COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	2101-0209AC
TRIAL COURT FILE NUMBER	1901-09160
REGISTRY OFFICE	CALGARY
PLAINTIFFS	STEPHEN FLESCH, MARSHAL THOMPSON, TYLER MAKSYMCHUK and REID CHAMBERLAIN
STATUS ON APPEAL	RESPONDENTS
DEFENDANTS	APACHE CORPORATION, WILLIAM C. MONTGOMERY, ANNELL R. BAY, DANIEL W. RABUN, RENE R. JOYCE and CHARLES J. PITMAN
STATUS ON APPEAL	APPELLANTS
DEFENDANT	PARAMOUNT RESOURCES LTD.
STATUS ON APPEAL	NOT A PARTY TO THE APPEAL
DOCUMENT	**FACTUM**

Appeal from the Decision of
The Honourable Justice G.H. Poelman
Dated the 25th day of June 2021
(Filed the 25th day of June 2021)

FACTUM OF THE APPELLANTS, APACHE CORPORATION, WILLIAM C. MONTGOMERY, ANNELL R. BAY, DANIEL W. RABUN, RENE R. JOYCE and CHARLES J. PITMAN

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I. OVERVIEW & FACTS

A. Overview

1. This Appeal arises from the manner in which the Chambers Justice formulated certain common issues, as part of certifying the within Action as a class proceeding.

2. The certified Class includes former employees of Apache Canada Ltd., a Canadian oil and gas company that was sold in a share transaction to Paramount Resources Ltd. in August 2017. The Class members claim that they were wrongly denied deferred compensation because of the sale.

3. The Appellant, Apache Corporation, is a United States corporate entity that, prior to the share transaction, indirectly owned Apache Canada Ltd. through a subsidiary. Apache Corporation denies that it was an employer of the Class members -- the Class members were instead employees of the Canadian entity, Apache Canada Ltd.

4. The named individual Defendants were directors of Apache Corporation and were members of Apache Corporation's Management Development and Compensation Committee ("**MDCC**") at the time the share transaction was announced. At no time were the named individual Defendants directors of Apache Canada Ltd.

5. These Appellants do not take issue with the cause of action criteria set out in section 5(1)(a) of the *Class Proceedings Act*, SA 2003, c C-16.5 ("***CPA***").

6. Instead, the focus of this Appeal is on sections 5(1)(b) through 5(1)(d) of the *CPA* and a lack of evidence put forward by the Plaintiff Respondents to establish "some basis in fact" for certain claimed common issues, and failures to address evidence put forward by the Appellants that states that Apache Corporation was not an employer of the Class members. Further, this Appeal focuses on the improper characterization of Apache Corporation as a "common employer".

7. In the context of class actions, there are three main policy drivers: access to justice, behavior modification and judicial economy[1]. The Appellants respectfully submit that the common issues, as certified in this particular Action, lack specificity and are overly broad. The result is an unfocused and unworkable class action that erodes judicial economy, rather than aiding it.

B. Facts

8. Apache Corporation is an international oil and gas corporation based in Houston, Texas. Apache Corporation has various subsidiaries that conduct oil and gas operations throughout the world.

9. For several years, Apache Canada Ltd. was an indirect, wholly owned subsidiary of Apache Corporation, with operations concentrated in Western Canada. Apache Canada Ltd. shares did not trade publicly.

10. As part of their compensation, employees of Apache Canada Ltd. received one or more forms of awards: restricted stock units, stock options and performance awards (the "**Awards**"). The Awards were tied to Apache Corporation stock, as it trades publicly, whereas Apache Canada Ltd. stock did not.

11. The Awards were allocated pursuant to a long-term compensation plan implemented by Apache Corporation, the Apache Omnibus Compensation Plan (the "**Plan**"). There were two iterations of the Plan, one issued in 2011 and one issued in 2016. The wording of the relevant sections in each iteration is identical.

12. The Awards were granted by way of notices (the "**Award Notices"**), and each type of Award Notice had its own specific grant agreement that was provided with the Award Notice,[2] being the RSU Agreements, the Option Agreements and the PA Agreements.

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[1] *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 [***Hollick***] at paras 14-15.

[2] Affidavit of Stephen Flesch, sworn February 21, 2020, filed March 6, 2020 at paras 13, 15, 19, 20, 21, 22 (Flesch Affidavit) **[Appellants Extracts of Key Evidence (AEKE), p. 6-8]**; Affidavit of Marshal Thompson, sworn February 20, 2020 filed March 6, 2020 at paras 8, 13, 15 (Thompson Affidavit) **[AEKE, p. 150-151]**; Affidavit of Tyler

13. The Grant Agreements provided that the Awards terminate on the employee's termination of employment except in certain specific circumstances[3].

14. Attached to and forming part of each Award Notice was a grant agreement (The "**Grant Agreement**")[4]. The Grant Agreements were between each individual Class member and Apache Corporation.[5]

15. Each of the Award Notices provided that the granting of the Awards was always subject to the AOCP.[6]

16. Further, each of the Grant Agreements stipulate that the AOCP was discretionary, and that the applicable individual employee acknowledged that neither the AOCP nor the Grant Agreement formed part of their terms of employment:

> 15. Terms of Employment. **The Plan is a discretionary plan. The Recipient hereby acknowledges that neither the Plan nor this Agreement forms part of his terms of employment** and nothing in the Plan may be construed as imposing on the Company or any Affiliate a contractual obligation to offer participation in the Plan to any employee of the Company or any Affiliate. The Company or any Affiliate is under no obligation to grant further Stock to any Recipient under the Plan. The Recipient hereby acknowledges that if he ceases to be an employee of the Company or any Affiliate for any reason or no reason, he shall not be entitled by way of compensation for loss of office or otherwise howsoever to any sum.[7]
>
> [emphasis added]

Maksymchuk, sworn February 20, 2020, filed March 6, 2020 at para 8 (Maksymchuk Affidavit) **[AEKE, p. 157]**; Affidavit of Clayton Reid Chamberlain, sworn February 21, 2020, filed March 6, 2020 at para 8 (Chamberlain Affidavit) **[AEKE, p. 163]**.

[3] Flesch Affidavit, Exhibit I "Vesting Period" and sections 2 and 3(a) **[AEKE, p. 77, 80-81],** Exhibit G "Eligible Persons" **[AEKE, p. 45]**.

[4] Flesch Affidavit at para 14 **[AEKE, p. 6]**.

[5] Affidavit of Greg Byrgesen, sworn January 21, 2021, filed January 22, 2021 at para 11(d) (Byrgesen Affidavit) **[AEKE, p. 170]**.

[6] See for example Flesch Affidavit, Exhibit L (RSU Award Notice/RSU Agreement) **[AEKE, p. 100-111]**, N (Option Award Notice/Option Agreement) **[AEKE, p. 113-125]**, O (PA Award Notice/PA Agreement) **[AEKE, p. 127-148]**.

[7] See for example Flesch Affidavit, Exhibit L (RSU Award Notice/RSU Agreement) (section 15) **[AEKE, p. 110]**, N (Option Award Notice/Option Agreement) (section 15) **[AEKE, p. 124]**, O (PA Award Notice/PA Agreement) (section 16) **[AEKE, p. 146]**.

17. The Grant Agreements also specifically stated that the granting of an Award did not confer any right with respect to the continuation of the employee's employment.[8]

18. The RSU Agreement and the PA Agreement provided that, to receive the Award, the recipient must be an "Eligible Person" at the end of the performance period set out in the Award Notice.[9] "Eligible Person" is defined in the AOCP as those employees who are employees of the Company or of any Affiliates who are designated as Eligible Persons by the MDCC.[10]

19. The AOCP and the Grant Agreements provided for certain events occurring after a "Change of Control", as defined. The "Change of Control" provision refers to a change of control of the "Company", which is defined as Apache Corporation, together with its Affiliates, *except where the context otherwise requires*[11] [emphasis added].

20. If there was a Change of Control, the AOCP and the Grant Agreements provided for accelerated vesting of the Awards, but only if the specific employee then later underwent either an "Involuntary Termination" or a "Voluntary Termination With Cause", both as defined in the AOCP and the Grant Agreements.[12] For example, the 2016 AOCP states:

> Change of Control
>
> 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:
>
> (a) Without further action by the Committee or the Board,

[8] See for example Flesch Affidavit, Exhibit L (RSU Award Notice/RSU Agreement) (section 10) **[AEKE, p. 108]**, N (Option Award Notice/Option Agreement) (section 10) **[AEKE, p. 122]**, O (PA Award Notice/PA Agreement) (section 11) **[AEKE, p. 144]**.
[9] See for example Flesch Affidavit, Exhibit L (RSU Award Notice/RSU Agreement) **[AEKE, p. 100-111]**, O (PA Award Notice/PA Agreement) **[AEKE, p. 127-148]**
[10] Flesch Affidavit, Exhibit G (2016 AOCP), section 2.1(i) **[AEKE, p. 45]**; Exhibit F (2011 AOCP) section 2.1(i) **[AEKE, p. 17]**.
[11] Flesch Affidavit, Exhibit G (2016 AOCP), section 1.1 **[AEKE, p. 43]**; Exhibit F (2011 AOCP), section 1.1 [emphasis added] **[AEKE, p. 15]**.
[12] Flesch Affidavit, Exhibit G (2016 AOCP), section 13 **[AEKE, p. 68-69]**; Exhibit F (2011 AOCP), section 12 **[AEKE, p. 36-37]**.

all outstanding Options **shall fully vest upon the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after a Change of Control**. Such newly vested Options shall be fully exercisable as of the date of the Involuntary Termination or Voluntary Termination with Cause on or after a Change of Control occurs.

(b) Without further action by the Committee or the Board,

all unvested Restricted Stock Awards and Restricted Stock Units **shall fully vest upon the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after a Change of Control**. …

[emphasis added]

21. The individual Grant Agreements contained slightly different terms regarding a Change of Control, but are consistent that acceleration only occurs in the event of an employee's Involuntary Termination or Voluntary Termination with Cause.[13]

22. The Grant Agreements also provided for situations in which the Awards would continue to vest following retirement, but the Grant Agreements differ on what conditions needed to be met on retirement for the Awards to continue to vest.[14]

23. Following receipt of the Award Notice, an individual Class member had to accept the Award.[15] The Award had to be accepted by the individual through an electronic acceptance which required the individual to read the Grant Agreement and accept and acknowledge its terms, conditions, exclusions and limitations.[16]

24. Following an individual Class member's acceptance of the terms of the Grant Agreement, the Awards were then deposited into the Class member's Fidelity account. The Awards

[13] See for example, Flesch Affidavit, Exhibits L (RSU Award Notice/RSU Agreement) (section 4) **[AEKE, p. 106]**, N (Option Award Notice/Option Agreement) (section 4(e)) **[AEKE, p. 118]**, O (PA Award Notice/PA Agreement) (section 5) **[AEKE, p. 141]**.

[14] See for example, Flesch Affidavit, Exhibits L (RSU Award Notice/RSU Agreement) (sections 3(b) and 5) **[AEKE, p. 105, 106]**, N (Option Award Notice/Option Agreement) (sections 4(a) and 5) **[AEKE, p. 117, 118-120]**, O (PA Award Notice/PA Agreement) (sections 4(c) and 6) **[AEKE, p. 141-142]**.

[15] Flesch Affidavit, Exhibit I (RSU Award Notice/RSU Agreement) **[AEKE, p. 76-98]**; Transcript of Oral Questioning of Stephen Flesch held January 7, 2021, filed January 27, 2021 (Flesch Transcript), page 25, line 5 to page 26, line 5 **[AEKE, p. 200-201]**.

[16] Byrgesen Affidavit at para 12(c) **[AEKE, p. 170]**.

would show as "unvested" until the Award's vesting date. Following the vesting of the Awards, the individual could either hold the Awards or sell them.[17]

25. On July 6, 2017, at a meeting of Apache Canada Ltd. employees, executives of Apache Canada Ltd., announced that all shares of Apache Canada Ltd. had been sold to a subsidiary of Paramount Resources Ltd. The share sale transaction closed on August 18, 2017. Later, on January 1, 2018, the subsidiary was amalgamated with Paramount Resources Ltd.

26. The Awards were cancelled upon closing of the share transaction.

27. Most of the proposed Class members became employees of Paramount after the transaction closed. They also became entitled to participate in the Paramount deferred compensation plan.

28. The Plaintiff Respondents subsequently commenced their Action on July 2, 2019.

29. The certification application was heard on April 28, 2021 and Reasons for Decision were issued on June 25, 2021.

30. The Chambers Justice certified several common issues, including the following common issues:

…

(1) "In relation to the sale of shares of Apache Canada Ltd. by Apache Corporation … to Paramount Resources Ltd …, what contractual obligations (including good faith) did the Defendants or any of them, jointly or severally, owe to Class members regarding their unvested awards of restricted stock units, stock options and

[17] Flesch Affidavit at para 15 **[AEKE, p. 6]**; Thompson Affidavit at para 9 **[AEKE, p. 150]**; Maksymchuk Affidavit at para 9 **[AEKE, p. 157]**; Chamberlain Affidavit at para 9 **[AEKE, p. 163]**.

performance awards … issued under the Apache Omnibus Compensation Plan … to Class Members prior to the Share Acquisition Date?"

(2) "Were any contractual obligations, as identified … above, breached by the Defendants, or any of them? Are the Defendants, or some of them, jointly or severally liable for any breach of these contractual obligations?"

…

(6) "With respect to the Plaintiffs' claim of unjust enrichment:

(a) Were Apache and Paramount, or either of them, enriched as a result of the Class members' loss of the Unvested Awards?

(b) If the answer to paragraph 7(6)(a) is yes, was there a corresponding deprivation to the Class members?

(c) If the answers to paragraphs 7(6)(a) and (b) are yes, was there a juristic reason for the enrichment?"

…

31. In addition to this Appeal, there is a second Appeal which was filed by Paramount Resources Ltd., under a different Court of Appeal file number (2101-0209AC). The two Appeals are to be heard concurrently. A shared Appeal Record was filed for both Appeals.

II. GROUNDS OF APPEAL

32. The Appellants respectfully submit that the grounds of appeal are as follows:

(a) The Chambers Justice erred in certifying common issues regarding claims in breach of contract absent supporting evidence and in the face of evidence directly contrary to the common issues sought by the Plaintiff Respondents;

(b) The Chambers Justice erred in concluding that Apache Corporation could, on the facts before him, meet the definition of a "common employer"; and

(c) The Chambers Justice erred in certifying common issues regarding claims in unjust enrichment.

III. STANDARD OF REVIEW

33. The decision to certify a class action is a discretionary decision and is not to be overturned on appeal unless the decision reflects an error of principle or it is unreasonable.[18] A decision regarding whether there is sufficient evidence to support certification is a question of fact or a mixed question of fact and law that should not be disturbed on appeal absent palpable and overriding error.[19]

34. The Appellants respectfully submit that Chambers Justice's decision to certify the Action in the manner he did was unreasonable, included errors of principle, and failed to address an absence of evidence on key matters, as well as disregarded clear controverting evidence put forward by the Appellants.

IV. ARGUMENT

35. The Chambers Justice correctly noted the policy aspects underpinning class proceedings are facilitating access to justice, judicial economy and behaviour modification and the general objectives of fairness and efficiency.[20]

36. The Chambers Justice also correctly noted, again relying on *Hollick,* that "the class representative must show some basis in fact for each of the certification requirements

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[18] *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182 [***Spring***] at para 16; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 [***Saint-Joseph***] at paras 10-12.
[19] *Spring* at para 16.
[20] Certification Decision, 2021 ABQB 491 at para 28 **[Appeal Record (AR), p. 49]**, relying on *Hollick* at paras 14 and 15; *Starratt v Mamdani*, 2017 ABCA 92 [***Starratt***] at para 9.

set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action."[21]

37. In addition, the Chambers Justice correctly noted that "It is useful to formulate the common issues as precisely as possible at the certification stage, if the certification application is granted" and the common issues should have "sufficient focus to ensure that the answer will have some meaning and serve the ends of fairness and efficiency."[22]

A. The Chambers Justice erred in failing to address a lack of evidence of commonality and in failing to address contrary evidence

38. In formulating the common issues in the manner he did, the Chambers Justice erred by not following the general principles of class actions he identified, as reflected above. Instead, and apparently out of a concern of "framing the issues too narrowly"[23], the Chambers Justice erred by defining the common issues in too broad a manner, where there was no basis in fact to do so, and where the common issues would offer no residual benefit to the Class.

39. The Chambers Justice appeared to resist the defining of common issues "so as to eliminate some grounds of liability." However, in doing so, he erred. Unless there is some basis in fact for a particular common issue, there is no basis to certify it. The resulting elimination of a ground of liability is exactly the point - the Plaintiffs in a class action cannot certify every possible ground for liability in a shotgun-style approach. This would lead to unfocussed and unwieldy class actions that do not serve the objectives of fairness and efficiency.[24]

40. The Appellants acknowledge that it is inappropriate to weigh evidence during certification, and that certification is not an adjudication of the merits of the claim. That

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[21] Certification Decision at para 30 **[AR, p. 49]**.
[22] Certification Decision at paras 66 and 67 **[AR, p.54]**.
[23] Certification Decision at para 67 **[AR, p. 54]**.
[24] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [***Atlantic Lottery***] at paras 68 and 71; *Rumley v British Columbia*, 2001 SCC 69 [***Rumley***] at para 29.

is not the issue at stake in this Appeal. Instead, the relevant evidentiary issue in this Appeal is focused upon the sufficiency of evidence to establish commonality for the proposed common issues.

41. In a certification application, the evidentiary requirement is low, but it is not non-existent.

42. A proposed representative plaintiff is obligated to put forward evidence to meet the threshold of "some basis in fact" for the commonality requirements set out in section 5 of the CPA. As noted in this Court's recent decision in Spring, at para 30:

> …the representative plaintiff must satisfy all the preconditions for certification in s. 5 of the [CPA] … That includes showing some basis in fact supporting the commonality of the issues.

43. Absent evidence of commonality, there is no way to prove a common impact on class members and no means to demonstrate that an issue is common.[25]

44. The requirement to show "some basis in fact" for commonality of an issue is an important screening device that requires "more than symbolic scrutiny".[26]

45. In the present circumstances, the proposed representative plaintiffs:

(1) Failed to specifically plead that Apache Corporation was a "common employer";

(2) Failed to put forward any evidence in support of their contentions that Apache Corporation was a "common employer";

(3) Failed to put forward any evidence to support an argument that a contract of employment existed between Apache Corporation and any of the proposed Class members[27];

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[25] *Spring* at paras 21, 27, 30.
[26] *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57 [**Pro-Sys Consultants**] at para 103.
[27] By way of contrast, the evidence confirms they were not employees of the US Apache Corporation: Transcript of Oral Questioning of Marshal Thompson held January 7, 2021, filed January 27, 2021 (Thompson Transcript), pages 10, 13-14 **[AEKE, p.180, 183-184]**

(4) Failed to demonstrate that if there was a contract of employment between Apache Corporation and any of the proposed Class members (which is not admitted but denied), that its material terms are universal across the Class, or even across a meaningful (or indeed any) subclass of potential Class members;

(5) Objected during cross-examination to any questions regarding Apache Corporation being a "common employer"[28]; and

(6) Confirmed that they were employees of Apache Canada Ltd. -- no such confirmation was ever made regarding Apache Corporation.

46. The actual evidence before the Court, including copies of Grant Agreements, demonstrated a clear absence of any intention to characterize Apache Corporation as being in an employment relationship with the Class members.

47. Taken together, the circumstances demonstrate that the Plaintiff Respondents have failed to discharge their burden of establishing "some basis in fact" for commonality. That failure is fatal to the Plaintiff Respondents' proposed common issues regarding the status of Apache Corporation being an employer or having any liability pursuant to employment law principles, either based on the express wording of contractual agreements or through the doctrine of "common employer".

B. There is no basis to certify any issues tied to Apache Corporation being characterized as a "common employer"

48. In response to arguments made by the Plaintiff Respondents, and notwithstanding a failure by the Plaintiff Respondents to specifically plead that Apache Corporation was a "common employer", and notwithstanding the clear wording of the Grant Agreements, the Chambers Justice left open the possibility that Apache Corporation was a "common

[28] Flesch Transcript at pages 10 and 11 **[AEKE, p. 192-193]**.

employer" of the individual Class Members. He then certified the common issues in a way that reflects this finding.

49. More specifically, at para 79 of the Reasons for Decision, the Chambers Justice stated:

> In my view, the common issues cannot be defined so as to exclude the question of whether Apache is liable in contract to class members for cancelling the Awards, and this question should not be limited to construing the language of the Plan and its associated documents.

50. The Appellants respectfully submit that the Chambers Justice erred in ignoring the clear wording of the Grant Agreements for individual employees and in failing to apply a narrow interpretation of the doctrine of "common employer".

51. The wording of the Grants Agreements is unequivocal. It is clear and direct. The Plan was discretionary. Further, neither the Plan nor the Grant Agreements formed part of the terms of employments.

> 15. Terms of Employment. **The Plan is a discretionary plan**. **The Recipient hereby acknowledges that neither the Plan nor this Agreement forms part of his terms of employment** and nothing in the Plan may be construed as imposing on the Company or any Affiliate a contractual obligation to offer participation in the Plan to any employee of the Company or any Affiliate. The Company or any Affiliate is under no obligation to grant further Stock to any Recipient under the Plan. The Recipient hereby acknowledges that if he ceases to be an employee of the Company or any Affiliate for any reason or no reason, he shall not be entitled by way of compensation for loss of office or otherwise howsoever to any sum. [29]
>
> [emphasis added]

52. In the face of the clear wording set out above, the Plaintiff Respondents adjusted course in their submissions and argued that Apache Corporation could be characterized as a "common employer". This line of reasoning was advanced notwithstanding that the

[29] See for example Flesch Affidavit, Exhibit L (RSU Award Notice/RSU Agreement) (section 15) **[AEKE, p. 110]**, N (Option Award Notice/Option Agreement) (section 15) **[AEKE, p. 124]**, O (PA Award Notice/PA Agreement) (section 16) **[AEKE, p. 146]**.

Plaintiff Respondents failed to even specifically plead in its Amended Statement of Claim that Apache Corporation was a "common employer".

53. The Plaintiff Respondents' position on this point does not align with existing case law and would require an expansion of the doctrine of "common employer". The Appellants respectfully submit that such an expansion is neither necessary nor appropriate in the circumstances.

54. The reasons for the Plaintiff Respondents' efforts to include Apache Corporation within an expanded definition of "employer" are transparent and obvious. The Plan and Grant Agreements have clear terms regarding the continuation and cancelled of the granted Awards. They make it clear that the Plan is discretionary and that neither the Plan nor the Grant Agreements form terms of employment.

55. Therefore, to attach any contractual liability to Apache Corporation and the individual director Defendants, the Plaintiff Respondents would need to go further afield -- they would have to capture Apache Corporation within the rubric of a "common employer". Failing that, the Plaintiff Respondents would have no legal basis for any of the employer focused common issues regarding Apache Corporation and its directors, and the proposed Class action against Apache Corporation and its directors would instead proceed based on the contractual terms governing the Awards. The Respondents submit this result is completely proper and in accordance with the goals and bases of class actions in Alberta.

56. In considering whether Apache Corporation could be a "common employer" the Chambers Justice correctly identified some relevant considerations, noting at para 45 of the Reasons for Decision that the "test for finding common employers involves broad considerations of facts, rather than a single test", and that "the key factors, it has been observed, are whether two entities may be considered a single employer and whether there is common control over both entities and both exercise control over the employee".

57. However, the Chambers Justice failed to address a key aspect of the "common employer" doctrine: intention. There must be an intention to create an employer/employee relationship between the employee and the related corporations.

58. The doctrine of common employer liability is often applied to prevent elaborate corporate structures from frustrating employee rights (or, less often, to expand employee obligations across a larger corporate structure). It recognizes:

> […] that an employee may simultaneously have more than one employer. If an employer is a member of an interrelated corporate group, one or more other corporations in the group may also have liability for the employment obligations. **However, and importantly, they will only have liability if, on the evidence assessed objectively, there was an intention to create an employer/employee relationship between the employee and those related corporations** [30]
>
> [emphasis added]

59. As noted in *O'Reilly,* the fact that one corporation owns the shares of another, or is affiliated with another, "does not mean that they have common responsibility for their debts, nor common ownership of their businesses or assets. A corporation's business and assets are not, in law, the business or assets of its parent corporation". Similarly, a parent company "is not liable for the debts and obligations of a subsidiary". The fact that corporations are related "does not, in and of itself, change this paradigm". (*O'Reilly,* para 45). [31]

60. The common employer doctrine "imposes liability on companies within a corporate group only if, and to the extent that, each can be said to have entered into a contract of employment with the employee".[32] Therefore, to be recognized as a common employer, the related corporation "will be found to be a common employer only where it is shown,

[30] *O'Reilly v ClearMRI Solutions Ltd.*, 2021 ONCA 385 [**O'Reilly**] at para 2.
[31] *O'Reilly* at paras 44 and 45.
[32] *O'Reilly* at para 49.

on the evidence, that there was an intention to create an employer/employee relationship between the individual and the related corporation"[33]. [emphasis added]

61. The Plaintiff Respondents have put forward no evidence to support the required intention component. They have certainly not put forward any evidence of the required intention component existing and being common across the Class. The Appellants however have provided evidence to the contrary. Taken together, there is no basis in fact, let alone "some basis in fact", to support any commonality sufficient to maintain any common issue tied to contractual or common employment liability on the part of the Appellants.

62. The Plaintiff Respondents' intended approach on "common employer" also runs contrary to jurisprudence and well-established legal principles regarding corporate separateness.

63. The issue of corporate separateness was canvassed extensively by the Ontario Court of Appeal in *Yaiguaje v Chevron Corp*, 2018 ONCA 472 ("***Chevron***"). The Court noted that Canadian corporations have stakeholders, including creditors, shareholders and employees, who rely of the doctrine of corporate separateness, and that these stakeholders have a reasonable expectation that when they do business with a Canadian corporation, "they need only consider the liabilities of that corporation and not the liabilities of some related corporation".[34]

64. The Court in *Chevron* noted that corporate separateness is the rule, and that the law recognizes an exception to the rule "where the corporate form is being abused to the point that the corporation is not truly a separate corporation and is being used to facilitate fraudulent or improper conduct".[35] That exception does not apply here and there is no evidence to support such an assertion.

65. The Court in *Chevron* also strongly rejected a group enterprise theory of liability, and noted that there is a "difference between economic reality and legal reality". The Court

[33] *O'Reilly* at para 50.
[34] *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472 [**Chevron**] at para 61.
[35] *Chevron* at para 70.

observed that the fact that on an operational level corporate separateness may be more nuanced among a group of related corporations is not relevant. "It is the legal reality, as provided for in … relevant business corporations statutes, that counts".[36]

66. Essentially, the Plaintiff Respondents are seeking to expose Apache Corporation to potential Class-wide liability under an "employment law" theory, absent evidence of commonality and contrary to the established doctrines of common employer and corporate separateness. There is no legal or evidentiary basis for doing so. There are also sound policy reasons for rejecting this approach, as noted by the Ontario Court of Appeal in *Yaiguaje*. Extending potential liability in this way would reduce both the fairness and efficiency of corporate law.[37]

C. The Chambers Justice erred in certifying common issues regarding claims in unjust enrichment

67. Claims that have no reasonable prospect of success should not be certified.[38] Similarly, claims that offer no residual benefit to members of the class should not be certified.[39]

68. As expressly pled by the Plaintiffs, the Awards were issued pursuant to the AOCP and the Grant Agreements. This claim is similar to that in *Atlantic Lottery*, where the Supreme Court found "Nothing in the pleadings…could serve to vitiate the alleged contract between the plaintiffs and [the defendant]. It follows that I agree with the appellants that the plaintiffs' unjust enrichment claim has no reasonable chance of success."[40]

69. The entirety of the Plaintiffs' claim against Apache Corporation arises from the contracts pursuant to which the Awards were granted. If the contracts were breached, the Class will have its full remedy to which it is entitled in contract. If the contracts were not breached, there will have been no unjust enrichment - Apache Corporation will have a

[36] *Chevron* at paras 76 and 77.
[37] *Chevron* at para 78.
[38] *Atlantic Lottery* at paras 18 and 71.
[39] *Spring* at para 52.
[40] *Atlantic Lottery* at paras 69-71.

juristic reason for any benefit obtained, and the Class members will not have suffered any deprivation. Rather, they will have received exactly the benefits to which they are entitled pursuant to the terms of the operative contracts.

70. As in *Atlantic Lottery* and *Spring,* in this matter "the claim for restitution can provide no incremental benefit to the members of the class".[41] A class action claim to pursue a hollow cause of action should be struck, as it will not further the goals of class actions. Instead, striking claims that have no reasonable chance of success is consistent with the objective of timely and affordable access to the civil justice system.[42]

V. RELIEF SOUGHT

71. The Appellants seek an Order:

(a) Granting the within Appeal;

(b) Re-stating the certified common issues as set out in Appendix A;

(c) Awarding the Costs of the Appeal and the Certification Application to the Appellants; and

(d) Such further and other relief as this Honourable Court deems just and appropriate having regard to the circumstances.

Estimate of time required for the oral argument: 45 minutes

[41] *Spring* at para 52.
[42] *Spring* at paras 52 and 56, relying on *Atlantic Lottery* at paras 18 and 68.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF JANUARY, 2022.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per:_____

Andrew Wilson | Gavin Price
Counsel for the Appellants, Apache Corporation, William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pitman

TABLE OF AUTHORITIES

1. *Class Proceedings Act*, SA 2003, c C-16.5
2. *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158
3. *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182
4. *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35
5. *Starratt v Mamdani*, 2017 ABCA 92
6. *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19
7. *Rumley v British Columbia*, 2001 SCC 69
8. *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57
9. *O'Reilly v ClearMRI Solutions Ltd.*, 2021 ONCA 385
10. *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472

APPENDIX A - PROPOSED COMMON ISSUES

The Appellants submit the Certification Order should be revised as outlined below.

7. This proceeding is certified on behalf of the Class in respect of the following common issues:

1. In relation to the sale of the shares of Apache Canada by Apache Corporation ("**Apache**") to Paramount Resources Ltd. ("**Paramount**") which sale closed on August 18, 2017 (the "**Share Acquisition Date**"), what contractual obligations (including good faith) under the Apache Corporation 2011 Omnibus Equity Compensation Plan (the "**2011 AOCP**") or the Apache Corporation 2016 Omnibus Equity Compensation Plan (the "**2016 AOCP**", together with the 2011 AOCP, the "**AOCP**"), and any of the Grant Agreements issued under the AOCP**,** did the Defendants or any of them, jointly or severally, owe to Class members regarding their unvested awards of restricted stock units, stock options and performance awards (collectively "**the Unvested Awards**") issued under the AOCP to Class Members prior to the Share Acquisition Date?

2. Were any contractual obligations, as identified in paragraph 7(1) above, breached by the Defendants, or any of them? Are the Defendants, or some of them, jointly or severally liable for any breach of these contractual obligations?

3. In relation to Apache's sale of the shares in Apache Canada to Paramount, what fiduciary duties, if any, did William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pittman (collectively "the Directors") owe to Class members under section 13 of the Plan (section 14 of the version of the Plan effective May 12, 2016) regarding the Unvested Awards?

4. Were any fiduciary duties, as identified in paragraph 7(3) above, breached by the Directors?

5. If the Directors are liable for breaching their fiduciary duties, as identified in paragraph 7(4) above, is Apache vicariously liable therefor?

~~6. With respect to the Plaintiffs' claim of unjust enrichment:~~

~~(a) Were Apache and Paramount, or either of them, enriched as a result of the Class members' loss of the Unvested Awards?~~

~~(b) If the answer to paragraph 7(6)(a) is yes, was there a corresponding deprivation to the Class members?~~

~~(c) If the answers to paragraphs 7(6)(a) and (b) are yes, was there a juristic reason for the enrichment?~~

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

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