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
DEFENDANT:	PARAMOUNT RESOURCES LTD.
STATUS ON APPEAL:	APPELLANT
DEFENDANTS:	APACHE CORPORATION, WILLIAM C. MONTGOMERY, ANNELL R. BAY, DANIEL W. RABUN, RENE R. JOYCE and CHARLES J. PITMAN
STATUS ON APPEAL:	NOT PARTIES TO THE APPEAL
DOCUMENT	**FACTUM OF THE RESPONDENTS**

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

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

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Table of Contents

OVERVIEW

1. This appeal is based on an erroneous presumption that a Chambers Justice hearing a certification application under the *Class Proceedings Act* must assess the merits of a claim when determining whether it should be certified as a class proceeding. The Supreme Court of Canada and numerous provincial Courts of Appeal have explicitly directed otherwise.

2. Many of the errors alleged in the Appellant's factum are premised on a fundamental misunderstanding of the certification test. The Appellant's submissions effectively convert a certification application into a merits-based inquiry, rather than accepting the facts as pleaded.

3. Here, the Chambers Justice made no error in applying the well-established jurisprudence. In particular,

    a. The Chambers Justice properly applied the cause of action criterion, properly found that the employment-based claims and unjust enrichment claims were sufficiently pleaded, and rightly ignored evidence at this stage of the inquiry;

    b. The Chambers Justice rightly found that there was some basis in fact sufficient to certify the common issues based on the significant evidence of the commonality of those issues; and

    c. The Chambers Justice made no error in exercising his discretion to find that a class proceeding was a preferable procedure, despite the Appellant's preference to be excluded from the proceeding.

4. The Respondents are not required to establish "some basis in fact" for the allegations in the claims. Any evidentiary conflicts or conflicts about the characterization of that evidence ought to be resolved at trial, not certification. Nevertheless, even if one were required to establish some basis in fact for the

allegations in the claims, the Respondents have provided more than enough evidence to do so.

PART I – FACTS

5. The Respondents rely on the facts and defined terms set out in their factum filed in response to Apache Corporation's appeal herein, specifically paragraphs 8-38 thereof, in addition to those set out further below.

6. 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. ("**Paramount**" or the Appellant).

7. In summary, the Respondents allege in the Amended Statement of Claim 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 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;

[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."

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.[2]

8. Prior to the hearing of the certification application, the Apache Appellants initiated summary judgment applications in parallel to the Respondents' certification application and sought to have those applications heard before certification. On November 3, 2020, the Honourable Mr. Justice Poelman determined to hear the certification application first, and stayed the summary judgment applications of the Defendants.[3]

9. 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 Appellant seeks to appeal components of the certification order herein.

PART II – ISSUES ON APPEAL

10. The Appellant has raised three issues on appeal, namely:

[2] 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.
[3] Order regarding sequencing of applications of Justice G.H. Poelman dated November 3, 2020, Respondents' Extracts of Key Evidence ("**REKE**") at p. 130.

a. Did the Chambers Justice err in concluding that the Respondents' pleadings satisfied s. 5(1)(a) of the *CPA* by disclosing a cause of action against Paramount in relation to the common employer breach of contract claims and the unjust enrichment claims?

b. Did the Chambers Justice err in certifying the common issues against Paramount?

c. Did the Chambers Justice err in finding that a class proceeding involving Paramount would be the preferable procedure for the fair and efficient resolution of the proposed common issues?

PART III – STANDARD OF REVIEW

11. The 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.[4]

12. 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.[5]

13. 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."[6] In showing a palpable and overriding

[4] *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182 at para. 16 [*Spring*].
[5] *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182 at para. 16; *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 80 [*Warner*].
[6] *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38 [*Benhaim*], citing *South Yukon Forest Corp. v. R.*, 2012 FCA 165 at para. 46 (Stratas J.) [*South Yukon Forest Corp*].

error, "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall."[7]

PART IV - ARGUMENT

A. Certification test and applicable principles

i. Established test and applicable principles

14. The Respondents rely on their submissions as to the test and principles applicable to a certification application in its factum in response to Apache's appeal at paragraphs 43-50. For the purposes of the Appellant's appeal herein, the Respondents highlight the following:

a. 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;[8]

b. Certification is not a trial nor is it a summary judgment application, but rather is a procedural application which concerns only the form of an action;[9]

c. When assessing whether the pleading discloses a cause of action, the facts alleged are assumed to be true and no evidence is permitted to be assessed;[10]

d. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage;[11]

e. With respect to the common issues criteria, a plaintiff need only provide "some basis in fact" for the commonality of the common issues and not whether the

[7] *Benhaim* at para. 38, citing *South Yukon Forest Corp* at para. 46.
[8] *Ravvin v. Canada Bread Company, Limited*, 2020 ABCA 424 at para. 40, citing *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at paras. 8-10.
[9] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 103 [*Pro-Sys Consultants Ltd*].
[10] *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 14.
[11] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.

alleged acts actually occurred or whether the plaintiff can prove their case on the merits;[12] and

f. 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.[13]

ii. No basis for the Appellant's argument that evidence should be considered when assessing the sufficiency of causes of action

15. In an alternative submission, the Appellant relies on *Setoguchi v. Uber B.V.,*[14] and *Engen v. Hyundai Auto Canada Corp*[15] to suggest that there is an evidentiary requirement under s. 5(1)(a) of the *Class Proceedings Act, 2003* ("**CPA**").[16] *Setoguchi* and *Engen* run counter to the clear and long-established jurisprudence that *no evidence is to be considered for the cause of action criteria*. There is no basis for this significant departure from well established jurisprudence from this Court and the Supreme Court of Canada.

16. The Supreme Court of Canada and appellate courts across the country have repeatedly noted this and that the "some basis in fact" standard does not apply to s. 5(1)(a).[17] In *Warner,* this Court expressly stated:

> It is also clear that the “some basis in fact” standard applies only to the procedural requirements set out in ss 5(1)(b) to (e), and not to the s 5(1)(a) requirement that the pleadings disclose a cause of action: see *Pro-Sys* at para 99 and *Hollick* at para 25. **As noted, the latter requirement is decided on the basis of the facts as set out in the pleadings, and not the consideration of evidence**.[18] [emphasis added]

[12] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 *Ltd* at para. 110.
[13] *Walter v. Western Canada Hockey League*, 2017 ABQB 382 at para. 13.
[14] *Setoguchi v. Uber B.V.*, 2021 ABQB 18 [*Setoguchi*].
[15] *Engen v. Hyundai Auto Canada Corp.*, 2021 ABQB 740 [*Engen*].
[16] *Class Proceedings Act,* 2003 SC c. C-16.5. [*CPA*].
[17] *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 14; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25 [*Hollick*]; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 63, 99.
[18] *Warner v. Smith & Nephew Inc.*, 2016 ABCA 223 at para. 14.

17. This Court recently summarized the applicable principles in assessing the cause of action criterion under s. 5(1)(a) in *Rieger v. Plains Midstream Canada ULC:*

> Section 5 of the Class Proceedings Act sets out five criteria required for certification including that the pleadings disclose a cause of action. The test is whether the disputed claims disclose a cause of action assuming the facts pled are true. **A claim should only be struck if it is "plain and obvious" that it cannot succeed**: *Elder Advocates of Alberta Society v Alberta,* 2011 SCC 24 at para 4. For the purposes of this test, **the pleadings should be construed generously and liberally, allowing for deficiencies that are not radically deficient***: LC v Alberta, 2017 ABCA 284* at para 14. Courts should err on the side of permitting novel but arguable claims to proceed at the certification stage: *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at para 21**. The substantive merits of a claim will be fully tested after certification. However, striking pleadings with no reasonable prospect of success helps promote timely and affordable access to justice**: *O'Connor Associates Environmental Inc v MEC OP LLC,* 2014 ABCA 140 at para 14.[19] [emphasis added]

B. The Chambers Justice properly concluded that the pleading disclosed causes of action for breach of contract and unjust enrichment

i. The Respondents' employment-based claims are properly pleaded

a. The Respondents' employment-related claims against the Appellant

18. The Respondents make two related employment-based claims against the Appellant:

a. *Direct employment claim* - The Class Members were employed by Apache Canada. Apache Canada is now Paramount. Participation in the Plan and the granting of the Awards were part of the remuneration of the Class for their work. Those Awards constituted a significant component of their remuneration. Despite there being no change in their duties or responsibilities, a significant component of the Class' remuneration was no longer honoured by their

[19] *Rieger v. Plains Midstream Canada ULC*, 2022 ABCA 28 at para. 31 [*Rieger*].

employer. The Class claims compensation for that loss from their employer – Apache Canada/Paramount; and

b. *Joint/Common employer claim* – separately, in addition to the employment relationship with Apache Canada/Paramount, the Class also had an employment relationship with Apache. Apache and Apache Canada/Paramount jointly had employment relationships with the Class. The Awards were a significant component of the remuneration provided to the Class for their work for these employers. Despite there being no change in their duties or responsibilities, a significant component of the Class' remuneration was no longer honoured. The Class claims compensation for that loss from their joint or common employers – Apache and Apache Canada/Paramount.

19. The Appellant does not appear to challenge the pleadings relating to the direct employment allegations – at least it cannot be seriously suggested that Apache Canada/Paramount did not employ the Class at the relevant times.

b. The Chambers Justice applied the right test for assessment of the common employer allegations

20. The Appellant baldly asserts that the Chambers Justice erred in concluding that the Respondents' common employer claim satisfied s. 5(1)(a) of the *CPA*, and appears to argue that the pleadings do not disclose a common employer claim based on the principles identified in *O'Reilly v. ClearMRI Solutions Ltd.*[20]

21. It is worth noting at the outset that *O'Reilly* was issued after the hearing of the certification application and the decision was never brought to the attention of the Chambers Justice. Additionally, *O'Reilly* stems from a summary judgment motion.

22. In any event, the test in *O'Reilly* is not materially different from the test identified by the Chambers Justice. The Chambers Justice noted that the test for finding common

[20] *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 [*O'Reilly*].

employers involves broad considerations of facts.[21] Similarly, the Ontario Court of Appeal in *O'Reilly* held that "a variety of conduct may be relevant to whether there was an intention to contract between the employee and the alleged common employer".[22] Additionally, the Chambers Justice articulated the same relevant factors identified in *O'Reilly,* namely "whether there is common control over both entities and both exercised control over the employee" (emphasis added).[23]

23. Ultimately, the only difference between the test articulated by the Chambers Justice and *O'Reilly* is that the latter simply clarifies that the purpose of considering the various factual circumstances is simply to ascertain the intention of the parties – it does not narrow the facts that may be considered to determine a common employer relationship.

24. The determination of whether there was a common employer relationship is a question reserved for the merits. At this stage, it is sufficient that the Respondents have pleaded facts to support the cause of action. They need not show that they will succeed on the facts pleaded. As this Court has noted, the certification test is not about whether the claim is likely to succeed.[24] The claim should only be struck if it is "plain and obvious" that it cannot succeed.[25]

25. In assessing whether the pleadings disclose a common employer claim, the Chambers Justice considered whether the Respondents have pleaded sufficient facts giving rise to a common employer claim. As the Chambers Justice noted,[26] the Respondents have pleaded that:[27]

    a. Apache Canada was a privately held subsidiary of Apache;[28]

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[21] Decision at para. 45, AR at p. 51.
[22] Decision at para. 45, AR at p. 51; *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 at para. 53.
[23] Decision at para. 45, AR at p. 51; *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 at paras. 53-54.
[24] *Rieger v. Plains Midstream Canada ULC*, 2022 ABCA 28 at para. 30.
[25] *Rieger v. Plains Midstream Canada ULC*, 2022 ABCA 28 at para. 31.
[26] Decision at paras. 41, 45, AR at p. 51.
[27] Decision at para. 41, AR at p. 51; see Amended Statement of Claim dated September 11, 2019 ("**Amended Statement of Claim**") at paras. 8-9, 19-23, 27, 54, 58, AR at pp. 7, 9, 14.
[28] Amended Statement of Claim at para. 9, AR at p. 7.

b. It was a term of employment with Apache Canada for the Plaintiffs and the Class that they would participate in the AOCP;[29]

c. The AOCP was offered to employees to encourage long-term service with Apache and its affiliates, including Apache Canada;[30]

d. The AOCP provided for various forms of deferred compensation in the form of Restricted Share Units ("**RSUs**"), Stock Options ("**Options**") and Performance Awards ("**PAs**") (collectively, "**Awards**") to employees;[31]

e. The Awards were made to employees through grant agreements ("**Grant Agreements**"), which were contractual agreements between Apache and Class Members.[32]

26. The claim is also clear in its pleading that Apache and Apache Canada/Paramount both owed and breached their duty of good faith and fair dealing.[33]

27. These facts clearly pass the low threshold to show that sufficient material facts have been pleaded, which if assumed to be true, could establish a joint/common employment relationship between the Class and Apache and Apache Canada/Paramount. It is not plain and obvious that the claim cannot succeed.

c. The Chambers Justice properly assessed the sufficiency of the pleadings

28. The Appellant accuses the Chambers Justice of improperly filling in the gaps in the pleadings, but offers no evidence of this in reference to the reasons.[34] In fact, their subsequent argument at paragraph 19(c) of their factum contradicts their argument that the Chambers Justice filled in gaps in the pleadings, as that paragraph identifies factual allegations in the pleadings that Paramount argues the Chambers Justice

[29] Amended Statement of Claim at para. 21, AR at p. 9.
[30] Amended Statement of Claim at para. 22, AR at p. 9.
[31] Amended Statement of Claim at para. 23, AR at p. 9.
[32] Amended Statement of Claim at paras. 24-26, 54, AR at pp. 9, 14.
[33] Decision at para. 47, AR at p. 52; Amended Statement of Claim at para. 68, AR at p. 16.
[34] Factum of the Appellant, Paramount Resources Ltd., dated January 19, 2022 ("**Paramount Factum**") at para. 19.

relied upon erroneously to conclude that the pleadings disclose a cause of action based on the common employer claim.

29. The Chambers Justice rightly found that the common employer claim was properly pleaded. He applied the same principles identified by this Court in *Rieger* and construed the pleadings liberally and generously. In arriving at this conclusion, the Chambers Justice applied the well-established principle that pleadings must be read generously in determining whether a cause of action is established,[35] and that in assessing pleadings, the focus is on whether sufficient facts are pleaded and not whether a cause of action is named.[36]

d. At worst, the pleadings can be amended

30. To the extent that any deficiencies exist in the pleadings, which is not conceded, the pleadings can be amended to correct those deficiencies by including the express term "common employer" and the evidence submitted to support such claims such as:

a. Apache Canada and Apache had a joint Human Resources function;[37]
b. Apache directed human resources policies at Apache Canada;[38]
c. Apache directed the compensation of Apache Canada employees, including the award of RSUs, the Options, and the PAs;[39]
d. Apache approved Awards granted by Apache Canada to employees;[40] and
e. The amount of long-term compensation received by Apache Canada employees was determined by Apache's policy, with input from Apache Canada.[41]

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[35] Decision at para. 44, AR at p. 51.
[36] *Carroll v. Purcee Industrial Controls Ltd.*, 2017 ABQB 211 at para. 59 [*Carroll*].
[37] Transcript of Cross-Examination of Greg Byrgesen on February 12, 2021 ("**Byrgesen Transcript**") at p. 10, lines 1-20, REKE at p.*
[38] Byrgesen Transcript at p. 10, line 26 – p. 11, line 2, REKE at p. *
[39] Byrgesen Transcript at p. 11, lines 3-14, REKE at p. *.
[40] Byrgesen Transcript at p. 11, lines 15 – p. 12, line 4, REKE at p. *.
[41] Byrgesen Transcript at p. 12, lines 5 – 14, REKE at p. *.

31. Such amendments are not necessary as the facts already pleaded are sufficient to ground the existence of the joint/common employment relationship. That is consistent with the case law on assessing pleadings – the focus is on whether sufficient facts are pleaded and not whether a cause of action is named.[42]

ii. *The Chambers Justice did not err in finding that the pleadings disclose a cause of action for unjust enrichment*

32. The heart of the Appellant's appeal on this point is that the unjust enrichment claim should not be certified because it is a hollow cause of action. The Appellant contends that the Chambers Justice erred in suggesting that if the Class were to be unsuccessful in their breach of contract claim against Apache, they still might have an unjust enrichment claim against Paramount.

33. The Chambers Justice correctly found that the claims in unjust enrichment do not overlap entirely with the claims for breach of contract, such that they provide 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 such equitable substitution is not possible or feasible, claims in unjust enrichment may provide for equitable relief.

34. In other words, there remains the possibility, depending on the ultimate determination of the proper interpretation of the contracts and surrounding facts 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 Appellant's argument would succeed.

35. The unjust enrichment claims, being based on the same factual matrix as the other claims asserted, will not add any evidentiary burden to a common issues trial. There

[42] *Carroll v. Purcee Industrial Controls Ltd.*, 2017 ABQB 211 at para. 59.

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 to prevent those claims from proceeding to a determination on the merits at a trial.

C. The Chambers Justice properly found that the common issues criterion was satisfied

i. Misapprehension of the test for establishing common issues

36. The Appellant's allegations of the Chambers Justice's errors with respect to the common issues criterion are premised on its own misunderstanding of the common issues test. The Appellant's assertion that the Chambers Justice erred in failing to consider whether there was some basis in fact for the claim that the Grant Agreements with Apache Corporation formed part of the employment agreements with Apache Canada is based on the misconception that s. 5(1)(c) requires "some basis in fact" for the cause of action (i.e., the claim).[43]

37. First, when assessing s. 5(1)(c), the focus is not on the existence or sufficiency of the claim itself; that is dealt with at s. 5(1)(a). What is asked at s. 5(1)(c) is whether "the claims of the prospective class members raise a common issue".[44]

38. Second, the test on s.5(1)(c) does not require a plaintiff to present some basis in fact for the existence of the issue. The plaintiff must present evidence of the commonality of the common issues,[45] namely whether the factual or legal issues presented by the claim can be determined in common. As the Supreme Court of Canada noted:

> "[i]n order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at

[43] Paramount Factum at paras. 28-29.
[44] *CPA*, s. 5(1)(c); *LC v. Alberta*, 2017 ABCA 284 at para. 22.
[45] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57at para. 110; *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182 at paras. 3, 21, 34.

> this stage goes only to establishing whether these questions are common to all the class members."[46] [emphasis added]

39. The Appellant misapplies the requirement to show "some basis in fact" for the commonality of the common issues when it argues that the Respondents are required to provide "some basis in fact" for the allegation that the Grant Agreements formed part of their employment agreements with Apache Canada/Paramount and that Apache Corporation and Apache Canada/Paramount were common employers. The Appellant's submission conflates the requirement to provide "some basis in fact" for the common issues with "some basis in fact" for the existence of the claim, which is not required.[47]

40. Viewed for its true nature, the Appellant seeks to have this Court engage in a merits assessment by converting the requirement to show "some basis in fact" for the common issues to a requirement to prove the merits of the claim. Evidence that goes toward establishing liability is not necessary at this stage. The Respondents are not required to prove that their claim will succeed as certification does not involve "a determination of the merits of the proceeding."[48]

41. With respect to the unjust enrichment common issue, the Appellant makes the same mistake insofar as it confuses the test under s. 5(1)(c) as requiring "some basis in fact" for the viability of the cause of action. The Chambers Justice appreciated this and rightly rejected such an approach:

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

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[46] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57at para. 110.
[47] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110. See also *Kalra v. Mercedes Benz*, 2017 ONSC 3795 at paras. 40-47; *Hodge v. Neinstein*, 2017 ONCA 494 at paras. 111-115.
[48] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 103; *Rieger v. Plains Midstream Canada ULC*, 2022 ABCA 28 at para. 31.

> the contracts in effect justify the enrichment and constitute a juristic reason. “Contract trumps unjust enrichment,” as the phrase goes: (citation omitted).
>
> [91] While that argument might succeed, this is not the time to decide it. It would require findings on all competing contractual interpretations and determine broad questions such as whether an unsuccessful contractual claim against one defendant bars an unjust enrichment claim against another, and whether the scope of the contracts are coterminous with the issues in the unjust enrichment claim.[49]

42. The Appellant offers no authority to support its position that the common issues determination requires the Respondents to show some basis in fact that the claim will succeed, and unsurprisingly so since that is not the law.

43. What is required, as the Supreme Court of Canada confirms in *Pro-Sys* , is factual evidence that establish <u>whether the questions are common</u> to all the class members.[50]

ii. <u>Conflicting evidence is not resolved at certification</u>

44. In addition to misapprehending the test for establishing common issues, it is not clear how the Appellant can suggest that no or insufficient evidence of the Respondents' claims has been put forward.

45. Even if the common issues test required some basis in fact for the claims themselves, the Respondents have provided significant evidence, including evidence that:

a. Apache Canada was a privately held subsidiary of Apache;[51]

[49] Decision at paras. 90-91, AR at pp. 58-59.
[50] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[51] Affidavit of Greg Byrgesen sworn January 21, 2021, filed January 22, 2021 (“**Byrgesen Affidavit**”) at para. 18, Appellant’s Extracts of Key Evidence (“**AEKE**”) at p.194.

b. It was a term of employment with Apache Canada for the Respondents and the Class that they would participate in the Plan;[52]

c. The Plan was offered to employees to encourage long-term service with Apache and its affiliates, including Apache Canada;[53]

d. Only "Eligible Persons", who are defined as being employees of Apache or its affiliates such as Apache Canada, may participate in the Plan; [54]

e. Participation in the Plan is mandatory for those who are performing "vital services" for Apache or an affiliate; [55]

f. The Awards were made to employees through Grant Agreements in accordance with the Plan;[56]

g. The Awards formed part of and were a significant component (for many, up to 50%) of the remuneration package of the Class; [57]

h. Apache Canada and Apache had a joint Human Resources function;[58]

i. Apache directed human resources policies at Apache Canada;[59]

j. Apache directed the compensation of Apache Canada employees, including the award of RSUs, the Options, and the PAs;[60]

k. Apache approved Awards granted by Apache Canada to employees;[61] and

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[52] Affidavit of Steven Flesch sworn February 21, 2020, filed March 6, 2020 ("**Flesch Affidavit**") at para. 10, AEKE at pp. 5-6; Byrgesen Affidavit at para. 22, AEKE at pp. 194-195.
[53] Section 1.2 of the Plan; Flesh Affidavit, Exhibit F, AEKE at p. 15.
[54] Flesch Affidavit, Exhibit G, AEKE at p. 42.
[55] Section 5.1 of the Plan, Flesch Affidavit, Exhibit F, AEKE at p. 24.
[56] Byrgesen Affidavit at para. 22, AEKE at pp. 194-195; Flesch Affidavit at paras. 14, 21-22, AEKE at pp. 6-8.
[57] Flesch Affidavit at para. 17, AEKE at p. 7; Transcript of Oral Questioning of Stephen Flesch dated January 7, 2021 ("**Flesch Transcript**") at p. 19, lines 4-15, REKE at p. 151; Affidavit of Marshal Thompson sworn February 20, 2020, filed March 6, 2020 ("**Thompson Affidavit**") at para. 11. AEKE at p. 176; Affidavit of Tyler Maksymchuk sworn February 20, 2020, filed March 6, 2020 ("**Maksymchuk Affidavit**") at para. 11, AEKE at p. 183; Affidavit of Reid Chamberlain sworn February 21, 2020, filed March 6, 2020 ("**Chamberlain Affidavit**") at para. 11, AEKE at p. 189.
[58] Byrgesen Transcript at p. 10, lines 1-20, REKE at p. 13.
[59] Byrgesen Transcript at p. 10, line 26 – p. 11, line 2, REKE at pp. 13-14.
[60] Byrgesen Transcript at p. 11, lines 3-14, REKE at p. 14.
[61] Byrgesen Transcript at p. 11, line 15 – p. 12, line 4, REKE at pp. 14-15.

l. The amounts of long-term compensation received by Apache Canada employees were determined by Apache's policy with input from Apache Canada.[62]

46. This must be considered sufficient evidence to establish some basis in fact for the establishment of an employment relationship with Apache Canada/Paramount, an employment relationship with Apache, and a corresponding joint or common relationship between the Class, Apache Canada/Paramount, the Plan, the Grant Agreement and the total remuneration agreed to be provided to the Class for their work.

47. Moreover, 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.

48. The Appellant does not seem to put much credence in such evidence. Instead, it seems to either ignore the evidence or assert that certain wording in the Grant Agreements must prevail over any other conflicting evidence.

49. The Appellant puts great weight and emphasis on the wording of the language in the Grant Agreements. It suggests that wording asserting 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, this is not correct in law. The assessment of whether an employment relationship exists is based on the factual circumstances. The unilateral characterization of such a relationship in a contract is not determinative of the issue.[63] Therefore, even if the certification application were the appropriate forum to determine the merits of this

[62] Byrgesen Transcript at p. 12, lines 5-14, REKE at p. 15.

[63] *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 courts looked to the totality of the relationship to assess the existence of an employee-employer relationship.

allegation, the Appellant's arguments about the effect of the language of the Grant Agreements are not absolute.

50. The Appellant's true complaint is that the Chambers Justice rejected its position that the Grant Agreements were unequivocal and operated to negate any employment relationship otherwise indicated by the evidence. However, 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 to Class Members are a common issue.

51. The Chambers Justice thus held that the common issues could not be defined so as to strictly limit 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].[64]

52. At most, the Appellant can point to conflicting evidence and conflicting arguments about the Respondents' allegations of the existence of an employment relationship between Apache, Apache Canada/Paramount and the Class. Certainly, the Appellant is fully entitled to raise the Grant Agreements and any other evidence it so choses at trial to defeat the Respondents' claims. However, the conflicts in

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

evidence between the parties should be resolved on the merits at a trial with a full evidentiary record, not at certification. It would be inappropriate and contrary to prevailing case law to resolve those conflicts at the certification application. The appropriate question is whether such conflicts can be resolved in common for the Class.

iii. Significant evidence was presented on commonality of the common issues

53. Contrary to the Appellant's submissions, there was significant evidence of the commonality of the employment-related common issues against Apache. This evidence is more than enough to establish some basis in fact that the issues can be determined in common.

54. The Plan and Grant Agreements are common to all Class Members. The Appellant must concede this when it argues that the Grant Agreements should operate to negate the Respondents' claims. The assessment of the Plan and Grant Agreement cannot be common when the Appellant wants 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, Apache and Apache Canada/Paramount can be assessed in common.

55. With respect to the Plan and the Grant Agreements, the Chambers Justice noted the following features indicating that the claim raised common employment issues:

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”, who are defined as being employees of Apache or its affiliates such as Apache Canada, may participate in the Plan;

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

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.[65]

56. Additional evidence of the common control exercised between Apache and Apache Canada/Paramount includes:

a. Apache Canada and Apache had a joint Human Resources function;[66]

b. Apache directed human resources policies at Apache Canada;[67]

c. Apache directed the compensation of Apache Canada employees, including the award of RSUs, the Options, and the PAs;[68]

d. Apache approved Awards granted by Apache Canada to employees;[69] and

e. The amount of long-term compensation received by Apache Canada employees were determined by Apache's policy with input from Apache Canada.[70]

57. The Appellant conveniently ignores the above evidence in arguing that the Respondents provided no evidence of a common factual matrix.

58. In addition, evidence of the common agreements and of common control elicited through Apache Canada/Paramount's witness provides more than some basis in fact for the commonality or evidence that the issues are common to each Class Member.

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[65] Decision at paras. 74-75, AR at p. 56.
[66] Byrgesen Transcript at p. 10, lines 1-20, REKE at p. 13.
[67] Byrgesen Transcript at p. 10, line 26 – p. 11, line 2, REKE at pp. 13-14.
[68] Byrgesen Transcript at p. 11, lines 3-14, REKE at p. 14.
[69] Byrgesen Transcript at p. 11, line 15 – p. 12, line 4, REKE at pp. 14-15.
[70] Byrgesen Transcript at p. 12, lines 5-14, REKE at p. 15.

D. The Chambers Justice properly found that a class proceeding would be the preferable procedure

59. This Court has found that decisions of a certification judge on the preferable procedure criterion are "entitled to special deference, because the judge must weigh and balance a number of factors."[71]

i. Test for preferability

60. It is notable that the Appellant did not cite to a specific test applicable to the preferability assessment in s. 5(1)(d) of the *CPA*. That test is set out in *TL v Alberta*, as follows:

> The essence of the inquiry is to assess the common and individual issues contextually, and consider the impact of the individual issues on the trial process, including fairness to plaintiffs, defendants and the court. The inquiry focuses on two questions: firstly, would the class action be a fair, efficient and manageable method of advancing the claim; and secondly, would the class action be preferable to all other reasonably available means of resolving the claims of class members (citation omitted). As such, the preferability analysis requires the court to look at all reasonably available means of resolving the class members' claims, such as joinder, test cases, consolidation and so on, and not just at the possibility of individual actions (citation omitted). [72]

61. All the Appellant does is cite to *Setoguchi*, which itself cites to *Berg* to suggest that a new factor of "proportionality" should be applicable. That "proportionality" factor appears to find root for Justice Perell, who seems to have established the factor, from *Hyrniak v Mauldin*, a Supreme Court of Canada case about summary judgment.[73] Aside from the fact that a certification application is not a summary judgment application nor is supposed to address the merits of any claims, such a

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[71] *Elder Advocates of Alberta Society v. Alberta*, 2009 ABCA 403 at para. 79.
[72] *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABCA 182 at para. 26, citing *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2008 ABQB 114 at paras. 98 (citations omitted).
[73] Paramount Factum at para. 49.

"proportionality" factor is not set out in the *CPA* and has not been endorsed by any appellate court.

ii. The court should not choose who the Plaintiff should proceed against

62. Even if a "proportionality" factor is applicable, it cannot and should not be used by a court or a defendant to decide for a plaintiff which defendant would be preferable to proceed against. It is the plaintiff who initiates the claim against those who it believes are responsible. If a properly pleaded cause of action is asserted against those defendants, the certification application must only determine the procedure to follow to determine the allegations made. It should not take away a plaintiff's right to seek recourse against the defendants it has chosen to name.

63. The Appellant suggests that it is not "proportional" to include it as a defendant in this proceeding because there is another defendant, Apache, who may be liable and who can pay.[74] Despite its assertion, it is not undisputed that Apache can pay if found liable as the Appellant suggests.[75] There is no evidence about the ability of any defendant to pay nor is such an issue relevant on certification. This is not a security for costs application or a judgment debtor examination. Apache is a U.S. corporation and the individual defendants are all U.S. residents, none of whom are likely to have any assets in Canada.

64. Regardless, if it were a valid basis to be excluded from an action because another defendant alleged to be jointly responsible may be solvent, then in every case of an alleged joint tortfeasor one defendant could escape liability by suggesting another defendant can pay. How would a court assess who should be the appropriate defendant if both defendants allege the other can pay?

65. A defendant should not be entitled to choose who the plaintiff seeks compensation from. As Justice Poelman noted, " …caution should be exercised in choosing for

[74] Paramount Factum at paras. 7, 50(a) and 50(b).
[75] Paramount Factum at para. 7.

plaintiffs which defendants they may proceed against, where there are valid causes of action against each of them."[76]

66. The Appellant also raises the added complexity of its involvement. There is no basis at law to suggest a defendant, against whom a valid cause of action has been pleaded, can escape liability because it feels it is too onerous for it to be involved in litigation. As the Chambers Justice noted, the Appellant is not a minor player – it is/was the employer of the Class before and after the sale, and possesses much of the information relevant to the issues to be determined.[77]

67. It is the Respondents' submission that it would be fundamentally inappropriate to extend the preferability requirements in the manner that the Appellant suggests, to absolve a defendant from potential liability where a valid cause of action has been pleaded simply because the defendant does not think it was worthwhile for them to be included in the proceeding. If the Appellant believes it should not be burdened with the time and expense of litigation, it should initiate a summary judgment application and seek recovery for its costs thrown away. That is exactly what those processes are for.

iii. Any remaining individual issues are minor in comparison to the common issues

68. The Appellant also suggests there will be individual issues remaining after a common issues trial, including with respect to releases that some have executed in favour of the Appellant.

69. First, as noted above, the liability issues can be determined in common. Once entitlement to the Awards is established, a simple calculation using information that has been admitted to exist can be conducted: (1) a list of the Awards for each Class member (which the defendants have) and (2) the price of the share of Apache at the

[76] Decision at para. 124, AR at p. 64.
[77] Decision at para. 123, AR at p. 64.

time (which is publicly traded).[78] As a result, any individual issues are minor in comparison with the common issues.

70. Second, the releases that the Appellant suggests limit liability to some Class Members all have the same language.[79] Even if the scope of those releases was in dispute, that dispute could be resolved in common as well.

71. Third, should any comparison between the Awards and the long term compensation provided by Paramount after the sale even be relevant and required (which should not be the case because such compensation was not paid in substitution of the Awards lost), Paramount has information of the exact compensation it provided to the Class Members for comparison against the Awards. The records exist and do not require individual assessments that would undermine the utility of determining the liability issues in common.

72. Fourth, as the Chambers Justice noted, this proceeding is focussed on a "few central matters" that "heavily outweigh any other questions".[80]

73. Lastly, as the Chambers Justice correctly found, to the extent any individual issues have to be determined after the common issues trial, those issues can be determined under the procedure set out under s. 28 of the *CPA*.

iv. <u>Undefined material adverse impacts</u>

74. The Appellant also claims that its inclusion in this proceeding would cause a

[78] Byrgesen Transcript at p. 21, lines 4-16, REKE at p. 24; Exhibits 1-7 entered at Oral Questioning on Thompson Affidavit, REKE at pp. 253, 264, 275, 287, 306, 327, 348; Exhibits 1-4 entered at Oral Questioning on Flesch Affidavit, REKE at pp. 370, 379, 398, 419. Under both the 2011 and 2016 AOCP, the total number of shares authorized for issuance under the Plan are prescribed under section 4.1. Section 4.3 of the AOCP requires the Company to retain sufficient shares to ensure its ability to perform its obligations under the Plan. In light of this requirement, it is likely that the Defendants would have detailed records of the outstanding awards issued under the Plan – see Flesch Affidavit, Exhibit F, AEKE at p. 21; Flesch Affidavit, Exhibit G, AEKE at p. 50.

[79] Byrgesen Affidavit at para. 52, Exhibit R, AEKE at pp. 201, 203.

[80] Decision at para. 108, AR at p. 62.

"material adverse impact on the Class and the administration of justice". No explanation of what that adverse impact may be has been provided.

v. *A class proceeding is the preferable proceeding*

75. The Appellant has not shown how hundreds of individual proceedings, which would all have to interpret and assess the same documents and factual matrix, can be preferable to a single proceeding where those common issues are determined at once. The Appellant cannot and has not been able to do so at the certification application or on this appeal.

PART V – RELIEF SOUGHT

76. 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 21ST DAY OF MARCH, 2022

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Table of Authorities