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DELIVERED AND BY EMAIL

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Attention: John Stevenson
Secretary of the Commission

Dear Sirs / Mesdames:

RE: Offer by Teck Cominco Limited ("Teck") to purchase all of the outstanding common shares (the "Teck Offer") of Inco Limited ("Inco")

Application for relief under section 127 of the *Securities Act* (Ontario)

We are special counsel to Teck in connection with this application.

Teck hereby applies for an order pursuant to section 127 of the *Securities Act* (Ontario) (the "Act") in connection with the Teck Offer and the shareholder rights plan of Inco dated September 14, 1998, as amended (the "Inco Rights Plan" or the "Plan"). Our firm cheque in respect of the applicable filing fee is attached.

In this application, Teck seeks the following relief:

- a) a permanent order pursuant to paragraph 127(1) of the Act that trading cease in respect of any securities issued, or to be issued, under or in connection with the Inco Rights Plan, including without limitation, in respect of the rights issued under the Inco Rights Plan (the "Rights") and any common shares of Inco 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 Inco Rights Plan) and in respect of the exercise of the Rights;

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- c) to the extent necessary, a temporary order pursuant to subsection 127(5) of the Act suspending the operation of the Inco Rights Plan, or providing that any rights that have been or may be issued thereunder shall not separate from the Inco shares or become exercisable or trade separately from the Inco shares until such time as the matters raised in this request for a hearing have been finally disposed of by the Commission; and
- d) such further and other relief as the Commission deems appropriate in the public interest.

All dollar amounts herein are in Canadian dollars unless otherwise indicated.

OVERVIEW OF TECK'S POSITION

1. Teck submits that it is in the public interest that the Inco Rights Plan be terminated immediately for the following reasons:
 - The Teck Offer, as it will be amended, contains all the elements of a Permitted Bid under the Inco Rights Plan;
 - Inco does not need the Inco Rights Plan to ensure an auction, as an auction has already occurred;
 - There is no reasonable prospect that the Inco Rights Plan, if permitted to continue, will result in an alternative bid or transaction more attractive to Inco shareholders;
 - Maintaining the Inco Rights Plan in effect will deprive Inco shareholders of the opportunity to choose between the Teck Offer and a transaction with Phelps Dodge Corporation ("Phelps Dodge") accepted by Inco's board of directors;
 - Inco has implemented various defensive tactics;
 - The Teck Offer is not coercive or unfair; and
 - Absent the application of U.S. federal securities legislation this application would be unnecessary.
2. The Phelps Dodge transaction is conditional on approval by shareholders (both Phelps Dodge and Inco), regulators and the courts, and those approvals will not be obtained, if at all, until at least the middle of September, 2006. Unless extended, the Teck Offer will have expired long before then. If one of those approvals are not obtained, such that the Phelps Dodge transaction never happens, and the Inco Rights Plan remains in place to prevent the Inco shareholders from even considering the Teck Offer, Inco shareholders

will never have the opportunity to decide for themselves whether they prefer the Teck Offer now to the uncertain Phelps Dodge transaction later.

SUMMARY OF MATERIAL FACTS

3. The following summary is based on affidavits from Peter C. Rozee, Teck's Senior Vice President, Commercial Affairs, and Daniel Mida, Co-Head of Origination at Merrill Lynch Canada Inc., both of which accompany this letter.

Teck

4. Teck is a diversified mining company engaged primarily in exploration for, and development and production of, natural resources. Teck has interests in mining and processing operations in Canada, the United States and South America. It is the world's largest zinc miner and an important processor of copper and gold, among other things. It also holds a 40% interest in, and is the managing partner of, the Elk Valley Coal Partnership, which is the world's second largest producer of seaborne hard coking coal.
5. Teck is incorporated under the laws of Canada and a reporting issuer or the equivalent in all of the provinces and territories of Canada. Its head and registered office is located in Vancouver. Teck's Class A common shares and Class B subordinate voting shares are listed for trading on the Toronto Stock Exchange (the "TSX"). Since June 29, 2006, its Class B subordinate voting shares have been listed for trading on the New York Stock Exchange (the "NYSE").

Inco

6. Inco is a producer of nickel. It is also a producer of copper, precious metals and cobalt and value-added specialty nickel products.
7. Inco is incorporated under the laws of Canada and is a reporting issuer or the equivalent in all of the Canadian provinces and territories. Inco's executive offices are located in Toronto. Inco's common shares are listed for trading on the TSX and the NYSE.

Discussions Between Teck and Inco

8. Beginning in the summer of 2005, Teck's Chairman, Dr. Norman B. Keevil, and President and Chief Executive Officer, Donald Lindsay, had several discussions with Inco's Chairman and Chief Executive Officer, Scott Hand, concerning the potential for a transaction between Teck and Inco.
9. In August 2005, Xstrata plc ("Xstrata") announced that it had acquired an interest in Falconbridge Limited ("Falconbridge"), another Canadian mining company. Mr. Lindsay suggested to Mr. Hand that Teck, Inco and Falconbridge maintain an ongoing dialogue about potential transactions.

10. In anticipation of a possible transaction involving Inco, between August 26, 2005 and September 2, 2005, Teck acquired an aggregate of 3.8 million shares of Inco through market purchases.
11. Between early September and the beginning of October, 2005, Dr. Keevil and Mr. Lindsay each again raised with Mr. Hand a possible combination of Inco and Teck. On September 26, 2005, Mr. Hand indicated that Inco was not interested in pursuing further discussions with Teck about such a transaction, although on October 7, 2005 Mr. Hand offered to meet with Mr. Lindsay on October 12, 2005.

The Inco/Falconbridge Support Agreement

12. On October 11, 2005, however, Inco entered into a support agreement with Falconbridge (the "Inco/Falconbridge Support Agreement"). Under that agreement Inco made an offer (the "Inco Offer") to acquire all of the outstanding common shares of Falconbridge. Under the Inco Offer, Inco offered to pay (i) \$34.00 in cash per share, or (ii) 0.6713 of an Inco share and \$0.05 in cash per share for each Falconbridge share, subject to proration.
13. The Inco Offer was originally scheduled to expire on December 23, 2005, but has been extended several times. It is currently scheduled to expire today.

Teck Decides to Make an Offer for Inco

14. In October and November 2005, Teck examined a possible acquisition of Inco. On November 21, 2005, Teck's board of directors determined that it would not pursue such a transaction at that time.
15. In early February 2006, Dr. Keevil wrote to Inco director David O'Brien. Dr. Keevil indicated that Teck remained willing to discuss a combination of Teck and Inco should Inco's transaction with Falconbridge not proceed. Mr. Hand wrote Dr. Keevil back, indicating that Inco remained committed to its acquisition of Falconbridge.
16. In late March 2006, in light of the continued strengthening of the metals markets and the ongoing delays in respect of the regulatory approvals for the Inco Offer, Teck again began to consider an offer for Inco. In late April 2006, Teck's board of directors authorized management to work towards an offer to purchase all of the Inco shares Teck did not already own.

Announcement of the Offer

17. On May 8, 2006, Teck issued a press release, announcing its intention to make the Teck Offer.

The Teck Offer

18. The terms of the Teck Offer are set out in an offer and circular (the "Teck Circular"), which was mailed to Inco shareholders on May 23, 2006.
19. As set out in the Teck Circular, the essential terms of the Teck Offer are as follows:
 - a) the offer is for all of the outstanding common shares of Inco together with associated rights issued and outstanding under the Inco Rights Plan other than Inco shares owned directly or indirectly by Teck.
 - b) in return for each Inco share Teck will pay:
 - i. \$78.50 in cash (the "Cash Alternative"); or
 - ii. \$0.9776 of a Teck Class B subordinate voting share and \$0.05 in cash (the "Share Alternative") at the shareholders' option,in each case subject to the proration described below.
 - c) the total cash available under the offer is limited to \$6,366,482,332 and the total number of Teck Class B subordinate voting shares available for issuance under the offer is 143,082,936. Assuming that all shareholders tendered to one of either the Cash Alternative or the Share Alternative, each Inco shareholder would be entitled to receive \$28.00 in cash and 0.6293 of a Teck Class B subordinate voting share for each Inco share tendered, subject to adjustment for fractional shares.
 - d) the offer is open for acceptance until 8:00 p.m. (Toronto time) on July 24, 2006. As of July 24, 2006, 77 days will have elapsed from Teck's initial announcement of its offer in the May 8, 2006 press release, and 62 days will have elapsed from the date the Teck Circular was mailed to Inco shareholders.
20. The Teck Offer offered shareholders a substantial premium based on the average trading price and closing price of Inco shares on the TSX prior to the announcement of the offer. As of May 5, 2006, the last trading day prior to the announcement of the Teck Offer, the closing price on the TSX of the Teck Class B subordinate voting shares was \$80.25. The closing price on the TSX of the Inco shares was \$65.38. The volume weighted average trading price of the Inco shares on the TSX for the thirty days ending May 5, 2006 was \$61.38. The offer price of \$78.50 per Inco share therefore represented a premium of about 20.1% over the closing price, and 27.8% over the thirty day volume weighted average price, of the Inco shares. On the basis of the closing price of a Teck Class B subordinate voting share on the TSX on July 12, 2006, the implied value of the Teck Offer at full proration was \$72.12 per Inco share.

Conditions of the Teck Offer

21. The Teck Offer is subject to a number of conditions, including the following:
 - a) Inco shares representing not less than 66⅔% of the total outstanding Inco shares must be validly tendered at the Expiry Time (as defined in the Teck Offer), including more than 50% of the Inco Shares held by Independent Shareholders (as defined in the Inco Rights Plan) (the “Minimum Tender Condition”). The Minimum Tender Condition cannot be waived by Teck;
 - b) the Inco/Falconbridge Support Agreement must have been lawfully terminated, and the Inco Offer must have expired or been lawfully withdrawn or terminated without any Falconbridge shares having been purchased by Inco pursuant to its take-over bid; and
 - c) the Inco Rights Plan must have been rendered inapplicable to the Teck Offer.

The Inco Rights Plan

22. The Inco Rights Plan includes provisions that trigger the potential for a massive dilution if any person acquires 20% or more of the outstanding common shares or voting shares of Inco (a “Flip-in Event”), unless the transaction is a Permitted Bid. This massive dilution will occur when the Rights provided for under the Inco Rights Plan become exercisable by shareholders other than the acquirer. The Rights will entitle the holder, other than the acquirer who causes the Flip-in Event, to purchase additional Inco shares at a deep (50%) discount to the then current market price.
23. According to its April 20, 2005 proxy circular and statement (the “2005 Inco Proxy Circular”), Inco first adopted a rights plan in 1988. Its current plan was adopted by shareholders in 1999 and reconfirmed by shareholders in 2002. Inco shareholders dealt with the plan most recently in April 2005 when they approved amendments to the plan then in place. Although the holders of 67.7% of Inco shares voting at the meeting reconfirmed the plan, a significant minority of 32.3% voted against reconfirmation according to Inco’s Report of Voting Results from the April 2005 Annual and Special Meeting of Inco Shareholders.
24. According to the 2005 Inco Proxy Circular, the Inco Rights Plan was implemented to give shareholders time to assess a take-over bid, and Inco’s board of directors time to explore and develop alternatives. Page 11 of the circular states:

The purpose of the shareholder rights plan, which takes the form of an agreement between the Company and the rights agent, CIBC Mellon Trust Company, is to provide the Shareholder with sufficient time to assess a take-over bid for

the Company, if such a bid were to be made, and to provide the Board of Directors with the opportunity to explore and develop alternatives to any bid that are in the best interests of the Company and its Shareholders. [Emphasis added]

25. The 2005 Inco Proxy Circular specifically advised shareholders that the Inco Rights Plan was not intended to prevent take-over bids or to deter offers for Inco's shares:

The current rights agreement is not intended to prevent a take-over bid or deter offers for the Company's Common Shares or any other voting securities of the Company that might be issued in the future (collectively, the "Voting Shares"). It is designed to encourage anyone seeking to acquire control of the Company to make a bid or offer that represents fair value to all holders of the Voting Shares.

...

The existence of the current rights agreement does not affect the duty of the Board of Directors to act honestly and in good faith with a view to the best interests of the Company and its Shareholders, and to consider any offer made on that basis. The current rights agreement is designed to provide the Board of Directors with the means to bring about negotiations with an offeror on behalf of the Shareholders. [Emphasis added]

Permitted Bids under the Inco Rights Plan

26. The Inco Rights Plan allows potential acquirors such as Teck to make a "Permitted Bid". Such bids do not trigger the plan, and thus avoid the massive dilution described above.
27. A Permitted Bid is defined in the Inco Rights Plan as a take-over bid made by an offeror by means of a take-over bid circular, which also complies with the following additional requirements:
- i) the bid must have been made to all voting Inco shareholders, other than the party making the bid;
 - ii) the bid must be open for at least 60 days, and no shares may be taken up and paid for in that period, unless more than 50% of the common shares held by shareholders other than the bidder have been tendered and not withdrawn prior to that time;
 - iii) the bid must allow any shares deposited during the 60 day period to be withdrawn up to the time they are taken up and paid for; and

- iv) if more than 50% of the independent common shares are tendered as described in (ii) above, the bidder must make a public announcement of that fact and the bid must remain open for not less than 10 business days from the date of such public announcement.
28. If, at the end of the 60-day period referred to in (ii) above, more than 50% of the independent Inco common shares have been tendered, the bidder may take-up and pay for the Inco shares which have been deposited, but must also extend the bid for a further 10 business days, to allow other Inco shareholders to tender.
29. The Inco Rights Plan also authorizes Inco's board of directors, prior to a Flip-in Event, to waive the application of the Plan.
30. According to the 2005 Inco Proxy Circular the Permitted Bid provisions are intended to encourage bidders to treat all shareholders equally and to allow them adequate time to assess the bid properly. Page 12 of the Inco Proxy Circular states:

Under the agreement, a bidder making a Permitted Bid (as defined below) for Voting Shares of the Company may not take up any shares before the close of business on the 60th day after the date of the bid and then only if more than 50% of the Common Shares not beneficially owned by the person making the bid and certain related parties are deposited, in which case the bid must be extended for 10 business days on the same terms. **The agreement is intended to encourage an offeror to proceed by way of Permitted Bid or to approach the Board of Directors with a view to negotiation by creating the potential for substantial dilution of the offeror's position. The Permitted Bid provisions of the agreement are designed to ensure that, in any take-over bid, all of the Shareholders are treated equally, receive the maximum available value for their investment and are given adequate time to properly assess the bid on a fully informed basis. Under the agreement, a bid for less than all of the Voting Shares may be a Permitted Bid.**

It is not the intention of the Board of Directors, in proposing the amendment, restatement and reconfirmation of the current rights agreement, to secure the continuance of existing Directors or management in office, or to avoid a bid for control of the Company. Through the Permitted Bid criteria described in more detail below, shareholders may tender to a bid which meets the Permitted Bid Criteria without triggering the agreement, regardless of the acceptability of the bid to the Board of Directors. Even in the context of a bid that does not meet the Permitted Bid criteria, the

Board of Directors will continue to be bound by its fiduciary duties to consider any bid for the Company's Common Shares or Voting Shares in deciding whether to exercise its discretion under the agreement to waive the application of the agreement to the offer. In discharging that responsibility, the Board of Directors must act honestly and in good faith with a view to the best interests of the Company and its Shareholders. [Emphasis added]

Teck's Attempt to Qualify as a Permitted Bid

31. In making its offer Teck attempted to meet the requirements the Inco Rights Plan set for a Permitted Bid. In particular the Teck Offer:
 - i) was made to all holders of Inco shares other than Teck;
 - ii) was open for at least 60 days, subject to the qualification described in paragraph 27 (ii) above respecting the deposit of more than 50% of the Inco shares held by Inco shareholders other than Teck at an earlier date; and
 - iii) provided that Inco shares could be deposited, and then withdrawn, until taken up and paid for.
32. Due to United States securities law, because more than 40% of Inco's shareholders were resident in the United States, Teck could not initially meet the requirement that, should the conditions for take-up be satisfied, it must announce that fact and extend the bid for an additional ten days. Essentially, under applicable United States securities law, such multiple take-up dates are not permissible when the offered consideration is pro-rated and consists of fixed amounts of cash and securities, absent the approval of regulatory authorities.
33. Teck noted the fact that its offer was not a Permitted Bid under the Inco Rights Plan in the Teck Circular, and that it intended to seek relief from that requirement from the appropriate U.S. authorities.
34. The Securities and Exchange Commission (the "SEC") granted Teck the necessary relief on June 21, 2006. By letter dated July 10, 2006 to Inco's counsel from Teck's counsel, Teck advised Inco of the SEC's decision. Teck also informed Inco that it intended to amend the Teck Offer to allow it to extend the offer for an additional ten days after the initial take-up date, thereby complying with all of the requirements for a Permitted Bid under the Rights Plan. A copy of a draft notice of variation making the proposed amendments was appended to the letter. Teck asked Inco to confirm, by no later than 10:00 a.m. Toronto time on Friday July 14, 2006 that, in light of the proposed variation, the Teck Offer would be a Permitted Bid under the Inco Rights Plan or that the Inco

board of directors had waived application of the Inco Rights Plan with respect to the Teck Offer. As of the date of these submissions, Teck has received no response from either Inco or its counsel.

Amendments to the Inco/Falconbridge Support Agreement

35. On May 13, 2006, Falconbridge and Inco announced amendments to the Inco Offer and the Inco/Falconbridge Support Agreement, pursuant to which the Inco Offer was increased by an additional \$5.00 in cash per share. The applicable break fee was also increased from US\$370 million to US\$450 million.

The Xstrata Bid for Falconbridge

36. On May 17, 2006, Xstrata publicly announced its intention to make an unsolicited cash offer (the "Xstrata Offer"), through a Canadian subsidiary, to acquire all of the outstanding common shares of Falconbridge for \$52.50 in cash per Falconbridge share. On May 18, 2006, Xstrata filed a take-over bid circular in respect of the Xstrata Offer. As it was made originally, the Xstrata Offer expired at 8:00 p.m. (Toronto time) on July 7, 2006.

Inco's Postponement of the Separation Time

37. On May 22, 2006, Inco's board of directors passed a resolution postponing the "Separation Time" under the Inco Rights Plan to a date to be set by the board. As a result, the rights created by the Inco Rights Plan did not separate from the existing Inco shares, although the Inco board had the ability to permit such separation by passing a resolution to set the date of separation.

Inco Board Advises Shareholders to Reject the Teck Offer

38. One week later, on May 29, 2006, Inco's board issued a circular (the "Inco Directors' Circular") advising shareholders to reject the Teck Offer.
39. In its discussion of the background to Teck's offer and Inco's response, the Inco Directors' Circular disclosed that in addition to the proposed transaction with Falconbridge, Inco's board had instructed management to explore and investigate with the assistance and advice of its financial advisors and legal advisors other possible transactions and that in fact Inco representatives had been having discussions with third parties. Page 28 of the Inco Directors' Circular states as follows:

In addition to instructing management of the Company to continue working to complete the Falconbridge Transaction, the Board considered and reviewed the feasibility and desirability of exploring and investigating certain types of possible transactions or combinations thereof, including

corporate transactions that would allow the Company to remain as an independent, publicly held company, a merger, amalgamation or other combination involving the Company, including without limitation certain possible three-way transactions including a transaction with both Falconbridge and Teck, the issuance of equity or other securities of the Company and the acquisition by the Company or others of Inco Shares by take-over bid or otherwise, all subject to compliance with its obligations under the Falconbridge Support Agreement. After considerable discussion, the Board resolved that it was desirable and in the best interests of the Company and the Inco Shareholders to continue to explore and investigate, with the assistance and advice of its Financial Advisors and legal advisors, one or more of such transactions, while continuing to comply with its obligations under the Falconbridge Support Agreement. The Board noted that the initiation or continuation of such activities may be dependent upon future actions with respect to the Teck Offer and the Falconbridge Transaction.

...

As part of the process of exploring alternatives to the Teck Offer, representatives of the Company have had discussions, and expect to have discussions and negotiations after the date hereof with third parties with respect to certain of the matters referred to in the preceding paragraphs. As and when deemed advisable by management, the Board has authorized management of the Company to provide confidential information relating to the Company to third parties, upon the execution by such third parties of a confidentiality agreement satisfactory to the Company.

The Board has determined that other than the disclosure set forth in this document, disclosure as to the substance of discussions and negotiations concerning, or the possible terms of, or potential parties to, any transaction or proposal of the type referred to above prior to reaching an agreement in principle with respect thereto would jeopardize the initiation or continuation of negotiations with respect to any such transaction and has, accordingly, adopted a resolution directing that no such disclosure shall be made until an agreement has been reached. [Emphasis added]

Competition/Anti-Trust Clearance of the Teck Offer

40. On June 14, 2006, Teck announced that it had received an advance ruling certificate from the Canadian Competition Bureau, and notice from the Federal Trade Commission in the United States confirming early termination of the waiting period under the Hart-Scott-Rodino Anti-Trust Improvements Act 1976, with respect to Teck's proposed acquisition of Inco. This constitutes Canadian and U.S. anti-trust clearance for the Teck Offer to proceed. On July 7, 2006, Teck's Offer also received competition clearance from the European Commission. As a result, Teck has received all necessary competition clearances.

Inco Announces Agreements with Phelps Dodge and Falconbridge

41. On June 26, 2006, Inco, Falconbridge and Phelps Dodge, announced that they had entered into a number of agreements, relating to (i) an increase in the consideration under the Inco Offer to acquire all of the common shares of Falconbridge (the "Amended Support Agreement"), and (ii) a proposed combination of Inco and Phelps Dodge, pursuant to a statutory plan of arrangement under which Inco would amalgamate with a wholly-owned subsidiary of Phelps Dodge and become a wholly-owned subsidiary of Phelps Dodge (the "Phelps Dodge Arrangement"). The Phelps Dodge Arrangement is not conditional upon the completion of the Inco Offer. If both the Inco Offer and the Phelps Dodge Arrangement are completed, the three companies would continue as "Phelps Dodge Inco Corporation." If the Inco Offer does not proceed, but the Phelps Dodge Arrangement does, Inco and Phelps Dodge would continue as "Phelps Dodge Inco Corporation".
42. Under the Amended Support Agreement, Inco agreed to increase the consideration offered under the Inco Offer from (i) \$51.17 to \$53.83 in cash, and (ii) from 0.6927 of an Inco share and \$0.05 in cash to 0.82419 of an Inco share and \$0.05 in cash.
43. Under the Phelps Dodge Arrangement, a newly-formed, wholly-owned subsidiary of Phelps Dodge would acquire all of the outstanding Inco shares pursuant to a statutory plan of arrangement. Each Inco share would be exchanged for 0.672 of a common share of Phelps Dodge and \$17.50 in cash. The Phelps Dodge Agreement is subject to, among other things, approvals from the shareholders of Phelps Dodge, the shareholders of Inco and the Ontario Superior Court of Justice. In addition, the transaction is subject to antitrust clearance and Investment Canada approval. In its press release describing the transaction Phelps Dodge states that it expects that the transaction will close in September 2006.
44. Based on the disclosure in the material change report describing both agreements, under the terms of the Phelps Dodge Arrangement, pending completion of the proposed arrangement between Inco and Phelps Dodge, Inco's board will not solicit any proposals relating to alternative acquisition transactions and, subject to certain exceptions, will not

engage in any discussions or negotiations, or provide confidential information, in connection with any proposals for alternate acquisition transactions. Instead, Inco's board agreed to recommend to its shareholders that they vote in favour of the arrangement with Phelps Dodge.

45. Inco and Phelps Dodge agreed to pay certain fees in the event that the Phelps Dodge Arrangement does not proceed. The Material Change Report describes the termination fees as follows:

The Combination Agreement contains certain termination rights in favour of each of Inco and Phelps Dodge and further provides that, upon termination of the Combination Agreement under certain specified circumstances, Inco may be required to pay Phelps Dodge a termination payment equal to US\$475 million, provided that such amount will be increased to US\$925 million from and after the date that Inco has acquired at least two-thirds of the outstanding common shares of Falconbridge. **The Combination Agreement also provides that Phelps Dodge may be required to pay Inco a termination payment equal to US\$500 million in certain specified circumstances.** The Combination Agreement further provides that each of Phelps Dodge and Inco may be required to pay the other party a termination payment equal to US\$125 million in certain specified circumstances. [Emphasis added]

46. Phelps Dodge is required to pay the termination fee to Inco should its board of directors withdraw its support for the proposed transaction with Inco.
47. In connection with the Phelps Dodge Arrangement, (i) Inco and Phelps Dodge also entered into a note purchase agreement, pursuant to which Phelps Dodge agreed, subject to certain conditions to purchase up to U.S.\$3,000,000,000 aggregate principal amount of Inco 8.0% convertible subordinated notes, the proceeds of which may only be used for certain purposes relating to the completion of Inco's proposed acquisition of all of the issued and outstanding common shares of Falconbridge, and (ii) Falconbridge and Phelps Dodge entered into a cooperation agreement in connection with the completion of the arrangement.

The Xstrata Hearing

48. On June 27, 2006, the Commission held a hearing to consider an application by Xstrata for an order pursuant to section 127 of the Act that trading cease in respect of any securities issued or to be issued under Falconbridge's shareholder rights plan, and an application by Falconbridge that the acquisition of Falconbridge shares by Xstrata in reliance upon section 94(3) of the Act be prohibited. On June 30, 2006, the Commission

issued an order providing that trading in any securities issued, or to be issued, under Falconbridge's shareholder rights plan shall cease on, and the exemption created by subsection 94(3) of the Act shall not apply to Xstrata until, the earlier of (a) the date that Xstrata takes up sufficient shares to meet its majority of the minority condition, or (b) July 28, 2006.

Extension and Increase of the Xstrata Offer

49. On July 7, 2006 Xstrata extended the expiry date of its offer to Falconbridge from July 7, 2006 to Friday July 21, 2006. On July 11, 2006 Xstrata increased its offer price from \$52.50 to \$59.00 in cash for each Falconbridge common share and indicated that its offer would expire at midnight (Vancouver time) on July 21, 2006.

TECK'S SUBMISSIONS

National Policy 62-202

50. The paramount consideration underlying the take-over bid provisions in Canadian securities legislation is the protection of the *bona fide* interests of the target company's shareholders.
51. Section 1.1(2) of National Policy 62-202 describes the take-over bid provisions of the 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. [emphasis added]¹

52. In adopting National Policy 62-202, the 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

¹ *National Policy 62-202 – Take-Over Bids – Defensive Tactics*, 20 O.S.C.B. 3525 at s. 1.1(2).

adopt 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.”²

53. The implementation or retention of a shareholder rights plan is a common defensive tactic employed by the management of a target corporation, as the effect of such a plan is to prevent a take-over bid from succeeding without the board’s approval. As is described in greater detail below, and consistent with the objectives of National Policy 62-202, the Commission has repeatedly held that a shareholder rights plan will be set aside as an improper defensive tactic where it 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

54. Since its decision in *Re Canadian Jorex*,³ this Commission has consistently held that all shareholder rights plans must, at some time, be set aside in order that shareholders may determine whether to tender their shares to an outstanding offer. Therefore, the fundamental issue in this application is not *whether* the rights plan will be set aside, but *when* it will be set aside. The paramount consideration in reaching this decision is the best interests of the shareholders of the target company.
55. In *Re Royal Host Real Estate Investment Trust*,⁴ the Commission identified the following as factors that might be among those relevant in determining whether the time has come for a shareholder rights plan to be set aside:
- a) whether shareholder approval of the rights plan was obtained;
 - b) when the plan was adopted;
 - c) the size and complexity of the target company;
 - d) the other defensive tactics, if any, implemented by the target company;
 - e) the number of potential, viable offerors;
 - f) the steps taken by the target company to find an alternative bid or transaction that would be better for shareholders;
 - g) the likelihood that, if given further time, the target company will be able to find a better bid or transaction;

² *Ibid.*, at s. 1.1(6).

³ (1992), 15 O.S.C.B. 257. See also: *Re Lac Minerals Ltd.* (1994), 5 C.C.L.S. 99; and *Re MDC Corp.* (1994), 5 C.C.L.S. 118.

⁴ *Re Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819 at 7828.

- h) the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
 - i) the length of time since the bid was announced and made; and
 - j) the likelihood that the bid will not be extended if the rights plan is not terminated.
56. In listing the above factors in *Royal Host*, the Commission clearly stated that its list was not exclusive. Take-over bids were fact specific: the relevant factors and the relative importance to be attached to each varied from case to case.⁵ The key issue in determining whether it was time for the pill “to go” was whether the shareholder rights plan in issue would facilitate an unrestricted auction for the corporation or, alternatively, would deprive shareholders of their fundamental right to tender their shares to the offer. Based on the facts of this case, the Inco Rights Plan’s continued application to the Teck Offer will not facilitate an auction, it will instead deprive shareholders of their ability to tender their shares to a fair offer.

Application to the Facts

57. The specific factors that the Commission should consider in this case in determining whether or not to cease trade the Inco Rights Plan are as follows:
- a) **The Teck Offer, as it will be amended, satisfies the “Permitted Bid” requirements of the Inco Rights Plan**

Inco has stated that the “Permitted Bid provisions of the [the Inco Rights Plan] are designed to ensure that, in any take-over bid, all of the Shareholders are treated equally, receive the maximum available value for their investment and are given adequate time to properly assess the bid on a fully informed basis.”⁶ The Permitted Bid requirements of the Inco Rights Plan were thus designed, by Inco, to protect the best interests of its shareholders. It follows that the Inco Rights Plan should not prevent Inco’s shareholders from deciding whether to accept offers that satisfy these requirements.

The Teck Offer, as it will be amended, is a Permitted Bid. It satisfies all the above noted requirements Inco set for such a bid.

By the expiry date of the Teck Offer, 77 days will have passed since Teck first announced its intention to make the Offer, and 62 days will have passed since Teck mailed the Teck Circular. This is clearly beyond the 60-day period stipulated by the Inco Rights Plan.

⁵ *Ibid.*, at 7828.

⁶ The 2005 Inco Proxy Circular, at 12 [emphasis added].

Teck expects that Inco may argue that, because the Teck Offer had to be amended, to allow for multiple take-up dates to qualify as a Permitted Bid, it should remain open for 60 days from the date of the contemplated amendment. Teck disagrees.

First, the proposed amendments to the Teck Offer are minor. The Teck Offer, as originally framed, complied with substantially all of the requirements for a Permitted Bid, with the exception that the Teck Offer did not provide for an additional take-up date ten days after satisfying the applicable take-up requirements. Under United States federal securities law, which apply to the Teck Offer because 40% of Inco's shareholders are resident in the United States, that is not permissible, absent regulatory approval, when the offered consideration consists of fixed amounts of cash and shares and is pro-rated. But for this regulatory hurdle, Teck would have made a Permitted Bid.

Second, Teck made it clear, in its offering circular, that it intended to seek the relief that was required to permit its offer to have multiple take-up dates.⁷ Teck applied for relief from the SEC and, as noted above, relief was granted. The proposed amendment should thus come as no surprise to Inco shareholders.

Third, Teck submits that the Permitted Bid provisions of the Inco Rights Plan were not intended to prevent offers such as the Teck Offer which by virtue of American securities law could not qualify for Permitted Bid status. The Commission should bear this in mind in assessing both the Inco Rights Plan and the Teck Offer.

In these circumstances, it would be an unfair and improper defensive tactic to permit Inco to use the Inco Rights Plan to block the Teck Offer for a further sixty day period from the date the Teck Offer was amended.

b) Inco does not need the Inco Rights Plan to ensure an auction

An auction for Inco's shares has already occurred. As Mr. Mida notes in his affidavit, Inco's directors told the company's shareholders as early as May 29, 2005, that they had already had discussions with third parties and that they expected to have more discussions and negotiations after that date. Although the directors did not disclose the identity of those third parties, presumably they were the very companies one would have expected to be interested in acquiring Inco.

On June 25, 2006, Inco agreed with Phelps Dodge to cease its efforts to find other offers that would compete with the Phelps Dodge Arrangement. As such, even if the Inco Rights Plan were allowed to continue, Inco cannot solicit bids from third

⁷ Teck Cominco Circular, at 38.

parties or to take other steps to facilitate or generate an auction for the company. Inco presumably believes that it has conducted a thorough canvass of potential buyers. As a result of Inco voluntarily relinquishing its right to solicit bids from potential bidders other than Phelps Dodge, if there is a bidder for Inco other than Phelps Dodge or Teck, that bidder will have to come forward without Inco's solicitation. So far as Inco is concerned, the auction is over. For Inco to act otherwise would be to breach the very covenants that enticed Phelps Dodge to enter into the Phelps Dodge Arrangement.

c) Continuation of the Plan would deprive Inco shareholders of their ability to decide between the competing transactions

There are currently two possible transactions available to Inco shareholders: the Teck Offer and the Phelps Dodge Arrangement. The Phelps Dodge Arrangement may never be completed for many reasons.

Mr. Mida addresses some of the uncertainties inherent in the Phelps Dodge transaction in his affidavit. Among the features generating such uncertainty are the following:

- (a) A majority of Phelps Dodge shareholders must approve the issuance of Phelps Dodge shares to Inco at a special meeting of Phelps Dodge shareholders. There can be no guarantee that the Phelps Dodge shareholders will do so, and certain shareholders of Phelps Dodge have been reported to be opposed to the transaction.
- (b) Inco's shareholders must approve the proposed transaction by special resolution which requires approval of 66 ⅔% of the votes cast on the resolution at in Inco shareholder meeting. That approval cannot be guaranteed;
- (c) The transaction requires approvals from competition authorities in Canada and Europe as well as approval under the *Investment Canada Act*. There can be no assurance that the transaction will obtain all those approvals;
- (d) Phelps Dodge can decide not to close the transaction if holders of more than 10%, or in certain cases 15%, of all the issued and outstanding share of Inco exercise dissent rights in respect of it. If that occurs Phelps Dodge, and not the Inco shareholders, will decide what happens to Inco; and
- (e) If either Inco increases its offer for Falconbridge or if Phelps Dodge increases its offer for Inco, the value of the Phelps Dodge

share consideration being offered to Inco shareholders will be affected negatively.

There is further uncertainty associated with the Phelps Dodge transaction in the need for it to be approved by the Superior Court of Justice. Court approval cannot be guaranteed.

The fact that these concerns are very real is demonstrated by the US\$500 million break fee which Phelps Dodge has agreed to pay Inco if Phelps Dodge cannot close the proposed transaction. That break fee is a concession of the magnitude of that risk

Inco shareholders may well decide that the benefits of the proposed transaction outweigh both its many risks and the risk of losing the Teck Offer. However, unless the Inco Rights Plan is cease traded, they will not have the ability to make that decision.

The existence of the Inco Rights Plan prevents Inco shareholders from accepting the Teck Offer and forces them to await the outcome of the Phelps Dodge transaction. It therefore has the deleterious effect of limiting, rather than enhancing, the choices available to Inco shareholders.

d) Further time to pursue Phelps Dodge is not a valid reason to maintain the Inco Rights Plan

Teck expects that Inco will argue that to the Inco Rights Plan should be maintained, because it needs more time to pursue its transaction with Phelps Dodge. This Commission rejected such an argument in *Chapters Inc. and Trilogy Retail Enterprises L.P.*⁸. In *Chapters*, Trilogy Enterprises L.P. (“Trilogy”) made a take-over bid for the majority of the common shares of Chapters Inc. (“Chapters”). The bid was announced on November 28, 2000, and the expiry date was ultimately extended to January 24, 2001. The board of directors of Chapters unanimously rejected the Trilogy offer. On January 18, 2001, Future Shop Ltd. (“Future Shop”) made a similar offer, and the board of directors of Chapter recommended this offer to its shareholders. Chapters and Future Shop entered into a support agreement, which included provisions making the offer conditional upon the continuation of Chapters’ shareholders rights plan, and providing that Chapters could not remove the rights plan without breaching the support agreement.

Trilogy applied to the Commission for an order to cease trade Chapters’ rights plan. At the hearing, Chapters argued that the rights plan should be maintained

⁸ (2001), 24 O.S.C.B. 1657.

for a longer period of time in order to allow Future Shop to mail its offer, thus providing shareholders a “real choice.” The Commission rejected this argument stating:

The Ontario Securities Commission’s Rules and Policies do not include a requirement that competing bids be open to shareholders simultaneously. In addition, no securities regulatory administrator, to our knowledge, has ever justified leaving a pill in place to eliminate timing advantages as between competing bidders.

The Act sets out minimum time periods during which a bid must remain open. That time period is not related to the existence of any other bid. Both *Lac*⁹ and *Tarxien*,¹⁰ *supra*, have considered timing issues and in both cases the pill was cease traded immediately. It was our opinion the Commission should not interfere with the timing issues as between the bidders. To do so would require the Commission to attempt to equalize the expiry dates for all existing and potential bids. Such an equalization, however, would result in a situation where the last bidder would dictate the timing for all previous bidders. Not only would this have a detrimental effect on the bidding process, but such an approach was not contemplated under the Act.¹¹

The Commission cease traded the Chapters’ shareholder rights plan immediately, so that Chapters’ shareholders could decide whether to tender their shares to the Trilogy offer.

- e) **There is no reasonable prospect that the Inco Rights Plan, if permitted to continue, will result in an alternative bid or transaction more attractive to Inco shareholders**

As noted above, Inco has stated that the purpose of the Inco Rights Plan is to give shareholders time to assess a take-over bid, and the board of directors time to explore and develop alternatives. This purpose has been served. There is no reasonable prospect that the Plan, if permitted to continue, will result in an alternative transaction more attractive to Inco shareholders.

⁹ *Re Lac Minerals Ltd.*, *supra*.

¹⁰ *Re Tarxien Corp.* (1996), 19 O.S.C.B. 6913.

¹¹ *Chapters Inc. and Trilogy Retail Enterprises L.P.*, *supra* at 1661-1662.

Inco and potential offerors have had more than enough time to consider the Teck Offer, as well as alternative bids or transactions. Teck announced its bid on May 8, 2006. The Plan has thus been effective for 77 days.

As stated by the Commission in *Re Cara Operations Ltd.*:¹²

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.¹³

Moreover, as the Inco Directors' Circular, dated May 29, 2006, stated, in addition to the proposed transaction with Falconbridge, Inco's board had instructed Inco's management to explore and investigate other possible transactions. Inco representatives were in fact in discussions with third parties. To the extent there were other prospective suitors for Inco, they have been approached already.

In any case, on June 25, 2006, Inco announced that it had entered a number of agreements with Phelps Dodge, and that in those agreements Inco bargained away its right to solicit other potential buyers. As noted above, Inco presumably bargained away this "deal protection" in Phelps Dodge's favour because it believed that the Phelps Dodge Arrangement was a suitable alternative to the Teck Offer and Inco had already been thoroughly shopped to potential buyers.

In light of the limited number of viable offerors, the time that will have passed, and the fact that Inco has bargained away the right to pursue other potential buyers, it is highly unlikely that a competing bid will emerge if the Inco Rights Plan is permitted to continue past the expiry date of July 24, 2006.

f) Inco has implemented defensive tactics

Inco has implemented various "deal-protection" mechanisms in its agreements with Phelps Dodge in respect of the Phelps Dodge Arrangement, including:

- i) a covenant to use its reasonable best efforts to take all actions required for the consummation of the Phelps Dodge Arrangement;
- ii) a covenant not to engage in combinations or other significant transactions;
- iii) subject to certain exceptions, Inco's board of directors will recommend to holders of Inco common shares that they vote in favour of the Phelps Dodge Arrangement, and will not withdraw such recommendation or

¹² (2002), 25 O.S.C.B. 7997.

¹³ *Ibid.*, at para. 60.

- modify or qualify such recommendation in any manner adverse to Phelps Dodge;
- iv) subject to certain exceptions, Inco will not solicit any proposals relating to alternative acquisition transactions;
 - v) subject to certain exceptions, Inco will not engage in any discussions or negotiations or provide confidential information in connection with any proposals for alternative acquisition transactions; and
 - vi) a requirement to pay a break fee, equal to US\$475 or US\$950 million, depending on the circumstances.

These “deal-protection” mechanisms essentially require Inco to favour its transaction with Phelps Dodge at the expense of the Teck Offer. The Commission should not defer to the board of directors of Inco with respect to the important questions to which this application gives rise, including whether the Inco Rights Plan serves any further purpose and when the Inco Rights Plan should be terminated.

g) The Teck Offer is not coercive or unfair

The Teck Offer is neither coercive nor is it unfair to Inco shareholders. It is not a partial bid, but an offer for 100% of Inco’s common shares. By the expiry date of July 24, 2006, the bid will have been in the market for 77 days. Furthermore, as noted above, it was made at a significant premium to the volume-weighted average trading price of the Inco shares on the TSX for the 30 trading days ended May 5, 2006, the last trading day prior to the announcement of the Teck Offer.

Teck does not intend to take up and pay for the common shares tendered to the Teck Offer unless the Inco Rights Plan is cease traded or waived. The Phelps Dodge Arrangement is not set to be completed until September 2006, at the earliest. It is submitted that fairness to Inco shareholders dictates that they be given the opportunity to tender to the Teck Offer, or at the very least to disclose to them before the expiry date of the Teck Offer on July 24, 2006 the date at which the Inco Rights Plan will cease to operate. Failing to cease trade the Inco Rights Plan frustrates the Teck Offer, one of only two bids available to Inco shareholders. Such an outcome would thwart the objectives underlying National Policy 62-202, which provides that one of the fundamental objectives of take-over bid legislation is to ensure that shareholders of a target company have the opportunity to exercise their right to decide whether to accept or reject an outstanding offer to acquire their securities.

- h) Absent the application of U.S. federal securities legislation, this application would be unnecessary**

Had it not been necessary to obtain relief from the SEC to the application of a rule under the U.S. federal securities legislation, Teck would have made a Permitted Bid and the Inco Rights Plan would not have been operative.

Relief from that limitation has been granted. No Inco shareholder is in any way prejudiced by treating the Teck Offer as a Permitted Bid from the time it was made.

58. Having regard to all of the foregoing, Teck submits that in the circumstances of this case the Commission should exercise its public interest jurisdiction to cease trade the Inco Rights Plan immediately.

59. If you have any questions or require further information, please do not hesitate to contact the undersigned, or our partners, J. David A. Jackson (416.863.2636) or Ernest McNee (416.863.3863).

Yours very truly,



Neil Finkelstein

R.S.M. Woods

NRF:wkw
Encl.

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