No. 18-1160

In The Supreme Court of the United States

TECK METALS LTD., formerly known as TECK COMINCO METALS, LTD.,

Petitioner,

v.

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA IN SUPPORT OF PETITIONER'S REQUEST FOR CERTIORARI

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INTEREST OF *AMICUS CURIAE*

Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia") respectfully submits this brief in support of the Petition for Certiorari filed by Teck Cominco Metals, Ltd. ("Teck") in accordance with Supreme Court Rule 37.1.[1]

British Columbia is one of ten Canadian provinces. It has a population of more than four million, the third largest in Canada. British Columbia shares a 1,347-mile border with the United States – 561 miles adjacent to Washington, Idaho, and Montana, and 786 miles adjacent to Alaska. Every American state along the British Columbia-United States border lies within the Ninth Circuit, making British Columbia more affected than any other Canadian province by the Ninth Circuit's decision.

British Columbia, like all Canadian provinces, has significant exclusive and shared governmental powers under the Canadian Constitution. Can. Const., art. VI, § 92 (Constitution Act, 1867) (granting certain exclusive powers to the provincial legislatures). In Canada, environmental regulation, including regulation of discharges into the environment and remedial regulation governing cleanup of polluted sites, is largely a provincial responsibility. *See, e.g.*, *Friends of the Oldman River*

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[1] Pursuant to Supreme Court Rule 39(6), British Columbia certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission. Counsel of record received timely notice of the intent to file this brief and all parties have consented to its filing.

Soc'y v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 (Can.) (explaining the federal-provincial division of environmental regulatory authority under Sections 91 and 92 of the Constitution Act, 1867); *Canadian Nat'l Ry. Co. v. Ontario (Director Under the Envtl. Prot. Act)*, [1991] 3 O.R. (3d) 609, ¶ 43 (Ont. Div. Ct.) ("Pollution is not a single matter assigned by the Constitution exclusively to one level of government. It is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."). Accordingly, British Columbia has enacted a comprehensive environmental law, Part 4 of the British Columbia Environmental Management Act, S.B.C. 2003, Ch. 53 (Contaminated Site Remediation), which is comparable to the American Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

In addition to having their own environmental laws, the United States and Canada have, over the years, created mechanisms for resolving trans-boundary environmental issues on a government-to-government basis, e.g., the Boundary Waters Treaty of 1909 and the International Joint Commission, or the NAFTA Commission on Environmental Cooperation. These mechanisms have been repeatedly used by the United States and Canadian governments to deal with trans-boundary environmental problems, rather than having them resolved by lawsuits by private litigants pursuing only their own private interests.

The Ninth Circuit's opinion is profoundly unsettling to British Columbia, because it undermines the trans-boundary agreements between the United States and Canada and creates uncertainty for British

Columbia and businesses, like Teck, that operate within its borders. Under the Ninth Circuit's logic, Canadian businesses are now vulnerable to suit by private litigants under CERCLA – *even if those Canadian businesses operate entirely in Canada, and comply fully with Canadian environmental and regulatory legal requirements*.

And it is truly unprecedented. Indeed, this is the "first case ever" to reach such a result (Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 367 (2005)), and its implications for Canada/U.S. relations and the North American economy are enormous.

Subjecting economic activity occurring wholly in Canada to the vagaries of U.S. litigation without any showing that Congress intended this could destabilize the trans-boundary North American economy, and will interfere with the United States' and Canada's ability to order their foreign and economic policies through bilateral negotiation and agreements between the two countries. The Ninth Circuit has brushed aside these concerns by instead opening the floodgates to private litigation as a means of resolving trans-boundary environmental disputes. This is the wrong result and seriously endangers international comity. Given the vital importance of this issue to the North American economy and the unprecedented nature of the Ninth Circuit's opinion, British Columbia supports Teck's Petition for a Writ of Certiorari, and urges the Court to grant it.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a century, the United States and Canada have resolved trans-boundary environmental issues through international treaties and agreements. These agreements and dispute-resolution procedures are a recognized and successful means of addressing environmental concerns without undermining principles of international comity and sovereignty. In fact, proceedings under the International Joint Commission ("IJC") created by the U.S.-Canada Boundary Waters Treaty of 1909 have previously adjudicated disputes over the very smelter that is the subject of this action.

The Ninth Circuit's decision is inexplicably silent about the potential impact of its decision on foreign relations. In neither the opinion below nor its prior rulings has the Ninth Circuit grappled with the implications of holding a foreign company liable under American law for conduct performed solely in another country. By holding Teck liable under CERCLA for its actions in British Columbia, the Ninth Circuit has circumvented the traditional, established methods for resolving trans-boundary environmental disputes, and substituted private litigation for these successful methods of resolving such disputes.

Review is needed to weigh carefully whether Congress intended for CERCLA to replace international treaties and regulate the actions of foreign companies outside the United States. Allowing the Ninth Circuit's decision to stand undermines international comity and interferes with British Columbia's and Canada's environmental

regulation scheme. Without due consideration of this case's impact on international relations and the wisdom of permitting private litigants to regulate activities in another country, the Ninth Circuit's decision should not stand. Accordingly, this Court should grant certiorari to resolve the important issue this case raises.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Ninth Circuit's Decision Ignoring The International Treaties, Agreements, And Procedures That The United States And Canada Have Agreed Upon To Resolve Trans-boundary Environmental Disputes.

As one commentator has noted, "North America constitutes a vast and interconnected system – physically, ecologically, and economically." Jameson Tweedie, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 WASH. & LEE L. REV. 849, 857 (2006). Indeed, almost 90% of Canada's population lives within 100 miles of the U.S. border. Parrish, *supra*, at 385. Most Canadian economic activity takes place within that 100-mile border region.

As a consequence of this explosion in economic activity near the border, the United States and Canada "'have a lot of trans-boundary environmental problems.'" Tweedie, *supra*, at 857 (quoting John Knox, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution*, 27 Can.-U.S. L.J. 199, 199 (2001)). The United States

and Canada "'share an extensive border that includes some 150 rivers and lakes – a situation that has "provided ample opportunity for the generation of international environmental disputes."'" Parrish, *supra*, at 383-84 (quoting Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiffs: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 132-33 (1991)). *See also generally* Randall S. Abate, *Dawn of a New Era in Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 131-32 (2006) (discussing a variety of brewing transboundary environmental disputes).

Over the last hundred years or so, the North American countries have dealt comprehensively with these "trans-boundary environmental problems" *solely* through diplomatic and inter-governmental means. On issue after issue – from acid rain, to solid waste, to sewage dumping, to pollution emanating *from the very smelter at issue in this case* (the "Trail Smelter") – the governments of the United States and Canada have endeavored to solve problems collaboratively, in the common interest of the North American countries. These diplomatic efforts have included such mechanisms as the International Waterways Commission (established in 1905), the Boundary Waters Treaty of 1909 and its International Joint Commission, the Great Lakes Water Quality Agreement of 1978, and the NAFTA "Side Agreement" on Environmental Cooperation between the United States, Mexico, and Canada, which included creation of the NAFTA Commission on Environmental

Cooperation. In short, the fact of intergovernmental cooperation on environmental issues is well established and effective.

British Columbia also has a strong record of working with neighboring American states to address and resolve environmental issues. *See, e.g.*, Environmental Cooperation Agreement Between the Province of British Columbia and the State of Washington (May 7, 1992); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Ministry of Environment, Land and Parks (April 12, 1996); Interagency Memorandum of Understanding Between the State of Washington, Department of Ecology and the Province of British Columbia, Ministry of Environment, Land and Parks (1995) (applying the 1992 Environmental Cooperation Agreement to the Columbia River); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (June 20, 2001); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Idaho (September 14, 2003); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Montana (September 14, 2003); Memorandum of Understanding Between the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land and Air Protection.[2]

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[2] Since neither Canadian provinces nor American states have the power to enter into treaties, these types of state-provincial

These diplomatic and inter-governmental mechanisms for solving trans-boundary environmental issues have served the North American countries well. Indeed, the IJC was instrumental in resolving one of the most contentious trans-boundary environmental disputes of the 20th Century – a dispute that arose from the *very same smelter at issue in this case*. The so-called "Trail Smelter" proceedings – a bi-national dispute adjudicated under the IJC – that resulted in the Canadian government agreeing to compensate U.S. farmers and others for damages caused by air pollution emanating from the Smelter, and imposing sulfur dioxide fume controls on the Trail Smelter. Parrish, *supra*, at 420-21 (discussing the Trail Smelter Arbitration (U.S.-Can.) 3 R.I.A.A. 1905 (1938) ("Trail Smelter I"), further proceedings 3 R.I.A.A. 1983 (1941) ("Trail Smelter II")).

The inter-governmental structure that resolved the Trail Smelter dispute still exists and is available to resolve trans-boundary environmental issues and related disputes between the United States and Canada, including this one. L.H. Legault, *The Roles of Law and Diplomacy in Dispute Resolution: The IJC as a Possible Model*, 26 Can.-U.S. L.J. 47, 50 (2000) (one of the IJC commissioners noting that "[t]he fundamental mandate of the Commission, as reflected in the preamble to the Boundary Waters Treaty, is to

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accords are limited to "agreements" and "memorandums of understanding" that do not have the full force to international treaties. But these state-provincial environmental agreements and memorandums reflect British Columbia's ability and desire to discuss and enter into agreements with its neighboring states to address trans-boundary environmental issues.

prevent and resolve disputes between Canada and the United States"); *see also id.* at 52-53 (noting the IJC "has developed a rich body of practice in addressing transboundary water and environmental issues assigned to it under the Boundary Waters Treaty, the Great Lakes Water Quality Agreement [of 1978], and other agreements"); Parrish, *supra*, at 419 ("Using the IJC as a method for dispute resolution has been successful").

If the United States and Canada are unable to resolve the dispute through bilateral negotiation, either country may, under the treaty, refer "matters of difference . . . involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the [U.S.-Canada border] . . . to the International Joint Commission ["IJC"] for examination and report[.]" Boundary Waters Treaty, art. IX. If the two countries are unable to reach an agreement based on the IJC's Article IX report, the countries may agree to have the IJC issue a binding decision. *Id*. art. X. As such, this treaty "specifically provides a remedy for resolving these types of transboundary water pollution disagreements." Parrish, *supra*, at 414; *see also id*. at 415-20 (discussing the application of the Boundary Waters Treaty to trans-boundary pollution issues).[3]

[3] Professor Parrish also notes that "Canada has long been concerned that Teck Cominco's Trail Smelter operations were violating Canada's obligations under the Boundary Waters Treaty." Parrish, *supra*, at 414 n.264. As stated, British Columbia does not seek to absolve Teck of all responsibility for pollution at the Columbia River site; rather, it seeks to ensure that, if Teck is to be assessed liability for cleanup costs, it be done

The Ninth Circuit's decision and its prior decision in this case, *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006) (*Pakootas I*), completely ignore the existence and application of the agreements and mechanisms established by Canada and the United States to resolve trans-boundary environmental issues. [4] Neither decision even mentions the Boundary Waters Treaty, the IJC, the Trail Smelter proceedings, or any of the mechanisms the United States and Canada have utilized over the last 100 years to resolve trans-boundary environmental disputes.

Nor has the Ninth Circuit acknowledged the troubling concept that U.S. environmental laws could be applied to Canadian businesses operating *solely and lawfully in Canada* or the concern that unlimited private litigation over trans-boundary environmental disputes "pose[s] a threat of international discord,"

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by bilateral agreement or application of treaty law, not unilateral, cross-border application of American law by private litigants.

[4] The Ninth Circuit does mention Teck's contention that this case presents an extraterritorial application of CERCLA, but holds that it had previously rejected that argument in *Pakootas I*, which is law of the case. Teck Petition for Certiorari, App. 35a, n.13. *Pakootas I* rejected Teck's argument about the extraterritorial application of CERCLA, finding that, because CERCLA controls only the cleanup of hazardous waste and that cleanup would take place in the United States, this case involved only a domestic application of CERCLA. *Pakootas I*, 452 F.3d at 1075-79. *Pakootas I* contains no discussion of comity or the implications of allowing private litigation to govern trans-boundary environmental disputes in lieu of bilateral agreements and their mechanisms for resolving disputes.

destabilizing the North American economy. Abate, *supra*, at 133. Nor is the Ninth Circuit troubled by the risk that "the floodgates of litigation would be opened for similar suits hauling U.S. businesses into Canadian courts for the effects of polluting activities that originate in the United States but have effects in Canada." *Id.* This Court should be troubled by these problems.

The fact that the Ninth Circuit's decision does not even *mention* these points – let alone discuss why a century of government-to-government resolution of trans-boundary environmental disputes should be cast aside in favor of a system of private litigation is mystifying. The Boundary Waters Treaty, like all treaties, is part of "the supreme law of the land" in the United States. U.S. Const., art. VI, cl. 2. And constitutionally-binding treaties aside, this Court has historically held that principles of international comity and respect for the law of nations are presumptively binding on all laws passed by Congress. *See, e.g., Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."); *accord McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21 (1963) (quoting *Murray*); *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 178 n.35 (1993) (same).

In *Benz v. Compania Naviera Hidalgo, S.A.,* 353 U.S. 138 (1957), this Court discussed and further developed these principles by declining to apply the Labor Management Relations Act to foreign seamen on a foreign ship while in an American port. This

Court stated that the judiciary is ill-suited to wade into international affairs where not clearly directed to do so:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliatative action so certain.

Id. at 147.

Teck's Petition demonstrates effectively that, as a matter of U.S. law, the Ninth Circuit's decision is both wrong and inadequate. Nothing in CERCLA's language or legislative history requires it to be interpreted to mean that any company operating lawfully and solely within a foreign country can be brought into federal court to face private litigation under CERCLA whenever the environmental impacts of its foreign activities are felt in the United States, or even where pollution discharged into Canadian waters is carried downstream into the United States and where subsequently there is a "release," as Teck's close analysis of CERCLA's language demonstrates.

Given the integrated nature of the North American economy and ecology, the Ninth Circuit's conclusion would mean that any business operating anywhere in Canada (or Mexico) could face environmental litigation under U.S. laws, regardless

of whether the business was operating lawfully under Canadian (or Mexican) law. And, of course, the converse principle would also be true – U.S. businesses could face environmental litigation in Canada (or Mexico).

Congress could not conceivably have intended such a result, so disruptive to the North American economy and to our relations with Canada, without saying so. There is simply no evidence that Congress intended to reject the century-long inter-governmental and diplomatic mechanisms by which the United States and Canada have cooperatively resolved their trans-boundary environmental disputes, and replace them all with a chaotic, uncontrolled system of private litigation. And the Ninth Circuit cites no such evidence or legislative history.

For all of these reasons, and those discussed more fully in Teck Petition, the Ninth Circuit's opinion requires review by this Court. Given the history of how the United States and Canada have collaboratively and through government-to-government diplomatic mechanisms resolved trans-boundary environmental disputes over the last century – and how cavalierly the Ninth Circuit brushed this history aside in concluding that trans-boundary environmental disputes should be resolved through private litigation – the Court should grant Teck's Petition.

B. Applying CERCLA To Conduct Within British Columbia Endangers International Comity By Interfering With Its Environmental Regulation Scheme.

The application of American law by U.S. courts to discharges from the Trail Smelter into the Columbia River is not limited to that specific facility and that specific activity. There is nothing in the Court of Appeals' opinion that would preclude the application of American law to thousands of other entities whose activities take place entirely within British Columbia and are subject to provincial regulation.

The Court of Appeals' decision interferes with British Columbia's environmental regulation scheme. CERCLA, like many U.S. environmental statutes, contains a parallel enforcement mechanism whereby "private attorneys general" can file citizens suits such as the instant case so as to enforce regulations, permits, and orders. 42 U.S.C. § 9659(a). To incentivize such private enforcement, prevailing plaintiffs are entitled to an award of attorneys' fees and costs. *Id. §* 9659(f). At the same time, such private actions are somewhat constrained by the requirements that they must provide 60-day advance notice of the suit to the federal and affected state governments, *id.* § 9659(d)(1), no action may be commenced if the United States is already "diligently prosecuting" an enforcement action, *id. §* 9659(d)(2), and the United States and the affected state may intervene in any action as of right, *id. §* 9659(g).

Because neither British Columbia nor the federal government of Canada enjoy any of the notice, diligent

prosecution, or intervention rights afforded their American regulatory counterparts under CERCLA, trans-boundary application of CERCLA provides none of the mechanisms for protecting the government's interests in such litigation. A Canadian province that has consciously chosen to take a different regulatory path than the United States would be subject to a more extreme exposure to private oversight, with its attendant contentiousness and attorneys-fees disputes, than U.S. jurisdictions would be subject to. This undermines longstanding principles of international comity and bilateral resolution of trans-boundary issues.

As commentators have recognized, the Ninth Circuit's decision in this case "interferes in the operation of Canadian law and creates uncertainty in its application to Canadian facilities." John C. Turchin & Risa Schwartz, *Beyond Trail Smelter: Assessing the Changes in International Environmental Law*, *in Environmental Law: The Year in Review 2006* 105, 106 & 124 (Stanley D. Berger & Dianne Saxe eds., 2007).

Indeed, the Canadian federal government has attempted to initiate discussions with the United States regarding the Columbia River cleanup, noting that while "Canada is opposed to enforcement of CERCLA against Teck. . . , a Canadian company operating in Canada," Teck "has offered to pay the costs of an investigation and remediation of the health and environmental risks attributable to its operations, but only under the terms of an international instrument and a binding commitment with the Canadian government." Letter from the Canadian Department of Foreign Affairs and International

Trade to the U.S. Department of State, dated Nov. 23, 2004 (presented to the Court of Appeals in the Appendix to the Government of Canada's Amicus Curiae Brief). Such an approach could result in an agreement between Teck, Canadian federal and provincial governments, and American federal, state, and tribal governments. If it does not, the procedures under the Boundary Waters Treaty (described in the previous section) can be used to resolve the dispute.

Permitting the Ninth Circuit's decision to stand would undermine such efforts by unilaterally assessing liability for the Columbia River cleanup under American law. To prevent that interference with British Columbia's and Canada's sovereignty, this Court should grant review and hold that trans-boundary environmental disputes should be resolved in accordance with bilateral agreements, not unilateral private litigation.

CONCLUSION

For the foregoing reasons, the Court should grant Teck's Petition for a Writ of Certiorari.

Respectfully submitted,

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