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Teck

January 24, 2018

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission of New Brunswick
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

**Me Anne-Marie Beaudoin, Corporate Secretary**

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**The Secretary**

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**Re: CSA Consultation Paper 52-404 – Approach to Director and Audit Committee Member Independence (the "Consultation Paper")**

Thank you for the opportunity to comment on the Consultation Paper. We appreciate the initiative of the Canadian Securities Administrators (the "CSA") to revisit the Canadian approach to assessing director independence. The Board of Teck Resources Limited ("Teck") is committed to the highest standards in corporate governance, and regards board independence from management as a critical component of good governance.

Our comments relate to two specific aspects of the Consultation Paper, and are based on concerns that our Board has had with respect to the existing rules regarding the assessment of director and Audit Committee member independence set out in NI 52-110. The first comment is rooted in our view that independence of directors fundamentally means independence from management. We note this view has been held by many commentators in the past, and that the existing rules that are not entirely consistent with this principle. Our second set of comments relates to the question raised in the Consultation Paper regarding whether the existing bright line tests for independence should be retained. Our view is that the existing bright line tests suffer from some specific deficiencies, and that in general bright line tests should be avoided. Boards are required to substantively analyze all relevant circumstances in assessing director independence. Bright line tests are by their nature broad and may inappropriately disqualify otherwise highly qualified and independent individuals. We support replacing bright line tests with enhanced disclosure of the criteria applied by boards in independence determinations and the results of their assessments.

**Independence From What?**

In our view, the Canadian approach to determining independence is should focus on independence from management. The rules as currently drafted, however, unnecessarily confuse independence from management and independence from controlling shareholders or other affiliated entities of an issuer. Section 1.5(b) of NI 52-110 in particular deems an individual who is an "affiliated entity" of an issuer or its subsidiaries to be non-independent for purposes of audit committee service. Notwithstanding the attempt in Section 3.3 to provide exceptions to this broad deeming rule, the inclusion of the "affiliated entity" prohibition highlights our concern and is inconsistent with recognition in the NI 52-110 Companion Policy that "...shareholding alone may not interfere with the exercise of a director's independent judgment,...".[1] In our view, directors who are related, in the broad sense, to controlling shareholders, can properly be regarded as independent of management unless there other relationships with management that raise concerns regarding independence. We recognize that this concern regarding affiliates and control originally arose under the *Sarbanes-Oxley Act of 2002*, and the related rules adopted by the U.S. Securities Exchange Commission. While the Consultation Paper highlights that consistency with the U.S. markets was the basis for the Canadian approach, we believe it is appropriate to diverge from the U.S. rules where there is a compelling reason and arguably little risk of confusion in doing so.

Teck has a dual class share structure, and our Corporate Governance and Nominating Committee and our Board regularly assess the governance principles that pertain particularly to a corporation with a dual class share structure. Teck's major long-term holders of multiple voting shares are committed long-term investors with a deep knowledge of Teck's business and its industry. In the vast majority of matters that come before the Board, the interests of the multiple voting shareholders and subordinate voting shareholders are entirely aligned. The dual class share structure, with its disparity between voting interests and equity interests, can create some potential conflicts of interest, as it would in any public company where an identifiable shareholder or group of shareholders holds majority voting control. The Board's general approach to these issues is outlined in the extract from our most recent management proxy circular, attached as Schedule A.

The Board and the Committee closely scrutinize any situation in which the interests of multiple voting and subordinate voting shareholders could possibly diverge, and as outlined in the attached have adopted a number of governance practices intended to avoid even the appearance of a potential conflict of interest. The potential for conflicts of interest however, is not the same as a lack of

[1] This acknowledgment in the Companion Policy is consistent with the view expressed by the New York Stock Exchange in its rules to the effect that the concern with the NYSE governance rules is independence from management, and that ownership of even a significant amount of stock does not, by itself, act as a bar to independence findings. See the commentary to Rule 303A.02(a) of the NYSE Listed Company Manual.

independence. It is entirely possible for directors in a relationship with controlling shareholders, whether in a dual class share context or otherwise, to be entirely independent of management and any presumption otherwise is inappropriate. Teck's experience is consistent with that of a large number of issuers in Canada, where as compared to the U.S. there are a historically higher proportion of controlled and family-controlled companies.

Directors with a relationship with a controlling shareholder should not be considered to be non-independent solely by reason of that relationship. Other governance commentators such as the Canadian Coalition for Good Governance recognize that directors may be "related" to controlling shareholders, and distinguish between related directors and non-independent directors. Proxy advisory firms and certain institutional investors adopt a similar distinction. We believe that this would be a useful avenue for the CSA to consider in revising the independence rules. Any concerns regarding a difference of approach with U.S. rules can be addressed for inter-listed issuers through disclosure of material difference in corporate governance regimes, which is currently required under NYSE rules applicable to foreign private issuers.

**Bright Line Tests**

Related to our concern noted above, we believe that the current bright line independence tests set out in NI 52-110 are unduly restrictive, and that attempting to revise these tests would not address their inherent flaws. We would support the elimination of the bright line tests, giving Boards additional and appropriate scope to exercise judgment with respect to whether circumstances exist that could compromise, or call into question, a director's exercise of independent judgment. While the Consultation Paper suggests that certainty and predictability for investors is a benefit associated with the existence of the bright line tests, we would suggest that the benefit is illusory if the tests themselves are not reliable and useful indicators of independence. At the end of the day, true independence is a question of character rather than form. Boards should be given the scope to make the relevant determination and required to explain the reasons for their determination. Shareholders should make their own assessment of a board's analysis and conclusions regarding director independence. Automatic disqualification of directors on the basis of a bright line test may inappropriately prevent qualified and factually independent candidates from serving as independent directors or Audit Committee members. We also echo concerns raised by prior commentators that issuers, investors and other market participants may place undue reliance on bright line tests to the detriment of a fuller and more careful assessment of the relationships that an individual may have with management in considering the individual's capacity to act independently of management.

The bright line test in section 1.5(a) of NI52-110, as supplemented by section 1.5(2)(b) is also quite onerous in the context of determining independence for Audit Committee service. The deeming rule in section 1.5(2)(b) with respect to indirect acceptance of consulting, advisory or other compensatory fees is completely unqualified by materiality. One can easily imagine many situations in which the acceptance of a fee by an entity in which a director of an issuer is an executive officer or partner would not as a factual matter create any reason to suspect that the director's ability to exercise independent judgment was compromised. An inconsequential fee paid to a national law firm with hundreds of partners, or a major bank, is enough to trigger deemed non-independence. Large issuers routinely pay these fees without any board involvement or oversight. A board should be able to conclude that a director's independence is not compromised simply because an entity in which that director is a partner or an executive officer or in a similar position accepts fees from the issuer, if as a substantive matter the director does not have a material financial interest in the transaction giving rise to those fees. A director might have a conflict for corporate law purposes in the event that board approvals for payment of such a fee were required. That fact alone should not necessarily lead to a conclusion that the director lacks independence from management on other issues or for all purposes. We note that this is

merely one example of the concerns that arise with bright line criteria, and that such criteria are inherently problematic and not well suited to independence determinations.

**Recommendation**

We strongly believe that investors are best served by clear disclosure and a regime in which issuers may structure their governance to fit their specific circumstances, provided that they clearly explain their thinking and conclusions to investors. The rigidity of the current bright line tests may create an illusion of certainty, but at the expense of flexibility and an emphasis on substantive deliberation regarding questions of independence. With fuller disclosure, investors and other market participants will be better placed to assess the integrity and functioning of the board. We would support including in the relevant rules additional guidance regarding relationships that might give rise to concerns regarding independence, in place of bright-line tests, which is consistent with the approach Australia, the U.K. and Sweden have adopted as described by the Consultation Paper.

**Summary**

We believe that the Canadian corporate governance regime would be enhanced if these two deficiencies in the existing rules were addressed. Again, we appreciate the opportunity to comment on this important regulatory initiative.

Yours sincerely,

[redacted]

Peter Rozee
Senior Vice President, Commercial and Legal Affairs

Schedule A

## Dual-Class Share Structure – Governance Considerations

The Committee regularly assesses those governance principles that pertain particularly to a corporation with a dual-class share structure. The Board believes that our governance practices and track record reflect a consistent regard for the interests of all shareholders, notwithstanding the different voting rights inherent in our capital structure.

The Corporation's dual-class share structure has been in place for over 45 years, since a 1969 corporate reorganization in which all of the outstanding shares of Teck Corporation (as it then was) were converted into Class A common shares. The structure facilitated the consolidation of a group of related operating and exploration companies that were under common management into a single vehicle, one in which all shareholders could participate. Since 1969, Teck has continued to issue Class B subordinate voting shares to enable the Corporation to grow by acquisition and new mine development.

The Class B subordinate voting shares carry in aggregate approximately 37.78% of the votes available at joint shareholder meetings. The Class B subordinate voting shares rank equally with Class A common shares in all respects, except voting. Although the holders of Class A common shares exercise a majority of total votes, under the *Canada Business Corporations Act*, the approval of the holders of each class of shares, voting separately as a class, is generally required for fundamental corporate changes. In 2001, with the approval of both its Class A and Class B shareholders, the Corporation amended its articles to adopt "coattail" provisions for the benefit of Class B shareholders, with the aim of ensuring fair treatment of Class B shareholders in the event of a takeover bid which is accepted by holders of a majority of Class A common shares. These coattail provisions are discussed above at page 2 under the heading "Subordinate Voting Shareholder Protection".

There are approximately 9.4 million Class A common shares and 567.9 million Class B subordinate voting shares currently outstanding. Both classes of shares are widely held and are listed on the TSX. The Class B subordinate voting shares are also listed on the NYSE. The voting attributes of the Class A common shares and Class B subordinate voting shares are disclosed above. While the trading volume of the Class A common shares is modest when compared to the trading volume of the Class B subordinate voting shares, there are no restrictions on an investor purchasing Class A common shares in the market.

Keevil Holding Corporation and Sumitomo Metal Mining Co. Ltd. and related parties hold Class A common shares which carry approximately 38.38% of the votes available at joint shareholder meetings. Institutional and individual investors unrelated to these companies also hold Class A common shares which carry 23.84% of the total votes.

The Committee believes that the major long-term holders of Class A common shares are committed long-term investors, many with a deep knowledge of Teck's business and its industry. The Board considers that this longer-term perspective has permitted Teck to make decisions which have helped it to grow shareholder value significantly over the last number of decades and will continue to be of benefit to all shareholders. The Board rejects the proposition that dual-class share structures are inherently unfair or improper. In many forms of business organizations, certain investors and stakeholders have few or no voting rights. Purchasers of preferred shares, limited partnership units and many forms of debt instruments often hold voting rights more restrictive than those attached to Teck's Class B subordinate

voting shares. It is widely accepted that appropriate governance practices can ensure that the interests of all these security holders are considered and respected, and the Board believes that the same is true in the case of a dual-class structure.

While in the vast majority of matters that come before the Board, the interests of the Class A and Class B shareholders are entirely aligned, the Committee and the Board recognize that to fulfill Teck's commitment to good governance, a dual-class share structure requires vigilance and robust governance practices. The dual-class share structure does create a disparity between voting interests and equity interests and this could create some potential for conflicts of interest, as it would in any public company where there is an identifiable shareholder or group of shareholders holding majority voting control, whether under a dual-class share structure or a single voting class structure.

Accordingly, the Board and the Committee closely scrutinize any situation in which the interests of Class A shareholders and Class B shareholders could possibly diverge.

In this respect, our governance practices are intended to avoid even the appearance of a potential conflict of interest. For example:

- Only four directors out of 14 have any interest in or relationship with any of the major Class A shareholders of the Corporation;
- All of our Board committees are constituted with a majority of independent directors, and our Audit, Corporate Governance and Nominating, and Compensation Committees are composed entirely of independent directors, who have no relationship with Management or any of the major holders of Class A common shares;
- Directors, with the exception of the Chairman, hold only Class B subordinate voting shares;
- Directors are required to maintain minimum holdings of Class B subordinate voting shares or stock units linked to the price of Class B subordinate shares;
- Our equity-linked compensation for directors and senior officers is linked only to the price of Class B subordinate voting shares;
- We publicly report in detail the voting results of shareholder meetings, with a breakdown of votes by class; and
- Only one director, the CEO, is a member of Management.

Teck's dual-class share structure has been key in facilitating its growth into a major diversified Canadian mining company. Ultimately, any decision about the appropriateness of the structure is a question for all shareholders, as any change in voting rights would require the approval of the affected class or classes of shareholders, voting separately. So long as the Corporation has more than one class of voting shares, the Committee and the Board will diligently apply appropriate measures to ensure governance that respects the interests of all shareholders.