CITATION: *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7
COURT FILE NO.: 11-CV-432919CP
DATE: January 2, 2014

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
BOB BRIGAITIS and CINDY RUPERT Plaintiffs	*Theodore P. Charney* and *Andrew Eckart* for the Plaintiffs
– and –	
IQT, LTD., c.o.b. as IQT SOLUTIONS, IQT CANADA, LTD., JDA PARTNERS LLC, IQT, INC., ALEX MORTMAN, DAVID MORTMAN, JOHN FELLOWS and RENAE MARSHALL Defendants	*Jeffrey E. Goodman* and *Jodi Gallagher Healy* for the IQT Inc., IQT. Canada Ltd., JDA Partners LLC, David Mortman and Alex Mortman.
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: November 25, 26, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] Pursuant to the *Class Proceedings Act,* 1992, S.O. 1992, c. 6, the Plaintiffs Bob Brigaitis and Cindy Rupert bring a motion for certification of this action against the Defendants IQT, Canada Ltd., IQT Inc., JDA Partners LLC, David Mortman, Alex Mortman, John Fellows, and Ranae Marshall. Mr. Fellows and Ms. Marshall did not defend and have been noted in default.

[2] The Plaintiffs claim is brought on behalf of the 521 dismissed employees of the now bankrupt IQT, Ltd. The employees have common law claims, including: wrongful dismissal, conspiracy, negligence, inducing breach of contract (which was incorrectly pleaded as an interference with economic relations tort), and breach of fiduciary duty. They have claims under the *Employment Standards Act, 2000*, S.O. 2000, c. 41. They also advance an oppression remedy claim under the Ontario *Business Corporation Act,* R.S.O. 1990, c. B.16, and the employees rely on alleged breaches of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 and the *Assignment and Preferences Act*, R.S.O. 1990, c. A.33.

[3] The Defendants IQT Inc., IQT, Canada Ltd., JDA Partners LLC, David Mortman, and Alex Mortman resist the certification motion and bring a Rule 21 cross-motion.

[4] Because of the operation of s. 97 of the *Employment Standards Act, 2000*, which bars an employee who files a complaint under the *Act* for unpaid wages, termination pay, and severance pay from commencing a civil proceeding for unpaid wages or for wrongful dismissal, and because of the design of Defendants' challenge to the certification of the action, in order to decide the Plaintiffs' certification motion, it is necessary to divide the putative Class Members into three groups based on whether: (1) they voluntarily made a claim under the *Employment Standards Act, 2000*; (2) they involuntarily made a claim under the *Act* for unpaid wages and vacation pay; or (3) they did not make a claim under the *Act.*

[5] The first group is the "Section 97 Group", which is made up of the 236 former employees who made claims under the *Employment Standards Act, 2000* and who have reviews pending before the Ontario Labour Relations Board ("OLRB") of the orders made by the Ministry of Labour. The Ministry ordered that the Directors of IQT, Ltd. pay to the employees outstanding wages, vacation pay, termination pay, and severance pay. These orders are called "Director's Order to Pay" or "DOTP," and the Defendants submit, in effect, that the Section 97 Group of employees, who are the beneficiary of the DOTPs, should be excluded from the class action.

[6] The second group is the "Assessed Group", which is made up of 136 former employees who are also parties to the pending OLRB review proceeding, although they did not file claims under the *Employment Standards Act, 2000*. Although they did not file claims, they were, nevertheless, assessed by the Ministry of Labour as being owed unpaid wages and vacation pay. Pursuant to a DOTP, the directors of IQT, Ltd. were ordered to pay the unpaid wages and vacation pay of the Assessed Group. The Defendants submit, in effect, that the Assessed Group employees should be excluded from the class action.

[7] The third group is the "No DOTP Group", which is made up of the 149 former employees who are not listed in any Ministry of Labour order to pay made against the directors. This third group have not made a claim under the *Employment Standards Act, 2000*, and this group of former employees is not a party to the OLRB review proceedings that are still pending.

[8] The Defendants submit that the Court has no jurisdiction over the claims of the Section 97 Group and that the Court ought not to assume jurisdiction over the claims of the Assessed Group. The Defendants submit that the claims of the Section 97 Group and the claims for unpaid wages and vacation pay of the Assessed Group are an abuse of process and should be stayed because there is another proceeding pending (the OLRB review) between the same parties in respect of the same subject matter.

[9] In their Rule 21 motion, the Defendants submit that the Plaintiffs' Amended Statement of Claim fails to disclose reasonable causes of action in: (a) corporate oppression under s. 248 of the Ontario *Business Corporations Act*; (b) unlawful interference with economic relations; (c) breach of fiduciary duty and aiding and abetting a breach of fiduciary duty; and (d) breaches of the *Bankruptcy and Insolvency Act,* the *Fraudulent Conveyances Act*, and the *Assignment and Preferences Act.*

[10] The Defendants also challenge most of the certification criteria for most of the Plaintiffs' claims. The Defendants do not oppose the negligence claim as a reasonable cause of action, but

they resist its certification on other grounds. In particular, the Defendants submit that the various claims advanced in the Plaintiffs' proposed class action fail the preferable procedure criteria.

[11] For the reasons that are detailed below, I grant the Plaintiffs' certification motion. As I will explain below, the Class Members' claims for negligence, conspiracy, inducing breach of contract, and for an oppression remedy are free-standing claims not before the OLRB and these claims are suitable for a class action. The Section 97 Groups' claims before the OLRB do preclude their wrongful dismissal claims being advanced in a class action but, in my opinion, the exclusion of this group's wrongful dismissal claims does not preclude the Section 97 Group from participating in the class action for the other claims shared by all former employees.

[12] I conclude that the Plaintiffs' proposed class action should be certified: (a) for the 521 dismissed employees to advance claims of negligence, conspiracy, inducing breach of contract, and for an oppression remedy; and (b) for the Assessed Group and the No DOTP Group to advance wrongful dismissal claims. The Plaintiffs' claims for breach of fiduciary duty and aiding or abetting a breach of fiduciary duty should not be certified, and those claims should be dismissed.

B. EVIDENTIARY BACKGROUND

[13] The Plaintiffs supported their motion for certification with an affidavit from Ms. Rupert and from Andrew Eckart, who is a lawyer with Falconer Charney LLP, lawyer of record and proposed Class Counsel. Mr. Eckart was cross-examined on his affidavit.

[14] The Defendants supported their Rule 21 motion and resisted the motion for certification with the affidavit of Mitchell R. Smith, who is a lawyer with Hicks Morley Hamilton Stewart Storie LLP, which is the lawyer of record for the Defendants.

C. FACTUAL AND PROCEDURAL BACKGROUND

1. Introduction

[15] The Defendants deny any wrongdoing, but for the exclusive purposes of the certification motion and the cross-motion, there is some basis in fact for the following findings of fact about the factual and procedural background to the Plaintiffs' claims.

2. The Claim Against the Defendants

[16] In September 2008, IQT, Inc. was incorporated in the State of Delaware. Its majority shareholders are John Fellows, Alex Mortman, and David Mortman.

[17] IQT, Inc. maintains a policy of insurance issued by Chubb, effective from October 10, 2010 to October 10, 2011, with an aggregate limit of liability of $5 million USD for Directors and Officers Liability and Employment Practices Liability. Under the Employment Practices Liability coverage, IQT, Inc. and its directors and officers are insured for claims for wrongful dismissal and negligence.

[18] JDA Partners LLC is a limited liability company organized in the State of New York. Its managing directors are the Mortmans. JDA Partners LLC shared the same head office as IQT, Inc.

[19] Within a few weeks, in Ontario, IQT, Inc. incorporated a wholly-owned subsidiary, IQT Canada, Ltd. Mr. Fellows and the Mortmans were appointed as directors of IQT Canada, Ltd.

[20] The next month, IQT Canada, Ltd. acquired 100% of the shares of Durham Contact Centre Limited and changed its name to IQT, Ltd., whose directors included Mr. Fellows and the Mortmans. IQT, Ltd. operated a call centre in Oshawa, Ontario.

[21] One of the employees of IQT, Ltd. was Mr. Brigaitis, who had been employed by Durham Contract since August 2002 in supervisory positions. As an employee of IQT, Ltd., he eventually assumed managerial responsibilities.

[22] Another employee was Ms. Rupert, who had been employed by IQT, Ltd.'s predecessor company from April, 2007 in a supervisory role. Ms. Rupert eventually assumed a managerial role at IQT, Ltd.

[23] Bell Canada was IQT, Ltd.'s only major contract for its call centre. The viability of IQT, Ltd.'s business was dependent on its contract with Bell Canada, and to finance its operations, IQT, Ltd. entered into an Accounts Purchase Agreement with Wells Fargo Business Credit Canada ULC. Under this agreement, Wells Fargo provided accounts receivable financing. Wells Fargo would pay a percentage of the face amount of the Bell Canada receivables and then Wells Fargo would collect the receivable directly from Bell Canada.

[24] Since at least December 31, 2009, IQT, Ltd. has been insolvent, but notwithstanding the insolvency, the Defendants used IQT, Ltd.'s assets and funds for their own purposes. Money was transferred into IQT, Inc.'s bank account in New York and then transferred into a bank account administered by JDA Partners. The funds were used for personal expenses and travel, including monthly golf and country club dues, cars, and quarterly dividend payments to the Mortmans' family and friends.

[25] In late 2010, Wells Fargo received the 2009 consolidated audited financial statements for the IQT corporations. The audited statements revealed that the unaudited 2009 financial statements were materially false and inaccurate. The audited statements showed a loss of income of over $3 million. After reviewing the statements, Wells Fargo retained and appointed a Chief Restructuring Officer, Barrie Kassoff, to operate IQT, Canada Ltd. On review of the finances of the IQT corporations, Mr. Kassoff found significant shortcomings in IQT, Inc. and its subsidiaries' financial reporting and in the day-to-day operations. Mr. Kassoff discovered major adverse changes to IQT, Ltd.'s contract with Bell.

[26] In July, 2011, IQT, Ltd. employed 521 employees, including Mr. Brigaitis and Ms. Rupert. Significantly, the employees were paid on their July 1, 2011 payday. This fact could prove legally significant because at this juncture, technically speaking, the employees were not unpaid creditors of IQT, Ltd. (This fact is significant to the arguments later about whether the employees are qualified to be complainants to advance an oppression remedy.)

[27] On July 15, 2011, IQT, Ltd. dismissed all its employees effective immediately. IQT, Ltd. told the employees that that they would not be receiving any outstanding pay, vacation pay, termination pay, severance pay, or pay in lieu of notice. The employees were told that their benefits were discontinued as of that date.

[28] On July 16, 2011, the employees established the "IQT Action Facebook Group" to "fight for and obtain wages, severance and vacation pay." There are 410 members of the Group including proposed Class Counsel, Charney Lawyers.

[29] On August 2, 2011, Charney Lawyers (which is proposed as Class Counsel) posted a document on its webpage called "Important Note – Ministry of Labour v. Class Action." The document outlined various limitations of the Ministry of Labour process compared to the potential class action proceeding, including the potential difficulty of collecting money from IQT, Ltd. The employees were told that under the *Employment Standards Act, 2000,* the directors of IQT, Ltd. could be ordered to pay back wages but no other amounts and that termination and severance pay under the *Act* is less money than what a court would award for a wrongful dismissal claim. The note also stated:

> If you file a claim with the Ministry of Labour against IQT Ltd., you may be precluded from participating in the class action. Section 97(1) of the *Employment Standards Act, 2000* ("the Act") prohibits an employee from participating in a lawsuit to recover wages if the employee also files a complaint with the Ministry. If you have filed a complaint, you have two weeks from the day you file your complaint to withdraw it under section 97(4) of the Act. To withdraw your complaint, you must send a letter within the two weeks to the Ministry stating your intention to withdraw the complaint.

3. *The Statutory Proceedings and the Proposed Class Action*

[30] Following the closure of IQT, Ltd., 242 employees filed complaints with the Ministry of Labour pursuant to the *Employment Standards Act, 2000.* The Ministry of Labour's "Claim Guide" advises complainants that:

> In most cases, if you have already started a court action against the employer, you cannot file a claim about the same matter. If, after you file a claim, you wish to start a court action against the employer about the same matter, you must withdraw your claim within 2 weeks from the date of filing your claim in order to proceed with the court action.

[31] Between July 27 and August 4, 2011, thirty-four of the former IQT, Ltd. employees who had filed Ministry of Labour claims withdrew those claims.

[32] On August 5, 2011, the Ministry of Labour issued an order against IQT, Ltd. for outstanding wages, vacation pay, termination pay, and severance pay.

[33] On August 16, 2011, Mr. Brigaitis and Ms. Rupert commenced this proposed class action. In their Amended Statement of Claim, they plead claims for wrongful dismissal, negligence, conspiracy, intentional interference with economic relations, and for an oppression remedy under the Ontario *Business Corporations Act.* They also claim breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. The Plaintiffs claim aggravated and punitive damages. The Amended Statement of Claim claims damages in the amount of $20 million.

[34] In the proposed class action, the Plaintiffs allege that the call centre's closure and non-payment of monies owed to employees was caused by the Defendants' diverting monies for personal purposes before the closure. The negligence claim is that the Defendants breached a duty of care to ensure that if IQT, Ltd. ceased operations, it could pay termination entitlements to the employees. The conspiracy claim is that the Defendants conspired to wrongfully dismiss the employees and conspired to divert assets away from IQT, Ltd. that should have been available to the employees. The inducing breach of contract claim is that the Defendants stripped IQT, Ltd. of assets disabling it from paying the employees upon termination. The oppression claim is that the employees had a reasonable expectation of receiving termination compensation and the Defendants breached the duty of ensuring funds were available. The breach of fiduciary duty

claim, which relies on New York State law, alleges that the Mortmans stripped IQT, Ltd. of assets and prevented IQT, Ltd. from paying employees their termination entitlements.

[35] The Plaintiffs also claim that IQT, Ltd. made a transfer of property or made a payment in favour of a creditor while insolvent contrary to s. 95 of the *Bankruptcy and Insolvency Act,* s. 2 of the *Fraudulent Conveyances Act*, or s. 4 of the *Assignment and Preferences Act*. The allegation is that Defendants directed payments to themselves or others improperly when IQT, Ltd. was insolvent. However, in their Reply Factum, the Plaintiffs state that these insolvency statutes are not pleaded as independent causes of action but rather as wrongful acts informing the tort claims that have been pleaded.

[36] In September 2012, Wells Fargo commenced an action in New York State with respect to IQT, Ltd.'s closure. In the New York action, Wells Fargo alleged that under New York State law Alex Mortman had breached a fiduciary duty to IQT, Ltd.'s creditors and aided and abetted others' breach of fiduciary duty. Alex Mortman, however, challenged the pleading that he owed fiduciary duties to IQT, Ltd.'s creditors, and Justice Shirley Werner struck out the breach of fiduciary duty and aiding and abetting fiduciary duty claims. She did so on the basis that Canadian law applied and that under Canadian law, directors do not have fiduciary duties to creditors of the corporation.

[37] On September 6, 2011, the Ministry of Labour issued a second order to pay against IQT, Ltd. for outstanding wages, vacation pay, termination pay, and severance pay, calculated pursuant to the provisions of the *Employment Standards Act, 2000.* The orders of August 5, 2011 and September 6, 2011, indicate that 242 employees had filed complaints under the *Act*. These employees are the so-called Section 97 Group.

[38] The Orders to Pay issued to IQT, Ltd. remained unsatisfied, and on September 28, 2011, the Ministry of Labour issued Directors Orders to Pay in the amount of $503,794.97 against IQT, Ltd.'s directors, including the Mortmans. The orders were for amounts owing to the 242 former IQT, Ltd. employees. The Orders to Pay describe each employee's claim and the amount of unpaid wages, vacation pay, termination pay, and severance pay owing to each employee.

[39] The Mortmans filed Applications for Review of the Ministry's orders with the OLRB.

[40] On October 12, 2011, Charney Lawyers again communicated to potential Class Members about withdrawing their complaints under the *Act* in order to participate in the class action. However, following this communication, no employees asked to withdraw their *Employment Standards Act, 2000* claims.

[41] On December 20, 2011, on an application by Revenu Québec and by order of the Superior Court of Quebec, IQT, Ltd. was assigned into bankruptcy.

[42] The Ministry of Labour filed a proof of claim with IQT, Ltd.'s trustee in bankruptcy for amounts owing to employees under the *Employment Standards Act, 2000.*

[43] Many former IQT, Ltd. employees applied for and received payments under the federal government's *Wage Earner Protection Program Act,* S.C. 2005, c. 47. Recently, the Federal Government was granted standing by the OLRB to advance subrogated claims for the payments it made to the employees.

[44] On April 20, 2012, the Ministry of Labour issued another pay order against the Mortmans. The Mortmans were ordered to pay $124,584.67 in unpaid wages and vacation pay to

140 employees, 136 of whom had not filed a complaint with the Ministry of Labour. The beneficiaries of this order are the employees of the so-called Assessed Group. Mr. Brigaitis is an involuntary member of the Assessed Group. Although the members of the Assessed Group did not actually file complaints; i.e. make claims under the *Employment Standards Act, 2000*, the Assessed Group were, nevertheless, assessed by the Ministry of Labour as being owed unpaid wages and vacation pay.

[45] The assessment process for the Assessed Group took place pursuant to s. 81 (1)(a) of the *Employment Standards Act, 2000*, which is a provision that authorizes the Ministry to issue a Director's Order to Pay where the employer is insolvent, proof of claim has been filed with the bankruptcy trustee, and the claim has not been paid. Section 81 (1)(a) states:

> *Directors' liability for wages*
>
> 81. (1) The directors of an employer are jointly and severally liable for wages as provided in this Part if,
>
> > (a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;

[46] The Mortmans again filed Applications for Review to the OLRB. The Section 97 Group and the Assessed Group are parties to the OLRB proceedings along with the Mortmans and the Ministry of Labour. As noted above, the Federal Government is also a party with respect to the *Wage Earner Protection Program Act* payments to the employees, for which it asserts a subrogated claim.

[47] In the OLRB proceedings, the Mortmans made an offer to settle and 19 of the 375 employees have accepted the offer.

[48] If the outcome of the OLRB proceedings is that the orders to pay are upheld in whole or in part, the Director of Employment Standards can file those orders with a court of competent jurisdiction and enforce them in the same manner as judgments or orders of the court. The Ministry of Labour treats enforcement of orders against non-resident directors on a case-by-case basis.

[49] There remains 149 employees who did not file complaints under the *Employment Standards Act, 2000* and who are not included in the various orders for payment. This is the so-called "No DOTP Group." Ms. Rupert is a member of the No DOTP Group.

D. DISCUSSION AND ANALYSIS

1. Introduction and Methodology

[50] As described at the outset of these Reasons for Decision, Mr. Brigaitis' and Ms. Rupert's certification motion is met by a cross motion under Rule 21 of the *Rules of Civil Procedure*. The outcome of the cross-motion will very much shape the proposed class action, because the various challenges to the various causes of action will determine what claims are certifiable and who should be members of the class.

[51] In a certification motion, defendants typically just rely on s. 5 (1)(a) of the *Class Proceedings Act, 1992* to put the burden on the Plaintiff to show a reasonable cause of action and

defendants do not often bring a cross-motion like the one in the case at bar where the burden is on them to satisfy the elements of the various branches of Rule 21.

[52] The Defendants' cross-motion goes beyond the issue of whether the Plaintiffs' pleadings discloses a cause of action, which issue is resolved by determining whether it is plain and obvious that the Plaintiffs have not pleaded a tenable cause of action. The cause of action determination, which is governed by rule 21.01 (1), overlaps with the cause of action criterion found in s. 5 (1)(a) of the *Class Proceedings Act, 1992*. The Defendants' motion, however, goes farther and also challenges several causes of action on what may be described as jurisdictional grounds; for example, the Defendants submit that the jurisdiction to resolve the claims of the Section 97 Group and of the Assessed Group rests with the OLRB and not the Superior Court.

[53] Thus, in the case at bar, it is necessary to analyze the numerous causes of action alleged first through the lens of rule 21.01 (1) and 21.01 (3) and then to consider the certification criteria of class definition, common issues, preferable procedure, and suitable representative plaintiff.

[54] Therefore, in the case at bar, I will defer consideration of the certification criteria and first analyse the Defendants' cross motion to determine what causes of action emerge as candidates for certification. The analysis of some of the various causes of action will also influence the definition of the class. After the analysis of the causes of action, I will consider the criteria for certification.

[55] As a matter of methodology for this discussion and analysis section, I will consider the various issues in the case at bar in the following order and under the following headings:

- Introduction and Methodology
- Section 5 (1)(a) of the *Class Proceedings Act, 1992* and Rule 21 of the *Rules of Civil Procedure*
- The *Bankruptcy and Insolvency Act*, the *Fraudulent Conveyances Act*, and the *Assignment and Preferences Act* Claims
- The Breach of Fiduciary Duty Claims
- The Negligence Claim
- The Inducing Breach of Contract Claim
- The Conspiracy Claim
- The Oppression Remedy Claim
- The Statutory Bar to Concurrent Civil and *Employment Standards Act, 2000* Claims
- Certification – General Principles
- The Cause of Action Criterion
- The Class Definition Criterion
- The Common Issues Criterion
- The Preferable Procedure Criterion
- The Representative Plaintiff Criterion
- Conclusion about Certification

2. *Section 5 (1)(a) of the Class Proceedings Act, 1992 and Rule 21 of the Rules of Civil Procedure*

[56] Before, getting underway with the discussion and analysis, it is necessary to say something about s. 5 (1) (a) of the *Class Proceedings Act, 1992* and the differences between rule 21.01 (1)(b) and rule 21.01 (3).

[57] Section 5 (1)(a) of the *Class Proceedings Act, 1992* requires that the pleadings of a proposed class action disclose a cause of action. The "plain and obvious" test derived from rule 21.01 (1)(b) for disclosing a cause of action from *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5 (1)(a) of the *Class Proceedings Act, 1992*: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[58] Typically, the s. 5 (1)(a) (cause of action) criterion is not difficult for a Plaintiff to satisfy because the law about the plain and obvious test under rule 21.01 (1)(b) is very tolerant to allowing claims to proceed.

[59] Rule 21.01 (1)(b) states:

> 21.01(1) A party may move before a judge, ...
>
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

[60] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc., supra,* and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[61] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9.

[62] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n. However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

[63] Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

[64] In the case at bar, however, in attacking the various cause of action advanced by the Plaintiffs, the Defendants rely on both rule 21.01 (1)(b) and also rule 21.01 (3), which sets a different standard than that for the rule 21.01 (1)(b) and for the s. 5 (1)(a) of the *Class Proceedings Act, 1992* analysis.

[65] Rule 21.01 (3) states:

> *To Defendant*
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> *Jurisdiction*
>
> (a) the court has no jurisdiction over the subject matter of the action; ...
>
> *Another Proceeding Pending*
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
>
> *Action Frivolous, Vexatious or Abuse of Process*
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
>
> and the judge may make an order or grant judgment accordingly.

[66] When a motion is brought under rule 21.01(3)(a), the court must decide whether it has the authority or jurisdiction to decide the subject matter of the dispute. Unlike a rule 21.01(1)(b) motion to strike a claim, there is no forgiving "plain and obvious" standard; under rule 21.01 (3)(a), either the court has jurisdiction or it does not: *McCracken v. Canadian National Railway Co.*, [2010] O.J. No. 3466 at paras. 113-141 (S.C.J.).

[67] The test for dismissing or staying an action is also different for rule 21.01 (3)(c), where the crucial element is whether another proceeding is pending between the same parties in respect of the same subject matter, and for rule 21.01 (3)(d), where the crucial element is the law about *res judicata* and abuse of process.

[68] If there is another proceeding in Ontario or another jurisdiction between the same parties in respect of the same subject matter, the test for determining whether the action should be dismissed or stayed is that a stay or dismissal should only be ordered in the clearest of cases where: (a) the continuation of the action would cause the defendant prejudice or injustice, not merely inconvenience or additional expense; and (b) the stay or dismissal would not be unjust to the plaintiff: *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221 (Ont. Gen. Div.); *TDL Group Ltd v. 1060284 Ontario Ltd.*, [2000] O.J. No. 4582 (S.C.J.); *Grover v. Canada (Attorney General)* (2005), 78 O.R. (3d) 126 (Ont. S.C.J.); *Sun Life Assurance Co of Canada v. Yellow Pages Group Inc.*, 2010 ONSC 2780 (Ont. S.C.J.); *B.L. Armstrong Co. v. Cove-Craft Indust. Inc.* (1980), 27 O.R. (2d) 490 (Ont. Dist. Ct.); *Varnam v. Canada (Minister of National Health and Welfare)* (1987), 12 F.T.R. 34 at p. 36 (F.C.T.D.).

3. *The Bankruptcy and Insolvency Act, the Fraudulent Conveyances Act, and the Assignment and Preferences Act Claims*

[69] As noted above, the Plaintiffs claim that IQT, Ltd. made a transfer of property or made a payment in favour of a creditor while insolvent contrary to s. 95 of the *Bankruptcy and Insolvency Act*, s. 2 of the *Fraudulent Conveyances Act*, or s. 4 of the *Assignment and Preferences Act*. The fundamental allegation is that Defendants directed payments to themselves or others improperly when IQT, Ltd. was insolvent.

[70] The Defendants submit that these allegations do not disclose a reasonable cause of action and that the Plaintiffs have failed to show any basis in fact for these causes of action, and, therefore, these claims should not be certified.

[71] I do not have to decide, however, whether these insolvency related claims show a reasonable cause of action, because, as noted above, in their Reply Factum, the Plaintiffs state that these insolvency statutes are not pleaded as independent causes of action but rather as wrongful acts informing the tort claims that have been pleaded.

[72] Thus, the Plaintiffs are not relying on the *Bankruptcy and Insolvency Act*, the *Fraudulent Conveyances Act*, and the *Assignment and Preferences Act* claims to satisfy the s. 5 (1)(a) (cause of action) criterion for certification.

[73] Therefore, I will not be certifying these insolvency claims, and I will only address them as necessary in the context of the other claims and the various criteria for certification.

4. *The Breach of Fiduciary Duty Claims*

[74] The Defendants submit that the Plaintiffs' claim for breach of fiduciary duty and aiding and abetting breach of fiduciary duty as set out in paragraphs 96 to 106 of the Amended Statement of Claim should be struck for failing to disclose a reasonable cause of action or for being an abuse of process.

[75] I agree with the Defendants that these claims should be struck.

[76] It was not disputed that under Ontario law, employers, and the directors and owners of a corporate employer do not have a fiduciary relationship with the employees of their corporation. However, New York law is apparently different, and the Plaintiffs plead in paragraph 96 of the Amended Statement of Claim that the misconduct of the Mortmans and Mr. Fellows occurred in the State of New York and, therefore, New York State law applies.

[77] The pleaded application of New York State law, however, has to be placed in the context that the Plaintiffs have also pleaded that the Ontario Plaintiffs and their Ontario proposed Class Members were all employees of an Ontario corporation with employment relationships governed by Ontario law. Further, the pleading of New York law has to be placed in the context that the Ontario employees are advancing employment law claims and tort claims based on Ontario common law and Ontario Statures and they are advancing an oppression remedy under an Ontario corporate law statute with allegations that the directors have breached Canadian insolvency statutes by taking assets out of an Ontario corporation.

[78] In these circumstances, independent of anything Justice Werner may have decided and accepting the facts set out in the Amended Statement of Claim as true, it is plain and obvious that

the former employee's rights will be governed by Ontario law and this action will be governed by Ontario law and not by New York State law, and it is plain and obvious that there is no tenable claim for breach of fiduciary duty or for aiding and abetting a breach of fiduciary duty under New York State law.

[79] In *Yordanes v. The Bank of Nova Scotia* (2006), 78 O.R. (3d) 590 (S.C.J.), which was an extraordinarily complex proposed class action involving Canadian law and the law from three foreign jurisdictions, Justice Cullity struck out the totality of the statement of claim with leave to amend for the plaintiff's failure to properly plead foreign law. Justice Cullity discussed the difficulty of applying the law associated with rule 21.01 (1)(b) to a plea of foreign law because of the principle that the court must accept that the pleaded facts are true and capable of proof. For present purposes, it is not necessary to set out Justice Cullity's treatment of the problem, and it is sufficient to note that at paragraph 15 of his judgment, he said that if the plaintiff pleaded a cause of action under a foreign law and it was plain and obvious that the facts pleaded would not justify the application of the foreign law, the pleading must be struck. That is the circumstance of the case at bar.

[80] I, therefore, strike the claims under New York State law for breach of fiduciary duty and for aiding and abetting a breach of fiduciary duty from the Amended Statement of Claim.

5. The Negligence Claim.

[81] In light of the Plaintiffs' stated intension to amend the negligence pleading to add an allegation that the Mortmans failed to properly supervise Fellows, the Defendants do not oppose negligence as a reasonable cause of action, and the Defendants do not oppose certification of the common issues set about the negligence claim.

[82] I conclude that the Plaintiffs' negligence plea satisfies the cause of action criterion.

6. The Inducing Breach of Contract Claim

[83] In paragraph 71 of the Amended Statement of Claim, the Plaintiffs plead that the manner in which the employment contracts were terminated was unlawful and constitutes an intentional interference with economic relations. However, in paragraph 100 of their factum for the certification motion, the Plaintiffs state that paragraph 71 contains some errors in drafting and that they actually intended to allege the tort of inducing breach of contract.

[84] While the Defendants in their factum picked up on the problems of the Plaintiffs' not having pleaded the constituent elements of the tort of intentional interference with economic relationships, the Defendants accept that there could be a common issue about the tort of inducing breach of contract if the Amended Statement of Claim is further amended to allege the tort of inducing breach of contract and not the tort of intentional interference with economic relationships.

[85] I, therefore, grant leave to the Plaintiffs to amend their pleading to allege the tort of inducing breach of contract.

[86] Given the position taken by the Defendants, I also conclude that the inducing breach of contract claim would satisfy the cause of action criterion for certification.

[87] In these circumstances, it is not necessary for me to comment about the Defendants' argument about the tenability of the original plea of the tort of interference with economic relations.

7. The Conspiracy Claim

[88] The Defendants did not challenge the legal tenability of the Plaintiffs' conspiracy claim or the associated proposed common issues, save with respect to those common issues that appeared to rely on the insolvency statutes as causes of action.

[89] Therefore, I conclude that the conspiracy claim satisfies the cause of action criterion for certification

8. The Oppression Remedy Claim

[90] The Plaintiffs seek an oppression remedy under sections 245 and 248 of the Ontario *Business Corporations Act,* R.S.O. 1990, c. B.16, which state:

> *Definitions*
>
> 245. In this Part, …
>
> "complainant" means,
>
> > (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
> >
> > (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
> >
> > (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.
>
> *Oppression remedy*
>
> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> *Idem*
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

Court order

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, ...

[91] The Plaintiffs advance the oppression remedy claim as in their capacity as wrongfully dismissed employees of the Defendant corporations. The Plaintiffs and the Class Members are not security holders, directors, or officers of the corporation, i.e., the Plaintiffs are not persons expressly within the definition of a complainant capable of advancing an oppression remedy claim. The Plaintiffs and the Class Members' status to advance an oppression remedy claim thus depends upon the court exercising its discretion under the definition of a complainant under. 245 (c) to decide that the Plaintiffs and the Class Members are a proper person to make an application for an oppression remedy. In the case at bar, the Defendants argue, however, that based on the decided case law about the court's discretion to qualify a person as a complainant, the Plaintiffs and the Class Members would not qualify to advance an oppression remedy.

[92] The Defendants argue that while in rare cases, a creditor might qualify as a complainant, the Plaintiffs and the Class Members were not creditors during the time of the alleged stripping of the assets of their employer by the Mortmans and they were not creditors at the time of their dismissal by the employer. The Defendants rely on the principles from *Royal Trust v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. S.C.J.) that debt actions should not be routinely turned into oppression remedies and that a creditor who has no particular or legitimate interest in the manner in which the affairs of the company are managed does not qualify as complainant.

[93] The Defendants argue that employees *simpliciter* been not been granted the status of a complainant and they rely on a line of cases that have held that the oppression remedy was not meant to provide a mechanism for employees to pursue a claim for wrongful dismissal: *Mohan v. Philmar Lumber (Markham) Ltd.* (1991), 50 C.P.C. (2d) 164 at para. 2 (Ont. Gen. Div.); *Daniels v. Fielder* (1988), 65 O.R. (2d) 629 (H.C.J.); *Flatley v. Algy Corp. (c.o.b. Mezzrow's)*, [2000] O.J. No. 3787 at para. 21 (S.C.J.).

[94] A review of the case law does indicate that simply being an employee adversely affected by the activities of a corporate employer will not qualify an employee as a complainant, and rather employees have been only granted status as complainants when: (a) the employee is also a director or officer or owner of the corporation and the dismissal is part of an overall pattern of oppression: *Naneff v. Con-Crete Holdings Ltd.,* (1993), 11 B.L.R. (2d) 218 (Ont. Gen. Div.), varied (1994), 19 O.R. (3d) 691 (Div. Ct.), varied (1995), 23 O.R. (3d) 481 (C.A.), *Benedetti v. North Park Electronics (1980) Ltd.*, [1997] O.J. No. 597 (Gen. Div.), aff'd. [1997] O.J. No. 5244 (Div. Ct.), *Clitheroe v. Hydro One Inc.*, [2002] O.J. No. 4383 (S.C.J.); (b) the employee is a creditor at the time of the oppressive conduct; or (c) the employee is dismissed and the oppressive conduct is then initiated to disappoint the reasonable expectations of the employee who has become or will become a creditor of the corporation: *Fortnum v. Royal City Plymouth Crysler (1999) Ltd.*, [2006] O.J. No. 5154 (S.C.J.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), leave to appeal to the S.C.C. refused [2001] S.C.C.A. No. 397.

[95] The Defendants' argument is thus strong that the proposed Class Members do not qualify as complainants, and this argument may ultimately succeed, but the argument is not strong enough to show that it is plain and obvious that the Plaintiffs and the Class Members will not be granted the status of a complainant. As noted by Justice Leitch in *Fortnum v. Royal City Plymouth Crysler (1999) Ltd., supra* at para. 14 critical to the finding that a party is a

complainant is the requirement that the person has a reasonable expectation that a company's affairs will be conducted with a view to protecting his or her interests. In my opinion, it is not plain and obvious that a former employee of IQT, Ltd. did not have a reasonable expectation that his or her employers' assets would not be removed in anticipation of dismissing the employees.

[96] In *Downtown Eatery (1993) Ltd. v. Ontario, supra*, in June 1993, the plaintiff Mr. Alouche was dismissed from his position as a manager of a nightclub known as For Your Eyes Only, and he commenced a wrongful dismissal action against Best Beaver Management Inc., which was the corporation that issued his pay cheque, although his employment contract identified For Your Eyes Only as the employer. Best Beaver Management was controlled by the defendants Messrs. Grad and Grosman. It took three years for the wrongful dismissal action to come on for trial in the summer of 1996, and a few months before the trial, Messrs. Grad and Grosman reorganized their companies and Best Beaver Management ceased to do business and became judgment proof. Mr. Alouche was successful in his wrongful dismissal action (which is the leading Ontario case about the common employer doctrine) and when his judgment went unpaid, he sued Messrs. Grad and Grosman for an oppression remedy. Reversing the trial judge, the Ontario Court of Appeal granted an oppression remedy to Mr. Alouche.

[97] In *Downtown Eatery (1993) Ltd. v. Ontario,* the Court of Appeal drew the inference that it was the reasonable expectation of Mr. Alouche that Messrs. Grad and Grosman, in terminating the operations of Best Beaver Management and leaving it without assets to respond to a possible judgment in his wrongful dismissal action, should have retained a reserve to meet the possible judgment. In *Downtown Eatery (1993) Ltd.*, there is no discussion about how it is that Mr. Alouche qualified himself to be a complainant, but the Court of Appeal had no difficulty in deciding that he was qualified for an oppression remedy as an employee with only a potential claim as a judgment creditor at the time when the oppressive conduct occurred. It seems that the key element to this holding was that as an employee, Mr. Alouche had a reasonable expectation that the corporation would respect his inchoate wrongful dismissal claim.

[98] I appreciate that it is arguable that the position of the Plaintiffs and the Class Members is more remote than that of Mr. Alouche but, in my opinion, it is not plain and obvious that their relationship is so much more remote that it could not be inferred that they had a reasonable expectation that the Defendants would not strip their employer of all its remaining assets before dismissing its employees without notice or any severance pay or payment of unpaid wages.

[99] I conclude that it is not plain and obvious that the former employees of IQT, Ltd. do not have an oppression remedy claim.

9. *The Statutory Bar to Concurrent Civil and Employment Standards Act Claims*

[100] So far, the discussion establishes that the Plaintiffs and the Class Members have causes of action for the torts of negligence, conspiracy, inducing breach of contract, and for an oppression remedy. It was not disputed that subject to s. 97 of the *Employment Standards Act,* 2000, the Plaintiffs and the Class Members also have wrongful dismissal claims and claims under the *Act.*

[101] Such being the available claims, the Defendants submit, as noted at the outset of these Reasons for Decision, that the Class Members comprise three groups and of these, the Defendants submit further that only the No DOTP Group should be Class Members. For a variety of reasons, essentially jurisdictional in nature, the Defendants submit that the Section 97

Group and the Assessed Group should not be Class Members and they should be left to advance their claims exclusively under the *Employment Standards Act, 2000* or outside of a class action by Small Claims Court actions or individual actions in the Superior Court.

[102] I do not agree, however, with the Defendants that the Section 97 Group and the Assessed Group should not be Class Members.

[103] Section 97 and 98 of *Employment Standards Act, 2000* are designed to provide employees with a mutually exclusive choice of a wrongful dismissal claim or a claim for wages, termination pay, or severance pay under the *Act*. The Legislature intended to put an aggrieved employee or former employee to an election as to whether to proceed with a civil suit for wrongful dismissal or to use the summary procedure contemplated under the Act: *Allen v. Vali Orchard Pharmacy Inc.*, 2013 ONSC 895 at para. 24 (S.C.J.).

[104] Sections 97 and 98 of the *Act* state:

> *When civil proceeding not permitted*
>
> 97. (1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.
>
> *Same, wrongful dismissal*
>
> (2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.
>
> *Amount in excess of order*
>
> (3) Subsections (1) and (2) apply even if,
>
> > (a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or
> >
> > (b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this.
>
> *Withdrawal of complaint*
>
> (4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.
>
> *When complaint not permitted*
>
> 98. (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.
>
> *Same, wrongful dismissal*
>
> (2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment.

[105] In *Aston v. Casino Windsor Limited*, [2005] O.J. No. 2879 at para. 2 (S.C.J), Justice Patterson considered the effect of s. 97 of the *Employments Standards Act, 2000* on an employee's ability to participate in a class action relating to their termination of employment and he stated:

> In my opinion Ms. Murawski should not be included in the class or a subclass as she filed a complaint under the *Employment Standards Act* alleging an entitlement to termination pay or severance pay. As a result she may not commence a civil proceeding for wrongful dismissal as the complaint in the class action relates to the same termination or severance of employment as in her complaint. See s. 97(2) of the *Employment Standards Act*.

[106] The effect of s. 97 of the *Act* is that a person who files a complaint under the *Employment Standards Act, 2000* alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal for the the same termination or severance of employment. The effect of s.97 is to preclude the Section 97 Group from advancing a claim for wrongful dismissal in the proposed class action.

[107] Relying on *General Motors of Canada Ltd. v. Calder*, [2004] O.J. No. 5553 (Div. Ct), which considered a predecessor version of s. 97, the Plaintiffs, however, submit that s. 97 would not preclude the Section 97 Group from advancing a wrongful dismissal claim against Defendants who were not in jeopardy under a complaint filed with the Ministry of Labour. The Plaintiffs submit that since in the case at bar, the complaints of the Section 97 Group were made only against IQT, Ltd., therefore, the Defendants were not vulnerable under the *Act* but are vulnerable to a wrongful dismissal claim in a class proceeding.

[108] In my opinion, however, this submission fails because it ignores the common employment doctrine codified by s. 4 of the *Employment Standards Act, 2000*, which did put the Defendants in jeopardy, and it ignores that the reality that the Defendants are already in jeopardy by the orders which are being reviewed by the OLRB.

[109] Section 4 states:

> *Separate persons treated as one employer*
>
> 4. (1) Subsection (2) applies if,
>
> > (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
> >
> > (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.
>
> *Same*
>
> (2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.
>
> *Businesses need not be carried on at same time*
>
> (3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

Exception, individuals

> (4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

Joint and several liability

> (5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

[110] The predecessor of s. 4 and the common employer doctrine was not considered or mentioned in *General Motors of Canada Ltd. v. Calder*, *supra*, which rather involved a case where the plaintiff first lodged a complaint under the *Employment Standards Act* against her employment agency as if it was her employer and then brought an action against her actual employer. In those circumstances, which are different than the circumstances of the case at bar, it made sense for the Divisional Court to rule that the predecessor of s. 97 did not bar the claim against the genuine employer.

[111] That all said, the effects of sections 97 and 98 of the *Act* should not be taken beyond their intended scope, which is associated with wrongful dismissal claims and no other civil claims. The limited scope of section 97 is made clear by s. 8 (1) of the *Employment Standards Act, 2000*, which states:

Civil proceedings not affected

> 8. (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

[112] In *Allen v. Vali Orchard Pharmacy Inc.*, *supra*, an employee of drug store was dismissed allegedly for stealing drugs. She brought proceedings under the *Employment Standards Act, 2000* for severance and termination pay, and her claims were dismissed. She then brought a civil action for wrongful dismissal, and she added claims for negligent misrepresentation, conspiracy, and intentional interference with economic relations. Arguing that the employee's action was statute-barred by s. 97 of the *Employment Standards Act, 2000*, the employer moved for a summary judgement. Justice Pierce dismissed the motion for summary judgment. She held that s.97 was not meant to preclude claims independent of the wrongful dismissal claim. At para. 27 of her judgment, she stated:

> 27. In my view, the scheme of adjudication contemplated by the Employment Standards Act was never intended to be a substitute court with jurisdiction to entertain cases involving intentional torts or other relief not sanctioned by its enabling statute. The relief contemplated in the Act is narrow: limited to awarding termination pay or severance pay. The intentional torts pleaded are independent claims arising from but independent of the plaintiff's dismissal. The fact of the dismissal is not in dispute. It is the circumstances leading up to the plaintiff's dismissal and during the investigative phase following it that call into question whether the defendants, or either of them, committed the intentional torts pleaded. These claims must be evaluated against a full evidentiary record that is only available at trial.

[113] As I view the matter, although the quantum of the claims of the Section 97 Group and the Assessed Group may be no more than or equal to their wrongful dismissal claim, the claims of all the former employees of IQT, Ltd. against the Defendants for negligence, conspiracy,

inducing breach of contract, and for an oppression remedy are suitable claims for a class action and, in my opinion, these claims not precluded by any provision in the *Employment Standards Act, 2000.*

[114] As I view the matter, in the class action, the Class Members of the NO DOTP Group and of the Assessed Group will require individual issue trials to quantify their wrongful dismissal losses, and in those individual issues trials, the Assessed Group will have to give credit for what they recover in the proceedings before the OLRB for unpaid wages and vacation pay. In my opinion, the Assessed Group are not caught by s. 97 of the *Employment Standards Act, 2000* from advancing a wrongful dismissal claim because, by its express wording, s. 97 applies only to employees who file a complaint under the Act and that is not how the members of Assessed Group happen to find themselves involved in proceedings under the *Act*. Their participation has been involuntary as they did not file complaints under the *Act*.

[115] As I view the matter, the Class Members of the Section 97 will not have individual issues trials because their wrongful dismissal claims are precluded by s. 97 of the *Employment Standards Act*, and they will be left with the quantum awarded in the OLRB proceeding. Nevertheless, the Section 97 Group should be able to benefit by the determinations in the common issues trial of the free-standing claims for negligence, conspiracy, inducing breach of contract, and an oppression remedy. These claims are shared by all the former employees of IQT, Ltd., regardless of whether they are advancing a wrongful dismissal claim or seeking the statutory awards available under the *Employment Standards Act, 2000.*

[116] In other words, all the former employees of IQT, Ltd. had the mutually exclusive choice of: (1) a wrongful dismissal claim in the Superior Court; or (2) a claim under the *Employment Standards Act, 2000* for statutorily prescribed awards, but all the former IQT, Ltd. employees have the right to prosecute the Defendants for the free-standing claims of negligence, conspiracy, inducing breach of contract, and for an oppression remedy.

[117] Given these choices, the Section 97 Group may be taken to have chosen not to advance a wrongful dismissal claim, but that is not a reason to preclude them from advancing claims against the Defendants in negligence, conspiracy, inducing breach of contract, or for an oppression remedy. Further, given these choices, there is no basis for taking the Assessed Group or especially the No DOTP Group to have elected against a wrongful dismissal claim, although the Assessed Group will have to give credit for their unpaid wage and vacation pay entitlements from the proceedings under the *Employment Standards Act, 2000.*

[118] The No DOTP Group has elected to advance a wrongful dismissal claim and also the claims for negligence, conspiracy, inducing breach of contract, and an oppression remedy and the Superior Court has the jurisdiction to determine all these claims.

[119] A defect in the Defendants' argument under rule 21.01 (3) of the *Rules of Civil Procedure* is that the substantive jurisdiction of the Superior Court over negligence, conspiracy, inducing breach of contract, and for an oppression remedy remains intact and is never ousted by the *Employment Standards Act, 2000* proceedings. Notwithstanding the Defendants' arguments to the contrary, these claims are not a disguised wrongful dismissal claim that would be precluded by s. 97 of the Act.

[120] This point can be quickly demonstrated by *Downtown Eatery (1993) Ltd. v. Ontario, supra*, where it may be recalled that Mr. Alouche first obtained a judgment for wrongful

dismissal and then successful sought an oppression remedy in order to enforce his wrongful dismissal judgment.

[121] Another defect in the Defendants' argument under rule 21.01 (3) is that once the action moves into the territory of the tort claims and the oppression remedy, for which the OLRB genuinely does not have jurisdiction, it cannot be said that the proceedings before the OLRB are in respect of the same subject matter as the proceedings before the Superior Court.

[122] The case at bar is thus not like *Snopko v. Union Gas Ltd.*, 2010 ONCA 248 or *Curactive Organic Skin Care Ltd. v. Ontario*, 2011 ONSC 2041, affd. 2012 ONCA 81, which cases were relied on by the Defendants to support their argument that the Superior Court should not adjudicate the claims of the Section 97 Group or the Assessed Group. In *Snopko* and *Curactive Organic Skin Care*, the jurisdiction of the Superior Court was genuinely ousted by the jurisdiction of another tribunal, and the common law claims purportedly being advanced in the Superior Court were in substance claims for which the jurisdiction of the Superior Court had been ousted.

[123] In the case at bar, although the quantum of damages for the various claims may overlap or even be commensurate with the wrongful dismissal claim, the claims are not disguised wrongful dismissal claims but free-standing claims for wrongdoing that actually arose before the wrongful dismissal.

10. *Certification – General Principles*

[124] Having resolved the Defendants' Rule 21 cross-motion, I can now turn to the Plaintiffs' certification motion.

[125] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[126] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[127] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[128] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26 to 29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 15 and 16.

[129] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 28 to 29.

11. The Cause of Action Criterion

[130] The first criterion for certification is the cause of action criterion.

[131] The discussion above establishes that the Plaintiffs have satisfied the cause of action criterion for claims of wrongful dismissal, negligence, conspiracy, inducing breach of contract, and for an oppression remedy.

12. The Class Definition Criterion

[132] The second criterion for certification is that there be an identifiable class.

[133] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[134] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[135] The proposed class definition, which replaced the class definition set out in the Amended Statement of Claim, is as follows:

> All persons who were employees of IQT, Ltd. whose employment in Oshawa, Ontario was terminated on July 15, 2011, exclusive of its directors and officers and with respect to the claims under section 81 of the *Employment Standards Act, 2000* (ESA) against John Fellows, David and Alex Mortman, only, those employees who voluntarily filed complaints pursuant to section 96 of the ESA and who did not withdraw those complaints within two weeks of filing them.

[136] In my opinion, this class definition does not accurately articulate the relationship between the class, the causes of action, and the common issues, and it does not adequately serve the three purposes of a class definition. The flaws, however, are not fatal flaws.

[137] As I have explained above, all persons who were employees of IQT, LTD. whose employment was terminated on July 15, 2011 (exclusive of its directors and officers) have causes of action against the Defendants for negligence, conspiracy, inducing breach of contract, and for an oppression remedy and of the former employees, the Assessed Group and the No DOTP Group also have wrongful dismissal claims, which will have to be quantified at individual issues trials.

[138] In these circumstances, the appropriate class definition is the straightforward definition originally set out in the Amended Statement of Claim; namely:

> All persons who were employees of IQT, Ltd. whose employment in Oshawa, Ontario, was terminated on July 15, 2011, exclusive of its officers and directors.

[139] I conclude that the class definition criterion is satisfied.

13. The Common Issues Criterion

[140] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each Class Member's claim and its resolution must be necessary to the resolution of each Class Member's claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18. The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39; *McCracken v. Canadian National Railway Co.*2012 ONCA 445 at para. 183.

[141] With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Shopping Centres Inc. v. Dutton, supra* at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160; *McCracken v. Canadian National Railway Co., supra,* at para. 183.

[142] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).

[143] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), O.R. (3d) 401 (C.A.) at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General) supra,* at para. 53.

[144] Mr. Brigaitis and Ms. Rupert propose 26 common issues, which are set out below. My discussion of each of these proposed common issues can be relatively brief, because subject to the outcome of its Rule 21 cross-motion and certain specific objections, the Defendants conceded that many of the questions satisfied the s. 5 (1)(c) criterion.

[145] Questions 1 to 8, which concern the employment law (wrongful dismissal) claims, are:

> 1. Was there a common contractual term of employment between IQT, Ltd. and the Class Members which required IQT, Ltd to provide reasonable notice to the class prior to termination of employment, or in the alternative, damages for pay-in-lieu of notice?
>
> 2. If the answer to question (1) is yes, did IQT, Ltd. breach the contract? If so, how?
>
> 3. Do sections 61 and 64 of the *ESA* require IQT, Ltd. to pay pay-in-lieu of notice and/or severance pay to the Class Members?

4. If the answer to question (3) is yes, did IQT, Ltd. breach sections 61 and 64 of the ESA? If so, how

5. Do sections 11 and 38 of the *ESA* require IQT, Ltd. to pay outstanding wages and vacation pay to the Class Members?

6. If the answer to question (5) is yes, did IQT, Ltd. breach sections 11 and 38 of the ESA? If so, how?

7. If the answers to questions (1) to (6) are "yes", are any of IQT, Canada, Ltd., IQT, Inc., and/or JDA Partners LLC, Alex, David, and/or Fellows jointly and severally liable for IQT, Ltd.'s breaches of the terms of the contracts and/or sections of the ESA? If so, how and why?

8. Pursuant to section 81 of the *ESA*, are any or all of Alex Mortman, David Mortman (the "Mortmans"), and/or John Fellows ("Fellows") liable to pay outstanding wages, including vacation pay, owing to the Class up to the date of termination?

[146] The Defendants conceded that questions 1 to 8 satisfy the common issues criterion.

[147] Question 9, which concerns the effect of s. 97 of the *Employment Standards Act, 2000*, is:

9. What impact, if any, does section 97 of the *ESA* have on the Class Members ability to pursue a claim in damages against any or all of the defendants for outstanding wages, vacation pay, termination pay and/or severance pay?

[148] As a result of the cross-motion, Question 9 has been answered, and it should not be certified as a common issue. The effect of s. 97 of the *Employment Standards Act* is to exclude the Section 97 Group from common issues trials to quantify their wrongful dismissal claims, which they no longer have, having instead elected the statutory claims under the *Act*.

[149] Questions 10 to 13, which concern the conspiracy claim and the inducing breach of contract claim, are:

10. Did any or all of the defendants conspire to wrongfully dismiss the Class Members from IQT, Ltd.? If so, when and how?

11. Did any or all of the defendants conspire to transfer, divert, convey, assign, and/or strip IQT, Ltd.'s revenues and assets by paying its executives exorbitant salaries and expense accounts so that there were no assets available to pay Class Members compensation for pay-in-lieu of notice, severance, outstanding wages and vacation pay? If so, when and how?

12. Did any or all of Fellows and/or the Mortmans intentionally interfere with the contractual relationships [induce breach of contract] between IQT, Ltd. and its employees?

13. Did IQT, Ltd. make a one or more transfers of property or make a payment in favour of a creditor while insolvent contrary to s. s. 95(1)(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F29, and/or section 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33? If so, to whom, how much and how?

[150] The Defendants did not challenge questions 10 to 13 on the grounds of an absence of commonality. Rather, they submitted that all these questions did not satisfy the preferable procedure criterion and that some of these claims were claims to be made in the bankruptcy proceeding and not in a class action. Thus, with one qualification, for the purposes of the third

criterion, the commonality of these questions was not challenged, and I shall certify questions 10 to 13 as common issues subject to the determination of the preferable procedure criterion.

[151] The qualification is that I would strike the words: "If so, to whom, how much and how?" from Question 13. Since the Class Members individual claims are calculated by what they lost not by what the Defendants may have gained by their wrongdoing, no purpose is served by the exercise of quantifying the value of the assets allegedly stripped from IQT, Ltd.

[152] Questions 14 and 15, which concern the oppression remedy claim, are:

> 14. Did Fellows and the Mortmans, or any of them, exercise their powers as directors of IQT, Ltd. in a manner that is oppressive or unfairly prejudicial or in disregard of the interests of the Class within the meaning of section 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA")?
>
> 15. Were the acts or omissions of IQT, Inc. and/or IQT Canada, Ltd. oppressive or unfairly prejudicial or in disregard of the interests of the Class for the purposes of section 248 of the OBCA?

[153] The Defendants did not challenge questions 14 and 15 on the grounds of an absence of commonality. Rather, as discussed above, they disputed that an oppression remedy claim was available for the proposed Class Members. Since, I have decided that point against the Defendants, I conclude that questions 14 and 15 are certifiable as common issues.

[154] Questions 16 and 17, which concern the negligence claim, are:

> 16. Did Fellows and/or the Mortmans owe a duty of care to the Class to take steps to ensure that on the cessation of IQT, Ltd.'s business, the Class Members would be terminated in accordance with the implied and actual employment contracts and/or under the ESA?
>
> 17. Did Fellows and/or the Mortmans breach the standard of care expected of them to taking steps to ensure that on the cessation of IQT, Ltd.'s business, the Class Members would be terminated in accordance with the implied and actual employment contracts and/or under the ESA? If yes, when and how?

[155] The Defendants did not challenge the commonality of the negligence claim, and thus they conceded that these questions satisfy the common issues criterion.

[156] Questions 18 to 20, which concern, the breach of fiduciary duty claim, are:

> 18. In the alternative, did Fellows and/or the Mortmans owe a fiduciary duty to the Class under the laws of the State of New York?
>
> 19. If the answer to (18) is "yes", did Fellows and/or the Mortmans breach that fiduciary duty? If so, when and how?
>
> 20. In the further alternative, did Fellows and/or the Mortmans aid and abet each other in breaching a fiduciary duty owed to the Class under the laws of the State of New York? If so, when and how?

[157] As discussed above, there is no tenable breach of fiduciary duty claim, and therefore questions 18 to 20 are not certifiable as common issues.

[158] Question 21 was withdrawn during the certification motion.

[159] Questions 22 to 28 concern what remedies are available to Class Members and the calculation of damages. Questions 22 to 28 are:

> 22. Can the damages of the Class with respect to the ESA (i.e. damages for outstanding wages, vacation pay, pay-in-lieu of notice and/or severance pay) be determined by using a generalized formula or some other measure that is not dependent on individual assessments? If yes, what amount should the defendants pay, to whom and why?
>
> 23. Should the defendants pay punitive damages to the Class, and if yes, who, why and in what amount?
>
> 24. Should the defendants pay prejudgment and postjudgment interest, and at what annual interest rate?
>
> 25. Should the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?
>
> 26. Is this an appropriate case for the defendants to provide an accounting of all proceeds received directly or indirectly from IQT, Ltd.?
>
> 27. Is this an appropriate case for the court to appoint a receiver-manager of IQT, Inc.?
>
> 28. Is this an appropriate case for the Class Members to follow the funds that were transferred, conveyed, gifted and/or assigned from IQT, Ltd to any or all of the defendants and to identify assets that could be traced to those funds in the hands of parties other than bona fides purchasers for value without notice?

[160] In my opinion, questions 22, 23, 24, and 25 depend upon the determination of individual issues trials and want for the commonality necessary to be certified as common issues.

[161] With the striking of the fiduciary duty claims, there is no legal underpinning or utility for questions 26 and 28.

[162] As for question 27 given that IQT, Inc. is an American Delaware corporation, I have some doubts about the availability, utility, and enforceability of an order appointing a receiver, but technically speaking, the question is a common issue and I, therefore, will give the Plaintiffs the benefit of the doubt and certify the question.

[163] To summarize, I conclude that questions 1-8, 10-17, and 27 satisfy the common issues criterion.

14. The Preferable Procedure Criterion

[164] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *AIC Limited v. Fischer*, 2013 SCC 69.

[165] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[166] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[167] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106.

[168] The following actions about the mass termination of employees have been certified as class proceedings: *Webb v. K-Mart Canada Ltd.*, (1999), 45 O.R. (3d) 389 (S.C.J.), leave to appeal to Div. Ct. refused (1999), 45 O.R. (3d) 638 (S.C.J.); *Scott v. Ontario Business College (1997) Ltd.*, [1997] O.J. No. 3441 (S.C.J.); *Gregg v. Freightliner Ltd (c.o.b. Western Star)*, 2003 BCSC 241; *Downey v. Mitel Networks Corp.*, [2004] O.J. No. 5981 (S.C.J.).

[169] The Defendants submit that the Plaintiffs have failed to establish that a class proceeding would be the preferable procedure for resolving the claims of the proposed class members. The Defendants submit that if the action were certified, the resulting proceeding would involve a vast number of individual trials on a myriad of individual issues that would undermine the interests of access to justice and judicial economy and impose a hopelessly unmanageable, inefficient and unfair process on the parties and on the Court.

[170] I disagree. In the case at bar, a class proceeding is the appropriate method of advancing the claims of the Class Members

[171] While it is true that the common issues trial will not necessarily be dispositive of all issues between the Class Members and some of the Class Members (but not the Section 97 Group members) will have to go on to individual issues trials, the common issues trial will make a substantial advance in the litigation and will determine whether it is worthwhile for the Assessed Group and the No DOTP Group to proceed to individual issues trials for a quantification of their losses.

[172] There is no preferable procedure or meaningful alternative to the Superior Court adjudicating the Class Members claims' for negligence, conspiracy, inducing breach of contract, and for an oppression remedy. If the Defendants are successful in defending these claims, there will be very few individual issues trials. Conversely, assuming that the Plaintiffs are successful at the common issues trial, there is also the prospect that some members of the Assessed Group may not need to proceed to individual issues trials. The Assessed Group may be satisfied with the quantum of the award made by the OLRB and the outcome that the Defendants are liable to pay that award as the damages for their negligence, conspiracy, inducing breach of contract, or oppression remedy claim.

[173] In my opinion, the proposed class action satisfies the preferable procedure criterion.

15. The Representative Plaintiff Criterion

[174] The Defendants accept that Mr. Brigaitis or Ms. Rupert satisfy the representative plaintiff criterion, but noting that neither are members of the Section 97 Group, the Defendants submit that this means that neither represents the Section 97 Group or is aligned with its interests. Thus, the Defendants submit that if the Section 97 Group's claims are permitted to proceed, an additional representative plaintiff should be added.

[175] I disagree. For the purposes of the common issues trial, the interests of all Class Members are aligned and Mr. Brigaitis or Ms. Rupert are suitable representative plaintiffs.

[176] The Defendants, however, submit that the representative plaintiffs' proposed litigation plan is deficient.

[177] For present purposes, it is not necessary to review the Defendants' criticism of the litigation plan because many of the points of criticism concern the treatment of common issues that have not been certified and because there is nothing in the Defendants' criticism that suggests that any problems with the plan cannot be addressed when the litigation plan is revised, as it must be revised, in light of the dismissal of the fiduciary duty claims, the interpretation of the effect of s. 97 of the *Employment Standards Act, 2000*, and the culling of the common issues.

[178] I conclude that the proposed class action satisfies the representative plaintiff criterion but direct that the litigation plan be settled as a part of the case management of the class action.

16. Conclusion about Certification

[179] Subject to the qualifications or modest refinements required to the class definition or to the Plaintiffs' statement of claim, and with the revision of the litigation plan to follow certification so that the plan accords with the claims and common issues that have been certified, I conclude that the Plaintiffs have satisfied all of the criteria for certification and, accordingly. this action should be certified as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*.

E. CONCLUSION

[180] The Defendants have been partially successful on their Rule 21 cross-motion but their success does not go so far to defeat the Plaintiffs' certification motion. Orders should be made accordingly.

[181] If the parties cannot agree about the matter of costs they may make submissions in writing beginning with the Plaintiffs' submissions within 20 days of the release of these Reasons for Decision followed by the Defendants' submissions within a further 20 days.

[182] If the parties require more time to negotiate costs, they may extend the above schedule provided that failing agreement, all the costs submissions are received within 60 days of the release of these Reasons for Decision.

Perell, J.

Released: January 2, 2014

CITATION: *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7
COURT FILE NO.: 11-CV-432919CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BOB BRIGAITIS and CINDY RUPERT

Plaintiffs

- and -

IQT, LTD., c.o.b. as IQT SOLUTIONS, IQT CANADA, LTD., JDA PARTNERS LLC, IQT, INC., ALEX MORTMAN, DAVID MORTMAN, JOHN FELLOWS and RENAE MARSHALL

Defendants

REASONS FOR DECISION

Perell, J.

Released: January 2, 2014