civ. P.] effective on September 14, 1999. A copy of that order was mailed to Shield and Anyox at the former corporate address.[43]

December 16, 1999 — The United States filed a Motion for 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 misdirected to "150 New York St.". Unsurprisingly, neither Shield nor Anyox filed a response to the Motion for Summary judgment.[44]

February 5, 2000 — Judge Ted Stewart of the U.S. District scheduled a hearing date on April 12, 2000. Copies of the order setting the hearing date were sent to Shield and Anyox at what Justice Herman regarded as the "correct" corporate address.[45]

June 19, 2000 — Judge Stewart granted Judgment to the USA following the defendants' failure to respond or appear at the hearing.[46] A copy of the order was mailed to Shield and Anyox at the "correct" corporate address. Justice Herman observed that neither Shield nor Anyox appealed the order nor moved to set it aside within the one-year limitation period under Rule 60(b)(1) of the Fed. R. Civ. P., noting that:

> Rule 60(b) of the Federal Rules of Civil Procedure provides for relief from a final judgment in a variety of situations 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.
>
> 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".[47]

Comparative Procedural Analysis

The American and Canadian laws of civil procedure are generally thought to be similar, having derived from the same historical antecedents of English common law. Furthermore, determining procedural fairness is necessarily subjective: a domestic court presumes that its own legal system and rules of procedure are fair to litigants. Nevertheless, the defence of natural justice is best considered by juxtaposing both procedural regimes under the following four categories:

> (1) Withdrawal or removal as counsel of record;
> (2) Standing for unrepresented (*pro se*) corporate litigants;
> (3) Sanctions for failure to respond to requests to admit; and
> (4) Legal standard for summary judgment and default judgment.

(1) Withdrawal or removal as counsel of record

Utah Counsel's motion to withdraw as counsel of record was brought on September 3, 1999. The US served its "First Set of Requests for Admissions" on Utah Counsel and to the wrong corporate address in Toronto. Judge David Sam allowed withdrawal of defendants' counsel by Order dated September on September 10, 1999 pursuant to Rule 83.1.4(a)(2) of the Utah Federal Rules of Practice which reads in part:

> DUCivR 83-1.4 ATTORNEYS - WITHDRAWAL OR REMOVAL OF ATTORNEY
>
> **(a) Withdrawal and Substitution**. No attorney will be permitted to withdraw or be substituted as attorney of record in any pending action except by written application and by order of the court. All applications for withdrawal must set forth the reasons therefor, *together with the name, address, and telephone number of the client*, as follows:
> ...
> (2) **Without Client's Consent**. Where the withdrawing attorney has not obtained the written consent of the client, the application must be in the form of a motion that must be served upon the client and all other parties or their attorneys. *The motion must be accompanied by a certificate of the moving attorney that (i) the client has been notified in writing of the status of the case including the dates and times of any scheduled court proceedings, pending compliance with any existing court orders,*

and the possibility of sanctions; or (ii) the client cannot be located or, for whatever other reason, cannot be notified of the pendency of the motion and the status of the case.[48]

(b) Responsibilities of Party Upon Removal. Whenever an attorney withdraws or dies, is removed or suspended, or for any other reason ceases to act as attorney of record, *the party represented by such attorney must notify the clerk of the appointment of another attorney or of his decision to appear pro se within twenty (20) days or before any further court proceedings are conducted.* If substituting counsel, the party also must provide the clerk with the name, current telephone number, address, and, where applicable, Utah State Bar identification number of substituting counsel. *If the party is proceeding pro se, the party must provide the party's address and telephone number to the clerk.*[49]

Conversely, Rule 74 (formerly 4-506) of the local Utah State Rules provides as follows:

Rule 74. Withdrawal of Counsel

(a) If a motion is not pending and a certificate of readiness for trial has not been filed, an attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. If a motion is pending or a certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing.

(*b*) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, *or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.*

(c) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.[50]

The differences are notable, if not, striking. Under the Utah Federal Rules of Practice, the onus is on the unrepresented party (former client) to notify the court and opposing counsel of new representation or its intention to act in person. By contrast, under the Utah State Rules, the onus is on the opposing party, who is required to serve a Notice to Appear or Appoint Counsel to the unrepresented party. The failure to deliver the appropriate Notice to Appear or Appoint Counsel has been held by the Utah Supreme Court as sufficient grounds to set aside default judgment against a personal defendant.[51] [52]

By comparison, under Rule 15 of the Ontario Rules, a party's solicitor may only withdraw or be removed as solicitor of record where (1) a Notice of Change of Solicitors from successor counsel is served; (2) the personal defendant delivers a Notice of Intention to Act in Person; or (3) by order of the court.[53] One may argue that Rule 74 of the Utah State Rules is much fairer than the corresponding Rule 83.1-4(b) of the Utah Federal Rules of Practice, as it provides a procedural safeguard to unrepresented personal defendants. Whether or not the same is true for unrepresented corporate defendants is considered below.

(2) Standing for unrepresented (*pro se*) corporate litigants

The Utah Code does not include any provision requiring a corporation to be represented by legal counsel. A statute did exist, *Utah Code Ann.* § 78-51-40, prohibiting corporations and associations from practicing law, but Laws 2001, c. 4 § 3, eff. April 30, 2001, repealed it. The prohibition appears to remain in effect under case law, however. The Utah Supreme Court observed in *Tracy-Burke Assoc. v. Dept. of*

Employment Security, "It has long been the law of [Utah] that a corporate litigant must be represented in court by a licensed attorney."[54]

There is no corresponding Federal Rule prohibiting a corporation from representing itself in court. However, the prohibition exists through case law, including a U.S. Supreme Court decision in which the court recognized, "It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel."[55] Similarly, in *CLD Construction, Inc. v. City of San Ramon*[56] the California Court of Appeal held that either a corporation may not represent itself in a court of record *in propria persona* or through an officer or agent who is not an attorney. However, the California Court of Appeal did note that:

> In federal courts there has been a consistent pattern during the last 40 years to dismiss a corporation that initially appears via a nonattorney officer or shareholder only after the corporation has been given a reasonable time to secure counsel.[57]

Interestingly, in *USA v. Shield*, the plaintiff's affidavit also contained an exhibit memo dated May 3, 2002 from a US Department of Justice paralegal specialist, which read in part:

> "The issues to be research [sic] in this case are whether clients are required to respond to pleadings received after counsel has withdrawn from the case and whether the clients and/or defendants can suffer default for lack of response.
>
> The courts have repeatedly held that corporations and other organizations, such as Shield Development Co., Ltd. and Anyox Metals Ltd., must be represented by counsel. Failure to appoint substitute counsel can justify entry of a default, if the corporation was notified that it may not proceed *pro se.* See *R Maganlal v. M.G. Chemical Co., Inc.,* 1996 WL 420234 (S.D.N.Y.) July 25, 1996). The Defendants, Shield Development and Anyox Metals, should have appointed substitute counsel to handle their case shortly after Judge Sam granted the Motion to Withdraw as Counsel for the Defendants in September 1999, to date Notice of Substitution of Counsel has not been filed with the Court. The Defendants' failure to appoint substitute counsel has provided DOJ with additional justification for entering default judgment."[58]

A contrario, the Ontario Rules do not contain an absolute prohibition against *pro se* corporate litigants.[59] Moreover, the Ontario Rules mandate that an order for removal of counsel as solicitor of record for a corporation must contain the following text:

> 15.04(6) A client that is a corporation shall, within 30 days after being served with the order removing the solicitor from the record,
>
> (a) appoint a new solicitor of record by serving a notice under subrule 15.03 (2); or
>
> (b) obtain and serve an order under subrule 15.01 (2) granting it leave to be represented by a person other than a solicitor. O. Reg. 739/94, s. 1 (2); O. Reg. 536/96, s. 1.
>
> (7) If the corporation fails to comply with subrule (6),
>
> (a) the court may dismiss its proceeding or strike out its defence; and
>
> (b) in an appeal,
>
> (i) a judge of the appellate court may, on motion, dismiss the corporation's appeal, or
>
> (ii) the court hearing the appeal may deny it the right to be heard. O. Reg. 171/98, s. 1.[60]

The provisions of Rule 15.04 reflect the principles of order and fairness by allowing a corporation to participate in the courts without legal counsel and to be notified of its rights, obligations and sanctions for inaction, following withdrawal by counsel. It is submitted that an additional factor for the defence of natural justice should be a determination of whether the foreign judgment was granted by the foreign court whose procedural system afforded a corporate defendant rights of appearance and notice similar to the domestic enforcing court.

(3) Sanctions for failure to respond to requests to admit

The sanctions for failure to respond to documentary requests to admit differ between the American and Ontario procedural systems. A party's failure to respond to a request for admissions under Rule 36 of the Federal Rules may result in a

material fact being deemed admitted and the subjecting of the party to an adverse grant of summary judgment.[61]

However, in the case of *U.S. v. Turk,*[62] District Judge Hebert F. Murray held that the court was not bound to deem as admitted unanswered requests for admissions by a *pro se* defendant, where to do so would be contrary to the interests of justice and unduly prejudicial to the defendant's rights. Judge Murray expressed his reluctance "to grant summary judgment against a *pro se* defendant based solely upon his failure to comply with the discovery requirements of the Federal Rules of Civil Procedure."[63] Although the Ontario Rules also contemplate Requests to Admit and provide for deemed admissions where no response is forthcoming,[64] they also contain the following important caveat under Rule 19.01 which reads:

> FACTS MUST ENTITLE PLAINTIFF TO JUDGMENT
>
> **19.06** A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment. R.R.O. 1990, Reg. 194, r. 19.06.

The potential harshness of facing a default judgment resulting from the failure to respond to admissions effectively deprives a party of the opportunity to contest the merits of a case. In Ontario, the test for setting aside default judgment requires the moving party to show:

> (a) that the motion to set aside judgment has been brought as soon as possible after the moving party received the judgment;
>
> (b) that the circumstances of the default gave rise to a possible explanation for the default; and
>
> (c) the facts establish at least an arguable defence.[65]

By comparison, U.S. Fed. R. Civ. P. 55(c) provides that a judgment of default may be set aside pursuant to U.S. Fed. R. Civ. P. 60(b), the latter of which allows judgments by default to be set aside for: mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence not previously discoverable by due diligence; fraud, misrepresentation or other misconduct by the opposing party; if the judgment is void; or, where the judgment has been satisfied, released or discharge, or a prior judgment on which it was based has been reversed or vacated; and, for any other reason justifying relief. A district court may refuse to grant relief from a judgment by default on the following grounds: (1) no meritorious defense; (2) the defendant's willful or careless disregard for the court's process; (3) the inexcusable neglect of counsel; (4) the defendant's lack of good faith or, (5) justice would not be furthered.[66] Generally, the client's or attorney's confusion, mistake, oversight or inattention, are all insufficient grounds to set aside a default judgment.[67] The defaulting party must demonstrate that it was justified in failing to avoid a mistake; gross carelessness and/or ignorance of procedural rules or laws are inadequate excuses.[68] Relief may be granted where extraordinary circumstances exist, or where statutory or common law protections were available to the defendant.[69]

While judicial policy may be to insure the orderly disposition of cases and parties to a lawsuit must comply with the rules of procedure, where a *pro se* corporation does not have any right of appearance or right to file documents, its knowledge of the law and legal procedure (e.g. whether it is entitled to withdraw admissions or respond to a request to admissions) is a *non-sequitur.* Therefore, it is submitted that an additional factor for the defence of natural justice should be whether a foreign rule of procedure was intended to be used as a technical weapon to defeat the rights of *pro se* litigants to have their cases fairly judged on the merits.[70]

(4) Legal standard for summary judgment and/or default judgment.

In her reasons, Justice Herman noted the Ontario test for summary judgment as follows:

> [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 States meets 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.

...

[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), 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, 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] 3 S.C.R. 423, [1999] S.C.J. No. 60, at para. 27).[71]

There are a few American cases in which the defendant's failure to appear in court results in summary judgment. In *Fireman's Ins. Co. of Newark, New Jersey v. Herbert,*[72] the court granted summary judgment against the *pro se* defendants after they had failed to respond to plaintiff's requests for admissions, or to appear at the hearing. The court noted its discretion in granting summary judgment and its leniency towards *pro se* defendants in warning them of the consequences of failing to respond. The responses to plaintiff's requests for admission were deemed admitted upon defendants' failure to respond, which formed the basis for summary judgment.[73] Similarly, in *Gittens v. Garlocks Sealing Technologies,*[74] the New York court granted summary judgment against a *pro se* plaintiff who had failed to respond to defendant's motion for summary judgment and to appear at the hearing. While the court noted the failure to respond and appear, in and of itself, did not constitute grounds for summary judgment, the statement of facts were deemed admitted through plaintiff's failure to respond and, "if those facts show summary judgment is appropriate, summary judgment should be granted."[75]

Rule 56(c) of Fed. R. Civ. P. specifies that "admissions on file" can be an appropriate basis for granting summary judgment.[76] Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record.[77] Instead, the proper course for a litigant that wishes to avoid the consequences of failing to timely respond to Rule 36 requests for admission is to move the court to amend or withdraw the default admissions in accordance with the standard outlined in Rule 36(b).[78] Although Rule 36(b) of Fed. R. Civ. P. provides discretion to the court to allow a party to withdraw or amendment of an admission, this is of little solace to a foreign *pro se* corporate defendant who has not been apprised of the availability of this procedure.

A Final Remark on Finality

The issue of notice was central to the court's analysis in *USA v. Shield.* However, whether or not service was properly effected begs the question of whether the corporate defendants were afforded basic or fundamental rights of natural justice under the Utah federal rules of court, after their Utah Counsel were removed as counsel of record. Mr. Sheridan's explanation for not responding to his former Utah Counsel was that he was involved in a head on accident in 1997 while riding in a taxi which affected him both physically and mentally and affected his recollection of events.[79] [80] However, the real issue is whether the fact that Shield and Anyox, having attorned to the Utah jurisdiction, thereafter were bound by all subsequent proceedings. Clearly, Justice Herman considered the misdelivery of some of the court documents, including the motion for summary judgment, as "procedural irregularities" which did not raise a triable defence of breach of natural justice.

The *ratio* of Herman, J.'s analysis is succinctly summarized as follows:

> [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.

The court's analysis fails to consider that a foreign judgment must be final and *res judicata* in the originating jurisdiction, before it can be enforced in Canada.[81] In the recent Supreme Court of Canada decision of *Pro Swing Inc. v. Elta Golf Inc.*[82] Deschamps, J. for the 4-3 majority deferred on the finality requirement, stating:

> The present case does not require the consideration of defences particular to the nature of equitable orders. Thus, I do not have to expand on Major J.'s *dictum* in *Beals* that the evolution of private international law may require the creation of new defences (para. 42). *The existing defences do not need to be broadened for the purposes of the case at bar. Similarly, the finality requirement, which is indispensable, although more complex in the context of an equitable order than in that of a common law order, could be the object of further commentary. However, these topics need not be fully addressed in the present case. Revisiting the defences and defining the finality requirement in the context of equitable orders are better left for another day.* [emphasis added]

In her dissenting opinion, McLachlin C.J., on behalf of the minority held:

> Finality demands that a foreign order establish an obligation that is complete and defined. The obligation need not be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step; orders for interest and costs may often follow. *But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration.*
>
> Clarity, which is closely related to finality, requires that an order be sufficiently unambiguous to be enforced. Just as the enforcing court cannot be asked to supplement the order, so it cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of the judicial apparatus in the enforcing jurisdiction.[83] [emphasis added]

However, aside from whether ineffective service constitutes a denial of natural justice, the circumstances under which summary judgment is granted through non-appearance merits further scrutiny by Canadian courts asked to enforce the foreign judgment. In *USA v. Shield*, once Utah counsel was removed as counsel of record, the corporate defendants were prohibited from filing any responding materials, including a response to Requests for Admissions or response to the motion for summary judgment, unless they retained legal counsel. Conversely, in Ontario, a corporation has the right to seek leave to appoint an officer of the corporation to represent it in court proceedings. Based upon Strategic Functionalism Theory, the defence of natural justice should not be merely a question of determining whether the foreign court provided minimum standards of procedural fairness (*i.e.* the "form"); it should also be regarded as a substantive defence on the merits (*i.e.* the "content") and the overall legitimacy of the legal system (*i.e.* the "process").

Therefore, the defence of natural justice in the context of foreign default judgment enforcement involving *pro se* corporate defendants should include the following analytical inquiry:

> 1. Was default judgment granted against a corporate defendant who previously attorned or submitted to the

foreign court's jurisdiction?
2. Is the foreign judgment final or *res judicata* in the foreign jurisdiction (i.e. all rights of appeal and time limitations to set aside the foreign judgment have been exhausted)?
3. If so, was default judgment granted against the corporate defendant in circumstances involving defective service under the foreign court's procedure?
4. If not, was the defendant represented by counsel at the time default judgment was granted?
5. If the corporate defendant was unrepresented at any stage of the foreign proceedings, did the foreign court's procedural system afford the corporate defendant a right of appearance and notice similar to those available in the Canadian domestic enforcing court?
6. Was the foreign judgment obtained based upon a foreign rule of procedure intended to be used as a technical weapon to defeat the rights of *pro se* litigants to have their cases fairly judged on the merits?

As a learned American jurist once remarked: "The sword of Damocles causes harm because it hangs, not necessarily because it drops."[84] Whether a defendant is a natural person or an artificial entity, all Canadians deserve the benefit of the same procedural rights and recognized defences to enforcement of foreign judgments within the Canadian legal system.

ENDNOTES

**Antonin I. Pribetic, B.A. (Hons.) (York, 1987), LL.B. (Osgoode Hall, 1991) LL.M. Candidate (Osgoode Hall, 2008). E-Mail: apribetic@smhilaw.com. Mr. Pribetic is Litigation Counsel at Steinberg Morton Hope & Israel LLP, Toronto, Ontario, Canada, where he practices in the areas of corporate commercial litigation and transnational litigation. He has published various articles on the topics of private international law and international sales law.* *He wishes to thank Mr. H. Scott Fairley of Theall & Associates, who acted as co-counsel for the USA in the proceedings, for providing a copy of the Appeal Book and Compendium which greatly assisted his research for this case comment. Mr. Pribetic also gratefully acknowledges the assistance of Mr. Dennis Flynn, Attorney-at-Law, of the Utah law firm, Winder & Haslam, for his thoughtful insights on both U.S. federal and Utah state civil procedure, as well as the helpful comments from an anonymous peer reviewer. The opinions expressed and any errors or omissions are exclusively his own.*

[1] *Beals v. Saldanha*, [2003] 3 S.C.R. 416, (2003) 234 D.L.R. (4th) 1 SCC [*Beals v. Saldanha* cited to S.C.R.]

[2] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, (1990) 76 D.L.R. (4th) 256 SCC [*Morguard* cited to S.C.R.]

[3] *Beals v. Saldanha, supra* note 1 at 437, Major, J.

[4] Justice Sharpe in *Muscutt v. Courcelles*, (2002) 213 D.L.R. (4th) 577 (Ont. C.A.) at 590-1, notes:

"Morguard establishes that the proper exercise of jurisdiction depends upon two principles. First, there is a need for "order and fairness" and jurisdictional restraint. Second, there must be a "real and substantial connection". This test was mentioned as a basis for assumed jurisdiction by Dickson J. in *Moran v. Pyle* and was derived from *Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.) at 105, where the court held that a foreign divorce decree should be recognized where a "real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction".

[5] Justice Sharpe identified three avenues to establish *jurisdiction simpliciter:*

There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extraprovincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extraprovincial judgments.

...

. . . Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, before *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement. *Ibid.* at 586.

[6] *Beals v. Saldanha, supra* note 1 at 441-454, Major, J.

[7] See Ronald F. Brand, "Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far," (2005) 24 J.L. & Com. 181; see also, Antonin I. Pribetic, "Strangers in a Strange Land": Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario, (2004) 13 *J. Transnat'l L. & Pol'y* 347-391.

[8] *The United States of America v. Shield Development Co.* (2005) 74 O.R. (3d) 583 (Sup ct.) [*USA v. Shield*]

[9] According to the AGEISS Environmental, Inc. Final Letter Report (Essex Copper Site-US EPA) dated August 28, 1995, "On January 5, 1984, Shield, then owner of the Site, won a judgment against TTI [Toledo Technologies, Inc.] (then TMC) [Toledo Mining Company] and EGI [Essex Group, Inc.]. As a result, EGI's rights to operate the Site were extinguished (G-29)." at 13. *Appellants' Appeal Book and Compendium*, Court of Appeal File No. C42849/Court File No. 04-CV-266938 CM2 at 65, ¶ 11 [*Appellants' Appeal Book*].

[10] 28 U.S.C. §§ 1331(Federal Question) and 1335 (United States as Plaintiff).

[11] 42 U.S.C. (1980) §§ 107(a) and 113(b) and §§ 9607(a) (Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date) and 9613(b) (Jurisdiction; venue)

[12] See discussion of the Utah District Court procedural history, *infra* note 36.

[13] *USA v. Shield, supra* note 8 at 594-5,

Herman, J..

[14] *The United States of America v. Shield Development Co.* (2005) 74 O.R. (3d) 595 (C.A.) Catzman, Labrosse and Moldaver JJ.A.

[15] For an historical and theoretical analysis of functionalist comparative law, see Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann & Reinhard Zimmermann, eds., *The Oxford Handbook Of Comparative Law* (Oxford University Press, Forthcoming), draft available online at Social Science Research Network: <http://ssrn.com/abstract=839826> where the author suggests, at 33, that:

"...Functional equivalence is similarity in difference, it is the finding that institutions are similar in one regard (namely in one of the functions they fulfill) while they are (or at least may be) different in all other regards – their doctrinal formulations, but also the other functions or dysfunctions they may have besides the one on which the comparatist focuses. The decision to look at a certain problem, and therefore at a certain function, becomes crucial therefore for the findings of similarity or difference, but this is always similarity only with regard to the one function. The finding of similarity is contingent on the comparatist's focus."

[16] Borrowed from the phrase "form ever follows function" attributed to the American sculptor, Horatio Greenough and popularized by the famous American Modernist architect, Louis H. Sullivan, in his article, "The tall office building artistically considered" *Lippincott's Magazine* (March, 1896). Strategic Functionalism Theory was first introduced in an article I wrote on trial advocacy. See, Antonin I. Pribetic "The Trial Warrior: Applying Sun Tzu's The Art of War to Trial Advocacy" (April 21, 2007). Available at SSRN: <http://ssrn.com/abstract=981886>. See also, Kenneth Einar Himma, "Functionalism and Legal Theory: The Hart/Fuller Debate Revisited," *De Philosophia*, vol. 14, no. 2 (Fall/Winter 1998); Michael Moore, "Law as a Functional Kind," in George, *Natural Law Theory*, 188- 242.

[17] Herman, J. rejected the public policy defence put forth by Shield and Anyox as follows:

[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 States improperly 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.

[18] *Beals v. Saldanha*, supra note 1, Major, J. (McLachlin C.J., Gonthier, Bastarache, Arbour and Deschamps JJ. concurring).

[19] *Ibid.*, LeBel J. at 516 posits:

In my opinion, two developments should be recognized in connection with this defence. First, the requirements of notice and a hearing should be construed in a purposive and flexible manner. Secondly, substantive principles of justice should also be included in the scope of the defence. The ultimate inquiry is always whether the foreign judgment was obtained in a manner that was fair to the defendant and consistent with basic Canadian notions of justice."

[20] *Ibid.* at 448-9, Major, J.

[21] *Ibid.* at 449, Major, J.

[22] *Ibid.* at 450-45, Major J. [emphasis added].

[23] *Ibid.* at 516, LeBel J. dissenting.

[24] *Ibid.*

[25] *Ibid.* at 517.

[26] *Ibid.* at 455, 565, Binnie, J. (Iacobucci, J. concurring in dissent).

[27] In the old English case, *The King v. The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Str. 557 at 567, 93 Eng.Rep. 698 at 704 (1723), Mr. Justice Fortescue, in granting *mandamus* to restore Richard Bentley to his 'academical degrees,' traced the roots of the maxim *audi alteram partem* back to the garden of Eden, stating:

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.

In an oft-cited dissent, Justice Frankfurter in *Caritativo v. California* 357 U.S. 549; 78 S. Ct. 1263; 2 L. Ed. 2d 1531; 1958 U.S. LEXIS 670 (U.S.S.C.) opined:

"*Audi alteram partem* — hear the other side! — a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them — executive, legislative, and judicial – whenever any individual, however lowly and unfortunate, asserts a legal claim."

See also *Porto Seguro Companhia de Seguros Gerais v. Belcan S.A.* [1997] 3 S.C.R. 1278, (1997) 153 D.L.R. (4th) 577, (1997) 220 N.R. 321 (S.C.C.).

[28] Lawrence B. Solum, "Procedural Justice" (2004) 78 *S. Cal. L. Rev.* 181.

[29] Latin for "for oneself, on one's own behalf." When a litigant proceeds without legal counsel, they are said to be proceeding "pro se." see, *e.g. Rivera v. Florida Department of Corrections, 526 U.S. 135 (1999)*, online: Cornell Law School's Legal Information Institute: <http://www.law.cornell.edu/wex/index.php/Pro_se>.

[30] *USA v. Shield, supra* note 8 at 587, Herman, J.; see also, Affidavit of Robert R. Homiak, Senior Attorney, US Department of Justice (Environmental Enforcement Section, Environment and Natural Resources Division) sworn June 2, 2004, *Appellants' Appeal* Book, supra note 9, at 65, ¶ 11.

[31] The removal consisted of cleanup and disposal of approximately 2,200 gallons of phenol liquids, 1.070 gallons of caustic powders, 12 polychlorinated biphenyl ("PCB") contaminated transformers, 40 PCB-contaminated capacitors, 220 gallons of mercury contaminated soil and debris, and approximately 15 cubic yards of phenol contaminated soils: U.S. Complaint filed

in the United States District Court for the District of Utah on May 26, 1998, *Appellants' Appeal Book, supra* note 9 at 107, ¶ 12.

[32] *USA v. Shield, supra* note 8 at 588, Herman, J.

[33] *Ibid.* at 588, Herman, J.

[34] *Federal Rules of Civil Procedure*, 28 U.S.C., Part V (as amended) [*Federal Rules*]. The origin of the Federal Rules can be traced to 1934 when the U.S. Congress passed the *Rules Enabling Act of 1934* (ch. 651, 48 Stat. 1064 (1934) as amended; also available online at Cornell Law School: <http://www.law.cornell.edu/rules/frcp/> (last visited August 29, 2006). No other correspondence or notices from either parties' counsel or the Utah Court office were ever sent to Mr. Sheridan's home address thereafter.

[35] *USA v. Shield, supra* note 8 at 588, Herman, J.; see also, Letter dated July 27, 1998, *Appellants' Appeal Book, supra* note 9 at 112.

[36] *USA v. Shield, ibid.* at 587, _Herman, J.; Answer of the Defendant Shield Development Co., Ltd. to Complaint dated August 26, 1998, *Appellants' Appeal Book, ibid.* at 114, ¶ 2; see also, Answer of the Defenant Anyox Metals, Ltd. to Complaint dated August 26, 1998, *Appellants' Appeal Book, ibid.* at 114, ¶ 2.

[37] The corporate defendants' attornment or submission to the Utah District Court by formal pleading thus rendered the issue of jurisdiction *simpliciter* moot. Shield and Anyox also did not dispute that there was a real and substantial connection with the Utah jurisdiction on the summary judgment motion: *USA v. Shield, supra* note 8 at ¶ 9-10, Herman, J.; see also, *United States of America v. Ivey*, (1995), 26 O.R. (3d) 533, [1995] O.J. No. 3579 (Gen. Div.), affd (1996), 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.; see also, *Beals v. Saldanha, supra* note 8, where the filing of a first defence by the Beals' in the Florida court constituted attornment, notwithstanding the fact that the failure to file subsequent defences to the plaintiffs' complaints (a procedural anomaly by Ontario standards) resulted in default proceedings. See also, Janet Walker, "Beals v Saldanha: The Great Canadian Comity Experiment Continues" (2004) 120 LQR 365; S.G.A. Pitel, "Enforcement of Foreign Judgments: Where Morguard Stands After Beals" (2004) 40 C.B.L.J. 189; Adrian Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 SYBIL 1-22; H. Scott Fairley, "Open season: recognition and enforcement of foreign judgments in Canada after Beals v. Saldanha" (2005) 11 ILSA J. Int'l & Comp. L. 305-318.

[38] *USA v. Shield,* ibid. at 588, Herman, J.

[39] *Ibid.* at 588; Initial Disclosures submitted pursuant to Rule 26(a)(1) of the Federal Rules, *supra* note 36.

[40] *USA v. Shield, ibid.* at 588, Herman, J.; Motion for Withdrawal of Counsel for the Defendants, including Certification of Counsel *Appellants' Appeal Book, supra* note 9 at 131-146. See discussion *infra* for a comparison of procedure for removal of counsel under Rule 84-1.4(a)2) of the *Rules of Practice for the United States District Court for the District of Utah* [*Utah Federal Rules of Practice*]; Rule 76 (formerly 4-506) of the *Utah Civil Rules* [*Utah State Rules*] and Rule 15.04 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Ontario Rules*].

[41] *USA v. Shield, ibid.* at 588, Herman, J.; United States First Set of Request for Admissions to Defendant Shield Development Co., Ltd., *Appellants' Appeal Book, ibid.* at 149-157; United States First Set of Request for Admissions to Defendant Anyox Metals, Ltd., *Appellants' Appeal Book, ibid.* at 158-168.

[42] Transcript of the Cross-Examination of John Patrick Sheridan on his Affidavit sworn October 5th, 2004 on October 19, 2004, *Appellants' Appeal Book, ibid.* at 59-62, Questions 92-106.

[43] *USA v. Shield, supra* note 8. at 588, Herman, J.

[44] *Ibid.* at 589, Herman, J.; Order of Chief Judge David Sam Allowing Withdrawal of Counsel for Developments Shield Development Co., Ltd. and Anyox Metals, Ltd. dated September dated September 10, 1999 and effective September 14, 1999, *Appellants' Appeal Book, supra* note 9 at 147-148.

[45] *USA v. Shield, ibid.* at 589, Herman, J.

[46] Order of Judge Ted Stewart granting the United States' Motion for Summary Judgment dated June 19, 2000, , *Appellants' Appeal Book, supra* note 9 at 235-237.

[47] *USA v. Shield, supra* note 8 at 591-2, Herman, J.

[48] The timing of Utah Counsel's motion to withdraw as counsel further compounded their former clients' predicament. The court record confirms that Utah Counsel was served with the First Set of Requests for Admissions by the US on September 9, 1999. The order allowing withdrawal was granted by Judge Sam on September 10, 1999, but was *effective on September 14, 1999. Quaere* whether Utah Counsel failed to comply with Rule 83-1.4(2) of the Utah Federal Rules of Practice. A review of the letters filed as exhibits in support of Utah Counsel's motion for withdrawal advised Shield and Anyox of settlement negotiations between the US Department of Justice and the current owners of the Essex mine, and also confirmed a subsequent request by the USA for referral of the case to mediation. However, there is no reference to the possible sanctions (including the prospect of default/summary judgment) arising from failure to deliver any response to the Requests for Admissions. Furthermore, Mr. Sheridan was not notified that Shield and Anyox had to retain new counsel and could not proceed unrepresented. See discussion *infra*, notes 54-57, *op. cit,* re: standing for unrepresented (*pro se*) corporate litigants. *See also,* Motion for Withdrawal of Counsel for the Defendants, including Certification of Counsel; Letter from Utah Counsel to Sheridan dated May 6, 1999 (Exhibit A) and June 16, 1999 (Exhibit B), *Appellants' Appeal Book, supra* note 9 at 131-146.

[49] [Emphasis added]. Rule 83 of the Fed. R. Civ. P. empowers each district court to establish local rules governing its practice and reads:

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedures When There is No Controlling Law

A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

[50] [Emphasis added] CJA 04-506. Withdrawal of counsel in civil cases. Repeal. Included in URCP 74. 1-Nov-03; URCP 074. Withdrawal of counsel. New. Replaces 4-506. Regulates process for withdrawing from representation. 1-Nov-03 URCP 074. Withdrawal of counsel. Amend. Modifies content of notice/request to withdraw. 1-Apr-04. The legislative history of Rule 74 is available on the Utah State Courts website available online: Utah Courts <http://www.utcourts.gov/courts/> (last visited on August 29, 2006).

[51] See *e.g.*, *Loporto v. Hoegemann*, 1999 UT App 175, ¶¶7-13, 982 P.2d 586 (stating former Rule 4-506 compels opposing counsel to file required notice and requires trial court to wait twenty days before holding proceedings, thus the trial court erred by striking wife's pleadings and placing her in default after her counsel's motion to withdraw). Cf. *Tebbs Family Partnership v. Rex*, 2001 UT APP 88 (Utah Court of Appeals) which held:

"Rex argues that his prior counsel's withdrawal in the midst of ongoing discovery and a pending motion for summary judgment constitutes excusable neglect because the trial court did not approve of the motion to withdraw, thereby violating Rule 4-506(1) of the Utah Code of Judicial Administration. Mr. Mitchell filed notice of withdrawal on September 28, 1998. TFP submitted a notice to appoint new counsel or appear *pro se* to Rex on October 6, 1998. The trial court granted summary judgment on January 4, 1999, nearly four months after Mr. Mitchell's withdrawal. *Thus, while there was a technical violation of Rule 4-506(1), we cannot say that, in this instance, the same amounted to either excusable neglect under Rule 60(b)(1) or an irregularity in the proceedings under Rule 59(a)(1).*

Rex asserts that his prior counsel's failure to file a counter-affidavit stating that the money due under the notes was not in fact due, Rex's failure to retain replacement counsel after Mr. Mitchell withdrew, but before entry of summary judgment against him, and Mitchell's alleged failure to adequately explain the consequences of the motion for summary judgment before withdrawing, constitutes excusable neglect. However, Rex cites no case law in support of his argument.

While these incidents might have constituted neglect on the part of prior counsel, Rex fails to adequately explain how they give rise to "excusable neglect" under Rule 60(b)(1). See, e.g., *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 913 (7th Cir. 1989) (stating, "attorney errors such as preoccupation with other matters, irresponsibility of counsel, tactical decisions and misreading of procedural rules" do not rise to level of "excusable neglect"). *This is particularly true in light of the fact that a review of the record reveals that Rex received notice to appoint counsel after Mr. Mitchell withdrew.* [emphasis added; citation omitted]

[52] See *USA v. Shield, supra* note 8 at 590, Herman, J., where the learned judge notes: [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.

[53] See Rule 15.03 of the *Ontario Rules*, *supra* note 40.

[54] *Tracy-Burke Assoc. v. Dept. of Employment Security*, 699 P.2d 687 at 688. (Utah 1985).

[55] *Rowland v. Calif. Men's Colony*, 506 U.S. 194, 201-02 (1993)(citations omitted).

[56] *CLD Construction, Inc. v. City of San Ramon*, (2004) 120 Cal.App.4th 1141 (Cal. Court of Appeal, 1st App. Dist.).

[57] *Ibid.* citing: *Southwest Exp. Co., Inc. v. I.C.C.* (5th Cir. 1982) 670 F.2d 53: proceedings held in abeyance for 18 days to allow corporation to cure deficiencies in its petition, including lack of attorney signature; *United States v. 9.19 Acres of Land, Marquette Co., Mich.* (6th Cir. 1969) 416 F.2d 1244: trial court abused its discretion in denying continuance when nonattorney corporate president learns one week before trial he cannot represent corporation and cannot locate an attorney; *Strong Del. Min. Ass'n v. Board of App. of Cook Cty.* (7th Cir. 1976) 543 F.2d 32: corporation whose complaint filed by nonattorney president given leave to file an amended complaint by locally licensed attorney; *U.S. v. High Country Broadcasting Co., Inc.* (9th Cir. 1993) 3 F.3d 1244: "perfectly appropriate" to enter default judgment against corporation when corporation's president/sole shareholder does not follow court order to obtain counsel; *Flora Construction Co. v. Fireman's Fund Insurance Co.* (10th Cir. 1962) 307 F.2d 413: defendant corporation that appears via its nonattorney president allowed time to secure attorney; *Sermor, Inc. v. U.S.* (1987) 13 Cl. Ct. 1: court does not abuse discretion in dismissing action after giving nonattorney corporate president every opportunity to cure the corporation's failure to be represented by counsel. See also *Harrison v. Wahatoyas, LLC*, 253 F.3d 552, 556 (10th Cir. 2001) ("As a general matter, a corporation or other business entity can only appear in court through an attorney and not through a non-attorney corporate officer appearing *pro se*."); *DeVilliers v. Atlas Corp.*, 360 F.2d 292, 294 (10th Cir. 1966) ("[A] corporation can appear in a court of record only by an attorney at law."); *Flora Constr. Co. v. Fireman's Fund Ins. Co.*, 307 F.2d 413, 414 (10th Cir. 1962) ("The rule is well established that a corporation can appear in a court of record only by an attorney at law."). See also *Rowland v. California Men's Colony*, 506 U.S. 194, 201-02 (1993) ("It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel."); *Commercial & R.R. Bank of Vicksburg v. Slocomb, Richards & Co.*, 39 U.S. (14 Pet.) 60, 65 (1840) ("[A] corporation cannot appear but by attorney. . . .") *overruled in part by* 43 U.S. (2 How.) 497 (1844); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 830 (1824) ("A corporation, it is true, can appear only by attorney, while a natural person may appear for himself."). See generally *Strong Delivery Ministry Ass'n v. Bd. of Appeals of Cook County*, 543 F.2d 32, 33-34 (7th Cir. 1976) (explaining the justification for the rule).

[58] Memorandum from Margaret A. Gallegos, Paralegal Specialist, DOJ, Denver

Field Office to Bob Homiak dated May 3, 2002, Exhibit 29 to the Affidavit of Robert R. Homiak, Senior Attorney, US Department of Justice (Environmental Enforcement Section, Environment and Natural Resources Division) sworn June 2, 2004, *Appellants' Appeal Book*, *supra* note 9 at 238-242 at 239.

[59] Rule 15.01(2) of the *Ontario Rules*, *supra* note 40, provides:

15.01(2) A party to a proceeding that is a corporation shall be represented by a solicitor, *except with leave of the court*. R.R.O. 1990, Reg. 194, r. 15.01 (2). [emphasis added]

[60] Rule 15.04(6) and (7), *ibid.*

[61] *See Carney v. I.R.S. (In re Carney)*, 258 F. 3d 415, 417-18 (5th Cir. 2001); *Gardner v. Borden, Inc.*, 110 F.R.D. 696, 697 (S.D.W.Va. 1986); *Freed v. Plastic Packaging Materials, Inc.*, 66 F.R.D. 550, 552 (E.D.Pa. 1975).

[62] *U.S. v. Turk*, 139 F.R.D. 615, 24 Fed. R. Serv. 3d 540 (D.Md. 1991)[cited to F.R.D.].

63 *Ibid.* at 618.

[64] See Rule 51.02 (Request to Admit Fact or Document) and 51.03 (Effect of Request to Admit) of the *Ontario Rules*, *supra* note 40.

[65] *Leblanc v. York Catholic District School Board* (2002), 61 O.R. (3d) 686 at 692 (S.C.J.); See also the recent Ontario Court of Appeal decision in *Hill v. Forbes*, 2007 ONCA 443 (Ont. C.A.) (June 15, 2007-unreported) where the Court reaffirmed the applicable principles for setting aside default judgment as follows:

[4]... In exercising his or her discretion pursuant to Rule 19.08 to set aside a default judgment, the motion judge should consider (a) whether the motion was brought without delay after learning of the default; (b) whether the circumstances giving rise to the default were adequately explained; and, (c) whether there is an arguable defence on the merits: *Morgan v. Toronto (Municipality) Police Services Board* (2003), 34 C.P.C. (5th) 46 (Ont. C.A.), at para. 19. A motion judge is entitled to considerable deference in the exercise of that discretion, and a decision of this nature will not be set aside unless there has been some error in law or principle, or a palpable and overriding error of fact, or unless the decision is so clearly wrong as to amount to an injustice: see, for example, *Sinnadurai v. Laredo Construction Inc.* (2005), 20 C.P.C. (6th) 234 (Ont. C.A.).

Cf. Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd., 2007 ONCA 333 (Ont. C.A.) (May 2, 2007-unreported) which suggests a less mechanical approach.

[66] *United States v. One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316, 318 (5th Cir. 1984); *Rogers v. Hartford Life & Accident Insurance Company*, 167 F.3d 933, 938-939 (5th Cir. 1999).

[67] *Express Air, Inc. v. General Aviation Services, Inc.*, 806 F.Supp. 619, 620 (S.D. Miss. 1992).

[68] *Allemand Boat Company v. Kirk*, 141 F.R.D. 438, 442 (E.D.La. 1992).

[69] *FDIC v. Yancy Camp Development*, 889 F.2d 647 (5th Cir. 1989); *FDIC v. Castle*, 781 F.2d 1101 (5th Cir. 1986).

[70] In *Raiser v. Utah County*, 409 F. 3d 1243 (Utah District Court, 10th Cir. 2005), the Utah district court's decision in refusing to allow a *pro se* debtor to amend admissions was reversed where the admissions were the sole basis for the motion for summary judgment and where any prejudice to the opposing party was insufficient to foreclose withdrawal or amendment of the admissions.

[71] *USA v. Shield*, *supra* note 8 at 586-7, Herman, J.

[72] *Fireman's Ins. Co. of Newark, New Jersey v. Herbert*, 2005 WL 3536091 (E.D. Va. 2005).

[73] *Ibid.*

[74] *Gittens v. Garlocks Sealing Technologies*, 19 F.Supp.2d 104 (W.D.N.Y. 1998).

[75] *Ibid.* at 109.

[76] *Federal Rules*, *supra* note 34 at 56(c).

[77] *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 548-49 (5th Cir. 1985); *Kasuboski*, 834 F. 2d at 1350. See also *American Auto Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1119 (5th Cir. 1991) (default admissions cannot be overcome by conflicting trial testimony).

[78] Rule 36(b) of *Federal Rules*, *supra* note 34 states:

36 (b) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. *Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits*. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding. [emphasis added]

[79] Affidavit of John Patrick Sheridan sworn October 5, 2005, *Appellants' Appeal Book*, *supra* note 9 at 80-81, ¶ 4-7.

[80] Admittedly, Mr. Sheridan and his Canadian mining companies did not have a stellar record as "good corporate citizens" given their prior convictions under the *Environmental Protection Act*, R.S.O. 1990, c. E.19, which may or may not have had a subliminal effect on Mr. Sheridan's credibility before the Ontario courts. Although not explicitly referred to by the lower and appellate courts in *USA v. Shield*, Madam Justice L'Heureux-Dubé in *R. v. Consolidated Maybrun Mines Ltd.* [1998] 1 S.C.R. 706, (1998) 38 O.R. (3d) 576, (1998) 158 D.L.R. (4th) 193 (S.C.C.), voiced the court's disapproval of Mr. Sheridan's cavalier attitude towards corporate environmental responsibility, noting:

¶ 64 In concluding, I cannot refrain from pointing out that the appellants, by systematically refusing to co-operate with the Ministry of the Environment and to participate in any dialogue, have shown an inflexible attitude for which they must now bear the consequences. Such an attitude serves neither the interests of society in environmental protection nor the interests of those who are subject to administrative orders. While penal sanctions will, perhaps, always be a necessary component of any regulatory scheme, they must not become the principal or a customary instrument for relations between the government and its citizens.

[81] See *Four Embarcadero Centre Venturee v. Kalen*, [1988] 65 O.R .2d 551, 563; see also J.G. Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: Lexis Nexis-Butterworths, 2006) at §14.6.

[82] *Pro Swing Inc. v. Elta Golf Inc.* [2006] SCC 52 (S.C.C.), Deschamps J. (LeBel, Fish and Abella JJ concurring) at ¶ 29, aff'g (2004) 71 O.R. (3d) 566 (C.A.), rev'g (2003), 68 O.R. (3d) 443 (Ont. S.C.J.) ["Pro Swing"]. For a more detailed discussion on the finality requirement, see Antonin I. Pribetic "Thinking Globally, Acting Locally: Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada", in *Annual Review of Civil Litigation 2006*, The Honourable Justices T. Archibald & R. Echlin, eds., (Toronto: Thomson-Carswell, 2007) 144-199.

[83] *Pro Swing, ibid, McLachlin* C.J. dissenting (Bastarache and Charron JJ. concurring) at ¶'s 95-96.

[84] *PSINet Inc. v. Chapman*, 167 F. Supp. 2d 878, 888 (W.D. Va. 2001), United States District Court Judge James H. Michael, Jr.