

In the United States Court of Appeals
For The Ninth Circuit

JOSEPH A. PAKOOTAS, an individual)
and enrolled member of the Confederated)
Tribes of the Colville Reservation;)
DONALD R. MICHEL, an individual)
and enrolled member of the Confederated)
Tribes of the Colville Reservation;)
STATE OF WASHINGTON,)

Plaintiffs-Appellees,)

v.)

TECK COMINCO METALS, LTD., a)
Canadian corporation,)

Defendant-Appellant.)

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NOV -6 2006

SHORT CRESSMAN & BURGESS, PLLC

No. 05-35153

(Eastern District of Washington
No. CV-04-0256-AAM)

MOTION FOR STAY OF MANDATE

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MOTION FOR STAY OF MANDATE

Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure, appellant Teck Cominco Metals, Ltd. (“Teck”) moves that the mandate in the above-entitled action be stayed for a period of 90 days to enable Teck to file a petition for a writ of certiorari in the United States Supreme Court, and thereafter stayed until final disposition by the Supreme Court. The foregoing motion is made on the grounds that:

1. Judgment in favor of appellees was entered in the instant case on July 3, 2006.
2. Appellant Teck filed a timely petition for panel rehearing and rehearing en banc on July 17, 2006; this Court entered an order denying the petition on October 30, 2006.
3. Appellant Teck expects and intends to apply to the Supreme Court for a writ of certiorari to review the aforesaid judgment.
4. The principal issues on which Teck expects and intends to seek Supreme Court review include:
 - (a) Whether imposing liability under the Comprehensive, Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601, et seq., on a Canadian defendant based on its operations in Canada would be an impermissible extraterritorial application of United States law.

(b) Whether Congress intended to allow application of CERCLA based on operations in Canada or other foreign countries.

(c) Whether the definition of an “arranger” who can be liable under CERCLA, 42 U.S.C. § 9607(a)(3), applies only where a person has arranged for disposal or treatment of hazardous substances **by another party or entity**. *See American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004).

5. The foregoing present serious statutory issues which are important not only to Canadian and Mexican businesses that may become ensnared in CERCLA proceedings, but also to international relations between the United States and its neighbors, Canada and Mexico.

6. A petition for a writ of certiorari is clearly not frivolous. *See* Circuit Rule 41-1.

7. If the mandate of this Court is allowed to issue prior to disposition of Teck’s petition for a writ of certiorari, Teck will be forced to defend in the district court against claims that may very well involve an impermissible extraterritorial application of United States law. Allowing this action to proceed in the district court could result in international discord. The Government of Canada has sent a diplomatic note to the U.S. State Department, expressing Canada’s concern that the underlying “Unilateral Administrative Order” issued by the U.S. Environmental Protection Agency “may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States.” *See* Excerpts of Record, p. 72. The Government of Canada also filed an amicus brief in support of Teck, urging reversal by the district court. *See* Government of

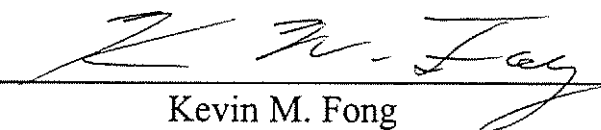
Canada's *Amicus Curiae* Brief in Support of Appellant and for Reversal of the Order of the District Court, pp. 3-4 ("The Government of Canada has a strong interest in preserving from interference, by private litigation in United States courts, its sovereign right to regulate Canadian persons and companies operating in Canada [¶] . . . Canada has a vital sovereign interest in having this dispute settled through diplomatic measures, rather than by adjudication in the domestic courts of the United States.").

8. The issuance of a stay of mandate would not affect the Unilateral Administrative Order, which has been withdrawn by the United States Environmental Protection Agency ("EPA") pursuant to a settlement between EPA and Teck.

Appellant Teck Cominco Metals, Ltd. respectfully requests that its motion to stay the mandate be granted.

Dated: November 3, 2006.

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[PROPOSED] STAY OF MANDATE

Pursuant to appellant Teck Comino Metals, Ltd.'s motion, the mandate in the above-entitled action is stayed for a period of 90 days from the date of this order. If during the period of the stay there is filed with the clerk of this Court a notice from the clerk of the United States Supreme Court that appellant has filed a petition for writ of certiorari in that court, the stay shall continue until final disposition by the Supreme Court.

Dated: _____.

Judge

PROOF OF SERVICE VIA UNITED STATES POSTAL SERVICE EXPRESS MAIL

I, David A. Kramlick, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is 50 Fremont Street, San Francisco, CA 94105-2228. My mailing address is 50 Fremont Street, P.O. Box 7880, San Francisco, CA 94120-7880.

3. I am familiar with Pillsbury Winthrop LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with postage thereon fully prepaid on the same day it is placed for collection and mailing.

4. On November 3, 2006, at 50 Fremont Street, San Francisco, California, I served true copies of the attached document titled exactly MOTION FOR STAY OF MANDATE by placing them in envelopes designated by the United States Postal Service for overnight delivery via Express Mail clearly labeled to identify the persons being served at the addresses shown below and placed in interoffice mail for collection and deposit in the United States Postal Service on that date following ordinary business practice:

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I declare under penalty of perjury that the foregoing is true and
correct. Executed this 3rd day of November, 2006, at San Francisco, California.

David A. Kramlick