Court of Queen's Bench of Alberta

Citation: Flesch v Apache Corporation, 2021 ABQB 491

Date:
Docket: 1901 09160
Registry: Calgary

Between:

Stephen Flesch, Marshal Thompson, Tyler Maksymchuk, Reid Chamberlain

Plaintiffs

- and -

Apache Corporation, Paramount Resources Ltd., William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pittman

Defendants

Reasons for Decision on Certification Application
of the
Honourable Mr. Justice G.H. Poelman

I. Introduction

[1] The plaintiffs apply for certification of their action as a class proceeding, pursuant to section 5(1) of the *Class Proceedings Act*, S.A. 2003, c. C-16.5. Their application is opposed only in part by Apache Corporation ("Apache") and the individual defendants, while Paramount Resources Ltd. ("Paramount") opposes any certification order against it.

[2] The plaintiffs and proposed class members were employees of Apache Canada Ltd. ("Apache Canada"), wholly owned by Apache, at the time Apache sold its shares of Apache Canada to Paramount. (The ultimately amalgamated corporation, comprising the former Apache

Canada and Paramount, will be referred to as "Apache Canada/Paramount," except where context makes it useful to distinguish between the two.) In conjunction with the sale of shares, unvested awards of deferred compensation units granted by Apache to the employees were cancelled. The plaintiffs' action seeks remedies founded in contract, fiduciary duties and unjust enrichment.

[3] The plaintiffs commenced this action on July 2, 2019. They later filed an amended statement of claim.

II. Factual Overview

[4] Apache is a Houston-based oil and gas company, with subsidiaries and operations throughout the world. It conducted operations in Canada through Apache Canada, an indirect, wholly-owned subsidiary, until August 18, 2017. The individual defendants were directors of Apache (those defendants collectively referred to as the "Directors").

[5] At the relevant times, Apache had a long-term compensation plan constituted under two iterations of an Apache Omnibus Compensation Plan ("the Plan"). The documents were issued in 2011 and 2016. The terms relevant to this action are identical between the two documents. My references are to the 2011 version, which was amended and restated effective December 15, 2015. The Plan provides for three forms of awards, namely restricted stock units, stock options and performance awards (collectively "the Awards").

[6] Many Apache Canada employees received one or more forms of the Awards as part of their employment compensation. The Awards were granted in the form of notices, each of which had an attached Grant Agreement. Each employee was required to indicate acceptance of an award by responding to the notice. In many cases, the Awards formed a significant portion of an employee's annual compensation.

[7] The Plan was administered by Apache's Management Development and Compensation Committee ("the Committee"). The Directors were members of the Committee during July and August 2017.

[8] On July 6, 2017, at a meeting of Apache Canada employees, Apache Canada executives announced that Apache was withdrawing from its Canadian operations and all shares of Apache Canada had been sold to Paramount. By a transaction that closed effective August 18, 2017, a subsidiary of Paramount acquired all of Apache Canada's shares. The parties used different dates to refer to the transaction in August, being either August 16 or 18; however, nothing turns on this fact and the date of August 18 will be used for the purposes of this decision.

[9] Through another series of transactions, Apache Canada was later amalgamated into Paramount on January 1, 2018. Following the sale of Apache Canada's shares, 347 of its employees continued to be employed with Paramount (or, initially, its subsidiary). Most of them continued their employment in similar positions, with similar duties and responsibilities and received the same salaries.

[10] The Awards employees had received under the Plan were all cancelled upon closing of the sale (which was part of the announcement made to employees on July 6, 2017). Later in 2017, Apache Canada employees were provided with various opportunities to participate in Paramount's share options. The plaintiffs say that they did not receive comparable or equitable

substitution for cancellation of the Awards; the defendants do not argue that the Paramount awards replaced their value.

[11] Substantial evidence was submitted by the plaintiffs and the defendants as affidavits with significant documentary exhibits and transcripts of cross-examinations on the affidavits. The evidence is helpful on various points but generally not controversial. Thus, it will only be referred to as relevant on certain points. There is no need to review it in detail.

[12] Key to understanding the issues are several provisions of the Plan, excerpts of which are as follows:

> 2.1 *Definitions*. The following terms shall have the meaning set forth below:
>
> . . .
>
> (i) *"Eligible Persons"* means those employees of the Company or of any Affiliates, members of the Board, and members of the board of directors of any Affiliates who are designated as Eligible Persons by the Committee. . . .
>
> 5.1 *Participation*. Participants in the Plan shall be those Eligible Persons who, in the judgment of the Committee . . . , are performing, or during the term of their incentive arrangement will perform, vital services in the management, operation, and development of the Company or an Affiliate, and significantly contribute, or are expected to significantly contribute, to the achievement of the Company's long-term corporate economic objectives.
>
> 12.1 *In General*. In the event of the occurrence of a Change of Control of the Company:
>
> (a) Without further action by the Committee or the Board,
>
> all outstanding Options shall fully vest upon the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after a Change of Control. Such newly vested Options shall be fully exercisable as of the date of the Involuntary Termination or Voluntary Termination with Cause on or after a Change of Control occurs.
>
> (b) Without further action by the Committee or the Board,
>
> all unvested Restricted Stock Awards and Restricted Stock Units shall fully vest upon the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after a Change of Control. Such newly vested Restricted Stock Units shall be converted to Stock and the Participant shall be issued the requisite number of shares . . . .
>
> (c) Assuming the achievement of a Performance Goal, the entitlement to receive cash and Stock under any outstanding Performance Award grants shall vest automatically, without further action by the Committee or the Board . . . .
>
> Section 13

> In the event that the Company is merged or consolidated . . ., then the Committee . . . shall, as to the Plan and outstanding Awards make appropriate provision for the adoption and continuation of the Plan by the acquiring or successor corporation and for the protection of any holders of such outstanding Awards by the substitution on an equitable basis of appropriate stock of the Company or of the merged, consolidated, or otherwise reorganized corporation which will be issuable with respect to the Stock. Additionally, upon the occurrence of such an event and provided that a Performance Goal has occurred, upon written notice to the Participants, the Committee may accelerate the vesting and payment dates of the entitlement to receive cash and Stock under outstanding Awards so that all such existing entitlements are paid prior to any such event. If a Performance Goal has not yet been attained, the Committee in its discretion may make equitable payment or adjustment.
>
> . . . [T]he Committee may provide . . . that any outstanding Award (or a portion thereof) shall be converted into a right to receive cash, on or as soon as practicable following the closing date or expiration date of the transaction resulting in the Change of Control or such event in an amount equal to the highest value of the consideration to be received in connection with such transaction . . . [according to a formula set out in the provision]. . . .
>
> 14.1 *Employment*. Neither anything contained in the Plan or any agreement nor the granting of any Award under the Plan shall confer upon any Participant any right with respect to the continuation of his or her employment by the Company or any Affiliate, or interfere in any way with the right of the Company or any Affiliate, at any time, to terminate such employment or to increase or decrease the level of the Participant's compensation from the level in existence at the time of the Award.
>
> An Eligible Person who has been granted an Award in one year shall not necessarily be entitled to be granted Awards in subsequent years.

[13] The following excerpts from a typical Grant Notice and Grant Agreement, from a Restricted Stock Unit Award Agreement, are also helpful in understanding the issues:

> **Grant Notice**
>
> Notice: A summary of the terms of your grant of Restricted Stock Units ("RSUs") is set out in this notice (the "Grant Notice") but subject always to the terms of the Apache Corporation 2011 Omnibus Equity Compensation Plan (the "Plan") and the Restricted Stock Unit Award Agreement (the "Agreement"). In the event of any inconsistency between the terms of this Grant Notice, the terms of the Plan and the Agreement, the terms of the Plan and the Agreement shall prevail.
>
> ...
>
> Vesting Period: RSUs granted shall vest (i.e., restrictions shall lapse) in accordance with the following schedule (the "Vesting Period"), provided that the Recipient remains employed as an Eligible Person as of such vesting date:
>
> First anniversary of the Grant Date – 1/3 vested

> Second anniversary of the Grant Date – an additional 1/3 vested
>
> Third anniversary of the Grant Date – an additional 1/3 vested.
>
> ...
>
> Vesting is accelerated to 100% upon the Recipient's Involuntary Termination or Voluntary Termination with Cause occurring on or after a ... Change of Control that occurs during the Vesting Period. ...

Restricted Stock Unit Award Agreement

> This Restricted Stock Unit Award Agreement (the "Agreement") relating to a grant of Restricted Stock Units ... is made between Apache Corporation (together with its Affiliates, the "Company") and each Recipient. ...
>
> ...
>
> 10. No Right to Continued Employment. Neither the RSUs or Stock issued pursuant to a Grant nor any terms contained in this Agreement shall confer upon the Recipient any express or implied right to be retained in the employment or service of the Company for any period, nor restrict in any way the right of the Company, which right is hereby expressly reserved, to terminate the Recipient's employment or service at any time for any reason or no reason. ...
>
> ...
>
> 15. Terms of Employment. The Plan is a discretionary plan. The Recipient hereby acknowledges that neither the plan nor this Agreement forms part of his terms of employment ...

III. Pleadings

[14] The plaintiffs commenced this action on July 2, 2019. Their statement of claim was amended on September 11, 2019. It is that pleading which must be considered on this application.

[15] The amended statement of claim begins with a brief factual overview, highlighting the announcement on July 6, 2017 to Apache Canada employees that their employer was being sold to Paramount and that following the announcement of sale, the Awards "were cancelled or not honoured" by the defendants.

[16] The amended statement of claim describes each of the parties and their relationships among each other (the plaintiffs being Apache Canada employees at the material times, and the defendants being Apache, Paramount (as the corporate successor of Apache Canada), and the individual defendants who are American residents who were Apache directors and members of the Committee). The proposed class is "all employees of Apache Canada as of July 6, 2017 and who were then participating in the [Plan]."

[17] In dealing with "Employment Agreements and Deferred Compensation Awards," the amended statement of claim pleads the following:

a. The employment contracts between the class and Apache Canada were formed and performed in Alberta and class members worked in Alberta.

b. It was a term of employment that the class would participate in the Plan's long-term compensation arrangements. The Plan's stated purpose "was to provide eligible employees with equity-based incentives to encourage long-term service."

c. The Plan provided for various forms of the Awards, given through grant notices and "Grant Agreements," which incorporated by reference the Plan. The Grant Agreements were contracts between Apache and the class members "and formed part of the terms of employment with Apache Canada, which was later amalgamated into Paramount."

[18] Under "Restricted Share Units, Stock Options and Performance Awards," the various forms of the Awards are described. Restricted share units were credited to an investment account but could not be sold or traded until a designated vesting date. Likewise, options to purchase Apache stock were given subject to a vesting period. Neither the units or options were contingent on performance targets and were not otherwise discretionary. They acted as the form of retention bonus. Performance awards vested with an employee upon certain performance goals tied to Apache's success being met.

[19] It is alleged that for many of the class, the Awards "comprised a significant component of their total compensation (in some cases 50%) and were a strong incentive for them to continue their employment until" the Awards had vested. Under the heading "Change of Control and Vesting of RSUs and PAs," references are made to the provisions in the Plan and Grant Agreements on change of control of Apache and its affiliates (which would include Apache Canada at the relevant times).

[20] The amended statement of claim then addresses "The Sale of Apache Canada," beginning with the July 6, 2017 announcement of the sale and the closing on August 18, 2017, at which time all of Apache Canada's shares were transferred to a company that was later amalgamated into Paramount. At the July 6, 2017 announcement meeting, the class was advised that any unvested Awards "would not be honoured."

[21] There were approximately four hundred employees of Apache Canada. "The vast majority of Class Members continued in their existing positions," and no new employment agreements were entered into. These employees maintained their same job duties, responsibilities and salaries. However, the Awards were "cancelled."

[22] Because the Awards formed part of their renumeration package and as the terms of employment did not change following the sale, class members' employment agreements, including their remuneration package, continued and the class relied on the Awards to continue working for Apache Canada "for as long as they had." "The Class did not receive compensation or substitution on an equitable basis for their cancelled awards," and "the Class suffered the loss of the cancelled [Awards]."

[23] The amended statement of claim expressly pleads several causes of action, the first of which is breach of contract. In summary, it alleges:

a. The Plan formed part of the contracts of employment, and the Awards were granted pursuant to the Plan and Grant Agreements. They

"comprised a significant component of their employment remuneration . . . upon which they relied in accepting and continuing their employment with Apache Canada."

b. The class members' employment contracts continued in full force and effect after the sale of shares and therefore the Awards "ought to have been honoured by Apache Canada." Paramount is liable for the Awards in accordance with section 186 of the *Business Corporations Act*.

c. Because of the Grant Agreements which incorporated by reference the Plan, there was a direct contractual relationship between the class members and Apache. Apache was aware that the Plan formed part of the contracts of employment between Apache Canada and the class.

d. Upon the transfer of shares, a "change of control" and "involuntary termination" were effected within the meaning of the Plan and, pursuant to its terms, all unvested Awards "should have fully vested to the Class."

e. By refusing to honour the Awards, Apache breached the Plan and Grant Agreements and they are valued in accordance with Apache's closing price as of July 6, 2019 (which presumably should be 2017).

f. In the alternative, the Committee breached its obligations under the Plan "to make provision for the adoption and continuation of the [Plan] by the purchasing company or the protection of any holders of [Awards] by the substitution on an equitable basis of the appropriate stock of the purchasing company." Apache is vicariously liable for the actions of the Committee.

[24] In addition to simple breach of contract, the amended statement of claim alleges that Apache Canada/Paramount owed the class members "a duty of good faith and fair dealing" in the "employment relationship" as part of their contracts; and Apache and the Committee owed duties of good faith and fair dealing with respect to the Plan and Grant Agreements. These duties of good faith and fair dealing were breached by cancellation of the Awards and failure to provide equitable substitutes.

[25] The amended statement of claim further alleges that the Committee owed a fiduciary duty to the class, by undertaking in the Plan to act in their best interests "during the course of any negotiation relating to the change in ownership of Apache Canada." That duty was breached by failing to ensure continuation of the Plan or the protection of the holders of the Awards by substitution on an equitable basis.

[26] As the last cause of action, the amended statement of claim pleads that "Apache and/or Paramount have been unjustly enriched as a result of gaining the benefit of the dutiful work of Class and failing to honour remuneration owing to the Class for that work" with a corresponding deprivation to the class members in not having their Awards honoured despite the fact that they had vested pursuant to the Plan and Grant Agreements. There is, it is further pleaded, no juristic reason for the enrichment and deprivation.

[27] Finally, the amended statement of claim seeks damages for the losses resulting from the cancellation of and failure to honour the Awards and punitive damages for knowing breaches of

contract and the defendants conducting their affairs “with wanton and callous disregard” for the class members.

IV. Certification: General Principles

[28] A generous approach should be taken to the interpretation and application of class proceedings legislation to give full effect to the policy of facilitating access to justice, judicial economy and behaviour modification and the general objectives of fairness and efficiency: *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, paras 14 and 15; *Starratt v Mamdani*, 2017 ABCA 292, para 9. Any member of a class of persons may commence a proceeding on behalf of the members of that class, but must then apply for an order certifying the proceeding as a class proceeding and appointing a person as representative plaintiff (*Class Proceedings Act*, section 2).

[29] The legislation sets out criteria on which the court must be satisfied for a certification order to be made (section 5(1)); and directs that where each of the criteria are met, certification must be granted; and if not all of the criteria are met, certification must not be granted (section 5(3) and (4)). The certification requirements in section 5(1) are that: the pleadings disclose a cause of action; there is an identifiable class of two or more persons; the claims raise a common issue; a class proceeding would be the preferable procedure; and there is a suitable representative plaintiff (having regard to certain qualifications).

[30] The emphasis in the *Class Proceedings Act* is on procedural considerations. An application for certification is a procedural motion that concerns the form of an action, not its merits: *Warner v Smith & Nephew*, 2016 ABCA 223, para 10; *Starratt*, para 9. Section 6(2) provides that “an order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.” *Hollick* emphasizes that caution, stating that “the certification stage is decidedly not meant to be a test of the merits of the action”: para 16. Nevertheless, *Hollick* also held that “the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action”: para 25.

[31] As held in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, there is “limited utility in attempting to define ‘some basis in fact’ in the abstract”; rather, each case must be decided on its own facts: para 104. There must be sufficient facts to show that the conditions for certification have been met to a degree that would allow the matter to proceed on a class basis without foundering at the merit stage by reason of the requirements of section 5(1): para 104.

[32] In summarizing the thrust of *Pro-Sys*’ holdings, Hall J. stated that “the certification requirements need not be proven on a balance of probabilities, nor is the certification judge to enter into a weighing of conflicting evidence”: *Walter v Western Hockey League*, 2017 ABQB 382, 62 Alta LR (6th) 85, aff’d 2018 ABCA 188, para 13, referring to *Pro-Sys*, paras 99-105. Where the pleadings disclose a cause of action, “the evidentiary threshold for certification is not onerous, requiring only that there be some factual basis for each of the other certification requirements”: *Starratt*, para 10.

V. Cause of Action

A. General Principles

[33] Section 5(1)(a) requires the court to be satisfied that the pleadings disclose a cause of action. The legislation is clear that this element is determined from the pleadings only.

[34] The test is the same as the test to strike pleadings for failure to disclose a cause of action. Thus, "a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed": *Pro-Sys*, para 63, citing *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, para 20; *Hollick*; and *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959, 74 D.L.R (4th) 321, para 980.

[35] As Martin J. (now of the Supreme Court of Canada) held, citing authority, in *Andriuk v Merrill Lynch Canada Inc*, 2013 ABQB 422, 578 A.R. 40, aff'd 2014 ABCA 177, pleadings "must be construed generously and liberally with allowances for drafting deficiencies that do not disclose radical defects": para 68. Further, again citing authority: "a cause of action will be disclosed if the facts pleaded *could possibly* be considered to entitle the plaintiff to a legal remedy; conversely, if it is plain and obvious that the facts are incompatible with an entitlement to remedy, or insufficient for that purpose so that the plaintiff has no chance of success, then a cause of action will not be disclosed": *Andriuk*, para 68 (emphasis in original).

[36] The novelty of a cause of action will not militate against the plaintiff establishing a cause of action for the purpose of a certification hearing. Rather, pleadings "which reveal an arguable, difficult or important point of law" must be allowed to proceed because this is the way that the common law continues to evolve to meet modern legal challenges: *Andriuk* at para 69, relying upon *Hunt v T&N plc*, [1990] 2 S.C.R. 959 at para 55; *Harrison v XL Foods Inc*, 2014 ABQB 431, 592 A.R. 266 at paras 58-63; *R v Imperial Tobacco Ltd*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paras 21-25.

[37] I turn next to the causes of action pleaded by the plaintiffs to determine whether they meet the requirements of section 5(1)(a), namely breach of contract and the contractual duty of good faith, breach of fiduciary duty and unjust enrichment.

B. Breach of Contract

[38] There are three broad allegations under the breach of contract cause of action that are raised by the pleadings and the parties' arguments.

[39] First, the plaintiffs plead contracts with their employer, then Apache Canada, now Paramount, which included the Awards as part of their remuneration. These contracts, they allege, were breached upon the Awards being cancelled with the sale of all of the shares of Apache Canada, such that the continuing employees were deprived of part of their compensation. Apache Canada/Paramount concedes that the pleadings meet the low bar of disclosing a cause of action in contract against it for loss of the Awards.

[40] Second, Apache and the Directors are sued in contract on the basis of the Plan and Grant Agreements which created direct contractual relationships with class members accepting the Awards. These contracts were breached when Apache failed to honour the deemed vesting of the Awards upon the triggering event of a change of control. Alternatively, the Directors (as the Committee) were required to provide for the adoption and continuation of the Plan by the purchasing company or protection of class members holding the Awards by the substitution on

an equitable basis of shares of the purchasing company. Having failed to do so, they are liable for breach of their contracts with the class members and Apache is vicariously liable. Again, because of the low bar for disclosing a cause of action, Apache and the Directors do not dispute that this cause of action is made out in the amended statement of claim.

[41] Finally, the plaintiffs allege that Apache is jointly and severally liable with Apache Canada/Paramount as a common employer, based upon pleadings that Apache Canada was wholly owned by Apache; it was a term of employment that class members participate in the Plan, the stated purpose of which was to provide incentives to encourage long-term service with Apache and affiliates such as Apache Canada; and the Plan and Grant Agreements formed part of terms of employment with Apache Canada and were a significant component of employment remuneration for the class members. (The amended statement of claim does not expressly allege that Apache and Apache Canada were common employers.)

[42] Apache's submissions on this point are ambiguous. Their brief concedes that the plaintiffs met the test for establishing its causes of action, and the plaintiffs' brief asserts that Apache had joint and several liability as a common employer with Apache Canada. Yet, in its brief Apache also says that "if this assertion is meant to support an argument that there was some kind of contract of employment between Apache and the Class Members, the Plaintiffs have failed to put forward nearly the sufficient evidence required of them to suggest that Apache and Apache Canada were 'common employers' of the Class Members".

[43] However, Apache recognizes that evidence is not required for meeting the cause of action criterion of the test for certification, and the passage just quoted is contained in its submissions on common issues. Perhaps, therefore, the existence of the cause of action of Apache being a common employer for liability purposes is not disputed.

[44] In any event, as stated above pleadings must be read generously in determining whether a cause of action is established. The main point in assessing pleadings is whether sufficient facts are pleaded, not whether the cause of action is named: *Carroll v Purcee Industrial Controls Ltd.*, 2017 ABQB 211, para 59. Here, the facts pleaded show that Apache Canada was a wholly-owned subsidiary of Apache, that the Awards were granted under a Plan and pursuant to terms established by Apache, they formed part of the class members' employment contracts, that they formed a significant part of their remuneration and that they ought to have been honoured by both Apache and Apache Canada/Paramount.

[45] The test for finding common employers involves broad considerations of facts, rather than a single legal test: *Waddell v Cintas Corp.*, [1999] BCJ No. 2404 (S.C.), para 62. The key factors, it has been observed, are whether two entities may be considered a single employer and whether there is common control over both entities and both exercise control over the employee: *Vaccaro v Twin Cities Power-Canada, U.L.C.*, 2014 ABQB 56, para 80. Based on those factors, the pleadings are adequate to make out a cause of action that Apache and Apache Canada/Paramount are jointly and severally liable with respect to liability under the Plan for the Awards and their cancellation as components of employees' compensation. It is not necessary for present purposes to address whether they could be common employers for purposes beyond those obligations.

[46] As will be seen, there is an argument on the evidence whether express terms in the Plan and the Grant Agreements exclude any employer relationship between Apache and class members. That is not an issue that arises on the plaintiffs' pleadings. As stated above, the

decision on whether the pleadings disclose a cause of action is made "on the basis of facts as set out in the pleadings, and not the consideration of evidence": *Warner*, para 14. The defendants' argument that express contractual terms negate an employer relationship with Apache is not a decision to be made when determining whether a cause of action is disclosed for the purpose of section 5(1)(a).

[47] Finally, it is not disputed that the pleadings establish the claim of a duty of good faith and fair dealing as part of the contractual relationships. Parties to an employment contract are subject to obligations of good faith and fair dealing, which subsist throughout the relationship until and including its termination: *McKinley v BC Tel*, 2001 SCC 38, para 73. The contracts at issue on this application all involve employment relationships and provision for compensation related to employment.

C. Fiduciary Duties

[48] The pleadings allege that the Committee (comprising the Directors) undertook to act in the best interests of those holding Awards in the event of a change of control of Apache or any affiliate. By failing to ensure continuation of the Plan or the protection of holders of the Awards or their substitution on equitable basis, the Directors failed to act in the best interests of class members and thereby breached their fiduciary duties.

[49] The Directors do not dispute that the pleadings make out a cause of action for breach of fiduciary duty. I conclude likewise, on the basis of the well-established test for fiduciary duties established in *Elder Advocates*, para 36.

D. Unjust Enrichment

[50] The plaintiffs plead the cause of action in unjust enrichment against Apache and Apache Canada/Paramount. They rely on the well-established three elements of unjust enrichment, namely 1) enrichment of the defendant, 2) a corresponding deprivation of the plaintiff and 3) an absence of juristic reason for the enrichment: *Garland v Consumers' Gas Co.*, 2004 SCC 25, para 30.

[51] The facts pleaded in support of the unjust enrichment claim are that the Awards were relied upon by members of the class in their decisions to continue working for Apache Canada. Apache and Apache Canada/Paramount gained the benefit of the class members' work without paying the agreed remuneration; and the members of the class suffered a corresponding deprivation as a result.

[52] Neither of these defendants dispute that the test for unjust enrichment is satisfied as a matter of pleading, and I so find.

E. Conclusions

[53] I conclude that the amended statement of claim discloses causes of action within the meaning of section 5(1)(a) as interpreted by the authorities. Accordingly, this criterion for a certification order has been satisfied.

VI. Identifiable Class of Two or More Persons

[54] The second requirement for certification is that "there is an identifiable class of two or more persons" (section 5(1)(b)).

[55] The class definition must be based on objective criteria enabling identification of potential class members without reference to the merits of the claim; have a rational connection between the definition, causes of action and common issues; and not be so broad as to include persons who have no claim against the defendant, but not so narrow as to arbitrarily exclude persons with claims similar to those asserted on behalf of the proposed class: *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, para 38; *Warner*, para 22; *Windsor v Canadian Pacific Railway*, 2007 ABCA 294, paras 18 and 19 (the latter decision aff'd Rooke A.C.J.'s decision in *Windsor v Canadian Pacific Railway*, 2006 ABQB 348, which I will sometimes refer to as well. I will distinguish them as *Windsor* (C.A.) and *Windsor* (Q.B.)).

[56] The importance of class definition is that it identifies the individuals entitled to notice, entitled to relief (if awarded) and bound by the judgment: *Dutton*, para 38; *Windsor* (C.A.), para 18. "The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of the proposed class": *Windsor* (C.A.), para 19.

[57] As with all requirements for certification, other than disclosing a cause of action, the plaintiff must adduce evidence to meet this requirement. This element cannot be satisfied by pleadings or argument. While it is a "relatively low evidentiary standard," plaintiffs "have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified:" *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545 at para 61.

[58] Prior to the oral hearing of this application, the parties agreed that the class should be identified as including Apache Canada employees at the time of the sale of its shares who had Awards – those being individuals whose compensation was affected by cancellation. The only material difference was that the plaintiffs proposed that the definition include employees as of July 6, 2017 (the date the sale and impending cancellation were announced) while the defendants said it should be August 18, 2017, the effective date of the sale. In responding to undertakings given during cross-examination on affidavits, the plaintiffs determined that there were two affected employees on July 6, 2017 who were no longer employed on August 18, 2017.

[59] The plaintiffs now agree to August 18, 2017 as the date for a class definition, on condition that the two employees whose employment ended between these dates be given sufficient notice to protect their rights. This is possible through section 22 of the *Class Proceedings Act* which allows the court to direct a party to give notice to "any persons that the Court considers necessary ... to ensure the fair conduct of the proceeding."

[60] I agree that the effective date of sale, which was when the Awards were cancelled, is most suitable to meet the objective criteria and be rationally connected to the common issues, which all turn on cancellation of the Awards. Taking this issue into account, I find that the class should be defined as follows:

> All employees of Apache Canada Ltd. as of August 18, 2017 who were then participating in Apache Corporation's Omnibus Compensation Plan and had outstanding Awards as defined in that Plan.

[61] There is adequate evidence in the affidavits in cross-examination to establish a class of Apache Canada employees whose long-term compensation was affected by the sale of that company's shares by Apache to Paramount.

VII. Common Issues

A. General Principles

[62] For the third requirement of certification, the plaintiffs must establish that "the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members" (section 5(1)(c)). As with other aspects of the certification test other than a cause of action, there must be evidence to show "some basis in fact" that the claims raise a common issue: *Pro-Sys*, para 99.

[63] As the section and the authorities state, the common question need not predominate over issues relating to individual class members (although that is a factor to be considered in the "preferable procedure" inquiry). "Class proceedings," wrote Rooke A.C.J., "are not intended to solve all the efficiency problems encountered in complex litigation. . . . What they can do is assist the parties and the Courts by shortening the process, even if only for hours or days over the course of a lawsuit": *Windsor* (Q.B.), para 131. Similarly, in *T.L. v Alberta (Director of Child Welfare)*, 2006 ABQB 104, 395 A.R. 327, Slatter J. (now J.A.) found that even though in the case before him the individual issues would substantially predominate over the common issues, and thus the overall benefits would be slight, "there is still some practical utility in deciding the common issues once", para 133.

[64] For an issue to be common, "the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus, an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim": *Dutton*, para 39. While common issues need not predominate over non-common issues, there must be "a substantial common ingredient to justify a class action": *ibid*.

[65] A common issue need not result in the same answer for each member of the class, and success for one member does not necessarily have to lead to success for all: *Dell'Aniello v Vivendi Canada Inc.*, 2014 SCC 1, paras 45 and 46. A question will be common "if it can serve to advance the resolution of every class member's claim": *Vivendi*, para 46.

[66] It is useful to formulate the common issues as precisely as possible at the certification stage, if the certification application is granted. However, issues regarding the precise formulation of common issues can be resolved after initial certification: *Warner*, para 34.

[67] Describing the common issues to be determined requires sufficient focus to ensure that the answer will have some meaning and serve the ends of fairness and efficiency: *Loveless v Ontario Lottery and Gaming Corporation*, 2011 ONSC 4744, paras 63, 64, 65 and 68; *Rumley v British Columbia*, 2001 SCC 69, para 29. On the other hand, framing the issues too narrowly would risk constraining the fair determination of all the matters in dispute. I adopt the approach of Strathy J. (now C.J.O.) in *1250265 Ontario Inc. v Pet Valu Canada Inc*, 2011 ONSC 1941, as the proper methodology for stating the issues according to the governing principles of class proceedings:

> [3] My objective is to state common issues that fairly reflect the pleadings, the evidentiary record and the conclusions in my reasons [for certifying the action]. The common issues should be clear, neutrally-worded and fair to both parties. They should be phrased in such a way that their answers will advance the litigation.

> [4] To serve these ends, the common issues should not be framed in overly broad terms. Nor should they be framed in overly narrow terms in a way that unreasonably constrains the ability of either party to prove or disprove the common issue.

(These remarks were made after the action had been certified and a subsequent hearing was held for submissions on how the common issues should be worded: paras 1 and 2.)

B. Breach of Contract

[68] The plaintiffs' proposed common issues are criticized by the defendants as being too broad and general. There is some merit in this contention, which may justify the addition of some detail.

[69] Both sets of defendants set out the common questions with algorithmic order and precision, in marked contrast to the plaintiffs' approach. As will be seen, my framing of the questions adds some detail but, in my view, the defendants' approach is too constrained and scripted to ensure resolution of the common issues fairly and completely.

[70] The main difference, however, is not in the degree of detail. Rather, it is in the defendants' defining the issues so as to eliminate some grounds for liability. The main arguments put forward by Apache and the Directors are the following:

a. There can be no "kind of employment agreement" at issue between Apache and the plaintiffs. Contractual issues are limited to construing and applying the express terms of the Plan and Grant Agreements. The only ties of employment are between class members and Apache Canada/Paramount.

b. The only claim against the Directors can be under the provision of the Plan that the Committee "make provision for the adoption and continuation of the [Plan] by the purchasing company or the protection of any holders of [Awards] by the substitution on an equitable basis of the appropriate stock of the purchasing company."

[71] These arguments line up with those made in relation to the first criterion for certification, that the pleadings disclose a cause of action. In the context of common issues, the thrust of the argument made by Apache and the Directors is that there is no basis in fact upon which some of the claims can succeed. Thus, they should be screened out of the common issues, in accordance with *Pro-Sys*' "reaffirming the importance of certification as a meaningful screening device": para 103.

[72] These arguments were addressed earlier in regard to the causes of action. The defendants correctly point out that all other criteria, including whether there are common issues, requires some basis in fact. They submit that the text of the Plan and Grant Agreements rule out the broader approach to potential liability taken by the plaintiffs.

[73] Certainly, the texts of these documents are important evidence on the legal relationships between the parties. The Plan is an Apache document and the plaintiffs were employees of Apache Canada. The Grant Agreements say that the Plan is discretionary, that neither the Plan nor the Grant Agreements form part of the terms of employment, nothing may be construed as imposing a contractual obligation to offer participation in the Plan to any employee of an

affiliate, Apache Canada and the affiliate are under no obligation to grant further stock to any recipient, and if a recipient ceases to be an employee they shall not be entitled by way of compensation for loss of office "or otherwise howsoever to any sum."

[74] The contractual language, however, may not be so definitive in ruling out any form of employment contractual obligation owed by Apache to class members, when the documents are considered in their entirety. The purpose of the Plan (section 1.2) is directed at the employment relationship, in that it is to provide employees of affiliates such as Apache Canada with incentives to encourage them to continue in long-term service of Apache and its affiliates and attract outstanding individuals. Only "Eligible Persons," that is employees of Apache or affiliates such as Apache Canada, may participate (section 2.1(i)). Further, participation is mandatory for those who are performing "vital services" for Apache or an affiliate. Thus, while the Plan is not a contract of employment, it contains provisions that often form part of a contract of employment.

[75] The Grant Agreements, by which employees agree to the terms and conditions of the Plan, also contain terms sometimes found in contracts of employment. Section 10 states that none of its terms confer any right to be retained in employment nor to restrict the right of the "company" (that is, Apache and Apache Canada) to terminate employment at any time for any reason. Section 15, most heavily relied upon as excluding the Plan and issues relating to the Awards from the employment relationship, states in part as follows:

> Terms of Employment. [Original emphasis.] The Plan is a discretionary plan. The recipient hereby acknowledges that neither the plan [*sic*] nor this Agreement forms part of his terms of employment and nothing in the Plan may be construed as imposing on the Company or any Affiliate a contractual obligation to offer participation in the Plan to any employee . . . .

Interpretation of this section will be an important part of trying the common issues. It is certainly arguable that the thrust of this so-called exclusion section is to ensure that no employee has the right to participate in the Plan, to receive Awards, or once receiving them to receive more, rather than to negate any employment relationship between class members and Apache.

[76] Further, there is evidence besides the Plan and Grant Agreements. Even where the text of a contract contains no ambiguity, there is always a factual matrix that must be considered: *Sattva Capital Corporation v Creston Moly Corp.*, 2014 SCC 53, paras 47, 48 and 57-58; *Nexxtep Resources Ltd. v Talisman Energy Inc.*, 2013 ABCA 40, paras 20 and 21. The plaintiffs testified in their affidavits that the deferred compensation under the Plan was provided to Apache Canada employees as part of their employment.

[77] Laurits G.W. Byrgesen, who swore an affidavit on behalf of Paramount and had extensive experience as an employee in human resources for Apache Canada, testified in his cross-examination that compensation for Apache Canada's employees included the Apache long-term compensation entitlements. Further, he said that Apache Canada and Apache had a joint human resources function and that in many respects, including compensation under the Plan, Apache directed human resources policies and compensation for Apache Canada. For many employees, according to the plaintiffs' affidavits, the Awards formed a significant component of their annual compensation and were a major incentive for their continued service with Apache Canada.

[78] It is not disputed that there are common issues between Apache and class members regarding the Plan, the Grant Agreements, the Awards and cancellation of the Awards. These include very specific questions such as whether the sale constituted a change of control with certain contractual consequences and whether specific obligations of the Directors, as members of the Committee, were triggered by the sale – some of the specific points listed in Apache's proposed common issues.

[79] In my view, the common issues cannot be defined so as to exclude the question of whether Apache is liable in contract to class members for cancelling the Awards, and this question should not be limited to construing the language of the Plan and its associated documents. As an example, I am not prepared to decide at the certification stage that if a class member ceases to be an "Eligible Person" at the end of a performance period (Eligible Person defined as someone who is an employee of Apache or an affiliate) he or she has lost the Award, because Apache Canada ceased to be an affiliate. Given the overall tenor of the documents and their factual matrix, the certification stage is not the time to determine whether Apache may have another source of contractual liability, perhaps jointly and severally with Apache Canada/Paramount – as its former subsidiary and continuing employer of class members.

[80] Paramount's proposed common issues are consistent with the plaintiffs' approach to their claims, as directed at determining, broadly speaking, whether Apache Canada was obligated to protect its employees' entitlement to the Awards if Apache cancelled them and whether certain provisions of the documents preclude such an obligation from being part of the employment agreements. Paramount caveats this, however, by arguing if the plaintiffs take the position that Paramount cannot rely upon exclusion provisions because they were not specifically brought to the attention of employees, then those matters can only be determined by individual proceedings, rather than common questions.

[81] Subject to further submissions, there may be a need for additional proceedings following a common issues trial. As I indicated above, however, whether exclusion sections were specifically brought to the class members' attention is not the only basis upon which it could be found that they do not have the effect contended by the defendants.

[82] In my view, the common issues relating to breach of contract could be framed as follows:

1. In relation to the sale of Apache Canada to Paramount, what contractual obligations (including good faith) did the defendants or any of them, jointly or severally, owe to class members regarding their unvested Awards?

2. Were any contractual obligations (as identified in para 1) breached by the fact that unvested Awards were cancelled, not honoured or not substituted by other compensation, on the part of the defendants or any of them, jointly or severally?

These are broad enough to include the disputed question of whether there was any type of employment relationship between Apache and class members.

[83] These are preliminary conclusions, subject to further submissions counsel may make.

[84] My preliminary view is that there is no need for separate questions identifying the duty and breach of good faith and fair dealing obligations. They are included in the contractual analysis: *Fulawka v The Bank of Nova Scotia*, 2012 ONCA 443, paras 48 and 49; *Bhasin v*

Hrynew, 2014 SCC 71, [2014] 3 SCR 494, para 93; *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26, paras 42-45. Preliminarily, I also conclude there is no need to set out the issues according to each contractual term in the documents, as Apache and the Directors have done. That is not necessarily how the plaintiffs approach their claims, and as I have said, it is arguable that there is another ground of contractual liability. The common issues should not be worded so as to follow only one party's analytical approach.

[85] Finally, in my view it is not necessary or proper to direct in each question that it be determined by Texas law, as Apache and the Directors have done. While the Plan and Grant Agreements contain governing law clauses, their enforcement and application is not automatic: Walker, *Halsbury's Laws of Canada: Conflict of Laws (2020)*, para 139. The issue of the applicable law is best dealt with as part of the general contract issues.

C. Fiduciary Duties

[86] As indicated above, the claim for breach of fiduciary duties is against the Directors as members of the Committee for failing to ensure continuation of the Plan or otherwise protecting the holders of the Awards from suffering loss if the Plan was not continued and their Awards not honoured.

[87] There is, in my view, some basis in fact for this to be tried as a common issue. The evidence establishes the role of the Directors, the contractual language by which they undertook their obligations, and the failure of the Awards to be protected or substituted upon sale of the shares of Apache Canada.

[88] The plaintiffs' proposed common wording is, in my view, too broad. It asks the very general question of whether the defendants or any of them owed a fiduciary duty to the class in relation to the sale of Apache Canada. The pleadings allege a breach of fiduciary duty only against the Directors, and the only basis put forward in the pleadings and argument is the specific undertaking in section 13 of the Plan.

[89] Apache and the Directors propose a form of common issue which, in my view, more properly describes the common issue which I have accepted as a valid cause of action. Modifying it slightly, my framing of this common issue would be as follows:

3. In relation to the sale of Apache Canada to Paramount, what fiduciary duties did the Directors owe to class members under section 13 of the Plan regarding their unvested Awards?

4. Were any Directors' fiduciary duties (as identified in para 3) breached by the fact that unvested Awards were cancelled, not honoured or not substituted by other compensation?

5. If the Directors are liable for breaching their fiduciary duties (as identified in para 4), is Apache vicariously liable therefor?

D. Unjust Enrichment

[90] As indicated above, an action in unjust enrichment requires enrichment of the defendant, a corresponding deprivation of the plaintiff and an absence of juristic reason for the enrichment. The defendants argue that based on the evidence, which includes what they consider exclusionary language in the contracts, there is a juristic reason for any enrichment. According to their argument, the plaintiffs will succeed in their contractual claims based on the terms of the

contracts; if they fail, the contracts in effect justify the enrichment and constitute a juristic reason. "Contract trumps unjust enrichment," as the phrase goes: McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont. LexisNexis, 2014), at 643.

[91] While that argument might succeed, this is not the time to decide it. It would require findings on all competing contractual interpretations and determine broad questions such as whether an unsuccessful contractual claim against one defendant bars an unjust enrichment claim against another, and whether the scope of the contracts are coterminous with the issues in the unjust enrichment claim.

[92] The plaintiffs' cause of action in unjust enrichment is pleaded against Apache and Paramount. Once again, therefore, their proposed common issue, which asks for adjudication of unjust enrichment against all defendants, is too broad. None of the defendants have proposed wording for this common issue.

[93] In my view, appropriate wording for the common issue on unjust enrichment is as follows:

> 6. Were Apache and Paramount, or either of them, unjustly enriched as a result of unvested Awards held by class members being cancelled, not honoured or not substituted by other compensation?

E. Damages

[94] The plaintiffs propose very general questions relating to compensatory and punitive damages. With respect to compensatory damages, the defendants argue they cannot be the subject of a common issues trial because there are too many individual issues, or at least it would be premature to certify those questions. They argue that there should be no questions put as to punitive damages, because there can be no determination of whether they should be granted, and if so in what amount, without reference to compensatory damages.

[95] The plaintiffs' proposed common issue on compensatory damages refers to them as being determined on an "aggregate basis" but in oral submissions, they clarified that this is a misleading description. Rather, what is sought is a common issue that would set out the basis upon which each class member's damages could be determined.

[96] The arguments of the respective parties seem at times to be addressing different theories of damages. Thus, it is important to set out my understanding of the alternative theories:

> a. The plaintiffs' primary theory of damages for breach of contract is that the sale of Apache Canada to Paramount constituted a change of control within the meaning of the Plan and Grant Agreements. (This is an important issue, because at least some of the defendants argue that change of control of a subsidiary company does not constitute a change of control within the meaning of the Plan.) If a change of control occurred, the plaintiffs argue that it constituted an "involuntary termination" within the meaning of section 12 of the Plan, triggering the immediate vesting of all unvested Awards. The defendants argue that there is no immediate vesting without an actual termination of the employee's contract following a change of control or a "voluntary termination with cause" (a carefully-defined form of constructive dismissal). However, if the plaintiffs' theory

succeeds, then all unvested Awards had an accelerated vesting date as of the sale of Apache Canada shares on August 18, 2017.

b. Alternatively, the plaintiffs argue that section 13 of the Plan required the Committee (thus, the Directors) and vicariously Apache to provide equitable substitution of the Awards by other stock or cash replacement, if the Awards were not continued by the party acquiring the shares.

c. Finally, the plaintiffs argue that if there was a change of control that did not immediately trigger a vesting of all unvested Awards, any subsequent termination without cause or involuntary termination with cause triggered the vesting of unvested Awards. There would then be a question as to whether such an employee was an "Eligible Person" within the meaning of the Plan and Grant Agreements.

I have drawn inferences about what the defendants argue or are likely to argue, as in many cases their arguments are not express.

[97] The defendants correctly point out that for any scenario, individual damages calculations must be made for each class member. That is because each class member had different amounts and combinations of the three main types of Awards and the formula depended on factors such as length of employment, position and level of base salary. However, the affidavit and cross-examination evidence indicates that all of the information necessary to make most calculations is in the records of one or both of the corporate defendants. They have the information about what Awards were granted to each class member, the employment and compensation history of that class member and – as a matter of public record – the share price of Apache stock for any given trading day. Thus, while an individual calculation is needed for each class member, it would not be necessary for each to prove the details necessary for the calculation. As the plaintiffs submit, it is largely a matter of assembling the data and making the necessary calculations.

[98] There is one possible scenario, however, which would likely require participation by individual class members. If the plaintiffs are driven to their last alternative of obtaining damages only when class members were terminated on some date following a change of control, individual evidence may be necessary to establish the circumstances and timing of those terminations.

[99] There are many cases certifying damages as a common issue, even though the exact approach must be left to the common issues trial judge: *Austin v Bell Canada*, 2019 ONSC 4757, paras 16-21; *Caponi v Canada Life Assurance Company*, [2009] O.J. No. 114, para 45, are examples. In my view, that is the proper approach in this case. It is highly likely that a common methodology can be used, but it is idle to set that out before the exact basis of liability has been determined.

[100] Compensatory damages for breach of fiduciary duty and unjust enrichment raise no additional concerns. In both cases, reliance on these causes of action likely would be an alternative to an unsuccessful breach of contract action. Damages issues would be whether the date on which damages should be measured would be the same for all class members; if so, what that date would be; and what method of calculation should be used.

[101] I conclude that there are common issues to be tried as to compensatory damages, even though it is possible that a common trial will not result in an aggregate number but rather a

method of calculation. Some uncertainty on this point is to be expected, because damages always depend upon liability findings. It is enough to certify the question of whether aggregate damages can be certified as the common issue and leave the ultimate decision to the common issues trial judge: *Pro-Sys*, para 134. A proper framing of the damages issue, in my view, would be as follows:

> 7. If liability is found against one or more defendants, can damages be determined as an aggregate amount or, if not, what methodology – including dates for assessment – should be used?

[102] Finally, the plaintiffs propose that entitlement to an amount of punitive damages be certified as a common issue. The defendants' main argument against this is that punitive damages cannot be determined without reference to compensatory or general damages; and since they say that compensatory damages cannot be certified as a common issue, neither can punitive damages.

[103] As I have determined that compensatory damages can be tried as a common issue, I conclude the same for punitive damages. I would phrase the issue as follows:

> 8. Should the class members be entitled to punitive damages against the defendants or any of them, and if so, in what amount?

VIII. Preferable Procedure

A. General Principles

[104] The fourth requirement for certification is that a class proceeding "be the preferable procedure for the fair and efficient resolution of the common issues" (section 5(1)(b)). As with the other statutory requirements for certification (other than cause of action), the plaintiffs must show some basis in fact for establishing the preferability of class proceedings.

[105] The guiding principle as to whether a class proceeding is preferable is whether "it presents a fair, efficient and manageable method of determining common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice and behaviour modification": *LC v Alberta*, 2017 ABCA 284, para 31; *AIC Limited v Fischer*, 2013 SCC 69, para 48. In addition to this guiding principle, there is a comparative analysis that asks whether a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims: *AIC v Fischer*, para 48; *TL v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 182, para 26.

[106] Properly addressing the preferability requirement necessitates taking into consideration "all of the individual and common issues arising from the claims in the context of the factual matrix": *LC v Alberta*, para 32. Further, in addressing the preferability requirement the common issues must be considered in the context of the action as a whole, and take into account their importance in relation to the claims as a whole: *AIC v Fischer*, para 21; *Hollick*, para 30.

[107] Section 5(2) states that in determining preferability of a class proceeding, the court may consider any matter relevant to that determination, but must consider at least five factors. I turn to those now.

B. Statutory Considerations

(a) "Whether questions of fact or law common to prospective of class members predominate over any questions affecting only individual prospective class members": s. 5(2)(a).

[108] This case is primarily about a few central matters. Key to resolution is how to interpret and apply the contracts governing deferred long-term compensation for about three hundred and fifty employees; and if the deferred compensation was wrongfully cancelled or not honoured, which defendants are liable therefor. Those issues heavily outweigh any other questions. The defendants do not seriously contend otherwise, subject to Paramount's argument about proportionality which I will address later.

[109] The defendants argue that determination of each class member's damages (assuming liability is found) will be a very individual, fact-based process. I conclude, however, that the identification of how those damages can be determined is, for most of the theories advanced, determinable as a common issue. Even if some individual fact-finding becomes necessary, it does not follow that individual trials are required.

[110] The *Class Proceedings Act* allows the court to have individual issues determined before judges or by appointment of "one or more persons, including, without limitation, one or more independent experts" who conduct inquiries and report back to the court: section 28(1)(b). The court may give directions for procedures to be followed in conducting hearings and inquiries, and in doing so must choose "the least expensive and most expeditious method of determining the individual issues," including dispensing with procedural steps considered unnecessary: section 28(2) and (3).

[111] This flexibility is emphasized in *Bouchanskaia v Bayer Inc*, 2003 BCSC 1306, [2003] B.C.J. No. 1969 at paras 150 and 151; and an example of the type of procedures employed for expeditious resolution of individual issues is seen in *Lundy v VIA Rail Canada Inc*, 2016 ONSC 425, [2016] O.J. No. 268, with an attached schedule entitled "Individual Issues Litigation Plan."

(b) "Whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions": s. 5(2)(b).

[112] There is nothing to suggest that any members of the proposed class other than the plaintiffs are interested in controlling the prosecution of their own actions. This factor thus has little bearing on the preferable procedure.

(c) "Whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 5(2)(c).

[113] There have been no other proceedings that would weigh against a class proceeding in this case.

(d) "Whether other means of resolving the claims are less practical or less efficient": s. 5(2)(d).

[114] The defendants have put forward no alternative means of resolving the claims sought to be certified. Preferability must be assessed in comparison in some other viable alternative. The defendants have, quite properly from their perspective, focused on the questions of practicality and efficiency in addressing how the common issues should be identified.

> ***(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": s. 5(2)(e).***

[115] Again, the defendants do not suggest that the plaintiffs' claims should not be certified, in favour of other proceedings. It is a question of whether it is preferable to certify all of the proposed common issues, or leave some for subsequent proceedings.

[116] As I have indicated, there are common issues capable of being addressed in a class proceeding. To the extent there are remaining individual issues, the procedures available under section 28 of the *Act* offer economy and practicability to the benefit of class members and the defendants.

C. Any Matter Considered Relevant

[117] In addition to the required considerations listed in section 5(2)(a) through (e), the court may consider any matter it considers relevant to determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. To assist in determining what considerations are relevant, regard must be had to the purpose of the "preferable procedure" inquiry, well set out by Martin J. as follows:

> The Court is required to take a purposive approach to the interpretation of these factors [as set out in sections 5(2)(a) through (e)], testing them against the objectives of the *CPA*. The essence of the preferable procedure inquiry is whether a class action represents a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims: *Hollick* at para 28. Furthermore, the Court must determine whether proceeding as a class action advances the policy objectives of access to justice, judicial economy, and behaviour modification: *Hollick* at para 27. [*Andriuk* at para 149]

[118] An additional factor relating to preferability, where applicable, is whether the emphasis on proportional procedures in *Hryniak v Mauldin*, 2014 SCC 7, favours certification of all of the causes of action pleaded the plaintiffs. *Hryniak* emphasized the need for a proper balance in litigation processes to ensure "simplified proportionate procedures for adjudication," para 27.

[119] Perell J. held that proportionality meant that pleading redundant causes of action may cause manageability problems, and it would be improper to conclude that because class members have satisfied the criteria for certification they should be entitled to put forward all claims, "without regard to whether they actually need to prove all those claims in order to achieve access to justice": *Berg v Canadian Hockey League*, 2017 ONSC 2608, para 204. This finding was made in the context of a proposed class action on behalf of hockey players with the common issue of whether team owners were required to comply with minimum employment standards. The certification decision reduced the causes of action from six to two, thereby greatly reducing the number of defendants and defence counsel who would be involved in the common issues. The principle of proportionality was adopted for certification applications by Rooke A.C.J. in

Setoguchi v Uber B.V., 2021 ABQB 18, paras 18-21, although its application was unnecessary in the result.

[120] Paramount relies on the proportionality principle as its main objection to certifying a class proceeding against it. If the plaintiffs' arguments about entitlement under the Plan and the Awards succeed, Paramount argues, liability will be established against Apache and the Directors or either of them. Paramount adds that it is highly unlikely that a judgment against those defendants would be uncollectable. Accordingly, Paramount is not a necessary defendant and including them in the class proceedings would be unnecessarily duplicative.

[121] In my view, the addition of proportionality as an express factor is a useful corrective to what Perell J. identifies as a tendency to certify every cause of action merely because it meets the basic criteria. However, it must be used with caution, and I am not convinced it justifies refusing certification of Paramount as a defendant in this case.

[122] First, excluding Paramount would not significantly improve manageability and efficiency of trying the common issues in this case. While one set of defence counsel would be eliminated, the prospect of having two sets of defence counsel involved in these proceedings does not raise concern about fairness, efficiency and manageability.

[123] Second, Paramount is not a marginal player. It is or was the employer of all class members before and after the sale of Apache Canada's shares and there is evidence that the deferred long-term compensation was in some way part of the terms of employment. Paramount possesses much of the information that would be relevant to calculating damages, although I hasten to add that merely having evidence is insufficient to include a party. While it may be fair to emphasize the creditworthiness of Apache as an international, Houston-based corporation, neither it nor the Directors have a presence in Canada.

[124] Finally, caution should be exercised in choosing for plaintiffs which defendants they may proceed against, where there are valid causes of action against each of them.

[125] Unlike in *Berg* and *Setoguchi*, I am not convinced that the inclusion of Paramount is a redundancy that tends against the objectives of the preferability criterion.

[126] The express considerations in the *Act* and the authorities guiding its purpose and interpretation persuade me that a class proceeding against these defendants is the preferable procedure for the fair and efficient resolution of the common issues I have identified in this case.

IX. Representative Plaintiff

[127] The final requirement for a certification order concerns the proposed personal representative. The court must be satisfied that there is a representative plaintiff who would fairly and adequately represent the interests of the class, has presented a workable litigation plan for advancing the action, and does not have a conflict of interest on the common issues.

[128] The defendants take no issue with the plaintiffs in this action as the representative plaintiffs, and I conclude that they meet the requirements. Accordingly, this last criterion for certification is met.

X. Conclusions and Incidental Matters

[129] I therefore conclude that the criteria for certification have been satisfied and accordingly I must grant an order certifying this proceeding as a class proceeding. The class will be defined as:

> All employees of Apache Canada Ltd. as of August 18, 2017 who were then participating in Apache Corporation's Omnibus Compensation Plan and had outstanding Awards as defined in that Plan.

[130] The common issues will be in the form of questions as set out earlier in these reasons, reproduced as follows:

1. In relation to the sale of Apache Canada to Paramount, what contractual obligations (including good faith) did the defendants or any of them, jointly or severally, owe to class members regarding their unvested Awards?
2. Were any contractual obligations (as identified in para 1) breached by the fact that unvested Awards were cancelled, not honoured or not substituted by other compensation, on the part of the defendants or any of them, jointly or severally?
3. In relation to the sale of Apache Canada to Paramount, what fiduciary duties did the Directors owe to class members under section 13 of the Plan regarding their unvested Awards?
4. Were any Directors' fiduciary duties (as identified in para 3) breached by the fact that unvested Awards were cancelled, not honoured or not substituted by other compensation?
5. If the Directors are liable for breaching their fiduciary duties (as identified in para 4), is Apache vicariously liable therefor?
6. Were Apache and Paramount, or either of them, unjustly enriched as a result of unvested Awards held by class members being cancelled, not honoured or not substituted by other compensation?
7. If liability is found against one or more defendants, can damages be determined as an aggregate amount or, if not, what methodology – including dates for assessment – should be used?

The plaintiffs and defendants are at liberty to make further submissions regarding the definition of these common issues, in line with what I have determined is appropriate in these reasons.

[131] The plaintiffs applied for an order under section 13 of the *Act* restricting the defendants' communications with the class and access to opt-out information. At the conclusion of oral submissions, following discussion with counsel, I indicated that I would await discussions between the parties and their counsel on whether they could agree on appropriate restrictions on communications. If they have been unable to agree, the parties are at liberty to make further submissions on that issue and I will make a ruling.

[132] The parties may schedule a further appearance to address finalization of questions, a litigation plan, notifications (including to the two employees who left between notice of the sale

and its closing) and other matters arising out of this decision. The parties also may speak to any claims for costs.

Heard on the 28th day of April, 2021.
Dated at the City of Calgary, Alberta this 25th day of June, 2021.

G.H. Poelman
J.C.Q.B.A.

Appearances:

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Andrew Wilson and Charlotte Stokes
for the Defendants, Apache Corporation, William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pittman