In the Court of Appeal of Alberta

Citation: Flesch v Apache Corporation, 2022 ABCA 374

Date: 20221117
Docket: 2101-0209AC;
2101-0208AC
Registry: Calgary

#2101-0209AC

Between:

Stephen Flesch, Marshal Thompson, Tyler Maksymchuk and Reid Chamberlain

Respondents
(Plaintiffs)

- and -

Apache Corporation, William C. Montgomery, Annell R. Bay,
Daniel W. Rabun, Rene R. Joyce and Charles J. Pitman

Appellants
(Defendants)

- and -

Paramount Resources Ltd.

Not Party to Appeal
(Defendant)

#2101-0208AC

And Between:

Stephen Flesch, Marshal Thompson, Tyler Maksymchuk and Reid Chamberlain

Respondents
(Plaintiffs)

- and -

Paramount Resources Ltd.

Appellant
(Defendant)

- and -

Apache Corporation, William C. Montgomery, Annell R. Bay,
Daniel W. Rabun, Rene R. Joyce and Charles J. Pitman

Not Parties to Appeal
(Defendants)

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Kevin Feehan

Memorandum of Judgment of the Honourable Justice Strekaf
And the Honourable Justice Feehan

Memorandum of Judgment of the Honourable Justice Slatter
Concurring in the Result

Appeals from the Order by
The Honourable Justice G.H. Poelman
Dated the 25th day of June, 2021
Filed on the 21st day of December, 2021
(2021 ABQB 491, Docket: 1901-09160)

Memorandum of Judgment

The Majority:

I. Overview

[1] Apache Corporation, members of the Management Development and Compensation Committee of its Board of Directors, and Paramount Resources, formerly Apache Canada, appeal the decision of a chambers judge certifying a class proceeding against them. The proceeding was commenced by Messrs Flesch, Thompson, Maksymchuk, and Chamberlain, as employees, for cancellation of awards under Apache's Omnibus Compensation Plan on the sale by Apache of Apache Canada, later Paramount.

[2] The chambers judge determined the employees' Amended Statement of Claim disclosed causes of action, there was an identifiable class, the claims of the prospective class members raised common issues, a class proceeding would be the preferable procedure for a fair and efficient resolution of the common issues, and the plaintiff employees were eligible and appropriate to be appointed as representative plaintiffs. Apache, its Management Development and Compensation Committee members, and Paramount contest various of those conclusions in separate appeals.

[3] For the reasons below, the appeals are allowed in part. The claim for unjust enrichment as a common issue is not allowed.

II. Facts

[4] Apache is a publicly traded corporation headquartered in Houston, Texas, engaged worldwide in petroleum and natural gas exploration and production. Apache Canada was a privately held, indirect, wholly owned subsidiary of Apache, incorporated in Alberta, engaged in petroleum and natural gas exploration and production in western Canada.

[5] On July 6, 2017, Apache Canada employed approximately 400 people. On that date, Apache announced it was withdrawing from its Canadian operations and all shares of Apache Canada had been sold to the company which eventually became Paramount through a series of amalgamations. The purchase and sale agreement closed August 18, 2017 and the amalgamation process was completed on January 1, 2018. There were 347 employees of Apache Canada who continued to be employed with Paramount, mostly in similar positions, with similar duties and responsibilities, and receiving the same salaries.

[6] On July 6, 2017, Apache also advised the employees of Apache Canada who were involved in its Omnibus Compensation Plan that all awards under that plan, restricted stock units, stock options, and performance awards, would be cancelled. The employees would be entitled to

participate in Paramount's share options, which the employees characterize as being "orders of magnitude" less remunerative than the Apache plan.

[7] Prior to the Paramount sale, Apache's Omnibus Compensation Plan was administered by its Management Development and Compensation Committee and many Apache Canada employees received one or more forms of awards under the plan as part of their compensation. The awards were granted by Apache to Apache Canada employees in the form of notices, each attached to a Grant Agreement.

[8] The key provisions of Apache's 2016 Omnibus Compensation Plan are set out below. The chambers judge referenced an earlier iteration, which for the purposes of this appeal has substantially similar provisions.

> 1.2 *Purpose*. The purpose of the Plan is to provide Eligible Persons designated by the Committee for participation in the Plan with equity-based incentives to: (i) encourage such individuals to continue in the long-term service of the Company and its Affiliates, (ii) create in such individuals a more direct interest in the future success of the operations of the Company, (iii) attract outstanding individuals, and (iv) retain and motivate such individuals. The Plan is intended to provide eligible individuals with the opportunity to acquire an equity interest in the Company, thereby relating incentive compensation to increases in stockholder value and more closely aligning the compensation of such individuals with the interests of the Company's stockholders. . . .
>
> 2.1 *Definitions*. The following terms shall have the meaning set forth below:
>
> . . .
>
> (k) *"Eligible Persons"* mean those employees of the Company or of any Affiliates, members of the Board, and members of the board of directors of any Affiliates who are designated as Eligible Persons by the Committee . . . .
>
> 5.1 *Participation*. Participants in the Plan shall be those Eligible Persons who, in the judgment of the Committee . . . , are performing, or during the term of their incentive arrangement will perform, vital services in the management, operation, and development of the Company or an Affiliate, and significantly contribute, or are expected to significantly contribute, to the achievement of the Company's long-term corporate economic objectives. . . .
>
> 13.1 *In General*. In the event of the occurrence of a Change of Control of the Company. . . .:
>
> (a) Without further action by the Committee or the Board,

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

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

all unvested Restricted Stock Awards and Restricted Stock Units shall fully vest upon the Participant's Involuntary Termination or Voluntary Termination with Cause occurring on or after a Change of Control. Such newly vested Restricted Stock Units shall be converted to Stock and the Participant shall be issued the requisite number of shares . . . .

(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 . . . .

Section 14

Reorganization or Liquidation

In the event that the Company is merged or consolidated . . . , then the Committee . . . shall, as to the Plan and 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 appropriate stock of the Company or of the merged, consolidated, or otherwise reorganized corporation which will be issuable with respect to the Stock. Additionally, upon the occurrence of such an event and provided that a Performance Goal has occurred, upon written notice to the Participants, the Committee may accelerate the vesting and payment dates of the entitlement to receive cash and Stock under outstanding Awards so that all such existing entitlements are paid prior to any such event. If a Performance Goal has not yet been attained, the Committee in its discretion may make equitable payment or adjustment.

. . . [T]he Committee may provide . . . that any outstanding Award (or portion thereof) shall be converted into a right to receive cash, on or as soon as practicable following the closing date or expiration date of the transaction resulting in the Change of Control or such event in an amount equal to the highest value of the consideration to be received in connection with such transaction . . . [according to a formula set out in the provision] . . . .

15.1 *Employment*. Neither anything contained in the Plan or any agreement nor the granting of any Award under the Plan shall confer upon any Participant any right with respect to the continuation of his or her employment by the Company or any Affiliate, or interfere in any way with the right of the Company or any Affiliate, at any time, to terminate such employment or to increase or decrease the level of the Participant's compensation from the level in existence at the time of the Award.

An Eligible Person who has been granted an Award in one year shall not necessarily be entitled to be granted Awards in subsequent years.

[9] Schedule A Grant Notice: Set out below is the Grant Notice for restricted stock options. Substantially similar notices were in place for stock options and performance awards.

Notice: A summary of the terms of your grant of Restricted Stock Units ("RSUs") is set out in this notice (the "Grant Notice") but subject always to the terms of the Apache Corporation 2011 Omnibus Equity Compensation Plan (the "Plan") and the Restricted Stock Unit Award Agreement (the "Agreement"). In the event of any inconsistency between the terms of this Grant Notice, the terms of the Plan and the Agreement, the terms of the Plan and the Agreement shall prevail.

. . .

Vesting Period: RSUs granted shall vest (i.e., restrictions shall lapse) in accordance with the following schedule (the "Vesting Period"), provided that the Recipient remains employed as an Eligible Person as of such vesting date:

First anniversary of the Grant Date – 1/3 vested

Second anniversary of the Grant Date – an additional 1/3 vested

Third anniversary of the Grant Date – an additional 1/3 vested.

. . .

Vesting is accelerated to 100% upon the Recipient's Involuntary Termination or Voluntary Termination with Cause occurring on or after a . . . Change of Control that occurs during the Vesting Period.

Restricted Stock Unit Award Agreement

This Restricted Stock Unit Award Agreement (the "Agreement") relating to a grant of Restricted Stock Units ... is made between Apache Corporation (together with its Affiliates, the "Company") and each Recipient . . . .

. . .

> 10. No Right to Continued Employment. Neither the RSUs or Stock issued pursuant to a Grant nor any terms contained in this Agreement shall confer upon the Recipient any express or implied right to be retained in the employment or service of the Company for any period, nor restrict in any way the right of the Company, which right is hereby expressly reserved, to terminate the Recipient's employment or service at any time for any reason or no reason . . . .
>
> . . .
>
> 15. Terms of Employment. The Plan is a discretionary plan. The Recipient hereby acknowledges that neither the plan nor this Agreement forms part of his terms of employment . . . .

III. *Class Proceedings Act*

[10] The *Class Proceedings Act*, SA 2003, c C-16.5, sets out the relevant criteria for certification:

> 5(1) In order for a proceeding to be certified as a class proceeding . . . 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;
>
> (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.
>
> (3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.
>
> (4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

[11] Section 6(2) of the *Act* provides that an order certifying a proceeding is not a determination of the merits of the proceeding.

IV. Chambers Judge's Decision

[12] In detailed reasons for decision, 2021 ABQB 491, the chambers judge evaluated the claims of the employees, based upon Apache's Omnibus Compensation Plan, Grant Notices, and the affidavit evidence before him, on the criteria set out in s 5 of the *Act*.

[13] The chambers judge certified the action as a class proceeding. He defined the class as:

> 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.

[14] He approved the claims asserted on behalf of the class in breach of contract, breach of duty of good faith, breach of fiduciary duty, and unjust enrichment, and the relief sought by the class to include damages, declarations, interest, and costs in relation to those claims.

[15] He appointed the plaintiff employees as the representatives for the class and their current counsel as counsel for the class.

[16] The chambers judge certified the following common issues:

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

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

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

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

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

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

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

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

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

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

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

[17] The chambers judge also stayed the summary judgment application brought by Apache and Paramount, pending resolution of the certification process.

V. Grounds of Appeal

[18] Apache and the members of its Management Development and Compensation Committee say the chambers judge erred in:

(a) 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 employees;

(b) concluding that Apache could, on the facts before him, meet the definition of a "common employer"; and

(c) certifying common issues regarding claims in unjust enrichment.

[19] Apache does not challenge the certification of the action as a class proceeding, that the Amended Statement of Claim disclosed some appropriate causes of action, the appointment of the plaintiff employees as the representatives for the class, or their counsel as counsel for the class. They simply wish to narrow the class proceeding on common issues.

[20] Paramount says the chambers judge erred in:

(a) concluding that the Amended Statement of Claim satisfied the requirements of s 5(1)(a) of the *Act* by disclosing a cause of action against Paramount for breach of contract as a result of the "common employer doctrine" and unjust enrichment;

(b) concluding that the proposed class action representatives had satisfied s 5(1)(c) and (d), and s 5(2) of the *Act* by establishing "some basis in fact" for their claims in breach of

employment against Paramount, their common employer claim, and unjust enrichment claim; and

(c) determining that the class proceeding involving Paramount would be the preferable procedure for the fair and efficient resolution of the proposed common issues.

[21] In the alternative, Paramount supports the narrowing of the class proceeding on common issues as proposed by Apache.

VI. Standard of Review

[22] The certification of a class proceeding is a discretionary decision and is not to be overturned on appeal unless the decision reflects an error of principle or is unreasonable. The decision to certify or not certify an action is a polycentric decision that is entitled to deference: ***L'Oratoire Saint-Joseph du Mont-Royal v JJ***, 2019 SCC 35, paras 10-12, [2019] 2 SCR 831; ***Warner v Smith & Nephew Inc***, 2016 ABCA 223, paras 7, 81, 38 Alta LR (6th) 224, leave to appeal refused, [2016] SCCA no 408; ***Spring v Goodyear Canada Inc***, 2021 ABCA 182, para 16, 459 DLR (4th) 315.

[23] The first criterion for certification, whether the pleading discloses a cause of action, is a question of law reviewed for correctness: ***Spring***, para 16; ***Pioneer Corp v Godfrey***, 2019 SCC 42, para 57, [2019] 3 SCR 295.

[24] On the remaining four criteria for certification, whether there is sufficient evidence to support certification is a question of fact or mixed fact and law which should not be disturbed on appeal absent palpable and overriding error, a highly deferential standard of review. 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": ***Spring***, para 16; ***Warner***, paras 80, 81; ***Benhaim v St-Germain***, 2016 SCC 48, paras 38-39, [2016] 2 SCR 352, citing ***South Yukon Forest Corp v R***, 2012 FCA 165, para 46, 4 BLR (5th) 31.

VII. Analysis

(a) Test for certification

[25] The fundamental purpose of class proceedings is to facilitate access to justice, judicial economy, and behaviour modification, with the general objectives of fairness and efficiency: ***Hollick v Toronto (City)***, 2001 SCC 68, paras 14,15, [2001] 3 SCR 158; ***Starratt v Mamdani***, 2017 ABCA 92, para 9, 100 CPC (7th) 197.

[26] The plaintiff employees must establish all five of the pre-conditions for certification set out in s 5(1)(a) to (e) and (2) of the *Act*. Where the court is satisfied as to each of those criteria, it must certify the proceedings as a class proceeding but may not do so unless each of the criteria have been met: ss 5(3) and (4).

[27] The certification process plays a screening role, but it is limited in scope. At the certification stage, the judge is ruling on a purely procedural question: ***Spring***, para 18. It does not involve an assessment of the merits of the claim, nor is it intended to be a pronouncement on the viability or strength of the action: ***Ravvin v Canada Bread Company Limited***, 2020 ABCA 424, para 40, [2021] 4 WWR 1, citing ***Warner***, paras 8-10; ***Bowman v Ontario***, 2022 ONCA 477, paras 37, 38, 40, 83 CCLT (4th) 235. Certification is not a trial nor a summary judgment application but merely a procedural application concerning only the form of an action: ***Pro-Sys Consultants Ltd v Microsoft Corporation***, 2013 SCC 57, para 103, [2013] 3 SCR 477; ***Ravvin***, para 40.

[28] On the first criterion for certification, when the court assesses whether a pleading discloses a cause of action, the facts alleged in the pleading are assumed to be true and no evidence is permitted to be assessed: ***Warner***, para 14; ***Bruno v Samson Cree Nation***, 2021 ABCA 381, paras 63, 64; ***Andriuk v Merrill Lynch***, 2013 ABQB 422, para 67, 578 AR 40, aff'd 2014 ABCA 177; ***Bowman***, para 39. With respect to the remaining criteria, the plaintiff need only provide "some basis in fact", and with respect to commonality of issues, need not prove whether the alleged facts actually occurred, or whether the applicant can prove those issues on the merits: ***Pro-Sys***, paras 99, 102, 110; ***Warner***, para 14; ***Hollick***, para 25. "Some basis in fact" is a low threshold, requiring only a "minimum evidentiary basis": ***Warner***, para 14; ***Starratt***, para 10; ***Hollick***, paras 24-25. However, claims should not be certified if there is a complete absence of evidence to support the remaining criteria: ***Spring***, para 40.

(b) Disclosure of a cause of action in the pleadings

(i) <u>Principles of law</u>

[29] Section 5(1)(a) of the *Act* requires the court to be satisfied that the pleadings disclose a cause of action.

[30] This requirement is assessed on the same standard of proof as applies to a motion to dismiss or striking a pleading for failure to disclose a cause of action. The requirement is satisfied unless it is "plain and obvious" that the plaintiff's claim cannot succeed: ***Warner***, para 12; ***Pro-Sys***, para 63, citing ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24, para 20, [2011] 2 SCR 261; ***Hunt v Carey Canada Inc***, [1990] 2 SCR 959, 980, 74 DLR (4th) 321; ***Hollick***, para 25; ***Bowman***, paras 38, 41.

[31] As ***Andriuk*** states, para 68:

> The test for certification is not predicated on the assumption that the pleadings may not be amended; rather, they must be construed generously and liberally with allowances for drafting deficiencies that do not disclose radical defects: *Healey v Lakeridge Health Corp* (2006), 38 CPC (6th) 145 (ONSC) at para 26; *Fakhri v Alfalfa's Canada (cob Caper's Community Market)*, 2003 BCSC 1717 at para 42,

> 26 BCLR (4th) 152, affirmed 2004 BCCA 549, 34 BCLR (4th) 201; *Cerqueira v Ontario*, 2010 ONSC 3954 at para 12. The question is whether the pleadings disclose a supportable cause of action assuming the facts pleaded to be true: *Alberta v Elder Advocates*....A cause of action will be disclosed if the facts pleaded *could possibly* be considered to entitle the plaintiff to a legal remedy; conversely, if it is plain and obvious that the facts are incompatible with an entitlement to a remedy, or insufficient for that purpose so that the plaintiff has no chance of success, then a cause of action will not be disclosed: *Healey* at para 27. [emphasis in original]

[32] The novelty of a cause of action will not militate against the plaintiff establishing a cause of action for the purpose of certification; pleadings "which reveal an arguable, difficult or important point of law" must be allowed to proceed: ***Andriuk***, para 69, citing ***Hunt***, 990-991.

[33] The principles that guide the assessment of whether a cause of action is disclosed in class proceedings are summarized in Michael A Eizenga et al, *Class Actions Law and Practice*, 2nd ed (LexisNexis Canada 2008) (loose-leaf updated September 2022, release 76), ch 3B, s 3.26:

> (1) all allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proven;
>
> (2) the plaintiff must show that it is not plain and obvious beyond doubt that the plaintiffs could not succeed;
>
> (3) the novelty of the cause of action will not militate against the plaintiffs;
>
> (4) the statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies; and
>
> (5) no evidence is admissible on the motion.

[34] Paramount suggests, however, that a court in its gatekeeping function must identify a positive evidentiary element in determining whether the pleading sets out a cause of action, relying upon two decisions of Rooke ACJ, ***Setoguchi v Uber BV***, 2021 ABQB 18, paras 62-72, currently reserved on appeal to this Court; and ***Engen v Hyundai Auto Canada Corp***, 2021 ABQB 740, para 22.

[35] To the contrary, ***Andriuk*** held that "[a]t this stage of the analysis, no evidence is required to prove a cause of action; nonetheless, the plaintiff must plead all of the material facts on which he or she relies and which must be proven to establish a cause of action in law": para 67; see also ***Jackson v Canadian National Railway***, 2012 ABQB 652, para 56, 73 Alta LR (5th) 219, aff'd 2013 ABCA 440, para 47, 91 Alta LR (5th) 401, leave to appeal refused, [2014] SCCA No 57.

[36] The threshold for satisfying the statutory criterion that "the pleadings disclose a cause of action", codified in s 5(1)(a) of the *Act*, has for at least two decades been employed as in applications to strike or dismiss claims that fail to disclose a cause of action. The test is whether, taking the facts pleaded as true, and without regard to the evidence, it is "plain and obvious" the pleadings do not disclose a cause of action: ***Hollick***, para 25; ***Elder Advocates***, paras 4, 20; ***Pro-Sys***, paras 63, 99; ***Sun-Rype Products Ltd v Archer Daniels Midland Company***, 2013 SCC 58, para 31, [2013] 3 SCR 545; ***Pioneer***, para 27; ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19, paras 14, 87, 447 DLR (4th) 543; ***Bruno***, paras 5, 58-68; ***Andriuk***, paras 67-69; ***Warner***, paras 12, 14; ***Bowman***, paras 37-41. Another way of putting it is that the claim has "no reasonable prospect of success": ***Atlantic Lottery,*** paras 18, 87; ***Knight v Imperial Tobacco Canada Ltd***, 2011 SCC 42, para 17, [2011] 3 SCR 45. As this Court noted in ***Bruno***, para 67, this is a low bar.

[37] There is no reason to depart from the long-established and well-settled test for assessing whether pleadings disclose a cause of action for certification purposes. No substantive evidence is required to prove a cause of action, and a cause of action as pleaded is to be accepted at face value unless it is plain and obvious it cannot succeed, there is no reasonable chance of success, or it is frivolous and vexatious.

(ii) Review of the Amended Statement of Claim

[38] The Amended Statement of Claim filed September 11, 2019 alleges the following causes of action against Paramount:

(a) breach of contract in failing to honour the unvested restricted stock units, stock units and stock options which the employees say "formed part of the contract of employment of the Class by Apache Canada": paras 54-57, 79(b);

(b) breach of the contractual duty of good faith: paras 66, 68; and

(c) unjust enrichment: paras 72, 73, 77, 79(d).

Based on those causes of action as pleaded, the employees assert against Paramount damages and punitive damages: paras 75, 78, 79(e)(f) and (g).

[39] The chambers judge reviewed the claim, examined the causes of action pleaded, and properly concluded that the criterion in s 5(1)(a) for disclosure of a cause of action against Paramount, is met. In oral submissions, Paramount conceded that paragraphs 54 and 55 of the Amended Statement of Claim do assert employment contracts with Apache Canada and Paramount.

(c) An identifiable class

[40] Paramount does not appeal the identification of a class comprising those employees of Apache Canada as at August 18, 2017 then participating in Apache's Omnibus Compensation Plan and holding awards as defined by that plan. Apache and members of its Management Development and Compensation Committee did not include a challenge on this criterion in their written submissions. They did speak to it briefly in oral submissions, only for consistency with their submissions on disclosure of a cause of action in the pleadings and common issues to the class. The chambers judge found the second criterion for certification was met, and we agree.

(d) Common issues to the class

(i) <u>Contractual relationship between the parties</u>

[41] Apache, the members of its Management Development and Compensation Committee, and Paramount all submit the common issues found by the chambers judge, set out above, are too broad. They say that where there is no basis in fact for a particular common issue, there is no ability to certify it. They acknowledge it is inappropriate to weigh evidence during the certification stage, certification is not an adjudication of the merits of the claim, and while the evidentiary requirement is low, they say it is not non-existent.

[42] Apache and Paramount say there is no basis in fact to conclude they were common employers of the employees. They say the words "common employers" do not appear in the pleadings. The chambers judge found they were common employers, based upon pleadings that Apache Canada was wholly owned by Apache, and Apache exercised an element of control over Apache Canada. It was a term of employment that Apache Canada employees participate in the Plan, the stated purpose of which was to provide incentives to encourage long-term service with Apache and affiliates such as Apache Canada; and the Plan and Grant Agreements formed part of terms of employment with Apache Canada and were a significant component of employment remuneration for the employees.

[43] Apache and Paramount point to the Grant Notice and in particular paragraph 15:

> <u>Terms of Employment.</u>
>
> The Plan is a discretionary plan. The Participant hereby acknowledges that neither the Plan nor this Agreement forms part of his terms of employment . . . .

They say the employees have no legal basis for any of the employer-focused common issues directed by the chambers judge, as there is no common control over both entities, and both entities do not exercise control over the employee. Additionally, they say there is no common intention to create an employer/employee relationship, citing ***O'Reilly v ClearMRI Solutions Ltd***, 2021 ONCA 385, paras 2, 50, 54, 460 DLR (4th) 487. ***O'Reilly*** says at para 2:

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

[44] The proper approach to employment contract interpretation is objective; "an intention to contract can be derived from conduct" assessed through the eyes of a reasonable person: ***O'Reilly***, para 52.

[45] Apache and Paramount submit the fact that one company is a subsidiary or affiliated with another or that two companies coordinate their activities is not evidence of common responsibility, common ownership, or common liability; it must be objectively assessed that each had entered into a contract of employment with the employee: ***O'Reilly***, paras 44, 45, 49, 50. They also submit there is no reason to breach the corporate separateness rule here, as there is no evidence the separate corporations were being used to facilitate fraudulent or improper conduct, or that one is a "mere puppet" of the other: ***Yaiguaje v Chevron***, 2018 ONCA 472, paras 61, 66, 70, 76-78, 423 DLR (4th) 687.

[46] The employees' affidavits indicate it was a term of employment with Apache Canada that they would participate in the Apache Omnibus Compensation Plan; it was offered to the employees to encourage long-term service with Apache and its affiliates, including Apache Canada; the awards were made through the Grant Agreements which were contractual agreements directly between Apache and Apache Canada employees, as part of the terms of employment with Apache Canada; and the plan formed a significant component of the renumeration package available through Apache Canada.

[47] The employees also say that Apache Canada and Apache had a joint human resources function; Apache directed all human resources policies of Apache Canada; and Apache managed the compensation of Apache Canada employees, including the award of restricted stock units, stock options, and performance awards. A human resources employee at Apache Canada confirmed that compensation for Apache Canada's employees included the Apache long-term compensation entitlements.

[48] The employees say Apache approved the awards granted by Apache Canada to its employees, and the amounts of long-term compensation received by Apache Canada employees were determined by Apache's award policy with input from Apache Canada. The employees say these factors show an objective common intention by Apache and Apache Canada to each have an employment relationship with the employees, and review of the provisions of the compensation plan show support for this contention. The purpose of the plan, they say, set out in s 1.2 is to provide employees of affiliates such as Apache Canada with incentives to continue in long-term service with Apache and its affiliates, and to attract outstanding individuals. These are indicia of

some basis in fact, viewed objectively, of a potential contractual relationship with both Apache and Apache Canada.

[49] Only eligible persons, employees of Apache or its affiliates, were entitled to participate in the compensation plan. Participation in the plan is mandatory for those eligible persons performing vital services for Apache or its affiliates, and who are expected to significantly contribute to the achievement of Apache's long-term economic objectives. Additionally, s 10 of the Grant Agreement provides that none of its terms confer a right to be retained in employment nor restrict the right of Apache or Apache Canada to terminate employment at any time for any reason, which they argue assumes an initial employment status.

[50] Given potentially conflicting provisions in the Apache compensation plan and the evidence of the employees as to the close operational relationship between Apache and Apache Canada with respect to the plan, human resources and compensation overlap, it cannot be said the low evidentiary threshold for certifying common issues resting upon joint contractual obligations of Apache and Apache Canada does not have some basis in fact. The same can be said with respect to the certification of common issues over the duty of good faith and fiduciary duty of Apache, members of its Management Development and Compensation Committee, and Paramount, linked with the certified contractual issues.

[51] The appellants propose that the common issue on breach of contract set by the chambers judge be limited so that it only refers to the contracts implicit in the various award plans. That, however, would unduly narrow the common issues. The award plan contracts are arguably contracts with Apache Corporation. Narrowing the common issues as proposed would preclude the plaintiffs from demonstrating some kind of contractual relationship (whether it be an employment contract or not) with Paramount. Certification of the common issues is not the place to take live issues like this off the table.

[52] As noted, certification is not a process of summary judgment, and nothing that the chambers judge said about "common employment" meant anything more than that the plaintiffs had presented a plausible argument to that end.

[53] The common issues on the contractual relationship between the parties were appropriately identified and certified by the chambers judge.

(ii) Unjust enrichment

[54] The elements of the cause of action for unjust enrichment are well established: the defendant was enriched, the plaintiff suffered a corresponding deprivation, and the enrichment and corresponding deprivation occurred in the absence of any juristic reason: ***Garland v Consumers' Gas Co***, 2004 SCC 25, para 30, [2004] 1 SCR 629; ***Spring***, para 47; ***Atlantic Lottery***, para 70.

[55] Apache and Paramount say the employees' claim in unjust enrichment can offer no residual benefit to members of the class and therefore should not be certified: ***Spring***, para 52. If the employment contracts were breached, the employees will have their full remedy for which they are entitled in contract, and it can be readily realized from Apache and the members of its Management Development and Compensation Committee. If they were not breached, there will have been no unjust enrichment as Apache and Apache Canada will have a juristic reason for their position and the employees will not have suffered deprivation, as they will have received exactly the benefit to which they were entitled pursuant to the terms of the contracts. Thus, a claim for unjust enrichment "provide[s] no incremental benefit to members of the class", and they have no reasonable chance of success on this cause of action: ***Spring***, para 52; ***Atlantic Lottery***, paras 69-71.

[56] On this submission, the chambers judge held that a certification application was not the time to decide whether, if the employees failed in their claims respecting their contracts, the contracts themselves would in effect justify the enrichment and constitute a juristic reason. That conclusion would require findings on "all competing contractual interpretations and [determination of] 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".

[57] He held there remained a possibility the claims of unjust enrichment did not entirely overlap with the breach of contract claims, leaving a potential incremental benefit to the employees, providing remedies not available under contract. For example, s 14 of Apache's compensation plan provides for the "substitution on an equitable basis of appropriate stock of the Company or of the merged, consolidated, or otherwise reorganized corporation" and if a performance goal has not yet been attained by an employee, "the Committee in its discretion may make equitable payment or adjustment". He said if direct substitution is not possible or feasible, claims in unjust enrichment may provide for equitable relief.

[58] Taken in context, the use of the word "equitable" in Apache's Compensation Plan is not a reference to the law of equity. It refers in plain language to fairness and reasonableness. If read that way, s 14 may require the Management Development and Corporation Committee to ensure substitution of its outstanding awards on a fair and reasonable basis with the appropriate stock of a merged or consolidated entity, and permits them to make fair and reasonable payments or adjustments of a performance goal not yet attained.

[59] The class members will either be successful or unsuccessful in their various contract claims. Either way, they will have received all the compensation to which they are entitled; there will be no deprivation to the class members, and no corresponding enrichment to Apache or Paramount.

[60] There are no circumstances in which a claim in unjust enrichment will be available to the class member which their various contract claims would not provide. It is a "hollow cause of

action" as it provides no incremental benefit to the members of the class: ***Spring***, para 52; ***Atlantic Lottery***, para 68.

[61] The claim in unjust enrichment is not certified as a common issue in the class proceeding. It has no reasonable chance of success.

(iii) Conclusion on common issues

[62] The common issues as set out by the chambers judge in paragraphs 7(1) to (5), (7) and (8) of his order are appropriate and the criterion set out in s 5(1)(c) of the *Act* is met. As to paragraph 7(6), the claim of unjust enrichment has no reasonable prospect of success and the criterion set out in s 5(1)(c) of the *Act* is not met.

(e) Preferable procedure

[63] The fundamental determinant as to whether a class proceeding is preferable is whether "it presents a fair, efficient and manageable method of determining common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice and behavior modification". In addition, one must consider whether a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims and must take into consideration "all of the individual and common issues arising from the claims in the context of the factual matrix": ***LC v Alberta***, 2017 ABCA 284, paras 31, 32; ***AIC Limited v Fischer***, 2013 SCC 69, paras 21, 48, 49, [2013] 3 SCR 949; ***Hollick***, para 30.

[64] The chambers judge concluded the certified common issues "heavily outweigh any other questions". He said damages for the most part can be determined as a common issue and if individual issues arise, they can be addressed as necessary.

[65] The chambers judge said nothing suggests that any other members of the class are interested in controlling the prosecution of their own actions, there have been no other proceedings that would weigh against the class proceeding in this case, no alternative means in resolving the claims sought to be certified have been put forward, and the determination of the common issues would not create greater difficulties than would be experienced if sought by other means.

[66] Finally, he concluded that concerns over proportionality, specifically that pleading potentially redundant causes of action against multiple parties may cause manageability problems, did not justify refusing certification of Paramount as an additional defendant. As Apache Canada was the employer of all the class members before the sale, there is some evidence that the long-term compensation was in some way part of the terms of employment, and Paramount possesses much of the information relevant to calculating damages, it is a necessary and essential party to the class proceeding.

[67] Paramount says the employees' breach of contract claims against Apache are straightforward; if they succeed in their claim against Apache they will be paid the damages to which they are entitled and if they are unsuccessful they will have no claim over against Paramount. Paramount says its involvement "would increase the complexity of the class proceeding, slow down the pre-trial process and increase the amount of time the Court would have to spend dealing with these proceedings". It is concerned that the terms of each employee's employment agreement, the factual basis for examination of implied terms in those employment agreements, and the relevant factual matrix for each employee, will add unnecessary complexity. It also says approximately 95 employees have executed releases and there is a material risk that there will be individual issues associated with those releases and whether the replacement Paramount awards are adequate compensation for any failure of Apache to vest its unvested awards.

[68] In essence, Paramount suggests it is not proportional to include it as a defendant in the class proceeding because there is another defendant, Apache, who may first be liable and who can pay.

[69] A defendant should not be entitled to choose from whom a plaintiff seeks compensation. As the chambers judge said: ". . . caution should be exercised in choosing for plaintiffs which defendants they may proceed against, where there are valid causes of action against each of them."

[70] Paramount is not a minor player; as Apache Canada, it was the employer of all the employees before and after the sale and possesses much of the information relevant to the issues to be determined. It would be inappropriate to ask the 347 employees of Apache Canada as at August 18, 2017 who participated in the Apache Omnibus Compensation Plan to bring and progress their own actions.

[71] If there are individual issues remaining, particularly with respect to damage calculations or the impact of any release executed, they can be addressed following resolution of the common issues by the court or by appointment of independent persons, including with respect to resolving subsequent individual issues: ss 28 and 29 of the *Act*.

[72] The chambers judge properly concluded that this class proceeding is the preferable procedure for the fair and efficient resolution of the common issues and that it meets the criteria set out in s 5(1)(d) and (2) of the *Act.*

(f) Persons eligible to be appointed

[73] Neither Apache nor Paramount take issue with the plaintiff employees in this action being designated as the class action representatives, nor with their counsel being designated as representative counsel for the class. They are the appropriate designations.

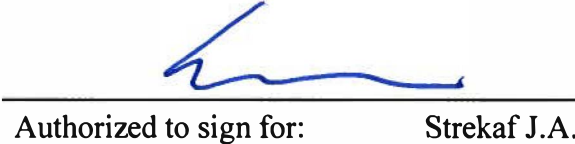
VIII. Conclusion

[74] The chambers judge determined that certification of this action facilitates access to justice, judicial economy, and behaviour modification; and it satisfies the general objectives of fairness and efficiency. The pre-conditions for certification set out in ss 5(1)(a), (b), (d), (e) and (2) of the *Act* are satisfied. As to s 5(1)(c), the common issues identified by the chambers judge in paragraph 7(1) to (5), (7) and (8) of his order are reasonable, supportable, and reflect no error in principle. As to paragraph 7(6), the claim of unjust enrichment has no reasonable prospect of success, offers no incremental benefit to the members of the class, and is not certified.

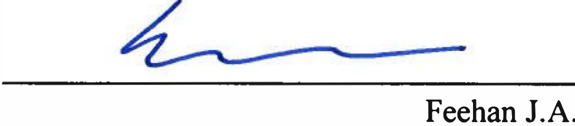
[75] The appeals are allowed in part, limited to the deletion of the claim in unjust enrichment as a common issue.

Appeals heard on November 1, 2022

Memorandum filed at Calgary, Alberta
this 17th day of November, 2022



Authorized to sign for: Strekaf J.A.



Feehan J.A.

Slatter J.A. (concurring in the result):

[76] I agree with the reasons of the majority deleting the common issue respecting unjust enrichment, but otherwise dismissing the appeals. I specifically agree with the majority's conclusion at para. 37 that we are unable to depart from the settled test for assessing whether the pleadings disclose a cause of action for certification purposes. The cases that the majority cites are binding on this panel.

[77] As the appellant Paramount points out, the certification judge is to perform a gatekeeping function, but the scope of that function is constrained by the established test for certification. Specifically, the merits of the proposed action are not directly considered, the pleadings need only disclose a cause of action, and the certification application is not to be turned into a form of summary judgment. That being said, the test for certification appears to be evolving and becoming more nuanced.

[78] The test on the first branch of certification, as presently stated, is whether, assuming the facts pleaded are true the pleadings disclose a cause of action. No evidence is permitted on the merits of the action at this stage. The pleadings are to be read generously, with allowances for drafting defects that could be corrected by amendment. In ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at para. 95, [2011] 2 SCR 261 this permitted the certification of a claim in unjust enrichment because it was "analytically defensible, albeit novel, even dubious".

[79] "Some basis in fact" is required to demonstrate that the other preconditions to certification are met, but this does not mean "some basis in fact that the action has merit". For example, evidence may be required to demonstrate that the damages alleged by the class have a "common" origin: ***Spring v Goodyear Canada Inc***, 2021 ABCA 182, 459 DLR (4th) 315. Some evidence may be required to prove that there is a plausible method of proving causation and damages: ***Pro-Sys Consultants Ltd v Microsoft Corporation***, 2013 SCC 57 at paras. 115, 140, [2013] 3 SCR 477; ***Andriuk v Merrill Lynch***, 2014 ABCA 177 at para. 11, 575 AR 208 affirming 2013 ABQB 422, 578 AR 40. Truly novel and speculative claims are sometimes not certified on the basis that the class proceeding is not the "preferable procedure". Thus, the apparent merits of the underlying claim are sometimes brought into play in later parts of the certification test.

[80] However, it is appropriate to ask whether the law, as it is presently interpreted and applied, serves the objectives of class proceedings in facilitating access to justice, judicial economy, behaviour modification, and the general objectives of fairness and efficiency. Cluttering up class action proceedings with collateral and marginally relevant causes of action does not serve these purposes. Nor does attempting to establish entirely novel causes of action through class proceedings.

[81] Section 5(1)(a) of the *Class Proceedings Act*, SA 2003, c C-16.5 only requires that the pleadings "disclose a cause of action". This can be contrasted, for example, with Federal Court R. 334.16(1)(a) under which the test for certification is that the pleadings "disclose a <u>reasonable</u> cause

of action". This establishes an overtly more robust gatekeeping role for the certification judge. If done properly, enhanced screening at the certification stage need not undermine the objectives of class proceedings legislation: see ***Mohr v National Hockey League***, 2022 FCA 145 at paras. 48-53. Similarly, Alberta R. 3.68(2)(b) provides for striking a pleading that "discloses no reasonable claim".

[82] An interesting juxtaposition of the two tests arose in ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19, 447 DLR (4th) 543. This litigation involved an application to strike the pleadings under the *Rules of the Supreme Court* (Newfoundland and Labrador), and a cross application to certify the class proceedings. The test in s. 5(1)(a) of the *Class Actions Act*, SNL 2001, c. C-18.1 required that the "pleadings disclose a cause of action". R. 14.24(1) of the *Rules* allowed the court to strike any portion of a statement of claim that "discloses no reasonable cause of action". Despite the difference in this wording, the Supreme Court of Canada treated the two tests as being the same. The claim had to disclose a "reasonable cause of action" which meant that "a claim that has no reasonable prospect of success" should not be allowed to proceed to trial. The test as stated in ***Atlantic Lottery*** appears to have evolved from how that test was applied in ***Elder Advocates***.

[83] While the test at certification of whether the pleadings "disclose a cause of action" has been said to be the same test as the one used to strike out pleadings, the situations are subtly different. One reason for a very strict test for striking out pleadings is that the evolution of the common law must not be unduly restricted: ***R. v Imperial Tobacco Canada Ltd***, 2011 SCC 42 at paras. 21-22, [2011] 3 SCR 45; ***Atlantic Lottery*** at para. 19. Merely because a cause of action has not previously been recognized does not mean that it is without any prospect of success. That, however, is not usually a risk on certification applications, particularly with respect to collateral causes of action.

[84] First of all, a more stringent gate keeping function at the certification stage would be aimed primarily at secondary causes of action, not the main cause of action. This is unlikely to impede the development of the common law. Secondly, the refusal to certify a class proceeding does not mean that the cause of action cannot be pursued. The plaintiffs always have the option of pursuing individual claims: ***Setoguchi v Uber BV***, 2021 ABQB 18 at para. 22, 24 Alta LR (7th) 158. Thirdly, if new facts emerge during the litigation process, the appropriate remedy is to amend the certification order under s. 9(4). Fourthly, when truly novel and speculative claims are advanced, a class proceeding is not always the preferable procedure.

[85] It follows that when applying the test for a "cause of action" in certification proceedings, a more balanced approach is called for. The formulation of the test in ***Atlantic Lottery*** as being whether there is a "reasonable cause of action", is to be preferred to that suggested in ***Andriuk***, 2013 ABQB 422 at para. 67: "A cause of action will be disclosed if the facts pleaded *could possibly* be considered to entitle the plaintiff to a legal remedy".

[86] This action is a good example. The various Awards Plans established by Apache Corporation have all the appearances of a contract. The appellants say they were entitled to cancel the Awards. The respondents disagree. That is a legitimate dispute that will be tried or settled based

on breach of contract. Adding other distracting causes of action does nothing to enhance access to justice or promote judicial economy. This is one reason that the issue of unjust enrichment should not have been certified.

[87] While it was not challenged, the same can likely be said for the claim for breach of fiduciary duty. It is not obvious that there is anything that breach of fiduciary duty can bring to this litigation that cannot be covered by the ordinary contractual doctrine of honest and good faith performance. Where the terms of the contract are set out in the pleadings, they can be examined to determine if there is a "reasonable" claim to be advanced: ***Haikola v The Personal Insurance Company***, 2019 ONSC 5982 at para. 48, 97 CCLI (5th) 73. The suggestion that the Management Development and Compensation Committee, which was an administrative instrument used by Apache Corporation to administer the Award Plans, somehow owed fiduciary duties to the employees is "analytically possible but dubious". Any such fiduciary duty would conflict with the directors' statutory duties towards the corporation. There is no plausible argument that there was any contractual relationship between the Committee members and the employees, or that somehow they became indirect guarantors of the obligations of Apache Corporation under the Awards Plans. The certification of this issue merely added unnecessary defendants to the litigation and raised issues that need not be resolved. If something emerges later, the common issues can be amended.

[88] Also undesirable is the almost mechanical addition of a claim for "punitive damages" to any class proceeding just because a bare pleading to that effect has been made. Unless there is some plausible basis for the claim for punitive damages, a class proceeding is not the most appropriate procedure to pursue it. If during the litigation process it becomes apparent that there are facts to support a claim for punitive damages, the appropriate approach is to amend the certified common issues before trial under s. 9(4).

[89] Further, where the pleadings disclose a theoretical cause of action, but there is no indication that anything beyond nominal damages will be recovered, the certifying judge may question whether certification of the action will meet the objectives of class proceedings and is the preferable procedure.

[90] In summary, on a test for certification of a class proceeding it is open to the certifying judge:

(a) to consider whether the pleadings disclose a *reasonable* cause of action;

(b) to identify what appears to be the main cause of action advanced, and to apply a generous test to that portion of the pleadings. Even if it discloses a novel cause of action, the action may still be certified. In these appeals, the main cause of action is in contract, a well established cause of action advanced on facts that plausibly raise it.

(c) With respect to secondary or collateral causes of action, however, the certification judge should ascertain whether the additional causes of action are "reasonable". They

should be examined not only on their prospect of success, but based on whether they will enhance the objectives of class proceedings in facilitating access to justice, judicial economy, behaviour modification, and the general objectives of fairness and efficiency. This may be done at the level of examining whether the pleadings disclose a reasonable cause of action, or whether class proceedings are the preferable procedure. In these appeals, it is questionable whether the common issues should have extended beyond those arising in contract.

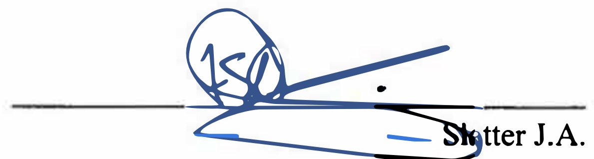
(d) In examining whether the pleadings disclose a reasonable cause of action, the certification judge should remember that the certification order can be amended before trial, if necessary, to ensure that the common issues are consistent with the evidence likely to be produced at the trial. Artificial attempts by the defendants to reduce the scope of pre-trial questioning or record production can be examined with that in mind.

(e) It is also relevant that the failure to certify a novel common claim does not mean that the claim cannot be pursued, as it is always open to plaintiffs who wish to extend the boundaries of the law to commence individual or collective actions.

Certification motions should not be turned into summary judgment applications. Nevertheless, the law is evolving to recognize that the gatekeeping function performed by the certification judge is a valuable component of the class proceedings regime.

Appeals heard on November 1, 2022

Memorandum filed at Calgary, Alberta
this 17th day of November, 2022



Slatter J.A.

Appearances:

E.J. Bodnar/ D. Rosenfeld
for the Respondents

A.P. Wilson/G. Price as Agent for C.E. Stokes
for the Appellants Apache Corporation, William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pitman

D.R. Beeman/J.A Legge
for the Appellant Paramount Resources Ltd.