

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Russell, Re, 2012 ABASC 43

Date: 20120202

Matthew Russell

Panel:

Stephen Murison
Roderick McKay, FCA
Fred Snell, FCA

Appearing:

Don Young and Taryn Montgomery
for Commission Staff

Matthew Russell
for himself

Dates of Hearing:

31 October and 1-3 November 2011

Date of Decision:

2 February 2012

I. INTRODUCTION

[1] This proceeding centres on allegations relating to certain disclosure made by a public junior mining company, Azteca Gold Corp. ("Azteca"). Staff ("Staff") of the Alberta Securities Commission (the "Commission") alleged, in a notice of hearing dated 4 February 2011 (the "Notice of Hearing"), that Matthew Russell ("Russell") breached Alberta securities laws and acted contrary to the public interest, first, by making (or causing Azteca to make) misleading or untrue statements (the "Impugned Statements") in eight Azteca news releases (the "Releases") in the first half of 2009 and, second, by improperly acting as Azteca's "qualified person" ("QP") for purposes of National Instrument 43-101 *Standards of Disclosure for Mineral Projects* ("NI 43-101").

[2] A hearing into the merits of Staff's allegations (the "Merits Hearing") was held in October and November 2011. Having considered the documentary evidence (although ultimately assigning no weight to some, as discussed below), the testimony of four witnesses (all of whom we found credible) and the oral submissions of Staff and Russell (who represented himself at the Merits Hearing), we find the allegations to have been proved. This proceeding will therefore move to a second phase for the purpose of determining what, if any, sanction and costs orders ought to be made against Russell.

II. BACKGROUND

A. Azteca, the Two Mile Project and the News Releases

[3] Azteca, which apparently operates from Spokane, Washington, USA, is a mineral exploration company with shares listed on the TSX Venture Exchange (the "TSXV"). It was, in 2009, an Alberta corporation and a reporting issuer under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"). Alberta corporate registry records identified Russell as one of Azteca's three directors, and Azteca news releases identified him as its president, chief executive officer (the "CEO") and chairman.

[4] Azteca had an interest (apparently as a 50% joint venturer) in a mineral property referred to as "Two Mile", located in an Idaho mining region known as Silver Valley.

[5] Russell has an engineering background. The evidence – including letters to Staff from Azteca's lawyer – was that Russell holds a master's degree in civil engineering (as well as an MBA), and is registered as a professional engineer in California. A summary of his résumé as at 21 May 2006 cited experience in the mining sector, including operational and project management work involving, specifically, copper and gold ore conveyor systems and coal preparation and storage facilities. One of the lawyer's letters spoke of Russell having "significant experience in the mining industry", including "feasibility studies", "directly supervising exploration activities for several years" at Azteca and another employer, and "extensive research on the Silver Valley geology, including interviews of experts in relevant regional geology and mining practice". A former fellow director of Azteca, Edward Schiller ("Schiller", who testified as a witness for Staff), referred to Russell as a "mining engineer" with "a lot of engineering experience".

[6] An 8 December 2008 Azteca news release announced completion of the drilling of an 8784-foot vertical core hole ("Hole 5A") at Two Mile, quoting Russell's description of this as

"perhaps the deepest geologic structural section ever drilled in the Silver Valley". The release described some of what was thought to have been found from the drilling, including "massive mineralization" beginning at 7950 feet. The release also indicated that Azteca "is conducting a \$2,500,000 private placement" at a price to be determined in a few days, the proceeds to be used in part for "drilling and assaying expenses" at Two Mile.

[7] Over the next six months – January through June 2009 – Azteca issued the Releases containing the Impugned Statements.

[8] Schiller testified that the Two Mile project was "basically run" by Russell, and that it was Russell who "created [or] authored" all of Azteca's news releases from December 2008 until Schiller resigned his directorship in March 2009. That testimony and transcript evidence of a 30 June 2010 investigative interview of Russell under oath make clear that – notwithstanding Schiller's involvement in the drafting, review and approval of the 13 January 2009 Azteca news release – Russell was involved in the drafting of the Releases, and he reviewed and approved the information contained in them and authorized their issuance.

Release 1

[9] Azteca issued a 13 January 2009 news release ("Release 1") announcing the results of "first preliminary assays" of 41 samples through and adjacent to the previously reported "massive mineralization" at Hole 5A.

[10] Ian McCartney ("McCartney"), a geologist employed by the British Columbia Securities Commission (the "BCSC") who testified as a witness for Staff, told us that the term "massive" mineralization, in a mining context, indicates that "a very high proportion of the material is composed of valuable minerals" – typically, although there is no precise limit, "at least half of the material, if not greater than 60%". Similarly, "semi-massive" mineralization could refer to "something from 30 to 60%".

[11] Release 1 stated that Azteca "is currently drilling at two locations" at Two Mile – the second drill hole being a "wedge-off" or directionally deviated ("Hole 5B")¹ – "in an effort to develop a mineral resource". Staff asserted that this reference to the development of a mineral resource – an Impugned Statement – was premature at the time, and misleading.

[12] Release 1 identified assaying methods applied, and set out percentages of zinc, lead and silver intercepted, in Hole 5A, at various intervals (ranging from a few inches to several feet) beginning at 7883 feet and ending at 7968.5 feet. The release highlighted the following (emphasis in original): a "high grade" zone of "**15.5 [feet] of 40.0% Zn [zinc], 7.4% Pb [lead], and 140.7 g/tonne Ag [silver]**", with "[t]he highest individual assays within this 15.5 [foot] massive zone includ[ing] **55.9% Zn, 44.7% Pb, and 1,113 g/tonne Ag**".

¹ The evidence and submissions concerning the designations of certain holes at Two Mile were at times inexact and occasionally inconsistent, although not in a way material to the issues before us. The evidence as a whole indicated that there was an initial or "parent" hole designated as DDH-005, about which we know little, but which became associated with two others frequently mentioned – that which Azteca identified as "DDH-005A" and we term Hole 5A, described in Releases as a "vertical" hole; and that which Azteca identified as "DDH-005B" and we term Hole 5B, which was described as a "wedge-off".

[13] Release 1 included the following statement: "The information contained in this news release has been reviewed and approved by [Russell], President and CEO, and [Schiller], director, the Company's Qualified Person as defined in [NI] 43-101."

[14] Staff did not take issue with Schiller so acting as Azteca's QP. Schiller, a geologist for many years, testified to his experience with base, precious and industrial metals exploration and mining, including the development of a lead-zinc mine and the logging of "several thousand feet of cores bearing lead-zinc minerals".

[15] Release 1 ended with the following caution (the "Litigation-protection Caution"):

WARNING: the Company relies upon litigation protection for "forward looking" statements. The information in this release may contain forward-looking information under applicable securities laws. This forward-looking information is subject to known and unknown risks, uncertainties and other factors that may cause actual results to differ materially from those implied by the forward-looking information. Factors that may cause actual results to vary materially include, but are not limited to, changes in laws or regulations, the risks of obtaining final approval from necessary regulatory bodies in connection with the Private Placement, inaccurate assumptions concerning the exploration for and development of mineral deposits and timing related to receipt of the preliminary assays. Readers are cautioned not to place undue reliance on this forward-looking information. The Company does not assume the obligation to revise or update this forward-looking information after the date of this release or to revise such information to reflect the occurrence of future unanticipated events, except as may be required under applicable securities laws.

Release 2

[16] Azteca issued a 2 February 2009 news release ("Release 2") announcing "drilling and assaying progress" at Two Mile. Most of the release discussed a different drill hole ("Hole 6"), already begun approximately (according to other evidence) one kilometre from Hole 5A. The "main target" of Hole 6 was said to be "a mineralized stratigraphic sequence", and, [b]ased on a similar . . . sequence encountered in" Hole 5A, a target depth for Hole 6 was "tentatively set" at 5000 feet. This information was accompanied by the following caution:

The Company wishes to stress that, although the purpose of [Hole 6] is to develop a mineral resource on-strike with the Two Mile Fault of the massive zinc-silver-lead mineralization intersected in [Hole 5A], the intersection of a similar mineralized stratigraphic sequence . . . does not ensure intersection of similar type massive mineralization.

[17] Release 2 also mentioned the drilling of Hole 5B, then under way and "on target for developing mineral resource", and another drill hole – the location of which had yet to be determined, its "purpose being to develop a mineral resource based primarily on the mineralization intercepted in" Holes 5A and 6. Again, Staff asserted that these references to the development of a mineral resource – Impugned Statements – were premature at the time, and misleading.

[18] Release 2 stated that the information contained therein had been reviewed and approved by Russell, identified as Azteca's president, CEO and QP, and ended with the Litigation-protection Caution.

Schiller Resigns

[19] In a 7 March 2009 email to Russell – post-dating Release 2 – Schiller stated that he was resigning as a director of Azteca the same day, citing unspecified "personal reasons". Schiller testified to a number of reasons for his departure, including "the way the company was operating was not the way I thought the company should be run". Elaborating on the latter, Schiller explained that he considered it "almost an impossibility" that mining could be done, or done profitably, at the great depth targeted by Azteca's drilling at Two Mile. Schiller told us that, even so, he followed subsequent Azteca news releases about the Two Mile project, occasionally communicating with Russell about them.

[20] It was Schiller's evidence that he, when an Azteca director and subsequently, was concerned that Russell – a mining engineer, not a geologist – lacked geological understanding and expertise appropriate to the Two Mile project and the interpretation of results obtained from drilling and assays. Schiller had apparently instigated discussion between Russell and a geologist of Schiller's acquaintance, JZ. An 18 February 2009 email from JZ to Schiller indicated that JZ had met with Russell and Azteca's "VP of Finance" on 4 and 11 February, but had not been retained by Azteca, largely, it seems, because JZ's work for another miner might interfere with or interrupt work for Azteca. In this email, JZ said: "He [Russell] understands that the work still needs doing, but I don't think he sees that work as time sensitive, whereas he wants a technical person to help him convince investors the property has merit right away. He doesn't really see how I can fill that role if he can't get the longer term continuity [of JZ's services]."

Release 3

[21] Azteca issued a 24 February 2009 news release ("Release 3") announcing more "drilling and assaying progress" at Holes 5B and 6. Concerning Hole 5B, "currently at a depth of approximately 7,675 [feet]", was a statement attributed to Russell that Azteca "expected" to "intersect the massive zone at 7,800 [-] 8,000 [feet]".

[22] Hole 6 was stated to have reached a depth of 5607 feet, Azteca having decided to drill further than the initial target depth. Release 3 referenced – again attributing these statements to Russell – "visibly apparent strength of the mineralization . . . at 5,000 [feet]. At 5,600 [feet], the mineralization became continuous and intermittently semi-massive". Staff contended that the latter statement – an Impugned Statement – was, in the absence of "assay or other support at that or any time", misleading or untrue.

[23] Release 3 cautioned that "although the purpose of [Hole 6] is to develop a mineral resource on-strike with the Two Mile Fault . . . of the massive zinc-silver-lead mineralization intersected in [Hole 5A], the intersection of a similar mineralized stratigraphic sequence . . . does not [e]nsure intersection of similar type zone of massive mineralization". It similarly cautioned in relation to Hole 5B.

[24] Release 3 stated that the information contained therein had been reviewed and approved by Russell, identified as Azteca's president, CEO and QP. It concluded with a caution similar to the Litigation-protection Caution.

Release 4

[25] Azteca issued a 2 April 2009 news release ("Release 4") with a new emphasis, titled "Azteca Discovers Sullivan-Style Massive Sulfides² at Two Mile". As the text of the release made clear, "Sullivan" referred to a very successful mine of that name located in Kimberley, British Columbia. McCartney, who had some work experience near and at the Sullivan mine, explained that the term "sulphides" refers to a mineral group (consisting of hundreds of types) in which base metals are combined with, or attached to, sulphur.

[26] Russell was identified in Release 4 as Azteca's president, CEO and QP and as having reviewed and approved the information contained in the release. It quoted him as follows:

"[Azteca] has made tremendous progress in furthering our understanding of the mineralizing system responsible for the high grade massive-type zinc-silver-lead mineralization reported in mid-January at Two Mile in [Hole 5A]," said [Russell]. "Considerable additional data has been garnered since our initial discovery in the form of drilling, assays, thin sections and other studies, and these indicate that what we have intersected are Sullivan-type Precambrian massive sulfide beds forming a thick lens.

"Further, we believe that the massive sulfide beds discovered at Two Mile, while very similar in thickness to those at the Sullivan ore body, have much higher grades of zinc, silver and lead. They also contain additional metals including gold, copper, gallium, germanium, and indium. Finally, we believe these beds may represent at least a portion of the original source for all of the Silver Valley region's mineralization, a theory first postulated . . . in 1916," said [Russell].

[27] According to Release 4 – and this information was not disputed – "[t]he Sullivan [deposit] is understood to be a Precambrian sub-sea hydrothermal system", which "occurred as broad, continuous and complex lenses [that is, lateral mineralization] in total approximately 2,000 [metres] in diameter and as much as 100 [metres] thick", associated with "Aldridge mudstone and pyrrhotite" and "sphalerite (zinc sulfide) and galena (lead sulfide)".

[28] Release 4 continued, under the subheading "Geologic Model: [Prichard]³-hosted Sullivan-type Massive Sulfide Beds":

The Company believes the assay results and geologic study being conducted on [Holes 5A, 5B and 6] support Sullivan-type massive sulfides hosted in stratified . . . beds within the . . . Prichard Precambrian mudstones, which are very similar to the Aldridge. The Company believes that the massive sulfides at Two Mile will be of much higher grade than the Sullivan . . .

[29] Release 4 suggested that data from Two Mile could represent the "smoking gun" proving the correctness of the mentioned 1916 theory and, by implication, that the Silver Valley mining

² Azteca tended to apply US spelling conventions in its disclosure.

³ Azteca, in its disclosure, spelled this word in two different ways. We will spell it "Prichard" throughout this decision.

region (including Two Mile) might contain an underlying mineralization lens comparable to, or even better than, what had been so successfully exploited at Sullivan.

[30] Under the subheading "Assay Results and Comparison to Sullivan", Release 4 stated that "[c]omparing the Sullivan main sulfide zone and the Two Mile main sulfide zone, the grades are much higher in Two Mile", and indicated that "the Two Mile lens of sulfides [is] similar in thickness to the 100 [metres] of the Sullivan deposit". There was also mention of copper as a seemingly "significant component in the intersected sulfides": "The Company believes preliminary sulfur (S) and copper (Cu) results as given below evidence a large mineralizing Sullivan type system", this followed by a table of assay results for Hole 6 specifying percentages of sulphur and grams-per-tonne of copper at various depth intervals.

[31] Following a tabular summary of assay results for Hole 5A, Russell was further quoted as saying that "it requires deep drilling to reach these stratified sulfide beds", but that "[t]he depths are easily within the mineable horizon, and the potential grades are very exciting".

[32] Release 4 indicated that Azteca would continue drilling Hole 6 to approximately, or at least, 8000 feet "with the expectation of intersecting a massive sulfide target much like that which was intercepted at a similar depth in [Hole 5A]".

[33] Release 4 gave information, similar to that given in Release 1, of assay methods applied, and, in addition to the concluding Litigation-protection Caution, the following caution (on the sixth and final page):

The potential quantities and grades reported within this press release are conceptual in nature, being from limited diamond drill core data. There has been insufficient exploration to define a mineral resource and it is uncertain if further exploration will result in the delineation of a mineral resource.

[34] Staff contended that statements in Release 4 comparing the Two Mile project to the Sullivan mine – Impugned Statements – were misleading or untrue at that or any time. Staff also contended that the statement concerning "[t]he depths [being] easily within the mineable horizon, and the potential grades [being] very exciting" – an Impugned Statement – was, in the absence of a mineral resource and sufficient evidence (then or ever) of "an economically mineable horizon", misleading or untrue.

[35] It seems to have been Release 4 that prompted Schiller to email Russell (also on 2 April 2009) as follows:

... Reporting percentages of [sulphur] and [parts per million of] copper is meaningless. If you [are] making a comparison with Sullivan, [sulphur] and [copper] means nothing. And reporting contiguous samples of 0.2 and 0.3 feet assaying similar values of zinc is a waste of time, money and data processing. I gather you have not hired a geologist to handle the core sampling and assaying. ...

[36] This email ended with a comment that another Azteca director knew of a Calgary geologist "who might be able to help you".

Release 5

[37] Azteca issued a 15 April 2009 news release ("Release 5") titled "Azteca Gold Reports Progress on [Hole 6] at Two Mile". The release identified Russell as Azteca's president, CEO and QP and as having reviewed and approved the information contained therein.

[38] Russell was quoted in Release 5 as saying that "[Azteca] continues to encounter Sullivan-style Precambrian sulfide beds in [Hole 6]" and that "we believe we may, in the coming weeks, intercept high grade massive-type zinc-silver-lead-copper mineralization similar to that reported in mid-January in [Hole 5A]".

[39] Ending with the Litigation-protection Caution, Release 5 earlier cautioned that, while "the purpose of [Hole 6] is to develop a mineral resource on-strike with the massive zinc-silver-lead mineralization intersected in [Hole 5A]", "the intersection of a similar mineralized stratigraphic sequence does not [e]nsure intersection of similar type zone of massive mineralization".

[40] Staff asserted that, to characterize the "deposit" as "Sullivan-style" in Release 5 – an Impugned Statement – was premature at that or any time, and misleading or untrue.

Release 6

[41] Azteca issued a 27 May 2009 news release ("Release 6") providing "an update on exploration activities at the Two Mile Project". Titled "Target intersected at Two Mile", the release identified Russell as Azteca's president, CEO and QP and as having reviewed and approved the information contained therein. The release, focusing on results from Hole 6, stated:

The Company is pleased to report the intersection of its initial deep target in [Hole 6], which is a Sullivan-style sulfide bed beginning at approximately 10,000 [feet] and continuing to approximately 10,180 [feet]. . . . Assays are forthcoming, and management believes this intersection may represent a main sphalerite (zinc sulfide) – tetrahedrite (silver-antimony sulfide) zone.

[42] Release 6 attributed the following comments, among others, to Russell:

"In regards to the geologic model, the prevalence of alternating feldspar and silicate layers immediately above the mineralized intercept is further evidence that a Sullivan style system may exist at Two Mile. . . .

"We want to stress that the apparent deficiency of pyrrhotite (iron sulfide) within the main mineralized beds makes the Two Mile discovery remarkably different than the Sullivan deposit. Pyrrhotite appears to have caused grade-dilution in the desirable minerals at the Sullivan."

[43] Ending with a caution similar to the Litigation-protection Caution, Release 6 earlier stated: "The Company wishes to emphasize that the intersection of significant mineralization as described above does not guarantee grade tenor as intercepted in [Hole 5A]."

[44] Staff asserted that, to characterize the "deposit" as "Sullivan-style" in Release 6 – an Impugned Statement – was premature at that or any time, and misleading. Staff also asserted

that the reference to a "main sphalerite (zinc sulfide) – tetrahedrite (silver-antimony sulfide) zone" – an Impugned Statement – was misleading or untrue.

Release 7

[45] Azteca issued a 10 June 2009 news release ("Release 7"), this titled "New Lead-Silver Target at Two Mile, Financing". The release identified Russell as Azteca's president, CEO and QP and as having reviewed and approved the information contained therein, and ended with a caution similar to the Litigation-protection Caution.

[46] Release 7 indicated that Hole 6 had been drilled to 10 829 feet and that assays were under way for the interval 10 000-10 350 feet, "including the fine-grained mineralized zone reported from 10,000 [feet] to 10,180 [feet]". It also referred to a zone encountered at 10 500 to 10 600 feet, quoting Russell as saying that "[w]e believe that these two zones . . . are tetrahedrite-type mineralization" and that "[t]hey are . . . disseminated to nearly completely massive". Russell was also quoted as saying that "we have noticed what appears to be increasingly dense disseminated galena mineralization with minor chalcopyrite and sphalerite", and that "[b]oth the technical literature on the Silver Valley, and evidence in the drill core suggest to us that we may expect significant lead and silver sulfide zones below a tetrahedrite-type mineralizing sequence". This was accompanied by the caution: "[Azteca] wishes to again emphasize that the intersection of significant mineralization as described above does not guarantee grade tenor as intercepted in [Hole 5A]."

[47] Release 7 announced a field trip to the Two Mile project for "professional analysts, newsletter writers, and select investors". It also announced a \$1.5 million private placement of Azteca units ("Units"), each priced at \$0.40 and consisting of a common share and a share-purchase warrant (exercisable for two years at \$0.75), the proceeds to be used in part for "drilling and assaying expenses" at Two Mile.

[48] In contending that the reference to "tetrahedrite-type mineralization" – an Impugned Statement – was misleading or untrue, Staff pointed to assay results for the relevant zone that pre-dated and post-dated Release 7 showing, according to Staff, "no significant mineralization".

Release 8

[49] Azteca issued an 18 June 2009 news release ("Release 8") providing updated "progress on exploration activities at the Two Mile Project" and announcing an increase in its private placement target. Russell was, again, identified as Azteca's president, CEO and QP and as having reviewed and approved the information contained in the release, which ended with a caution similar to the Litigation-protection Caution.

[50] In Release 8 Azteca was "pleased to announce the intersection in [Hole 6] of a second major mineralized zone beginning at approximately 10,850 [feet] and extending down to our current depth of 11,108 [feet]". Russell was quoted as follows:

"It appears to us now that the galena with minor chalcopyrite mineralization found in the stockwork veining forms rims around a mineral that the Company believes is primarily bournonite," said [Russell]. "This bournonite mineralization appears to be accompanied by a silver sulfosalt mineral which may be polybasite. . . . So rather than a bed . . . comprised primarily

of galena, the nature of the stockwork veining changed to what appears to be this mix of bournonite and polybasite. . . . Within the last 30 [feet] or so this mineralization has become intermittently massive."

[51] Release 8 described bournonite as "a lead-copper-antimony-sulfur mineral" and polybasite as "a copper-silver-antimony-sulfur mineral". In his testimony, McCartney characterized bournonite as "a very valuable base metal silver sulfide mineral", and polybasite as "a much rarer and very valuable copper-silver mineral".

[52] Russell was further quoted in Release 8 as indicating that the recent "observation dovetails with our view that these beds of sulfide mineralization are the source of the remobilized silver, lead, copper and zinc ores of the Silver Valley". He was also quoted as making reference to "technical literature on the Silver Valley" and making mention of past gold finds there, these comments ending with: "Of course, this is just supposition at this point, and only time, technology and assays will tell what the full system may actually contain." The entire discussion of mineralization concluded with the caution: "[Azteca] wishes to emphasize that the intersection of significant mineralization as described above does not guarantee grade tenor as intercepted in [Hole 5A]."

[53] Release 8 informed readers that Azteca had "decided to again extend the [target depth] for [Hole 6] to 11,500 [feet]". This was "[d]ue to the visibly increasing strength of the mineralization encountered", and the expectation (attributed to Russell) "that this lower zone may be similar in width to the upper mineralized zone". Russell was also quoted as to Azteca's "anticipat[ion of] drilling wedge-offs from the parent [Hole 6] for the purpose of developing high grade mineral resource tonnage immediately adjacent to the hole".

[54] The final topic highlighted by Release 8 was Azteca's previously announced private placement financing. Initially set at \$1.5 million, "the Company intends to increase the total financing size to \$2.5 million on the same terms". Proceeds were to be applied in part for "drilling and assaying expenses" at Two Mile.

[55] Staff contended that the references in Release 8 to bournonite and polybasite – Impugned Statements – were unsupported by assay or other reliable information at that or any time and were, therefore, misleading or untrue.

Other Promotional Material

[56] The Two Mile project, with its supposed similarities to the Sullivan deposit, was touted by means other than Azteca news releases. In evidence were two sets of PowerPoint slides, both beginning with a cover page bearing the Azteca logo and a "Two Mile Project" subtitle. This material was the subject of some testimony and submissions. Also in evidence was a document titled "The Morgan Report", about which we heard very little. Staff made no allegations in the Notice of Hearing about material other than Azteca news releases. We therefore give no weight to these slides and this report in conducting our analysis and reaching our findings, apart from the weight we accord evidence elicited in relation to one such slide that was consistent with Azteca's description of the Sullivan deposit set out in Release 4.

Concerns about Disclosure in Releases

[57] The evidence of McCartney, and to some extent Schiller, disputed – or expressed concerns about – the disclosure made in the Releases, including the Impugned Statements.

[58] Schiller complained directly to Russell about conduct or disclosure that, to Schiller, betrayed a lack of appropriate geological understanding and expertise. For example, in a 4 February 2009 email, Schiller exhorted Russell about a presentation as follows: "We need to start using a little science and less science fiction." Schiller also expressed the hope that a geologist had been contacted. Also, in a 2 April 2009 email (mentioned above) Schiller, having apparently read Release 4, commented to Russell that some of the data reported therein was "meaningless" or "a waste of time, money and data processing", concluding with: "I gather you have not hired a geologist to handle the core sampling and assaying."

[59] As noted above, Schiller testified that he considered it "almost an impossibility" that mining could be done, or done profitably, at the great depth targeted by Azteca's drilling at Two Mile. It appeared clearly to be his view that, whatever concentrations of valuable metals might have been found, economically viable production (let alone profitability on the scale of the famous Sullivan mine) was very doubtful.

[60] McCartney's evidence was that representations in certain of the Releases – including Russell's references to bournonite and polybasite in Release 8 – were not borne out by subsequent negative assay results.

Staff Demand Clarifying Disclosure

[61] On or about 22 June 2009 Azteca and its disclosure came under review by Canadian securities regulators – Staff working with, and relying heavily on, BCSC staff (in particular McCartney) in their review of Azteca's continuous disclosure and ensuing discussions with the company or its counsel. The evidence included written communications that McCartney drafted for use by Staff and which the latter reissued essentially verbatim. One such example issued as a letter from Staff to Azteca on 26 June 2009. This, among other things, sought an explanation of the basis for Russell's acting as Azteca's QP for the Two Mile project, and expressed concern about the timing, nature and meaningfulness of certain of Azteca's news release and other disclosure (characterized by Staff as "extremely positive or promotional statements without . . . meaningful details or supporting evidence"). Cited examples of the latter included news release references to "development of a mineral resource", purported analogies to "a Sullivan bedded massive sulphide model", and statements implying economic viability of deep-mining at Two Mile. This Staff missive concluded with a direction that Azteca issue "a comprehensive and detailed clarifying news release retracting and restating its previous disclosure, as necessary".

Azteca Private Placement Closes

[62] Azteca's June 2009 private placement of Units closed on 29 June.

Clarifying Release 1

[63] Shortly thereafter, Azteca issued a 2 July 2009 news release announcing that it would issue another news release "outlining the latest assays and management's initial interpretation of them after the market close" the next day (a Friday). The promised news release was apparently

first circulated for comment to Staff or BCSC staff (or both): the evidence included a draft of a 3 July 2009 Azteca news release marked with comments of (including revisions suggested by) BCSC staff (or Staff and BCSC staff). In general these comments urged cautionary wording; also included was a reminder that Azteca "has not responded to our inquiry about QP status". McCartney testified that the marked comments were suggestions made to Azteca's lawyer; he did not suggest that Staff or BCSC staff were blessing the proposed news release, and some of the comments make clear that that was not the case. McCartney also testified that "we never intended to complete the clarification requirement with these suggestions".

[64] The promised 3 July 2009 Azteca news release ("Clarifying Release 1") incorporated most of the mentioned revisions suggested by BCSC staff (or Staff and BCSC staff). In addition to providing some detailed assay results for Hole 6 at various depths (from just under 10 000 feet to 11 173 feet), the release discussed the "wedge-off" Hole 5B, suggesting that work on that (suspended) hole might be resumed because, in a quote attributed to Russell, "it may be worthwhile to test it for massive sulfides".

[65] The overall tenor of Clarifying Release 1 was somewhat mixed: on the one hand, optimistic; on the other, expressing some blunt warnings about prior disclosure. In the optimistic vein, the release summarized some drilling and assay results for Hole 6 – for which the "targets are the same as we found in [Hole 5A]: lead-zinc massive sulfides with copper, silver, and gold" – and announced that a new wedge-off hole from Hole 6 and wedge-off Hole 5B "will be deepened during July and August with the expectation of intersecting massive sulfides". Azteca was also "pleased to announce the intersection of both sulfide stock-work veins above previously unknown calcic carbonates", about which Russell was quoted as saying "[w]e are very excited about this new discovery", and "[t]he presence of anomalous gold within the sulfides along with anomalous tungsten is particularly exciting".

[66] A table of assay results was followed by another comment attributed to Russell:

"The ratios of zinc to lead and lead to silver . . . are generally similar to those found in the massive sulfides reported for [Hole 5A] in January, except that both copper and gold as they ratio to the other metals may be higher, but more data and analysis is needed to make a conclusive determination. . . ."

[67] In a more cautionary vein, Clarifying Release 1 included such statements as (the just mentioned) "more data and analysis is needed", "more study is needed" and Azteca "wishes to stress that the above assay values represent grades of stock-work veins and disseminated mineral and not adjacent massive sulfides like those reported in [Hole 5A]". More significant were warnings about earlier Azteca disclosure. Citing Staff's continuous disclosure review, Azteca "cautions that any previous statements suggesting mineable nature or potential economic viability, the application of a Sullivan-type bedded massive sulfide deposit model, or any inferences about metal grades based on geological descriptions of 'massive sulfide' or other mineralization types should not be relied on". To similar effect, under the subheading "Geologic Discussion", the release mentioned an unspecified earlier news release statement about possible "Sullivan Style bedded or strata bound type of mineralization", going on to state: "Based on the discovery of significant carbonates in [Hole 6], we are re-evaluating this mineralization concept." Under the heading "Longer Term Exploration Plan", the release noted that Azteca

"has previously described its objective of 'developing resources'", but Azteca now "cautions that the definition of mineral resource depends on grades and widths of mineralization as well as a preliminary economic study of potential mineability of the particular mineralized geometry". This was followed by a statement indicating that "[t]he premise for our exploration is . . . not the vein type massive sulfides for which the Silver Valley of Idaho is known, nor the massive sulfides that were mined . . . at . . . Sullivan".

[68] Clarifying Release 1 continued to identify Russell as Azteca's president, CEO and QP and as having reviewed and approved the information contained therein, and ended with a caution similar to the Litigation-protection Caution.

Concerns Persist

[69] Schiller continued to express concern about the content of Azteca news releases. In a 9 July 2009 email Schiller, having apparently read Clarifying Release 1, complained to Russell about certain disclosure therein:

. . . The term calcic carbonate is not a geological term[.] . . . It is like saying a granitic granite [–] it is redundant. . . . [Y]our term is like saying a boy man. . . .

. . . Had you hired a geologist with [experience in the region] when we discussed it, all this nomenclature confusion from a couple of engineers [Russell and his brother, also associated with Azteca] would never have happened.

[70] Staff and BCSC staff continued to have concerns about aspects of Azteca's public disclosure notwithstanding the issuance of Clarifying Release 1. These concerns included Russell's eligibility to act as Azteca's QP for the Two Mile project, the use of "extreme or subjective descriptions" in the absence of supportive "documentary evidence prepared by a qualified person", and failures to make timely disclosure of some negative assay results. The evidence included several written communications of such concerns from 7 July to 14 August 2009 between Staff and BCSC staff, and between or among them and Azteca or its lawyer. Concerns were also shared by the TSXV, which ordered a halt in trading in Azteca shares on or about 13 August 2009.

Clarifying Release 2

[71] Azteca eventually responded to persisting concerns by issuing a 14 September 2009 news release ("Clarifying Release 2") titled "Two Mile Clarification Update Regarding QA/QC [Quality Assurance/Quality Control] Protocols, Regulatory Reviews and Trading Resumption". We quote excerpts from the somewhat lengthy release:

Company's Qualified Person ("QP")

The Company advises that effective immediately, [Russell] will no longer be acting as [its] QP. A review by the [Commission] determined that [Russell] did not have the formal education and relevant experience to meet the requirements of a QP for the Two Mile Project. . . .

[Another Azteca director, identified as] a professional geologist . . . has temporarily assumed the role of QP

QA/QC Protocol

The Company advises that exploration work conducted on the Two Mile Project did not follow CIM [Canadian Institute of Mining, Metallurgy and Petroleum] Exploration Best Practices guidelines

. . .

Continuous Disclosure Review

As a result of a continuous disclosure review, . . . the [Commission] advised the Company that it was required to clarify certain technical and geological information. The Company cautions that any previous statements in press releases or interviews suggesting mineable nature or potential economic viability, or any inferences about metal grades based on geological descriptions of massive mineralization, sulfides or other mineralization types are premature and should not be relied upon.

The applicability of a Sullivan-type bedded massive sulfide deposit model or other models . . . is uncertain and needs support. To establish which geological model(s) are applicable to the deep sulfide mineralization additional work is required, including geological core logging, geological and geochemical analysis, and additional drilling results.

The Company has previously described its objective of developing resources by step-out drilling, including wedge-off holes. The Company cautions that the determination of a mineral resource depends on grades, widths and continuity of mineralization, as well as a preliminary economic study of potential [mineability] of the identified mineralized geometry at the particular depth.

Reporting of zinc-lead assay results

It is the opinion of [Azteca's newly designated] QP . . . that all material sulfide assays . . . have been disclosed for [Holes 5A, 5B and 6 to certain respective depths]. The assay values as presented by [Russell] have been presented accurately but it is the opinion of the qualified person that certain further assays as presented below will provide clarification.

[72] Under the subheading "Assay Clarification", Clarifying Release 2 noted certain prior assay-result disclosure or comments by Azteca, and corrected, revised or expanded upon some of this. Among this new disclosure were the following statements:

. . . In a press release dated April 2, 2009, the Company disclosed assay results for [Hole 6] of high iron sulfide grades but there were no lead-zinc-silver grades of potential economic interest.

In its June 18, 2009 press release the Company reported [for Hole 6] a "second major mineralized zone" from 10,850 to 11,108 [feet]. The Company is not expecting high-grade zinc-lead intersections from [that] interval The Company identified bournonite and possibly polybasite, and said the mineralization . . . "within the last 30 [feet] or so . . . has become intermittently massive". The assays given within this interval in the July 3, 2009 press release . . . do not represent, at these depths, "major mineralization" as described in the press release. . . . [T]he Company has not yet confirmed through further analysis that [bournonite] is present. A dark silicate material may have been mistaken for polybasite, which also has not been positively identified in the drill core. Referral to the "intermittently massive" character of this zone is uncertain and cannot be relied on.

[73] Clarifying Release 2 also discussed a "mistaken identification of tetrahedrite".

[74] The Azteca share trading halt was apparently lifted by the TSXV on 15 September 2009, following the issuance of Clarifying Release 2.

B. Azteca Share Trading

[75] Azteca provided Staff with a summary trading history for Azteca shares for the period 2 January to 6 August 2009. The shares opened, and closed, at \$0.08 on the first day in this period, and closed on the last day in this period (before the August 2009 trading halt) at \$0.16. On most of the trading days during the period, trading volume was in the hundreds of thousands of shares.

[76] After trading between \$0.08 and \$0.15 from 2 January 2009, Azteca shares closed at \$0.09 on 9 January. According to the summary in evidence, there was no trading between then and the issuance of Release 1. On 14 January trading volume shot up to 3.2 million shares – a volume exceeded only once (on 6 July) in the entire period summarized. The shares opened on 14 January at \$0.15, up two-thirds from their most recent close. After a comparatively modest fallback to the range of \$0.12 to \$0.14 over three days, the shares rose again to close at \$0.20 on 19 January. From that day to the end of February the shares traded in the range of \$0.15 (the lowest close, on 24 February) to \$0.20.

[77] From 2 to 20 March 2009 Azteca shares traded in the range of \$0.14 to \$0.17, generally and gradually declining in the latter days of that month until closing on 1 April at \$0.10.

[78] On 2 April 2009 Azteca issued Release 4 titled "Azteca Discovers Sullivan-Style Massive Sulfides at Two Mile". That day its shares opened at \$0.11 and closed at \$0.16, up 60% from the day before; they went on to open the next day at \$0.19. Thereafter the price fell back, but to no lower than \$0.13 until, rising again, the shares traded from 13 to 24 April in the range of \$0.18 to \$0.21. Then, in the last week of April, the price rose as high as \$0.25, closing at \$0.23 on 30 April.

[79] The Azteca share price fluctuated between \$0.18 and \$0.26 during May and the early days of June 2009, closing at \$0.20 on 3 June. There then began a generally progressive rise in both price and trading volume. On 11 trading days in June, volume exceeded 1 million shares, and the price moved to as high as \$0.53 (the opening price on 17 June) – considerably more than double the price at which the shares opened the month. Beginning on 19 June the price, although fluctuating, declined toward the private placement offering price of \$0.40, briefly falling below that level on 29 June (the date on which the private placement ended) to close at \$0.37. Trading volume on the last seven trading days in June fell back below the 1 million level (on two of those days below the 600 000 level). On 30 June and 2 July (no trading was reported between those dates) the price was in the range of \$0.39 to \$0.45. It was on 2 July that Azteca announced it would issue another news release "outlining the latest assays" after market close on 3 July. The price rose to close at \$0.49 on 3 July.

[80] As discussed above, Clarifying Release 1 issued on 3 July 2009 combined optimism with some blunt warnings about prior Azteca disclosure. The market was clearly jolted by something when trading in Azteca shares resumed at \$0.29 on 6 July. With trading volume of 6.4 million shares on that day, the price fell 53% from the most recent close, to end the day at \$0.23. We are

in no doubt – and we find – that, no other cause having been advanced or demonstrated, the cause was the information contained in Clarifying Release 1. Trading volume remained high for five of the next seven trading days: 3.1 million shares on 7 July; 2.4 million on 8 July; 1.7 million on 13 July; 1.3 million on 14 July; and 2.3 million on 15 July. The price drifted lower, hitting \$0.14 on 13 July. From 16 July until 6 August daily trading volume returned to the hundreds of thousands and the price ranged from \$0.15 to \$0.19, ending the period at \$0.16.

[81] Other evidence indicated that daily trading price ranges (from high to low) for Azteca shares during the same period were generally quite narrow, with some markedly larger daily ranges in June 2009.

III. POSITIONS OF THE PARTIES

A. Staff

[82] Staff alleged that Russell breached section 92(4.1) of the Act by making, causing Azteca to make, or authorizing, permitting or acquiescing in Azteca's making of, statements in the Releases – the Impugned Statements – that were misleading or untrue and that would reasonably be expected to have a significant effect on the market price or value of Azteca securities. Staff submitted that this allegation has been proved – in large part, through admissions by Azteca's lawyer and the issuance of Clarifying Releases 1 and 2 (the "Clarifying Releases").

[83] Staff took issue not with the announcements of "a mineralized zone being found in [H]ole 5A", but with "the hype, conjecture and speculation that followed from that". In alleging that "Russell drafted or supervised the drafting of the Releases and caused or authorized, permitted or acquiesced in their issuance by Azteca", Staff pointed to, among other things, the following wording in each of the Releases: "The information contained in this news release has been reviewed and approved by [Russell], President and CEO". Staff submitted that the Impugned Statements "were, at best, premature and misleading, and in many instances simply false and misleading", and that in all the circumstances Russell knew or ought to have known this. Staff also submitted that the materiality of the Impugned Statements has been established by the trading activity in Azteca shares from 2 January to 6 July 2009 and, further, by emailed comments of Azteca investors in evidence.

[84] Staff also alleged that Russell breached section 2.1 of NI 43-101 by acting as Azteca's QP "without the requisite experience and qualification". Staff, while not disputing that Russell is an engineer with at least five years' experience in mine development, asserted that he lacked experience relevant to the Two Mile project – specifically, that Russell had "little formal training or education in geology and exploration and a job history devoid of exploration experience".

[85] Staff further alleged that, in so breaching Alberta securities laws, Russell acted contrary to the public interest. To this end, Staff characterized the Impugned Statements as "an escalating series of misleading or untrue statements" and Russell as "[a]n officer and director of a public company playing a role he clearly did not have the qualifications for".

B. Russell

[86] In his opening statement Russell, after referring to the Clarifying Releases, stated that "for the most part, . . . as far as the mistakes that were made, I don't think we have a conflict here

... because we essentially agreed with this". Russell told us that he believed "stakeholders involved here ... deserve as complete a picture as possible of the issues", that Staff had established "one viewpoint for the stakeholders based primarily on codification and preferred practices" and that he would present "another viewpoint derived from evidence and from my perspective". Russell then advanced seven arguments, which we summarize:

- First, Russell argued that there is not a definitively reliable technical basis for Staff's allegations as to misleading mineral identification and massive mineralization characterization. To that end, Russell asserted that evidence before us, including documentary evidence he provided as well as testimony he elicited in cross-examining McCartney, suggested reasonable doubt as to the reliability of ICP assays, on which Staff's technical expert – McCartney – relied. Russell also noted that McCartney apparently made no attempt to visit Two Mile, to inspect the Two Mile core samples or to request other supporting tests.
- Second, Russell argued that the Sullivan model "was at the very least a valid target within the [Prichard] rocks of Two Mile", which, Russell asserted, was supported by comments made in Schiller's testimony and in documentary evidence Russell provided. As we understand this argument, Russell asserted that his references to the Sullivan model, albeit "premature", represented his honest effort to explain what had been found at Two Mile.
- Third, concerning the "continuity of massive sulfide mineralization over one [kilometre] and cautionary statements about same" in Release 3, Russell argued that Holes 5A and 6 were drilled having regard to the risks or uncertainties associated with deep drilling and the limitations of the drilling technology used, not "for the purpose of inferring continuity over a great distance". Russell asserted that a reasonable investor with a rudimentary understanding of geometric scale would realize this, and further asserted that the investing public were strongly cautioned three times in Release 3 that "there was no guarantee of success, no matter the mineralization descriptions".
- Fourth, Russell acknowledged having come to realize that "even the stated objective of developing a mineral resource may be too presumptuous and may be rigidly interpreted as misleading". However, he noted that Release 4 included cautionary statements – including "[t]here has been insufficient exploration to define a mineral resource and it is uncertain if further exploration will result in the delineation of a mineral resource" – stating that such a caution "should have been the norm rather than the exception".
- Fifth, Russell challenged Staff's position concerning what might be termed the market-price effects of the Impugned Statements. Asserting that the sudden rise in the Azteca share price in June 2009 was unexplained, Russell argued that disclosure of the initial assay results in Release 1 established a market price of approximately \$0.19 per share that was, but for the June anomaly, essentially

maintained through to and after the issuance of Clarifying Release 2 (when the market price was approximately \$0.17 per share).

- Sixth, concerning lack of timeliness in clarifying or correcting the Impugned Statements (the Clarifying Releases being issued in July and September 2009), Russell seemed to admit as much, but argued that this was a consequence of the nature of the Two Mile project (a deep-drilling one), the need to prioritize to protect "the deep drill hole from loss" and Azteca's limited and busy staff.
- Seventh, Russell argued that he understood he had the "general qualifications" to act as QP "per regulatory requirements".

[87] Russell also provided a 9 December 2010 letter to Staff from a lawyer acting at that time for him and Azteca, and entered into evidence an undated letter from a fellow Azteca director who acted as Azteca's QP for Clarifying Release 2 and a 2 November 2011 letter from his fellow Azteca directors, each of these partly to similar effect as some of Russell's submissions just summarized. The 2 November 2011 letter included factors presented in mitigation such as Russell and his family having invested heavily in Azteca, and a recent shareholder vote that the letter interpreted as a sign of continued shareholder reliance on Russell.

IV. ANALYSIS

A. The Law

1. NI 43-101

[88] NI 43-101 establishes certain standards for, and imposes requirements and restrictions on, disclosure relating to mineral projects. Broadly speaking, the rule requires that scientific or technical information be based on, or reflect, work done or supervised by appropriately qualified professionals, and that key terminology be applied correctly and consistently.

[89] Section 2.1 of NI 43-101 (as it applied in 2009) stated:

- 2.1 **Requirements Applicable to All Disclosure** - All disclosure of scientific or technical information made by an issuer, including disclosure of a mineral resource or mineral reserve, concerning a mineral project on a property material to the issuer must be based upon information prepared by or under the supervision of a qualified person.

[90] This provision is to be read in light of definitions set out in section 1.1 of NI 43-101 (as it applied in 2009), including these:

"disclosure" means any oral statement or written disclosure made by or on behalf of an issuer and intended to be, or reasonably likely to be, made available to the public in a jurisdiction of Canada, whether or not filed under securities legislation, but does not include written disclosure that is made available to the public only by reason of having been filed with a government or agency of government pursuant to a requirement of law other than securities legislation;

...

"qualified person" means an individual who

- (a) is an engineer or geoscientist with at least five years of experience in mineral exploration, mine development or operation or mineral project assessment, or any combination of these;
- (b) has experience relevant to the subject matter of the mineral project and the technical report; and
- (c) is in good standing with a professional association and, in the case of a foreign association listed in Appendix A, has the corresponding designation in Appendix A[.]

[91] Concerning disclosure of "mineral resources", section 2.2 of NI 43-101 must be read in conjunction with section 1.2 (as both applied in 2009):

- 1.2 **Mineral Resource** - In this Instrument, the terms "mineral resource", "inferred mineral resource", "indicated mineral resource" and "measured mineral resource" have the meanings ascribed to those terms by the Canadian Institute of Mining, Metallurgy and Petroleum, as the CIM Definition Standards on Mineral Resources and Mineral Reserves adopted by CIM Council, as those definitions may be amended.
- 2.2 **All Disclosure of Mineral Resources or Mineral Reserves** - An issuer must not disclose any information about a mineral resource or mineral reserve unless the disclosure
 - (a) uses only the applicable mineral resource and mineral reserve categories set out in sections 1.2 and 1.3; . . .

[92] We reproduce, from the CIM Definition Standards, the definition of "Mineral Resource" in bold font and associated guidance in italic font (as they there appear):

A Mineral Resource is a concentration or occurrence of diamonds, natural solid inorganic material, or natural solid fossilized organic material including base and precious metals, coal, and industrial minerals in or on the Earth's crust in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction. The location, quantity, grade, geological characteristics and continuity of a Mineral Resource are known, estimated or interpreted from specific geological evidence and knowledge.

The term Mineral Resource covers mineralization and natural material of intrinsic economic interest which has been identified and estimated through exploration and sampling and within which Mineral Reserves may subsequently be defined by the consideration and application of technical, economic, legal, environmental, socio-economic and governmental factors. The phrase 'reasonable prospects for economic extraction' implies a judgement by the Qualified Person in respect of the technical and economic factors likely to influence the prospect of economic extraction. A Mineral Resource is an inventory of mineralization that under realistically assumed and justifiable technical and economic conditions might become economically extractable. These assumptions must be presented explicitly in both public and technical reports.

2. Section 92(4.1) of the Act

[93] Section 92(4.1) of the Act states:

- (4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know

- (a) in any material respect and at the time and in the light of the circumstances in which it is made,
 - (i) is misleading or untrue, or
 - (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
- and
- (b) would reasonably be expected to have a significant effect on the market price or value of a security or an exchange contract.

[94] Thus, to find a breach of section 92(4.1) of the Act, we must conclude that:

- a person or company made a statement; and
- the person or company knew or reasonably ought to have known that the statement:
 - in a material respect was misleading or untrue or omitted a fact required to be stated or necessary to make the statement not misleading; and
 - would reasonably be expected to have a significant effect on the market price or value of a security.

B. Russell as Azteca's QP

[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.

[96] It is possible – the evidence permits no firmer conclusion, despite Azteca's lawyer having asserted in a 10 July 2009 letter to Staff that Russell had involvement with mining industry "feasibility studies" – that Russell had some experience with "mineral project assessment", one sort of qualifying experience mentioned in paragraph (a) of the QP Definition. The evidence does not persuade us, however, that Russell had the sort of experience in "mineral exploration" contemplated by that paragraph. Even if, as Azteca's lawyer asserted, Russell "directly supervis[ed] exploration activities for several years" at Azteca and another employer, that falls short of demonstrating the sort of personal professional exploration experience consistent with the intent of that paragraph.

[97] That said, we are prepared to accept that Russell, in 2009, possessed two of the three characteristics necessary for him to act as Azteca's QP. His California standing as a professional engineer was undisputed – this satisfied paragraph (c) of the QP Definition. Further, he had worked for several years in the mining sector, accumulating more than five years of experience in aspects of the industry that would seem to fit within the term "mine development or operation". This satisfied paragraph (a) of the QP Definition.

[98] There remains the crucial third element of eligibility (under paragraph (b) of the QP Definition): "experience relevant to the subject matter of the mineral project".

[99] It is not sufficient simply to assert (as Azteca's lawyer did in the 10 July 2009 letter to Staff) that Russell had done "extensive research on the Silver Valley geology, including interviews of experts in relevant regional geology and mining practice". Nor does it suffice simply to assert (as Russell's fellow directors did in their 2 November 2011 letter) that "[t]here seems to be precedent for an individual with [Russell's] training and professional designation, along with experience, to act as a QP".

[100] Russell's background as a mining engineer might, possibly, prove relevant to a mineral project once it had reached the stage at which planning and constructing a mine could commence. The Two Mile project was, in the first half of 2009, nowhere near such a stage. To the contrary, it was at a very early stage of information gathering and interpretation – according to Schiller, the "grass roots phase" of the exploration (first) stage – with much work remaining to be done before one could reasonably even begin to determine whether Azteca had found something that might be mined economically. The experience needed for this sort of work was distinct – a distinction that we consider was aptly conveyed in Schiller's testimony:

[Russell] is a mining engineer with I'm sure a lot of engineering experience, but exploration is another part of the mining business and requires skills that most engineers are not trained in because their disciplines are more how to get the stuff out of the rock rather than how the stuff got into the rock.

[101] The mentioned assertions advanced by or for Russell notwithstanding, the evidence does not suffice to persuade us that Russell had the experience relevant to the Two Mile project as it stood in the first half of 2009 – geoscience experience in the geology of zinc-lead-silver deposits and exploration for such deposits – as contemplated by paragraph (b) of the QP Definition. To some extent Russell's lack of such experience was evident from terminology used in Azteca news releases for which Russell as Azteca's QP took responsibility. Specifically, we accept Schiller's complaints (which he conveyed directly to Russell) about "meaningless" reporting in Release 4 and, in Clarifying Release 1, use of an improper geological term and "nomenclature confusion".

[102] We therefore find (consistent with Clarifying Release 2) that Russell did not possess the experience contemplated by paragraph (b) of the QP Definition to act as Azteca's QP in respect of the Two Mile project in the first half of 2009, but that he nonetheless did so act, and was held out as so acting, in seven of the eight Releases and in Clarifying Release 1. It follows, and we find, that Russell improperly acted as Azteca's QP and, in so doing, he breached section 2.1 of NI 43-101.

C. Materially Misleading or Untrue Statements

1. Maker of Impugned Statements

[103] Russell held the most senior executive positions at Azteca. The evidence was that Russell was involved in the drafting of the Releases, and that he reviewed and approved the information contained in them and authorized their issuance. Thus, he bore direct responsibility for the content of the Releases, including the Impugned Statements, and the issuance of the Releases. We accordingly find not only that Russell caused Azteca to make – or authorized, permitted or acquiesced in Azteca's making of – the Impugned Statements, but also that the Impugned Statements were made by him.

2. Materially Misleading or Untrue

[104] The totality of the evidence makes clear that the Impugned Statements – in speaking of a "mineable horizon" or development of a mineral resource, and thereby suggesting that there was already, in the first half of 2009, reason to believe that mining would be feasible or economic (or both); in speaking of significant type-specific and grade-specific mineralization; and in making comparisons to the successful Sullivan mine in Canada – were, at best, conjecture based on speculation about what had actually been found at Two Mile.

[105] It is clear from the provisions of NI 43-101 and the CIM Definition Standards quoted above that the concept of a "mineral resource" is an important one under Alberta securities laws and its NI 43-101 disclosure regime. The concept is indicative of the potential, as assessed by a professional with relevant expertise and experience, of something both technically and economically mineable. Disclosure, by a mining issuer, of its expectations concerning a mineral resource in respect of a particular mineral project can reasonably be expected to convey, to readers of the disclosure, an impression of such project different from one that has not reached the stage at which a mineral resource can reasonably – and legally – be spoken of. The cautionary language that Azteca sprinkled throughout the Releases was not, in our view, sufficient to overcome the impression conveyed – deliberately, we believe – that Two Mile was or would become a mineral resource capable of being produced, technically and economically. In reality, neither Azteca nor Russell was in any position to reach such a conclusion at the time of the Releases. We find that the Impugned Statement references to "mineral resource" were misleading, in the absence of extensive additional cautionary information.

[106] Moreover, the repeated Impugned Statement references to Sullivan, and the various Impugned Statements relating to the type, grade and extent of the mineralization at Two Mile, or to a mineable horizon, presented a highly optimistic picture of Two Mile, seemingly reflective of Russell's hopes and theories but lacking the requisite technical or scientific foundation or the sort of care and balance that the topic demanded. This lack of foundation, care and balance rendered of little value any cautionary language used by Azteca in conjunction with such Impugned Statements, which statements could not but give the wrong impression, and were at least in some instances unfounded. We accordingly find that these Impugned Statements were misleading, in the absence of extensive additional cautionary information, and in at least some instances untrue.

[107] In short, we find (consistent with the Clarifying Releases) that the Impugned Statements expressed as fact information that was misleading, in the absence of extensive additional cautionary information, and in at least some instances untrue.

[108] The allegations here turned not on whether Azteca should have been announcing its progress, or its thinking, about the Two Mile project, but rather the manner in which it did so. We recognize that even early-stage, high-risk mining ventures can be of interest to some especially risk-tolerant investors. Still, they – like investors of any other class – are entitled to assume that disclosure provided by an issuer of securities is sufficiently fair and accurate to form a basis for the investors to understand and assess the risks of an investment in such securities. At least as important, proper disclosure helps the less risk-tolerant investor to recognize when a particular investment falls outside his or her risk tolerance. The effect of such market-wide understanding and assessment will, generally speaking, be reflected in the demand for, and the price or value assigned to, particular securities. Common sense tells us that investors generally would have assigned a markedly different risk profile to the Two Mile project – and therefore to an investment in the first half of 2009 in Azteca shares or Units ("securities", we find, within the meaning of the Act) – had they been told the unvarnished truth in the Releases. Intuitively, we think it obvious that a correctly informed capital market would have assigned a significantly lower price to Azteca shares or Units in the first half of 2009, particularly at the time of Azteca's June 2009 private placement. In other words, the Impugned Statements were, we find, misleading (and at least in some instances untrue) in a material way, in that, at the time and in the circumstances in which they were made, they would reasonably have been expected to have a significant effect on the market price or value of Azteca shares or Units.

[109] There is objective confirmation of this in the evidence before us. Once correcting information reached the market via Clarifying Release 1, the Azteca share price plunged, which (as discussed above) we found was caused by the information contained in the release. Also, emails to Azteca included expressions of investor dismay, among them at least one instance of an unhappy and "utterly shocked" investor who expressly attributed his investment, at \$0.40 in June 2009, to the company's "glowing press releases".

3. Knowledge

[110] As early as 4 February 2009 – on the heels of the issuance of Release 2 – Schiller was urging Russell (as mentioned above) to use "a little science and less science fiction" and expressing the hope that Russell had followed up on an earlier prompting by contacting a geologist for assistance with the Two Mile project. In April 2009 Schiller was continuing to encourage Russell to hire a geologist "to handle the core sampling and assaying". Certainly, then, from 4 February 2009 Russell, having effectively been warned by his fellow Azteca director, knew or reasonably ought to have known that the Impugned Statements were misleading, or misleading and untrue, and materially so, and we so find. Indeed, considering specifically the allegations relating to mentions of developing a mineral resource, we find that Russell reasonably ought to have known when each of Releases 1 and 2 was issued that such mentions were premature, given what had been discovered and been done to date, and thus misleading and materially so, in the absence of extensive additional cautionary information.

4. Conclusion

[111] For these reasons, we find that in making and in causing Azteca to make – or in authorizing, permitting or acquiescing in Azteca's making of – the Impugned Statements, when he knew or reasonably ought to have known them to be materially misleading, or misleading and untrue, Russell breached section 92(4.1) of the Act.

D. Conduct Contrary to the Public Interest

[112] Alberta securities laws 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 decisions, 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.

[114] Aggravating, in our view, was the continued identification, in Clarifying Release 1, of Russell as Azteca's QP – this despite (as is apparent from the evidence of a draft of that release bearing BCSC staff's, or their and Staff's, comments) Staff having again questioned Russell's eligibility for that role. That is, even in a release meant to correct prior flawed disclosure, Azteca, and Russell, maintained the impression that the disclosure reflected the work or review of someone with adequate and directly relevant professional experience. To persist with this misleading presentation at such a late stage – in full knowledge of the concerns repeatedly communicated to Azteca and, thus, to Russell – evinces a disregard for this essential element of the NI 43-101 disclosure regime. This too, we find, was clearly contrary to the public interest.

[115] Our conclusion concerning Russell's breaches of section 92(4.1) of the Act is similar. By causing or allowing himself to be identified as Azteca's QP (with express mention of NI 43-101) in Releases 2 through 8, Russell was conveying a misleading and, in our view, plainly false impression that the Impugned Statements therein to the investing public rested on the sort of professionally solid foundation that NI 43-101 and its requirement for QP involvement are meant to ensure. Further, the Impugned Statements found to be materially misleading, or misleading and untrue, impaired the ability of investors to make properly informed investment decisions. The potential harm is broad and foreseeable. Investors who bought Azteca securities in the first half of 2009, in the face of the improper disclosure, appear to have been directly and quantifiably harmed. Others who learn of this episode could lose faith in disclosure of other mining issuers – and perhaps issuers in other sectors – and so refrain from investing in our capital market. Such a loss of confidence can harm both investors and those law-abiding issuers who find their access to capital impaired as a result. Therefore we find that Russell, in breaching section 92(4.1), clearly acted contrary to the public interest.

V. CONCLUSION AND NEXT STEPS

[116] With our findings that Russell breached section 2.1 of NI 43-101 and section 92(4.1) of the Act, and that in so doing he also acted contrary to the public interest, this proceeding will now move to a second phase for the purpose of determining what, if any, orders ought to be made against him.

[117] We direct that Staff provide to the panel (through the Commission Registrar) and to Russell any written submissions that Staff wish to make on the issue of appropriate orders **by 16:00 on Friday 9 March 2012**.

[118] Russell may reply in writing to Staff's submissions. Any such written submissions must be provided to the panel (through the Registrar) and to Staff **by 16:00 on Friday 13 April 2012**.

[119] Staff may reply in writing to any such written submissions by Russell, such reply to be provided to the panel (through the Registrar) and to Russell **by 16:00 on Friday 27 April 2012**.

[120] If either party wishes to make supplementary oral submissions or to adduce evidence on the issue of appropriate orders, the panel will hold an in-person hearing session **on Monday 14 May 2012 commencing at 10:00**. A party requesting such an in-person hearing session must advise the Registrar **by 16:00 on Friday 4 May 2012**, indicating whether that party proposes to adduce evidence (via witnesses or otherwise) and the amount of hearing time that party expects to require. (In the event a requesting party does propose to adduce evidence, under section 2.3 of Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* we direct that party to provide to the other party at the same time as they make their request: (i) the names of all proposed witnesses; (ii) summaries of the proposed witnesses' anticipated evidence; and (iii) copies of all documents intended to be entered as evidence.) Even if no party requests such an in-person hearing session, one may be required by the panel. The Registrar will inform the parties as to whether an in-person hearing session will proceed.

2 February 2012

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Roderick McKay, FCA

"original signed by"
Fred Snell, FCA