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In The  
**Supreme Court of the United States**

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TECK COMINCO METALS, LTD.,

*Petitioner,*

v.

JOSEPH A. PAKOOTAS, DONALD R. MICHEL,  
and STATE OF WASHINGTON,

*Respondents.*

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**On Petition For A Writ Of Certiorari To  
The United States Court Of Appeals  
For The Ninth Circuit**

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**BRIEF OF AMICUS CURIAE HER MAJESTY  
THE QUEEN IN RIGHT OF THE PROVINCE OF  
BRITISH COLUMBIA IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICUS CURIAE HER  
MAJESTY THE QUEEN IN RIGHT OF THE  
PROVINCE OF BRITISH COLUMBIA**

Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia") respectfully submits this brief in accordance with Supreme Court Rule 37.1.<sup>1</sup> British Columbia asks this Court to grant the petition filed by Teck Cominco Metals, Ltd. and review the decision below of the United States Court of Appeals for the Ninth Circuit.<sup>2</sup>

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 Judicial Circuit, making British Columbia more affected than any other Canadian province by the Court of Appeals' decision in this case.

British Columbia, like all Canadian provinces, has significant exclusive and shared governmental powers under the Canadian Constitution. *See* Can. Const. art. VI,

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<sup>1</sup> The parties have consented to the filing of this brief. Letters indicating their consent have been filed with the Clerk of the Court. This brief was authored by Dorsey & Whitney LLP, counsel for British Columbia. Pursuant to Rule 37.6, British Columbia hereby affirms that no counsel for a party authored this brief in whole or in part, and that no persons or entities other than the province made any monetary contribution to the preparation or submission of this brief.

<sup>2</sup> The Court of Appeals' decision below, *Pakootas v. Teck Cominco Metals, Ltd.* (Ninth Circuit Case No. 05-35153), is reprinted in the appendix to the petition and is published at 452 F.3d 1066.

§ 92 (Constitution Act, 1867) (granting certain exclusive powers to the provincial legislatures). The Canadian federal system of allocating powers between the federal and provincial governments is comparable to, but not identical to, the American federal system. *Compare id.* art. VI, §§ 91 & 92 (allocating powers between federal and provincial governments) *with* U.S. Const. art. I, § 8 & amend. X (allocating powers between federal and state governments).

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., The Queen in Right of Alberta v. Friends of the Oldman River Soc'y*, [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. Director Under the Env'tl. 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."). Although the American statute at issue in the Court of Appeals' decision, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, is a federal act, the comparable Canadian version of CERCLA is Part 4 of the British Columbia Environmental Management Act, S.B.C. 2003, Ch. 53 (Contaminated Site Remediation).<sup>3</sup> Thus, the

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<sup>3</sup> For purposes of this brief, general references to "Canadian law" mean both federal and provincial law, whichever is applicable in a  
(Continued on following page)

Court of Appeals' decision holding that an American federal statute could apply to conduct that occurred entirely in Canada specifically impacts British Columbia's jurisdiction to regulate environmental cleanup necessitated by pollution produced within the province, and the province of British Columbia has a significant interest in Teck's petition for certiorari.

In explaining that Canada's counterparts to CERCLA are provincial rather than federal, British Columbia does not mean to suggest that Part 4 of the Environmental Management Act would exclusively regulate the cleanup of the Columbia River site. Rather, as more fully discussed in the argument section of this brief, *see infra* § C, international law and principles of comity require that instances of cross-border pollution such as that in this case be addressed through bilateral agreements whenever possible. CERCLA governs cleanup of American pollution in the United States, and Part 4 of the Environmental Management Act governs cleanup of Canadian pollution in British Columbia, but applying one country's statutes to conduct in the other's territory violates sovereignty and harms comity.

British Columbia also has an interest in this case because Teck is headquartered in Vancouver and has many operations throughout the province. As a significant contributor to the provincial economy and the development of its resources, Teck and its facilities benefit the people of British Columbia. British Columbia, therefore, would like

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particular situation, and general references to "American law" mean both federal and state law, whichever is applicable in a particular situation.

to ensure that Teck is treated fairly in assessing cleanup costs for pollution at the Columbia River site. If Teck – or, for that matter, any other British Columbia business in a position to directly or indirectly cause pollution across the U.S.-Canada border – is to be held responsible for cleanup costs in the United States, it is only fair that those cleanup costs be assessed in a manner that recognizes and accounts for the cross-border, international nature of the environmental contamination. Unilaterally applying the laws of one country without any sort of bilateral agreement fails to recognize that cross-border pollution is an international issue, and British Columbia strongly opposes this unilateral approach taken by the Court of Appeals.

In essence, British Columbia's interest in the petition is based on (1) the provincial government's significant role in environmental regulation within its borders and (2) British Columbia's view that businesses operating within the province and contributing to its economy – like Teck – should not be subject to private lawsuits in the United States under exclusively American law for conduct that took place entirely in Canada. Accordingly, British Columbia is filing this brief to make the following case to this Court: Whatever CERCLA's statutory structure, environmental regulation of discharge and cleanup of pollutants that cross the U.S.-Canada border in either direction should be addressed, wherever possible, through bilateral negotiation and agreements between the two countries, not private lawsuits in one country's courts.<sup>4</sup>

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<sup>4</sup> Formal international negotiations are primarily a matter for the Canadian and American federal governments; under the Canadian Constitution, British Columbia, like American states, does not have treaty powers. See Can. Const. (Constitution Act, 1867) art. IX, § 132; (Continued on following page)

**STATEMENT OF THE CASE**

The facts most important to this brief, which British Columbia wishes to emphasize, are as follows:

- Discharges from the Trail Smelter into the Columbia River have been regulated under British Columbia and Canadian law from the outset of the smelter's operations in the early 1900s. The discharge of slag was authorized in accordance with provincial regulations until 1995, when updated assessments of environmental impacts resulted in a prohibition against any further discharge of slag into the river. The provincial regulations were also updated to require reductions in the discharge of metals to the river, which was accomplished through upgrades in smelter technology and pollution control equipment.
- The Trail Smelter is located in British Columbia, and discharges of effluent from the smelter were released into the Columbia River well inside British Columbia, approximately ten miles upstream from the U.S.-Canada border. Such pollutants entered the United States by traveling down the Columbia River.

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U.S. Const. art. I, § 8. Because the federal government of Canada is equipped to represent the interests of the provinces in these bilateral negotiations, British Columbia has a strong interest in ensuring that the Canadian federal government is able to continue representing the provinces' interests in bilateral negotiations with the United States. Furthermore, although not formal international treaties, British Columbia also often works with neighboring states to reach agreements on environmental matters that are local in nature. *See infra* § C; *infra* note 7; App. 4-33.

- If Respondents successfully brought a private CERCLA action against Teck, liability for the Columbia River cleanup would be unilaterally assessed under American law with no regard to the possibility of reaching an agreement between Teck, Canadian federal and provincial governments, and American federal, state, and tribal governments.
- 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 (App. 1-3) (presented to the Court of Appeals in the Appendix to the Government of Canada’s Amicus Curiae Brief).

### ARGUMENT

The Court of Appeals disregarded the international and intergovernmental complexities inherent in trans-boundary pollution cases by unilaterally and exclusively applying American law to Teck, a Canadian company operating a smelter in British Columbia. The Court of Appeals’ decision to apply American law without regard to

the fact that Teck's discharges occurred in British Columbia conflicts with long-established principles of international comity. Cross-border environmental issues should be addressed through bilateral negotiations and agreements, not unilateral application of one country's laws to conduct occurring in the other country's territory. This Court should grant Teck's petition in order to reestablish the importance of international comity in resolving cross-border disputes.

**A. The United States and Canada, at both the federal and state/provincial levels, have different environmental regulatory schemes, but they share the same ultimate goals of protecting the environment while promoting economic development.**

Canada and the United States are both industrialized, resource-rich countries, and they both have federal systems of government with constitutional divisions of power between the federal and state/provincial governments. Like the American federal and state governments, the Canadian federal and provincial governments all share the common goal of balancing environmental protection and resource preservation with economic growth and respect for private property rights. This is not an easy balance to manage, but it is important that any government seeking the best interests of its people make its best effort to manage this balance fairly and effectively.

The American federal and state governments employ various laws in their attempts to manage this difficult balance. One of these laws is CERCLA, which provides for, among other things, a private right of action against parties potentially liable for cleanup of polluted sites.

British Columbia does not quarrel with the United States' decision to enact CERCLA and create private litigation regarding environmental cleanup, so long as that litigation stays within the United States. Part 4 of the Environmental Management Act, like CERCLA, provides means to ensure cleanup of polluted sites within British Columbia, but, unlike CERCLA, it is enforced exclusively by the provincial government, not private litigation.

It is immaterial whether CERCLA or the Environmental Management Act represents the more effective framework for ensuring cleanup of polluted sites. All that matters is that the United States and Canada have chosen different ways of approaching this difficult and important issue – the United States enacted CERCLA, and Canada has left the matter largely to the provinces, leading to Part 4 of British Columbia's Environmental Management Act. Allowing Canada and the United States to manage their own environmental affairs is, of course, perfectly fair as long as the pollution remains in the jurisdiction whence it came. The problem, as in this case, arises when the pollution crosses an international border. The Court of Appeals chose to fall back on a technical reading of the CERCLA statute, willfully ignoring the implications of its unilateral cross-border application of American environmental law. This was error.

**B. The Court of Appeals mistakenly treated Respondents' suit as "domestic" by narrowly focusing on the fact that the pollution currently lies on the American side of the border and neglecting to read CERCLA as part of a broader "constellation" of environmental regulation.**

The Court of Appeals stated that its decision to reach across the U.S.-Canada border to apply CERCLA to a

Canadian company acting exclusively in British Columbia “is reinforced by considering CERCLA’s place within the constellation of [American] environmental laws, and contrasting it with” the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*” Pet. App. at 21a (citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996)). The court continued, noting that “RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the environment.” *Id.* at 21a-22a. In stating its view that extraterritorially applying CERCLA to acts within Canada was not, technically speaking, extraterritorial, the court observed that “it is the Canadian equivalent of RCRA, not CERCLA, that regulates how Teck disposes of its waste within Canada.” *Id.* at 22a.

In effect, the Court of Appeals reasoned as follows:

- Remedial environmental cleanup laws, like CERCLA, exist in a separate universe from regulatory environmental discharge laws, like RCRA.
- Here, the discharge occurred in Canada, so it was governed by the Canadian or British Columbia equivalent of RCRA, but the cleanup must occur in the United States, so it is governed by CERCLA.
- Therefore, even though the discharge occurred north of the border, the fact that the cleanup area is entirely in the United States means that American law governs exclusively.

This reasoning might be *internally* logical, but it ignores the broader context of the environmental regulation field. In ignoring this broader context, the Court of Appeals mistakenly treats each individual environmental law – American or Canadian – as separate and distinct. But environmental laws should not be viewed this way, because they are designed to work together as part of a broader system of regulation. Indeed, the court itself referred to “CERCLA’s place *within the constellation of . . . environmental laws,*” Pet. App. at 21a (emphasis added), recognizing that CERCLA is merely one part of a broader federal and state regulatory scheme.

Viewed through the narrow, out-of-context prism of the Court of Appeals’ reasoning, it is a simple matter to say: “This is a cleanup case, the cleanup area is in the United States, so it involves a domestic application of American law.” And cleanup does in fact involve an application of domestic American law when the discharge is also governed by domestic American law. If, for example, the Trail Smelter were located just on the American side of the border, CERCLA could be applied as an integral part of “the constellation of environmental laws” applicable to the stretch of the Columbia River just south of the U.S.-Canada border (in this case, that “constellation” consists of a combination of U.S. federal and Washington state law). For a slightly more complicated, but still domestic, example, imagine that the Trail Smelter was along the Columbia River in southern Washington, and the cleanup site was on the Oregon side of the river. Federal law, including CERCLA, would apply in both states, but there could be a question of conflicting Washington and Oregon environmental law if Washington claimed the discharge was licensed, permitted, and legal, with Oregon insisting that

it was not. Even then, U.S. federal courts could conduct a conflict of laws analysis, determine which law would apply, and fairly decide the matter under established national rules.<sup>5</sup>

The important point here is that, when Congress enacted CERCLA – and when U.S. federal regulatory agencies and courts enforce CERCLA – Congress “consider[ed] CERCLA’s place within the constellation of [American] environmental laws.” Congress did *not* “consider[] CERCLA’s place within the constellation of” American *and Canadian* environmental laws, which must be done in order to fairly and properly address cross-border pollution issues. The Court of Appeals failed to recognize this distinction when it decided to “domestically” apply one specific American statute to the cleanup of pollution discharged in British Columbia and regulated by Canadian federal and provincial law. Given its cross-border migration, the discharges from the Trail Smelter ought to be regulated by “the constellation of” American *and Canadian* environmental laws, and CERCLA should not have been applied exclusively and unilaterally to the Columbia River cleanup.

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<sup>5</sup> The same would be true if this were a dispute between two Canadian provinces regarding the applicability of one province’s environmental law to a cleanup in or discharge from another province – the Supreme Court of Canada has the authority to resolve such conflict of laws matters. See, e.g., *Interprovincial Co-Operatives Ltd. v. The Queen in Right of Manitoba*, [1976] 1 S.C.R. 477 (Can.).

**C. Considering principles of international comity, fairly and properly addressing cross-border pollution issues requires bilateral negotiation and agreements, not unilateral judicial action by one country's courts under one country's law.**

The fundamental question presented by this case is not whether an American or Canadian facility near the border that causes pollution on the other side of the border may be required to assist with the cleanup of the polluted site; it is how to allocate responsibility and assess liability for cleanup costs.<sup>6</sup> Here, where a Canadian smelter polluted an American river, this Court must determine whether it is a matter properly resolved (1) in American courts under exclusively American law, which was the approach approved by the Court of Appeals, or (2) pursuant to bilateral negotiation and agreement, and possible reference to the International Joint Commission ("IJC"), which is the approach historically taken to cross-border pollution issues by Canada and the United States. The Court of Appeals effectively dismissed the significance of the U.S.-Canada border and applied American law. British Columbia asks this Court to instead favor bilateral solutions respecting the laws of both countries.

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<sup>6</sup> British Columbia does not dispute that, to the extent Teck is responsible for polluting the Columbia River, it may be required to contribute to the cleanup costs. See Boundary Waters Treaty, cited *infra*, art. IV ("It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."); *Restatement (Third) of Foreign Relations Law* § 601(1)(b) ("A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.").

As explained in the petition, Canada and the United States share a long history of working together to cooperatively resolve border issues, including cross-border pollution. *See* Pet. at 10-12. 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) (App. 4-9); Memorandum of Understanding Between the Washington Department of Ecology & the British Columbia Ministry of Environment, Land, & Parks (April 12, 1996) (App. 10-15); Interagency Memorandum of Understanding Between the State of Washington, Department of Ecology and the Province of British Columbia, Ministry of Environment, Land and Parks (applying the 1992 Environmental Cooperation Agreement to the Columbia River) (App. 16-22); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (June 20, 2001) (App. 23-29); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Idaho (September 14, 2003) (App. 30-31); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Montana (September 14, 2003) (App. 32-33); Memorandum of Understanding Between the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land and Air Protection (App. 34-37).<sup>7</sup> Resolving

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<sup>7</sup> Since neither Canadian provinces nor American states have the power to enter into treaties, *see supra* note 4, these types of state-provincial accords are limited to “agreements” and “memorandums of understanding” that do not have the full force to international treaties. That said, these state-provincial environmental agreements and  
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these issues through bilateral negotiation and agreement is important because it is the only method that ensures the resolution considers both American and Canadian environmental law and practice. While each country can and should apply its own law when regulating discharge and cleanup of domestic pollution, cross-border pollution must be addressed taking into account both countries' regulatory systems.

Since the United States and Canada share a history of bilateral solutions, there is no need to start from scratch in fashioning an agreement for cleanup of the Columbia River site. The 1909 Boundary Waters Treaty between the United States and Great Britain (on behalf of Canada), which established the IJC to address border disagreements, should govern. *See Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 ("Boundary Waters Treaty").* 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. *See id. art. X.* As such, this treaty "specifically

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memorandums reflect British Columbia's ability and desire to discuss and enter into agreements with its neighboring states to address cross-border environmental issues.

provides a remedy for resolving these types of transboundary water pollution disagreements.” 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, 414 (2005); see also *id.* at 415-20 (discussing the application of the Boundary Waters Treaty to cross-border pollution issues).<sup>8</sup> Indeed, the United States and Canada have even used the Boundary Waters Treaty to resolve a dispute regarding air pollution from the very same facility at issue here, the Trail Smelter, that began during the 1920s and was finally resolved by a special arbitration tribunal in 1941. See *id.* at 420-23.<sup>9</sup>

It is remarkable that the Court of Appeals decided to apply exclusively American law to this cross-border pollution case without even citing the Boundary Waters Treaty, especially given that 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

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<sup>8</sup> 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, the province seeks to ensure that, if Teck is to be assessed liability for cleanup costs, it be done by bilateral agreement or application of treaty law, not unilateral, cross-border application of American law.

<sup>9</sup> The final decision in the “Trail Smelter Arbitration” has been called “by far the ‘most influential decision on transboundary pollution in international law.’” Parrish, *supra*, at 420 (quoting Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 947 (1997)).

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. . . .") (op. per Marshall, C.J.), quoted by *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993).

In *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), this Court discussed and further developed these principles in 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 relative action so certain.

*Id.* at 147. That same reasoning should apply to this case. Congress enacted CERCLA as part of what the Court of Appeals called the United States' "constellation of environmental laws," Pet. App. at 21a, and it functions perfectly well within that constellation. But whatever the Court of Appeals' technical reading of terms like "arrangers" and "releases," there is no evidence that Congress intended CERCLA to reach across the U.S.-Canada border and undermine the bilateral approach to cross-border

pollution historically followed by Canada and the United States.

The Court of Appeals' decision recklessly ran "interference in . . . a delicate field of international relations" without "the affirmative intention of the Congress clearly expressed." Without any evidence of clear Congressional intent, the Court of Appeals should have respected principles of international comity and allowed the United States and Canada to address the cross-border Columbia River cleanup issue bilaterally.

**D. Application of CERCLA to conduct within British Columbia interferes with the province's environmental regulation scheme and would be unfair.**

The application of American law by U.S. courts to discharges from the Trail Smelter into the Columbia River would not be an isolated instance, 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 interference of the Court of Appeals' decision with British Columbia's environmental regulation scheme can be illustrated by considering one of the differences between Part 4 of British Columbia's Environmental Management Act and CERCLA. 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. *See* 42 U.S.C. § 9659(a).

To incentivize such private enforcement, prevailing plaintiffs are entitled to an award of attorneys' fees and costs. *See 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, *see id.* § 9659(d)(1), no action may be commenced if the United States is already "diligently prosecuting" an enforcement action, *see id.* § 9659(d)(2), and the United States and the affected state may intervene in any action as of right, *see id.* § 9659(g).

British Columbia's Environmental Management Act has no similar provision. Rather, it has long been the province's statutory and administrative policy to use formal enforcement actions as a last resort, preferring to devote the resources that would be consumed in litigation to voluntary cleanup agreements and other remedial mechanisms. For that reason, a citizen suit provision is antithetical to the province's environmental policy, because it substitutes time-intensive and costly formal litigation for other enforcement mechanisms that, in the province's considered judgment, are more cost effective. Under the Court of Appeals' decision, individual U.S. citizens would have private attorney general rights against Canadian entities operating in British Columbia, rights Canadian citizens who may be equally affected by the same pollution would not have.

Moreover, since 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, the delicate balance envisioned in CERCLA between private attorneys general and overseeing agencies would be upset.

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 is an affront to longstanding principles of comity and bilateral resolution of transboundary issues.

As another example of the consequences of the Court of Appeals' decision, under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the difficult problem of cross-border air pollution is expressly recognized and managed through a program of respect and reciprocity at the highest levels of government, *see id.* § 7415, a program that has served both countries well. Yet, because a CERCLA "facility" can be created through deposits of pollutants carried by wind as easily as by water, the Court of Appeals' decision would authorize private U.S. citizens to effectively second-guess in U.S. courts the range of measures taken pursuant to the Clean Air Act, a result clearly not envisioned by Congress in enacting either the Clean Air Act or CERCLA.

The potential impact of the Court of Appeals' decision within Canada, and on international law, has already been recognized by commentators:

In *Pakootas v. Teck*, the Court of Appeals for the Ninth Circuit issued a stark decision that provides for the extra-territorial application of U.S. domestic law, and raises far more questions than it answers. If the decision stands, it will have a fundamental impact on the development of international environmental law. . . . Further, the decision 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).

The Court of Appeals' decision, if it stands, will have broad impact on environmental regulation within British Columbia and on the relationship between the Canadian and American federal and provincial/state governments addressing cross-border environmental issues.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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