Court of Queen's Bench of Alberta

Citation: Stevens v Ithaca Energy Inc, 2019 ABQB 474

Date: 20190624
Docket: 1501 05830
Registry: Calgary

Between:

David Stevens

Plaintiff

- and -

Ithaca Energy Inc. and Les Thomas

Defendants

Corrected judgment: A corrigendum was issued on June 27, 2019; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice R.A. Neufeld

I. Introduction

[1] David Stevens purchased shares in Ithaca Energy Inc. ("Ithaca") in late 2014. Until 2017, Ithaca was a publicly traded company under the regulatory jurisdiction of the Alberta Securities Commission. As such it was required to provide continuous disclosure to the investing public regarding its operations.

[2] Mr. Stevens seeks leave to bring a class action suit as representative plaintiff against Ithaca for breach of those disclosure obligations. He also seeks certification of a class proceeding. Mr. Stevens says that on four occasions between August 12, 2014 and January 12, 2015, Ithaca failed to disclose material facts relating to when it would be able to first produce oil from its wells in the Greater Stella Area (the "GSA") in the North Sea. Specifically, he contends

that there is evidence to support the conclusion that Ithaca did not disclose a number of events causing slippage in the construction and installation schedule for a floating production facility (the "FPF") that was required to bring oil resources from the GSA on-stream. The plaintiff alleges the misrepresentations were not corrected until disclosure was made on February 25, 2015.

[3] Ithaca denies having made any misrepresentations to the investing public. It says that it relied on and communicated information received from the contractor, Petrofac Facilities Management Limited ("PFML"), regarding construction progress. In particular, Ithaca claims that it relied on PFML's projected dates for completion of the FPF, "sail-away" for installation of the FPF in the GSA, and first-production of hydrocarbons. It contends that it was not required to conduct and disclose its own assessment of whether those dates were appropriate, because it did not possess the information necessary for such a major undertaking. Ithaca also argues that its public disclosures specifically warned readers of the uncertainty associated with forward-looking statements such as projected first-production dates.

[4] In deciding an application for leave to bring a class action under the *Securities Act*, RSA 2000, c S-4 [*Securities Act*], the court is required to make a robust analysis of the evidence while at the same time bearing in mind that at this stage the threshold to be met — whether there is a reasonable possibility of success — is low.

[5] I have determined that the plaintiff has met that threshold in respect of Ithaca's public statements between October 7, 2014 and January 12, 2015, and his application for leave to bring an action is granted. I also grant Mr. Stevens' application for certification of a class action under the Alberta *Class Proceedings Act*, SA 2003, c C-16.5 [*CPA*].

II. Issues

[6] Mr. Stevens seeks an order:

(a) granting him leave to proceed under section 211.08 of the *Securities Act*; and

(b) certifying the claims as a class proceeding under the *CPA*.

[7] The defendants, Ithaca and Les Thomas (Ithaca's Chief Executive Officer), argue that the plaintiff's claims have no reasonable possibility of succeeding at trial, and as a result, both leave and certification should be denied.

III. The Legal Framework

[8] Class actions are a product of statute, in this case the *CPA*. When properly grounded, they offer a mechanism for redressing wrongful conduct and discouraging its repetition that might not otherwise be available through individual actions. They also allow for actions involving similarly situated claims to be efficiently litigated.

[9] At the same time, however, the availability of class actions can create the risk of actions being advanced solely or primarily for their settlement value, with no material benefit for claimants and little effect in terms of changing the behaviour of targeted defendants. They can also threaten the financial survival of such defendants.

[10] Under the *CPA*, the court exercises a limited gatekeeper function in ensuring that class actions that are clearly without merit do not proceed through the litigation process. At the

certification stage, the court determines whether the pleadings disclose a cause of action. The facts as pleaded are assumed to be true, and the requirement is satisfied unless it is "plain and obvious" that claim cannot succeed: ***Warner v Smith & Nephew Inc***, 2016 ABCA 223 at para 12. The ultimate question before the certification judge is, however, procedural. That is, whether there is some basis in fact (as set out in the pleadings) to conclude that a class proceeding is the preferred procedure for litigating the matter: ***Warner*** at para 15.

[11] For class actions involving claims under the *Securities Act* for secondary market misrepresentation, a similarly low threshold test applies. The plaintiff must satisfy the court that the proposed action is being brought in good faith, and that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff: *Securities Act,* s 211.08(2).

[12] Importantly, however, the factual foundation for this determination is not the pleadings, but rather the affidavit evidence before the court regarding the certification application, and associated questioning. In ***Theratechnologies inc v 121851 Canada Inc***, 2015 SCC 18, the Supreme Court of Canada described the approach to be taken. It directed that the threshold for granting leave is not a mere "speed bump". The court must undertake a reasoned consideration of the evidence with a view to deciding whether the plaintiff has offered a plausible analysis of the law and some credible evidence in support of the claim. This is not a mini-trial but a screening process designed to balance the accommodation of realistic claims and the need to weed out costly strike suits and litigation with little chance of success: ***Theratechnologies*** at paras 38-39.

IV. Leave to Bring Action

[13] There is no issue that Ithaca is a "responsible issuer", and that as a result, Part 17.01 of the *Securities Act* regarding civil liability for secondary market disclosure applies. The issue between the parties is whether the threshold required under section 211.08(2) has been met, such that this court will grant permission for the plaintiff to bring his action.

[14] In this case, the plaintiff alleges in his Amended Amended Statement of Claim that Ithaca misrepresented the likely date of first production from the GSA, and consequently the income that would be received by the company in 2015 and onwards. Although he filed an expert report on this issue, in argument before me, the plaintiff advised that he would not be relying on that report but would instead rely on the affidavit of the defendant, Mr. Thomas, and related evidence given by Mr. Thomas on questioning or in response to undertakings. The plaintiff argued that this evidence shows that during the claim period four public statements were issued by Ithaca that failed to include material facts known to it, as set out in monthly progress reports provided by PFML to Ithaca pursuant to its construction contract.

[15] I will deal with each of the alleged misrepresentations later in these reasons. Before doing so, however, it is necessary to discuss the basis upon which the materiality of information not disclosed to the public is to be addressed.

[16] To begin with, it is clear that not all information available to a publicly listed company must be disclosed to the investment community. "Material Fact" is defined in the *Securities Act* as "...a fact that would reasonably be expected to have a significant effect on the market price or value of the securities": s 1(1). To be effective, disclosure must make sense, and must be provided in a digestible form. This necessarily engages a need to provide information that matters, and weed out that which does not.

[17] Whether a company has lawfully walked that line is determined by looking first at the information disclosed to investors when they made their investment decision. The next step when a material omission is alleged is to examine the information that allegedly ought to have been disclosed against the backdrop of that which was disclosed. If the omitted information would have significantly altered the total mix available to the reasonable person in making her decision to invest, then a material omission may have taken place: ***Sharbern Holding Inc v Vancouver Airport Centre Ltd***, 2011 SCC 23 at paras 59-61.

[18] With this framework in mind, I turn to the specific misrepresentations alleged by the plaintiff.

A. The Claim

[19] The plaintiff claims to have been misled by public statements made by Ithaca between August 12, 2014 and January 14, 2015, which were subsequently corrected on February 25, 2015.

[20] The plaintiff contrasts those statements with monthly progress reports, among other things, issued by PFML contractor on the FPF modification contract to Ithaca, in its capacity as operator of the GSA joint venture. He claims that those reports contain information that would have shed a different light on the dates projected by Ithaca regarding when the FPF modification would be completed at the shipyard in Gdansk, Poland, and available for transport to the North Sea for installation.

B. Background

[21] Initially, the GSA joint venture was comprised of Ithaca (through two UK subsidiaries) and a privately-owned company based in the Netherlands, Dyas UK Limited ("Dyas"). The joint venture owned hydrocarbon resources in the GSA, but had no means to produce them.

[22] In 2013, Petrofac Inc. ("Petrofac"), an international engineering company publicly traded in the UK, entered the scene. A deal was reached between Ithaca, Dyas, and Petrofac (the "Joint Venture"). Petrofac would provide the FPF, which it already owned and which was sitting unused. In return, it would earn a 20% interest in production from the Joint Venture (through its subsidiary Petrofac GSA). Petrofac undertook to perform the modification work on the FPF through its subsidiary PFML, which would be reimbursed by the Joint Venture for its costs up to US$241 million or US$250 million, depending on the scope of work completed. Costs above that amount would be absorbed by Petrofac GSA, meaning that Ithaca and Dyas would bear no portion of any cost overrun. The modifications were to be performed by Remontowa Inc. ("Remontowa") at its shipyard in Gdansk, Poland. PFML was responsible for the design, engineering, procurement, fabrication, teardown, construction, logistic and commissioning works to ensure that the FPF met the detailed contractual specifications.

[23] It was at first believed that the modifications could be completed in time to allow the FPF to be operational by mid-2014. However, the FPF required more extensive modifications than anticipated.

[24] In April 2014, participants in the Joint Venture and PFML agreed on a new re-baselined target schedule, which projected "sail-away" in May 2015 and first production in mid-2015, following approximately three months of installation and commissioning work. Both Ithaca and Petrofac made public disclosure of the re-baselined schedule.

[25] It its capacity as contractor, PFML provided monthly progress reports to Ithaca. These reports were ordinarily issued a few weeks after the month in question. They covered many topics, including construction progress as compared to the baseline or re-baselined schedule in place.

[26] When the participants in the Joint Venture and PFML agreed to the re-baselined schedule in the spring of 2014, Remontowa had not yet completed its own Level-3 Schedule estimate. This was noted in each of PFML's ensuing monthly progress reports for 2014. In addition, the need for more extensive modifications to the FPF spawned a contractual dispute between Ithaca and PFML, with PFML seeking reimbursement for additional projected costs of over $300 million.

[27] PFML asserted that the added costs were outside the scope of the original construction contract and therefore not subject to the cap, an assertion that Ithaca vigorously contested.

[28] Starting in July 2014, PFML warned in its monthly reports that the parties had reached a commercial impasse and implied that the allegedly out of scope modifications could cause further delay.

[29] Ithaca regarded the demands by PFML for additional compensation as being without merit. It also held the view that slippage in the construction schedule from the re-baselined schedule set in April 2014 was attributable to insufficient manpower at the Remontowa shipyard – something that PFML could remedy but for its desire to exert leverage on Ithaca to recover more money.

[30] Over the second half of 2014, total construction progress as reported by PFML lagged behind the re-baselined schedule by approximately 10%. Both Petrofac and Ithaca publicly maintained that the schedule for completion of the FPF modifications was essentially unchanged. Initially, they each anticipated "sail-away" as late as May 2015, with first production in mid-2015. By the end of 2014, these anticipated dates were changed to July/August 2015 (for "sail-away") and Q3 2015 (for first-production).

[31] In December 2014, PFML did not provide its usual monthly progress report. It advised Ithaca that it was preparing a new schedule (having apparently not yet received Remontowa's schedule).

[32] In early February 2015, a revised schedule (the "revised schedule") was disclosed internally and agreed upon by PFML and Ithaca, in what the plaintiff calls "corrective disclosure". It anticipated "sail-away" in the first quarter of 2016 and first-production in the second quarter of 2016. The revised schedule was publicly disclosed by both Petrofac and Ithaca on February 24, 2015. The price of Ithaca shares dropped significantly the next day.

C. The Alleged Misrepresentations

[33] The Amended Amended Statement of Claim alleges a variety of misrepresentations. In argument before me, however, the plaintiff focussed on allegations of misrepresentation by omission.

[34] The *Securities Act* defines misrepresentation in section 1(ii) as follows:

> "misrepresentation" means
>
> (i) an untrue statement of a material fact, or

(ii) an omission to state a material fact that is required to be stated, or

(iii) an omission to state a material fact that is necessary to be stated in order for a statement not to be misleading;

[35] Ithaca does not challenge the good faith of the plaintiff. Rather, it says that the action has no reasonable possibility of success because its public statements did not misrepresent the project schedule by either commission or omission.

[36] The plaintiff argues that he has a reasonable possibility of showing that each of the four public statements made by Ithaca over the claim period were misleading because material facts bearing on the likely date of first-production were withheld. He says that the impression left on readers of these statements was that everything was progressing as planned, when in fact that was not the case.

Alleged Misrepresentation No. 1 – August 12, 2014

[37] On August 12, 2014, Ithaca released its Second Quarter results. Accompanying the release was its Management Discussion and Analysis ("MD&A").

[38] The MD&A projected 2014 energy production as within the company's guidance range, with production of approximately 14,300 Barrels of Oil Equivalent Per Day ("BOEPD"). It then discussed progress in its plans to essentially double that production once its GSA wells were brought on-stream.

[39] The MD&A also contained a discrete "Greater Stella Area Development Update". It described progress being made in drilling development wells and installation of subsea infrastructure works.

[40] It then described progress on the FPF modifications program as follows:

> FPF-1 Modification Works
>
> Completion of the FPF-1 modifications programme is the key development activity dictating the overall schedule for first hydrocarbons from the GSA hub. As highlighted in May 2014, whilst progress was being made on the topsides processing plant construction programme, it was advancing more slowly than planned. As a consequence, it was announced that the vessel would be ready for sail-away from the Remontowa yard in Poland to the Stella field in spring 2015. This schedule is anticipated to result in first hydrocarbons from the GSA hub in mid-2015. Since the schedule update, Petrofac has made good progress implementing changes to expedite completion of the remaining modification works, including managerial changes in the yard team and the deployment of increased manpower on the construction workscopes.

[41] The plaintiff argues that this description of progress on the FPF modification work was misleadingly optimistic. He argues that the monthly reports from PFML did not support such optimism.

[42] In its June 2014 report to Ithaca, PFML stated that the project was targeting its P40 "sail-away" for March 2015, but noted that alignment with Remontowa's schedule had not occurred.

Therefore, PFML would develop its own Level-3 Schedule and prepare alternative execution strategies in order to achieve target completion and "sail-away" dates.

[43] PFML advised that it had, therefore, decided not to update its overall progress as "progress may be re-set depending on the outcome of schedule discussions and reanalysis of current progress". PFML also reported that the project had reached a commercial impasse which could result in an extension of the contractually defined "completion date" until May 30, 2015.

[44] The plaintiff also argues that, according to PFML's July 2014 report, a meeting was held on July 30, 2014 (before the Q2 2014 MD&A) in which the commercial impasse was discussed, as it was the contractor's intent to instigate the dispute resolution process under the contract if no resolution was reached.

[45] The plaintiff says that these were material facts that were omitted from the MD&A. Investors were entitled to know about these problems, although Ithaca could have explained how they were being addressed. This is similar to the approach taken in the Ontario Superior Court of Justice decision of ***Wong v Pretium Resources Inc***, 2017 ONSC 3361, where the court granted an application for leave to commence an action for secondary market misrepresentation involving the correction of a material fact about the mineral resource estimate for a mine. In that case, the defendant mining company retained a mining consultant, Strathcona Mineral Services ("Strathcona"), to engage in a bulk sample program to test and verify a Mineral Resource Estimate prepared by another mining consultant, Snowden. Strathcona expressed concerns about the Mineral Resource Estimate, but the defendant did not agree with the reliability of Strathcona's results or that the concerns were material, and no public disclosures were made. Ultimately, the concerns were not warranted, but Belobaba J concluded that reasonable investors would have considered it material that two mining consultancies fundamentally disagreed as to whether there were valid mineral resources: at para 37. In those circumstances, he held that the defendant "should have disclosed Strathcona's concerns when they were voiced, adding its own views about the unreliability of the sample tower results if they wanted to do so": at para 38.

[46] Ithaca argues that the MD&A contained no misrepresentations regarding progress. It says that the MD&A expressly warns readers that forward-looking statements are subject to uncertainty, and that the assumptions upon which they are based may be incorrect. Therefore, while Ithaca believes that the expectations expressed are reasonable, no assurance can be given that they will turn out to be accurate.

[47] According to Mr. Thomas' Affidavit evidence, Ithaca considered PFML's contractual demands to be unmerited, and that they posed an immaterial financial risk. It also considered that although progress was behind schedule as of July 2014, this delay could be remedied by the contractor devoting additional resources to the project. Thus, Ithaca believed that the dates expected by the parties (and publicly reported by Petrofac) remained reasonable.

[48] While in retrospect, the re-baselined schedule of April 2014 was not achievable, I see no credible evidence to support an argument that as of August 2014 Ithaca acted unreasonably in relying on it, or should have disclosed more information to investors than it did. Specifically, I do not consider that the total mix of information available at that time would have been significantly altered if Ithaca had stated that a contractual dispute had arisen between the GSA Project and PFML regarding financial responsibility for certain costs, or that alignment had not yet been reached with Remontowa regarding the construction schedule. A reasonable investor would expect that while in transition to a new construction program, as contemplated under the

new schedule, issues such as these would need to be managed. Ithaca submitted that, as of September 8, 2014, it did not consider the gap between target completion and actual completion of PFML's work was significant, and was of the view that the gap could be closed if PFML committed additional resources and manpower. As of August 2014, this was an objectively reasonable position.

Alleged Misrepresentation No. 2 – October 7, 2014

[49] On October 7, 2014, Ithaca issued a "Third Quarter 2014 Operations Update." This was a non-core document, so the plaintiff would need to establish that misrepresentations alleged in the update were knowingly made: *Securities Act*, s 211.04(1).

[50] As the document's title connotes, it was focused on providing an update on production during 2014. It indicated that 2014 performance production was anticipated to be around 12,500 BOEPD versus the 13,500 BOEPD given earlier as the low end of the 2014 guidance range.

[51] It went on, however, to update progress on the GSA Development:

> Greater Stella Area Development
>
> Continued progress had been made during the quarter on execution of the Greater Stella Area development. The fourth Stella development well was successfully completed, further de-risking the initial annualised production forecast for the field. The ENSCO 100 drilling rig has now been moved to the main drill centre on the field and has commences operations on the fifth Stella development well. Work on this year's subsea infrastructure installation campaign has been successfully completed and preparation is well advanced for finishing the remaining subsea activities in 2015. Construction activities continue on the main deck of the "FPF-1" floating production facility, with completion of the works and the delivery of first hydrocarbons scheduled for mid-2015.

[52] The plaintiff argues that this description was misleadingly optimistic – particularly the last sentence of the paragraph.

[53] The plaintiff argues that PFML's July 2014 monthly report had stated that the project was continuing to pursue a March 2015 "sail-away" date but that a revised project Level-3 Schedule was being prepared. The plaintiff claims that Ithaca had concluded by that time that neither the March 2015 (40% possibility, or P40) "sail-away" date nor the May 2015 (90% possibility, or P90) "sail-away" date was achievable. In support of this claim, the plaintiff cites a letter from Ithaca to PFML dated September 8, 2014, concerning the ongoing contract dispute, which stated:

> Further, the Project S Curve for Construction, included by CONTRACTORS in its Monthly Report for July 2014 (issued to COMPANY on 29 August 2014), identifies that actual construction progress at 25 July 2014 was circa 51% against planned progress of circa 60%, based on a Mechanical Completion date of March 2015. With this delay to the date for Mechanical Completion CONTRACTOR is clearly unable to achieve its P40 to P90 sail-away delivery window, as advised in Your Letter, and COMPANY requests confirmation from CONTRACTOR of the revised window. [emphasis in original]

[54] The plaintiff says that this shows that Ithaca knowingly misrepresented the progress of modifications to the floating platform and therefore the Company's ability to double its production by mid-2015.

[55] Ithaca argues that its Operations Update was factually correct, because the modification project schedule, as communicated to it by PFML, remained unchanged. It says that the statement appearing in its September 9, 2014 letter was made for a tactical purpose: to force PFML to acknowledge that it was able to meet the projected schedule if sufficient resources were employed. Ithaca goes further and notes that the strategy was successful, as PFML responded by reinstating its ability to deliver the project on-time. The plaintiff does not directly dispute this, but says that investors were entitled to be advised of the fact that the project was behind schedule and needed substantial extra resources in order to recover (the message communicated by Mr. Thomas to Ithaca's Board of Directors).

[56] While the October 7, 2014 Operations Update was factually correct, there is some credible evidence that at this point Ithaca had significant concerns regarding PFML's ability or willingness to meet such schedule.

[57] Ithaca's letter of September 9, 2014 formally advised PFML of those concerns and an internal memorandum to the Board of Directors expressed the view that the schedule could not be maintained without new resources. Given the importance of the GSA development to Ithaca's projected earnings, these doubts and concerns may have significantly altered the total mix of information available to investors deciding on whether to acquire shares in Ithaca.

[58] Ithaca may very well be able to show at trial that its letter to PFML was mere posturing, and that the internal memorandum was not significant, but at face value they constitute some evidence that Ithaca's reliance on PFML's projected completion and start-up date schedule for disclosure purposes was not reasonable, and that this was known to Ithaca. In addition, there is a reasonable possibility of success in showing that Ithaca's reliance on PFML's projections for disclosure purposes was not reasonable, absent further explanation, such that Ithaca would not be protected by its cautions to investors regarding forward-looking statements.

Alleged Misrepresentation No. 3 – November 13, 2014

[59] On November 13, 2014 Ithaca issued its Q3 2014 Financial Results.

[60] It provided the following update on the GSA Development:

> Greater Stella Area Development Update
>
> Continued progress has been made during the Quarter on execution of the Greater Stella Area Development. The fourth Stella development well was successfully completed, further de-risking the initial annualised production forecast for the field of approximately 30,000 boepd (100%), 16,000 boepd net to Ithaca. Operations are currently on-going on the fifth Stella development well, which is scheduled to be completed in early 2015. Work on this year's subsea infrastructure installation campaign has been successfully completed and preparation is well advanced for finishing the remaining subsea activities in early 2015. Construction activities continue on the main deck of the "FPF-1" floating production facility, with completion of the works and the delivery of first hydrocarbons scheduled for mid-2015.

[61] The plaintiff argues that by this point in time, even if May 15, 2015 was still the scheduled "sail-away" date, it was significantly at risk. He points to the following portion of the September 2014 progress report from PFML to Ithaca:

> The May 2015 schedule date is under pressure due to the ongoing impact of contract variations with July/August 2015 now more likely. The development of the revised Level 3 Schedule is ongoing based on the final design and MTO/BOQ incorporating all the Variations now available. As previously recorded the revised schedule will incorporate all currently known changes including scope associated with both Methanol Washing and Tanker Loading together with information associated with Engineering, Procurement and Construction Activities...

[62] He also says that, while the scheduled "sail-away" date may not have changed, the contractor, PFML, remained approximately 10% behind schedule in terms of construction progress even as to the re-baselined schedule and without considering the possibility of a new schedule being announced.

[63] The project's "S" curve for total construction illustrated this delay, and also noted (as had previous iterations) that PFML awaited agreement with Remontowa on the contract schedule.

[64] Ithaca contends that the impugned statement was factually correct, and consistent with information being provided by Petrofac to the market at the time in public releases. Ithaca says that the best information available at the time was that PFML continued to target the previously set "sail-away" date and continued to project first-production in mid-2015. Ithaca says that it was under no obligation to critique the mention of PFML's schedule for investors, and once again emphasizes that investors were warned that the MD&A contained forwarded-looking information, such as projected dates for first-production from the GSA, along with clear cautions as to the use of such statements.

[65] Ithaca also says that by this point in time, PFML had responded to Ithaca's letter of September 9, 2014, in which Ithaca said that PFML was "clearly unable to achieve its P40-P90 sail-away delivery window, and requested a revised window, stating in its response letter of October 14, 2014:

> With regard to COMPANY'S assertions referring to the percentage completion figures in the July 2014 Monthly Report and the inferences that the May 2015 date is not achievable, CONTRACTOR rejects this opinion.

[66] The letter, however, went on to state that the contract variations driving the commercial impasse "are likely to put the previously forecast completion dates under pressure making July 2015 a real possibility."

[67] In my view, the continued uncertainty and disagreement on achievable "sail-away" and first-production dates shown in this correspondence constitutes at least some credible evidence that the projections contained in the Q3 2014 MD&A, while factually correct as worded, were misleading. This is particularly the case when considered in the context of monthly progress reports that continued to show that the project was behind schedule and continued to note that the re-baselined schedule depicted had not yet been aligned with the builder's own schedule. Also noteworthy is subsequent email correspondence in which Petrofac expresses its concern over past public releases by Ithaca.

[68] When considered as a whole, I conclude that the plaintiff has a reasonable possibility of success in showing that the missing information would have significantly altered the mix of information available to an investor considering purchasing shares in Ithaca regarding the progress of the modification works and associated dates for first-production. There is also a reasonable possibility of success in showing that Ithaca's reliance on PFML's schedule for disclosure purposes and without further explanation was not reasonable, such that Ithaca would not be protected under the cautions given to investors regarding forward-looking statements.

Alleged Misrepresentation No. 4 – January 12, 2015

[69] On January 12, 2015, Ithaca issued a non-core document entitled "Ithaca Energy Inc. Operations Update & 2015 Update 12 January 2015" (the "January 2015 Update"). It stated in part:

> Greater Stella Area
>
> Significant progress was made in 2014 on the development of the GSA production hub, with the clean-up flow test results from the first four Stella development wells de-risking forecast initial production from the hub.
>
> The critical path item for delivering first hydrocarbon from the Stella field is completion of the "FPF-1" floating production facility modifications being undertaken by Petrofac. As reported by Petrofac at the end of November 2014, it continues to advance the modification works and anticipates the vessel being finished in time to enable first production from the Stella field in the third quarter 2015. Further details will be provided during the year on the anticipated start-up schedule for the field as additional information becomes available from Petrofac on the timing for sail-away of the FPF-1 from the modifications yard in Gdansk, Poland.
>
> Drilling operations on the Stella Ekofisk development well are progressing and completion of the clean-up flow test period is anticipated in February 2015. Following completion of the well the ENSCO 100 rig will be demobilised, marking the end of the Stella development drilling campaign. It is planned for the remaining subsea infrastructure installation activities required prior to the arrival of the FPF-1 on location to be undertaken in Spring 2015, leaving the final vessel hook-up element of the programme to be completed once the vessel is on location.

[70] The plaintiff contends that by this point in time the dates for "sail-away" and first-production previously provided to investors had become unrealistic, and Ithaca's failure to disclose that to investors constituted a material misrepresentation by omission.

[71] In support of this position, the plaintiff refers to emails between Ithaca, Petrofac, and Dyas regarding the information being provided to investors. In one of those emails an executive from Petrofac states that, at some time, the companies will have to be more realistic (with Petrofac now projecting first-production in Q3 2015 in its own public update dated November, 24 2014 ("November 2014 Update"). An email from Dyas to Ithaca dated January 9, 2015 described a Q3 2015 completion date at the Remontowa shipyard as a "dream", with Dyas refusing to approve Ithaca's draft press release.

[72] The plaintiff argues that Ithaca was obliged to fully communicate the schedule slippage that was obviously occurring at the end of 2014 to the investing public, but it failed to do so in its

January 2015 Update. He says that it was not until the end of the claim period when Ithaca issued its February 25, 2015 "correction statement" (as he terms it) that more realistic dates for "sail-away" and first-production were given.

[73] Ithaca responds by noting that all of the statements contained in the January 2015 Update were factually correct and made in reliance on information contained in Petrofac's November 2014 Update. It says that it provided a draft of its own update to Petrofac, who (unlike Dyas) did not disagree, or propose any changes. Ithaca also says that it was not in a position to provide a different schedule to the investing public, as all relevant information regarding construction progress as of that date was held by PFML and Remontowa, neither of whom were sharing information with Ithaca pending completion of a revised schedule.

[74] As with the earlier misrepresentation alleged, Ithaca also maintains that the scheduled dates included in its January 2015 Update clearly fell into the category of forward-looking information. Because its use of cautionary language regarding forward-looking information and its reasonable reliance on PFML for scheduling information, Ithaca says that it is shielded from liability pursuant to section 211.04(9) of the *Securities Act*.

[75] The January 2015 Update was more nuanced and carefully worded than previous iterations. It explicitly relied on Petrofac's November 2014 Update, and Petrofac's anticipation that the vessel would be completed in time for first-production in Q3 2015. It also promised to provide further details during the year on the anticipated start-up schedule for the field as additional information "becomes available from Petrofac on the timing for sail-away of the FPF-1 from the modifications year in Gdansk Poland".

[76] Despite the more cautious wording, I find that there is credible evidence that a significant slippage in the project schedule had occurred, with the extent of delay being actively reviewed by PFML and Remontowa.

[77] In my view, there is a reasonable possibility of success in arguing that an investor would consider the continued lack of progress relative to the re-baselined schedule, the delay of a Level-3 Schedule by PFML until the builder had completed its own schedule, and the divergence of opinion among the Joint Venture participants as to the likely date of first-production, to be a significant alteration to the total mix of information upon which an investment decision would be based. There is also a reasonable possibility that the plaintiff will succeed in showing that it was not reasonable in the circumstances for Ithaca to rely on and repeat Petrofac's projection of a Q3 2015 first-production date, and is not shielded from liability for that forward-looking statement under section 211.04(9) of the *Securities Act*.

D. Conclusion on Alleged Misrepresentations

[78] As required under section 211.08(2) of the *Securities Act*, I am satisfied that this action is being brought in good faith, and that there is a reasonable possibility that the plaintiff will succeed at trial in respect of Alleged Misrepresentations No. 2, 3 and 4. As I have noted above, this is a low threshold to be met. Therefore, I grant permission to the plaintiff to proceed with the claim in respect of Alleged Misrepresentations No. 2, 3 and 4. Permission is not granted in respect of Misrepresentation No. 1.

V. Certification of Class Action

A. Class Action Requirements

[79] The plaintiff seeks to have this action certified as a class action, and to be appointed as the Representative Plaintiff, pursuant to section 5 of the *CPA*. The test for certification is set out in section 5(1):

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[80] The defendants have only taken issue with (a) above, arguing that the plaintiff's claims have no reasonable possibility of succeeding at trial, and therefore the action should not be certified. I have already concluded above that there is a cause of action in respect of Alleged Misrepresentations No. 2, 3 and 4. It remains necessary to consider (b) through (e), as regardless of the position taken by the defendants, the court must be satisfied as to each of the above requirements. The burden is on the plaintiff to establish each requirement: ***Windsor v Canadian Pacific Railway Ltd***, 2007 ABCA 294 [***Windsor***] at para 17, citing ***Hollick v Toronto (City)***, 2001 SCC 68 [***Hollick***] at para 17.

B. Remaining Section 5(1) Requirements

Identifiable Class

[81] In order to be certified as a class action, class members must be identifiable by stated, objective criteria: ***Windsor*** at para 18, citing ***Western Canadian Shopping Centres Inc v Dutton***, 2001 SCC 46 [***Western Canadian Shopping Centres***] at para 38. In ***Windsor***, the Alberta Court of Appeal set out the following criteria for the class, at para 18:

> A plaintiff must establish that the class is capable of being defined by objective criteria that will permit the identification of potential class members without

reference to the merits of the claim, and that there is a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues.

[82] The plaintiff proposes the following class:

> "Class" or "Class Members" means all persons, other than Excluded Persons, who acquired Ithaca's common shares during the Class Period and who held some or all of those securities, either beneficially or as the holder of record, at the close of trading on February 24, 2015.

[83] "Class Period" is defined in the Amended Amended Statement of Claim as "...the period from and including August 12, 2014 to and including February 24, 2015". This is the period between the Alleged Misrepresentation No. 1 and the date the corrective disclosure (as the plaintiff calls it) on February 25, 2015.

[84] "Excluded Persons" is defined in the Amended Amended Statement of Claim as "...Ithaca's subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns."

[85] I accept the class definition proposed by the plaintiff would establish a class defined by objective criteria without reference to the merits of the claim (share ownership during the Class Period; not an Excluded Person). There is a rational connection between the proposed class, the proposed causes of action (which arise during the Class Period), and the proposed common issues.

[86] The Class Period must be amended to reflect that the action is proceeding from October 7, 2014, the date of Alleged Misrepresentation No. 2. I do not view this as "entering the ring" to remedy a lacking class definition or to fill gaps in the pleadings as cautioned against by the Alberta Court of Appeal in ***Andriuk v Merrill Lynch Canada Inc***, 2014 ABCA 177 at para 12. It is a simple adjustment to reflect my decision on which aspects of the proposed action can proceed under the *Securities Act*.

Common Issues

[87] To be certified as a class action, the claims must raise common issues among the class members. "Common issue" is defined in section 1(e) of the *CPA* as "(i) common but not necessarily identical issues of fact, or (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

[88] In assessing whether claims raise common issues, the question is whether allowing an action to proceed as a class action will avoid duplication, either in fact-finding or in legal analysis. In other words, resolution of a common issue is necessary to resolve each class member's claim. The issues do not have to be identical, but common issues must predominate over non-common issues and class members' claims must share a substantial common ingredient: ***Western Canadian Shopping Centres*** at para 39, ***Hollick*** at para 18.

[89] In his written brief, the plaintiff proposes the following common issues for certification:

(i) Were the delays and/or cost overruns with the Modification Program material facts that were required to be disclosed by the defendants?

(ii) Did the defendants' failures to disclose the delays and/or cost overruns with the Modification Program constitute misrepresentations by omission?

(iii) If there were misrepresentations, do the misrepresentations give rise to liability under section 211.03 of the *Securities Act*, and/or under the equivalent legislation in other provinces? If so, for which defendants, for which misrepresentations for each defendant, and for what time period(s)?

(iv) Did the defendant Mr. Thomas, or someone under his authority, authorize, permit or acquiesce in the release of each of the documents containing such alleged misrepresentations?

(v) Did Ithaca and/or Mr. Thomas know of each of the alleged misrepresentations at the time that they were made? If not, were these defendants wilfully blind to each of the misrepresentations at the time that they were made, and does wilful blindness constitute knowledge for the purposes of section 211.07(2) of the *Securities Act* or the provisions of equivalent legislation in other provinces?

(vi) Did the documents released by Ithaca and Petrofac on February 25, 2015 contain public corrections of previously-misrepresented material facts?

(vii) If leave is granted, are one or both of the defendants liable to pay damages to the Class Members, pursuant to section 211.03 of the *Securities Act* or the provisions of equivalent legislation in other provinces?

(viii) If so, which (or both) of the defendants is liable, and what are the damages payable by each defendant found liable?

(ix) Did the price of Ithaca's securities incorporate and reflect any of the alleged misrepresentations made during the Class Period, and if so, what effect did such misrepresentations have on the prices of Ithaca's securities during the Class Period?

(x) Is Ithaca vicariously liable or otherwise responsible for the acts of its officers, directors and employees, including Mr. Thomas?

(xi) If the court determines that the defendants, or some of them, are liable to the Class Members, and if the court considers that the participation of individual Class Members is required to determine individual issues:

a. Are directions necessary?

b. Should any special procedural steps be authorized?

c. Should any special rules relating to admission of evidence and means of proof be made?

d. What directions, procedural steps or evidentiary rulings ought to be given or authorized?

(xii) Should one or both of the defendants pay pre-judgment and/or post-judgment interest? If so, who should pay it, and at what rate? Should the interest be simple or compounded?

(xiii) Should one or both of the defendants pay the costs of administering and distributing any monetary judgment and/or costs of determining eligibility and/or costs of determining any individual issues? If so, who, and in what amount?

[90] I agree with the plaintiff's submission that a determination of the proposed common issues will substantially advance the litigation. I expect there will be individual issues that require determination, including establishing the appropriate damages for each proposed Class Member proportionately where, as in this action under Part 17.01 of the *Securities Act*, there is a statutory liability limit. However, proceeding as a class action will avoid duplication in respect of the defendants' knowledge and actions, as well as in determining whether misrepresentations were made. I find there is a substantial common ingredient in the proposed Class Members' claims, and that the common issues predominate over non-common issues.

Preferable Procedure

[91] Pursuant to section 5(1)(d) of the *CPA*, the court must also be satisfied that a class proceeding would be the preferred procedure for the fair and efficient resolution of the common issues. Factors to be considered in determining whether a class action is the preferred procedure are set out in section 5(2), as follows:

> 5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
>
> (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[92] The proposed common issues would be, in my view, the main issues to be determined in the action. While there may be individual issues to be determined, particularly to determine Class Members' individual share of a damages award, the questions common to the class predominate.

[93] I accept the plaintiff's submissions that there has been no evidence adduced of any prospective class member who may have a valid interest in controlling the prosecution of a separate action, and that there is no evidence of any lawsuit or claim having been filed against the defendants in respect of the same issues raised in this action. There will be a means of opting

out of the Class that will be available if it later is determined that a Class Member wishes to pursue an individual remedy.

[94] I also accept the plaintiff's submission that other means of resolution would require individual determination of the common issues, and would therefore be less efficient and less practical. There has been no argument raised that a class proceeding would create difficulties for the Class Members or the defendants, and in fact, they would benefit from a more efficient, cost-effective proceeding.

[95] To proceed with a class action in this case would have the advantages identified by the Supreme Court of Canada of promoting judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis, improving access to justice by distributing fixed litigation costs among Class Members, and serving efficiency and justice by ensuring that wrongdoers have an incentive to modify their behaviour to take account of the harm they are causing (or might cause) to the public: ***Hollick*** at para 15, ***Western Canadian Shopping Centres*** at paras 27-29.

[96] For all of these reasons, I conclude that a class proceeding is the preferable procedure.

Representative Plaintiff

[97] The final requirement in section 5(1) of the *CPA* is that there must be a proposed Representative Plaintiff who will fairly and adequately represent the interests of the class, has provided a plan for the proceeding, and has no conflict of interest with other prospective class members in respect of the common issues.

[98] Mr. Stevens seeks to be appointed as the Representative Plaintiff. There has been no objection raised by the defendants concerning Mr. Stevens' ability to fairly and adequately represent the class. The court should be satisfied "that the proposed representative will vigorously and capably prosecute the interests of the class": ***Western Canadian Shopping Centres*** at para 41. As a shareholder of Ithaca and a member of the proposed class, Mr. Stevens has a self-interest in pursuing this action. He has been active in the litigation, participating as affiant in an interlocutory application to compel answers to an undertaking. Given his self-interest, I am satisfied he will vigorously and capably prosecute the interests of the class.

[99] In the plaintiff's written submissions, he proposes a plan for advancing the action. It includes obtaining court approval for a procedure to notify potential class members of the certification of the action and opt-out procedures, the exchange of affidavits of records, and a general commitment to proceed with the litigation of the common issues in an expeditious manner, with any issues to be addressed in case management. There is a proposed form and method of Notice of Certification at Appendix D to the Application filed December 8, 2015, and a proposed litigation plan at Appendix F. The defendants have raised no objection to the proposed plan.

[100] While the plan set out in the plaintiff's written submissions is general, I am mindful of the decision of Rooke J (as he then was) in ***Windsor v Canadian Pacific Railway Ltd***, 2006 ABQB 348, var'd 2007 ABCA 294, where he noted, at para 162:

> In my view, [the] term "workable," as it is used in s. 5(1)(e)(ii), is meant to convey the requirement that the plan does not need to be perfect, but instead be capable of implementation in the circumstances. Improvements can be made to the litigation plan in case management, including in the details of the Certification

> Order herein if either party so desires. This accords with the legislative scheme and the mandated tools under Civil Practice Note #1.

[101] The proposed plan is specific as to early steps in the litigation, including notice to the proposed class members and documentary disclosure. I find the proposed plan in the plaintiff's written submissions is workable. In addition, the proposed litigation plan at Appendix F covers before and after the litigation of the common issues, and will likely evolve with the assistance of the case management process as the litigation progresses.

[102] There is no evidence of any conflict of interest between the plaintiff and other proposed Class Members in respect of the common issues. There is no contradictory evidence, and I am satisfied that Mr. Stevens meets this requirement.

[103] As a result, I find that Mr. Stevens is an appropriate Representative Plaintiff.

C. Conclusion on Certification of Class Action

[104] Section 5(3) of the *CPA* requires the court to certify the proceeding where it is satisfied that each of the requirements in section 5(1)(a) through (e) have been met. I am satisfied that the plaintiff has met all of the requirements of section 5(1), and accordingly, I certify the action as a class action.

D. Certification Order

[105] The *CPA* sets out the requirements for a Certification Order in section 9(1), as follows:

> 9(1) Where the Court makes a certification order, the Court may include any provisions that it considers appropriate, but in its order the Court must at least
>
> (a) describe the class in respect of which the order is made by setting out the class's identifying characteristics;
>
> (b) appoint the representative plaintiff for the class;
>
> (c) state the nature of the claims asserted on behalf of the class;
>
> (d) state the relief sought by the class;
>
> (e) set out the common issues for the class;
>
> (f) state the manner in which and the time within which a class member may opt out of the proceeding.
>
> ...

[106] The court may amend the Certification Order at any time on application of a party or Class Member, or on the court's own motion: *CPA*, s 9(4).

[107] Subsections 9(1)(a), (b) and (e) have already been dealt with in this decision. Appendix A to the Application filed December 8, 2015 summarizes the nature of the claims asserted on behalf of the class, while Appendix B sets out the relief sought on behalf of the class on this application, as well as in the action. The form and method of Notice of Certification to be given to proposed members of the class, as well as the procedure for opting out, are in Appendix D.

[108] I find the nature of the claims for the purpose of the Certification Order is set out in paragraphs 1 to 13 of Appendix A to the Application. I further find that the relief sought on behalf of the class for the purpose of the Certification Order is set out in paragraph 16 of

Appendix B, with the name of the Representative Plaintiff, David Stevens, replacing the proposed representative plaintiff named in Appendix B. Finally, I approve the proposed form and method of notice of certification in Appendix D, including the opt out process contained at page 18 of Appendix D. Counsel are directed to agree upon reasonable dates for the opt out process and to include them in the Certification Order.

VI. Conclusion

[109] I have decided that the plaintiff has met the prerequisites for leave to bring an action under section 211.08(2) of the *Securities Act*, and hence under the *CPA*, covering the time period of October 7, 2014 to February 25, 2015.

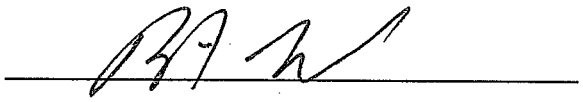
[110] I have also decided that the action should be certified as a class action, with the Class as defined in paragraphs 82 to 84 of this decision. The Class Period is to be revised to the period of October 7, 2014 to February 25, 2015. Mr. Stevens will be appointed the Representative Plaintiff for the class. The common issues are those set out in paragraph 89 of this decision.

[111] I will continue as the case management judge, in accordance with section 15(1) of the *CPA*. The parties may seek advice and direction at any time, including on issues raised but not argued on the Application regarding the nature of the claims asserted and relief sought on behalf of the class.

[112] The Certification Order is to be prepared by the plaintiff's counsel in accordance with this decision, including paragraph 108 above. If the parties are unable to agree on dates for the opt out process, counsel may briefly advise me in writing of their respective proposed dates and I will advise of the dates to be included in the Certification Order.

[113] If the parties are unable to agree on costs, they may contact my office within 60 days of the date of this decision to arrange to speak to costs.

Heard on the 7th and 8th day of March, 2019.
Dated at the City of Calgary, Alberta this 24th day of June, 2019.



R.A. Neufeld
J.C.Q.B.A.

Appearances:

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Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice R.A. Neufeld

Para 1- In 2017 Ithaca Energy Inc. ceased to be publicly traded. Paragraph 1 of the Reasons for Judgment has been amended to reflect that fact.