COURT OF APPEAL OF ALBERTA

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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 OF THE RESPONDENTS**

Appeal from the Decision of
The Honourable Justice G.H. Poelman
Dated the 25th day of June, 2021
Filed the 21st day of December, 2021

FACTUM OF THE RESPONDENTS, STEPHEN FLESCH, MARSHAL THOMPSON, TYLER MAKSYMCHUK and REID CHAMBERLAIN

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OVERVIEW

1. In this appeal the Appellants asks this Court to assess and determine the merits of the Respondents' allegations contrary to the clear guidance from this Court and the Supreme Court of Canada on discretionary, procedural certification applications.

2. In seeking to appeal the Chambers Justice's discretionary decision to certify certain common issues for determination at a trial with a full evidentiary record, the Appellants rely on a fundamental misunderstanding of the test applicable to certification applications. Contrary to the Appellants' approach on this appeal and at the court below, the jurisprudence is clear and unequivocal that the merits of the underlying allegations are not to be determined at the certification application – what is determined is whether, from a procedural perspective, those allegations present issues that can be determined in common for the class of persons sought to be represented.

3. The basic premise of the Respondents' claims is that significant components of the Class'[1] remuneration were not honoured after the sale of the shares of the corporate entity they directly worked for, despite there being no change in the duties and responsibilities the Class performed. The Class seeks recovery of that remuneration from Apache Corporation ("**Apache**"), the parent, and Apache Canada Ltd. ("**Apache Canada**"), the former subsidiary, now Paramount Resources Ltd.

4. This appeal only addresses two aspects of the Chambers Justice's decision: (1) the certification of common issues relating to the Respondents' allegations that Apache had an employment relationship with the Class along with Apache Canada; and (2) the certification of common issues relating the claim for unjust enrichment. The Appellants do not challenge the causes of action pled or the certification of the other

[1] "Class" or "Class Member" is defined herein to be the class as certified by the Chambers Justice: "All employees of Apache Canada Ltd. ("Apache Canada") as of August 18, 2017 who were then participating in Apache Corporation's Omnibus Compensation Plan and had outstanding Awards as defined in that Plan."

common issues for breach of the terms of contracts with the Class or breach of fiduciary duties. As a result, this class proceeding will proceed to trial regardless.

5. All the Appellants are seeking to do with the parties' and this Court's resources is narrow the allegations made by the Respondents on this procedural application. However, absent a finding that the claims pleaded do not assert a cause of action (which the Appellants do not raise on this appeal) or a summary judgment application (which was not heard by the Chambers Justice), there is no basis to narrow the allegations the Appellants face at this time in the fashion they propose. Rather the question on the certification application is only whether the issues underlying the properly pleaded allegations can be determined in common for the entire Class.

6. In submitting that certain of the common issues should not be certified, the Appellants misapprehend the appropriate test for certification and inappropriately assert arguments on the merits. In addition, the Appellants' submissions simply disregard the evidence elicited by the Respondents, which formed the basis of the factual procedural determinations of the Chambers Justice on the proper test applicable to certification applications. The evidence presented, and ignored by the Appellants herein, greatly exceeded the required “some basis in fact” threshold for the commonality of the common issues.

7. The Appellants have failed to assert errors of law or principle in the Chambers Justice's application of the certification test, nor have they been able to overcome the high deferential burden necessary to show that the Chambers Justice's discretionary, procedural decision to certify the common issues subject to this appeal was patently unreasonable.

PART I – FACTS

8. The Appellant, Apache Corporation (“**Apache**”), provides a long-term compensation plan, known as the Omnibus Compensation Plan (the “**Plan**”) to its employees. The Plan provides for the award of Restricted Stock Units (“**RSUs”**), Stock Options

("**Options**") and Performance Awards ("**PAs**"), as part of employees' compensation package (together, the "**Awards**").[2]

9. The Plan was administered by a Committee at Apache known as the Management Development Compensation Committee ("**Committee**").[3] The individual Appellants ("**Directors**")[4] were members of the Committee as of July 6, 2017.[5]

10. The term "Company" is defined in the Plan to mean Apache together with its "Affiliates", which included Apache Canada at the time.[6]

11. The term "Eligible Persons" is defined in the Plan as "those employees of the Company *or of any Affiliates*" [emphasis added].[7]

12. Section 1.2 of the Plan sets out its purpose, which is to provide Eligible Persons with equity-based incentives to "encourage such individual to continue in the long-term service of the Company and its Affiliates", "to create in such individuals a more direct interest in the future success and operations of the Company", and to "attract", "retain and motivate such individuals".[8]

13. Participation in the Plan was provided to the Class as a term of their employment.[9]

14. Despite the Appellants' insistence, Apache and Apache Canada were not independent arms-length entities vis-a-vis the Apache Canada employees. Apache Canada was controlled and directed by Apache. Apache directed human resources

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[2] Affidavit of Steven Flesch, sworn February 21, 2020, filed March 6, 2020 ("**Flesch Affidavit**"), at paras. 10-12, Appellants' Extract of Key Evidence ["AEKE"] at pp. 5-6; Exhibit F, AEKE at p. 15; Exhibit G, AEKE at p. 43.
[3] Flesch Affidavit, Exhibit F, s. 3.1, AEKE at p. 19.
[4] William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pitman.
[5] Flesch Affidavit, para. 5, AEKE at p. 5; Exhibit F, AEKE at p. 19; Exhibit G, AEKE at p. 48.
[6] Flesch Affidavit, Exhibit F, AEKE at p. 15; Exhibit G, AEKE at p. 43.
[7] Flesch Affidavit, Exhibit G, AEKE at p. 45.
[8] Flesch Affidavit, Exhibit F, AEKE at p. 15.
[9] Affidavit of Steven Flesch, sworn February 21, 2020, filed March 6, 2020 ("**Flesch Affidavit**") at para. 10, AEKE at pp. 5-6; Affidavit of Marshal Thompson, sworn February 20, 2020, filed March 6, 2020 ("**Marshall Affidavit**") at para. 5, AEKE at p. 150; Affidavit of Tyler Maksymchuk, sworn February 20, 2020, filed March 6, 2020 ("**Maksymchuk Affidavit**") at para. 5, AEKE at p. 156-157; Affidavit of Reid Chamberlain, sworn February 21, 2020, filed March 6, 2020 ("**Chamberlain Affidavit**") at para. 5, AEKE at p. 163.

policies at Apache Canada. Apache directed the compensation of Class Members at Apache Canada, including the granting of Awards under the Plan.[10]

15. The Awards made under the Plan, provided as part of the remuneration promised to the Class for the work the performed for the benefit of Apache, formed a significant component of employees' annual compensation, in some cases comprising as much as 50% of their compensation.[11]

16. The RSU and Option Awards were restricted in the sense that portions of the Awards vested over periods of time. The vesting of RSU and Option Awards was not contingent upon meeting any performance target, nor was it otherwise discretionary. Such Awards simply required that the recipient remain 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.[12] Employees who received RSUs or Options under the Plan would be subject to the same grant agreements, as amended from time to time ("**Grant Agreements**").[13]

17. PAs were based on 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 who received PAs under the Plan would be subject to the same PA agreement, as amended from time to time.[14]

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[10] Transcript of Greg Byrgesen held February 12, 2021 ("**Byrgesen Transcript**") at pp. 10-13, Respondents' Extracts of Key Evidence ("**REKE**") at pp.13-16.

[11] Flesch Affidavit at para. 17, AEKE at p. 7; Transcript of Oral Questioning of Stephen Flesch held January 7, 2021 ("**Flesch Transcript**"), AEKE at p. 197; Thompson Affidavit at para. 11, AEKE at p.151; Maksymchuk Affidavit at para. 11, AEKE at p.158; Chamberlain Affidavit at para. 11, AEKE at p. 164.

[12] Flesch Affidavit at para. 21, AEKE at p.7; Exhibit N, AEKE at p. 115.

[13] See for example, RSU Grant Notices and Agreements granted on March 2, 2016, Flesch Affidavit, Exhibit I, AEKE at p. 76; Maksymchuk Affidavit, Exhibit A, p. 2, REKE at p. 71; Thompson Affidavit, Exhibit A, REKE at p. 83; Chamberlain Affidavit, Exhibit A, REKE at p. 132.

[14] Flesch Affidavit, Exhibit O, AEKE at p.127; Thompson Affidavit, Exhibit D, REKE at p. 109.

18. All of the agreements relating to the Awards incorporate by reference the Plan, including the definition of Company and provisions relating to change of control.[15]

A. Change of Control

19. The Plan details what happens in the event of a "Change of Control". The term "Change of Control" under the Plan 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.[16]

20. Section 13 of the 2016 AOCP[17] provides:

> "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, 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.

[15] Flesch Affidavit, Exhibit I, AEKE at pp. 76, 80; Exhibit N, AEKE at pp.113, 116 ; Exhibit O, AEKE at pp. 127, 139.
[16] Flesch Affidavit, Exhibit H, REKE at p. 144
[17] Flesch Affidavit, Exhibit G, AEKE at p. 68.

…

(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…[18]

21. Further, section 14 of the 2016 AOCP[19] 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. [emphasis added]

B. Sale of Apache Canada

22. On July 6, 2017, Apache Canada announced that it was withdrawing from its Canadian operations and that all shares of Apache Canada had been sold to Paramount.[20] The sale closed on August 18, 2017.

23. Through a series of subsequent amalgamations, Apache Canada was ultimately continued as Paramount.[21] The employees of Apache Canada thereby became employees of Paramount. In effect, Paramount is Apache Canada.

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[18] Flesch Affidavit, Exhibit G, AEKE at p. 69-70; an identical provision is contained in section 12 of the 2011 AOCP, see Flesch Affidavit, Exhibit F, AEKE at p. 36.
[19] Flesch Affidavit, Exhibit F, Section 13 of the 2011 Plan, AEKE at p. 37.
[20] Flesch Affidavit, para. 25, AEKE at p. 8.
[21] Affidavit of Michelle Dietz, sworn February 20, 2020 ("**Dietz Affidavit**") at paras. 4-6, REKE at p. 147.

24. The sale of Apache Canada to Paramount was announced at a “town hall” meeting of employees on July 6, 2017, during which Apache Canada employees were advised that their unvested Awards would be “cancelled”.[22]

25. Employees who held unvested Awards were not compensated for their cancellation, nor did they receive any comparable or equitable substitution for them from Paramount or Apache.[23]

26. A total of 347 Apache Canada employees continued their employment with Apache Canada after the sale, with the same responsibilities and duties, for which they received the same salaries.[24] All that changed was that hundreds of Apache Canada employees lost a significant part of their remuneration for the work they performed for their employer, including work they had already performed for Apache Canada.

27. After Apache Canada was taken over by Paramount, Class Members became entitled to participate in the Paramount deferred compensation plan. This plan was worth “orders of magnitude” less than the Apache Plan, and did not compensate them for the Awards that had been lost nor the work they had already performed for Apache Canada while still participating in the Apache Plan.[25]

C. Commencement of this Action and Certification Application

28. The Respondents commenced this action on July 2, 2019, and an Amended Statement of Claim was filed on September 11, 2019. The Respondents allege that:

    a. The sale of Apache Canada to Paramount constituted a "change of control" and a termination of the Class Members' employment for the purposes of the

[22] Flesch Affidavit at para. 28, AEKE at p. 9.
[23] Flesch Affidavit at para. 31, AEKE at p. 9; Thompson Affidavit para. 15, AEKE at p.151; Chamberlain Affidavit at para. 13, AEKE at p. 164; Maksymchuk Affidavit at para. 15, AEKE at p. 158.
[24] Byrgesen Affidavit at para. 15, AEKE at p.171; Flesch Affidavit at para. 6; AEKE at p. 5.
[25] Transcript of Marshal Thompson held on January 7, 2021 ("**Thompson Transcript**") at p. 20 lines 4-24, REKE at p. 200; Chamberlin Affidavit, at para. 13, AEKE at p. 164.

Plan and that s. 13 of the Plan required the immediate vesting of any outstanding and unvested Awards;

b. The sale of Apache Canada to Paramount constituted a "change of control" and pursuant to s. 14 of the Plan, Apache/the Committee was required to make provision for the adoption and continuation of the Plan or the equitable substitution of the Awards by the purchasing company, which Apache/the Committee failed to do;

c. The Committee's failure to make provision for the adoption and continuation of the Plan or the equitable substitution of the Awards by the purchasing company breached fiduciary duties owed by the Committee to the Class;

d. The cancellation of the unvested Awards and corresponding significant reduction in the remuneration that had been promised to the Class Members was a fundamental breach of the terms of their employment with Apache/Apache Canada (now Paramount);

e. The cancellation of the unvested Awards and corresponding significant reduction in the remuneration that had been promised to the Class Members was a breach of the duty of good faith and fair dealing; and

f. Apache and/or Paramount have been unjustly enriched as a result of the cancellation of the unvested Awards.[26]

29. The Respondents proceeded to seek the certification of this action as a class proceeding.

30. The Defendants initiated summary judgment applications in parallel to the Respondents' certification application and sought to have those applications heard before certification. On November 3, 2020, Justice Poelman determined to hear the

[26] Reasons for decision on certification application of Justice G.H. Poelman dated June 25, 2021 (the "**Decision**") at paras. 15-27, Appeal Record ("AR") at pp. 46-49.

certification application first, and stayed the summary judgment applications of the Defendants.[27]

31. Ultimately the certification application was heard on April 28, 2021. Justice Poelman granted the Respondents' application for certification with reasons on June 25, 2021. The form of an order was eventually agreed upon and then signed by Justice Poelman on December 7, 2021.

32. The Appellants seek to appeal components of the certification order herein.

D. Reasons for Decision on Certification

33. On certification, Apache took issue with the proposed common issues as being framed too broadly, seeking to eliminate any claim for liability on the grounds of an employment relationship between Apache and the Class Members, arguing that the contractual claims against it should be strictly limited to construing and applying the terms of the Plan and Grant Agreements.[28]

34. The Chambers Justice addressed this directly, acknowledging that the text of the Plan and the Grant Agreements were important and contained certain provisions which suggest that the Plan was discretionary, and that neither document formed part of the terms of employment of employees receiving the Awards.[29] However, he held that those terms may not be definitive so as to rule out any form of employment contractual obligation owed by Apache to Class Members when the documents were considered in their entirety:

> … The purpose of the Plan (section 1.2) is directed at the employment relationship, in that it is to provide employees of affiliates such as Apache Canada with incentives to encourage them to continue in long-term service of Apache and its affiliates and attract outstanding individuals. Only “Eligible Persons,” that is employees of Apache or affiliates such as Apache Canada, may participate (section 2.1(i). Further, participation is mandatory for those who are performing “vital services” for Apache or an

[27] Order regarding sequencing of applications of Justice G.H. Poelman dated November 3, 2020, REKE at p. 209.
[28] Decision at paras. 69-70, AR at p. 55.
[29] Decision at para. 73, AR at pp. 55-56.

> affiliate. Thus, while the Plan is not a contract of employment, it contains provisions that often form part of a contract of employment.
>
> The Grant Agreements, by which employees agree to the terms and conditions of the Plan, also contain terms sometimes found in contracts of employment. Section 10 states that none of its terms confer any right to be retained in employment nor to restrict the right of the "company" (that is, Apache and Apache Canada) to terminate employment at any time for any reason.[30]

35. He further held that, beyond the texts of the Plan and Grant Agreements themselves, the "factual matrix" needed to be considered, which provided further indications of an employment relationship of Class Members with Apache:

> Further, there is evidence besides the Plan and Grant Agreements. Even where the text of a contract contains no ambiguity there is always a factual matrix which must be considered: [citations omitted]. The plaintiffs testified in their affidavits that the deferred compensation under the Plan was provided to Apache Canada employees as part of their employment.
>
> Laurits G.W. Byrgesen, who swore an Affidavit on behalf of Paramount and had extensive experience as an employee in human resources for Apache Canada, testified in his cross-examination that compensation for Apache Canada's employees included the Apache long-term compensation entitlements. Further, he said that Apache Canada and Apache had a joint human resources function and that in many respects, including compensation under the Plan, Apache directed human resources policies and compensation for Apache Canada. For many employees, according to the plaintiffs' affidavits, the Awards formed a significant component of their annual compensation and were a major incentive for their continued service with Apache Canada.[31]

36. Following from the above, the Chambers Justice held that the common issues could not be defined so narrowly as to exclude Apache from liability for breach of contract in relation to the employment of the Respondents:

> 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 that this question should not be limited to construing the language of the Plan and its associated documents. As an example, I am not prepared to decide at the certification stage that if a class member ceases to be an "Eligible Person" at the end of a

[30] Decision at paras. 74-74, AR at p. 56.
[31] Decision at paras. 76-77, AR at p. 56.

> performance period (Eligible Person defined as someone who is an employee of Apache or an Affiliate) he or she has lost the Award because Apache ceased to be an affiliate. Given the overall tenor of the documents and their factual matrix, the certification stage is not the time to determine whether Apache may have another source of contractual liability, perhaps jointly and severally with Apache Canada/Paramount – as its former subsidiary and continuing employer of class members.[32] (emphasis added)

37. The Chambers Justice ruled that the common issues relating to breach of contract were properly framed as follows:

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

    b. Were any contractual obligations (as identified in para 1) breached by the fact that unvested Awards were cancelled, not honoured or not substituted by other compensation, on the part of the defendants or any of them, jointly and severally? [33]

38. In this regard, the Chambers Justice appropriate certified the issues for determination at a trial with a full evidentiary record.

PART II – GROUNDS OF APPEAL

39. The Respondents understand the Appellants to raise two issues on appeal as to whether the certain common issues as against Apache were properly certified:

    a. Did the Chambers Justice err in certifying the employment-related common issues against Apache? and

    b. Did the Chambers Justice err in certifying unjust enrichment common issues?

[32] Decision at para. 79, AR at p. 57.
[33] Decision at para. 82, AR at p. 57.

PART III – STANDARD OF REVIEW

40. The Appellants correctly state that certification of a class action is a discretionary decision which should not be overturned on appeal unless it reflects an error of principle, or it is patently unreasonable. The decision to certify or not certify an action is a polycentric decision that is entitled to deference.[34]

41. Decisions as to whether there is sufficient evidence to support certification are owed particular deference. Findings of fact, including inferences from the facts, should not be disturbed on appeal absent palpable and overriding error, even where the Justice has heard no oral evidence.[35]

42. The palpable and overriding error standard is a highly deferential standard of review. A palpable error is one that is obvious, while an overriding error is one that "goes to the very core of the outcome of the case." In showing a palpable and overriding error, "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall."[36]

PART IV – ARGUMENT

A. Certification test – the relevant legal principles generally

43. The *Class Proceedings Act* ("**CPA**") provides the following requirement for certification:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;

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[34] *Spring v. Goodyear Canada Inc.,* 2021 ABCA 182 at para. 16.
[35] *Spring v. Goodyear Canada Inc.,* 2021 ABCA 182 at para. 16; *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223 at para. 80.
[36] *Benhaim v. St-Germain,* 2016 SCC 48 at paras. 38-39, citing Stratas J. in *South Yukon Forest Corp. v. R.,* 2012 FCA 165 at para. 46.

(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,

(i) will fairly and adequately represent the interests of the class,

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

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

(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;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

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

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.[37]

44. The general principles which apply to certification of class actions were properly set out by the Chambers Justice[38], some of which are pertinent to the present appeal.

[37] *Class Proceedings Act*, SA 2003, c. C-16.5, s. 5(1) & (2).
[38] Decision, starting at para. 28, AR at p. 49.

45. 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 of the strength of the action.[39] It is not a trial nor is it a summary judgement application, but a procedural application which concerns only the form of an action.[40]

46. In construing class action legislation, the Supreme Court of Canada has held that it is essential that courts do not take an overly restrictive 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.[41]

47. The evidentiary threshold on a certification application is not onerous.[42] Where the pleadings disclose a cause of action, to satisfy the remaining criteria, including the common issue criterion, the representative plaintiff need only show "that there is 'some basis in fact' for each of the certification elements and must bring evidence to establish them.[43]

48. The "some basis in fact" standard asks not whether there is such a basis for the claim itself, but whether there is some basis in fact which establishes each of the certification requirements.[44] The Supreme Court of Canada further elaborated on the standard as follows:

> The 'some basis in fact' standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessment of evidentiary weight' (citations omitted).[45]

49. Further, with respect to the evidence necessary to support the common issues criteria, the Supreme Court of Canada was clear that a plaintiff need only provide

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[39] *Ravvin v. Canada Bread Company Limited,* 2020 ABCA 424, at para. 40 citing *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223.
[40] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57 at para. 103.
[41] *Hollick v. Toronto (City)*, 2001 SCC 68, paras. 14-15.
[42] *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223 at para. 13; *Starratt v Mamdani*, 2017 ABCA 92 at para. 10.
[43] *Warner v. Smith & Nephew Inc.,* 2016 ABCA 223 at para. 13.
[44] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57, at para. 100.
[45] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57, at para. 102.

some basis in fact for the commonality of the common issues and not whether the alleged acts occurred:

> In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.[46]

50. Thus, the certification requirements need not be proven on a balance of probabilities, nor is the certification judge to enter into a weighing of conflicting evidence.[47] Rather, the evidentiary threshold requires only that there be "some factual basis" for each of the certification requirements where the pleadings disclose a cause of action.[48]

B. The employment-related common issues were properly certified

i. Sufficiency of the pleadings is not under appeal

51. Much of the Appellants' arguments seem to focus on the validity of the allegation that Apache had an employment relationship with the Class Members in addition to the employment relationship the Class had with Apache Canada. That is an allegation that must be proven at trial, not at certification.

52. The Chambers Justice found that such allegations were sufficiently pleaded in the Amended Statement of Claim.[49] The Appellants have not argued on this appeal that such an allegation was not properly pled. In fact, the Appellants have conceded the cause of action criteria of the certification test.[50]

53. As a result, arguments related to the Respondents' claim that Apache had an employment relationship with the Class is not and should not be at issue on this

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[46] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 110.
[47] *Walter v Western Canada Hockey League,* 2017 ABQB 382 at para. 13.
[48] *Starratt v Mamdani*, 2017 ABCA 92 at para. 10.
[49] Decision at paras. 44-46, AR at p. 51.
[50] Factum of the Appellants filed January 18, 2022 ("**Apache Factum**") at para. 5.

appeal. The only further assessment to be made under s. 5 of the CPA is whether the merits of that allegation can be determined in common for the Class.

ii. The Appellants misapprehend the common issues test

54. Despite conceding that the allegations of the existence of an employment relationship between the Class and Apache have been properly pled, the Appellants continue to attack the merits of such an allegation. In the Respondents' submission, this flows from a misunderstanding of the certification test.

55. What is fundamentally clear from this Court and the Supreme Court of Canada is that a certification application is a procedural application where the merits of the underlying allegations are not to be assessed.[51] The time to determine whether the Respondents can ultimately prove the allegations they have made is at trial, with a full evidentiary record.

56. The Appellants arguments on this appeal belie this approach. While conceding the allegations are properly pled, the Appellants argue that there is no factual basis for claiming any employment relationship between Apache and the Class. The first ground of appeal the Appellants assert highlights this:

> 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.[52] [emphasis added]

57. The Appellants argue that the Respondents have submitted no (or insufficient) evidence to support their claims and that there was contradictory evidence presented by the Appellants. This fundamentally misapprehends the test for

[51] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 99; *Rieger v. Plains Midstream Canada ULC*, 2022 ABCA 28 at para. 31; *Spring v. Goodyear Canada Inc.,* 2021 ABCA 182 at para. 30.
[52] Apache Factum at para. 32.

certification – the certification application is not the time to weigh evidence or resolve conflicting evidence about the merits of the claims.[53]

58. With respect to the common issue criterion that the Appellants appear to focus their appeal, the Appellants assert that, unless there is some basis in fact for a common issue, there is no basis to certify it, a proposition for which no authority is offered.[54] That is because it is not the law. The Appellants' argument is based on the mistaken position that the common issue criterion requires some basis in fact for the common employer claim, contrary to *Pro-Sys,* where the Supreme Court of Canada expressly held:

    a. "The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements.";[55] and

    b. "[i]n order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members."[56]

59. In order to satisfy the common issues criterion, a plaintiff must demonstrate “some basis in fact” for the commonality of the issue.[57] An issue is common if it will avoid duplication of fact-finding or legal analysis.[58] 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.[59] It does not ask whether there is some basis in fact for the claim itself nor is it an assessment of whether there is a factual basis on which a claim may succeed on the merits.[60]

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[53] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57 at para. 102; *Spring v. Goodyear Canada Inc.,* 2021 ABCA 182 at para. 30.
[54] Apache Factum at para. 39.
[55] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 100.
[56] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[57] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57*,* at para. 100.
[58] *Western Canadian Shopping Centres Inc. v Dutton,* 2001 SCC 46 at para. 39.
[59] *Western Canadian Shopping Centres Inc. v Dutton,* 2001 SCC 46, at para 39*; Hollick v Toronto (City),* 2001 SCC 68, at para 18.
[60] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at paras. 99-100, 102.

60. Whether there is a factual basis for a claim is addressed under s. 5(1)(a) of the *CPA* – whether the pleading discloses a cause of action where the facts alleged are assumed to be true and where no evidence is permitted to be assessed.[61] Apache does not contest this criterion.[62]

61. After a cause of action has been determined to exist (which has been conceded by the Appellants), the evidence on the certification application is only relevant (in the context of the common issues criteria) to the commonality of the common issues – whether the issues can be determine in common for the Class.[63]

iii. The Appellants' focus on evidence of the merits is misplaced and inaccurate

a. Appellants' merits-based arguments are for trial or summary judgment only

62. The Appellants' arguments are about the merits of the claims asserting that the Respondents:

a. "Failed to put forward any evidence in support of their contentions that [Apache] was a "common employer"";

b. "Failed to put forward any evidence to support an argument that at contract of employment existed…";

c. "Failed to demonstrate there was a contract of employment …";

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[61] *Warner v Smith & Nephew Inc.,* 2016 ABCA 223 at para. 14.

[62] Having conceded that section 5(1)(a) was met, it is inappropriate for the Appellants to now argue that the Respondents failed to specifically plead that Apache Corporation was a "common employer" or has some employment relationship with the Class - Apache's factum at paras. 45, 48. The claim that Apache was a common employer with Apache Canada was expressly raised in the Respondents' Application for Certification, on which the Appellants made submissions in response. The sufficiency of the pleadings with respect to the common issue claim is also not properly before this Court since it was not raised in the Appellants' notice of appeal - Amended Civil Notice of Appeal of the Defendants, Apache Corporation et al filed July 26, 2021, AR at p. 67.

[63] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 110.

d. "the Chambers Justice erred in ignoring the clear wording of the Grant Agreements…", which wording makes it clear that "the Plan is discretionary and that neither the Plan nor Grant Agreements form terms of employment.[64]

63. These arguments assert that the allegations made against Apache in relation to an employment relationship are unfounded and that those claims ought to be dismissed. These are arguments that are to be put forward at trial or summary judgment, not on this procedural application. It happens that the Appellants sought to have a summary judgment application heard before certification, but that request was denied by the Chambers Justice – which decision was not appealed.[65] It appears the Appellants' approach seeks to ignore the Chambers Justice's decision, which can be considered an abuse of process.

b. The Appellants ignore evidence presented by the Respondents

64. Additionally, the Appellants seem to ignore the evidence presented by the Respondents, at this preliminary stage, of the existence of an employment relationship between Apache and the Class. This evidence was specifically noted by the Chambers Justice, including:

a. Apache Canada was a privately held subsidiary of Apache;[66]

b. It was a term of employment with Apache Canada for the Respondents and the Class that they would participate in the Plan;[67]

c. The Plan was offered to employees to encourage long-term service with Apache and its affiliates, including Apache Canada;[68]

[64] Apache Factum at paras. 45, 51.
[65] Order regarding sequencing of applications of Justice G.H. Poelman, dated November 3, 2020, REKE at p. 209.
[66] Byrgesen Affidavit at para. 18, AEKE at p.169.
[67] Flesch Affidavit at para 10, AEKE at p. 5; Byrgesen Affidavit at para. 22, AEKE at pp. 169-170.
[68] s. 1.2 of the Plan, Flesh Affidavit, Exhibit F, AEKE at p. 116.

d. The Awards were made to employees through Grant Agreements, which were contractual agreements between Apache and Class Members;[69]

e. The Grant Agreements were also part of the terms of employment with Apache Canada;[70]

f. The Awards formed part of and were a significant component (for many, up to 50%) of the remuneration package of the Class.[71]

g. Apache Canada and Apache had a joint Human Resources function;[72]

h. Apache directed human resources policies at Apache Canada;[73]

i. Apache directed the compensation of Apache Canada employees, including the award of RSUs, the Options, and the PAs;[74]

j. Apache approved Awards granted by Apache Canada to employees;[75] and

k. The amounts of long-term compensation received by Apache Canada employees were determined by Apache's policy with input from Apache Canada.[76]

65. It should be noted that the above evidence is just what the Respondents were able to gather at this preliminary stage – no documentary or oral discovery has yet been conducted.

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[69] Byrgesen Affidavit at para 22, AEKE at p. 170; Flesch Affidavit at paras. 14, 21 and 22, AEKE at paras. 6-7.
[70] Byrgesen Affidavit at para 22, AEKE at p. 170.
[71] Flesch Affidavit at para. 17, AEKE, p. 7; Flesch Transcript, AEKE at p. 197; Thompson Affidavit at para. 11, AEKE at p.151; Maksymchuk Affidavit at para. 11, AEKE at p.158; Chamberlain Affidavit at para. 11, AEKE at p. 164.
[72] Transcript of Cross-Examination of Greg Byrgesen on February 12, 2021 ("Byrgesen Transcript") at p. 10, lines 1-20, REKE at p. 13.
[73] Byrgesen Transcript at p. 10, line 26 – p. 11, line 2, REKE at pp. 13-14.
[74] Byrgesen Transcript at p. 11, lines 3-14, REKE at p. 14.
[75] Byrgesen Transcript at p. 11, lines 15 – p. 12, line 4, REKE at pp. 14-15.
[76] Byrgesen Transcript at p. 12, lines 5-14, REKE at p. 15.

c. The Grant Agreements are not determinative

66. Further, the Appellants put great weight and emphasis on the wording of the language in the Grant Agreements, specifically section 15. They suggest that such wording that asserts that such Grant Agreements do not create an employment relationship should prevail, at the certification stage, over any other evidence submitted to assert an employment relationship. In addition to asserting such arguments at the inappropriate time, they are incorrect in law. The assessment of whether an employment relationship exists is completed on the basis of the factual circumstances and the unilateral characterization of such relationship in contracts are not determinative of the issue.[77] Therefore, even if the certification application were the appropriate forum to determine the merits of this allegation, the Appellants' arguments about the effect of the language of the Grant Agreements are not absolute.

67. In any event, far from ignoring section 15 in the Grant Agreements, the Chambers Justice reproduced and directly addressed the interpretation of it in the Decision. The Chambers Justice held that the Grant Agreements were properly considered together with other evidence. On that basis, he held that "it was certainly arguable" that the Grant Agreements did not act to negate any employment relationship, but rather to ensure that no employee could participate in the Plan or receive Awards under it as of right. The Chambers Justice thus held that the Grant Agreement was not unequivocal, and that there existed many other points of evidence indicating that employment obligations of Apache to Class Members as a common issue.[78]

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[77] *Downtown Eatery (1993) Ltd. v. Ontario,* 2001 CanLII 8538 (ONCA) at para. 37; *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 at para. 65; see also *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* 2001 SCC 59; *Belton v. Liberty Insurance Co. of Canada,* 2004 CanLII 6668 (ONCA) at para. 11; *Alberta Permit Pro v. Booth*, 2007 ABQB 562 at para. 126, where the courts looked to the totality of the relationship to assess the existence of an employee-employer relationship.

[78] Decision at paras. 75-79, AR at pp. 56-57.

68. The Chambers Justice thus held that the common issues could not be defined so as to strictly limit Apache's liability for the breach of contract claim to construing the language of the Plan and its associated documents:

> … As an example, I am not prepared to decide at the certification stage that if a class member ceases to be an "Eligible Person" at the end of the performance period (Eligible Person defined as someone who is an employee of Apache or an affiliate) he or she has lost the Award because Apache Canada ceased to be an affiliate. Given the overall tenor of the documents and their factual matrix, the certification stage is not the time to determine whether Apache may have another source of contractual liability, perhaps jointly and severally with Apache Canada/Paramount – as its former subsidiary and continuing employer of class members [emphasis added].[79]

69. The Chambers Justice's assessment was directly in line with prevailing caselaw on the establishment of an employment relationship and consistent with class proceeding jurisprudence on the test for certification. The Chambers Justice did not commit an error of law or principle in this regard and his determination to certify the employment-related common issues based on the factual matrix before him is entitled to deference. The Appellants' true complaint is that the Chambers Justice rejected their position that the Grant Agreements were unequivocal and operated to negate any employment relationship otherwise indicated by the evidence. However, their disagreement is not grounds for setting aside the Chambers Justice's decision. Moreover, the Chambers Justice's decision certainly cannot be seen as being patently unreasonable – especially when the Appellants will be fully entitled to raise these merits-based positions at the common issues trial.

d. Objective evidence of intention to create an employment relationship is not required at this stage, but it exists

70. The Appellants' argument that the Respondents failed to provide any evidence indicating that it intended to create an employment relationship required for there to

[79] Decision at para. 79, AR at p. 57.

be a common employer is another merits-based argument.[80] This argument does not go to the criterion of whether there is some basis in fact to find that the employment-related claims were common to Class Members, and ignores the clear evidence found by the Chambers Justice indicating numerous factual bases which were more than sufficient to satisfy the common issue criterion in relation to those claims.

71. The Respondents are not required to frame the employment-related claims using the doctrine of common employer. The issue, as the Chambers Justice correctly discerned, was whether there was some basis in fact that the employment-related issues were common to the class. Even were it the case that the only means of attaching employment-related liability to Apache is by finding some basis in fact for it being a common employer with Apache Canada/Paramount, the same result obtains.

72. The Appellants contend that the Chambers Justice failed to consider the issue of intent in relation to the common employer doctrine, which argument rests on the Ontario Court of Appeal's decision in *O'Reilly v ClearMRI Solutions Ltd.*[81] In that case, the court explained how to determine the existence of such intention:

> To determine whether the required intention to contract was present, the parties' subjective thoughts are irrelevant. Nor need the intention necessarily have been reflected in a written agreement. The common law's approach to contractual formation is objective; an intention to contract can be derived from conduct. As the Supreme Court has stated in a similar common law contractual formation context, what is relevant is "how each party's conduct would appear to a reasonable person in the position of the other party": [citations omitted] [82]

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[80] Further, the Appellants point to objections raised by the Respondents on cross-examination to questions about Apache being a "common employer." The clearly stated basis for such objections was that they went to the merits, not certification. No application to compel an answer to such questions was brought by the Appellants. The remedy for objections at questioning is to bring an application to compel the answers. Since the Appellants did not do so, they must be taken to have accepted that the objections were appropriate and no adverse inference may be drawn - *Wade v. Baxter,* 2001 ABQB 812 at para. 25; see also *Woronuk v Woronuk,* 2003 ABCA 97 at para. 3.

[81] *O'Reilly v. ClearMRI Solutions Ltd*., 2021 ONCA 385 ("***O'Reilly***").

[82] *O'Reilly v. ClearMRI Solutions Ltd*., 2021 ONCA 385 at para. 52.

73. Far from there being no basis in fact, much of Apache's conduct, assessed from the perspective of a reasonable person, is plainly supportive of an intention to create an employment relationship which is common to all Class Members. The evidence of such conduct by Apache and as found by the Chambers Justice includes:

    a. Providing the Plan to Class Members as part of their employment;

    b. Having as an express purpose of the Plan that it is to provide employees of Apache or affiliates with incentives to encourage them in long-term service to Apache and its affiliates and to attract outstanding individuals to employment;

    c. Providing as a term of the Plan that employment with Apache or its affiliates is necessary to participate in the Plan;

    d. Making Awards under the Plan a significant component of employee compensation and a major incentive for their continued service; and

    e. Having Apache directed human resource policies and compensation apply to Apache Canada.[83]

74. Contrary to the Appellants' assertions, the factual bases above are common to all Class Members and support a common intention by Apache to create an employment relationship with Class Members. These provide a strong factual grounding for the commonality of the issue for determination in common, which far exceeds the very low "some basis in fact" threshold required for certification of common issues.

e. Conflicts in the evidence are to be determined at trial, not at certification

75. At most, the Appellants can point to conflicting evidence and arguments about whether the Respondents' allegations of the existence of an employment relationship between Apache and the Class. Those conflicts should be resolved on

[83] Decision at paras. 74-77, AR at p. 56.

the merits at a trial with a full evidentiary record. It would be inappropriate and contrary to prevailing case law to resolve those conflicts at the certification application. What is appropriate to assess at the certification application is whether such conflicts can be resolved in common for the Class.

iv. There was some basis in fact of the commonality of the employment common issues against Apache

76. The Chambers Justice found numerous factual bases supporting the commonality of the common issues relating to the existence of an employment relationship between Class Members and Apache. These findings are grounded in the texts of the Plan and Grant Agreements and the evidence submitted about the common control exerted by Apache over Apache Canada and the Class, all of which were common across Class Members.

77. Apache identifies no error, let alone a palpable and overriding error, in the factual findings of the Chambers Justice. Rather, Apache simply invites this Court to revisit factual findings made by the Chambers Justice by disregarding evidence adverse to their position while recasting what they deem to be critical provisions as being both unequivocal and determinative. Not only is this contrary to the highly deferential standard of review which applies on an appeal of a certification decision, but further seeks to have the Court engage in the very kind of weighing of evidence and assessment of the merits which has been consistently held to be inappropriate at the certification stage.

v. Significant evidence of commonality was presented to and relied upon by the Chambers Justice

78. Contrary to the Appellant's submissions, there was significant evidence of the commonality of the employment-related common issues against Apache. In particular, the Chambers Justice noted the following features found in the Plan and Grant Agreements as evidence indicating that the claim raised common employment issues as against Apache:

a. The purpose of the Plan, set out at section 1.2, is directed at the employment relationship in that it is to provide employees of affiliates such as Apache Canada with incentives to continue in long-service of Apache and its affiliates and attract outstanding individuals;

b. Only “Eligible Persons,” may participate in the Plan, who are defined as being employees of Apache or its affiliates such as Apache Canada; and

c. Participation in the Plan is mandatory for those who are performing “vital services” for Apache or an affiliate.

d. Section 10 of the Grant Agreements states that none of its terms confer a right to be retained in employment nor restrict the right of Apache and Apache Canada to terminate employment at any time or for any reason.[84]

79. The Plan and the Grant Agreements are common to all Class Members. The Appellants concede this when they argue that the Grant Agreements should operate to negate any employment relationship with all Class Members. The assessment of the Plan and Grant Agreements cannot be common when the Appellants want to rely upon them to dismiss the Respondents' claims, but not when such documents are asserted by the Respondents to establish commonality. Whether or not the Plan and Grant Agreement provide support for the existence of an employment relationship between the Class and Apache can be assessed in common.

80. Further, the Chambers Justice correctly found additional evidentiary support for the commonality of the employment-related common issues in the factual matrix surrounding the documents themselves. This included:

[84] Decision at paras. 74-75, AR at p. 56.

a. Testimony in the Respondents' affidavits that the deferred compensation under the Plan was provided to Apache Canada employees as part of their employment;[85]

b. Cross-examination of a human resources employee at Apache Canada that compensation for Apache Canada's employees included the Apache long-term compensation entitlements;[86]

c. Evidence that Apache and Apache Canada had a joint human resources function and that, in many respects, including compensation under the Plan, Apache directed human resources policies and compensation for Apache Canada;[87]

d. Evidence that for many employees the Awards formed a significant component of their annual compensation and were a major incentive for continued employment with Apache Canada.[88]

81. This evidence all relates to actions by Apache, not the individual Class Members – the impact of these actions is common across all Class Members.

82. Therefore, an assessment of whether this evidence, and other related evidence from discovery, in addition to the terms of the Plan and Grant Agreements, establishes an employment relationship with Apache can be assessed in common.

83. The Appellants appear to urge this Court to disregard such evidence and the Chambers Justices' findings thereon in favour of a sole reading of the Grant Agreements in isolation and in a manner that overrides the other provisions in the Plan and Grant Agreements and other factual evidence that supports the

[85] Flesch Affidavit at para 10, AEKE at p. 5, Byrgesen Transcript at p. 15, lines 9-27; p. 16, lines 3-13, REKE at p. 19; Byrgesen Affidavit at paras. 13, 22(b), AEKE at pp. 171, 170.
[86] Byrgesen Transcript, p. 16, lines 3-8, REKE at p. 19
[87] Byrgesen Transcript at p. 10, lines 1-20; p. 11, lines 3-15; p. 12, lines 4-14, REKE at pp. 13-15.
[88] Decision at paras. 76-77, AR at p. 56.

establishment of an employment. Such merits-based arguments are entirely inappropriate at this application and insufficient to defeat certification.

vi. Appendix A – The Appellants' alternate proposed formulation of common issues is flawed

84. In addition, in formulating their proposed common issues attached as Appendix A to their submissions, the Appellants seek to eliminate all claims for employment-related liability, including as against Paramount.

85. It is undisputed that the Class Members were employed by Apache Canada, and that the great majority continued their employment with Paramount when it acquired Apache Canada. No reason is given, and none is apparent, for the elimination of all employment-related liability from the common issues proposed by the Appellants.

86. It is certainly possible that the Appellants will defeat the employment-related claims at trial, but that is not apparent nor relevant at the certification stage. As the Supreme Court of Canada noted in *Pro-Sys,* "the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial."[89] However, the Respondents are entitled to their day in court to advance these claims.

C. Unjust enrichment common issue was properly certified

87. The Appellants re-argue that the Respondents' claim against Apache arises from the contracts under which the Awards were granted, and that they will either succeed or fail on that basis alone. They argue that the claim for unjust enrichment offers no residual benefit to Class Members and should not be certified.

88. The Chambers Justice held that certification was not the time to decide that argument, as it would require findings on all competing contractual interpretations and determination of broad questions such as whether an unsuccessful contract claim against one defendant bars an unjust enrichment claim against another, and

[89] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57 at para. 105.

whether the scope of the contracts are conterminous with the issues in the unjust enrichment claim.

89. In other words, there remains the possibility, depending on the ultimate determination as to proper interpretation of the contracts at issue, that the claims for unjust enrichment do not entirely overlap with the breach of contract claims such that claims for restitution do, in fact, provide an incremental benefit to the Class. The Chambers Justice simply found that it was premature to strike the unjust enrichment claim as it was not yet apparent that the Appellants' argument would succeed.

90. Yet it may be, as the Chambers Justice held, that the claims in unjust enrichment do not overlap entirely with the claims for breach of contract such that it provides remedies not available under contract. In particular, the Plan contains provisions by which the Class Members are entitled to equitable substitution of their Awards. If direct substitution is not possible or feasible, claims in unjust enrichment may provide for equitable relief.

91. The Appellants simply reiterate their argument on appeal, and offer no reason to intrude on the finding of the Chambers Justice that it is premature to strike the claim until determinations on the various contractual interpretations at issue are made such that it is apparent whether the claims of unjust enrichment offer a residual benefit to the class.

92. This action will be certified as a class proceeding and will proceed to a common issues trial regardless of this appeal on, at minimum, the breach of contract and breach of fiduciary duty claims. The unjust enrichment claims, being based on the same factual matrix, will not add any evidentiary burden to that common issues trial. There would be no additional procedural impact to this class proceeding by including the unjust enrichment common issues. If there is a possibility that the unjust enrichment common issues provide a remedial path for the Class, then there is no basis not to certify those issues and have a determination on the merits of those issues at a trial.

PART V – RELIEF SOUGHT

93. The Respondents seek an order dismissing this appeal with costs.

Estimate of time required for the oral argument: 45 minutes

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

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Table of Authorities