



CMH
April 27, 2021
Justice Poelman

COURT FILE NUMBER 1901-09160
 COURT COURT OF QUEEN'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY
 PLAINTIFFS STEPHEN FLESCH, MARSHAL THOMPSON, TYLER
 MAKSYMCHUK, AND REID CHAMBERLAIN
 DEFENDANTS APACHE CORPORATION; PARAMOUNT RESOURCES
 LTD., WILLIAM C. MONTGOMERY, ANNELL R. BAY,
 DANIEL W. RABUN, RENE R. JOYCE, AND CHARLES J.
 PITMAN

Brought under the Class Proceedings Act

**BRIEF & AUTHORITIES OF THE PLAINTIFFS
 PLAINTIFFS' CERTIFICATION APPLICATION
 BEFORE THE HONOURABLE MR. JUSTICE G. H. POELMAN
 TO BE HEARD APRIL 27 & 28, 2021**

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I. OVERVIEW

1. The action sought to be certified as a class proceeding on this motion is the quintessential class action: one involving the interpretation of a common contract applying to hundreds of people. Who will be successful in its interpretation ought only to be decided at trial, not on this procedural motion.
2. The Plaintiffs seek to represent a group of employees from Alberta who were employed in a Canadian subsidiary of a U.S. oil company that was sold to a Canadian oil company. Those employees were provided with deferred compensation as part of the remuneration for their hard work, which was to incentivize their long term devotion to their employer. For many employees this amounted to a significant component of their compensation package.
3. When that U.S. oil company sought to exit Canada and sold its Canadian subsidiary, it did so in such a way that the employees' employment was not terminated nor did their duties and responsibilities change. The only thing that changed was that their employer no longer honoured the deferred compensation owing to them for the work they had already performed for that company.
4. The Plaintiffs and the class they seek to represent consist of approximately 350 former employees. They claim that the terms of their employment, which did not change, provided that the deferred compensation awarded to them for their past work be honoured when the change of control of the Canadian subsidiary occurred – by the U.S. parent, by the committee responsible for the long-term compensation, their employer and/or the purchasing entity.
5. This is a procedural motion. It is solely concerned with determining the appropriate process for deciding the rights of 350 employees. At its heart, the underlying dispute is about the interpretation of a limited number of words in a common contract. There is no sense in seeking determinations in what the words of a common contract mean 350 separate times – that would result in a multiplicity of

proceedings leading to inconsistent decisions and a complete waste of judicial resources.

6. This proceeding easily satisfies the for certification set out in section 5 of the *Class Proceedings Act ("CPA")*:¹
 - a. **There are causes of action:** The Plaintiffs have pleaded well-known and recognizable causes of action, namely breach of contract, breach of contractual duty of good faith, breach of fiduciary duty and unjust enrichment;
 - b. **There is an identifiable class of 2 or more persons:** the proposed class is linked to those employed on the date the sale was announced, are specifically known to the Defendants and who will all rationally benefit from the determination of the common issues;
 - c. **The claims raise common issues:** The interpretation of provisions of common contracts and the contractual duty of good faith, and the determination of duties and responsibilities that flow from them are common across the class and forms a substantial ingredient of each class member's claim;
 - d. **A Class Proceeding is the Preferable Procedure:** The nature of the claims and inherent power imbalance between the employees and Defendants in this action make it an ideal class action; and
 - e. **The Proposed Representative Plaintiffs are Adequate and Appropriate:** The plaintiffs are all members of the proposed class and are committed to vigorously pursue the claims on behalf of the class.
7. The requirements for certification as a class proceeding are clearly met in this case. Attempts to obfuscate or complicate the application of the certification criteria to straightforward factual circumstances with application to all putative class members should be viewed skeptically as seeking to avoid an efficient and fair process for the determination of all of their claims. The 350 employees in Alberta should be permitted to advance those claims together to seek recourse.

¹ *Class Proceedings Act*, SA 2003, c C-16.5, s.5 ("*CPA*"), [Tab 11].

II. FACTS

A. GENERAL BACKGROUND

8. Apache Corporation ("**Apache**") is a publicly traded corporation, headquartered in Houston, Texas. Apache is engaged in oil and natural gas exploration and production worldwide² and carried on its operations in Canada (primarily in Alberta) through Apache Canada Ltd. ("**Apache Canada**"), an indirect, wholly-owned subsidiary of Apache up until August 18, 2017.³
9. Apache has a long-term compensation plan, most recently known to employees of Apache Canada as the omnibus compensation plan ("**AOCP**"),⁴ which provides for the award of Restricted Stock Units ("**RSUs**"), Stock Options ("**Options**") and Performance Awards ("**PAs**") as part of the employees' remuneration package.⁵
10. The present proceeding involves RSUs, Options and PAs awarded under two iterations of the AOCP, namely, the Apache Corporation 2011 Omnibus Equity Compensation Plan, As Amended and Restated Effective December 15, 2015 ("**2011 AOCP**"),⁶ and the Apache Corporation 2016 Omnibus Compensation Plan ("**2016 AOCP**").⁷ The terms from the 2011 AOCP and the 2106 AOCP relevant to this proceeding are identical.⁸
11. In consideration for their work, the remuneration package of Apache Canada employees included participation in the AOCP. This deferred compensation was provided to Apache Canada employees as a term of their employment.⁹ For many

² Affidavit of Steven Flesch, sworn February 21, 2020 ("Flesch Affidavit") at para 2, Exhibit A.

³ Affidavit of Greg Byrgesen, sworn January 21, 2020, ("Byrgesen Affidavit"); Flesch Affidavit, para 3; Affidavit of Michelle Dietz, sworn February 20, 2020 ("Dietz Affidavit") at Exhibit I.

⁴ Flesch Affidavit at paras 10 & 11, Exhibit F & Exhibit G.

⁵ Flesch Affidavit at para 12 & Exhibit F and Transcript of Cross-Examination of Greg Byrgesen on February 12, 2021 ("Byrgesen Transcript") at p. 16, lines 3-13.

⁶ Flesch Affidavit, Exhibit F

⁷ Flesch Affidavit, Exhibit G.

⁸ See Schedule "B" of Plaintiffs Brief.

⁹ Flesch Affidavit at para 10, Byrgesen Transcript at p. 15, lines 9-27; p. 16, lines 3-13; Byrgesen Affidavit at paras 22(b) & para13.

the RSUs, Options and PAs formed a significant component of their annual compensation – in some cases up to 50 per cent.¹⁰

12. In particular, where RSUs were awarded, these awards would be deposited into employees' online account with Fidelity and would be reflected as "unvested" until the vesting date, at which point it those RSUs would be indicated as "vested" and employees could either hold or sell the RSUs.¹¹
13. The AOCPP was administered by a committee at Apache, known as the Management Development and Compensation Committee ("**Committee**").¹² The individual Defendants named in this proceeding were members of the Committee as of July 6, 2017.¹³

B. SALE OF APACHE CANADA

14. On July 6, 2017, Apache Canada announced that Apache was withdrawing from its Canadian operations and that all shares of Apache Canada had been sold to Paramount Resources Ltd. ("**Paramount**").¹⁴ Paramount is a publicly traded Canadian corporation, headquartered in Calgary, Alberta that is engaged in oil and natural gas exploration and production in Canada.¹⁵
15. Paramount's acquisition of Apache Canada was completed on August 16, 2017 and involved acquisition of all of Apache Canada's shares.¹⁶ Through a series of subsequent amalgamations, Apache Canada was ultimately continued as Paramount.¹⁷ Therefore following the amalgamations, the employees of Apache Canada became employees of Paramount.

¹⁰ Flesch Affidavit at para 17; Thompson Affidavit at para 11; Maksymchuk Affidavit at para 11; Chamberlain affidavit at para 11.

¹¹ Flesch Affidavit, at para 15.

¹² Flesch Affidavit, Exhibit F, s. 3.1.

¹³ Flesch Affidavit, paras 5, Exhibit F, p. 120, Exhibit G, p. 149.

¹⁴ Flesch Affidavit at para 25; Dietz Affidavit, Exhibits E & F.

¹⁵ Flesch Affidavit at para 4; Byrgesen Affidavit at para 14.

¹⁶ Dietz Affidavit, Exhibit F & Exhibit I.

¹⁷ Dietz Affidavit at paras 4-6.

C. CANCELLATION OF RSUs, OPTIONS AND PAs

16. The announcement of Apache Canada's sale to Paramount took place at a "town hall" meeting on July 6, 2017, during which Apache Canada employees learned that their unvested RSUs, Options and PAs would be cancelled.¹⁸
17. Following the sale, employees' RSUs, unvested options and unvested stock awarded as PAs were all cancelled; RSU awards on employees' Fidelity accounts which previously reflected the RSUs as "unvested" were indicated as "cancelled".¹⁹
18. Employees who held unvested RSUs, Options and PAs were not compensated for the cancellation of the Apache RSUs, Options and PAs nor did they receive any comparable or equitable substitution for them from Paramount or Apache.²⁰ There was also no adoption or continuation of the AOCIP provisions granting RSUs, or Options by the Defendants.²¹
19. A total of 347 Apache Canada employees continued their employment with Paramount after the sale and like the representative Plaintiffs, most of them did so in similar positions, with similar duties and responsibilities and received the same salaries.²² The duties and responsibilities of the Apache Canada employees were continued after the sale of Apache Canada to Paramount.²³ All that changed is that hundreds of Apache Canada employees lost a significant part of the remuneration for their work they performed for their employer.

¹⁸ Flesch Affidavit at para 25-28.

¹⁹ Flesch Affidavit at para 28; Thompson affidavit at para 15; Maksymchuk Affidavit at para 15; Chamberlain Affidavit at para 13.

²⁰ Flesch Affidavit at para 31; Affidavit of Marshal Thompson, sworn February 20, 2020 ("Thompson Affidavit") at para 15; Affidavit of Reid Chamberlain, sworn February 21, 2020 ("Chamberlain Affidavit") at para 13; Affidavit of Tyler Maksymchuk, sworn February 20, 2020 ("Maksymchuk Affidavit") at para 15.

²¹ Flesch Affidavit at para 36.

²² Byrgesen Affidavit at para 15; Flesch Affidavit at para 6.

²³ Byrgesen Affidavit at para 15.

D. THE APACHE OMNIBUS COMPENSATION PLAN

20. The stated purpose of the AOCPP is to provide eligible employees with equity-based incentives to encourage long-term employment with Apache **and its affiliates (including Apache Canada)** and attract, retain and motivate talented individuals.²⁴
21. As noted above, the AOCPP provided for the awarding of RSUs, Options and PAs. Apache Canada employees were awarded RSUs, Options or PAs in the same manner.²⁵
- i) Restricted Stock Units, Stock Options and PA Awards
22. RSUs were rights to receive stock, cash or a combination thereof at the end of a specified vesting period.²⁶ Apache Canada employees who received RSUs were entitled to receive one share for each RSU awarded at the end of the vesting period, which was commonly set at three years.²⁷
23. Options were the rights to purchase shares at a specified price ("strike price") for a period of time, typically ten years. Options were subject to a restricted period, during which they could not be traded, after which they would vest.²⁸
24. PAs were effectively awards of RSUs, which were contingent on meeting certain performance goals. The stocks would vest provided the Company met specified performance targets, with one half vesting upon achievement of the specified target and the other half vesting a year later.²⁹ The number of PA shares that vested depended upon the performance of Apache.³⁰

²⁴ Flesch Affidavit, Exhibit F, p. 116, Exhibit G, p. 144.

²⁵ Byrgesen Affidavit at para 12.

²⁶ Flesch Affidavit, Exhibit F, p. 119.

²⁷ Byrgesen Affidavit at para 13; Flesch Affidavit at para 13.

²⁸ Flesch Affidavit, para 20.

²⁹ Flesch Affidavit at para 22; Thompson Affidavit at para 14.

³⁰ Flesch Affidavit at para 23.

ii) Common Award Agreements

25. Employees would receive RSUs by way of a grant notice ("RSU Grant Notice") and an RSU Award Agreement. The RSU Award Agreement provides that it is included in and forms part of the RSU Grant Notice, and that it is an agreement made between the Company and each recipient. Employees who received RSUs received the same standard Grant Notices and RSU Agreements, as amended from time to time.³¹
26. Similarly, Apache Canada employees who received Options under the AOCPP would also receive an Options Grant Notice and a Stock Options Award Agreement. The Stock Options Award Agreement provides that it is an agreement made between the Company and each recipient and sets out the terms by which the Options are granted.³² Employees who received Stock Options under the plan would be subject to the same Stock Options Award Agreement, as amended from time to time.³³
27. The vesting of RSUs and Options were not contingent on meeting any performance target, whether by Apache Canada, Apache or the employee, nor was it otherwise discretionary. It simply required that the recipient remained employed with the Company until the RSUs had vested or the restricted period for the Options had passed, after which an employee was free to sell or trade them.³⁴
28. PAs were granted by way of an award notice and a performance award agreement, which specified performance goals to be achieved by Apache. The award notice would indicate the number of conditional shares awarded. The PA Agreement states that it is between the Company and each recipient. Employees

³¹ See for example, RSU Grant Notices and Agreements granted on March 2, 2016, Flesch Affidavit, Exhibit I, at p. 180; Maksymchuk Affidavit, Exhibit A, p. 2; Thompson Affidavit, Exhibit A, p. 2; Chamberlain Affidavit, Exhibit A, p. 2.

³² Flesch Affidavit at para 21, Exhibit N, p. 244.

³³ Flesch Affidavit, Exhibit N; Thompson Affidavit, Exhibit C.

³⁴ Flesch Affidavit at paras 16 & 21.

who received PAs under the plan would be subject to the same PA Agreement, as amended from time to time.³⁵

29. All three types of agreement incorporate by reference the AOCP, including the definition of Company and provisions relating to a change in control.³⁶

iii) The AOCP provisions on Change of Control

30. The AOCP details the consequences of a "Change of Control". The term "Change of Control" under the AOCP incorporates the definition adopted in the Apache Income Continuance Plan, which provides:

"Change of Control" shall mean the event occurring when a person, partnership or corporation together with all persons, partnerships or corporations acting in concert with each person, partnership or corporation, or any or all of them acquires *more* than 20% of the Company's outstanding voting securities; provided that a Change of Control shall not occur if such persons, partnerships or corporations acquiring more than 20% of the Company's voting securities is solicited to do so by the Company's board of directors, upon its own initiative, and such persons, partnerships or corporations have not previously proposed to acquire more than 20% of the Company's voting securities in an unsolicited offer made either to the Company's board of directors or directly to the stockholders of the Company.³⁷

31. The term "Company" is defined in the AOCP to mean Apache together with its "Affiliates", which would include Apache Canada at the time.³⁸

32. Section 13 of the 2016 AOCP³⁹ provides:

"In the event of the occurrence of a Change of Control of the Company and unless otherwise provided in an applicable Award Agreement:

³⁵ Flesch Affidavit, Exhibit O; Thompson Affidavit, Exhibit D.

³⁶ Flesch Affidavit, Exhibit I p. 180, 184; Exhibit N, p. 242, 245; Exhibit O, p. 256, 268.

³⁷ Flesch Affidavit, Exhibit H, p. 178.

³⁸ Flesch Affidavit, Exhibit F, p. 116; Exhibit G, p. 110.

³⁹ See also Flesch Affidavit, Exhibit F, p. 137, section 12 of the 2011 AOCP.

(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.

...

(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.

...

(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...⁴⁰

33. Further, section 14 of the 2016 AOC⁴¹ provides:

In the event that the Company is merged or consolidated with another corporation and the Company is not the surviving corporation, or if all or substantially all of the assets or more than 20 percent of the outstanding voting stock of the Company is acquired by any other corporation, business entity or person, or in the case of reorganization (other than a reorganization under the United States Bankruptcy Code) or liquidation of the Company, then the Committee or the board of directors of any corporation assuming the obligations of the Company, shall, as to the Plan and any 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 an appropriate stock of the Company or of the merged, consolidated, or otherwise reorganized corporation which will be issuable with respect to the Stock.

⁴⁰ Flesch Affidavit, Exhibit G, p. 13; an identical provision is contained in section 12 of the 2011 AOC⁴¹, see Flesch Affidavit, Exhibit F, p. 137.

⁴¹ See also Flesch Affidavit, Exhibit F, p. 138, Section 13 of the 2011 AOC⁴¹.

E. The Representative Plaintiffs and the Class

34. The proposed representative plaintiffs are former employees of Apache Canada, who participated in the AOCIP as a term of employment with Apache Canada and received RSUs, Options and/or Performance Awards.
35. The proposed class consists of "All employees of Apache Canada Ltd. as of July 6, 2017, and who were then participating in the Apache Corporation's omnibus compensation plan."⁴²
36. Stephen Flesch was employed with Apache Canada for almost 18 years,⁴³ and held, as of July 6, 2017, approximately \$112,000 USD worth of RSUs based on the market price at that time.⁴⁴ At the time of Apache Canada's sale, Mr. Flesch also held 928 unvested Options at a strike price of \$63.25 and a total of 1635.952 pending Apache shares awarded as PAs.⁴⁵
37. Marshal Thompson was employed with Apache Canada for almost 11 years. As of July 6, 2017, Mr. Thompson held 12,405 options at various strike prices. Mr. Thompson also held RSUs and PAs as of July 6, 2017.
38. Tyler Maksymchuk was employed with Apache Canada for approximately 11 years.⁴⁶ Mr. Maksymchuk held 3,339 RSUs as of July 6, 2017, with a market value of approximately \$153,000 USD based on the market price of July 6, 2017. He also held 3,343 Options at various strike prices.⁴⁷
39. Reid Chamberlain was employed with Apache Canada for approximately 5 years and resigned from Paramount on May 17, 2019. As of July 6, 2017, Mr.

⁴² Notice of Application filed March 6, 2020.

⁴³ Flesch Affidavit at para 7.

⁴⁴ Flesch Affidavit at para 32.

⁴⁵ Flesch Affidavit at para 33-34.

⁴⁶ Maksymchuk Affidavit at para 2.

⁴⁷ Maksymchuk Affidavit at paras 12-14.

Chamberlain held 2051 RSUs with a market value of approximately \$94,000 USD based on the market price at the time.⁴⁸

40. Mr. Flesch, Mr. Thompson, Mr. Maksymchuk and Mr. Chamberlain ("**Plaintiffs**") received the various deferred compensation awards through their participation in the AOCF, which was a term of their employment with Apache Canada.⁴⁹ The AOCF awards formed a significant part of their employment income and were a major incentive for their continued service with Apache Canada.⁵⁰
41. The Plaintiffs are committed to and well-suited to advance class members' interest in the case and do not have a conflict of interest with the proposed class members with respect to any of the proposed common issues.⁵¹

F. Paramount's Communications with Employees about this Class Action

42. Shortly after the commencement of this litigation, Paramount convened a "town hall" meeting of all its employees on or about November 8, 2019. At that meeting, Paramount's President and Chief Executive Officer, Jim Riddell, addressed the present proposed class action.
43. Mr. Riddell advised class members who he had ultimate authority over as the CEO of their employer that:
 - a. the class action was meritless;
 - b. that class members had an opportunity to opt out; and
 - c. that "legacy" Apache Canada employees would be named as parties in the case.

⁴⁸ Chamberlain Affidavit at para 12.

⁴⁹ Thompson Affidavit at para 5, Chamberlain Affidavit at para 5; Maksymchuk Affidavit at para 5; Flesch Affidavit at para 10.

⁵⁰ Thompson Affidavit at para 11, Chamberlain Affidavit at para 11; Flesch Affidavit at para 17; Maksymchuk Affidavit at para 11.

⁵¹ Flesch Affidavit at paras 42-52, Thompson Affidavit at paras 17-26; Maksymchuk Affidavit at paras 17-26; Chamberlain Affidavit at paras 15-24.

44. At the same time as providing misleading information that the class members would be named as parties and therefore known to their employer, Paramount's CEO advised that staffing cuts would be made.⁵²
45. Subsequent to the Town Hall meeting, Paramount sent out an email about the present proposed class action to all its employees. Notably, the email stated that Paramount would be aware of employees who did not opt out of the class proceeding.⁵³
46. The communications by Paramount and Mr. Riddell caused distress to a number of Paramount employees. In particular, certain employees were concerned about the idea that they would be named and that Paramount would be aware of their support for the proposed class action.⁵⁴
47. The implication to class members employed by Paramount was that they would be fired or otherwise poorly treated by their employer should they continue to be part of the class proceeding.

III. ISSUES AND LAW

48. There are two issues on this motion:
- (i) Whether the proceeding should be certified as a class action? and
 - (ii) If certified, whether the Defendants should be restricted from communicating about the class action with class members during the notice period and restricted from accessing opt out information?

ISSUE I: THE COURT SHOULD CERTIFY THE PROCEEDING AS A CLASS ACTION

A. General Principles

49. The test for certification is set out in s. 5(1) of the *CPA*.⁵⁵ The five criteria that must be met are: (i) the pleadings disclose a cause of action; (ii) there is an identifiable

⁵² Flesch Affidavit at paras 37-38.

⁵³ Flesch Affidavit at paras 36-40, Exhibit Q.

⁵⁴ Flesch Affidavit at para 41.

⁵⁵ *Class Proceedings Act*, SA 2003, c C-16.5, s. 5(1), [Tab 11].

class of two or more persons; (iii) the claims of the prospective class raise a common issue; (iv) a class proceeding is the preferable procedure; and (v) there is a person eligible to be appointed as a representative plaintiff.⁵⁶

50. Where the test for certification is met, the certification of the proceeding as a class proceeding is mandatory.⁵⁷
51. The Alberta Court of Appeal in *Ravvin v Canada Bread Company Limited* recently reiterated the purpose of certification as allowing courts to deal efficiently with increasingly complicated litigation, on a principled rather than ad hoc basis.⁵⁸
52. The certification stage does not involve an assessment of the merits of the claim nor is it intended to be a pronouncement on the viability or strength of the action.⁵⁹ It is not a trial nor is it a summary judgment application, but a procedural motion which concerns only the form of an action.⁶⁰
53. In construing class action legislation, the Supreme Court of Canada ("**SCC**") has held that it is essential that courts do not take an overly restrictive approach. Instead, courts should apply a generous approach and interpret class action legislation that "gives full effect" to the benefits of class actions, namely access to justice, judicial economy and behaviour modification.⁶¹
54. The Court of Appeal of Alberta confirmed these principles in *Starratt v Mamdani*:

Class action legislation is procedural. It is intended to determine issues that are common to the members of the class who opt into the proceeding in a manner that is economical, fair, efficient and manageable. For that reason,

⁵⁶ *Class Proceedings Act*, SA 2003, c C-16.5, s 5(1)(a)-(e).

⁵⁷ *Class Proceedings Act*, SA 2003, c C-16.5 s. 5(3).

⁵⁸ *Ravvin v Canada Bread Company Limited*, [2020 ABCA 424](#), at [Tab 26] at para 40 citing *Warner v Smith & Nephew Inc.*, 2016 ABCA 223.

⁵⁹ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013 SCC 57](#), [Tab 25] at para 103 ("*Pro-Sys*").

⁶⁰ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 10 ("*Warner*").

⁶¹ *Hollick v Toronto (City)*, [2001 SCC 68](#), [Tab 16] paras 14-15 ("*Hollick*").

the legislation is applied flexibly and liberally in order to balance fairness and efficiency.⁶²

55. The evidentiary threshold on a certification motion is not onerous.⁶³ Where the pleadings disclose a cause of action, to satisfy the remaining criteria, the representative plaintiff need only show "that there is 'some basis in fact' for each of the certification requirements and must bring evidence to establish them."⁶⁴ The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. On the contrary, that standard reflects the fact that the court is "ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight."⁶⁵

B. The Pleadings Disclose Causes of Action

56. The first certification requirement requires the pleadings to disclose a cause of action.⁶⁶ This requirement is assessed on the same standard of proof applicable to a motion to strike/dismiss – that is, assuming all facts pleaded to be true, unless it is plain and obvious that the plaintiff's claim cannot succeed, the requirement is satisfied.⁶⁷
57. The assessment of whether the pleadings disclose a cause of action is determined based on the facts as set out in the pleadings, and not the consideration of evidence.⁶⁸ Put simply, the focus is on the pleadings. Further, at this stage, "pleadings are construed generally and liberally allowing for deficiencies that are

⁶² *Starratt v Mamdani*, [2017 ABCA 92](#), [Tab 29] at para 9 ("Starratt").

⁶³ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 13; *Starratt v Mamdani*, [2017 ABCA 92](#), [Tab 29] at para 10.

⁶⁴ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 13.

⁶⁵ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013 SCC 57](#), [Tab 25] at para 102.

⁶⁶ *Class Proceedings Act*, SA 2003, c C-16.5, s 5(1)(a).

⁶⁷ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013 SCC 57](#), [Tab 25] at para 63; *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#) at para 12.

⁶⁸ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 14.

not radically deficient."⁶⁹ Where the facts pleaded, assuming them to be true, *could possibly* entitle the plaintiff to a remedy, the requirement is met.⁷⁰

58. The courts are not supposed to determine whether the Plaintiffs will succeed on the merits on the causes of action pleaded, but need only determine whether the Plaintiffs' position on the cause *could possibly* entitle the Plaintiffs to a remedy when determined on a full evidentiary record.

59. The section 5(1)(a) requirement is clearly met in this case, by clearly disclosing the following causes of action:

- a) Breach of contract;
- b) Breach of the contractual duty of good faith;
- c) Breach of fiduciary duty; and
- d) Unjust enrichment.

i) Breach of Contract

60. Breach of contract is a basic, well-recognized and sufficient cause of action.⁷¹ The Plaintiffs have pleaded the necessary facts to establish a cause of action for breach of contract: namely, the existence of a contract and breach of a term of that contract.⁷²

61. The Plaintiffs' have alleged that the Plaintiffs and the Class held employment contracts with Apache Canada, the terms of which continued in full force and effect after Paramount's acquisition of Apache Canada.⁷³ The Plaintiffs also allege that the participation in the AOCIP formed part of the Plaintiffs' and class' contract of employment with Apache Canada. The RSUs, Options and PAs granted to the Plaintiffs and the Class were granted pursuant to the AOCIP and Grant Agreements and formed a significant component of their employment

⁶⁹ *Starratt v Mamdani*, [2017 ABCA 92](#), [Tab 29] at para 10; see also *Hollick v Toronto (City)*, [2001 SCC 68](#), [Tab 16] at para 25.

⁷⁰ *Starratt v Mamdani*, [2017 ABCA 92](#), [Tab 29] at para 10. (emphasis added)

⁷¹ *Vander Griendt v Canvest Capital Management Corp*, [2014 ABQB 542](#), [Tab 23] at para 39.

⁷² *Atlantic Lottery Corp. v Babstock*, [2020 SCC 19](#), [Tab 5] at para 91.

⁷³ Amended Statement of Claim filed September 11, 2019, ("SOC") at paras 2, 19-21, 23, 56.

remuneration.⁷⁴ Paramount, having assumed the obligations of Apache Canada pursuant to section 186 of the *Business Corporations Act*, RSA 2000, c B 9, was required to honour the RSUs, Options and PAs that were awarded to the Class prior to July 6, 2017.⁷⁵

62. With respect to the breach of contract claim against Apache, the Plaintiffs base their claim on the AOCIP and Grant Agreements, which created a direct contractual relationship between Apache and the class members,⁷⁶ in addition to its joint and several liability as a common employer with Apache Canada.⁷⁷ The claim further alleges that a Change of Control occurred when Paramount acquired 100% of Apache Canada's shares, thus triggering the operation of section 13 of the 2016 AOCIP,⁷⁸ which would have resulted in all unvested RSUs, Options and PAs becoming fully vested to the Class. These facts and Apache's failure to honour the Class' RSUs, Options and PAs form the basis of the Plaintiffs' claim for breach of contract.
63. The Plaintiffs' claim for breach of contract against the Committee is also sufficiently pleaded. The statement of claim alleges that upon sale of 100% of Apache Canada's voting stock, the Committee was required by virtue of section 14 of the 2016 AOCIP⁷⁹ to provide for the adoption and continuation of the AOCIP by the purchasing company or the protection of any holders of RSUS or PAs by the substitution on an equitable basis of the appropriate stock of purchasing company. The statement of claim alleges that the Committee failed to do so, thus breaching section 14 of the AOCIP. Apache is also vicariously liable for the Committee's breach.
64. The Plaintiffs' claims for breach of contract offer a tenable interpretation of the Defendants' obligations under the AOCIP and the contracts of employment.

⁷⁴ Amended Statement of Claim filed September 11, 2019 at para 46, 55.

⁷⁵ Amended Statement of Claim filed September 11, 2019 at para 57.

⁷⁶ Amended Statement of Claim filed September 11, 2019 at para 58.

⁷⁷ Amended Statement of Claim filed September 11, 2019 at para 9, 19, 21-22, 27, 38, 58; *Bagby v Gustavson International Drilling Co.*, [1980 ABCA 227](#), [Tab 8] at paras 44-50, [1980] AJ No. 743.

⁷⁸ Amended Statement of Claim filed September 11, 2019 at para 59, (also section 12 of the 2011 AOCIP)

⁷⁹ Section 13 of the 2011 AOCIP.

65. An alternative interpretation of the contract is not sufficient basis to find that it is plain and obvious the Plaintiffs' claim for breach of contract will fail. In *Vander Griendt v Canvest Capital Management Corp*, Martin J. rejected the defendant's argument that the requirement under section 5(1)(a) was not met based on the defendant's interpretation of the contract at issue and held that the interpretation issue ought to be properly addressed at trial.⁸⁰
66. At certification, the Court is not to determine whether the Plaintiff's interpretation should prevail on the merits – only that the Plaintiff has pleaded a reasonable cause of action. The breach of contract claims pleaded easily pass this threshold.
- ii) Breach of the contractual duty of good faith*
67. The Plaintiffs have alleged that Paramount owed the Class a duty of good faith and fair dealing as a feature of their employment contracts. Likewise, the Plaintiffs allege that Apache and the Committee owed a similar duty in respect of their contractual relationship arising out of the AOCIP and Grant Agreements.
68. It is well-established that the duty of good faith forms part of the employment relationship and that these obligations continue throughout the employment relationship.⁸¹ The Plaintiffs allege that the class was in an employment relationship with Apache and Apache Canada/Paramount.
69. In addition, the Plaintiffs have alleged that the Defendants owed duties of good faith and fair dealing in the AOCIP and the Grant Agreements as a feature of the contractual relationship.
70. The Plaintiffs have alleged that the Defendants breached their respective duties of good faith and fair dealing in cancelling the unvested RSUs, Options and PAs and failing to provide Class Members with any equitable substitute.

⁸⁰ *Vander Griendt v Canvest Capital Management Corp*, [2014 ABQB 542](#), [Tab 32] at para 39.

⁸¹ *McKinley v BC Tel*, [2001 SCC 38](#), Tab 21 at para 73; see also *Fulawka v Bank of Nova Scotia*, [2012 ONCA 443](#), [Tab 13] at paras 48-49.

71. Again, a determination as to whether such duties exist or were breached on the merits ought not be made at certification – only when a full evidentiary record is before the court.

iii) Breach of Fiduciary Duty

72. The test for recognition of the existence of a fiduciary duty is set out in the SCC's decision in *Alberta v Elder Advocates of Alberta Society*.⁸² The SCC summarized the test as follows:⁸³

In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

73. In addition to their *per se* fiduciary duties to the corporation, directors may also owe fiduciary duties to other corporate stakeholders and the existence of that relationship turns on the facts of the relationships between the parties and whether the *Elder Advocates* criteria are met.⁸⁴

74. The Plaintiffs have pleaded the necessary elements to establish a claim for breach of fiduciary duty. The Plaintiffs have pleaded the following facts in support of the claim for breach of fiduciary duty:

⁸² *Alberta v Elder Advocates of Alberta Society*, [2011 SCC 24](#), [Tab 3] ("*Elder Advocates*").

⁸³ *Alberta v Elder Advocates of Alberta Society*, [2011 SCC 24](#), [Tab 3] at para 36.

⁸⁴ See for example: *Tongue v Vencap Equities Alberta Ltd*, (1994) 17 Alta LR (3d) 103; [1994 CanLII 8918](#), [Tab 31] at para 105 aff'd 1996 ABCA 208 (court found directors had a fiduciary duty to minority shareholders); *Green v Canada Trust Realty Inc.*, [2005 MBQB 249](#), [Tab 15] at paras 63-66 (court found it was not plain and obvious that former employees' claim for unpaid wages against individual directors of a corporation based on a breach of fiduciary duty was bound to fail); *Natco International, Inc. v Photo Violation Technologies Corp.*, [2008 BCSC 1325](#), Tab 22 at para 57 & 61 (court found claims by creditors against individual directors for breach of fiduciary duty not bound to fail). See also C Hansell, *Directors and Officers in Canada: Law and Practice* (Toronto: Thompson Reuters, 2021) at §9:3. Common Law—Nature of the Fiduciary Relationship.

- a. An undertaking to act in the best interests of the Plaintiffs and the Class arises pursuant to the terms of the AOCP, in particular section 14 of the 2016 AOCP;⁸⁵
 - b. The terms of section 14 of the AOCP required the Committee to make provisions for the adoption and continuation of the Plan by the acquiring or successor corporation and for the protection of the holders of outstanding awards by substitution on an equitable basis;⁸⁶
 - c. The Plaintiffs and the Class were regularly awarded RSUs, Options and PAs, which made up a significant component of their total employment compensation;⁸⁷ and
 - d. The Committee breached their fiduciary duties by failing to ensure the continuation of the AOCP or the protection of any holders of the RSUs, Options or PAs by the substitution on an equitable basis.⁸⁸
75. The Plaintiffs have identified the individual Defendants named in this proceeding as members of the Committee,⁸⁹ and have pleaded the express obligations set out in the AOCP as basis for their claim against these individuals for breach of fiduciary duty.⁹⁰
76. The Plaintiffs has sufficiently pleaded the elements of a fiduciary duty, which should be tested on the merits at trial.

iv) Unjust enrichment

77. The elements for unjust enrichment are: (1) enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment.⁹¹ The Plaintiffs have alleged the following facts in support of the Class' claim for unjust enrichment:
- a. The RSUs, Options and PAs formed part of the remuneration package of the Class and relied on these awards to continue working for Apache Canada;⁹²

⁸⁵ Amended Statement of Claim filed September 11, 2019 at para 70, see section 13 of the 2011 AOCP.

⁸⁶ Amended Statement of Claim filed September 11, 2019 at para 40.

⁸⁷ Amended Statement of Claim filed September 11, 2019 at paras 35-63.

⁸⁸ Amended Statement of Claim filed September 11, 2019 at para 52 & 71.

⁸⁹ Amended Statement of Claim filed September 11, 2019 at paras 12-17.

⁹⁰ Amended Statement of Claim filed September 11, 2019 at para 40, 62-64.

⁹¹ *Garland v Consumers' Gas Co.*, [2004 SCC 25](#), [Tab 14] at para 30.

⁹² Amended Statement of Claim filed September 11, 2019 at para 46, 55.

- b. Apache and/or Paramount gained the benefit of the dutiful work of the Class without paying or honouring remuneration owed to the Class for that work;⁹³ and
 - c. The Class Members suffered a corresponding deprivation as a result of the RSUs, Options or PAs being cancelled or not honoured despite the fact that they had vested pursuant to the terms of the AOCIP and Grant Agreements.⁹⁴
78. Claims for unjust enrichment have been certified in contract-based class proceedings regularly.⁹⁵

C. There is an identifiable class

79. Section 5(1)(b) of the *CPA* requires that there be an identifiable class of 2 or more persons.⁹⁶ The purpose of a class definition is to identify persons entitled to notice and relief and those who are bound by the judgment.⁹⁷
80. The threshold for satisfying this requirement is a low one.⁹⁸ The class must be based on objective criteria and bear a rational connection or relation to the common issues.⁹⁹ A class definition is sufficient if it allows a court to determine whether any person coming forward is or is not a class member.¹⁰⁰ It is not necessary that every class member be named or known.¹⁰¹
81. The Plaintiffs propose the following class definition: "all employees of Apache Canada Ltd. as of July 6, 2017, and who were then participating in the Apache Corporation's omnibus compensation plan."¹⁰²

⁹³ Amended Statement of Claim filed September 11, 2019 at para 72.

⁹⁴ Amended Statement of Claim filed September 11, 2019 at paras 39, 52, 59-60, 72.

⁹⁵ *Baroch v Canada Cartage*, [2015 ONSC 40](#), [Tab 9] at para 21; *O'Neill v General Motors of Canada Ltd.*, [2011 ONSC 6291](#), [Tab 24] at para 3 (certified on consent) at para 5; *Fulawka v Bank of Nova Scotia*, [2012 ONCA 443](#), [Tab 13] at paras 42-45.

⁹⁶ *Class Proceedings Act*, SA 2003, c C-16.5, s 5(1)(b).

⁹⁷ *Western Canadian Shopping Centres Inc. v Dutton*, [2001 SCC 46](#), [Tab 38] ("*Dutton*") at para 38.

⁹⁸ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 22.

⁹⁹ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 22; *Western Canadian Shopping Centres Inc. v Dutton*, [2001 SCC 46](#), [Tab 38] at para 38.

¹⁰⁰ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 22.

¹⁰¹ *Western Canadian Shopping Centres Inc. v Dutton*, [2001 SCC 46](#), [Tab 38] at para 38

¹⁰² Notice of Application at para 2.

82. In this case the class definition is not only objectively determinable, every class member can be identified through the Defendants' records.¹⁰³
83. The AOCPP and corresponding RSUs, Options, and PAs were available to all employees of Apache Canada as a term of their employment.¹⁰⁴ Accordingly, the common issues (detailed below) that involve the interpretation of the AOCPP and standard Grant Agreements are rationally connected to the employees who are bound by those agreements.
84. This criterion is clearly satisfied in this case.

D. The Class Members' Claims Raise Common Issues

85. Section 5(1)(c) requires the claims of prospective class members to raise a common issue.¹⁰⁵
86. In assessing commonality, "the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis."¹⁰⁶ An issue will be common if it forms a substantial ingredient of each class member's claim and its resolution is necessary to the resolution of each member's claim.¹⁰⁷ It is not necessary for common issues to be determinative of liability; resolution of the common issues need only advance the litigation.¹⁰⁸
87. In addition, to satisfy the common issues requirement it is not necessary for common issues to predominate over non-common issues.¹⁰⁹ Nor does the commonality requirement demand that success for one member lead to success

¹⁰³ Byrgesen Transcript at p. 22, lines 12-16; Byrgesen affidavit at para 15.

¹⁰⁴ Flesch Affidavit at para 11, Byrgesen Affidavit at paras 22(b) & 13; Byrgesen Transcript at p. 15, lines 9-27; p. 16, lines 3-13.

¹⁰⁵ *Class Proceedings Act*, SA 2003, c C-16.5, s 5(1)(c).

¹⁰⁶ *Western Canadian Shopping Centres Inc. v Dutton*, [2001 SCC 46](#), [Tab 38] at para 39.

¹⁰⁷ *Western Canadian Shopping Centres Inc. v Dutton*, [2001 SCC 46](#), [Tab 38] at para 39; *Hollick v Toronto (City)*, [2001 SCC 68](#), [Tab 16] at para 18.

¹⁰⁸ *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 30; *Vivendi Canada Inc. v Dell'Aniello*, [2014 SCC 1](#), [Tab 34] ("*Vivendi*") at para 46.

¹⁰⁹ *Class Proceedings Act*, SA 2003, c C-16.5; s. 5(1)(c); *Warner v Smith & Nephew Inc.*, [2016 ABCA 223](#), [Tab 36] at para 31.

for all the members, though success for one member must not result in failure for another.¹¹⁰

88. The heart of the claims in this proceeding turns on the interpretation of several words of a common contract: the definition of the term "Company" and sections 13 and 14 of the AOCIP.¹¹¹ Issues for resolution involving the interpretation of common contracts are regularly certified.¹¹²

Breach of Contract

89. Common issues 1 and 2 ask what contractual obligations the Defendants owe to the class with respect to the unvested RSUs, PAs or Options as a result of the sale and whether the Defendants breached those contractual obligations.¹¹³ These are questions that impact all class members claim, but only require the assessment of common facts and common contractual provisions.
90. A determination of the contractual obligations owed by the Defendants to class members, including the nature of their liability (i.e., whether such liability is joint or several) is a necessary and substantial ingredient of class members' claims. For example, such a question has been found to be an appropriate common issue in employment cases.
91. Courts have recognized certified claims based on the interpretation of a common document or single document, recognizing that common issues typically arise in such cases.¹¹⁴ In *Caponi v Canada Life Assurance Co.*,¹¹⁵ Cullity J noted:

¹¹⁰ *Vivendi Canada Inc. v Dell'Aniello*, [2014 SCC 1](#), [Tab 34] at para 45.

¹¹¹ For proposed common issues, see Schedule "A" below.

¹¹² *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10] at para 45; *Austin v Bell Canada Inc.*, [2019 ONSC 4757](#), [Tab 6] at paras 17-19; *Dominguez v Northland Properties Corporation*, [2012 BCSC 328](#), [Tab 12] at paras 20 & 61.

¹¹³ The terms underlying the alleged contractual obligations are based on the common interpretation of terms within the AOCIP, which terms are also similarly defined in the various grant agreements. See Schedules B and C.

¹¹⁴ See for example *Vivendi Canada Inc. v Dell'Aniello*, [2014 SCC 1](#), [Tab 34] at para 75.

¹¹⁵ *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10].

Numerous cases involving challenges to employers' administration of pension and other employee benefits plans have been certified in the past. Typically, this has been held to be appropriate because of the existence of common questions of interpretation of plan documents, and common formulae and methodologies that determine and govern the rights of all, or some group of, participants in the plan and constitute most of the issues in dispute between the parties.¹¹⁶

92. Common issues for breach of contract claims framed in terms of ascertaining what contractual obligations exist arising from a common contract or common documents have been routinely certified in cases such as *Austin v Bell Canada Inc.*,¹¹⁷ *O'Neill v General Motors of Canada Ltd.*,¹¹⁸ *Caponi v Canada Life Assurance Company*,¹¹⁹ *Perrenoud v eHealth Ontario*,¹²⁰ *Fulawka and Baroch v Canada Cartage*.¹²¹
93. Common issues 3 and 4 are concerned with whether the Defendants owe the Class duties of good faith and fair dealing as a feature of their respective contractual relationships (i.e., employment contracts and grant agreements) and whether the Defendants breached those duties. These duties are said to arise out of the common contractual relationships the Plaintiffs and the Class have with the Defendants. These types of questions have also been certified in cases such as *Walter v Western Hockey League*,¹²² *Rosen v BMO Nesbitt Burns*,¹²³ and *Dominguez v Northland Properties Corporation*.¹²⁴

Breach of Fiduciary Duty

¹¹⁶ *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10] at para 47.

¹¹⁷ *Austin v Bell Canada Inc.*, [2019 ONSC 4757](#), [Tab 6] at para 15-16, rev'd 2020 ONCA 142 only on summary judgment findings.

¹¹⁸ *O'Neill v General Motors of Canada Ltd.*, [2011 ONSC 6291](#), Tab 23 at para 3 (certified on consent).

¹¹⁹ *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10] at para 45; *Austin v Bell Canada Inc.*, [2019 ONSC 4757](#), [Tab 6] at paras 17-19.

¹²⁰ *Perrenoud v eHealth Ontario*, [2012 ONSC 6704](#), [Tab 24].

¹²¹ *Fulawka v Bank of Nova Scotia*, [2012 ONCA 443](#), [Tab 13] at para 89-90; see also *Baroch v Canada Cartage*, [2015 ONSC 40](#), [Tab 9] at para 26.

¹²² *Walter v Western Hockey League*, [2017 ABQB 382](#) at paras 59-60, [Tab 35] ("Walter").

¹²³ *Rosen v BMO Nesbitt Burns Inc.*, [2013 ONSC 2144](#), [Tab 27] at para 64.

¹²⁴ *Dominguez v Northland Properties Corporation*, [2012 BCSC 328](#), [Tab 12] ("Dominguez") at para 144.

94. Common issues 5 & 6 ask whether the Defendants owe a fiduciary duty to the Class and whether any such duty was breached. The Class is similarly situated *vis-à-vis* the Defendants and the Defendants' alleged fiduciary duties to the class stem from the source, i.e., the AOCP. These questions are capable of common resolution and do not require individualized inquiries. Accordingly, they are appropriate common issues because their determination can be applied across the class. Questions such as these have been certified as common issues in other cases.¹²⁵

Unjust Enrichment

95. Common issue 7 asks whether the Defendants' conduct resulted in their unjust enrichment and if so, whether the Defendants are constructive trustees for the benefit of the class, and what amounts are held in the constructive trust. This proposed common issue is capable of common resolution given its focus on the Defendants' action as opposed to any individual class members' actions. Similar questions have been certified in the past and there is no reason why they should not be certified in this case.¹²⁶

Damages

96. Common issue 8 asks whether the amount of damages can be determined on an aggregate basis and if so, in what amount. In *Pro-Sys*, the SCC has found such questions to be appropriate for certification.¹²⁷ At the certification stage, the Plaintiffs need only establish that the conditions in section 30(1) of the *CPA* are likely to be satisfied in order for aggregate damages to be certified as a common issue.¹²⁸

¹²⁵ *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10] at para 45.

¹²⁶ *Fulawka v Bank of Nova Scotia*, [2012 ONCA 443](#), [Tab 13] at para 106; *Baroch v Canada Cartage*, [2015 ONSC 40](#), [Tab 9] at paras 49-50; *Dominguez v Northland Properties Corporation*, [2012 BCSC 328](#), [Tab 12] at paras 161-167.

¹²⁷ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013 SCC 57](#), [Tab 25] at para 128.

¹²⁸ *Andriuk v Merrill Lynch Canada Inc.*, [2013 ABQB 422](#), [Tab 4] at para 136, aff'd [2014 ABCA 177](#); see also *Markson v MBNA Canada*, [2007 ONCA 334](#), [Tab 20].

97. In this case, once determinations are made of common contractual rights, damages are a basic arithmetic exercise as the Defendants retain information as to the exact number of RSUs, Options and PAs each class member held as of July 6, 2017.¹²⁹
98. Common issue 9 asks whether an award of punitive damages is warranted based on the Defendants' conduct and if so, what the appropriate amount ought to be. The inquiry here is necessarily focussed on the Defendants' conduct and does not depend on any individualized evidence. In *Rumley*, the SCC held that certification of punitive damages as a common issue is appropriate where it is founded on the conduct of the defendant.¹³⁰

E. A Class Proceeding is the Preferable Procedure

99. Section 5(1)(d) requires the Court to be satisfied that a class proceeding is the preferable procedure.
100. In *LC v Alberta*,¹³¹ the Alberta Court of Appeal stated that a class proceeding is the preferable procedure if "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."¹³²
101. In considering whether a class proceeding is the preferable procedure, the Court has to consider the common issues in the context of the action as a whole and take into account the importance of the common issues in relation to the claims as a whole.¹³³
102. The preferability inquiry focuses on two questions, namely whether a class proceeding would (1) be a fair, efficient and manageable method of advancing the

¹²⁹ Bergysen Transcript, p. 21, lines 12-16.

¹³⁰ *Rumley v Canada*, [2001 SCC 69](#), [Tab 28] at para 34.

¹³¹ *LC v Alberta*, [2017 ABCA 284](#), [Tab 17].

¹³² *LC v Alberta*, [2017 ABCA 284](#), [Tab 17] at para 31.

¹³³ *AIC Limited v Fischer*, [2013 SCC 69](#), [Tab 2] at para 21 ("*AIC*"); *LC v Alberta*, [2017 ABCA 284](#), [Tab 17] at para 31; *Hollick v Toronto (City)*, [2001 SCC 68](#), [Tab 16] at para 30.

claim and (2) be preferable to other reasonably available means of resolving the claims of class members.¹³⁴

i) A class action would be a fair, efficient and manageable method of advancing the claim

103. Claims involving the interpretation of a common plan and contracts are well-suited to class actions.¹³⁵ The nature of the common issues raised in this action are all intrinsically connected to the interpretation of the AOCP, which all class members commonly participated in as a term of their employment. Resolution of the common issues will be dispositive of questions of liability, and if the common issues judge determines that aggregate damages are appropriate, there would be limited individual issues remaining, if any. Accordingly, resolution of the common issues will significantly advance the litigation, and the common issues predominate over any individual issues.

104. Even if damages would have to be established at the individual issues stage, that factor alone does not negate the preferability of a class proceeding in the present circumstances. Importantly, section 8(a) of the *CPA* expressly provides that the Court should not refuse certification based solely on the reason that the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.¹³⁶

ii) A class action is preferable to other reasonably available means of resolving class members' claims

105. A class proceeding is the preferable way to resolve the common issues.

106. Access to justice is a key consideration militating in favour of class proceeding, particularly in this case. For a class member to pursue this case on an individual basis, significant financial resources would be required to retain a lawyer,

¹³⁴ *TL v Alberta*, [2009 ABCA 182](#), [Tab 30] at para 26.

¹³⁵ *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10] at para 47.

¹³⁶ *Class Proceedings Act*, SA 2003, c C-16.5, [Tab 11] s. 8(a).

commence a proceeding, prosecute it against *multiple* well-funded defendants and potentially face an adverse cost award if unsuccessful.¹³⁷

107. Additionally, for many class members who remain employed with Paramount, access to justice is a vital concern where those class members fear reprisal by their employer for seeking to enforce their employment rights.¹³⁸ Fear of reprisal in this case is not unfounded, particularly given the distressing communications that Paramount has issued about the class action.¹³⁹ A class action can deter employer reprisal through judicial oversight of the process and provide anonymity, thus addressing employees' fear of reprisals.¹⁴⁰
108. A class proceeding would also serve the goal of judicial economy by avoiding unnecessary duplication of fact finding and legal analysis and inconsistent findings of fact and law. A common contract that applies to all employees need only be interpreted once rather than 350 times, which might result in inconsistent results and a complete waste of judicial resources.
109. The goal of behaviour modification would also be served if certification is granted. The claim at issue includes allegations of breach of employment contracts in the context of a sale of a subsidiary in the oil industry. Determining the rights of employees in those transactions will modify the behaviour of this set of defendants and future transacting parties. If the class succeeds in proving the allegations and establishing liability, it would serve as an important lesson for the Defendants as well as other employers that have equity-based compensation programs. Certification would accordingly serve the interests of behavioural modification.¹⁴¹
110. Apart from a class proceeding, there is no other reasonably available means of resolving the claims of class members. A test case would be unsuitable here given

¹³⁷ Flesch Affidavit at para 45; Maksymchuk Affidavit at para 18; Thompson Affidavit at para 18; Chamberlain Affidavit at para 16.

¹³⁸ *AIC Limited v Fischer*, [2013 SCC 69](#), [Tab 2] at para 27.

¹³⁹ Flesch Affidavit at paras 37-41.

¹⁴⁰ *Fulwka v Bank of Nova Scotia*, [2012 ONCA 443](#), [Tab 13] at para 169; *Rosen v BMO Nesbitt Burns Inc.*, [2013 ONSC 2144](#), [Tab 27] at para 68.

¹⁴¹ *Caponi v Canada Life Assurance Co.*, [2009] OJ No. 114 (S.C.); [2009 CanLII 592](#), [Tab 10] at para 48.

that the results of the test case would not be binding on class members and there is no indication that if the Plaintiffs succeed, the Defendants are prepared to apply the Court's findings to the claims of the potential class.¹⁴² Nor is a joinder or consolidation of cases feasible given the size of the potential class.

F. The Plaintiffs are Appropriate Representative Plaintiffs

111. A suitable representative plaintiff is one who (i) will fairly and adequately represent the interests of the class, (ii) has produced a litigation plan 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 member.¹⁴³
112. It is not a requirement that the proposed representative be "typical" or the "best" possible representative.¹⁴⁴ The Alberta Court of Appeal has held that "being similar and typical is not an absolute requirement."¹⁴⁵
113. Mr. Flesch, Mr. Thompson, Mr. Maksymchuk and Mr. Chamberlain are all suitable representative plaintiffs and committed to fairly and adequately representing the interests of the class.¹⁴⁶
114. They have produced a litigation plan that sets out a workable method of determining the issues in the action and notifying the class.¹⁴⁷ Such litigation plans created at the outset of the litigation are considered works in progress subject to modification by the court as the action progresses.¹⁴⁸

¹⁴² *Fulawka v Bank of Nova Scotia*, [2012 ONCA 443](#), [Tab 13] at para. 87; see also *Wenham v Canada (Attorney General)*, [2018 FCA 199](#), [Tab 37] at paras 93-94.

¹⁴³ *Class Proceedings Act*, SA 2003, c C-16.5, s. 5(1)(e).

¹⁴⁴ *Class Proceedings Act*, SA 2003, c C-16.5, s. 5(1)(e).

¹⁴⁵ *Ayrton v PRL Financial (Alta) Ltd.*, [2006 ABCA 88](#), [Tab 7] at para 16.

¹⁴⁶ Flesch Affidavit at paras 42-49; Thompson Affidavit at paras 17-24; Maksymchuk Affidavit at paras 17-26; Chamberlain Affidavit at paras 15-25.

¹⁴⁷ Flesch Affidavit, para 50, Exhibit R; Maksymchuk Affidavit at para 25, Exhibit F; Thompson Affidavit, para 25, Exhibit E, Chamberlain Affidavit, para 23, Exhibit F.

¹⁴⁸ *Wenham v Canada (Attorney General)*, [2018 FCA 199](#), [Tab 37] at para 103.

115. The Plaintiffs are unaware of any interest they may have that is in conflict with the interests of the class.¹⁴⁹ Given that the contractual interpretation of common contracts applies equally to the class, it is not clear what conflicts of interest could exist in this case.
116. The Plaintiffs have also retained counsel with extensive experience in class proceedings.
117. Additionally, all four proposed representative plaintiffs have taken all the essential steps of a class representative including retaining and instructing class counsel, providing documents and information to class counsel, and providing evidence.¹⁵⁰
118. All four plaintiffs are individually and together adequate representative plaintiffs.

ISSUE II: THE COURT SHOULD GRANT AN ORDER RESTRICTING THE DEFENDANTS FROM COMMUNICATING WITH CLASS MEMBERS EMPLOYED BY PARAMOUNT AND RESTRICT ACCESS TO OPT OUT INFORMATION

119. Section 13 of the *CPA* allows the Court to make any order it considers appropriate respecting the conduct of a class proceeding to ensure the fair and expeditious determination of the proceeding, and impose any terms or conditions the Court considers appropriate on any one or more of the parties. The Court's authority under this provision has been described as a "broad" one.¹⁵¹
120. The analogous provision under Ontario's *Class Proceedings Act* has been held to confer upon the court a broad remedial jurisdiction, which allows the court to impose conditions on communications between parties and class members when there is sufficient evidence of inappropriate behaviour to ensure the integrity of the class proceeding.¹⁵²

¹⁴⁹ Flesch Affidavit, para 48-49; Maksymchuk Affidavit, at para 23-24, Chamberlain Affidavit, para 21-22; Thompson Affidavit, para 23-24.

¹⁵⁰ Flesch Affidavit at paras 42-49; Thompson Affidavit at paras 17-24; Maksymchuk Affidavit at paras 17-26; Chamberlain Affidavit at paras 15-25.

¹⁵¹ *Lepitre v Welder*, [2013 ABQB 586](#), [Tab 18] at para 3.

¹⁵² *Vitelli v Villa Giardino Homes Ltd.*, (2001) 54 OR (3d) 334, [2001 CanLII 28067](#), [Tab 33] at paras 37-38.

121. In this case, there is sufficient evidence of inappropriate behaviour to warrant an order restricting the Defendants' communications with Class Members. The Defendants have engaged in highly questionable conduct that can be viewed as attempts to intimidate employees. For example, from what came to the attention of the Plaintiffs, Paramount held an all-employee meeting where the CEO advised class members that the claim was meritless, that Paramount would know if employees did not opt out and, at the same time, advised class members that staffing cuts would be made shortly.¹⁵³ The clear implication to class members employed by Paramount was that they would be fired or otherwise poorly treated by their employer should they continue to be part of the class proceeding.
122. Even if there was no intention on Paramount's part to intimidate employees, which is doubtful in the Plaintiffs' view, Paramount's communications clearly had such an effect on employees who reported feeling distressed.¹⁵⁴ Further, the egregiousness of Paramount's conduct must be assessed against Paramount's status as an employer and the vulnerability of class members who remain in their employ. This employer/employee power imbalance alone is a barrier to access to justice. Add on implicit threats of negative treatment for participating in a case to enforce employment rights, makes Paramount's conduct deeply concerning.
123. There is no prejudice to Paramount to restrict its communications during the notice period or restricting its access to opt out information. Paramount will be advised of the class member's identities should the Plaintiffs be successful on the common issues and class members make claims for compensation – they do not need such information until then.
124. The opposite is true for class members who are impacted by Paramount's conduct and decide to opt out – the limitation period for such claims may very well have expired two years following July 6, 2017. Therefore, if class members are intimidated enough to opt out of the proceeding, their claims against Paramount

¹⁵³ Flesch Affidavit, paras 36 – 41 & Exhibit Q.

¹⁵⁴ Flesch Affidavit at para 41.

may become statute barred without coverage from this class proceeding. In addition, the claims in this proceeding are not just against Paramount, but against Apache and the Directors as well. Should class members be impacted by Paramount's inappropriate conduct and opt out of the proceeding, they may be compromising rights as against Apache and the Directors, not just as against Paramount.

125. Unless they want to pursue an action against the Defendants individually, there should be no rational reason a class member opts out of this class proceeding as there should be no negative impact to them.
126. An order restricting communications during the opt out period similar to the order requested by the Plaintiffs was granted in *1176560 Ontario Ltd. v Great Atlantic & Pacific Company of Canada Ltd.* where the Court found that the defendant had engaged in inappropriate conduct.¹⁵⁵ Additionally, in *Lundy v VIA Rail*, the Court granted an order requiring the defendants to provide the plaintiff with a copy of their intended correspondence to class members at least seven days before distribution.¹⁵⁶
127. The orders restricting communications and access to opt out information sought are proportionate responses that balance both the need to ensure the integrity of the class proceedings and the Defendants' ability to communicate with class members.

¹⁵⁵ *1176560 Ontario Ltd. v Great Atlantic & Pacific Company of Canada Ltd.*, [2002] O.J. No. 4781 (S.C.), [2002 CanLII 6199](#), [Tab 1] at paras 71-72.

¹⁵⁶ *Lundy v VIA Rail Canada Inc.*, [2012 ONSC 4152](#), [Tab 19] at para 12.

IV. RELIEF SOUGHT

128. The Plaintiffs request that the motion for certification be granted, an order restricting the Defendants' communication with the class and access to opt out information be granted, and costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF APRIL, 2021

Lawyers for the Plaintiffs

Per:

DAVID ROSENFELD / MARK ZIGLER /
SUE TAN
KOSKIE MINSKY LLP

Per:



CHARLES GORDON
KOSKIE GLAVIN GORDON

Per:



EUGENE J. BODNAR
SCOTT VENTURO RUDAKOFF LLP

SCHEDULE "A" - PROPOSED COMMON ISSUES

Breach of Contract

- 1) What contractual obligations did the Defendants, or any of them jointly or severally, owe to the Class with respect to any unvested Restricted Share Units, Performance Awards, or Options held by the Class as a result of the sale of Apache Canada to Paramount?
- 2) Did the Defendants, or any of them jointly or severally, breach their contractual obligations?
- 3) Did the Defendants, or any of them jointly or severally, owe the Class duties of good faith and fair dealing by virtue of their employment and contractual relationships?
- 4) Did the Defendants, or any of them jointly or severally, breach any such duties of good faith and fair dealing?

Breach of Trust and Fiduciary Duty

- 5) Did the Defendants, or any of them jointly or severally, owe a fiduciary duty to the Class in relation to the sale of Apache Canada Ltd.?
- 6) If so, the Defendants, or any of them jointly or severally, breach any such duty?

Unjust Enrichment

- 7) Has the conduct of the Defendants, or any of them jointly or severally, resulted in their unjust enrichment? If so, are the Defendants, or any of them jointly or severally, constructive trustees holding ill-gotten gains for the benefit of the Class? What amount is held by the Defendants, or any of them jointly or severally, in the constructive trust?

Damages

- 8) If one or more of the above common issues 2), 4), 6) or 7) are answered affirmatively, can the amount of damages payable by the Defendants, or any of them, to the Class be determined on an aggregate basis? If so, in what amount?
- 9) Does the conduct of the Defendants, or any of them, justify an award of punitive damages, and if so, what is an appropriate amount of punitive damages?

SCHEDULE "B" – COMPARISON OF AOCV 2011 AND AOCV 2016 TERMS & PROVISIONS

Terms & Provisions	AOCV 2011 ¹⁵⁷	AOCV 2016 ¹⁵⁸
Company	<p>Section 1.1.</p> <p>Apache Corporation, a Delaware corporation (hereinafter referred to, together with its Affiliates (as defined below) as the "Company" except where the context otherwise requires)</p>	<p>Section 1.1</p> <p>Apache Corporation, a Delaware corporation (hereinafter referred to, together with its Affiliates (as defined below) as the "Company" except where the context otherwise requires)</p>
Affiliate	<p>Section 2.1(b)</p> <p><u>"Affiliate"</u> means any entity other than the Company that is affiliated with the Company through stock or equity ownership or otherwise and is designated as an Affiliate for purposes of the Plan by the Committee; ...</p>	<p>Section 2.1(b)</p> <p><u>"Affiliate"</u> means any entity other than the Company that is affiliated with the Company through stock or equity ownership or otherwise and is designated as an Affiliate for purposes of the Plan by the Committee; ...</p>
Change of Control	<p>Section 2.1(e)</p> <p>"Change of Control" shall have the meaning assigned to such term in the Company's Income Continuance Plan as in effect on the Effective Date.</p>	<p>Section 2.1(f)</p> <p>"Change of Control" shall have the meaning assigned to such term in the Company's Income Continuance Plan.</p>

¹⁵⁷ Flesch Affidavit, Exhibit F, p. 115

¹⁵⁸ Flesch Affidavit, Exhibit G, p. 143

Terms & Provisions	AOCP 2011 ¹⁵⁷	AOCP 2016 ¹⁵⁸
	<p>Apache Income Continuance Plan¹⁵⁹</p> <p>Section 1(b)</p> <p>"Change of Control" shall mean the event occurring when a person, partnership, or corporation together with all persons, partnerships or corporations acting in concert with each person, partnership or corporation, or any or all of them, acquires more than 20% of the Company's outstanding voting securities; provided that a Change of Control shall not occur if such persons, partnerships or corporations acquiring more than 20% of the Company's voting securities is solicited to do so by the Company's board of directors, upon its own initiative, and such persons, partnerships or corporations have not previously proposed to acquire more than 20% of the Company's voting securities in an unsolicited offer made either to the Company's board of directors or directly to the stockholders of the Company.</p> <p>...</p> <p>"Company" shall mean Apache Corporation, a Delaware corporation, whose headquarters is in Houston, Texas, and, unless the context indicates otherwise, its wholly-owned subsidiaries and affiliates. "Affiliate" shall mean any and all entities that, together with Apache, would not cause any portion of this Plan to be treated as a multiple employer welfare arrangement pursuant to ERISA §3(40).</p>	
<p>Committee</p>	<p>Section 2.1(f)</p> <p>"Committee" means the Management Development and Compensation Committee of the Board or such other Committee of the Board that is empowered hereunder to administer the Plan. The Committee shall be constituted at all times so as to permit the Plan to be administered by "non-employee directors" (as defined in Rule 16b-3 of the Exchange Act) and "outside directors" (as defined in Treasury Regulations Section 1.162-27 (e)(3)) and to satisfy such additional regulatory or listing requirements as the Board may determine to be applicable or appropriate.</p>	<p>Section 2.1(g)</p> <p>"Committee" means the Management Development and Compensation Committee of the Board or such other Committee of the Board that is empowered hereunder to administer the Plan. The Committee shall be constituted at all times so as to permit the Plan to be administered by "non-employee directors" (as defined in Rule 16b-3 of the Exchange Act) and "outside directors" (as defined in Treasury Regulations Section 1.162-27 (e) (3)) and to satisfy such additional regulatory or listing requirements as the Board may determine to be applicable or appropriate.</p>

¹⁵⁹ Flesch Affidavit, Exhibit H, p. 177

Terms & Provisions	AOCP 2011¹⁵⁷	AOCP 2016¹⁵⁸
Involuntary Termination	<p>Section 2.1(o)</p> <p>"Involuntary Termination" means the termination of employment of the Participant by the Company or its successor for any reason on or after a Change of Control; provided, that the termination does not result from an act of the Participant that (i) constitutes common-law fraud, a felony, or a gross malfeasance of duty, or (ii) is materially detrimental to the best interests of the Company or its successor.</p>	<p>Section 2.1(q)</p> <p>"Involuntary Termination" means the termination of employment of the Participant by the Company or its successor for any reason on or after a Change of Control; provided, that the termination does not result from an act of the Participant that constitutes common law fraud, a felony, or gross malfeasance of duty</p>
Change of Control Provisions	<p>Section 12</p> <p>12.1 In General. In the event of the occurrence of a Change of Control of the Company:</p> <p>(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.</p> <p>(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, after any withholding under Section</p>	<p>Section 13</p> <p>13.1 In General. In the event of the occurrence of a Change of Control of the Company and unless otherwise provided in an applicable Award Agreement:</p> <p>(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.</p> <p>(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, after any withholding under Section 12, as soon as administratively practicable after the Involuntary</p>

Terms & Provisions	AOCF 2011 ¹⁵⁷	AOCF 2016 ¹⁵⁸
	<p>11, as soon as administratively practicable after the Involuntary Termination or Voluntary Termination with Cause on or after a Change of Control occurs, unless the Participant had elected to defer Restricted Stock Units to the Deferred Delivery Plan in which case the Participant's account in the Deferred Delivery Plan shall be credited with deferred Restricted Stock Units as of the date of the Involuntary Termination or Voluntary Termination with Cause on or after the Change of Control occurs.</p> <p>(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, and shall become payable as follows:</p> <p>(i) If such Change of Control occurs subsequent to the achievement of a Performance Goal, any remainder of such payout amount shall vest as of the date of the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after the date of such Change of Control and shall be paid by the Company to the Participant within thirty (30) days of the date of such Involuntary Termination or Voluntary Termination with Cause which occurs on or after the date of the Change of Control in the manner set out in subsection 12.1 hereof.</p> <p>(ii) If the achievement of a Performance Goal occurs subsequent to the date of a Change of Control, the applicable payout amount shall vest in full for which the Performance Period has not yet ended as of the date of the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after such Change of Control and shall be paid by the Company to the Participant within thirty (30) days after the later of (1) the date of the Participant's Involuntary Termination or Voluntary Termination with Cause or (2) the date that the Performance Goal is reached. The payment will occur only if the Participant is</p>	<p>Termination or Voluntary Termination with Cause on or after a Change of Control occurs, unless the Participant had elected to defer Restricted Stock Units to the Deferred Delivery Plan in which case the Participant's account in the Deferred Delivery Plan shall be credited with deferred Restricted Stock Units as of the date of the Involuntary Termination or Voluntary Termination with Cause on or after the Change of Control occurs.</p> <p>(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, and shall become payable as follows:</p> <p>(i) If such Change of Control occurs subsequent to the achievement of a Performance Goal, any remainder of such payout amount shall vest as of the date of the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after the date of such Change of Control and shall be paid by the Company to the Participant within thirty (30) days of the date of such Involuntary Termination or Voluntary Termination with Cause which occurs on or after the date of the Change of Control in the manner set out in subsection 13.1 hereof.</p> <p>(ii) If such Change of Control occurs prior to the achievement of a Performance Goal, the applicable payout amount shall vest in full for which the Performance Period has not yet ended as of the date of the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after such Change of Control and shall be paid by the Company to the Participant within thirty (30) days after the later of (1) the date of the Participant's Involuntary Termination or Voluntary Termination with Cause or (2) the date that the Performance Period ends. The payment will occur only if the Participant is employed at the time that the Performance Period ends or if the Performance</p>

Terms & Provisions	AOCP 2011¹⁵⁷	AOCP 2016¹⁵⁸
	<p>employed at the time that the Performance Goal is reached or if the Performance Goal is reached after the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after the Change of Control.</p> <p>(d) To the extent that any Award is subject to Internal Revenue Code Section 409A, the Award shall contain appropriate provisions to comply with Internal Revenue Code Section 409A, which shall supersede the provisions of subsections (a), (b), and (c).</p>	<p>Period ends after the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after the Change of Control.</p> <p>For purposes of this paragraph, the Committee shall determine whether, and to what extent, any such Performance Goal has been met as of the trading day immediately prior to the date of the Change of Control.</p> <p>(iii) Notwithstanding the foregoing, upon the occurrence of a Change of Control, all Performance Awards will be governed by the Award agreement, including, but not limited to, the determination of the payment amount, vesting, and the timing of such payment.</p> <p>(d) To the extent that any Award is subject to Internal Revenue Code Section 409A, the Award shall contain appropriate provisions to comply with Internal Revenue Code Section 409A, which shall supersede the provisions of subsections (a), (b), and (c).</p>
Reorganization or Liquidation	<p>Section 13</p> <p>In the event that the Company is merged or consolidated with another corporation and the Company is not the surviving corporation, or if all or substantially all of the assets or more than 20 percent of the outstanding voting stock of the Company is acquired by any other corporation, business entity or person, or in case of a reorganization (other than a reorganization under the United States Bankruptcy Code) or liquidation of the Company, then the Committee, or the board of directors of any corporation assuming the obligations of the Company, shall, as to the Plan and outstanding Awards make appropriate provision for the adoption and continuation of the Plan by the acquiring or</p>	<p>Section 14</p> <p>In the event that the Company is merged or consolidated with another corporation and the Company is not the surviving corporation, or if all or substantially all of the assets or more than 20 percent of the outstanding voting stock of the Company is acquired by any other corporation, business entity, or person, or in case of a reorganization (other than a reorganization under the United States Bankruptcy Code) or liquidation of the Company, then the Committee, or the board of directors of any corporation assuming the obligations of the Company, shall, as to the Plan and outstanding Awards make appropriate provision for the adoption and continuation of the Plan by the acquiring or</p>

Terms & Provisions	AOCF 2011 ¹⁵⁷	AOCF 2016 ¹⁵⁸
	<p>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.</p> <p>In its discretion, and on such terms and conditions as it deems appropriate, the Committee may provide, either by the terms of an agreement applicable to any Award or by resolution adopted prior to the occurrence of a Change of Control or an event described in this Section 13, that any outstanding Award (or 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 for one share of Stock, or, if higher, the highest Fair Market Value of a share of Stock during the thirty (30) consecutive business days immediately prior to the closing date or expiration date of such transaction, less the per-share Option Price or grant price of SARs, as applicable to the Award, multiplied by the number of shares subject to such Award, or the applicable portion thereof.</p>	<p>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.</p> <p>In its discretion, and on such terms and conditions as it deems appropriate, the Committee may provide, either by the terms of an agreement applicable to any Award or by resolution adopted prior to the occurrence of a Change of Control or an event described in this Section 14, that any outstanding Award (or 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 for one share of Stock, or, if higher, the highest Fair Market Value of a share of Stock during the thirty (30) consecutive business days immediately prior to the closing date or expiration date of such transaction, less the per-share Option Price or grant price of SARs, as applicable to the Award, multiplied by the number of shares subject to such Award, or the applicable portion thereof.</p>

SCHEDULE "C" - DEFINITION OF TERMS IN VARIOUS APACHE DOCUMENTS / AGREEMENTS

SOURCE	WORDING
"THE PLAN" PROVISION	
RSU Award Agreements, section 11 ¹⁶⁰	In consideration for this Grant, the Recipient agrees to comply with the terms of the Plan and this Agreement. <u>This Agreement is subject to all the terms, provisions and conditions of the Plan, which are incorporated herein by reference, and to such regulations as may from time to time be adopted by the Committee.</u> Unless defined herein, capitalized terms are used herein as defined in the Plan. <u>In the event of any conflict between the provisions of the Plan and this Agreement, the provisions of the Plan shall control, and this Agreement shall be deemed to be modified accordingly.</u> ...
Stock Option Award Agreements, ¹⁶¹ section 11	In consideration for this Grant, the Participant agrees to comply with the terms of the Plan and this Agreement. Unless defined herein, capitalized terms are used herein as defined in the Plan. <u>In the event of any conflict between the provisions of the Plan and this Agreement, the provisions of the Plan shall control, and this Agreement shall be deemed to be modified accordingly.</u> <u>This Agreement is subject to all the terms, provisions and conditions of the Plan, which are incorporated herein by reference, and to such regulations as may from time to time be adopted by the Committee.</u>
Performance Share Program Agreement, section 12 ¹⁶²	In consideration for this Conditional Grant, the Recipient agrees to comply with the terms of the Plan and this Agreement. <u>This Agreement is subject to all the terms, provisions and conditions of the Plan, which are incorporated herein by reference, and to such regulations as may from time to time be adopted by the Committee.</u> Unless defined herein, capitalized terms are used herein as defined in the Plan. <u>In the event of any conflict between the provisions of the Plan and this Agreement, the provisions of the Plan shall control, and this Agreement shall be deemed to be modified accordingly.</u> ...

¹⁶⁰ Flesch Affidavit, Exhibit I, p. 188; Exhibit J, p. 200; Exhibit K, p. 212; Exhibit L, p. 224; Exhibit M, p. 237; Maksymchuk Affidavit, Exhibit A, p. 6; Exhibit B, p. 18; Exhibit C, p. 30; Exhibit D, p. 43; Exhibit E, p. 56; Chamberlain Affidavit, Exhibit A, p. 6; B, p. 18; Exhibit C, p. 30; Exhibit D, p. 43; Thompson Affidavit, Exhibit A, p. 6; Exhibit B, p. 19;

¹⁶¹ Flesch Affidavit, Exhibit N, p. 252; Thompson Affidavit, Exhibit C, p. 49

¹⁶² Flesch Affidavit, Exhibit O, p. 265; Thompson Affidavit, Exhibit D, p. 70

SOURCE	WORDING
"NOTICE" PROVISION IN GRANT / AWARD NOTICES	
RSU Grant Notice ¹⁶³	A summary of the terms of your grant of Restricted Stock Units ("RSUs") is set out in this notice (the "Grant Notice") but <u>subject always to the terms of the Apache Corporation [2011 Omnibus Equity Compensation Plan / 2016 Omnibus Compensation Plan]</u> (the "Plan") and the Restricted Stock Unit Award Agreement (the "Agreement"). <u>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.</u>
Stock Option Grant Notice ¹⁶⁴	A summary of the terms of your grant of a Stock Option to purchase Shares ("Option") is set out in this notice (the "Grant Notice") but <u>subject always to the terms of the Apache Corporation 2016 Omnibus Compensation Plan</u> (the "Plan") and the Stock Option Award Agreement (the "Agreement"). <u>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.</u>
Performance Award Grant ¹⁶⁵ Notice	A summary of the terms of Conditional Grants of Restricted Stock Units ("RSUs") under the 2017 Performance Share Program is set out in this notice (the "Award Notice") but subject always to the terms of the Apache Corporation 2016 Omnibus Compensation Plan (the "Plan") and the 2017 Performance Share Program Agreement (the "Agreement"). <u>In the event of any inconsistency between the terms of this Award Notice, the terms of the Plan and the Agreement, the terms of the Plan and the Agreement shall prevail.</u>

¹⁶³ Flesch Affidavit, Exhibit I, p. 180, Exhibit J, p. 192; Exhibit K, p. 204; Exhibit L, p. 216; Exhibit M, p. 229

¹⁶⁴ Flesch Affidavit, Exhibit N, p. 242; Exhibit C, p. 39

¹⁶⁵ Flesch Affidavit, Exhibit O, p. 256; Thompson Affidavit, Exhibit D, p. 53

APPENDIX "A" – LIST OF AUTHORITIES

TAB	CASE
1.	<i>1176560 Ontario Ltd. v Great Atlantic & Pacific Company of Canada Ltd.</i> , [2002] O.J. No. 4781 (S.C.), 2002 CanLII 6199
2.	<i>AIC Limited v Fischer</i> , 2013 SCC 69
3.	<i>Alberta v Elder Advocates of Alberta Society</i> , 2011 SCC 24
4.	<i>Andriuk v Merrill Lynch Canada Inc.</i> , 2013 ABQB 422
5.	<i>Atlantic Lottery Corp. v Babstock</i> , 2020 SCC 19
6.	<i>Austin v Bell Canada Inc.</i> , 2019 ONSC 4757
7.	<i>Ayrton v PRL Financial (Alta) Ltd.</i> , 2006 ABCA 88
8.	<i>Bagby v Gustavson International Drilling Co.</i> , 1980 ABCA 227
9.	<i>Baroch v Canada Cartage</i> , 2015 ONSC 40
10.	<i>Caponi v Canada Life Assurance Co.</i> , [2009] O.J. No. 114, 2009 CanLII 592 (ON SC)
11.	<i>Class Proceedings Act</i> , SA 2003, c C-16.5
12.	<i>Dominguez v Northland Properties Corporation</i> , 2012 BCSC 328
13.	<i>Fulawka v Bank of Nova Scotia</i> , 2012 ONCA 443
14.	<i>Garland v Consumers' Gas Co.</i> , 2004 SCC 25
15.	<i>Green v Canada Trust Realty Inc.</i> , 2005 MBQB 249
16.	<i>Hollick v Toronto (City)</i> , 2001 SCC 68
17.	<i>LC v Alberta</i> , 2017 ABCA 284
18.	<i>Lepitre v Welder</i> , 2013 ABQB 586
19.	<i>Lundy v VIA Rail Canada Inc.</i> , 2012 ONSC 4152
20.	<i>Markson v MBNA Canada</i> , 2007 ONCA 334
21.	<i>McKinley v BC Tel</i> , 2001 SCC 38
22.	<i>Natco International, Inc. v Photo Violation Technologies Corp.</i> , 2008 BCSC 1325
23.	<i>O'Neill v General Motors of Canada Ltd.</i> , 2011 ONSC 6291
24.	<i>Perrenoud v eHealth Ontario</i> , 2012 ONSC 6704

25. *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57
26. *Ravvin v Canada Bread Company Limited*, 2020 ABCA 424
27. *Rosen v BMO Nesbitt Burns Inc.*, 2013 ONSC 2144
28. *Rumley v Canada*, 2001 SCC 69
29. *Starratt v Mamdani*, 2017 ABCA 92
30. *TL v Alberta*, 2009 ABCA 182
31. *Tongue v Vencap Equities Alberta Ltd*, (1994) 17 Alta LR (3d) 103; 1994 CanLII 8918
32. *Vander Griendt v Canvest Capital Management Corp*, 2014 ABQB 542
33. *Vitelli v Villa Giardino Homes Ltd.*, (2001) 54 OR (3d) 334, 2001 CanLII 28067
34. *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1
35. *Walter v Western Hockey League*, 2017 ABQB 382
36. *Warner v Smith & Nephew Inc.*, 2016 ABCA 223
37. *Wenham v. Canada (Attorney General)*, 2018 FCA 199
38. *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46