

May 18, 2006

William M. Ainley
Dir 416 863 5509
wainley@dwpv.com

File No. 204613

SENT BY FACSIMILE, COURIER AND EMAIL

Mr. John Stevenson
Secretary,
Ontario Securities Commission
Suite 1800
20 Queen Street West
Toronto, ON M5H 3S8

Dear Mr. Stevenson:

Offer of Xstrata Canada Inc. to purchase all of the outstanding common shares of Falconbridge Limited

Request for a Hearing under Section 127 of the *Securities Act* (Ontario)

We are the solicitors for Xstrata plc ("Xstrata") and Xstrata Canada Inc. ("Xstrata Canada", and together with Xstrata, the "Applicants"). Xstrata Canada has made an offer (the "Xstrata Offer") to purchase all of the outstanding common shares of Falconbridge Limited ("Falconbridge") for \$52.50 in cash per share. In connection with that offer, the Applicants are hereby requesting that the Ontario Securities Commission (the "Commission") conduct a hearing at the earliest available date to determine whether it is in the public interest under section 127 of the *Securities Act* (Ontario) (the "Act") that the following orders be granted in respect of Falconbridge's shareholder rights plan dated as of March 21, 2006 (the "Replacement Rights Plan"):

- (a) a permanent order pursuant to section 127 of the Act that trading cease in respect of any securities issued, or to be issued, under or in connection with the Replacement Rights Plan, including without limitation, in respect of the rights issued under the Replacement Rights Plan (the "Rights") and any common shares of Falconbridge ("Falconbridge Shares") to be issued upon the exercise of the Rights;
- (b) a permanent order removing prospectus exemptions in respect of the distribution of the Rights on the occurrence of the Separation Time (as defined in the Replacement Rights Plan) and in respect of the exercise of the Rights;

- (c) to the extent necessary, a temporary Order pursuant to subsection 127(5) of the Act suspending the operation of the Replacement Rights Plans, or providing that any Rights that have been or may be issued under the Replacement Rights Plan shall not separate from the Falconbridge Shares or become exercisable or trade separately from the Falconbridge Shares until such time as the matters raised in this request for a hearing have been finally disposed of by the Commission (the "Interim Relief"); and
- (d) such further and other orders as the Commission deems appropriate in the public interest.

Overview of Xstrata's Position

The Applicants submit that it is in the public interest that the Replacement Rights Plan be terminated immediately for the following reasons:

- (i) The Replacement Rights Plan is, in effect, an extension or amendment of a shareholder rights plan (the "First Rights Plan") that was first adopted by Falconbridge on September 22, 2005. Falconbridge failed to submit the First Rights Plan to its shareholders for approval within six months of its adoption as required by the *TSX Company Manual*. Rather than submit the First Rights Plan to its shareholders for approval, Falconbridge let the six month period expire and simply adopted the Replacement Rights Plan in its place. Falconbridge's adoption of the Replacement Rights Plan while letting the First Rights Plan expire is abusive and a breach of the *TSX Company Manual*, and it is in the public interest that the Replacement Rights Plan be terminated and any Rights issued thereunder be cease traded; and
- (ii) Even if it were not abusive and unlawful, there is no reason for the Replacement Rights Plan to be allowed to continue. The stated purpose of the Replacement Rights Plan was to prevent a "creeping" bid. The Replacement Rights Plan has fulfilled its stated purpose; there is now an auction underway with two competing offers for Falconbridge, each for all of the outstanding Falconbridge Shares. Since the Xstrata Offer is conditional upon the Replacement Rights Plan being terminated, if it is not terminated, the effect of the Replacement Rights Plan will be to inhibit rather than encourage an auction. If the Replacement Rights Plan is not terminated, Falconbridge's shareholders will be unable to accept one of the two competing offers currently before them. In the circumstances, the continued operation of the Replacement Rights Plan constitutes an improper defensive tactic and is contrary to the public interest.

In this letter, references to tab numbers in parenthesis indicate the applicable tab of the volume that accompanies this letter where the materials referred to can be found.

A. ~ Summary of Material Facts

Xstrata and Xstrata Canada

1. Xstrata is a corporation existing and incorporated under the laws of England and Wales with its principal executive offices in Zug, Switzerland. Xstrata's ordinary shares are listed on the London and Swiss stock exchanges.
2. Xstrata is a major producer of export thermal coal, ferrochrome copper, coking coal, vanadium, zinc, gold, lead and silver. Xstrata's operations and projects span five continents and nine countries: Australia, South Africa, Spain, Germany, Argentina, Peru, Colombia, Canada and the UK.
3. Xstrata owns 73,665,996 Falconbridge Shares, or approximately 19.8% of the Falconbridge Shares outstanding through 1184760 Alberta Ltd. ("Xstrata Alberta"), which is a wholly-owned indirect subsidiary of Xstrata.
4. Xstrata Canada is a corporation existing and incorporated under the laws of the Province of Ontario. Xstrata Canada is a wholly-owned indirect subsidiary of Xstrata and was incorporated for the purpose of making the Xstrata Offer.

Falconbridge

5. Falconbridge is a corporation incorporated under the laws of the Province of Ontario with its principal executive offices located in Toronto, Ontario. Falconbridge is the result of an amalgamation between Noranda and Falconbridge Limited which occurred on June 30, 2005.
6. Falconbridge is principally engaged in the production of copper and nickel and has investments in fully integrated zinc and aluminium assets.
7. The authorized capital of Falconbridge consists of an unlimited number of Common Shares, an unlimited number of Preferred Shares issuable in series, an unlimited number of Junior Preference Shares issuable in series and an unlimited number of Participating Shares issuable in series. Based on publicly available information, as of April 24, 2006, there were issued and outstanding: (i) 372,385,672 Common Shares; (ii) 3,246,057 Preferred Shares, Series F; (iii) 8,753,943 Preferred Shares, Series G; (iv) 6,000,000 Preferred Shares, Series H; (v) 89,835 Preferred Shares, Series 1; (vi) 4,787,283 Preferred Shares, Series 2; (vii) 3,122,882 Preferred Shares, Series 3; (viii) 11,999,899 Junior Preference Shares, Series 1; (viii) 11,999,899 Junior Preference Shares, Series 2;

and (ix) 5,999,903 Junior Preference Shares, Series 3. As of March 31, 2006, there were options to acquire an aggregate of 6,371,000 Common Shares outstanding under Falconbridge's stock option plans. In addition, Falconbridge has issued Cdn. \$150,000,000 aggregate principal amount of convertible debentures due April 30, 2007 which are convertible by the holders thereof into Common Shares at a conversion price of Cdn. \$27.55. As of March 31, 2006, the aggregate principal amount of Falconbridge Convertible Debentures remaining outstanding, based on the conversion price of Cdn. \$27.55 per Common Share is convertible into approximately 4,334,000 Common Shares. Falconbridge announced on April 25, 2006 that it intended to redeem on April 26, 2006, 8,000,000 junior preference shares, series 1; 8,000,000 junior preference shares, series 2; and 4,000,000 junior preference shares, series 3. If such redemptions were completed, the number of junior preference shares, series 1 would be 3,999,899, the number of junior preference shares, series 2 would be 3,999,899 and the number of junior preference shares, series 3 would be 1,999,903.

8. The Falconbridge Shares are listed on the Toronto Stock Exchange (the "TSX") and the New York Stock Exchange (the "NYSE").

Inco

9. Inco Limited ("Inco") is a corporation incorporated under the laws of Canada with its executive offices in Toronto, Ontario.
10. Inco is principally engaged in the production of nickel.
11. Inco's common shares are listed on the TSX and the NYSE.

Falconbridge "in Play" Starting in 2004

12. In February 2004, Brookfield Asset Management Inc, formerly Brascan Corporation ("Brookfield") owned 41% of the common shares of Noranda Inc. ("Noranda"). At the time, Noranda was a 59% shareholder of Falconbridge Limited ("Old Falconbridge") before its amalgamation with Noranda. In February 2004, Brookfield advised Noranda's board that Noranda no longer fit within Brookfield's stated business model and Noranda began to seek possible buyers.
13. Between February and September, 2004, numerous parties (including Xstrata and Inco) conducted due diligence on Noranda, and Noranda negotiated with a number of parties (including Inco) concerning their interest in acquiring Noranda.
14. In April 2004, in response to solicitations by Brookfield and its affiliates for expressions of interest for the purchase of Noranda, Xstrata entered into discussions with Brookfield.

15. On April 27, 2004, Xstrata and Xstrata (Schweiz) AG ("Xstrata Schweiz"), an affiliate of Xstrata, each entered into separate confidentiality agreements with Noranda and Old Falconbridge (the "Confidentiality Agreements") pursuant to which Noranda and Old Falconbridge agreed to provide confidential information in connection with Xstrata's consideration of a possible transaction to acquire all or substantially all of the shares of Noranda. After signing the confidentiality agreements, Xstrata, together with its legal and financial advisors, was granted access to a data room established by Noranda and other information.
16. On June 16, 2004, Noranda publicly announced that it had commenced a review of various means of maximizing shareholder value and that a special committee of the Board of Directors of Noranda had been established to oversee a review of the expressions of interest that had been received.
17. On September 24, 2004 Noranda announced that it had entered into exclusive negotiations with China Minmetals Corporation concerning a preliminary non-binding proposal to acquire 100% of Noranda. A definitive agreement with China Minmetals was never concluded.
18. On June 30, 2005, Old Falconbridge and Noranda amalgamated to form Falconbridge.
19. On August 14, 2005, Xstrata and its wholly-owned subsidiary Xstrata Alberta purchased from an affiliate of Brookfield 73,115,756 Falconbridge Shares, constituting approximately 19.9% of the Falconbridge Shares outstanding at the time, for Cdn. \$28.00 in cash per share. Prior to September 19, 2005, Xstrata Alberta purchased an additional 550,240 Falconbridge Shares in three private transactions. At the time of these acquisitions Falconbridge did not have a shareholder rights plan in place

The First Rights Plan

20. On September 22, 2005, Falconbridge announced that it had adopted, effective immediately and without shareholder approval, the First Rights Plan (*Tab A*). The First Rights Plan included provisions that trigger the massive dilution effects if any person acquires 20% or more of the outstanding Falconbridge Shares except in certain exempt transactions (a "Flip-in Event"). The dilution caused by a Flip-in Event is accomplished by the Rights becoming exercisable (other than by the person who acquires the 20% interest) to purchase Falconbridge Shares at a 50% discount to the market price. Consistent with the requirements of the *TSX Company Manual*, the terms of the First Rights Plan provided that if the plan was not ratified by a majority of Falconbridge's independent shareholders at a meeting of shareholders to be held not later than six months from the date of the plan, then

the First Rights Plan (and any rights issued thereunder) would be of no further force or effect.

21. It is a requirement of the *TSX Company Manual* that when filing a rights plan with the TSX that the issuer make a statement concerning whether the issuer is aware of any specific take-over bid being made or contemplated for the issuer, together with full details regarding any such bid. At the time the First Rights Plan was adopted, Falconbridge made no such statement.
22. Falconbridge did not contact Xstrata to discuss the proposed rights plan or to discuss Xstrata's intentions, if any, to increase its investment in Falconbridge.

The Inco Offer

23. On October 11, 2005, Falconbridge announced that it had entered into an agreement with Inco (the "Inco Support Agreement") (**Tab B**) to support an offer to be made by Inco to acquire all of Falconbridge's shares (the "Inco Offer") for consideration of \$7.50 in cash plus 0.524 Inco common shares for each Falconbridge Share (assuming full pro ration of the maximum amounts of cash and Inco common shares offered). Even though at the time Xstrata was Falconbridge's largest shareholder holding 19.8 % of its shares and its only shareholder holding more than 5 %, Falconbridge entered into the Inco Support Agreement without any prior discussion or consultation with Xstrata concerning the agreement or Xstrata's interest in making an offer for all of the Falconbridge Shares.
24. The Inco Support Agreement contains numerous provisions designed to protect the Inco Offer and to inhibit any other proposal from being put forward to the shareholders of Falconbridge, including:
 - a covenant from Falconbridge that it will not redeem the Rights or otherwise waive, amend, suspend the operation of or terminate the First Rights Plan (and, pursuant to the third amending agreement to the Inco Support Agreement, the Replacement Rights Plan) without the prior written consent of Inco;
 - a covenant from Falconbridge that it will use its reasonable best efforts to permit the Inco Offer to be successful;
 - a covenant from Falconbridge that it will not solicit or facilitate any other inquiries or offers regarding an acquisition of Falconbridge;
 - a covenant from Falconbridge that it will not engage in any discussions or negotiations regarding, or provide any confidential information with respect to, an acquisition proposal;

- an agreement to present any unsolicited offers to Inco and to allow Inco the right to match a competing offer before Falconbridge's board withdraws its recommendation for the Inco Offer or recommends a competing bid; and
 - a requirement to pay a U.S. \$320 million break fee (subsequently increased to U.S. \$450 million) in certain circumstances, including in the event that Falconbridge withdraws its recommendation of the Inco Offer or proposes to enter into an agreement with respect to a superior proposal.
25. The Inco Support Agreement also provides for the employment of certain members of Falconbridge management if the Inco Offer is successful. Section 1.8 of the Inco Support Agreement provides that as soon as practicable after Inco's acquisition of Falconbridge, Derek G. Pennell, the CEO of Falconbridge, will be appointed President of Inco and four Falconbridge directors will be nominated for election or appointment to the board of directors of Inco. The take-over bid circular for the Inco Offer (*Tab C* at page 39) states that numerous other senior executives of Falconbridge will join the Inco management team following the acquisition.
26. Since making the Inco Offer, Inco has announced the following extensions of the expiry date of its offer to allow more time for it to receive all necessary regulatory clearances:

Announcement Dates	Revised Expiry Dates
December 8, 2005	January 27, 2006
January 12, 2006	February 28, 2006
February 21, 2006	June 30, 2006

27. Inco also announced on January 12, 2006 and February 21, 2006 that the Inco Support Agreement had been amended to reflect Inco's agreement with Falconbridge to extend the expiry date of the Inco Offer in order to obtain all necessary regulatory clearances. Inco is currently committed to Falconbridge to extend the expiry date of the Inco Offer to August 9, 2006 to obtain all necessary regulatory clearances.
28. On February 15, 2006, Falconbridge notified the Canadian securities regulatory authorities that it had set April 25, 2006 as the date for its annual and special meeting of shareholders.
29. On March 10, 2006, Falconbridge notified the Canadian securities regulatory authorities that the April 25, 2006 shareholders' meeting was being cancelled (*Tab D*). Falconbridge has not explained publicly the reason for the cancellation.

30. Falconbridge has not made any further public announcement indicating an intention to call a meeting of its shareholders.

The Replacement Rights Plan

31. On March 21, 2006, Falconbridge announced that it had adopted, effective immediately and without shareholder or TSX approval, the Replacement Rights Plan (*Tab E*). The Replacement Rights Plan is substantially similar to the First Rights Plan, with the principal exception that the Replacement Rights Plan does not impose a minimum deposit period. The Replacement Rights Plan was adopted one day before the First Rights Plan (including any then outstanding rights thereunder) terminated in accordance with its terms as it had not been ratified by Falconbridge's shareholders within six months from the date of its adoption.
32. In a press release dated March 21, 2006, Falconbridge stated that the Replacement Rights Plan was adopted to address concerns of "many of the Company's shareholders" with the possibility of a "creeping" takeover (*Tab F*).
33. Even though Falconbridge stated that the Replacement Rights Plan was adopted to address the concerns of its shareholders, Falconbridge has not called a meeting of its shareholders to consider either the First Rights Plan or the Replacement Rights Plan, despite the fact that 237 days have elapsed since the adoption of the First Rights Plan and 57 days have elapsed since the adoption of the Replacement Rights Plan.
34. On March 22, 2006, Falconbridge's CEO, Derek Pannell, was quoted in the *Report on Business* as saying, "[the Replacement Rights Plan] was not designed to target anyone in particular, either Xstrata or Inco" (*Tab G*).
35. On April 10, 2006, Falconbridge issued a press release stating that:
- "...the Toronto Stock Exchange (TSX) has determined to defer its consideration of the acceptance for filing of the [Replacement Rights Plan] until [Falconbridge] can confirm that it is not aware of any pending or threatened takeover bid for [Falconbridge] or the TSX is satisfied that the Ontario Securities Commission will not intervene in any takeover bid for [Falconbridge]. The TSX further advised that a condition of any future acceptance of notice of the plan by the TSX would be that [Falconbridge's] shareholders ratify the plan. In the meantime, the rights plan remains effective in accordance with its terms."** (emphasis added) (*Tab H*)
36. Neither Falconbridge nor the TSX has announced that either the TSX has confirmed the acceptance of the Replacement Rights Plan for filing or that

Falconbridge has obtained an exemption from the requirements of the *TSX Company Manual* with respect to the adoption of the Replacement Rights Plan.

37. On May 8, 2006, Teck Cominco Limited ("Teck Cominco") announced that it was making an unsolicited offer to acquire all of the shares of Inco at a price of Cdn. \$78.50 per share, consisting of Cdn. \$28 in cash plus 0.6293 of a Class B subordinate voting share of Teck Cominco for each Inco common share outstanding (the "Teck Offer"). The Teck Offer is contingent upon Inco not completing its acquisition of Falconbridge.

The Revised Inco Offer

38. On May 13, 2006, Falconbridge and Inco announced an amendment to the Inco Offer and the Inco Support Agreement pursuant to which the Inco Offer was increased to \$12.50 in cash and 0.524 of an Inco common share for each Falconbridge Share (assuming full pro ration of the maximum amounts of cash and Inco common shares offered). In connection with the amendment to the Inco Support Agreement, the Falconbridge board of directors also agreed to increase the break fee by U.S. \$130 million to U.S. \$450 million. In addition, the Falconbridge board agreed to increase the "Offeror Enhanced Expense Payment" payable to Inco from \$107 million to \$150 million, and agreed that the Offeror Enhanced Expense Payment would be payable in the additional circumstance that the Falconbridge board withdraws or fails to reiterate its recommendation of the Inco Offer (*Tab I*).
39. In its announcement, Inco stated that the value of the revised offer based on Inco's closing share price on the TSX of \$72.80 on May 12, 2006 was \$51.17 per Falconbridge share. The announcement did not reveal the important fact, however, that the May 12, 2006 Inco share price had been significantly influenced by the Teck Offer which is conditional upon Inco not acquiring Falconbridge pursuant to the Inco Offer.
40. On May 12, 2006, the closing price of Falconbridge shares on the TSX was \$53.38 per share, \$2.21 higher than the purported value of the revised Inco Offer.

The Xstrata Offer

41. On May 17, 2006, Xstrata announced that it was making an unsolicited offer to purchase of all of the outstanding Falconbridge Shares for a purchase price of \$52.50 per share payable in cash. The offer price of \$52.50 per share represents a premium of:
 - 12.3% over the value of the revised offer announced by Inco in its competing offer for Falconbridge, based upon the May 5, 2006 closing price on the TSX of Inco shares, the last trading day prior to the

announcement of the Teck Offer and assuming full proration of the share and cash consideration in accordance with terms of Inco's offer; and

- 11.2% over the closing price of \$47.23 per Falconbridge share on May 5, 2006, the last trading day prior to the announcement of Teck Offer.
42. The Xstrata Offer was commenced on May 18, 2006 by published advertisement and the take-over bid circular in respect of the Xstrata Offer (the "Xstrata Circular") (*Tab J*) was filed with the securities regulatory authorities in Canada on May 18, 2006.
43. On May 18, 2006, Xstrata hand delivered to Falconbridge's offices in Toronto a copy of the Xstrata Circular and a request for Falconbridge's shareholder list to allow Xstrata to mail the Xstrata Circular to the shareholders of Falconbridge. When that list is provided, the Xstrata Circular and other relevant materials will be mailed to the shareholders of Falconbridge.
44. The Xstrata Offer is open for acceptance until 8:00 p.m. (Toronto time) on July 7, 2006, at which time, if all of the conditions of the offer are met, Xstrata will take-up the Falconbridge Shares deposited under the Xstrata Offer and pay for them within three business days.
45. The Xstrata Offer is conditional upon the Replacement Rights Plan not being effective at the time of Xstrata's take-up and payment of the Falconbridge Shares.

The Effect of the Replacement Rights Plan on the Xstrata Offer

46. The Replacement Rights Plan contains a "Permitted Bid" provision. Among other things, to be a "Permitted Bid" an offer must be made to all holders of Falconbridge Shares for all Falconbridge Shares held by them. The Replacement Rights Plan also requires that a Permitted Bid contain an irrevocable and unqualified condition that no Falconbridge Shares shall be taken up and paid for pursuant to a take-over bid unless the shares taken up constitute more than 50% of the then outstanding Falconbridge Shares held by "independent shareholders" (i.e., shareholders other than Xstrata and its affiliates, associates and joint actors).
47. Since the Xstrata Offer does not contain such an irrevocable condition, it is not a "Permitted Bid" under the Replacement Rights Plan.
48. Under the terms of the Replacement Rights Plan, a so-called "Separation Time" is deemed to occur on the 10th business day following the public announcement by a person to commence a take-over bid. In the case of the Xstrata Offer, unless postponed by Falconbridge's board of directors, the Separation Time will occur on June 1, 2006. If the Separation Time occurs, the Rights issued under the

Replacement Rights Plan will separate from and become independent of the Falconbridge Shares and Falconbridge will be required to distribute Rights certificates to all of the holders of those Shares. The Rights will become exercisable at a price equal to four times the market price of the Falconbridge Shares determined as at the Separation Time in the period between the Separation Time and the occurrence of a so-called "Flip-In Event", as defined immediately below.

49. If as a result of the Xstrata Offer, Xstrata were to become a beneficial owner of 20% or more of the Falconbridge Shares, a "Flip-In Event" will be triggered under the Replacement Rights Plan and each Right will constitute, effective from and after the tenth business day following Xstrata becoming a 20% beneficial owner, the right to purchase Falconbridge Shares from Falconbridge at a 50% discount to the then current market price¹.
50. To avoid triggering a Flip-in Event and the resulting dilution, it is a condition of the Xstrata Offer that the Replacement Rights Plan not be effective at the time of Xstrata's take-up and payment of the Falconbridge Shares.
51. Under the terms of the Inco Support Agreement, as amended on March 21, 2006, Falconbridge has covenanted to Inco that it will not redeem the Rights or otherwise waive, amend, suspend the operation of or terminate the Rights Plan without the prior written consent of Inco.

The Impact of the Replacement Rights Plan on the Ability of Falconbridge's Shareholders To Sell

52. If the Replacement Rights Plan is not terminated, and if Falconbridge does not waive the application of the Replacement Rights Plan to the Xstrata Offer, or if Inco refuses to consent to any request for a waiver that Falconbridge might make, the conditions of the Xstrata Offer will not be satisfied. The shareholders of Falconbridge will be deprived of the ability to sell their shares into the Xstrata Offer.
53. The harm to the shareholders of Falconbridge that will arise from being denied the opportunity to sell their shares pursuant to the Xstrata Offer is obvious and avoidable. Furthermore, in the circumstances of this case the harm may be magnified substantially given that the Inco Offer may, in fact, never proceed. The Inco Offer was commenced on October 11, 2005, and has been extended numerous

¹ See Section 3.1 of the Replacement Rights Plan and Section 1.1 for the definition of "Flip-in Event" which includes an acquisition of 20% or more of the outstanding Falconbridge Shares pursuant to a bid which is not a Permitted Bid.

times pending regulatory approvals. It is uncertain whether the Inco Offer will ever receive the regulatory clearances required to proceed. In addition, as a result of Teck Cominco's offer for Inco which is conditional on Inco not acquiring Falconbridge, there is also a possibility that the Inco Offer will be withdrawn.

B. ~ Xstrata's Submissions

54. Having regard to the facts above, Xstrata submits that the circumstances of this case provide a substantial and compelling foundation for the Commission to exercise its public interest jurisdiction to cease trade the Replacement Rights Plan.

The Replacement Rights Plan is Abusive

55. The Replacement Rights Plan was adopted in violation of the rules and policy of the TSX.
56. Section 634 of the TSX Company Manual notes the importance of shareholder approval for shareholder rights plans:

"TSX believes that security holders of the listed issuer should have the opportunity to decide whether the continued existence of a plan that has been adopted by the board of directors of the listed issuer in the normal course of affairs (i.e. absent a threatened or actual specific take-over bid) is in the security holders' best interests."

57. Section 636 of the TSX Company Manual clearly requires that as a condition to the effectiveness of a rights plan, the plan must be ratified by the security holders of the listed issuer at a meeting held within six months following the adoption of the plan:

"If a plan is adopted at a time when the listed issuer is not aware of any specific take-over bid for the listed issuer that has been made or is contemplated, TSX will not generally refuse the plan for filing, **provided that it is ratified by the security holders of the listed issuer at a meeting held within six months following the adoption of the poison pill.** Pending such security holder ratification, the plan is allowed to be in effect so that its intent is not circumvented prior to the security holders meeting. **If security holders do not ratify the plan by the required time, the plan must be immediately cancelled and any rights issued thereunder must be immediately redeemed or cancelled.**" (emphasis added)

58. Section 637 of the TSX Company Manual further provides:

"No amendment of a plan that has been adopted by a listed issuer may be made without the prior written consent of TSX. In order to seek such consent, the listed issuer must file with TSX (i) a black-lined draft of the amended plan, (ii) a letter that summarizes the proposed changes to the plan, and (iii) the requisite filing fee payable to TSX."

59. Neither the First Rights Plan nor the Replacement Rights Plan have been approved by the shareholders of Falconbridge. As noted above, 237 days have elapsed since the initial adoption of the First Rights Plan and 57 days have elapsed since the adoption of the Replacement Rights Plan. The board of directors of Falconbridge has not called a special meeting or annual meeting of shareholders at which either Plan could have been considered. In fact, Falconbridge cancelled an annual and special meeting of shareholders it had scheduled for April 25, 2006, at which time the two Rights Plans could have been considered.
60. The Falconbridge board essentially ignored the requirements of the *TSX Company Manual* by failing to seek and obtain shareholder approval for the First Rights Plan. Instead, immediately prior to the automatic expiration of the First Rights Plan, the board adopted the Replacement Rights Plan, again without seeking or obtaining the approval of Falconbridge shareholders.
61. Moreover, Falconbridge did not obtain the prior written consent of the TSX required by Section 637 of the *TSX Company Manual* for the adoption of the Replacement Rights Plan which is essentially an amendment to the First Rights Plan. Nor did Falconbridge obtain an exemption from the TSX from the requirements of the *TSX Company Manual*.
62. In *Re Canadian Jorex*², the Commission held that shareholder approval is a key factor in determining whether to allow the continued existence of a rights plan. Furthermore, the Zimmerman Report³ describes a shareholder rights plan as a contract between the company and its shareholders. Despite this, the Falconbridge board has chosen not to submit either the First Rights Plan or the Replacement Rights Plan to Falconbridge shareholders for approval even though they have had ample opportunity to do so.
63. In *Re Cara Operations Ltd.*⁴, in which the Commission considered whether to cease trade a rights plan, the Commission stated:

² (1992), 15 O.S.C.B. 257.

³ Investment Dealers Association, *Report of the Committee to Review Take-Over Bid Time Limits*, (1996) 19 O.S.C.B. 4469 (the "Zimmerman Report").

⁴ (2002), 25 O.S.C.B. 7997 ("*Cara*").

"If a plan does not have shareholder approval, it generally will be suspect as not being in the best interest of shareholders; however, shareholder approval of itself will not establish that a plan is in the best interest of the shareholders."

64. An adverse inference must be drawn from Falconbridge's failure to submit the two rights plans to its shareholders for approval. It must be inferred that Falconbridge shareholders would not have approved the rights plan had they been given the opportunity to do so.
65. Falconbridge's adoption of the Replacement Rights Plan also violates one of the fundamental objectives of the takeover bid provisions of Canadian securities legislation, namely to provide a regulatory framework within which takeover bids may proceed in a fair, open and even-handed environment.⁵
66. As stated by the Alberta Securities Commission in *Re: 1153298 Alberta Ltd.*⁶:

"We believe there is a public interest in a fair and predictable process for the conduct of takeover bids. Not only can a measure of predictability be important once a bid has been launched, it can also (as the OSC suggested in *Cara*) be a factor in motivating bidders to enter into the process in the first place. We noted earlier that our securities laws attempt to provide such fairness and predictability through mechanisms such as minimum prescribed bid duration, and that NP 62-202 and case law address the issue of acceptable and unacceptable defensive tactics."

67. The shareholders of Falconbridge, including Xstrata, have a reasonable expectation that Falconbridge would adhere to the requirements of the *TSX Company Manual* and to general principles of Canadian securities law, both of which mandate shareholder approval for shareholders' rights plans. Falconbridge's failure to seek and obtain shareholder approval and its adoption of the Replacement Rights Plan in flagrant disregard of the prevailing rules of the TSX is unfair and unpredictable and is contrary to and disregards unfairly the interests of Falconbridge's shareholders, including Xstrata.
68. For the reasons set out above, Falconbridge's failure to submit the First Rights Plan and Replacement Rights Plan to its shareholders for their approval and its failure to obtain the prior consent of the TSX to the Replacement Rights Plan are abusive and contrary to the public interest. Falconbridge and Inco should not be allowed to take

⁵ NP 62-202, Section 1.1(2).

⁶ [2005] A.S.C.D. No. 1004.

advantage of this abusive behaviour and an Order should be granted to cease trade the Replacement Rights Plan and the Rights on this basis alone.

The Replacement Rights Plan is No Longer Necessary and Should Be Set Aside

69. Even if the Replacement Rights Plan and the circumstances under which it was adopted are found not to be unlawful, abusive or contrary to the public interest, the Plan should be terminated in any event as it is not necessary to give Falconbridge the opportunity to create an auction for its shares. In the present circumstances, where Falconbridge has been "in play" since 2004, and there are now two competing offers, the Replacement Rights Plan has the opposite effect. It severely limits or restricts entirely the ability of Falconbridge's shareholders to respond to the Xstrata Offer and could deter other potential bidders. This is contrary to the interests of the shareholders of Falconbridge, and to the public interest.

National Policy 62-202

70. Section 1.1(2) of NP 62-202 describes the take-over bid provisions of Canadian securities legislation as follows:

"The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. **The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision.** The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process."

71. In adopting NP 62-202, Canadian securities regulators recognized that while defensive tactics may sometimes be legitimately used by a target corporation as a means of maximizing shareholder value, it is inappropriate for the target corporation to adopt or maintain defensive tactics "that are likely to deny or limit severely the ability of shareholders to respond to a take-over bid or to a competing bid."
72. The implementation of a shareholder rights plan is a common defensive tactic employed by the management of a target corporation. As is described in greater detail below, and consistent with the objectives of National Policy 62-202,

Canadian securities commissions have repeatedly held that a shareholder rights plan will be set aside as an improper defensive tactic where the shareholder rights plan is being used to prevent shareholders of a target corporation from exercising their fundamental right to determine whether to accept or reject an offer to acquire their shares.

Shareholder Rights Plans

73. Since the decision of this Commission 14 years ago in *Re Canadian Jorex*, securities commissions in Canada have consistently held that all shareholder rights plans must, at some time, be set aside in order that shareholders may determine whether or not to tender their shares to an outstanding offer.
74. In *Re Royal Host Real Estate Investment Trust*,⁷ the Commission identified the following as factors that may be relevant in determining whether the time has come for a rights plan to go:
- (a) whether shareholder approval of the rights plan was obtained;
 - (b) when the plan was adopted;
 - (c) whether there is broad shareholder support for the continued operation of the plan;
 - (d) the size and complexity of the target company;
 - (e) the other defensive tactics, if any, implemented by the target company;
 - (f) the number of potential, viable offerors;
 - (g) the steps taken by the target company to find an alternative bid or transaction that would be better for shareholders;
 - (h) the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
 - (i) the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
 - (j) the length of time since the bid was announced and made; and
 - (k) the likelihood that the bid will not be extended if the Replacement Rights Plan is not terminated.

⁷

(1999), 22 O.S.C.B. 7819.

75. Several of these factors are particularly relevant in the circumstances of this case and the determination by the Commission of whether the Replacement Rights Plan will facilitate an unrestricted auction for the corporation or, alternatively, will deprive the shareholders of Falconbridge of their fundamental right to tender their shares to an offer that has been made to them. As is described in greater detail below, the Replacement Rights Plan falls into the latter category.

Application to the Facts

76. The principal factors relevant to the Commission's determination of whether the Replacement Rights Plan in this case should be set aside or cease traded are as follows:

- *Neither the First Rights Plan nor the Replacement Rights Plan has been approved by Falconbridge Shareholders*

As described above, the Falconbridge board chose not to submit either the First Rights Plan or the Replacement Rights Plan to Falconbridge shareholders for approval even though the board was required to do so by the applicable provisions of the *TSX Company Manual*. The adoption of the Replacement Rights Plan is particularly abusive considering that the First Rights Plan expressly provided that it would terminate automatically if shareholders did not ratify it within six months. An adverse inference must be drawn from Falconbridge's failure to seek shareholder approval and it must be inferred that the shareholders of Falconbridge would not have approved either the First Rights Plan or the Replacement Rights Plan had they been given the opportunity to consider and approve either of these Plans.

- *The Xstrata Offer is not coercive or unfair to the holders of Falconbridge Shares*

As the Xstrata Offer is an all-cash bid for all of the outstanding Falconbridge Shares and is open for 50 days, it is not coercive. There is nothing improper, coercive or unfair about the Xstrata Offer, and it was made at a very substantial multi-billion dollar premium to the revised Inco Offer and the trading price of the Falconbridge Shares based on the closing price of the shares of Inco and Falconbridge on May 5, 2006, the last trading day prior to the announcement of the Teck Offer. Xstrata has also expressed its intention to effect a subsequent acquisition transaction pursuant to OSC Rule 61-501 and Policy Statement Q-27 of the *Authorit  des march s financiers (Qu bec)* if the Xstrata Offer is successful. As a result, any shareholder who does not tender to the Xstrata Offer will still be able to receive the equivalent consideration for his or her Falconbridge Shares as part of any subsequent acquisition transaction.

- *The Xstrata Offer is not a "creeping" takeover*

The Xstrata Offer is an offer for all of the Falconbridge shares. It is Xstrata's intention, as clearly expressed in the Xstrata Offer, to acquire 100% of Falconbridge for cash.

The Replacement Rights Plan is not necessary to protect Falconbridge shareholders against a creeping takeover bid by Xstrata or any other bidder. Falconbridge shareholders are fully protected by the provisions of the Act.

During the course of the Xstrata Offer, Xstrata is prohibited by section 94(2) of the Act from acquiring or entering into any agreement, commitment or understanding to acquire any Falconbridge Shares otherwise than pursuant to the Xstrata Offer and the exemption available under Section 94(3) of the Act. As a result, the private purchase exemption in Section 93(1)(c) of the Act is unavailable to Xstrata.

Furthermore, any acquisitions which Xstrata may make pursuant to the exemption provided for in Section 94(3) of the Act is limited to 5% of the Falconbridge Shares. Assuming Xstrata were to exercise this right and acquire an additional 5%, at most, Xstrata would hold only 24.8% of Falconbridge's Shares and only 24.5% on a fully-diluted basis. This would not be enough to stop Inco from achieving a 66 $\frac{2}{3}$ % acceptance of its offer. Consequently, Inco could still obtain the 66 $\frac{2}{3}$ % ownership it would require in order to conduct a second step compulsory acquisition of any Falconbridge Shares that do not tender to the Inco Offer, including any not tendered by Xstrata.

The stated objective of the Replacement Rights Plan has already been achieved. Falconbridge is currently the subject of two competing offers for all of the outstanding Falconbridge Shares. As a result, the Replacement Rights Plan serves no further purpose and should be terminated.

- *Falconbridge does not need the Replacement Rights Plan to ensure an auction for the company.*

An auction for Falconbridge's shares is already underway. The continued existence and operation of the Replacement Rights Plan is, therefore, not necessary to ensure an auction.

Moreover, **Falconbridge has agreed in the Inco Support Agreement to cease its efforts to find other offers that would compete with the Inco Offer.** As such, even if the Replacement Rights Plan were allowed to continue, Falconbridge is not permitted to solicit bids from third parties or to take other steps to facilitate or generate an auction for the company.

Falconbridge presumably bargained away this right in Inco's favour because it believed that the Inco Offer was a good offer for Falconbridge Shareholders and Falconbridge and its predecessor companies had already been thoroughly shopped to potential buyers.

Although there has been recent speculation in the press about the interest of other large mining companies making bids for Falconbridge, Falconbridge has covenanted that it will not solicit bids from potential bidders other than Inco. As a result, if there is a bidder other than Inco or Xstrata interested in making a bid for Falconbridge, it will have to do so without Falconbridge's solicitation.

The existence of the Replacement Rights Plan has the effect of limiting, rather than enhancing, the choices available to Falconbridge's shareholders.

- *Falconbridge has implemented other defensive tactics.*

Falconbridge has implemented additional deal-protection mechanisms in the Inco Support Agreement, including:

- a covenant to use its reasonable best efforts to permit the Inco Offer to be successful;
- a covenant not to solicit or facilitate any other inquiries or offers regarding an acquisition of Falconbridge;
- a covenant not to engage in any discussions or negotiations regarding, or provide any confidential information with respect to, an acquisition proposal;
- an agreement to present any unsolicited offers to Inco and to allow Inco the right to match a competing offer before Falconbridge's board withdraws its recommendation for the Inco bid or recommends a competing bid; and
- a requirement to pay a U.S.\$450 million break fee in certain circumstances, including in the event that Falconbridge withdraws its recommendation of the Inco Offer or proposes to enter into an agreement with respect to a superior proposal.

In addition, under the Inco Support Agreement, the Replacement Rights Plan cannot be terminated or waived and the Rights may not be redeemed by Falconbridge without the consent of Inco. As a result, the board of directors of Falconbridge has essentially delegated to Inco Falconbridge's ability and duty to waive the Replacement Rights Plan. Even where it might be in the best interests of the shareholders of Falconbridge for the Replacement Rights Plan to be terminated or waived, the consent of Inco

(which has no fiduciary duty to Falconbridge or its shareholders) would be required. As a consequence, the Commission should give Falconbridge's board of directors no deference with respect to important questions this application gives rise to, including whether the Replacement Rights Plan serves any further purpose and when the Replacement Rights Plan should be terminated. It is particularly appropriate not to give any deference to the board of directors of Falconbridge in the current circumstances where it appears that the board is seeking to ensure the success of the Inco Offer at all costs, as evidenced by Falconbridge's agreement to increase the break fee by \$130 million in connection with negotiating an increase to the Inco Offer which does not even result in an offer that exceeds the current market price of the shares of Falconbridge.

In light of the deal-protection mechanisms in the Inco Support Agreement, it is inappropriate for Falconbridge to allow Inco to use the Replacement Rights Plan to impose a further obstacle to the ability of Falconbridge shareholders to accept the Xstrata Offer.

- *The Length of Time the First Rights Plan and Replacement Rights Plan Have Been in Place.*

The First Rights Plan was in place for six months, including 161 days during which the Inco Offer was outstanding. The Replacement Rights Plan has been in place for 57 days. As stated by the Commission in *Cara*:

"While absolute numbers of days, on their own, should not be the deciding factor in determining whether a rights plan no longer serves the interest of shareholders, the longer the period the higher the onus is on those alleging that the rights plan still serves the interest of shareholders."⁸

As discussed above, with two competing offers for all of the Falconbridge shares currently before the Falconbridge shareholders, the Replacement Rights Plan serves no further purpose and should be terminated immediately.

Request for Hearing

The Xstrata Offer expires at 8:00 p.m. (Toronto time) on Friday, July 7, 2006. The Applicants respectfully request that the Commission conduct a hearing in respect of this matter at the earliest available date and, in any event, prior to May 31, 2006, to determine whether it is in the public interest under section 127 of the *Securities Act* (Ontario) that the orders requested be granted. As described above, the Applicants request that a hearing be

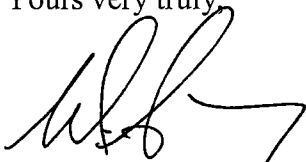
⁸ (2002), 25 O.S.C.B. 7997.

held no later than May 31, 2006 in order to ensure that the hearing is held prior to June 1, 2006 when the Separation Time under the terms of the Replacement Rights Plan will otherwise occur. To the extent necessary, the Applicants also seek the Interim Relief referred to above. Enclosed you will find our firm cheque in the amount of \$7,500 in respect of the applicable filing fee.

* * * * *

Should you have any questions or require any additional information, please do not hesitate to contact me at 416.863.5509 or my partner Kent Thomson of Davies Ward Phillips & Vineberg LLP at 416.863.5566.

Yours very truly,



William M. Ainley

WMA/man
Enclosures

cc: Naizam Kanji, *Ontario Securities Commission*
Michael Brown, *Ontario Securities Commission*
Julie Shin, *Toronto Stock Exchange*
Benny S. Levene, *Xstrata plc*
H. Lorne Morphy, *Davies Ward Phillips & Vineberg LLP*
Kent E. Thomson, *Davies Ward Phillips & Vineberg LLP*
Garth M. Girvan, *McCarthy Tétrault LLP*

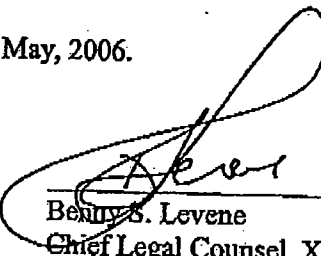
**XSTRATA PLC
XSTRATA CANADA INC.**

CERTIFICATE OF VERIFICATION

To: Ontario Securities Commission

I hereby authorize Davies Ward Phillips & Vineberg LLP to make this application and I confirm the truth of the facts contained therein.

DATED as of this 17 day of May, 2006.



Benny S. Levene
Chief Legal Counsel, Xstrata plc
President and Secretary, Xstrata Canada
Inc.