

No. 26-130

IN THE
Supreme Court of the United States

TECK METALS LTD.,
FKA TECK COMINCO METALS LTD.,
A CANADIAN CORPORATION,
Petitioner,

v.

CONFEDERATED TRIBES OF THE
COLVILLE RESERVATION,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**AMICUS CURIAE BRIEF OF
HIS MAJESTY THE KING IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA
IN SUPPORT OF PETITIONER**

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**AMICUS CURIAE BRIEF OF
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THE PROVINCE OF BRITISH COLUMBIA
IN SUPPORT OF PETITIONER**

His Majesty the King in Right of the Province of British Columbia (British Columbia) respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.¹

INTEREST OF THE AMICUS CURIAE

British Columbia is the third-largest province in Canada, both in population and land mass.

The opinion currently under consideration subjects Canadian businesses to a heretofore unrecognized form of damages by private litigants under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq. Allowing respondent Confederated Tribes of the Colville Reservation (Tribes)² to seek damages for the loss of cultural connection to national resources conflicts with decisions of the Tenth and D.C. Circuits limiting the scope of natural resource damages under CERCLA. Unless the circuit split is

¹ No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. Amicus provided all parties with notice of its intent to file this brief more than ten days before the deadline. Sup. Ct. R. 37.2.

² The Tribes were plaintiff in the district court and appellant in the court of appeals.

resolved and this Court establishes a uniform interpretation of CERCLA's damages provisions, British Columbia businesses and residents will likely face greater exposure in environmental disputes than their counterparts in provinces that border other federal circuits. This may compel them to defer to U.S. environmental laws over the laws of Canada and British Columbia. The opinion also undermines the agreed-upon mechanisms for resolving transnational disputes and threatens Canada's and British Columbia's sovereignty by exposing their citizens and businesses to large and unpredictable damages claims in American courts.

British Columbia therefore believes that its perspective will help the Court decide whether to grant certiorari to the Ninth Circuit's most recent opinion. British Columbia does not suggest the Tribes should be denied relief for their injuries and does not seek to absolve petitioner Teck Metals Ltd. (Teck) of responsibility for pollution at the Columbia River site. British Columbia seeks to ensure that, if Teck is to be assessed liability for cleanup costs, it be done under uniform law applied consistently by U.S. courts or by bilateral agreement or treaty law, not unilateral, cross-border application of American law by private litigants.

SUMMARY OF ARGUMENT

The Ninth Circuit has interpreted CERCLA to apply to environmental harm resulting from the actions of a British Columbia corporation operating solely and lawfully in British Columbia. Because British Columbia only abuts states within the Ninth Circuit, the Ninth Circuit's expansive reading of CERCLA's

damages provision disproportionately affects British Columbia, its businesses, and its residents. The Ninth Circuit's decision to authorize damages for loss of a cultural connection to natural resources subjects British Columbia businesses and residents to potential liabilities greater than businesses and residents in Canadian provinces that do not border Ninth Circuit states.

The lack of uniformity also poses a great risk to British Columbia's sovereignty. Companies in British Columbia are now exposed to potential and uncertain liabilities if they do not defer to the United States' environmental policies. Fearing tens or hundreds of millions of dollars in potential damages, businesses within British Columbia may feel compelled to follow U.S. environmental laws instead of the laws enacted by British Columbia and Canada. That is a threat to British Columbia's sovereignty that provinces like Manitoba and Quebec do not face.

Granting certiorari to establish a uniform interpretation of CERCLA's damages provisions will ensure that the United States' neighbors experience the law's transnational implications equally.

The Ninth Circuit's opinion also ignores international law and custom in imposing expansive damages on a corporation for its actions taken entirely in British Columbia. In addition to resolving the circuit split identified by Teck in its petition, principles of comity and respect for foreign sovereignty provide further reason to grant certiorari. The opinion's repercussions extend far beyond the litigants. This Court should hold the Tribes' damages are best ad-

dressed through negotiated transnational agreements and treaties, so courts should exercise restraint in expanding CERCLA's damages provisions.

Historically, for more than a century, the United States and Canada have resolved transboundary 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 Boundary Waters Treaty of 1909 have previously adjudicated disputes over the smelter that is the subject of this action (the Trail Smelter).

Accordingly, this Court should grant certiorari.

ARGUMENT

I. Uniformity in CERCLA Damages Will Ensure Consistent Application of the Law in Transnational Disputes Such as This.

As set forth in the petition, the Ninth Circuit is the only federal circuit to embrace the broad remedy the Tribes seek in this case. Unlike the Tenth and D.C. Circuits, the Ninth Circuit has held that the Tribes may seek damages for the loss of use of injured natural resources where the diminished use has a “cultural dimension.” Pet. App. 10a, 14a. The result is that, for actions taken entirely in British Columbia, Teck now faces a novel form of damages that no other federal circuit has recognized.

British Columbia borders four U.S. states—Washington, Idaho, Montana, and Alaska. Those states are

all within the Ninth Circuit. Thus, British Columbia businesses face greater exposure than their counterparts in provinces like Manitoba, which entirely borders the Eighth Circuit states of North Dakota and Minnesota, and Quebec, which borders the First Circuit state of Maine and the Second Circuit states of New York and Vermont. Those circuits have not considered whether CERCLA permits the types of damages the Ninth Circuit has authorized. But they are likely to limit the scope of CERCLA damages, like the Tenth and D.C. Circuits have done. As Teck establishes, the Ninth Circuit's interpretation is at odds with CERCLA's plain language, history, and purpose. Pet. 16-27.

The absence of uniformity places British Columbia businesses and residents at greater risk from CERCLA lawsuits than those in other Canadian provinces. If British Columbia businesses and residents face greater exposure than those in other provinces, they are more likely to feel compelled to comply with U.S. environmental laws rather than British Columbia's laws. *See* section II.C, *infra*. A uniform interpretation of CERCLA's damages provisions is necessary to ensure CERCLA's transnational impact is consistent and not purely dependent on proximity to states in particular circuits.

II. This Case Raises Important Issues of International Law, Comity, and Foreign Sovereignty.

A. Expanding CERCLA damages against Canadian businesses operating solely and lawfully in Canada raises important transnational concerns that no court has yet considered.

In an earlier opinion in this case, the Ninth Circuit held that CERCLA governs Teck's actions taken in Canada. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1075-79 (9th Cir. 2006). Interpreting CERCLA provisions requiring cleanup for a "release" or "threatened release" of hazardous substance, 42 U.S.C. § 9607(a)(4), the court rejected the argument that the "release" occurred when Teck's Trail Smelter released slag into Canadian waters. Instead, the Ninth Circuit held that the "release" of hazardous materials occurred when pollutants leached from the slag after it entered the United States. 452 F.3d at 1078. Thus, it held the Tribes' claims involved only a domestic application of CERCLA. *Id.*

Interpreting "release" in this fashion allowed the Ninth Circuit and the district court to ignore the implications of applying U.S. environmental laws to Canadian businesses operating solely and lawfully in Canada. While that issue is not currently before this Court, the expansive interpretation of CERCLA's damages to Teck similarly failed to consider the transnational implications.

This Court has long held that courts should be hesitant in construing statutes “to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (courts must “construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations”).

This Court has also cautioned 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 retaliative action so certain.

Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

Expanding the scope of damages beyond the clear language of CERCLA to Canadian businesses operating solely and lawfully in Canada through private litigation over transboundary environmental disputes “pose[s] a threat of international discord,” destabilizing the North American economy. Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 Colum. J. Env’t L. 87, 133 (2006).

Granting certiorari will allow this Court to weigh comity and the transnational implications of having judges unilaterally interpret American laws to transboundary environmental disputes in lieu of bilateral agreements and their mechanisms for resolving disputes.

B. Expanding CERCLA damages to conduct in British Columbia interferes with British Columbia's environmental regulatory scheme.

Nothing in the opinion precludes the application of American law to thousands of other entities whose activities take place entirely in British Columbia and are subject to provincial regulation. Expanding damages will incentivize even more claims seeking damages under newly devised and novel theories.

CERCLA, like many U.S. environmental statutes, permits citizen suits to enforce regulations, permits, and orders. 42 U.S.C. § 9659(a). Although CERCLA protects federal and state interests by requiring notice, prohibiting actions that duplicate federal litigation, and authorizing governments to intervene in private actions, *id.* § 9659, transboundary application of CERCLA provides none of these protections to Canada or British Columbia. This undermines longstanding principles of international comity and bilateral resolution of transboundary issues.

The prior opinions in this case “interfere[] in the operation of Canadian law and create[] 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). These claims “smack[] of environmental imperialism because, if the . . . Tribes are successful, the capacity of British Columbia to set its own environmental priorities and policies will be limited sharply.” 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, 406 (2005). The opinions have “set a precedent that Canadian companies, without Canadian consent, are required to follow U.S. environmental policy” or face significant liability. *Id.* “Canadian environmental policy—to the extent that it imposes a different standard or a different method of regulation—would be undermined as Canadian companies would feel compelled to follow U.S. laws.” *Id.*

The Ninth Circuit’s expansive interpretation of CERCLA’s damages provisions threatens the sovereignty and environmental policies of other governments. Companies in British Columbia are now exposed to potential and uncertain liabilities if they do not defer to the United States’ environmental policies, even if the companies comply with Canadian laws.

In deference to comity and the concerns detailed above, this Court should grant certiorari and reject the Ninth Circuit’s interpretation of CERCLA’s damages provisions. The liability of a foreign company operating entirely outside the United States should be limited to relief that is clearly enumerated in CERCLA, not the result of judicial interpretation of vague language and later-enacted administrative regulations. “Elementary notions of fairness . . . dictate

that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

The Ninth Circuit has already adopted a dubious interpretation of the term “release” to impose CERCLA liability on a foreign actor that took actions entirely outside of the United States. Expanding the scope of damages beyond what courts have done in the past further turns CERCLA into an even greater trap for the unwary.

C. The United States and Canada have negotiated international treaties, agreements, and procedures to resolve transboundary environmental disputes.

Limiting CERCLA damages will not allow violators to evade liability. Instead, limiting the scope of damages will disincentivize private litigation and encourage parties to pursue claims through the robust system designed to resolve transboundary environmental disputes.

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 (citation modified); *see also generally* Abate, *supra*, at 131-32 (discussing a variety of brewing transboundary environmental disputes). The vast economic activity near the border has created significant “trans-boundary environmental problems.” Jameson Tweedie, *Transboundary Environmental Impact Assessment Under the North*

American Free Trade Agreement, 63 Wash. & Lee L. Rev. 849, 857 (2006) (citation omitted).

Canada and the United States have historically dealt comprehensively with these problems *solely* through diplomatic and inter-governmental means. On issue after issue—from acid rain, to solid waste, to sewage dumping, to pollution from the Trail Smelter—the United States and Canada have collaborated to solve environmental problems. Among others, they have adopted the International Waterways Commission (established in 1905); the Boundary Waters Treaty of 1909 and its IJC; the Great Lakes Water Quality Agreement of 1978; and the NAFTA “Side Agreement” on Environmental Cooperation between the United States, Mexico, and Canada. Most recently, in March 2024, the two countries provided a reference to the IJC to help establish a collaborative governance body involving both federal governments, British Columbia, indigenous nations, and the states of Idaho and Montana to study and make recommendations regarding transboundary water pollution in the Elk-Kootenai/y watershed.³

³ Independent of federal governments, British Columbia has long worked 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); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Idaho (Sept. 14, 2003); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Montana (Sept. 14, 2003); Statement of Cooperation on Protection of Transboundary Waters Between the State of Alaska Departments of Environmental Conservation, Fish and Game and Natural Resources and the Province of British Columbia Ministries of Environment, and Energy and Mines (Nov. 25, 2015).

These diplomatic and inter-governmental mechanisms for solving transboundary environmental issues have historically served Canada and the United States well. Indeed, the IJC was instrumental in resolving one of the most contentious transboundary environmental disputes of the 20th Century—a dispute that arose from the *same smelter in this case*. The IJC’s “Trail Smelter Arbitration” proceedings resulted in the Canadian government agreeing to compensate U.S. farmers and others for damages caused by air pollution emanating from the smelter and in imposing sulfur dioxide fume controls on the Trail Smelter. Parrish, *supra*, at 420-21 (discussing the Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1938), further proceedings, 3 R.I.A.A. 1938 (1941)).

The IJC remains intact and “has developed a rich body of practice in addressing transboundary water and environmental issues assigned to it.” 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, 52-53 (2000). Under Article IX of the Boundary Waters Treaty, if the United States and Canada are unable to resolve a dispute through bilateral negotiation, either country may refer matters to the IJC for examination and report. If the two countries are unable to reach an agreement based on the IJC’s report, the countries may agree to have the IJC issue a binding decision. *Id.* art. X. Thus, this treaty “provides a remedy for resolving these types of transboundary water pollution disagreements.” Parrish, *supra*, at 414.

Private litigation under CERCLA circumvents this network of treaties, agreements, and procedural mechanisms for resolving transnational disputes.

D. Expanding CERCLA damages invites foreign nations to subject American companies to reciprocal actions.

This Court should also consider the risk to American businesses of being forced to litigate environmental claims in neighboring countries under the laws enacted by foreign governments. Canada, for instance, has suffered significant environmental damage from acid rain from coal usage in the eastern United States. Under the Canada-U.S. Air Quality Agreement (AQA) signed in 1991, both countries reduced their emissions of sulfur dioxide (SO₂) and oxides of nitrogen (NO_x). Env't and Climate Change Can. & U.S. Env't Prot. Agency, *Review and Assessment of the Canada-U.S. Air Quality Agreement* (2023), <https://tinyurl.com/mrya63fh>. But the effects are still being felt in Canadian rivers and the Atlantic salmon population. Moira Donovan, *Nova Scotia's Rivers Still Suffer from Acid Rain. Restoring Them Could Also Help the Climate*, CBC News (Aug. 6, 2024), <https://tinyurl.com/3edrshaf>. Should U.S. coal producers face suit for the environmental damage to the Canadian salmon fisheries?

Similarly, applying CERCLA transnationally invites reciprocal litigation over the United States' role in climate change. British Columbia has experienced increasingly destructive wildfires driven by climate change. Laura Van Vliet et al., *Developing User-Informed Fire Weather Projections for Canada*, Climate Servs. 35 (2024), <https://tinyurl.com/sb2tjpxj>; Benjamin Shingler, *The True Scale of Canada's Quietly Devastating Wildfire Season, in 4 Charts*, CBC News (Oct. 4, 2024), <https://tinyurl.com/aeYr8249>. These

fires disproportionately affect First Nation reserves and communities. Van Vliet, *supra*, at 2.

Historically, propelled by the coal and automobile industry, the United States has been the greatest contributor to climate change. Nadja Popovich & Brad Plumer, *Who Has the Most Historical Responsibility for Climate Change?*, N.Y. Times (Nov. 12, 2021), <https://tinyurl.com/yswehkah>; Council on Foreign Relations, *Who Releases the Most Greenhouse Gases?* (Mar. 12, 2026), <https://tinyurl.com/3xtjw473>; see also Simon Evans, *Analysis: Which Countries Are Historically Responsible for Climate Change?*, Carbon Brief (Oct. 5, 2021), <https://tinyurl.com/yc4y5wac> (“The US remains in first position for its cumulative CO2 emissions throughout the timeseries, as its development continued first with widespread use of coal, then with the advent of the motor car.”). If Canadian companies can be sued under CERCLA, there is no reason why U.S. coal producers or auto manufacturers could not be sued in Canada for the environmental damage that actions taken in this country have caused outside of it.

Extending expansive CERCLA damages to defendants operating entirely in a foreign country invites reciprocal litigation against American businesses. It creates potential and uncertain liabilities for American businesses, just as the decisions below do for Canadian businesses.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the Court should hold that CERCLA does not authorize damages for loss of cultural connection to national resources.

Respectfully submitted,

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