BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: QcX Gold Corp., 2022 BCSECCOM 142 Date: 20220429

**QcX Gold Corp. (formerly First Mexican Gold Corp.),
James Arthur Robert Voisin and John Charles Archibald**

Panel	Gordon Johnson	Vice Chair
	Judith Downes	Commissioner
	Marion Shaw	Commissioner
Hearing dates	June 23, 24, 25, 28, 29 and 30, 2021	
Submissions completed	November 2, 2021	
Decision date	April 29, 2022	

Appearing

Paul Smith Jorie Les	For the Executive Director
Patricia A.A. Taylor	For QcX Gold Corp. and James Voisin
John Archibald	For himself

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 (Act).

[2] This proceeding was initiated by a notice of hearing dated October 22, 2020 (2020 BCSECCOM 426) naming QcX Gold Corp. (formerly First Mexican Gold Corp.) (QcX), James Arthur Robert Voisin (Voisin) and John Charles Archibald (Archibald) as respondents.

[3] In the notice of hearing, the executive director alleged that:

(a) during the relevant period QcX was a mineral exploration company whose principal asset was a concession in Sonora State, Mexico (Property);

(b) Voisin, acting in his capacity as a director and officer of QcX, retained a mining consultant (Consultant) to provide an informal estimate of the resource on the Property (First Estimate);

(c) Voisin provided the Consultant's estimate to Archibald, who in turn used the First Estimate to prepare a report dated December 8, 2014 (Report) which purported to comply with National Instrument 43-101, *Standards of Disclosure for Mineral Projects* (NI 43-101). QcX filed the Report with the Commission on December 8, 2014;

(d) Archibald, in breach of section 168.1(1)(b) of the Act, falsely certified within the Report that he fulfilled the requirements of a qualified person for the Report, that he was responsible for the preparation of and content in the Report, and that he was not aware of the omission of any material fact which would make the Report misleading;

(e) by filing the Report, QcX made a representation that the Report complied with NI 43-101 when that representation was materially false. QcX thereby breached section 168.1(1)(b) of the Act. In addition, when it filed the Report, QcX breached sections 5.1 and 8.3(1)(a) of NI 43-101 by failing to ensure that Archibald met the criteria to be a qualified person and by failing to obtain a consenting statement from the Consultant when QcX knew the Consultant was responsible for preparing the estimate used in the Report;

(f) on January 6, 2015 the Consultant emailed Voisin a revised and materially lower estimate of the mineral resource on the Property (Second Estimate). This represented a material change in the affairs of QcX which QcX, in contravention of section 85(b) of the Act, failed to disclose;

(g) on December 8, 2016 the Consultant emailed Voisin a further estimate of the mineral resource on the property (Third Estimate). The Third Estimate represented a material change in the affairs of QcX which QcX, in contravention of section 85(b) of the Act, failed to disclose;

(h) after he became aware of the lower estimates and while those estimates had not been publicly disclosed, Voisin sold shares of QcX and thereby engaged in insider trading in contravention of section 57.2(2) of the Act; and

(i) as QcX's directing mind, Voisin, by authorizing, permitting or acquiescing in QcX's contraventions, contravened the same provisions as QcX pursuant to section 168.2 of the Act.

[4] During the hearing the executive director called two witnesses, a Commission compliance officer and a Commission geologist. Voisin gave evidence. QcX introduced into evidence an affidavit from one of its directors, who was cross-examined on his evidence. Archibald, who was self-represented at the hearing, elected not to testify.

II. Factual background

[5] The events relevant to this hearing occurred between September 2014 and November 2017.

[6] QcX was at all material times a reporting issuer in British Columbia. Its shares were listed on the TSX Venture Exchange and the Frankfurt Stock Exchange.

[7] The principal asset of QcX was the Property. In 2010, QcX filed on SEDAR a technical report on the Property that did not include a resource estimate. Archibald was the qualified person who authored that report. Subsequently, QcX conducted some drilling on the Property and obtained some assay data on drill hole samples.

[8] The management's discussion and analysis filed by QcX during the relevant period indicated that its projects were at the exploration stage and its "long term financial success (was) dependent on discovering properties that contain mineral reserves that are economically recoverable."

[9] Throughout the relevant period, Voisin was a director and the president and chief executive officer (CEO) of QcX.

[10] On September 9, 2014 Voisin sent an email to a technical services firm which offers consulting services, including regarding resource estimates, to resource issuers. The subject of the email was identified as "inferred resource". Attached to the email was a pdf file identified in part as "drill highlights to date". The content of the email was as follows:

> Hi Jim
>
> I'm a Jr explorer in Mexico that has a potential resources. Fresnillo has Leapfroged the zone and come up with 300,000 oz Au. However once I saw their input data, and realized they had not entered the Silver values, I knew the model was not accurate.
>
> I'm in discussion with two financial companies that I have told them both to go on hold as I get a more realistic picture of our area. I can build a small heap leach facility on miss[sic] guided data. As all Jr companies I have little cash, but need a down and dirty non compliant overview of grade made by entering 15 holes in a very small area. Of course I need it as soon as possible.
>
> I'm hoping you, or your group can help. I have attached some of the holes.
>
> Thanks
> Jim Voisin

[11] The technical services firm indicated that it could run a quick resource model with a bit of analysis and provide a memo describing the tonnage and grade of the resource. The technical services firm also indicated that the maximum cost of the work would be $2,600. Voisin expressed QcX's interest, at which point the technical services firm

assigned the Consultant, who was a professional mining engineer, and a junior engineer to the task of developing the memo for QcX.

[12] Included in Voisin's early communications with the Consultant's firm were various records and instructions regarding the location of drill holes created during QcX's drilling program. In one email Voisin specifically referenced Drill Hole #27 as one of the holes for which he was confident the data was correct.

[13] On September 11, 2014, the junior engineer contacted Voisin, noting that he could not see the survey information for drill hole #27. Voisin replied that drill hole #27 was "collared at hole 8". The junior engineer replied that he would "input DH 27 with the info you've provided".

[14] Also included in Voisin's early communications with the Consultant was an email from Voisin assuring the Consultant that:

> "This document will not be anywhere near to a public document. I don't even need it on letterhead really. It is for me to reference something that I believe to be a true number which I will discount myself from the number you give me so you don't have to."

[15] On September 25, 2014, the Consultant emailed Voisin an estimate with an explanation of the methodology used. Voisin complained about the estimate itself and the approach used to develop it. Voisin referred to the estimate as "ass covering", suggesting that the technical services firm was being too conservative. The Consultant responded that she could extend the geologic boundary and re-run the estimate. She adjusted her methodology and delivered to Voisin on September 26, 2014 what is defined above as the First Estimate. The Consultant accompanied the First Estimate with an email warning that it was "pretty twitchy which is usually the case with limited data" and to "[p]roceed with caution". Voisin replied "Understood, thanks".

[16] According to Voisin, he discussed the First Estimate with his fellow board members and then sent it to Archibald. Voisin testified he then asked Archibald if Archibald could prepare a technical report as a qualified person based on the First Estimate. Archibald was a professional geoscientist with experience in resource development who had previously visited the Property.

[17] Voisin testified that during his discussion with Archibald about a possible report, Archibald asked about the Consultant's background and Voisin replied that the Consultant was a professional engineer. Archibald agreed to prepare a technical report for QcX based on the First Estimate.

[18] At no time did Voisin advise Archibald that the First Estimate was the result of his request for a "down and dirty non-compliant overview" based on limited data or that he had assured the Consultant that it would not be publicly disclosed.

[19] Without notifying the Consultant or ensuring that she consented to the First Estimate being publicly disclosed, Archibald prepared the Report, which included the First Estimate. Archibald signed the Report and affixed his Ontario "Professional Geoscientist" seal to it.

[20] In the Report, Archibald certified that:

- he fulfilled the requirements to be a qualified person and had the relevant experience and qualifications to determine the geological significance of the Property
- he was responsible for the preparation and contents of the Report, and
- he was not aware of any omission of a material fact that would make the Report misleading.

[21] The Report was dated October 28, 2014 but was not delivered to QcX until December 8, 2014. Archibald did not dispute that he was the primary author of the Report, although there was other evidence presented to us indicating that Archibald was assisted to some extent by his brother. It is undisputed that Archibald did not speak to the Consultant in the course of completing the Report.

[22] The report is an 83-page document, not including its cover page or table of contents. The cover page describes the Report as a "NI 43-101 Technical Report" prepared by Archibald. The Report lists its sources of data, including "Data supplied by First Mexican". No mention is made of the Consultant in the description of sources or elsewhere in the Report. The Report describes the Property, its history, the legal context related to its possible development, and various topics relevant to possible development on the Property. There follows a description of the drilling results available for the Property. Later, the Report states as follows:

> "The following are the 'Results and Recommendations' based on the drill intercepts of the mineralization presently in the inferred category. The values can be plotted and categorized by their cut-off grades to give them an inherent, in-situ value. With additional close interval drilling this resource could likely be upgraded to the proven and probable category under the NI 43-101 Guidelines - it is presently non-compliant"

[23] The Report continues with materials quoted directly from the First Estimate, including a table setting out the inferred resource on the Property. The Report does not reference any of the limitations applicable to the First Estimate about which the Consultant had expressly cautioned Voisin.

[24] The Report included forms headed "Consent of Author" and "Certification of Author", both signed by Archibald. In the consent form Archibald says that he does not have "any reason to believe that there are any misrepresentations derived from the "Technical Report" or that the written disclosure in the October 28th news release of First Mexican Gold Corp. contains any misrepresentation…".

[25] In the certification form Archibald says the following:

> 5. I have read the definition of " Qualified Person" set out in the National Instrument 43-101 Guidelines ("NI 43-101") and certify that by reason of my education, affiliation with a Professional Association (as defined in the N.I. 43-101 Guidelines) and past relevant experience, I fulfill the requirements to be a "Qualified Person" for the purpose of NI 43-101.
>
> 6. I am responsible for the preparation and content in this report titled "N.I. 43-101 Technical Report on the Hilda '30'Concession, Sonora State, Mexico for First Mexican Gold Corp.", (the Technical Report), relating to the Hilda '30' Concession. I visited the property between the dates of January, 2012, in order to view, sample and supervise bulldozer stripping and a Reverse Circulation drilling program. Over 700 samples were taken of the drilled material, and delivered under security to an accredited laboratory facility (ALS-Chemex Labs) in Hermosillo, Mexico, for preparation and sent to Vancouver for final analysis for gold, silver and multi-element determinations.
>
> 8. I am not aware of any material fact or material change with respect to the subject matter of the Technical Report that is not reflected in the Technical Report, the omission to disclose which makes the Technical Report misleading.
>
> 10. I have read the National Instrument 43-101 Guidelines and Form 43-101F1, and the Technical Report has been prepared in compliance with that instrument and form.

[26] The news release mentioned in the consent form signed by Archibald had been issued by QcX on October 28, 2014. The news release stated that QcX had completed an updated 43-101 resource report related to the Property. The news release included a resource estimate summary and table consistent with the First Estimate and the content of the Report (although, as noted, the Report was finalized later). The news release stated that Archibald had reviewed and approved the technical information in the news release, but the news release did not make any mention of the Consultant.

[27] Voisin authorized the filing of the Report on SEDAR and the report was filed on behalf of QcX on December 8, 2014.

[28] On December 22, 2014, Voisin emailed the Consultant asking "assuming the bill is paid, do you think there is a number you could get as indicated?". The First Estimate had focused on the "inferred" mineralization. An estimate of the "indicated" mineralization would relate to a different classification of the resource and would be expected to produce a different figure.

[29] On January 6, 2015, the Consultant sent Voisin the Second Estimate, which was a new resource estimate for the Property. The Second Estimate lowered the estimate of gold by 72% and the estimate of silver by 83%. The Consultant explained that the resource was updated because the original drill hole collar locations for holes #27 and #08 were incorrect.

[30] QcX did not disclose the Second Estimate in a news release, material change report, revised technical report or otherwise.

[31] In November of 2015, staff of the Commission conducted a review of QcX's disclosure. On November 20, 2015, Commission staff notified QcX by letter of deficiencies in the Report. Ten specific deficiencies were listed, ranging from questions of form (including the use of the wrong form, and inclusion of language suggesting that certain information was NI 43-101-compliant when that information fell into categories not addressed by NI 43-101) to questions about the reliability of the Report (for example, reference to adjacent properties which might not qualify as adjacent and the absence of an explanation why Archibald's professional experience made him a qualified person for a resource estimate). Commission staff instructed QcX to file a revised technical report within 10 days or immediately issue a news release disclosing that the Report was not compliant with NI 43-101.

[32] QcX did not file a revised report or issue a news release as directed. In fact, QcX did not publish a news release stating that the Report did not comply with NI 43-101 and that the resource estimates in the Report should not be relied on until over a year later, on November 30, 2016. That news release did not include the Second Estimate.

[33] The intervention by Commission staff led to various discussions between Commission staff and each of QcX and Archibald. During those discussions, Archibald admitted to Commission staff that he did not have experience authoring resource estimates for technical reports. Commission staff then advised QcX that they objected to Archibald acting as the qualified person for a revised technical report.

[34] QcX subsequently engaged the Consultant to author a new technical report that would be NI 43-101-compliant.

[35] On December 8, 2016, as part of that work, the Consultant provided QcX with the Third Estimate, another updated resource estimate. The Third Estimate was consistent with the Second Estimate.

[36] When Voisin complained that the Third Estimate was again significantly lower than the First Estimate, the Consultant explained to Voisin that the calculations were not comparable because the First Estimate was prepared on the basis of very limited data, some of which was incorrect.

[37] QcX did not disclose the Third Estimate in a news release, material change report, revised technical report or otherwise.

[38] QcX subsequently terminated its engagement of the Consultant and retained a new consultant, who produced a further resource estimate (Final Estimate) in an NI 43-101 report that was ultimately filed on November 3, 2017. The Final Estimate was significantly lower than the First Estimate contained in the Report.

[39] From January 29, 2016 to November 23, 2016, Voisin sold shares of QcX in 53 transactions for total proceeds of $86,018. Those trades occurred after Voisin received the Second Estimate and before QcX published its November 30, 2016 news release stating that the Report should not be relied upon.

[40] From December 9, 2016 to September 26, 2017, Voisin sold shares of QcX in 77 transactions for total proceeds of $76,482. Those trades occurred after Voisin received the Third Estimate and before the report containing the Final Estimate was filed.

III. Disclosure Standards for Mineral Projects

Part 1 – The Regulatory Framework

[41] NI 43-101 regulates disclosure by reporting issuers of scientific and technical information related to their mineral projects. Companion Policy 43-101CP *Standards of Disclosure for Mineral Projects* (43-101CP), which does not itself have the force of law, provides market participants with guidance on Canadian securities regulators' interpretation of certain aspects of NI 43-101.

[42] Section 2.1(1) of 43-101CP states:

> 2.1 Requirements Applicable to All Disclosure
> (1) **Disclosure is the Responsibility of the Issuer** – Primary responsibility for public disclosure remains with the issuer and its directors and officers.

[43] Section 4.2(1)(j)(i) of NI 43-101 requires an issuer to file a technical report if any written disclosure discloses a mineral resource for the first time and that disclosure constitutes a material change in relation to the issuer.

[44] Section 4.2(3) of 43-101CP states:

> **First Time Disclosure Trigger 4.2(1)(j)(i)** – In most cases, we think that first time disclosure of mineral resources, mineral reserves, or the results of a preliminary economic assessment, on a property material to the issuer will constitute a material change in the affairs of the issuer.

[45] Section 5.1 of NI 43-101 provides that a technical report must be prepared by or under the supervision of one or more qualified persons.

[46] "Qualified person" is defined in section 1(1) of NI 43-101 as an individual who:

(a) is an engineer or geoscientist with a university degree, or equivalent accreditation, in an area of geoscience, or engineering, relating to mineral exploration or mining;

(b) has at least five years of experience in mineral exploration, mine development or operation or mineral project assessment, or any combination of these, that is relevant to his or her professional degree or area of practice;

(c) has experience relevant to the subject matter of the mineral project and the technical report;

(d) is in good standing with a professional association; […]

[47] Section 5.1 of 43-101CP states:

> **5.1 Prepared by a Qualified Person**
> (1**) Selection of Qualified Person** – It is the responsibility of the issuer and its directors and officers to retain a qualified person who meets the criteria listed under the definition of qualified person in the Instrument, including having the relevant experience and competence for the subject matter of the technical report.
>
> […]
>
> (4) **More than One Qualified Person** – Section 5.1 of the Instrument provides that one or more qualified persons must prepare or supervise the preparation of a technical report. Some technical reports, particularly for advanced properties, could require the involvement of several qualified persons with different areas of expertise. In that case, each qualified person taking responsibility for a part of the technical report must sign the technical report and provide a certificate and consent under Part 8 of the Instrument. However, section 5.2 and Part 8 of the Instrument allow qualified persons who supervised the preparation of all or part of the technical report to take overall responsibility for the work conducted under their supervision by other qualified persons. While supervising qualified persons do not need to be experts in all aspects of the work they supervise, they should be sufficiently knowledgeable about the subject matter to understand the information and opinions for which they are accepting responsibility. Where there are supervising qualified persons, only the supervising qualified persons must sign the technical report and provide their certificates and consents.
>
> (5) **A Qualified Person Must Be Responsible for All Items of Technical Report** – Section 5.1 of the Instrument requires a technical report to be prepared by or under the supervision of one or more qualified persons. By implication, this means that at least one qualified person must take responsibility for each section or item of the technical report, including any information incorporated from previously filed technical reports. If the qualified person, in response to a particular item, refers to the equivalent item in a previously filed technical report, the qualified person is implicitly saying that the information is still reliable and current and there have been no material changes. This would normally involve the qualified person doing a certain amount of background work and validation.
> (6) **Previous Mineral Resources or Mineral Reserves** – When a technical report includes a mineral resource or mineral reserve estimate prepared by

> another qualified person for a previously filed technical report, under section 5.2 and Part 8 of the Instrument, one of the qualified persons preparing the new technical report must take responsibility for those estimates. In doing this, that qualified person should make whatever investigations are necessary to reasonably rely on the estimates.

[48] Section 8.3(1)(a) of NI 43-101 provides:

> (1) An issuer must, when filing a technical report, file a statement of each qualified person responsible for preparing or supervising the preparation of all or part of the technical report, dated, and signed by the qualified person
>
> (a) consenting to the public filing of the technical report[...]

Part 2 – Purpose of and Material Elements of the Standard

[49] Clear, timely and accurate disclosure is the cornerstone of fair and efficient securities markets. Because information relating to the scientific and technical aspects of mineral projects is necessarily complex and cannot reasonably be expected to be within the knowledge of all investors, NI 43-101 mandates that such information must be prepared under the supervision of an expert who is qualified to understand and assess it.

[50] NI 43-101 contains several elements which demonstrate an intention that any claims made by an issuer regarding a resource project must meet specified standards in order to be "NI 43-101-compliant". An element of the standard set within NI 43-101 is the definition of the characteristics of a qualified person. That definition has flexibility to recognize that there are various types of technical reports which might be prepared for different resource projects at different stages and the necessary skills, education and experience needed for some types of reports might be different for reports addressing differing subjects.

[51] It is consistent with the purpose of NI 43-101 that some aspects of a technical report might be prepared by one qualified person while other parts might be prepared by another, each responsible for his or her particular area of knowledge, education and experience. However, in such a case the purpose of NI 43-101 is undermined if it is not made clear which qualified person prepared which content. Our conclusion in that regard is consistent with paragraph 4 of section 5.1 of the companion policy. As is noted above, the companion policy is not legally binding. However, it can provide some interpretive guidance and here we find that the language of the companion policy is consistent with the intent which is evident in NI 43-101.

[52] Our views about the centrality of the qualified person's knowledge and experience to the quality of mining-related disclosure are generally consistent with the following paragraphs from the decision of the Alberta Securities Commission in *Re Russell*, 2012 ABASC 43:

[95] The definition of "qualified person" in section 1.1 of NI 43-101 (quoted above; we will refer to it as the QP Definition) makes clear, from its three conjunctive components, the underlying purpose: the individual identified as taking responsibility for disclosure relating to a mineral project must possess a combination of attributes that warrant confidence in his or her understanding of the information being conveyed. From paragraph (b) of the QP Definition – which requires experience relevant to the subject matter of the mineral project – it is apparent that eligibility to act as a QP must be assessed in relation to the particular mineral project. Thus, while prescribed professional standing and at least five years' experience in a prescribed sector or sectors are prerequisites, such characteristics are not, alone or together, sufficient for eligibility.

[…]

[112] Alberta securities law governing the eligibility and use of QPS were designed to enhance the quality and reliability of mining-related disclosure made available by issuers to the investing public. These requirements and restrictions serve to assist investors in making informed investment decision, in furtherance of the fundamental objectives of protecting investors and of fostering a fair and efficient capital market that warrants investor confidence and in which, as a result, law-abiding issuers can raise capital economically.

[113] Russell's acting as Azteca's QP in breach of section 2.1 of NI 43-101 undermined the objectives just stated. By holding himself out, or allowing himself to be held out, as Azteca's QP in relation to the Two Mile Project in the first half of 2009, Russell led readers of seven of the eight Releases to believe that the Impugned Statements therein reflected the informed understanding of someone with adequate and directly relevant professional experience when, as we have found, such was not the case. His conduct in this regard, we find, was clearly contrary to the public interest."

IV. Key Provisions of the Securities Act

[53] The relevant legislative provisions are as follows:

Definitions
1 (1) In this Act:

"material change" means,

(a) if used in relation to an issuer other than an investment fund,

(i)a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer,
…

"material fact" means,

(a) when used in relation to a security issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the security, ...

Definition of special relationships
3 For the purposes of sections 57.2 and 136, a person is in a special relationship with an issuer if the person

…

(c) is a director, officer or employee of the issuer …

Insider trading, tipping and recommending
57.2 (1)In this section, "issuer" means

(a)a reporting issuer, or

(b)any other issuer whose securities are publicly traded.

(2)A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person

(a)is in a special relationship with the issuer, and

(b)knows of a material fact or material change with respect to the issuer, which material fact or material change has not been generally disclosed.

Continuous disclosure
85 A reporting issuer must, in accordance with the regulations,

…

(b)provide disclosure of a material change …

…

False or misleading statements prohibited
168.1 (1)A person must not

…

(b) make a statement or provide information in any record filed, provided, delivered or sent under this Act, or in relation to a service provided by the commission, that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

Contraventions attributable to employees, officers, directors and agents
168.2 (1) If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be. …

V. Burden of Proof

[54] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), the Supreme Court of Canada held, at paragraph 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[55] The Court also held that the evidence "must always be sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test. The executive director does not have to prove each evidentiary element on a balance of probabilities. The totality of the evidence must establish that the events at issue are more likely than not to have occurred in order to satisfy the balance of probabilities test.

VI. Analysis - Did Archibald Make Misrepresentations in the Report?

[56] The notice of hearing alleges that three statements made by Archibald in the Report were, in a material respect and at the time and circumstances in which they were made, either false or misleading or omitted facts that were necessary to make statements in the report not false or misleading, contrary to section 168.1(1)(b) of the Act.

A. Requirement to be a Qualifying Person

[57] The first of the allegations of misrepresentation is that Archibald certified that he fulfilled the requirements to be a qualified person for the purpose of NI 43-101 and had the relevant experience to determine the geological significance of the Property when he knew both statements were false.

[58] There is no doubt that Archibald said, in his certification which formed a part of the Report, that by reason of education, affiliation and past experience he fulfilled the requirements to be a qualified person for the purpose of NI 43-101. On a plain reading of the certification which he signed, especially in light of the purpose of a technical report under NI 43-101 as discussed above, Archibald's statement was false unless he possessed each of the required education, the required affiliation and the required experience.

[59] There is no suggestion that Archibald was not a qualified person in respect of some matters that which might be addressed in a technical report. The primary issue is whether Archibald had the necessary experience to be a qualified person for the particular report in respect of which he provided his certification.

[60] The definition of "qualified person" in NI 43-101 requires "experience relevant to the subject matter of the mineral project and the technical report." The Report included a resource estimate, yet Archibald admitted, on more than one occasion, that he had never prepared a resource estimate for a technical report. We place particular reliance on what Archibald said in an email dated February 9, 2016 to Commission staff: "I have not had the experience in authoring the reserve calculations/estimates for technical reports…".

[61] During the hearing Archibald made submissions suggesting that he had the necessary experience to be a qualified person, including for the purposes of the Report. Archibald chose not to testify to explain that experience to us and we have no other evidence of that experience or why, if Archibald had the necessary experience, he would sometimes say otherwise. To the extent that Archibald's submissions diverge from his earlier statements, we rely upon his earlier statements. We find that Archibald's statement, where he certified that he had the relevant experience to be a qualified person for the purpose of the Report, was false and misleading.

[62] Archibald's false statement contravenes section 168.1(1)(b) of the Act only if it was false or misleading in a material respect in light of the circumstances under which it was made. The concept of materiality in this context relates to both the extent to which the statement diverges from the truth and the significance of the information which was false or misleading.

[63] Regarding the degree to which Archibald's misrepresentation diverges from the truth, we conclude that the misrepresentation was material. The evidence is that Archibald had no experience preparing resource estimates for NI 43-101 reports. Archibald certified he fulfilled the requirements, including regarding his level of experience. That is a fundamental difference and it is material under the Act.

[64] Regarding the significance of the misrepresentation, we again conclude that the misrepresentation was material. A key purpose of NI 43-101 is to ensure that claims made in technical reports are the responsibility of a person with the appropriate qualifications and experience. The importance of that purpose is highlighted by the nature of the very document in which Archibald made his misrepresentation, the certification.

B. Responsibility for the Preparation and Content of the Report

[65] The second of the allegations of misrepresentation is that Archibald certified that he was responsible for the preparation and content of the Report when he knew that the Consultant had prepared the resource estimate that was included in the Report and he failed to name the Consultant as a source of data as required by Form 43-101F1.

[66] Archibald clearly states in his certification that he is responsible for the preparation and content of the Report.

[67] Archibald's certification should be read in its larger context. Part of the context is the format of the Report as a whole, which appeared to have been authored only by Archibald. The cover page identifies the Report as Archibald's work. The Report purports to identify Archibald's sources of data, and Archibald does mention "Data supplied by First Mexican". This would not provide a reader with any indication that a critical element of the Report, the resource estimate, was entirely the work of someone else. Only the clear identification of the exception to the certification made would have made Archibald's representation not misleading.

[68] The nature of the certification and the purpose of the Report establish the significance of the misrepresentation made. Regarding the degree to which the misrepresentation diverged from the truth we note that, although those circumstances were not known to Archibald, the resource estimate was delivered to Voisin on the basis of his representation that the estimate would not be made public, and with a caution that the limited data underlying the estimate made the estimate "twitchy". Archibald's broad statement that he was responsible for the content of the Report masked key underlying information regarding the reliability or otherwise of the resource estimate contained in the Report. We find this misrepresentation to be material.

C. Archibald's Knowledge the Report was Non-Compliant

[69] The third of the allegations of misrepresentation is that Archibald certified that he was not aware of the omission of any material fact which would make the Report misleading when he knew that he had omitted the fact that he used the First Estimate without the Consultant's knowledge or consent and without reviewing it with her.

[70] Archibald did certify that he was not aware of any material fact or material change with respect to the subject matter of the Report which was not reflected in the Report, the omission to disclose which makes the Report misleading.

[71] We have found that Archibald made a misrepresentation about being responsible for the preparation and content of the Report. We have also found that misrepresentation was material. This further allegation raises what are in substance the same elements. We conclude that Archibald's certification that he was not aware of a relevant omitted fact was a material misrepresentation, for the same reasons noted above.

[72] In sum, we agree with the executive director that in all three instances, Archibald made a statement in the Report that, at the time and in light of the circumstances in which it was made, was false or misleading in a material respect or that omitted facts that were necessary to make statements in the Report not false or misleading, contrary to section 168.1(1)(b) of the Act.

VI. Analysis - Did QcX Misrepresent that the Report Complied with NI 43-101?

[73] The notice of hearing alleges that by filing the Report, QcX represented that the information in the Report complied with NI 43-101 and that that representation was materially misleading, contrary to section 168.1(1)(b) of the Act.

[74] The elements of section 168.1(1)(b) which the executive director must prove to establish a breach of the Act are that QcX:

- provided information in any record filed under the Act that,
- in a material respect
- and at the time and in light of the circumstances under which it is made, is false and misleading, or omits facts necessary to make the information not false or misleading.

[75] It is undisputed that QcX filed the Report under the Act.

[76] We have already made findings, above, concluding that certain statements in the Report filed by QcX were false and misleading. The Report stated that Archibald fulfilled the requirements to be a qualified person for the purposes of the Report, and the Report stated that Archibald was solely responsible for the preparation and content of the Report. Neither of those statements was true. Both of those misstatements were material, as discussed above.

[77] QcX and Voisin argued that the Report was accurate, or at least that the First Estimate was accurate. Considerable evidence was led on behalf of QcX and Voisin regarding the location of drill hole #27 in an effort to establish that the First Estimate was accurate, or at least to establish that there was doubt about whether all later (and lower) estimates were unreliable. With respect, we do not read the notice of hearing in a manner which puts in issue the accuracy of the First Estimate.

[78] In their submissions, QcX and Voisin reference the need to confine this proceeding to the "four corners" of the notice of hearing. We are limiting our findings to the substance of the notice of hearing and we do not perceive that the submissions of the executive director ask us to go further. However, our focus on what is alleged in the notice of hearing does not assist QcX. The allegation made is that QcX filed the Report, which provided information that in a material respect and in the light of the circumstances was false or misleading or omitted facts necessary to make the information not false or misleading. We find that all of the elements which must be proven to establish a breach of section 168.1(1)(b) of the Act by QcX are present.

VII. Analysis – Did QcX Breach NI 43-101?

[79] In addition to alleging that QcX made a material misrepresentation by filing the Report at a time when the Report contained information which was false and misleading, the executive director alleges that QcX's conduct in filing the Report was a breach of sections 5.1 and 8.3(1)(a) of NI 43-101.

[80] The executive director's argument with respect to section 5.1 is based on the allegations that Archibald "did not have the experience estimating mineral resources", and so Archibald "did not meet the requirements set out in NI 43-101 to be a QP for the Report". We have already, above, applied the appropriate evidentiary standard and found those allegations to be well-supported. Accordingly, we find that QcX breached section 5.1 of NI 43-101.

[81] The executive director also alleges that QcX breached section 8.3(1)(a) of NI 43-101 by failing to file a consenting statement from the Consultant. NI 43-101 requires an issuer filing a technical report to file a consenting statement of each qualified person responsible for preparing any part of the technical report. While QcX did not engage the Consultant to provide an NI 43-101-compliant report, QcX was aware that the resource estimate contained in the Report was prepared by the Consultant and not by Archibald. QcX was not entitled to abrogate its responsibility to obtain the requisite consenting statement, and we find that QcX breached section 8.3(1)(a) of NI 43-101. Indeed, had QcX sought the requisite consent from the Consultant, it is likely that the unreliability of the First Estimate would have been revealed at an early date, before the Report was published.

VIII. Analysis – Did QcX Fail to Disclose a Material Change?

[82] As stated by the Canadian Securities Administrators in National Policy 51-201 *Disclosure Standards*, "[i]t is fundamental that everyone investing in securities have equal access to information that may affect their investment decisions." That Policy goes on to note that non-disclosure or selective disclosure can create opportunities for insider trading and also undermine investor confidence in the marketplace as a level playing field.

[83] Section 85(b) of the Act requires each reporting issuer to make immediate disclosure of material changes in its business, operations or capital. A material change is one that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer.

[84] Some of the key principles regarding the determination of materiality in that context are summarized in the Commission's decision in *Canaco Resources Inc (Re).*, 2013 BCSECCOM 310 at paragraph 84:

> ¶ 84 In *Cornish v. Ontario (Securities Commission)* 2013 ONSC 1310, the Ontario Superior Court of Justice (Divisional Court) summarized the current case law relevant to determinations of material fact and material change, including *YBM Magnex International Inc.* (2003) OSCB 5285; *AiT Advanced Information Technologies Corp.* (2008) 31 OSCB 712; *Kerr v. Danier Leather* [2007] 3 SCR 331; *Rex Diamond Mining Corp.* (2008) 31 OSCB 8337 (OSC); 2010 ONSC 3926 (Ont. Div. Ct); and *Biovail Corporation* (2010) 33 OSCB 8914. These are the principles that follow from these cases:
>
> 1. The test for materiality is objective – would the fact or event reasonably be expected to significantly affect the market price or value of the securities?
>
> 2. The test for materiality is a market impact test. As stated in *YBM*, "The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities."
>
> 3. The reasonableness of market impact is assessed from the point of view of the reasonable investor, that is, would a reasonable investor expect that the market price or value of the securities would be affected by the fact or event? (*Cornish*)
>
> 4. It is noteworthy that in some jurisdictions, the test for materiality is whether the fact or event is something that a reasonable investor would want to know. This is not the test under the Act. Information can be important to a reasonable investor without being "material". As stated in *Biovail*:
>
> > "If a statement would be reasonably expected to have a significant effect on the market price or value of a security, then that statement would clearly be important to an investor in making an investment decision. However, it does not necessarily follow that a statement that is important to an investor in making an investment decision would reasonably be expected to have a significant effect on the market price or value of a security."

5. Materiality is assessed in the context of the issuer's industry and the market. (*Cornish*).

6. Issuers are not held to perfection nor is the expectation of the market impact assessed with the benefit of hindsight. As stated in *AiT*:

> "Instead we must objectively assess the facts that were available to the AiT board during the relevant period, to determine in all the circumstances whether the three events constituted a material change . . . . It is important, therefore, to recognize the dangers of hindsight in coming to this conclusion and to be careful not to look at the situation based on what subsequently happened."

7. The test, being objective, neither defers to the business judgement of management" (*Danier Leather*) nor depends "on the subjective assessment or optimistic personal views of company executives." (*Cornish*, citing *Rex Diamond*)

[85] Prior to its October 24, 2014 news release, QcX's public disclosure indicated that it possessed no economically recoverable mineral resources. When QcX issued its October 24, 2014 news release and then filed the Report in December of 2014, members of the investing public who were aware of the business, operations and capital of QcX would have understood that a qualified person as defined in NI 43-101 had issued a technical report which included a particular resource estimate (the First Estimate) for the Property. The executive director submits that from that point, any positive investor perception regarding QcX rested entirely on the viability of the mineral resource on the Property as represented in the Report. The executive director also submits that any revised report which demonstrated that the mineral resource was not commercially viable would reasonably be expected to impact the market price or value of QcX's securities because QcX would revert to being a company with no economically recoverable mineral resources.

[86] The Second Estimate was significantly lower than the First Estimate, showing approximately 72% less gold (the dominant factor related to value) and approximately 83% less silver. The executive director submits that QcX's receipt of the Second Estimate and of all further estimates, each of which estimated gold and silver resources far below those described in the Report, was a material change.

[87] QcX has two primary responses to the position of the executive director. QcX first argues that it was not incumbent on it to disclose the Second Estimate as a material change because the First Estimate was correct and the Second Estimate and all subsequent estimates were incorrect, due primarily to misunderstandings about the location where

drill hole #27 had been drilled. QcX also submits that new drilling information is not always material, depending on the nature of the drilling and the results, and QcX references *Canaco* in support of that position.

[88] Regarding the issue of the "correctness" of the First Estimate, we reject QcX's position. QcX submitted at length at the hearing that the question of whether it was required to disclose the Second Estimate and/or the Third Estimate as a material change turns on the accuracy of the estimates and QcX's belief in the accuracy of the First Estimate. It does not.

[89] The Act requires a reporting issuer to make immediate disclosure of a material change, whether favourable or unfavourable to the issuer. If QcX believed the Second Estimate to be in error, it could have said so expressly and explained its position in its public disclosure, but it was not open to QcX to choose instead to conceal the receipt of the lower estimates from the public. If an issuer receives information which it perceives is patently inaccurate, the issuer might properly take a very brief period to verify the information before determining if the new information reflects a material change. In some cases, it may be appropriate for an issuer to disclose a material change to the Commission initially on a confidential basis before making public disclosure. That is not the situation that occurred here. Upon its receipt of the Second Estimate, QcX was not going through a process of quickly verifying information with the Consultant and with Archibald. Instead, QcX simply chose to allow the disavowed estimate to remain in the market.

[90] What the public was initially given to understand was that QcX had received an NI 43-101-compliant technical report from a qualified person and that the resource estimate in that report (the First Estimate) appeared to support further work. The negation of that technical report, especially based on new and significantly unfavourable information about the resource estimate, would meet the objective market impact test because it would reasonably be expected to be highly material to the reasonable investor, without the benefit of hindsight.

[91] We do not know what mineral resources underlie the Property, or whether the First Estimate was more accurate than the subsequent estimates. What is relevant in the matter before us is that QcX's share value could reasonably be expected to be materially influenced by the information which QcX received in January of 2015 that the Consultant who prepared the First Estimate no longer considered it to be accurate. When QcX kept the information about the Second Estimate to itself, QcX breached section 85(b) of the Act.

[92] Our conclusion regarding QcX's breach in failing to report the material change resulting from receipt of the Second Estimate takes account of QcX's submissions arising from the decision in *Canaco*. In particular, QcX quite properly points to paragraph 100 of *Canaco* on the question of whether information allegedly reflecting a material change would be likely to change existing investor perception. In *Canaco* the new information received in the course of its in-fill drilling process was generally consistent with the disclosure which

Canaco had previously made. As a result the new information would not reasonably be expected to change investor perceptions. Here the opposite is true, as the Second Estimate reflected a significant departure from what had been publicly disclosed by QcX in the Report.

[93] The executive director has also alleged that QcX again breached section 85(b) of the Act when QcX failed to report a material change on its receipt of the Third Estimate, which was provided by the Consultant in the course of preparing the new 43-101 report required by the Commission, nearly two years after QcX had received, but not disclosed, the Second Estimate.

[94] This alleged failure relates to the period after QcX had issued its November 30, 2016 news release alerting investors that they should not rely on the Report. At that point, the only information available to the market was that QcX had retracted the Report and the First Estimate contained in it. No explanation for the retraction was given, leaving investors in the dark about the reasons for the retraction and with no means to assess the potential commercial viability of the Property. A reasonable investor was at that point without the information necessary to support even reasoned speculation about the value of shares in QcX. In fact, the Third Estimate calculated an inferred resource approximately 80% lower than that shown in the First Estimate.

[95] Applying the materiality criteria outlined in *Canaco*, we find that the Third Estimate was a material change, and the failure to disclose it constituted a further breach by QcX of section 85(b) of the Act. It supported the previous, undisclosed material change provided by the Second Estimate, and contained new and highly significant information. Given the dearth of information available to the investing public once QcX had disavowed the First Estimate, the disclosure of the Third Estimate would reasonably be expected to have a significant effect on the market price or value of the shares of QcX.

IX. Analysis—Did Voisin Contravene the Same Provisions as QcX?

[96] Liability under section 168.2 of the Act is established where:

(a) a corporate respondent has contravened the Act, the regulations, or failed to comply with a decision; and

(b) an individual who is an employee, officer, director or agent of the corporate respondent "authorizes, permits or acquiesces" in the contravention.

[97] The executive director submits that we should apply section 168.2 and find that Voisin breached the same provisions as QcX.

[98] Voisin was QcX's decision-maker. He was President and CEO and described himself as "chief cook and bottle washer" who was "basically responsible for everything" that went on at QcX. Based on his own testimony and on contemporaneous emails and other documents, Voisin consulted with his fellow board members at key moments but he was

personally at the centre of all significant conduct for which we have made findings against QcX.

[99] Voisin's primary argument against finding personal liability against him with respect to the misrepresentation findings against QcX is the due diligence defence set out in section 168.1(2). Those provisions make it clear that a person does not contravene subsection 1 (of section 168.1) if the person did not know and in the exercise of due diligence could not have known that the statement or information was false or misleading.

[100] In support of his position Voisin emphasizes, among other factors, that Archibald, acting as a QP, had provided a technical report regarding the Property in the past, that Archibald was a geoscientist in good standing who worked in the resource field, and that Archibald had visited the Property and was familiar with it. It seemed clear that, during the relevant period, Voisin trusted Archibald and had respect for him.

[101] Voisin also emphasizes that Archibald agreed to prepare the Report based on the information provided to him and that Archibald certified he was qualified to prepare the Report. Finally, Voisin submits that he also relied on the Consultant for the accuracy of the First Estimate and he had no reason to do otherwise.

[102] Voisin's submissions would have been more compelling if the issues in this case related to the accuracy of the First Estimate at the time it was given or if the specific misrepresentations which we conclude were proven related to the accuracy of the First Estimate. As we have stated, the issues with the Report related to whether it was compliant, not whether the specific resource estimate contained in it was accurate based on the information available at the time.

[103] In any event, the due diligence defence is not available to Voisin because of the many examples of his lack of due diligence related to the First Estimate and the Report. We refer specifically to the following:

1. Voisin's assurances to the Consultant that he was only seeking a quick and dirty non-compliant overview and that the resource estimate prepared would "not be anywhere near to a public document";

2. the Consultant's warning that the First Estimate was "twitchy" and should be used with caution;

3. Voisin's failure to ask Archibald if Archibald had prepared a NI 43-101 resource estimate in the past;

4. Voisin's failure to pass on to Archibald his communications with the Consultant;

5. Voisin's failure to ensure that Archibald spoke to the Consultant; and

6. perhaps most significantly, the self-evident fact that the Report purported to have been prepared by Archibald alone when Voisin knew the resource estimate came from the Consultant.

[104] For the reasons submitted by the executive director as summarized above, we find this is a clear case where Voisin is properly held liable under section 168.2 for all of the breaches by QcX.

X. Insider Trading

[105] Section 57.2(2) of the Act prohibits a person who is in a special relationship with an issuer from entering into a transaction involving a security of that issuer if the person knows of a material fact or a material change with respect to the issuer that has not been generally disclosed.

[106] The executive director alleges that Voisin breached section 57.2(2) by selling QcX shares in 53 transactions on 49 different days between January 29, 2016 and November 23, 2016, all of which were before QcX published its news release saying the Report should not be relied upon.

[107] Voisin admitted that he made the trades in question. He said he did so because he was paying funds to support QcX, which was in financial difficulty.

[108] The starting point of an insider trading analysis is whether a person is in a special relationship with an issuer. During the period of the trades at issue, Voisin was a director and the president and CEO of QcX, one of the enumerated categories of "special relationship" outlined in section 3 of the Act. There is no doubt that Voisin was in a special relationship with QcX.

[109] We have already found, above, that Voisin knew of the Second Estimate and that delivery of the Second Estimate represented an undisclosed material change in the business of QcX. Finally, with knowledge of the Second Estimate, Voisin sold shares of QcX into the market over a period of approximately ten months.

[110] It is often the case that insider trading allegations are difficult to prove, but that is not the situation here. The facts and circumstances of this case are such that it is clear that Voisin, an insider of QcX, had the benefit of significant material undisclosed information relating to QcX while selling QcX securities into the market. This is precisely the type of conduct prohibited in the Act. We agree with the executive director's submission that Voisin's trading during the period between January 29, 2016 and November 23, 2016 was contrary to section 57.2(2) of the Act.

[111] The executive director also alleges that Voisin breached section 57.2(2) by selling QcX shares after the release of the November 30, 2016 news release retracting the Report and after receipt of the Third Estimate. The executive director alleges that these trades took place in 77 transactions on 72 different days between December 9, 2016 and September 26, 2017.

[112] By December 9, 2016, QcX's public disclosure included a November 30, 2016 news release advising that the Report, which incorporated the First Estimate, should not be relied on. However, we do not find that that news release remedied QcX's significantly deficient disclosure. As outlined above, QcX's receipt of the Third Estimate was a material change; accordingly, we find that Voisin's trading during the period between December 9, 2016 and September 26, 2017 was contrary to section 57.2(2) of the Act.

XI. Summary of Conclusions

[113] We have found:

1. with respect to the allegations against QcX, that QcX:

    a) contravened section 168.1(1)(b) of the Act by filing the Report and representing that the information in the Report complied with NI 43-101, when in all of the circumstances, that was materially misleading,

    b) contravened sections 5.1 and 8.3(1)(a) of NI 43-101 by failing to ensure that Archibald met the criteria to be a qualified person for the Report and by failing to obtain a consenting statement from the Consultant,

    c) contravened section 85(b) of the Act on two occasions by failing to disclose the Second Estimate and the Third Estimate,

2. with respect to the allegations against Archibald, that he made three statements in the Report that, at the time and in light of the circumstances in which they were made, were either false or misleading or which omitted facts that were necessary to make statements in the report not false or misleading, contrary to section 168.1(1)(b) of the Act, and

3. with respect to the allegations against Voisin, that:

    a) by operation of section 168.2 of the Act, Voisin authorized, permitted or acquiesced in QcX's contraventions of section 168.1(1)(b) and section 85(b) of the Act, and therefore also contravened those sections, and

    b) Voisin contravened section 57.2(2) of the Act by selling QcX shares in 53 transactions on 49 different days between January 29, 2016 and November 23, 2016, and in a further 77 transactions on 72 different days between December 9, 2016 and September 26, 2017, all while in a special relationship with QcX and having knowledge of undisclosed material information.

XII. Schedule of submissions regarding sanctions

[114] We direct the executive director and the respondents to make their submissions on sanction as follows:

By May 20, 2022	The executive director delivers submissions to the respondents and to the Commission Hearing Office.
By June 3, 2022	The respondents deliver response submissions to the executive director and the Commission Hearing Office. Any party seeking an oral hearing of the issue of sanctions so advises the Commission Hearing Office. The hearing officer will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By June 10, 2022	The executive director delivers reply submissions, if any, to the respondents and the Commission Hearing Office.

April 29, 2022

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Marion Shaw
Commissioner