

## **Signing the Report - Recognition, Responsibility and Liability for the Qualified Person**

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David Abbott introduces us to the evolving concepts of the Qualified Person and Competent Person, in his recent article, "What is a Competent or Qualified Person and Who Cares?" (*TPG*, Jan. 99). Now, in his article, "Personal Versus Corporate Responsibility and Liability," he raises the intriguing possibility of recognizing groups or corporations as "Competent." Also, professional liability is of great concern to many of us consultants. Therefore, I will add my independent consultant and somewhat international perspective to the discussion.

The concept raised by the "Qualified Person" issue, of individuals taking responsibility for their work, has a long history in the earth sciences. When I first began working as a contract geologist in minerals exploration and mining in Australia and Southeast Asia in the late 1960s and early 1970s, essentially every map, cross-section, drill log, table and written document, contained the names of the individuals who created and updated them and the dates thereof. During my past two decades of working in the USA, my observation is that the willingness or ability of individuals to put their names on such documents, let alone complete technical reports, is low and getting lower. The concept of the individuals actually signing the report is fading even faster. Many consulting reports that I receive, or subcontract on, contain no mention of the individuals who worked on the project, let alone any indication of which parts they created. Sometimes a principal of the consulting company has signed the report, but commonly we don't even have that.

Why do we have this trend, at least in the USA, in lack of willingness or ability to take individual responsibility and credit for our work? My belief is that it is at least primarily due to the desire to shield the individual professional from legal liability in a highly litigious society.

Although I am an independent consultant, I conduct my work from within the legal shield of my own corporation, as its only employee. Over the years, lawyers have drilled into me the ways that I should put together business documents and reports so that they are viewed legally as having been produced by my corporation rather than by me. The book value of the corporation hovers near zero, making it an unattractive target for a law suit. My wife and I buy the items of value that the corporation needs to operate, such as computers and furniture, and we write legally binding leases with the corporation.

So far my consulting work has thankfully not resulted in any legal actions against my corporation nor me. However, I have been verbally threatened with such a couple of times by clients when the opinions I have developed from my research were not what they wanted to hear. For example, "I have appraised the market value of your property to be zero dollars, but it is possibly less than that." From other legal experiences I have learned that even defending against a law suit can temporarily cripple my work and earnings ability. I also learned early in my career as an independent consultant that my corporate shield does not protect me from an irate miner toting a gun or some sticks of explosive. Lawyers tell me that they also have less violent ways of piercing the corporate shield.

Compared to these alternatives, the inevitable write-off of the occasional invoice for about \$10,000 seems not such a bad result.

Many years ago I checked on the possibility of obtaining errors and omissions insurance through the AIPG broker and an independent insurance broker. At first, the estimate of the annual premium to cover my geological consulting work sounded only moderately crippling, being a few thousand dollars. However, consulting geologists rarely consult in just geology. The premium for covering my economics consulting was another few thousand, similarly for appraisal/valuation and computer programming, then topping it off was the five figure premium for my hazardous waste consulting work. The annual tab would have exceeded my earnings. I have not yet met a U.S.-based independent consulting geologist who has told me that he is carrying errors and omissions insurance. Perhaps I will after one reads this. In the meantime, due to increasing liability discussed below, I am applying for some new estimates to see if the costs have moderated to affordable levels through some unlikely event. One has to wonder though whether the deep pocket provided by such an insurance policy wouldn't just attract litigation. The best solution may be to work from Australia where there is only a small fraction of the U.S. rate of litigation, and the insurance premiums are affordable.

The trend internationally and domestically is to increase the requirement for qualified persons to take responsibility for technical reports in the minerals industry. These increase our recognition and prestige as earth science professionals, and also potentially increase the demand for consultants with the appropriate qualifications and experience. On the other hand, they make us personally accountable to the reviewing bodies, open us more to potential complaints to the ethics committees of our various institutes, and increase our legal liability.

As discussed by David Abbott in his January article, "Australia's JORC Code," in the early 1970s first introduced the requirement of having a "Competent Person," sign, taking responsibility for ore reserve estimates used in company reporting under securities laws. A Competent Person was defined as a Corporate Member (Member or Fellow) of The Australasian Institute of Mining and Metallurgy (The AusIMM) with a minimum of five years of relevant experience. Early versions also included the concept that a "Competent Company" could issue such reports without a Competent Person taking responsibility, provided that it demonstrated to the Australian Association of Stock Exchanges (ASX) that it retained the services of a Competent Person. Despite what read as comprehensive requirements to meet the Competent Company provision, that provision was dropped as of the 1989 edition of the Code. From this, it seems that The ASX and The AusIMM must have had difficulty in enforcing the Code through the Competent Company provision. However, given David's suggestion of recognizing a "Competent Group" or "Competent Corporation," determining the reason for JORC dropping the Competent Company provision deserves inquiry by David and me, both as AusIMM members, to JORC.

The AusIMM expanded its definitions of qualified signatories in 1995 when it issued its first edition of the VALMIN Code for technical assessments and valuations. This Code has since been refined in the 1998 edition. The definitions and requirements are somewhat convoluted. In essence, the "Expert" taking responsibility for such a report on mineral or petroleum properties must have a

minimum of ten years of relevant experience, unless the Expert uses “Specialists” with ten years of relevant experience who take responsibility for technical sections. The VALMIN Code greatly expanded the variety of reports requiring qualified signatories, and introduced a comprehensive definition of “Independent Expert Reports.”

Accountability of AusIMM members signing reports under the JORC and VALMIN Codes is proudly enforced by The AusIMM through its proven ability to reprimand and disbar members. However, it recognizes that these Codes also open up signatories to personal legal liability. To help members protect themselves, The AusIMM has introduced professional categories of certification, with continuing education requirements. Also, its current President, Michael Lawrence, who was instrumental in the development of the VALMIN Code, has written on the importance of adequate, critical, due diligence in data verification and the need for thorough disclosure as the key professional defenses (Lawrence 1998 and 1999). In presentations and personal discussions though, he also states the importance of carrying errors and omissions insurance.

Those of us who have worked much for Canadian mining companies, are familiar with National Policy 2-A, *Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators*, introduced in 1983. A report under NP 2-A is required to support the issuance of securities and for a change in listing status. NP 2-A requires that the author must attached a signed “certificate” providing pertinent details about himself, his qualifications, and the process by which he gathered the information for the report. It is up to the judgement of the mining industry specialist at the provincial securities administration to determine if our credentials are of sufficient quality to carry the report, so pre-qualification by him is advisable.

Replacement of NP 2-A and its companion NP 22 is planned sometime in 1999 by National Instrument 43-101 and its Companion Policy 43-101CP. These more comprehensive rules are collectively titled *Standards of Disclosure form Mineral Exploration, Development and Mining Properties*. NI 43-101 will incorporate many of recommendations of the Mining Standards Task Force (MSTF) of the Toronto Stock Exchange (TSE) and Ontario Securities Commission (OSC), which has submitted its final report dated January 1999.

The MSTF report and the draft 43-101 both contain definitions of a “Qualified Person” (QP). David Abbott extensively reviews the recommendations of the MSTF Interim Report of June 1998 in his January 1999 article. The MSTF final report recommends a wide variety of QP responsibilities, but our focus here is the recommendation of responsibility and accountability for reports and disclosure for public and regulatory purposes. The recommended definition of a QP specifies an individual with 5 years’ of relevant experience and is a member of a “recognized professional association.” The draft 43-101 provides that the QP can also be a company. The Interim MSTF report also recommended that the QP could be “a corporation, partnership or other legal entity...” However, its final report restricts a QP to an individual, apparently to aid accountability through the disciplinary powers of recognized professional associations. Therefore, it is likely that 43-101 will do the same. Therefore, our second country is eliminating David’s suggestion.

To mitigate against the legal liability of the QP, the MSTF recommends that the recognized professional associations develop standards or best practices to follow, and suggests indemnification of the QP by the client. The report recognizes that considerable liability goes with increased professional recognition. US consultants based in the USA who will inevitably be acting as QPs for Canadian reporting and disclosure need to be aware that Canadians are not averse to bringing legal enforcement actions in the USA.

## References

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