SUPREME COURT OF NOVA SCOTIA

Citation: *Murray v. East Coast Forensic Hospital*, 2015 NSSC 61

Date: 20150225
Docket: Halifax**,** No. 422819
Registry: Halifax

Between:

MARK JASON MURRAY

Applicant

v.

CAPITAL DISTRICT HEALTH AUTHORITY, a body corporate carrying on business as the EAST COAST FORENSIC HOSPITAL

Respondent

Judge:	The Honourable Justice Denise Boudreau
Heard:	January 30, 2015, in Halifax, Nova Scotia
Decision:	February 25, 2015
Counsel:	Michael Dull, for the Applicant Carman McCormick, Q.C. and Karen Bennett-Clayton, for the Respondent

By the Court:

[1] This is an application for certification of a class-action. The proposed representative plaintiff, Mark Murray, brings this action as a result of "strip searches" that were conducted on himself and other forensic psychiatry patients at the East Coast Forensic Hospital in Dartmouth Nova Scotia ("ECFH") in October 2012. For the reasons that follow, I have determined that this proceeding should be certified as a class action proceeding.

Facts

[2] On October 16th, 2012, 33 forensic psychiatry patients at the ECFH were strip searched. The decision to search them was made on the basis of events that had taken place over a number of months and weeks prior to October 16th.

[3] Evidence was put before the court in the form of affidavits. In addition, the Rehabilitation Manager of the ECFH, Brenda Mate, and the proposed representative plaintiff Mark Murray were discovered on November 4, 2014. Transcripts of both examinations for discovery were also placed before the court as exhibits. I have reviewed all the evidence and I will discuss the evidence most relevant to this application.

Evidence of Brenda Mate

[4] Brenda Mate is responsible for the "rehabilitation side" of the ECFH, which includes two units of 30 beds. All patients in those units, including the 33 patients at issue, fall into one of two categories: they have either been found not criminally responsible, or unfit to stand trial, in relation to criminal charges. They are considered "patients", as opposed to persons in the connected correctional facility, who are considered "inmates". Having said that, the ECFH does have correctional officers working within their facility to deal with issues of security.

[5] The existence of illicit drugs within correctional facilities, and within the ECFH, is not a new phenomenon; but is of great concern to facility administrators. Ms. Mate described various events that took place within the ECFH from June - October 2012, causing her increased concern about illegal substances being brought into the ECFH. All of these events were presented as leading to the search on October 16th. I will note them in abbreviated form:

a) On June 22, 2012, a routine search of a patient's locker found eight 25 mg tablets of Diphenhydramine Hydrochloride. That same date, a psychiatrist at the hospital suggested that all patient lockers be searched, as she had noted "stoned" patients. All lockers were searched, but no other pills were found.

b) On July 25, 2012, staff advised that a patient was concerned that another patient was selling him "cigs laced with drugs".

c) On July 31, 2012, a patient's room was searched and some (non-drug) contraband was found. Also found was a bottle containing one tablet of Advil sinus.

d) Between September 12th and September 19th, 2012, seven patients tested positive for illegal substances. Emails were sent to staff to encourage them to more closely monitor patients.

e) On September 26, 2012, a nurse at the facility overheard a conversation between two patients; one of them had just completed drug testing, and stated that he was lucky nothing had shown up on his drug screen.

f) On October 1, 2012, nursing staff found 450 mg of lithium on the floor in a patient's room.

g) On October 2, 2012, testing on tobacco and pills found on three patients showed "positive for meth".

h) In the weeks prior to October 16, a number of patients had requested their bedroom door be locked from the outside at night, because they were afraid other patients under the influence of drugs might try to enter their room.

i) Between October 13 and October 15, 2012, events caused staff to be concerned about a "black market" operation between patients. It would appear that this "black market" trade could possibly involve all manner of goods, contraband or otherwise. One patient in particular is suspected of such trade. Some reports indicate the "possible" involvement of street drugs.

j) Between October 1st and October 15th, 2012, 19 patients exercised periods of unsupervised community access outside the facility.

k) On October 15, 2012, a few patients are noted to be acting oddly: for example, acting inappropriately, mumbling, giggling; one patient is reported by his mother to be "deteriorating" and "not right". Other patients admitted to staff that there is "Spirit 420" (reported to be a smoked herbal incense product with marijuana like effects) being brought into the hospital by certain patients. Three patients are searched with negative results, including a strip search, locker search, and room search.

[6] As a result of these events, discussions arose among staff, including Ms. Mate, about the need to conduct more interventions.

[7] Ms. Mate's affidavit provides as follows in respect of her involvement with the searches on October 16th (Capt. Todd Henwood is an employee of the Department of Justice, Correctional Services Division, working at the hospital):

> 50 On October 16, 2012 at approximately 8:00am I spoke with Capt. Todd Henwood. I advised Captain Henwood of the details contained in Dr. Neilson's email of October 15, 2012, which is attached as Exhibit 25. I advised Captain Henwood that the activity and behaviors detailed in Dr. Nielsen's email created significant concern regarding the safety of the patients and staff on the ECFH Rehabilitation Units A&B. I requested that Captain Henwood arrange for the Correctional Services Division officers to search the day rooms, bedrooms, bathrooms, lockers, laundry rooms and kitchens of the Rehabilitation Units A and B to see if there was any contraband, including illegal substances and/or synthetic cannabinoids. I made this request to Captain Henwood as I cannot conduct searches. Pursuant to the Capital Health Mental Health Program Policy number 1933 - Person Searches, Correctional Workers conduct searches. Captain Henwood advised that he could arrange for the search as I requested, however said it was no good doing that search unless everyone was searched to see if they had contraband on them. I responded to Captain Henwood to say that if he had reasonable and probable grounds for such a search, then I would leave that up to him. Captain Henwood responded to say that based on the information I provided to him, he felt there was reasonable and probable grounds for the searches.

[8] In her discovery evidence, Ms. Mate confirmed her evidence that Captain Henwood was the person who made the decision to strip search patients. Having said this, in Ms. Mate's opinion there were reasonable and probable grounds for the decision to strip search all patients that morning, with the same grounds applying to all patients. Ms. Mate felt that recent events (as described hereinabove) showed that safety and security of the facility was at immediate risk.

[9] No contraband was found on any of the patients. A "Strip Search Report" was completed for each patient, and the 33 reports were attached as exhibits to Ms. Mate's affidavit. Each of the 33 reports is identical as to its substantive information. Each has been signed by Todd Henwood as "reporting staff". Each has also been signed by Brenda Mate as "manager". Under the heading "Reasons for search", each report states:

> Information received from Brenda Mate (Rehab Manager) that drugs may be in Rehab and that patient safety is at risk. Manager Mate wanted all patients strip

> searched and the bedrooms and common areas searched. Mate also wanted the Patient lockers searched. Patient movement was placed on hold (0900 hrs) by the clinical teams until the search was concluded. The patient movement resumed at1530 hrs.

[10] Under the second heading "What was the source of information relied upon to conclude a strip search was necessary in the circumstances:" each report states:

> Direction and information came from Brenda Mate.

[11] Under the third heading "Provide details of the search and results:" each report provides the same information:

> Patient was asked to comply with a strip search and complied. Corrections staff asked the patient to disrobe in their bedroom or the washroom area. One Corrections Officer gave direction while the other Corrections Officer witnessed the search. Both staff search the bedroom and the common area of the day room.

[12] The reports then go on to detail where each individual patient was sent after their search was completed.

[13] Ms. Mate was asked about these reports during her discovery examination. Although she signed each of the reports, she disputes their content, to the extent that she maintains she did not order the strip search of any of these patients. She maintains that this decision is strictly within the power of Correctional Services, and that she left this decision with Captain Henwood.

[14] Also attached as an exhibit to Ms. Mate's affidavit was the Capital Health Mental Health Program policy 1933 – Person Searches. This policy contains a section in relation to "personal searches", which provides the following in relation to strip-searching of patients:

1. Strip searches will be conducted on patients at the following times:

    a) prior to admission;

    b) when found in possession of weapons, or any items modified for use as a weapon, drugs or alcohol;

    c) when CWs have reasonable and probable grounds to believe the patient has weapons, drugs or alcohol in their possession;

    d) upon return from attendance at court; and

e) after all personal contact visits (MIOU patients only).

…

2. A CW must determine at the time of a strip search conducted in accordance with s. 1 (c) of this Section if they have reasonable and probable grounds to believe a patient has weapons, drugs or alcohol in their possession…

…

7. Where a patient refuses to be searched or resists a search, the CWs will advise a member of the patients' Clinical Team or the Psychiatrist On Call that the patient has been detained until such time as the patient is willing to consent to a personal search…

[15] In a second affidavit filed and dated January 9, 2015, Ms. Mate advises that according to Captain Henwood, all strip searches that took place on October 16, 2012 occurred either in the washroom facilities or individual bedrooms located off of day room A1, the washroom facilities or individual bedrooms located off of day room B5 or the women's section.

Evidence of Mark Murray

[16] Mr. Murray provided a description of his strip search on October 16th 2012. The salient parts of his affidavit read as follows:

4 On October 16, 2012 I was residing in one of the wedges on the "B side" of the East Coast forensic hospital. That morning began as it usually did for me. I woke up, had a shower, ate breakfast and clean my room. I was watching TV in my wedge when I was told by another patient that we had been locked in our wedge. I witnessed guards escort 1 or 2 other patients, who had been outside of the wedge, back into the wedge for the lockdown.

5 Once we were all locked in our wedge, the Captain and another guard entered the wedge and told us all that they were going to be doing strip searches. They looked at me and said, "Mark, you're first".

6 The guards then escorted me to the closest bathroom within the wedge. With the door open, they forced me to take off all my clothes and my underwear. The door was kept open, meaning that other patients could have seen me naked. I am not sure if they did. I may also have been in the view of a video camera.

7 I was forced to stand completely naked in front of the two guards. They then asked me to turn around, bend over and cough. I complied.

> 8 I was then asked to run my fingers through my hair, to lift my tongue, flip my ears back and to show the bottom of my feet. I complied. I was forced to do each of these tasks in close proximity to the guards while completely naked.
>
> 9 I had nothing on my possession. As such, the strip search found nothing. However I was never asked before the search whether I had anything on my possession. I was never informed of the grounds upon which the search was being conducted.

[17] During his discovery, Mr. Murray was asked about prior strip searches that he had experienced. In relation to the issue of consent in past experiences, Mr. Murray stated as follows:

> Q. Okay. Did you ever refuse to be searched?
>
> A. Yes, I did.
>
> Q. When was that?
>
> A. Number of times I refused.
>
> Q. Why?
>
> A. Just basically I didn't want to be strip-searched, to be honest with you. I find it very uncomfortable and very traumatizing and I find it…
>
> Q. Okay.
>
> A. I don't agree with it. So there are a number of times when I refused to be strip-searched. I always ended up being strip-searched but not… basically, not with my consent ever.
>
> Q. So there were occasions in the past when you refused to be strip-searched or you expressed that.
>
> A. I expressed that… Yes, I didn't give my consent is how I would put it.
>
> Q. And other occasions you did consent?
>
> A. No, I never did.
>
> Q. And other occasions did you not refuse?
>
> A. Just never gave my consent.

[18] Later, Mr. Murray was asked:

> Q. Were there are occasions when you refused to be searched, either frisked or pat searched?
>
> A. I don't think so. I just basically… You don't really have a choice. So it comes to a point where you just let them do it, right?
>
> Q. You didn't…
>
> A. And there are severe repercussions to refusal, I will say that.

Evidence of Shane Reid

[19] Another patient, Shane Reid, also filed an affidavit and described his experience as follows:

> 4 On October 16, 2012 I was residing on the "A side" of the East Coast Forensic Hospital. As I did regularly every morning, I went to the nursing station to sign out for a smoke break. I had outside smoking privileges. The nurses at the station informed me that all smoking privileges were canceled that day. I believe this was after breakfast.
>
> 5 I walked back to me (sic) unit. Shortly after, guards and nurses enter the unit. I heard them tell everyone on A-side to go into a large room with six beds. Myself, and approximately a dozen other inmates, complied. Once in the room the door was shut behind us.
>
> 6 I waited in the large bedroom for some time. Guards would occasionally enter the room and ask for a patient and then escort that patient out of the room. About half the patients had already left when they called me.
>
> 7 I believe that at least two guards escorted me from the large bedroom to my bedroom (#6). Once in my room, I was asked to remove all of my clothes in the presence of at least one guard (while others waited outside the door). I did so. Once completely naked, I was asked to turn around and to bend over the cough (sic). I was then permitted to get dressed. The guards left.

> 8 I was very uncomfortable with the guard's request that I get completely named (sic) in front of them. However I complied for fear of physical force or other punishment.
>
> 9 I was not made aware of the reason for the strip search. I was never asked if I had anything on my possession prior to them conducting the strip search. I was never told of the grounds upon which the search was being conducted.
>
> 10 I did not have anything on my possession at the time of the strip search.
>
> 11 I felt that I was forcibly strip-searched without a good reason. I felt degraded by the incident.

[20] The court has also been provided with formal complaints to the Nova Scotia Human Rights Commission, filed by 21 of the persons searched. The names of the complainants, along with their specific psychiatric diagnosis, have been redacted. However, it is noted that their diagnoses all fall within certain categories: schizoaffective disorder, schizophrenia, cognitive delay, substance abuse, frontal lobe syndrome, or some combination of these disorders. These complaints have not yet been dealt with by the Commission.

[21] The representative plaintiff Mark Murray has filed a Notice of Action (the active pleading is the Second amended Notice of Action, filed on January 8, 2015). He pleads a breach of section 8 of the *Canadian Charter of Rights and Freedoms* (hereinafter "*Charter*") as well as the tort of intrusion upon seclusion, and seeks relief in the form of various heads of damage. He further seeks an order certifying this proceeding as a class proceeding and appointing himself as the representative plaintiff for the class.

Law

[22] A certified class action allows for group litigation in appropriate cases. In such cases, class actions advance litigation by alleviating some of the practical difficulties that would arise, were individual separate claims advanced by many claimants. Whether a matter should proceed by way of class-action is a procedural question. It has been often said that there are three public policy interests served by class actions: (1) access to justice; (2) behaviour modification; and (3) judicial economy.

[23] A case may proceed as a class action even where all of the plaintiffs' claims are not completely identical. Furthermore, a decision to allow such a proceeding is not determinative, in any way, of the merits of that proceeding. The fundamental question is whether a class action is the appropriate way to handle the matter from a procedural perspective.

[24] The *Class Proceedings Act*, SNS 2007 c. 28 (hereinafter "*CPA*"), provides five mandatory factors that must be shown in order that a class proceeding be certified. Put another way, section 7(1) of the *CPA* provides that certification must be ordered when the following 5 factors are made out to the satisfaction of the court:

> 7(1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5, or 6 if, in the opinion of the court,
>
> a) the pleadings disclose or the notice of application discloses a cause of action;
>
> b) there is an identifiable class of two or more persons that would be represented by representative party;
>
> c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> e) there is a representative party who
>
> i) would fairly and adequately represent the interests of the class,
>
> ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>
> iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.

[25] I also note s. 10 of the *CPA*:

> 10 The court shall not refuse to certify a proceeding as a class proceeding by reason only that:

> a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> b) the relief claimed relates to separate contracts involving different class members;
>
> c) different remedies are sought for different class members;
>
> d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable; or
>
> e) the class includes a subclass whose members have claims that race common issues not shared by all class members.

[26] Courts have repeatedly recognized that the test for class certification is a low threshold, and is not meant to be onerous. Each of the criteria noted in s. 7 (1) of the *CPA* (with the exception of 7(1)(a) which is to be made out on the pleadings alone), must be made out by showing " some basis in fact" on the evidence. (*Taylor v. Wright Medical Technology Canada Ltd*. 2014 NSSC 89; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* 2009 BCCA 503).

[27] In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Gen. Div.), affirmed at 42 O.R. (3d) 576, Sharpe J. said, at para. 4:

> … At a minimum, the court must be satisfied that there is a class of more [than] one person and that the issues raised by the members of the class satisfy the requirement that they raise common issues, and that a class proceeding would be the preferable procedure for the resolution of the common issues. In most class proceedings, these factual matters may well be obvious and require little evidence. Most class [proceedings] arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself… I do not say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. I do say, however, that <u>there must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess of the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied</u>. [Emphasis added.]

[28] Similarly, in *Hollick v. Toronto (City)*, 2001 SCC 68, the Supreme Court held that, in addition to showing a cause of action, the plaintiff "must show some basis in fact for each of the certification requirements" (at para. 25). This is a lesser standard

then balance of probabilities (*Pro-Sys Consultants v. Microsoft Corp.* (2013) SCC 57). In the *Pro-Sys* case, the SCC stated as follows (para. 102):

> The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Limited v. Atofina Chemicals Inc.* (2009) 99 OR (3d) 358 (SCJ), at para. 119, citing *Hague v. Liberty Mutual insurance Co.* (2004) 13 CPC (6^{th}) 1 (Ont. S.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

[29] In a broad sense, class action legislation is to be given a "large and liberal interpretation" to ensure that the goals of class actions are met (see *Anderson v. Canada* 2010 NLCA 106; *Hollick*, supra) In *Gay v. Regional Health Authority* 2014 NBCA 10, the New Brunswick Court of Appeal points out that the weight of authority, particularly from the Supreme Court of Canada, is toward a "generous application of certification legislation to a wide array of alleged mass wrongdoing":

> 6 ….It should go without saying that all courts are duty bound to do more than pay lip service to the principles that emanate from that authoritative jurisprudence.
>
> 7 The present appeal raises the usual threshold issue, which is whether, having regard to the accepted standards of review, the motion judge committed reversible error in dismissing the motion for certification. The appellants contend he did and for the reasons that follow, we respectfully agree and conclude certification order ought to have been granted. Bluntly put, our view is that, if certification is not appropriate in a case such as the present one, informed observers might be forgiven for wondering if the *Class Proceedings Act* is not merely a *trompe l'oeil* in terms of access to justice for innocent victims of systemic failures whose harm and expenses are relatively modest (see AIC Limited, paras. 22 – 34). There will always be an argument against certification. However, no objection can be rooted in the substantial merits of the action, and, ultimately, the question to be resolved is whether any arguable procedural objection should overwhelm the case in favor of collective relief. Where, as here, there is some basis in fact for the conclusion that each of the statutory conditions for certification has been met, denial of certification cannot be upheld on the basis of judicial discretion. After all, s. 6(1) of the *Class Proceedings Act* is unambiguous; the court must certify if the statutory conditions

> are met. At any rate, fear of the unfamiliar is no reason for refusing certification. [Emphasis is mine]

[30] With all of those broad principles in mind, I shall review the requirements of Section 7 of the Act as they apply to the case at bar.

7(1) The pleadings disclose or the notice of application discloses a cause of action

[31] Section 7(1) of the *Act* requires that an assessment made strictly on the basis of the pleadings. The court is to assume all facts pleaded to be true, and give the claim a generous interpretation in light of the fact that deficiencies may be addressed by amendments (*Canada v. MacQueen* 2013 NSCA 143).

[32] The appropriate assessment required by section 7(1) of the CPA is often referred to as the "plain and obvious" test; it is satisfied where the pleadings disclose a cause of action, and where it is not "plain and obvious" on its face that the claim cannot succeed. (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* [2013] 3 S.C.R 545; *Hunt v. Carey Canada Inc.* [1990] 2 SCR 959). In *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, our Court of Appeal confirmed that the *Class Proceedings Act* is:

> …procedural not substantive. It does not relax the standard that pleadings must disclose a cause of action on their face. The test is not onerous. Pleadings are adequate provided that it is not 'plain and obvious' that the cause of action will fail.
>
> [Pleadings] must be read generously to allow for inadequacies owing to drafting frailties and the respondents' lack of access to documents and discovery… (paras. 53 / 54).

[33] In the present case, the second amended Notice was filed on January 8, 2015. The plaintiff first claims a breach of Section 8 of the *Charter*, in that: he had a reasonable expectation of privacy in relation to his person; a strip search of his person was effected, including an invasive cavity check; the search was warrantless and without reasonable and probable grounds; and was conducted in an unreasonable manner. These pleaded facts underlie the plaintiff's claim that he was subject to an unreasonable search and seizure contrary to section 8 of the *Charter.*

[34] The defendant acknowledges that the section 8 *Charter* pleading does disclose a cause of action, at least for the purposes of section 7(1) of the CPA. (see: *Vancouver v. Ward*, 2010 SCC 27). I agree.

[35] Secondly, and more controversially, the plaintiff pleads a second cause of action arising from these same facts, that of "intrusion upon seclusion", and seeks damages on that basis. The claim provides as follows:

> Intrusion upon seclusion
>
> 22. Without lawful justification, the Defendant intentionally intruded on the seclusion of the Plaintiff and Class Members' private bodily integrity. The invasion of privacy is highly offensive. The arbitrary strip search of October 16, 2012 reasonably cause distress, humiliation or anguish.

[36] The intrusion upon seclusion claim requires a more in-depth analysis, in the context of 7(1) of the Act. This is a novel tort. In fact, as the defendant argues, no court in Nova Scotia has yet awarded damages pursuant to this cause of action.

[37] The cause of action has been recognized in Ontario. In the case of *Jones v. Tsige* 2012 ONCA 32 the Ontario Court of Appeal recognized the tort of intrusion upon seclusion, and held that the tort required the following elements to be proven:

> 1. The privacy intruders conduct must be intentional;
>
> 2. the privacy intruder must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
>
> 3. a reasonable person would regard the invasion is highly offensive causing distress, humiliation, or anguish.

[38] The court in *Jones* further held that "proof of harm to a recognized economic interest", was <u>not</u> a necessary element of this cause of action (par. 71). The court concluded (para. 71):

> I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[39] The defendant points out that other jurisdictions have adopted a different interpretation of this cause of action. In the United States and in Australia, for example, it would appear that the tort of intrusion upon seclusion does include a requirement that the plaintiff show actual loss, as well as causation between the intrusion and the loss shown. The defendant refers to *Grosse v. Purvis* (2003) Q.D.C. 151, wherein an Australian court held that in addition to the three requirements listed above, they would require a fourth element to be proven: that the act "causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do." (par. 444).

[40] The defendant argues that since the tort of intrusion upon seclusion has not been substantively considered, or relied upon, by any court in Nova Scotia, it is impossible to know whether this cause of action is viable. It is also unclear how Nova Scotian courts might fashion this tort in our province. What elements would be required? With the cause of action resemble the Ontario tort, or would our court adopt the approach taken in the United States and Australia? Could a Nova Scotian court fashion new requirements?

[41] In my view, in the context of a section 7(1) analysis, this cause of action meets the appropriate threshold requirement. I acknowledge that the tort of intrusion upon seclusion is novel. However, s. 7(1) of the *CPA* does not exclude novel claims; it means to exclude claims that have absolutely no chance of success, or frivolous claims. (*Fresco v. CIBC*, 2010 ONSC 4724). As stated by Mr. Justice Winkler in *Edwards v. Law Society of Upper Canada* [1995] OJ No. 2900:

> There is a very low threshold to prove the existence of a cause of action… The court should err on the side of protecting people who have a right of access to the courts.

[42] I also note the case of *Trout Point Lodge v. Handshoe*, 2012 NSSC 245, where a Nova Scotia Court agreed that, in the right circumstances, damages for this cause of action could be awarded:

> 55 I am satisfied that in an appropriate case in Nova Scotia there can be an award for invasion of privacy or as the Ontario Court of Appeal called it, "the intrusion upon seclusion".

[43] Therefore, I am not satisfied that it is "plain and obvious" that this cause of action would fail. Assuming the facts pleaded to be true, this cause of action could be successful. I find that the plaintiffs have met the requirement of section 7(1) in relation to both causes of action before the court.

7(2) There is an identifiable class of two or more persons that would be represented by representative party

[44] As I have previously noted, it must be shown that there is "some basis in fact" that there is such an identifiable class.

[45] The plaintiff submits, and I agree, that the following principles can be gleaned from the case law relating to this requirement:

> a) membership in the class should be determined by objective criteria that do not depend on the outcome of any substantial issue in the litigation;
>
> b) the class definition should bear a rational relationship to the common issues;
>
> c) the class must be bounded and not unlimited membership;
>
> d) it is not necessary to identify every, or even most of the class members at the certification stage;
>
> e) a proper class definition does not need to include only those persons whose claims will be successful;
>
> f) all class members need not have an equivalent likelihood of success. The defining aspect of class membership is an interest in the resolution of the proposed common issues;
>
> g) the class definition is the group to be bound by the result, including to the extent the claims fail.

[46] The plaintiff proposes the following as the class definition:

> **All patients who are subjected to a strip search on October 16, 2012 at the East Coast Forensic Hospital**

[47] This amounts to 33 people. There can be no doubt that this is a discrete class, of limited membership, determined by completely objective criteria. There is also

no doubt that membership in this class would be easy to determine. It does not depend on any outcome.

[48] The defendant submits that there are considerations which cause this proposed group to be inappropriate. It is their submission that the members of this group have significant differences between them, which affects both their viability as a common group and the proposed common issues (to be discussed further at s. 7(c)).

[49] As previously noted, 21 of these 33 people have filed complaints with the Nova Scotia Human Rights Commission, alleging discrimination on the basis of mental disability, arising from the strip searches.

[50] Secondly, the defendant argues, the group of 33 also breaks down in subcategories depending on each person's particular circumstances. For example, as I have described above, some members of the larger group were suspected, prior to the 16th of October, of being under the influence of substances. Some of its members were suspected of organizing the importation of illegal substances. Still other members exercised unsupervised community access privileges in the weeks prior to the search. The defendant submits that each of these subgroups would require different legal analyses, as the reasonable grounds for searching each person, dependent on their membership in any or none of the subgroups, would be different.

[51] The defendant is not arguing that the court certify each of the subgroups as an alternative to the plaintiff submission. Rather, the defendant argues that these differences create a circumstance where a class action involving the one class definition of these 33 people, would be inappropriate.

[52] In my view, while there are admittedly certain differences between members of this group, this is not fatal. In any certified class action, individual class members may have certain differences between them; it might even be difficult to picture a class action where every possible member of the plaintiff class was in exactly the same circumstances. This is not what is required in a 7(2) analysis.

[53] The plaintiff's case, as framed, hinges on the fact that one decision led to the search of these 33 people; the decision was not based on individual circumstances, nor membership in any sub-group. This is what creates the common element for all 33 members of the proposed class.

[54] It may be that some members of the proposed class have a stronger chance of succeeding than others; this does not defeat a proposed class, nor is it a reason to

refuse certification (*Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46). Neither is the fact that the defendant might be able to raise certain defences against some members of the proposed class and not others (*Elwin v. Nova Scotia Home for Colored Children*, [2013] NSSC 411). In my view, the concerns raised by the defendant here can be addressed by a) framing appropriate common issues, in light of those issues that might not be common, and/or b) dealing with these individual issues after the common issues have been dealt with. More will be said about common issues in the next section of this decision.

[55] For the purposes of s. 7(b), I find that the proposed class meets the requisite test.

7(3) The claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members

[56] The requirement and delineation of common issues is, quite often, the most difficult analysis within a certification hearing. Section 2(e) of the CPA defines common issues as follows:

> 2 In this Act,
>
> …
>
> (e) common issues means:
>
> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; but

[57] An issue may be "common" even though it does not resolve all issues that may exist in relation to liability and damages; a common issue merely needs to advance the claim to an extent that justifies a collective approach, as opposed to an individual one.

[58] The common issues requirement is also subject to the same low threshold as the other requirements, that is "some basis in fact" to support its finding. Our Court of Appeal (In *Canada (AG) v. MacQueen* 2013 NSCA 143) recently approved of a

list of legal principles to consider when assessing whether common issues exist, and if so, what they are:

> [123] The legal principles relating to common issues were summarized in *Fulawka v. Bank of Nova Scotia* 2012 ONCA 443 at p. 81 as follows:
>
> > [81] There are a number of legal principles concerning the common issues requirement in s. 5 (1) (c) that can be discerned from the case law. Strathy J. provided helpful summary of these principles in **Singer v. Schering-Plough Canada Inc.** 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement are described by Strathy J. in **Singer**, at para. 140, are as follows:
> >
> > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis**: Western Canadian Shopping Centers Inc. v. Dutton** 2001 SCC 46, [2001] S.C.R. 534 at para. 39.
> >
> > 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,** at para. 53.
> >
> > There must be a rational relationship between the class identified by the plaintiff and the proposed common issues: **Cloud**, at para. 48.
> >
> > The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: **Hollick**, at para. 18.
> >
> > A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: **Harrington v. Dow Corning Corp.** [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (SC), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to SCC ref'd [2001] S.C.C.A. No. 21.
> >
> > 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's be capable of extrapolation, in the same manner, to each member of the class: **Dutton**, at para. 40, **Ernewein v. General Motors of Canada Ltd**., 2005

> BCCA 540, 46 B.C.L.R. (4th) 234, at para. 32, **Merck Frosst Canada Ltd. v. Wuttunee** 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145 – 46 and 160.
>
> A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: **Williams v. Mutual life Assurance Co. of Canada** (2000) 51 O.R. (3d) 54, at para. 39, aff'd (2001) 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and [2003] O.J. No. 1161 (C.A.); **Fehringer v. Sun Media Corp** (2002) 27 C.P.C. (5th) 155 (S.C.J.), aff'd (2003) 39 C.P.C. (5th) 151 (Div. Ct.).
>
> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: **Chadha v. Bayer Inc.** 2003 CanLII 35843 (C.A.), at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and **Pro-Sys Consultants Ltd. v. Infineon Technologies AG**, 2008 BCSC 575, at para. 139.
>
> Common issues should not be framed in overly broad terms: "it would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class-action could only make the preceding less fair and less efficient": **Rumley v. British Columbia,** 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 29.

[59] Even where one can see potential differences that affect liability in individual cases within the proposed class, this does not rule out the existence of common issues. The question is whether the differences are overwhelmed in importance, factually and legally, by the common issues (*Anderson v. Wilson* 1998 OJ No. 671).

[60] The plaintiff proposes the following list of common issues:

> a) were class members all subjected to a strip search stemming from one order?
>
> b) If the answer to (a) is yes, who ordered the strip search?
>
> c) Were there reasonable and probable grounds to order the strip search of all class members?
>
> d) Did the strip search constitute an unreasonable search in violation of the class members' rights under section 8 of the *Charter*?

> e) If the answer to (f) is yes, are *Charter* damages a just and appropriate remedy?
>
> f) Did the defendant intentionally, and without a valid purpose, intrude on the seclusion of the class members privacy?
>
> g) Is yes, is the defendant liable for intrusion upon seclusion?
>
> h) If the defendant is liable for intrusion upon seclusion, can damages of class members be determined on an aggregate basis? If so, what is the appropriate amount of aggregate damages?

[61] The defendant concedes that proposed issues (a) and (b) appear to be legitimate common issues.

[62] In relation to proposed issues (c) and (d), the defendant submits that these are not common issues. It is their position that the answer to these questions would be different for different class members, depending on their particular circumstances. I have alluded to this argument earlier in this decision, in my discussion of s. 7(2) (identifiable class).

[63] The defendant argues that, in assessing the alleged *Charter* breaches, the court will need to conduct an individual assessment of each search. In particular, the court will need to determine whether there were reasonable and probable grounds to search that particular individual; whether that individual search was done in a reasonable manner; and whether valid informed consent was obtained in relation to that one individual. The defendant submits that in the case of certain people, there may have existed reasonable and probable grounds, on the basis of a number of factors particular to those people; for others, there may not have existed such grounds. In the defendant's submission, therefore, the question of "reasonable and probable grounds" cannot be a common issue.

[64] The defendant cites the case of *Thorburn v. British Columbia* 2012 BCCA 480 (hereinafter "*Thorburn*") as authority for its position. In that case, the Vancouver city jail had a policy of routinely strip searching new arrivals, with certain exceptions. The proposed plaintiffs sought certification of a class action for "detained individuals who were not then remanded into pre-trial custody". The BC Court of Appeal dismissed the appeal from the motions judge decision to not certify the proposed action; as in its view, the s. 8 analysis would require individual assessments of each search. In considering the legal framework for strip-searches, the Court referred to the case of *R. v Golden* 2001 SCC 83:

> [9] …The issue in *Golden* was the legality of a strip search incidental to the arrest of an individual at a Subway sandwich shop for trafficking in cocaine. The Court allowed the appeal, set aside the conviction and entered an acquittal on the grounds that, in the circumstances of that case, while the arrest was lawful, the strip search incidental to the arrest (during which the illegal drugs were discovered) had been unjustified and therefore unreasonable. Writing for the majority, Mr. Justice Iacobucci and Madam Justice Charron described strip searches as "inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy" (para.90). They held that reasonable grounds for an arrest did not confer automatic authority on the police to carry out a strip search incidental to a lawful arrest but that "additional grounds pertaining to the purpose of the strip search are required" (para. 98). In their words:
>
> > [99] in light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid common-law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the Charter.
>
> [10] Thus, on the authority of *Golden* a strip search is constitutionally valid if there are reasonable grounds for the arrest, and reasonable grounds to justify the strip search incidental to arrest, and the searches conducted in a reasonable manner.

[65] I agree with the Supreme Court's comments in relation to the inherently degrading nature of strip searching; I doubt anyone would disagree with that statement of principle. Other than for that purpose, however, the *Golden* case is not of much help to the case at bar; while the search in *Golden* was a strip search, it was effected under completely different circumstances, i.e. that of a search incidental to arrest. The court in *Golden* acknowledged that strip searches within custodial settings were subject to different considerations: "the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment." (para. 96).

[66] *Thorburn* also involved the situation of persons under arrest / detained, and the constitutional validity of searches under those circumstances. That is not the

situation before me. The search of persons in custodial settings is subject to its own set of considerations; here we are dealing with searches of forensic psychiatric patients, which would require further analysis (see *Mazzel v. British Columbia (Director of Adult Forensic Psychiatric Services*), 2006 BCCA 321).

[67] In *Thorburn*, the BC Court of Appeal found that the "common issues" requirement had not been met, as the unreasonable search could not be established in common. The court held:

> [41] …While a warrantless search is presumptively unreasonable, a *Charter* right is individual in nature. Individual assessments would be necessary to determine if reasonable grounds existed (based on the objectively – justifiable subjective belief of the arresting officer or staff member conducting the search) for the arrest and the search incidental to the arrest of each class member, and whether the manner of the search was reasonable in all of the circumstances unique to each proposed class member. On the basis of *Golden*, these circumstances would include a consideration of the likelihood that a detainee might be remanded into custody and thereby be mingling with the prison population. Each of these legal and factual determinations would require a consideration of the multifarious circumstances of each class member (e.g. the reason for the arrest, any prior criminal record or acts of violence and/or possession of weapons, and the extent of the possibility he or she might be remanded into custody). And unreasonable policy alone could not provide the foundation for determining each class member's cause of action of an unreasonable search; only an individual assessment of the relevant circumstances unique to each class member would allow a judge to determine if a cause of action had been established.
>
> [42] Both the initial common issues and the supplementary common issues set out broadly framed issues that include: (i) elements of the well-established legal tests for an unlawful search; (ii) settled law regarding the shift in onus for establishing a s. 8 *Charter* breach, (iii) the principles for awarding *Charter* damages (from *Ward*); and (iv) the availability of statutory defenses (under the former and current legislation) and the common-law defenses (from *Golden* and the common-law power of search incidental to arrest). The resolution of these "common issues" in practical terms resolves no "common" element of each member's cause of action (an unlawful search) as each of the elements of the cause of action (reasonable grounds for arrest, search incidental to arrest, reasonableness of the manner of the search including the likelihood of a member being placed into the prison population, and the appropriateness of *Charter* damages) requires individual findings specific to the proposed class member. Accordingly, even if the answers to the "common issues" could be said to clarify the questions they pose, they would not advance the litigation in any meaningful way as they would not avoid the duplication that would be necessary for the individual fact-finding and legal analysis of each class members claim. In other words, a finding of a s. 8 *Charter*

> violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member.

[68] In *Thorburn*, therefore, since each person entering the prison had been arrested for a different reason, was searched at a different time by a different staff member who had made that decision to search, it was impossible to boil down all those events to one common issue. Any of the searches could be deemed reasonable or unreasonable, depending on its unique set of circumstances. There was purportedly one policy, but it had been implemented over the course of years, countless times by countless decision-makers in countless different ways. This was fatal to the proposed class action.

[69] I contrast this with the case at bar, where a single decision was made to search a group, at one time, on the basis of one set of facts. I distinguish the *Thorburn* case for those reasons.

[70] I further contrast *Thorburn* with the case of *Good v. Toronto Police Services Board,* 2014 ONSC 4583 (hereinafter "*Good*") . In my view, *Good* is more closely aligned with the facts of the case before me.

[71] *Good* arose as a result of protests occurring during the G20 summit held in Toronto in 2010. To deal with the demonstrations, the police decided to "round up" groups of people within certain areas of the city, without regard for their circumstances or conduct, and detain them. Five "location-based" subclasses came forward seeking certification of a class-action against the police services board, alleging illegal detention contrary to s. 9 of the *Charter*. The motions judge refused to certify the proceeding as a class-action. The matter was appealed to the Ontario Superior Court of Justice (Divisional Court).

[72] The court first undertook a lengthy assessment as to the appropriateness of the identified class. Arguments against certification were similar to those made before me. The defendant, Police Services Board, argued that important differences existed between the class members circumstances, and that therefore, their detention could not be examined as a common issue. For example, some members of the class were later charged with an offense; some members were not charged but their detention was still justified by their unlawful conduct; and so on. The court rejected these arguments, saying:

> 28 With respect, these observations failed to take into account the fundamental foundation for the claim that is being advanced by the appellant. Central to the appellant's claim is that the persons in the subclasses were detained based upon a command order that did not take into account whether any of those persons had or had not committed an offense or even whether there were reasonable grounds to suspect that any of those persons had committed an offense. Rather, the persons in the subclasses were detained simply because they were part of a large group who had congregated in a particular area of the city.
>
> 29 As I shall discuss further when it comes to the common issues requirement, if the appellant's core contention is correct, it is of no consequence whether any member of the class did, in fact, commit a criminal offense or a breach of the peace. The police cannot justify the detention of a person based on information that they either did not have, or which they did not rely upon, in ordering a person to be detained.

[73] And later, in conclusion on the "identified class" issue:

> 37 In essence, in this case, we have a broad class of persons who were allegedly arbitrarily detained in each instance by the police through the use of a single sweeping order. That broad class is then divided into subclasses distinguished only in each specific instance by the geographic location where the particular mass detention occurred. These divisions do not change the fact that there is nonetheless a central commonality linking each of the subclasses.

[74] The test for assessing a *Charter* breach for arbitrary detention was defined in the leading Supreme Court of Canada case *R. v. Mann* [2004] 3 SCR 59; it is the "articulable cause" This is defined as "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation".

[75] In considering the facts of their case in light of *Mann*, the court in *Good* held:

> 47 … In this case, the allegation is that the command order was given without regard to whether any particular individual swept up in the mass detention was or was not implicated in the unlawful activity with which the police were concerned. In other words, the allegation is that the police engaged in an approach of detaining people first and then later deciding whether any of those persons were actually engaged in criminal activity.
>
> …

> 49 On this point, it is important to remember that the police cannot sweep up scores of people just in the hope that one of the persons captured is a person who they believe is engaged in criminal activity. The police are only lawfully able to detain those persons who meet the *Mann* test...
>
> 59 It was not therefore relevant whether the evidence at the certification stage could prove that all of the arrests were unlawful. Rather, what was relevant was whether there was some evidence that could suggest the possibility of that result. In that regard, the appellant filed affidavits from persons involved who attested to the arbitrary nature of the detentions and arrests supplemented by comments from various police officers that they had no discretion not to detain an arrest. The appellant also pointed to various police notes recording the issuance of mass arrest orders, instructions that persons detained were not to be allowed to leave before being arrested and that the intent was to detain an arrest not to disperse the crowd.

[76] Having reviewed the law, the court decided that the first proposed issue was, in fact, a common issue: “Were the members of the class arbitrarily detained and/or arrested in violation of their rights at common-law or under s. 9 of the Canadian Charter of Rights and Freedoms?” The court was of the view that the answer to this question would significantly advance the claim of each member of the class.

[77] Similarly, the plaintiff’s proposed claim here, involves one decision to search all members of a proposed class, at one time, on the basis of one set of facts. The question of whether this decision met the requirement for reasonable and probable grounds, is an important question in a *Charter* analysis: how could any search, particularly a strip search, be reasonable, no matter how respectfully conducted, unless the searcher had grounds for doing so? In this context, it is a common issue to all class members here.

[78] The defendant submits that *Good* can be distinguished because it deals with section 9 of the *Charter*, rather than section 8. I disagree. Analyses of both s. 8 and s. 9 claims, in the normal course, require a review of all of the particular facts and circumstances of the individual claiming a breach of the Charter. In my view, if a section 7 cause of action can be confirmed as a class-action due to one sweeping order, so too can a section 8 cause of action. I do not see any distinction between two such cases.

[79] The defendant has also argued that the “manner” of each individual search is a necessary requirement to a *Charter* analysis (thereby necessitating an individual analysis of each search). As to that issue, I repeat the following comments from the SCC in *Golden*:

> 89 … The importance of preventing unjustified searches before they occur is particularly acute in the context of strip searches, which involve a significant and very direct interference with personal privacy… As was pointed out in *Flintoff*, supra, at p. 257, "[s]trip-searching is one of the most intrusive manners of searching, and also one of the most extreme exercises of police power".
>
> 90 Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy. The adjectives used by individuals to describe their experience of being strip-searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating", "degrading", "demeaning", "upsetting", and "devastating"… The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse…" [Emphasis is mine]

[80] All strip searches are recognized as "humiliating and degrading"; the manner in which they are carried out can only make them more or less so. Furthermore, all warrantless searches are unreasonable on their face. While I agree that a *Charter* analysis of a search will ultimately require knowledge of all of the circumstances, in this particular case, the grounds for each search was the same.

[81] In appropriate cases, courts have found a *Charter* breach as against a group at once, where all are subject to the same treatment (*R. v. A.M.*, [2008] 1 S.C.R. 569).

[82] I also repeat, at this point, that a certification hearing is not an assessment of the merits of the case itself, and I do not concern myself with whether this action might ultimately succeed. The question as to whether the searches conducted here did, in fact, breach the *Charter*, is a question for another day.

[83] I conclude that there are important common issues here. The first two issues proposed by the plaintiff I certify as common issues:

> a) were class members all subjected to a strip search stemming from one order?
>
> b) If the answer to (a) is yes, who ordered the strip search?

[84] The next proposed common issue, deals with grounds for the search. Here, for reasons that I have already outlined, I find that this issue of "grounds" is a common issue, as the pleaded facts show one decision being made for all members. However, I have made slight changes to the proposed wording, to be more clear (changes are underlined):

> c) If the answer to (a) is yes, were there reasonable and probable grounds to order the one strip search of all class members?

[85] If a court was to answer that question in the affirmative, it is conceivable that the analysis would end there.

[86] I next move to a related, but different, question. As I have already discussed, the defendant has argued that individual assessments of grounds need to be made, since they might have had grounds in relation to some patients, but not others. On the other hand, this raises the interesting preliminary question: if 33 patients were searched on the basis of one order, with no consideration of individual circumstances at that time, it is now possible to argue, *ex post facto*, that there were grounds for some, and not others?

[87] In my view, this question requires an answer. This is also a common question:

> (d) If the answer to (a) is yes, and if the answer to (c) is no, can the defendant now justify the search of individual class members on the basis of individual considerations?

[88] If a court determines that such an approach would be permissible, the next steps would obviously not be common, as each of the class members would need to be assessed individually. That could also, potentially, include the issue of consent to any individual search. Therefore, I have considered proposed common issue (d), which reads:

> (d) Did the strip search constitute an unreasonable search in violation of the class members' rights under section 8 of the *Charter*?

[89] For the reasons I have given, I do not certify proposed issue (d) as common.

[90] In relation to (e):

> e) Are *Charter* damages a just and appropriate remedy?

[91] I do see this as a common issue. It is possible that some members of the class will be unsuccessful depending upon the answers to the previous questions. However, that does not detract from the question as to whether, for those members who are found to have been searched in contravention of the *Charter*, damages are a just and appropriate remedy under 24(1).

[92] In relation to the intrusion upon seclusion claims, in my view, the first question that needs to be answered is whether the strip searches that occurred constitute intrusion upon seclusion as the court would define it. There are two separate questions:

> d) What are the elements of intrusion upon seclusion?
>
> e) Did the decision to strip search the members of this class intrude on the seclusion of the class members privacy, as defined by the Court?

[93] Depending on the Court's decisions and findings in earlier questions, there might also be a need under this claim, at some later point, for individual assessments to be made in relation to the particular manner of each search.

[94] The last proposed common issue is:

> f) If the defendant is liable for intrusion upon seclusion, can damages of class members be determined on an aggregate basis? If so, what is the appropriate amount of aggregate damages?

[95] Authors Winkler, Perell, Kalajdzic, and Warner state as follows (*The Law of Class Actions in Canada*, 2014, Canada Law Book), at page 266:

> Thus, an aggregate assessment of monetary relief may only be certified as a common issue where resolving the other certifiable common issues could be determinative of monetary liability and where the quantum of damages could reasonably be calculated without proof by individual class members. In circumstances where the assessment of damages is necessarily idiosyncratic to individual members of the class and where an element of liability cannot be determined without the evidence of individual class members, the issue of damages is not common and an aggregate assessment of damages is not appropriate.

[96] The pleadings simply claim "damages" for intrusion upon seclusion. For the section 8 *Charter* breach, the claim is for general damages and special damages (no detail is provided as to what those special damages might be). On the evidence before me, I am not satisfied that an aggregate quantum of damages could be calculated without hearing evidence from individual class members as to their particular circumstances. I reject this as a common issue.

[97] In conclusion, I find that the common issues are:

> **a) were class members all subjected to a strip search stemming from one order?**
>
> **b) If the answer to (a) is yes, who ordered the strip search?**
>
> **c) <u>If the answer to (a) is yes</u>, were there reasonable and probable grounds to order the <u>one</u> strip search of all class members?**
>
> **d) If the answer to (a) is yes, and if the answer to (c) is no, can the defendant now justify the search of individual class members on the basis of individual considerations?**
>
> **e) If s. 8 of the Charter was breached, are *Charter* damages a just and appropriate remedy?**
>
> **(f) What are the elements of Intrusion upon seclusion?**
>
> **(g) Did the decision to strip search the members of this class intrude on the seclusion of the class members privacy, as defined by the Court?**

<u>7(4) A class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute</u>

[98] The *CPA* provides additional direction to the court in relation to this criteria, at s. 7(2):

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider:
>
> (a) whether questions of fact or law, and to the class members predominate over any questions affecting only individual members;

> (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
>
> (c) whether the class proceeding would involve claims or defenses 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; and
>
> (f) any other matter the court considers relevant.

[99] In my view, the common questions that I have identified in the preceding section would predominate over individual questions in this matter. They strike at the heart of the claim being advanced, and need to be determined before any individual considerations are even relevant. It does seem more practical, to have those common issues determined once, for all members.

[100] In relation to s. 7(2) (c), I do note, as mentioned earlier in this decision, that some members of the class have made formal complaints to the provincial Human Rights Commission; in my view, this is not prevent the present action from proceeding. A human rights complaint would be dealt with in a much different way, and with consideration of many different factors, then would a court proceeding involving a cause of action and claim for damages. The human rights matter is also in its early stages, and it would be speculative that such a proceeding should prevent any other claim from advancing at this stage. Of course, I do not exclude the possibility that the human rights proceeding might, in the future, affect this action in some way.

[101] An analysis of the s. 7(4) requirement needs to include a consideration of the three main advantages of class actions in appropriate circumstances: judicial economy, access to justice, and behavior modification (*Cloud*, supra; *Pearson v. Inco Ltd.* (2005) 78 O.R. (3d) 641). Given that I have found that the common issues are significant and must be determined for all members of the class, the judicial economy consideration is met.

[102] In relation to access to justice, the plaintiff submits that this is an issue of primordial importance. The proposed class members here come from a marginalized and disadvantaged group in society, i.e. the mentally ill. It is also acknowledged that damage awards might be relatively small. The plaintiff submits that it is unlikely that any of these claims will advance independently. Certification of this class action allows these class members to access the courts.

[103] I agree that access to justice is a significant consideration in the present case. Such has been recognized as an important goal of class proceedings (See *Hollick*, supra). I recognize that significant barriers exist here that affect the possibility of each potential plaintiff advancing an individual claim. These proposed plaintiffs are/were individuals with diagnosed psychiatric illnesses; they had been involved in the criminal justice system and ordered to be treated at the ECFH. Some of these proposed class members may still be housed and treated at the ECFH. Such barriers were recognized in *Fischer v. IG Investment Management Ltd.* 2013 SCC 69:

> 27 The sorts of barriers to access to justice may vary according to the nature of the claim and the makeup of the proposed class. They may relate to either or both of the procedural and substantive aspects of access to justice. The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature. They may arise from such factors as the ignorance of the availability of substantive legal rights (Ontario Law Reform Commission, Report on Class Actions, Vol 1 (1982) ("OLRC Report")), ignorance of the fact that significant injuries have occurred (OLRC Report, at pp. 128-28), limited language skills (see e.g. Rubenstein, at 4:65), elderly age of the claimants (…), frail or emotional or physical state of the claimants (see e.g. *Rumley v. British Columbia* 2001 SCC 69), fear of reprisals by the defendant (…), or alienation from the legal system as a result of negative experiences with it (…). A common procedural barrier is that there is no other procedure available to afford meaningful redress. [Emphasis is mine]

[104] The following quote from *Good*, supra, makes the point very well and in my view, is equally applicable here (at para. 93):

> Most of [the proposed class members}, as angry and unhappy and offended as they undoubtedly are at what was done to them by police officers sworn to "serve and protect", would not likely be willing to devote the time and expense required to seek individual relief through the legal system. That is especially so when one

> recognizes that in almost all of these cases we are not dealing with physical injuries or significant psychological damage. Rather, the damage was made to the liberty interests of those individuals where the harm is, perhaps, easier to ignore and easier to minimize. Lacking any physical effect, a person who might otherwise be willing to invest in advancing a claim may well, in this instance, consider the energy and expense as the equivalent of "throwing good money after bad". It is a harm, however, that is nonetheless real and it is harm, if proven, that should not go on remedied.

[105] Again, I make no comment as to the merits of the plaintiffs' case. These strip searches may ultimately be found to have been reasonable, or not. Regardless, important questions are raised, and a class action will allow those questions to be litigated.

[106] I also agree that the "behavior modification" aspect of this analysis, is another persuasive factor toward certification. The defendant will be advancing the argument that these searches were justified, on the basis of the information before them. The evidence shows that strip searches have occurred in this facility before, and one presumes, will occur again. If the searches performed here are ultimately found to be unconstitutional, and/or a violation of patients' privacy, such would then allow the defendant to modify their practices accordingly.

[107] There can be no doubt that administrators of facilities such as the ECFH need to be able to control their facilities; there can also be no doubt that strip searches are highly intrusive. A court ruling in this particular case would likely be helpful in finding the appropriate line between those two realities.

7(5) There is a representative party who

a) would fairly and adequately represent the interests of the class,

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

c) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members

[108] Mark Murray is the representative party here who is proposed. I have nothing before me that would suggest that Mr. Murray would not be able to fairly and adequately represent the interests of the class. Mr. Murray has provided affidavit evidence wherein he confirms his intention to proceed with this matter in the interests of all members of this proposed class. He asserts no conflict with any of the other class members, nor do I see any. Mr. Murray has produced a plan which I have reviewed. Obviously such plans are works in progress and may need amendment in the future, but for the purposes of the present motion, the proposed plan appears to reasonably set out a workable method of advancing this proceeding as a class proceeding. I see no interest that Mr. Murray has, which would be in conflict with interests of the other class members.

[109] In all of the circumstances, I am satisfied that the Applicant / Plaintiff has met the burden upon him with respect to each of the requirements of s. 7 of the *Class Proceedings Act*. I grant the application and certify this proceeding as a class action pursuant to that *Act*. The class definition, and common issues, are as described within this decision.

[110] I thank counsel for their able and helpful submissions. I shall hear the parties as to costs, if they cannot agree.

Boudreau, J. (Denise)