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PLAINTIFF(S) (RESPONDENT(S))	STEPHEN FLESCH, MARSHAL THOMPSON, TYLER MAKSYMCHUK, AND REID CHAMBERLAIN
DEFENDANT(S) (APPLICANT(S))	APACHE CORPORATION, PARAMOUNT RESOURCES LTD., WILLIAM C. MONTGOMERY, ANNEL R. RAY, DANIEL W. RABUN, RENE R. JOYCE, AND CHARLES J. PITMAN

Brought under the Class Proceedings Act

BRIEF OF ARGUMENT OF THE DEFENDANT PARAMOUNT RESOURCES LTD. IN RESPONSE TO THE PLAINTIFFS' CERTIFICATION APPLICATION TO BE HEARD BEFORE THE HONOURABLE MR. JUSTICE G. H. POELMAN ON APRIL 27-28, 2021

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I. OVERVIEW

1. We recommend that the Court review the brief of argument of Apache Corporation and the individuals defendants filed on April 15, 2021 (the "**Apache Brief**") prior to reviewing Paramount's.

2. Paramount is a publicly traded Canadian corporation, incorporated in the Province of Alberta and headquartered in Calgary. It is engaged in petroleum and natural gas exploration and production in Alberta and British Columbia.[1]

3. Apache Corporation ("**Apache**") is a publicly traded corporation in the United States of America, incorporated in Delaware and headquartered in Houston, Texas. It is engaged in petroleum and natural gas exploration and production worldwide. Apache trades on the New York Stock Exchange. According to publicly available information, in 2019, Apache owned assets in excess of US$18 billion and had revenue in excess of US$6.3 billion.[2]

4. Unless stated otherwise herein, Paramount adopts the definitions used in the Apache Brief, the key ones of which are as follows:

> "**AOCP**": means collectively the 2011 Apache Omnibus Compensation Plan and the 2016 Apache Omnibus Compensation Plan;
>
> "**Awards**": means collectively any RSUs, Stock Options and Performance Awards issues to an eligible person under the Grant Agreements and the AOCP;
>
> "***CPA***": means the *Class Proceedings Act*, SA 2003, c C-16.5; and
>
> "**Grant Agreements**" means the agreements (i.e., RSU Agreements, Options Agreements and PA Agreements) entered into between Apache and eligible persons pursuant to which Awards were issued.

5. In addition, Paramount will use the following definitions in its brief:

> "**Apache Canada**" means the corporate entity Apache Canada Ltd. prior to the Share Acquisition Date ("Paramount" will be used to refer to that corporate entity effective as of the Share Acquisition Date);
>
> "**Award Agreements**" means collectively the Grant Agreements and the AOCP;
>
> "**Class Members**" as the meaning set out in paragraph 16 of this brief;
>
> "**Paramount Awards**" means the incentive awards granted to the Class Members by Paramount as of the Share Acquisition date as described in paragraph 12

[1] Affidavit Greg Byrgesen filed January 22, 2021 (the "***Byrgesen Affidavit***"), at para. 14

[2] Byrgesen Affidavit, at paras. 16-17

below;

"**Share Acquisition Date**" means August 16, 2017, the date on which Paramount acquired all of Apache's shares in Apache Canada; and

"**Unvested Awards**" means the Awards the Class Member had received prior to the Share Acquisition Date in accordance with the related Award Agreements, which had not vested prior to that date.

6. The Plaintiffs have suggested various causes of action and very broad and clearly unworkable proposed common issues. The claim alleged in their Amended Statement of Claim is much more limited and can be summarized as follows:

   (a) Prior to the Share Acquisition Date, the Class Members had entered into Award Agreements with Apache pursuant to which they received the Unvested Awards;

   (b) It was a term of the Award Agreements with Apache that the Unvested Awards would vest as of the Share Acquisition Date;

   (c) Apache breached the Award Agreements by failing to vest the Unvested Awards on the Share Acquisition Date and then cancelling them; and

   (d) As a result of Apache's breach of the Award Agreements

      (i) Apache Canada (despite not being a party to those agreements) had a legal obligation under the Class Members' employment agreements to adequately compensate them for the loss of the Unvested Awards, and the Paramount Awards were not sufficient alternative compensation for this purpose; and

      (ii) Apache Canada was unjustly enriched at the expense of the Class Members because it received the services of the Class Members without Apache vesting the Unvested Awards and the Paramount Awards were not sufficient alternative compensation.

7. Apache has agreed that certain key common issues related to the Plaintiffs' claims on behalf of the Class Members can be certified against it.

8. As noted above, a necessary component of the Class Members claims against Paramount is that Apache breached the Award Agreements by failing to vest the Unvested Awards on the Share Acquisition Date and then cancelling them. As a result, the Class Members' alleged claims against Paramount fail if they are unsuccessful in their action against Apache.

9. There is no dispute that Apache can pay any damage award that the Class Members might receive against it for its alleged breach of the Award Agreements.

10. As will be noted below, it is Paramount's position that the Plaintiffs' application to certify certain common issues against it should be dismissed for, *inter alia,* the following reasons:

    (a) They have failed to meet the required minimum threshold (i.e., a sufficient legal and factual basis for the alleged causes of action); and

    (b) Even if the Plaintiffs met the required minimum threshold (which is denied), the proposed class action is not a "preferable procedure" (section 5(1)(d) of the *CPA*). The most efficient manner (both for the Class Members and the Court) in which to resolve the Class Members' claims related to the failure of Apache to vest the Unvested Awards on the Share Acquisition Date is for the Plaintiffs' application against Paramount to be dismissed and for them to pursue the common issues proposed by Apache.

II. FACTS

11. For the purposes of this application, Paramount adopts the statement of facts set out in paragraphs 10 to 40 of the Apache Brief and the definitions contained therein.

12. After the Share Acquisition Date:

    (a) There were approximately 347 employees of Apache Canada who remained with Apache Canada (now Paramount);[3]

    (b) The former Apache Canada employees received the Paramount Awards, a summary of which is as follows:[4]

        (i) Eligible employees are entitled to awards under Paramount's Cash Bonus and Restricted Share Unit Plan ("**CBRSUP**") and stock option grants under the corporation's Stock Option Plan (the "**Option Plan**");

        (ii) Paramount's CBRSUP has reasonable target levels, with awards tied to performance goals (individual, departmental or corporate) and comprised of a cash component targeted to be one-third of the value of the award and a Restricted Share Unit component targeted to be two-thirds of the value of the award, vesting over two years;

        (iii) The Option Plan is intended to recognize the contribution of Paramount's officers and employees who are responsible for Paramount's management and growth by granting them options to acquire common shares to align their interests with Paramount shareholders. Options were available to employees, including Apache Canada employees after the Amalgamation,

[3] Byrgesen Affidavit, at para. 15

[4] Byrgesen Affidavit, at paras. 17-23

when they commenced their employment with Paramount and thereafter on an annual basis. Options generally vest in approximate equal tranches over successive years to help ensure its eligible employees feel a responsibility to manage Paramount's assets and operations with a view to the long term health and growth of the corporation; and

(iv) Apache Canada employees, who remained in the employ of Paramount have continued to receive, on an annual basis, merit increases to their base salaries and awards under the CBRSUP, the Option and Stock Plans;

(c) At various points in time, 180 of the original 347 former Apache Canada employees (who fall within the proposed definition of the Class) left their employment with Paramount for a variety of reasons including retirements, resignations, and terminations with and without cause. Approximately 95 of these employees accepted severance offers from the company and in consideration for this agreed to execute releases in favour of Paramount (the "**Releases**") which are broad enough to capture the Plaintiffs' proposed claims against In particular, the Releases forever discharged Paramount and any predecessor from:[5]

> ... all actions, causes of action, debts, covenants and claims whatsoever, which I had, now have or may hereafter have against the Releasees, or any of them, arising out of a cause or matter related to my employment with Paramount, or the termination thereof, or to the termination of any employment benefits, and any claim under the Employment Standards code, the Alberta Human Rights Act, the Workers' Compensation Act or any other legislation related to my employment with Paramount.

(d) In addition, Paramount's current Vice President of People Operations, Greg Byrgesen, verbally advised numerous former Apache Canada employees that, if they executed the Release and accepted the severance offers, they would be relinquishing and releasing any right they had to participate as a Class Member in the Plaintiffs' proposed class proceedings.[6]

III. ARGUMENT

A. RELEVANT PROVISIONS OF THE *CPA* RELATED TO THE PROPOSED CERTIFICATION OF COMMON ISSUES AGAINST PARAMOUNT

13. The relevant provisions of sections 5(1) and (2) of the *CPA* state as follows:

> (1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;

[5] Byrgesen Affidavit, at paras. 48-53 and Exhibit "R"

[6] Byrgesen Affidavit, at para. 53

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court

...

(ii.) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

...

(d) whether other means of resolving the claims are less practical or less efficient; and

(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.

B. SUMMARY OF THE RELEVANT APPLICABLE PRINCIPLES TO BE APPLIED BY THE COURT WHEN DETERMINING WHETHER THE PLAINTIFFS' PROCEEDINGS AGAINST PARAMOUNT SHOULD CERTIFIED AS A CLASS PROCEEDING

14. It is submitted that the following is a summary of the relevant principles that should be applied by this Court for the purposes of determining whether the Plaintiffs' proceedings against Paramount should be certified as a class proceeding:

(a) The certification process must serve as a "meaningful screening device". While the standard for assessing evidence at certification is not a determination of the merits of the claim, it should not involve "such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.";[7]

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

(b) The pleadings must disclose a cause of action. A pleading which simply lumps different corporate entities together as one without identifying specific acts undertaken by each is not a viable claim in law;[8]

(c) "There must be some evidence or basis in fact for the alleged cause of action and related loss. The standard must be lower than the actual proof on a balance of probabilities necessary at a common-issues trial…but the Representative Plaintiff must demonstrate at least some meaningful substance to the case before certification should be granted";[9]

(d) "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";[10]

(e) The Plaintiffs' claim must raise one or more common issues which includes a consideration of, *inter alia,* the following:[11]

(i) Does the common issue arise from the causes of action raised in the pleadings;[12]

(ii) Is the common issue overly broad? The common issues should not be framed in overly broad terms and the court must be careful to ensure that an issue is not simply made to appear common by the manner in which it is posed;[13]

(iii) Will the resolution of the common issue avoid duplication of fact-finding or legal analysis;

(iv) Is there a basis in the evidence before the court to establish the existence of the proposed common issues;

(v) Is the proposed common issue a substantial ingredient of each Class Member's claim and is its resolution necessary to the resolution of that claim;

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8 *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, at para. 65 ("***Marshall***")

9 *Setoguchi v. Uber B.V.,* [2021] A.J. No. 22, at para. 33 ("***Setoguchi***")

10 *Rieger v Plains Midstream Canada ULC*, 2020 ABQB 312, at para. 73

11 *Fairview Donut Inc. v. The TDL Group Corp.,* 2012 ONSC 1252, at paras. 229-230, affirmed on appeal

12 *Williams v. Canon Canada Inc.,* 2011 ONSC 6571, at para. 271; *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 63

13 *Marshall* at para. 140; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29; *Fisher v. Richardson GMP Ltd.,* 2019 ABQB 450 at para. 61 ("***Fisher***")

(vi) A proposed common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

(vii) Where questions relating to causation or damages are proposed as common issues, the plaintiffs must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis; and

(viii) The common issue must advance the litigation towards a resolution; [14] and

(f) The proposed representative plaintiff bears the onus of showing that a class proceeding would be the preferable procedure.[15] 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.[16]

C. SECTION 5(1)(B) – CLASS DEFINITION

15. It is convenient to deal with the class definition before discussing the other issues relevant to the Plaintiffs' certification application.

16. Paramount adopts Apache's submissions on the class definition in paragraphs 51 to 60 including its proposed definition of "**Class Members**":

> All employees of Apache Canada Ltd. as of August 16, 2017 and who were then participating in Apache Corporation's Omnibus Compensation Plan, had outstanding Awards (as defined in Apache Corporation's Omnibus Compensation Plan), and who became employees of Paramount Resources Ltd.

D. SECTION 5(1)(A) – THE PLEADINGS MUST DISCLOSE A CAUSE OF ACTION

(i) Introduction

17. As noted above:

(a) The pleadings must disclose a cause of action;

(b) There must be some evidence or basis in fact for the alleged cause of action and related loss. The standard must be lower than the actual proof on a balance of probabilities necessary at a common-issues trial…but the Representative Plaintiff must demonstrate at least some meaningful substance to the case before certification should be granted; and

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[14] *Fisher* at para. 58

[15] *Setoguchi* at para. 92,

[16] *Setoguchi at* para. 100, *Nette v. Stiles*, 2010 ABQB 14, at para. 96; *Berg v Canadian Hockey League*, 2017 ONSC 2608 at para. 179-180

(c) The certification process must serve as a "meaningful screening device". A court should avoid "such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".[17]

(ii) What allegations and causes of action have the Plaintiffs alleged against Paramount in their Amended Statement of Claim

18. The first step in the analysis of whether the Plaintiffs have established that they have one or more causes of action for which there is sufficient evidence is to examine their Amended Statement of Claim. Many of the Plaintiffs' alleged causes of action and proposed related common issues are not pled in their Amended Statement of Claim.

19. A summary of the Plaintiffs' allegations in their Amended Statement of Claim concerning Paramount's breach of the Class Members employment agreements is as follow:

(a) The Class Members entered into AOCP and Grant Awards with Apache;

(b) As of the Share Acquisition Date the Class Members had unvested RSUs, Options and PAs;

(c) In accordance with the provisions of the AOCP and Grant Awards, the unvested RSUs, Options and PAs vested as of the Share Acquisition Date;[18]

(d) Apache cancelled the unvested RSUs, Options and PAs;[19]

(e) The Class Members did not receive compensation or substitution on an equitable basis for their unvested RSUs, Options and PAs cancelled awards;[20]

(f) The Class Members suffered the loss of the cancelled unvested RSUs, Options and PAs;[21] and

(g) The Class Members employment agreements with Paramount:

(i) Included the Class Members' rights under the AOCP and Grant Awards to have their RSUs, Options and PAs vest as of the Share Acquisition Date;[22]

(ii) Included a duty of good faith and fair dealing in their employment

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17 *Pro-Sys* at para. 103

18 Amended Statement of Claim, at paras. 59-60

19 Amended Statement of Claim, at para. 45

20 Amended Statement of Claim, at para. 52

21 Amended Statement of Claim, at para. 53

22 Amended Statement of Claim, at paras. 54-56

relationship;[23] and

(iii) Obligated Paramount to:[24]

(A) "[H]onour" Apache's obligation to vest the Unvested Awards; or

(B) Provide an "equitable substitute".

20. A summary of the Plaintiffs' allegations in their Amended Statement of Claim concerning the Class Members' unjust enrichment claim against Paramount is as follow:

(a) Paramount has been unjustly enriched as a result of gaining the dutiful work of the Class Members and failing to pay or honour RSUs, Options and PAs (despite the fact that they had vested under the terms of the AOCP and Grant Agreements) which were part of the compensation for that work;[25]

(b) The Class Members have suffered a corresponding deprivation in not having their RSUs, Options or PAs honoured and paid (despite the fact that they had vested under the terms of the AOCP and Grant Agreements);[26] and

(c) There is no juristic reason for Paramount's enrichment and the Class Members' corresponding deprivation. [27]

(iii) Allegations and causes of action that are not in the Plaintiffs' Amended Statement of Claim

21. There are no allegations in the Plaintiffs' Amended Statement of Claim related to Paramount:

(a) Being a party to the AOCP and the Grant Agreements and/or breaching the AOCP and Grant Agreements;

(b) Being a party to any other agreements with the Class Member other than the employment agreements;

(c) Being a common employer with Apache;

(d) Breaching any other terms of the employment agreements other than by allegedly refusing to honour or pay the vested RSUs, Options or PAs (despite the fact that they had vested under the terms of the AOCP and Grant Agreements); and

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[23] Amended Statement of Claim, at para. 66

[24] Amended Statement of Claim, at paras. 45, 57, 72, 75

[25] Amended Statement of Claim, at para. 72

[26] Amended Statement of Claim, at para. 72

[27] Amended Statement of Claim, at para. 73

(e) Owing a fiduciary obligation to the Class Members or breach of any such fiduciary obligation.

(iv) Possible causes of action based on the pleadings

22. It was not alleged (and does not appear to be disputed by the Plaintiffs) that the Class Members have no cause of action against Paramount if the Unvested Awards were validly cancelled by Apache under the Award Agreements as of the Share Acquisition Date.

23. Presumably the Plaintiffs are also not alleging that Paramount had a legal obligation to either:

(a) Vest the Unvested Awards as of the Share Acquisition Date; or

(b) Legally compel Apache to vest the Unvested Awards as of the Share Acquisition Date,

as it was obviously not within Paramount's power to do either. The most that Paramount could theoretically do to compensate the Class Members for Apache's breach would be to pay them additional compensation or provide an equitable substitute (which obligations are denied).

24. The Plaintiffs' Amended Statement of Claim alleges that Paramount owed the Class Members a duty of good faith and fair dealing in their employment relationship. It is well established that:

(a) An employer owes an employee a duty of good faith and fair dealing in their contractual relationship; and

(b) Any alleged breach of a duty of good faith and fair dealing in an employment arrangement is not an independent cause of action, but rather a component of a breach of employment agreement claim.[28]

25. A summary of the causes of action alleged against Paramount in the Plaintiffs' Amended Statement of Claim is as follows:

(a) Paramount breached the Class Members' employment agreements (including the duty of good faith) by failing to adequately compensate the Class Members for their loss of the Unvested Awards as a result of Apache's breach of the Award Agreements; and

(b) Paramount was unjustly enriched by receiving services from the Class Members when Apache breached the Award Agreements by failing to vest the Unvested

[28] *Fulawka v. The Bank of Nova Scotia*, 2012 ONCA 443, at paras. 47-49; *Saskatchewan Government Insurance v. Wilson*, 2012 SKCA 106, at para. 10

Awards as of the Share Acquisition Date and then cancelling them.

(v) The Plaintiffs have failed to satisfy the minimum evidentiary and legal threshold for their employment claim against Paramount

26. As noted above:

(a) There must be some evidentiary basis for the alleged cause of action (both legal and factual); and

(b) The certification process (including an analysis of this requirement) must serve as a "meaningful screening device".

27. A summary of the limited potentially relevant evidence before the Court related to the Plaintiffs' employment claim against Paramount is as follows:

(a) Most of the Apache Canada employees would have received some type of Award from Apache under the AOCP. Whether an Apache Canada employee received an Award under the AOCP depended on a variety of factors;[29]

(b) An Apache Canada employee that received an Award was required to confirm that they had read the Award Agreement and accepted its terms;[30]

(c) Apache Canada's Human Resources Manager (Greg Byrgesen) understood that Apache Canada's employees were aware that they were entering into Award Agreements with Apache and not Apache Canada;[31]

(d) The Plaintiffs have deposed that:

(i) It was a term of their "employment with Apache Canada that [they] participate in [Apache's] long term compensation plan, most recently called the omnibus compensation plan ("**AOCP**");[32] and

(ii) "The RSUs were a significant part of [their] employment income and provided a major incentive to continue [their] employment with Apache Canada until they vested";[33]

(e) The Plaintiffs' Award Agreements specifically state as follows:

(i) To be eligible to receive an Award, the person had to be employed with Apache or an affiliate; and

(ii) "The Recipient hereby acknowledges that neither the plan 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

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29 Byrgesen Affidavit, at para. 13

30 Byrgesen Affidavit, at para. 12

31 Byrgesen Affidavit, at para. 11

32 Affidavit of Stephen Flesch (the "***Flesch Affidavit***"), at para. 10

33 Flesch Affidavit, at para. 17

contractual obligation to offer participation in the Plan to any employee of the Company or any Affiliate" (the "**Employment Exclusion Provisions**");[34] and

(f) There is no evidence that the Plaintiffs or the other Class Members entered into written employment agreements with Paramount.

28. It is submitted that the Plaintiffs' statements that "it was a term of their employment agreements that they participate in Apache's long term compensation plan"[35] and the "RSUs were a significant part of [their] employment income"[36] are nothing more than an inadmissible legal opinions. In addition:

(a) The Plaintiffs' affidavits do not include any factual basis for this inadmissible legal opinion; and

(b) The Plaintiffs' refused to answer questions concerning this during the cross-examinations on their affidavits.[37]

29. While the Plaintiffs depose that the "RSUs ... provided a major incentive to continue [their] employment with Apache Canada until they vested", there is no evidence that this was the case for other Class Members. As noted in the Byrgesen Affidavit, as would be expected, the Class Members received different types and amounts of Awards from Apache.[38]

30. A summary of the evidence related to the Plaintiffs' allegation that Paramount had a legal obligation under the employment agreements to compensate the Class Members for the losses they suffered if Apache breached the Award Agreements by failing to vest the Unvested Awards as of the Share Acquisition Date is as follows:

(a) Apache Canada was a wholly owned subsidiary of Apache;

(b) Some Apache Canada employees were entitled to participate in Apache's long term incentive plan (the AOCP). The type and number of Awards that the Class Members received was dependent on a number of factors and would vary between employee;

(c) While the Unvested Options may have provided a significant incentive to the Plaintiffs and some other Class Members in similar circumstances to remain employed by Apache Canada, there is no evidence that it did so for other Class Members; and

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34 Byrgesen Affidavit, section 15 of Exhibit "I", section 15 of Exhibit "J", section 15 of Exhibit "K", section 15 of Exhibit "L", section 15 of Exhibit "M", and section 16 of Exhibit "O"

35 Amended Statement of Claim, at para. 21

36 Flesch Affidavit at para. 17

37 Transcript from examination of Stephen Flesh dated January 7, 2021, page 69 line 5 to page 70 line 9 (the "**Flesch Examination**")

38 Byrgesen Affidavit, at paras. 12-13

(d) The Class Members entered into Award Agreements with Apache, which provided that the Award Agreements did not form part of their employment agreements with Apache Canada (i.e., the Employment Exclusion Provisions).

31. The only legal authority the Plaintiffs have provided in support of the allegation that Paramount had an obligation to compensate the Class Members for any losses they suffered if Apache breached the Award Agreements by failing to vest the Unvested Awards on the Share Acquisition Date is that Paramount is jointly liable for Apache's obligations under the Award Agreements because Apache and Apache Canada were "common employers".

32. As noted above, this was not alleged in the Plaintiffs' Amended Statement of Claim. Assuming (without conceding) that the Plaintiffs can raise the "common employer" on this application for the first time, it does not assist them. The only authority cited by the Plaintiffs in support of their "common employer" allegation is the Alberta Court of Appeal's decision in *Bagby v. Gustavson International Drilling Co.* (1980) ABCA 227 the relevant passages of which state as follows:

> [48] However apt is this method of analysis for some purposes, in my view the solution to the problem in this case is that the real employer was Raymond International Inc.; the nominal employer was GIDC. **The evidence is overwhelming that this was so. Raymond International Inc. was in complete control of GIDC and governed every aspect of Mr. Bagby's employment.** His salary and his bonus was fixed after reference to the executive vice-president of Raymond. Changes to the pension plan were instituted only after Raymond approved. So close was this control that when Mr. Bagby presented the agreement of March 11, 1975 which governed his employment, the document was signed "Gustavson Arctic Drilling Co., R.R. Bagby" and "Raymond International Inc., R. N. Crews".
>
> [49] The letter agreement selling GIDC assets to Thompson Industries Ltd. contains clear recognition of the true situation. Though it is an agreement for the sale of GIDC assets, it is not signed by GIDC. Rather, it is an agreement between Raymond and Thompson. It contains this clause:
>
> > "Raymond International Inc. shall be responsible for any arrangement it may currently have with Mr. R. R. Bagby or Mr. P. L. Waid regarding additional compensation for their employment or previous employment relative to their continuing efforts with the companies, during discussions of the sale thereof, as they existed prior to the formation of GIDC."
>
> [50] In my view, when one asks: Who was Mr. Bagby's employer, the answer must be that in substance it was Raymond International Inc. through its intermediary, GIDC. The judgment should be against both of them. **There is not, however, any evidence involving the other two defendants, Raymond Concrete Pile Company of the Americas and Global Marine Exploration Company. The only connection of either Company to the transaction is that they are the shareholders of GIDC. Without more, liability does not flow from that relationship. As against those two Companies therefore, the action should be dismissed.**

33. The *Bagby* decision not only does not assist the Plaintiffs' position, it is completely contrary to it.

34. Paramount adopts the submissions of Apache concerning the Plaintiffs' common employer allegations, including the following:[39]

    (a) When determining if an employment relationship exists between an employee and both the parent company and the subsidiary such that they are "common employers" of an employee, the Court will consider factors such as whether the employee performed services for more than one of the entities, which entity performed the hiring, terminating and paying of the employee, whether the parent company maintained very close control over the subsidiary, and who supervised the employee. The key factors that the Court will consider are "whether there is a common control over both entities and whether they both exercise control over the employee; and

    (b) Even if the Plaintiffs had presented any evidence on this issue, Courts have found that there was no employment relationship in situations analogous to the relationship between the Class Members and Apache in this Action.

35. Independent of the common employer argument, the Plaintiffs have offered no evidence or any legal authority to support their suggestion that Paramount had a legal obligation to compensate the Class Members for Apache's alleged breach of the Award Agreements.

36. While this Court noted in its decision on the sequencing application on November 3, 2020 (at para 16):

> Terms of employment contracts may be implied as well as express... In some cases of affiliated corporations, both subsidiary and parent corporation may be liable for employment benefits.

it is submitted that in the certification application, the Plaintiffs have an obligation to meet the minimum required threshold by introducing some factual and legal basis to support a valid cause of action against Paramount. The Plaintiffs have failed to do so.

(vi) The Plaintiffs have failed to satisfy the minimum evidentiary and legal threshold for their unjust enrichment claim against Paramount

37. The basis for the Plaintiffs' unjust enrichment claim is unclear. There are two possible ways in which to articulate this claim - one where Paramount's alleged obligation under the Class Members' employment agreements is a component of the claim, and the other where it was not. Each will be discussed below.

The alleged employment agreement obligation is a component of the claim

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[39] Apache Brief, paras. 78-80

38. The first formulation is that Paramount was unjustly enriched at the expense of the Class Members because:

    (a) Paramount received the benefit of the services provided by the Class Members without it complying with its obligation to compensate them for Apache's breach of the Award Agreements;

    (b) The Class Members suffered a corresponding deprivation as a result of Paramount's breach of their employment agreements; and

    (c) There is no juristic reason for Paramount's unjust enrichment and the Class Members' corresponding deprivation.

39. If this is the Plaintiffs' position, it is submitted that:

    (a) This claim does not meet the minimum evidentiary and legal threshold because as noted above, a necessary component of this claim (i.e., the Plaintiffs' employment claim against Paramount) has not met the required minimum evidentiary and legal threshold; and

    (b) In any event, the Plaintiffs' unjust enrichment claim is based on a breach of contract (i.e. both Apache and Paramount's alleged breaches of contract) for which it has a remedy. The unjust enrichment claim is redundant and should not be certified. [40]

The alleged employment agreement obligation is <u>not</u> a component of the claim

40. The second formulation is that Paramount was unjustly enriched at the expense of the Class Members because:

    (a) Paramount received the benefit of the services provided by the Class Members without Apache complying with its obligation to vest the Unvested Awards (i.e., in circumstances where Paramount had no obligation to compensate the Class Members for that loss);

    (b) The Class Members suffered a corresponding deprivation as a result of Paramount's breach of their employment agreements; and

    (c) There is no juristic reason for Paramount's unjust enrichment and the Class Members' corresponding deprivation.

41. If this is the Plaintiffs' position, it is submitted that:

    (a) They have failed to establish that there is some evidentiary and legal basis for a

[40] *Revolution Resource*, paras. 43 and 50-51

potential unjust enrichment claim against Apache Canada for a breach by its former parent company Apache of the Awards Agreements that Apache Canada had no obligations in relation thereto; and

(b) In any event, the Plaintiffs' unjust enrichment claim is based on a breach of contract (i.e. Apache's alleged breach of the Award Agreements) for which it has a remedy. The unjust enrichment claim is redundant and should not be certified. [41]

E. SECTION 5(1)(C) – COMMON ISSUES

(i) Introduction

42. Assuming that the Plaintiffs have established the minimum threshold for their employment and unjust enrichment claims against Paramount (which is denied) there are very limited possible common issues related to these claims.

43. As noted above, the Plaintiffs claim must include one or more "common issues", the analysis of which includes a consideration of, *inter alia,* the following:

(a) Does the common issue arise from the causes of action raised in the pleadings;

(b) Is the common issue overly broad;

(c) Will the resolution of the common issue avoid duplication of fact-finding or legal analysis;

(d) Is there a basis in the evidence before the court to establish the existence of the proposed common issues;

(e) Is the proposed common issue a substantial ingredient of each Class Member's claim and is its resolution necessary to the resolution of that claim;

(f) Is the proposed common issue dependent upon individual findings of fact that have to be made with respect to each individual claimant; and

(g) Is there a workable methodology for determining such issues on a class-wide basis.

(ii) Common issues – Plaintiffs' employment claim against Paramount

44. As noted above, the Plaintiffs have alleged that Paramount breached the Class Members' employment agreements as follows:

(a) The Class Members were parties to the Award Agreements;

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[41] *Revolution Resource*, paras. 43 and 50-51

(b) The Class Members had the Unvested Awards as of the Share Acquisition Date;

(c) Apache breached the Award Agreements by failing to vest the Unvested Awards as of the Share Acquisition Date and then cancelling them; and

(d) Paramount failed to adequately compensate the Class Members for their loss of the Unvested Awards.

45. Paramount adopts the submissions in paragraphs 65 to 85 of the Apache Brief concerning common issues related to the matters referred to in paragraph 44 (a) through (c) above.

46. It is submitted that the following are the only possible common issues related to the Plaintiffs' employment claim which are not dependent upon individual findings of fact:

(a) Prior to the Share Acquisition Date, did Apache Canada by virtue of the fact that it was a wholly owned subsidiary of Apache Corporation, without anything more, have a legal obligation under its employment agreements with the Class Members to compensate them if Apache wrongfully refused to vest the Unvested Awards in accordance with the terms of the Award Agreements and then cancelled them;

(b) If the answer to (a) is yes, did this obligation continue after the Share Acquisition Date; and

(c) If the answer to (a) and (b) are yes, did the Employment Exclusion Provisions in the Award Agreements operate so as to preclude this obligation from forming a part of the Class Members' employment agreements with Apache Canada.

47. The surrounding circumstances (factual matrix) for the above contractual interpretation issues would have to be limited to generic background information and exclude any information which might not apply to all Class Members.

48. It is unclear if the Plaintiffs intend to take the position that Paramount is precluded from relying on the Employment Exclusion Provisions in the AOCP and the Grant Agreements because:

(a) This is an exclusionary provision which Paramount or Apache had an obligation to bring to the attention of the Class Member;

(b) Paramount or Apache failed to adequately bring these provisions to the attention of all of the Class Members; and

(c) As a result of (a) and (b), these provisions are unenforceable against the Class Members.

49. The issues described in paragraph 48 are dependent upon individual findings of fact that

have to be made with respect to each individual claimant and accordingly, do not qualify as a common issue.

(iii) Common issues – Plaintiffs' unjust enrichment claim against Paramount

50. Assuming that the Plaintiffs have established the minimum threshold for their unjust enrichment claim against Paramount (which is denied), no part of this claim meets the minimum requirements of a common issue for, *inter alia,* the following reasons:

(a) The value to each of the Class Members of the Unvested Awards is different and unknown;

(b) Each of the Class Members provided different services to Paramount;

(c) In *Webster v. Robbins Parking Service Ltd*., 2016 BCSC 1863 at para. 188, the Court refused to certify a claim for unjust enrichment because "to find unjust enrichment the court would need to carefully consider the circumstances of each class member". The same principle applies here. An analysis of Paramount's alleged enrichment and the Class Members corresponding deprivation would involve numerous factual issues which are peculiar to each Class Member including the following:

(i) What benefit did Paramount receive from the services provided by the Class Members? This would involve an individual assessment of what services each Class Member provided to Paramount;

(ii) What were the value of each Class Members Unvested Awards; and

(iii) The value of the additional compensation they received from Paramount after the Share Acquisition Date. This would include an analysis of the value of the awards provided to them under Paramount's Cash Bonus and Restricted Share Unit Plan and Stock Option Plan;

(d) The Plaintiffs have failed to provide a process for determining the alleged deprivation suffered by the Class Members (collectively or individually);[42] and

(e) This claim is redundant. If the Plaintiffs are successful in the claim against Apache for breach of the Award Agreements, they will recover damages from it. If they are unsuccessful in their claim against Apache, there would be a juristic reason for any alleged enrichment of Paramount.

51. Paramount also adopts the submissions in paragraphs 111 to 126 of the Apache Brief.

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[42] *Panacci v Volkswagen*, 2018 ONSC 6312, at paras. 51 to 54

(iv) This is not a case where damages can be determined on an aggregate basis or be the subject of a common issue in a class proceeding

52. The Plaintiffs have failed to meet the minimum requirements for a common issue on aggregate damages to be certified. It is obvious in this case that the Court's assessment of any damage award for the Class Members' alleged loss of their Unvested Awards (and corresponding failure to provide an equitable substitution for this loss) would require an assessment of the individual circumstances of each Class Member.

53. Paramount adopts the submissions in paragraphs 88 to 106 of the Apache Brief. In addition, the calculation of any damage award against Paramount would involve an assessment by the Court of the additional compensation the Class Members received from Paramount after the Share Acquisition Date, which would include an analysis of the value of the Paramount Awards.

(v) This is not a case where punitive damages would be an appropriate award

54. Paramount adopts the submissions in paragraphs 107 to 110 of the Apache Brief.

F. SECTION 5(1)(D) - A CLASS PROCEEDING AGAINST PARAMOUNT IN THESE CIRCUMSTANCES IS NOT A PREFERABLE PROCEDURE

55. Paramount adopts the submissions in paragraphs 127 to 139 of the Apache Brief.

56. In particular, a class proceeding against Paramount is not the preferable procedure because, *inter alia*:

    (a) The questions affecting only individual Class Members predominate over the issues of fact or law common to the Class Members; and

    (b) A class action would not meet the goal of achieving judicial economy.

57. It is submitted that the questions affecting only individual Class Members predominate over the issues of fact or law common to the Class Members for, *inter alia,* the following reasons:

    (a) There are the following limited potential common issues:

        (i) Was Apache Canada a common employer with Apache in relation to the Class Members solely because it was a subsidiary of Apache;

        (ii) If the answer to (i) is yes, was Apache Canada obligated to compensate the Class Members for any losses they suffered as a result of Apache's breach of the Award Agreements; and

(iii) If the answer to (ii) is yes, did the Employment Exclusion Provisions in the Award Agreements operate so as exclude this obligation from the Class Members Employment Agreements; and

(b) There are material individual issues, including the following:

(i) Are the Employment Exclusion Provisions unenforceable against the Class Members;

(ii) Did the Class Members who executed the Releases in favour of Paramount release any rights they have in relation to this action;

(iii) What losses did the Class Members suffer as a result of Apache's alleged breach of the Award Agreements; and

(iv) Were the Paramount Awards adequate compensation for the Class Members alleged losses.

58. As was the case in *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158, the issues in this case which are common are "negligible" when compared to the remaining individual issues. As such, a class action is not the preferable procedure.

59. Further, a class action would not meet the goal of judicial economy. Judicial economy is not met where causes of action are "redundant and add unnecessary and burdensome complexity to the claim".[43] Such "redundant causes of action cause enormous problems of manageability".[44] As stated in Berg v. *Canadian Hockey League*, 2017 ONSC 2608 and recently adopted by Justice Rooke in *Setoguchi* at para. 120:

> …it is inimical to the access to justice principles … to succumb to the argument that it would be simply unjust and unfair to deny the Class Members the opportunity to prove all the claims they have that satisfy the criteria for certification without regard to whether they actually need to prove all those claims in order to achieve access to justice.

60. It is submitted that the class action would not meet the goal of achieving judicial economy for, *inter alia,* the following reasons:

(a) The Plaintiffs raise redundant causes of action which will cause enormous problems of manageability;

(b) If the Class Members succeed with their claim against Apache, they will be paid damages by Apache;

(c) If the Class Members are unsuccessful in their action against Apache they have no

[43] *Setoguchi*, at para. 120

[44] *Setoguchi*, at para. 120

claim against Paramount; and

(d) The Plaintiffs' claims against Paramount would only increase the complexity of issues involve in the action, slow down the process and increase the amount of time the Court would have to spend dealing with these proceedings for absolutely no additional benefit to the Class Members.

G. SECTION 5(1)(E) – REPRESENTATIVE PLAINTIFFS

61. As with Apache, Paramount does do not take any issue with the appropriateness of the proposed representative plaintiffs under section 5(1)(e) of the *CPA*.

H. THE PLAINTIFFS' REQUESTED RESTRICTIONS ON COMMUNICATIONS SHOULD BE DENIED

62. It is submitted that if one or more common issues involving Paramount are certified by this Court, an order restricting communications between the Defendants from communicating with the Class Members should be denied.

63. As stated in *Smith v. National Money Mart Co*., [2007] O.J. No. 1507 at para. 13:[45]

(a) There is no absolute prohibition on communication by the defendants to class members during the opt-out period and the *CPA* does not require prior court approval for every communication;

(b) An order limiting communication is extra-ordinary;

(c) If communication by a defendant to a class member during the opt-out period is inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process the court will, on the motion of a party or class member, intervene to ensure the fair determination of the class proceeding; and

(d) An order limiting communication by the defendant during the opt-out period should only be granted if it is necessary to prevent a real and substantial risk to the fair determination of a class proceeding, because reasonably available alternative measures will not prevent the risk.

64. The Plaintiffs have not adduced any admissible evidence that:

(a) Paramount made any inaccurate statements to the Class Members;

(b) Any of the Class Members were intimidated or coerced by Paramount; and

(c) There is any risk that this proceeding, if certified, will not be determined fairly.

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[45] See also *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2016 ONSC 676 at paras. 8-10

65. The Plaintiffs rely primarily on hearsay evidence of the alleged communications between Paramount and the Class Members (which, in any event, do not arise to the types of communications warranting court intervention), and refused to answer any questions in cross-examination as to the source of these allegations on the basis that such evidence was not relevant to the certification application.[46]

66. The only admissible evidence is the summary of information provided by Paramount to its employees (which is attached as Exhibit "Q" to the Flesch Affidavit). Paramount is entitled to communicate with its employees on the Plaintiffs' action. There was nothing inappropriate in Paramount's communications.

67. In the absence of any evidence, it is inappropriate to grant the extraordinary relief sought by the Plaintiffs.

IV. RELIEF REQUESTED

68. The Plaintiffs' application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of April, 2021

John A. Legge/Robb Beeman
Lawyers for the Defendant Paramount Resources Ltd.

[46] Flesch Examination, page 101 line 19 to page 102 line 22