SUPREME COURT OF NOVA SCOTIA
Citation: *Murray v. Capital District Health Authority*, 2016 NSSC 141

Date: 20160527
Docket: Hfx No. 422819
Registry: Halifax

Between:

Mark Jason Murray

Plaintiff

v.

Capital District Health Authority, a body corporate carrying on business as the East Coast Forensic Hospital

Defendant

DECISION

APPLICATION TO AMEND PLEADINGS TO ADD THE ATTORNEY GENERAL OF NOVA SCOTIA, REPRESENTING HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE, AS A DEFENDANT

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	March 22, 2016, in Halifax, Nova Scotia
Final Written Submissions:	May 12, 2016
Counsel:	Michael Dull, for the Plaintiff Karen Bennett-Clayton, for the Defendant Agnes MacNeil and Catherine Lunn, for the proposed Defendant

By the Court:

[1] On February 25, 2015, I granted the plaintiff's motion to certify a class action proceeding against the defendant Capital District Health Authority, carrying on business as the East Coast Forensic Hospital ("the defendant"), (*Murray v. East Coast Forensic Hospital* 2015 NSSC 61).

[2] The plaintiff now comes forward with a new motion, seeking to amend their pleadings by adding a second defendant, the Attorney General of Nova Scotia, representing Her Majesty in right of the Province ("the proposed defendant").

Facts

[3] This action came about as a result of "strip searches" that were conducted on 33 forensic psychiatry patients at the East Coast Forensic Hospital in Dartmouth Nova Scotia, on October 16, 2012. The hospital is staffed by employees of the defendant (health employees) and the proposed defendant (correctional employees).

[4] For the purpose of this motion, the parties agreed to put before me the original evidentiary record from the original certification motion. Further material

was put before me by the parties; in particular, a Human Rights Commission Report dated March 13, 2015.

[5] The original evidentiary record included 33 reports entitled "Strip Search Reports", one for each of the searches. These were signed by both Brenda Mate, an employee of the defendant and Todd Henwood, a correctional officer employed by the proposed defendant. Within each report, under the 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.

[6] 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.

[7] The certified class action against the defendant claims a Charter breach, as well as intrusion upon seclusion, for its actions. At its core, the claim focuses on the one decision to strip search all 33 patients.

[8] In June of 2015, following certification, Mr. Dull was advised that an investigation report had been produced by an officer from the Nova Scotia Human Rights Commission. This was as a result of complaints to that Commission, filed by 21 of the 33 persons searched.

[9] Mr. Dull obtained this report and, as I previously noted, it was put before me on this application. It was not filed for the truth of its contents, but merely in support of the request to add the proposed defendant. The report contains a section entitled "**G. Evidence for individual allegations and issues**", with a sub-heading entitled "i. Witness Statements". The ninth person listed in that section is "Todd Henwood (Captain, Correctional Services)".

[10] One of the statements attributed to Captain Henwood is as follows:

> 41. Henwood indicated it was his ultimate decision to conduct the strip search and end it ….

[11] As a result of that new information, the plaintiff moves to add the proposed defendant.

Amendment of certified class proceeding

[12] I note Rule 68 (Class Proceedings), and in particular, Rule 68.04:

Amendment of pleading

68.04 A statement of claim, or statement of grounds, in a class proceeding may not be amended under either Rule 38 - Pleadings or Rule 83 – Amendments, after a certification order is granted, unless a judge permits the amendment.

[13] A motion to join a party to a proceeding is referred to in Rule 35:

35.05 A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 – Amendment.

…

35.08 (1) A judge may join a person as a party in a proceeding at any stage of the proceeding.

(2) It is presumed that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing.

(3) The presumption is rebutted if a judge is satisfied on each of the following:

(a) joining a person as a party would cause serious prejudice to that person, or a party;

(b) the prejudice cannot be compensated in costs;

(c) the prejudice would not have been suffered had the party been joined originally, or would have been suffered in any case.

[14] Rule 83 provides:

Amendment to add or remove party

83.04 (1) A notice that starts proceeding, or third-party notice, may be amended to add a party, except in the circumstances described in Rule 83.04 (2).

(2) A judge must set aside an amendment, or part of an amendment, that makes a claim against the new party and to which all of the following apply:

(a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;

(b) the expiry precludes the claim;

> (c) the person protected by the limitation period is entitled to enforce it.

[15] In the present matter, the complicating factor is that this is a certified class-action proceeding. The proposed defendant has raised concerns about the way this proceeding has evolved. It submits that its possible involvement was known to the plaintiff at the time of the original filing of this claim, and that the plaintiff should have included it then. The proposed defendant argues that it would be inappropriate for the court to now sanction this amendment.

[16] The proposed defendant further argues that it has been prejudiced by this proceeding, and that the situation meets the test for rebuttal of the presumption (at Rule 35.08) which is found at Rule 35.08(3). The prejudice, it is submitted, is that the common issues were decided at the original certification decision. The proposed defendant argues that those issues are too broad and vague, and that the proposed defendant is now prejudiced by having to live with these common issues, with no opportunity to have them better defined. I shall deal with the common issues, and this argument, later in these reasons.

[17] A decision to add a party as a defendant must always be made judicially, in consideration of the appropriate principles. (*M5 Marketing Communications v. Ross* [2011] NSJ No 43)

[18] I am not persuaded that the plaintiff undertook these actions in bad faith. I accept that the plaintiff would not have chosen this course of action in hindsight. I see no reason not to consider this amendment as it was presented.

[19] There is very little case law in the area of adding of a defendant to a certified class action. In *Bodnar v. The Cash Store* 2008 BCSC 714, the plaintiffs had brought an action alleging unjust enrichment and unconscionable trade practices as against a number of defendants. Following certification, the plaintiff made application to add other defendants, and to add common issues. In bringing the motion, the plaintiff noted that the claims against the proposed defendants were the same as those made against the original defendants.

[20] The court in *Bodnar* referred to the British Columbia rule for adding parties, which set out a two-part test: first whether there was a "degree of relationship" between the defendants and the proposed defendants in relation to the subject matter of the action; and secondly whether it would be "just and convenient" to have the issue involving the proposed party joined with the existing party. The court reviewed the facts before it and decided that this case met both parts of the test. It agreed, "These are exactly the same claims that have been made against the existing defendants with respect to their involvement in the same business and relating to the same loans." (para. 10)

[21] The court then proceeded to address each of the B.C. *Class Proceedings* Act requirements in turn in relation to the proposed defendants while pointing out that the proposed claims were essentially the same as those already certified. The court also made the point that certification is only a procedural step in the proceeding, and is in no way determinative of the merits of the action:

> [24] With respect to the evidentiary basis, the plaintiffs are required to adduce evidence for certification requirements, as set out in s. 4 of the **Act.** The plaintiff is not required to provide evidence to prove all of the allegations of the statement of claim. Certification is not a determination of the merits of the action (*Holick v. Toronto (City)* 2001 SCC 68). The plaintiffs have adduced evidence to meet this burden. The plaintiffs are not required to provide evidence to prove all of the allegations in the statement of claim. The evidence here is sufficient to establish a rational connection tween the class and the common issues asserted against the proposed defendants. The claims are not ridiculous or incapable of proof. It is not plain and obvious that the claims cannot succeed.

[22] The *Bodnar* decision was confirmed on appeal (*Bodnar v. 367463 Alberta Ltd*. 2008 BCCA 192). The appeal court stated:

> [10] In examining the merits of the proposed grounds of appeal, it is important to note that the decision whether to add parties to an action is essentially discretionary and attracts an exacting standard of review. Leave to appeal a discretionary order will only be granted "where the order is clearly wrong, a serious injustice will occur, or the discretion was not exercised judicially or was exercised on a wrong principle" per **Strata Plan LMS 1212 v. Winchester Investments** 2004 BCCA 500 at para. 2. The standard is even more stringent where the appeal is from the decision of the case management judge who has had conduct of the proceedings for a considerable length of time, as here. (See, **Robak Industries Ltd. v. Gardner** 2006 BCCA 395 (Donald J.A.).)

[23] In the present case, the plaintiff also argues that the claim against the proposed defendant is exactly the same as that against the original defendant. The events alleged have not changed. The new information raises only one question: the identity of the person who made the decision that set the events in motion.

[24] The proposed defendant here does not disagree with some of the plaintiffs submissions. Their brief indicates at page 2:

> **Position of the AGNS**
>
> 6. The AGNS agrees with the fundamental underpinnings of the decision made arising from the CDHA certification hearing. The AGNS concedes that this action ought to be certified, that there are common issues, and that it is the preferable procedure for determining the issues raised. The two issues outstanding on this motion are:
>
> 1) whether the court accepts that "intrusion upon seclusion" is a viable cause of action on the face of the pleading; and
>
> 2) whether the proposed common issues ought to be amended and whether there are additional common issues which should be added?

[25] And later, at page 3:

> 10. The AGNS has conceded most of the issues on this motion, and is merely seeking a modification of the order sought.

Requirements for class certification

[26] Section 7(1) of the *CPA* provides that certification must be ordered ("The Court shall certify …") when five 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.

[27] It has often been said that the test for class certification is not meant to be an onerous threshold. Each of the criteria noted in s. 7(1) of the *CPA* (with the exception of s. 7(1)(a) which is to be made out on the pleadings alone), is to 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).

[28] In my original certification decision I noted a number of cases, and quotes therefrom, which illuminate the general applicable principles. While I do not intend to repeat all those in detail here, I refer again to *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379, [1998] O.J. No. 2694 (Gen. Div.); and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. In *Pro-Sys Consultants v. Microsoft Corp*. (2013) SCC 57 the Supreme Court held that the "some basis in fact" standard is lesser then "balance of probabilities".

[29] Class action legislation must be given a "large and liberal interpretation" to ensure that its goals are met (*Anderson v. Canada* 2010 NLCA 106; *Hollick*, *supra*). I quote again, as I did in my original certification decision, from the New Brunswick Court of Appeal *Gay v. Regional Health Authority* 2014 NBCA 10:

> 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.]

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

[30] Section 7(1) of the *CPA* 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). The appropriate assessment required by s. 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 *CPA* 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).

i) Charter claim

[31] In the present case, the plaintiff has put forward two causes of action: first, he claims a breach of s. 8 of the *Charter*. In relation to that cause of action, at the time of the original certification motion, the defendant acknowledged that this claim met the requirements of s. 7(1) of the *CPA*. In relation to the motion before me today, the proposed defendant acknowledges that same narrow point.

[32] The claim against the proposed defendant is exactly the same as the claim against the defendant. I confirm that for the purposes of s. 7(1) of the *Act*, there is a cause of action disclosed by the s. 8 Charter claim, as against the proposed defendant.

ii) Intrusion upon seclusion

[33] The second cause of action pled by the plaintiff, "intrusion upon seclusion", was not conceded by the original defendant, and is not conceded by the proposed defendant. As I noted in my original decision, that claim is set out in the pleadings 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.

[34] Again, this claim against the proposed defendant is exactly the same as for the existing defendant.

[35] The proposed defendant made many arguments before me, disputing the viability of this cause of action. The proposed defendant is of the strongly held view that the present fact scenario does not create a cause of action in "intrusion upon seclusion"; furthermore, it submits that this tort, in Nova Scotia, is in its infancy, and is not defined to a point that we could properly certify it within a class action.

[36] As a preliminary point, with respect to this particular cause of action, the plaintiff raised the issue of "*functus officio*" in his oral submissions. The plaintiff submits that since I have already made the decision to certify the claim of intrusion upon seclusion, in this case, as against one defendant, I cannot reconsider that decision as against the proposed defendant. Interestingly, the defendant CHDA agrees with the plaintiff and says that, to accept the proposed defendants argument, I would have to overturn a decision I have already made.

[37] The proposed defendant disagrees. They point out that my function is to address this motion by reviewing each of the *CPA*'s s. 7 requirements once again. It is their submission that I am *functus* only with respect to the certification order

issued on May 5, 2015; the court's record as to that order, on that date, cannot be altered.

[38] I agree with all counsel that to the law with respect to *functus officio* is as described by the Nova Scotia Court of Appeal in *MacQueen v. Canada* (Attorney General) 2014 NSCA 73:

> [8] Once a court has issued its order, the general rule is that it cannot reopen the decision. See, for example, *Midland Doherty Ltd. v. Rohrer* [1985] N.S.J. No. 121 (S.C.A.D.), where MacKeigan, C.J. stated:
>
> > [5] Once a final order is issued on appeal this court has prima facie no jurisdiction to open the appeal to grant a new hearing of the appeal or to correct any substantive error made by it on the appeal; a party aggrieved by our error must ordinarily look for remedy to the Supreme Court of Canada, if appeal to that Court is available.
>
> [9] Although he did not use the term, what MacKeigan, C.J. described was the effect of the common-law doctrine of functus officio. In *Nova Scotia Government and General Employees Union v. Capital District Health Authority* 2006 NSCA 85, Cromwell, J.A. (as he then was) explain the principles relating to functus officio:
>
> > [36] Functus officio is a rule about finality; once a tribunal has completed its job, it has no further power to deal with the matter. In relation to court proceedings, the principle means that, in general, once a court has issued and entered its final judgment, the matter may only be reopened by means of appeal. To this general rule, however, there are at least two exceptions: the court may correct slips and, as well, address errors in expressing its manifest intent: *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; see also Civil Procedure Rule 15.07.
> >
> > [37] These principles developed in the context of court decisions which are subject to full rights of appeal. The existence of these full rights of appeal fostered the view that an appeal, rather than a reopening of the case before the initial decision-maker, was generally the preferred way to address errors in the initial decision.

> [10] In regard to finality, the policy rationale underlying functus officio, the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 elaborated:
>
> > 79 It is clear that the principle of functus officio exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey* [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense; if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal…
>
> [11] As *Capital District Health* pointed out, there are at least two exceptions to the doctrine of functus officio. These allow a court to correct slips and to address errors in expressing its manifest intent. See also *Doucet-Boudreau* at p. 113.
>
> [12] Our Civil Procedure Rules contain provisions which permit such corrections and amendments. See, for example, Rules 78.08, 82.22(1) and, specifically for judgments of this Court, Rule 90.50(2).

[39] In my original decision, I certified a cause of action between the plaintiff and defendant in "intrusion upon seclusion" in relation to the events of October 16, 2012. The question before me, now, is whether that is my "final judgment" as to the viability of this cause of action, in this case and fact scenario, for the purposes of ss. 7(1) of the *CPA* in relation to the proposed defendants.

[40] I repeat again, this claim against the proposed defendant is exactly the same as the claim against the original defendant. Therein lies a fundamental problem. If I were now to conclude that there is no viable cause of action of "intrusion upon seclusion" in this case against the proposed defendant, that would mean that I would necessarily have to also conclude that my original decision to certify the

cause of action, against the original defendant, was incorrect. This was the opinion of both the plaintiff and the defendant; having considered this, I must agree. I could not logically conclude otherwise. If I were to so conclude, that would clearly violate the rule against the finality of court decisions.

[41] I therefore conclude that I am *functus officio* as to the viability of a cause of action of "intrusion upon seclusion" in this case. I cannot reconsider my own decision. It could only be reconsidered by an appeal court.

[42] I find that both causes of action before the court meet the test pursuant to s. 7(1) of the *CPA*, for both the defendant and the proposed defendant.

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

[43] The proposed defendant has made no substantive submissions on this requirement. The identifiable class here is, again, exactly the same as it is for the existing defendant:

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

[44] For the purposes of s. 7(b), and for the same reasons as I explained in my first decision, I find that the proposed class meets the requisite test for the proposed defendant.

[45] The defendant has put forward the argument that, assuming that the proposed defendant is added, I should consider the identification of sub-classes: those searched by correctional officers, and those searched by both correctional officers and Capital Health employees. Secondly, those who made Human Rights complaints, and those who did not.

[46] Neither the plaintiff nor the proposed defendant made any substantive submission with respect to that suggestion. It has not been made clear to me at this point why sub-classes would be necessary or desirable. The claim as presently framed questions the one decision to search, and the basis for that decision. I have not certified any common issues dealing with the manner in which each of these individual searches was carried out. In my view, it is possible that these are questions for individual assessments, and not sub-classes.

[47] I would seek further submissions and discussions with counsel before committing to any sub-classes.

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

[48] 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 …

[49] 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.

[50] 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.

[51] In my original decision, I concluded that the following common issues were certified against the original defendant:

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

[52] The proposed defendant submits that some of these certified common issues should be amended. I shall refer to each of their suggestions individually.

[53] It should be noted that both the plaintiff and the defendant disagree that any of the certified common issues should be amended.

Common issue (c)

[54] In relation to common issue (c), the proposed defendant submits that, in its view, the issue of "reasonable and probable grounds" does not relate to the Charter claim, but rather, would relate to a breach of the hospital's policy. As a result, since a breach of policy is not an actionable tort, common issue (c) should not be certified. In the alternative, they argue, common issue (c) should be reworded to state:

> If the answer to (a) is yes, were there reasonable and probable grounds pursuant to Capital Health Mental Health Program Policy Number 1933 to order a strip search of all Class Members?

[55] I disagree. Common issue (c), as it presently exists, was clearly meant to address a common issue related to the s. 8 Charter action (*Ward v. Vancouver* 2007 BCSC 3). At the original certification hearing, the defendant objected to this common issue, not because it was not relevant to the Charter action, but because in their submission this was an individual issue, not a common one. I found that this

question was both relevant to the Charter action, and a common issue. My reasons for so finding in my original decision, and I do not repeat them here.

[56] In my view, questions relating to hospital policy about searches, while they will obviously be part of the analysis, are not the central issues this case. They are not determinative of any material question of law in issue. As the proposed defendant points out, breach of a policy is not actionable; the plaintiffs have not brought this action because of any breach of policy.

[57] The question before the court is not whether the searches violated the policy; the question is whether the searches violated the *Charter*. The searches might have been conducted in accordance with policy, or not. Therefore, I decline to amend certified common issue (c) at this time. The "proposed" common issue (c) is inappropriate because it addresses no live issue before the court.

Finding of Charter violation

[58] The proposed defendant makes the following point:

> It is submitted by the AGNS that the section 8 Charter issue would ultimately break down into individual issues and therefore not materially advance the claims of the class members. Therefore, it should not be certified as a common issue.

[59] I agree that this is possible. The reader will note that, in my original decision, I did not certify as a common issue the question "Was there a violation of

a section 8 *Charter* right of all class members?" I was not satisfied that this question was definitively common to all class members. In particular, I note certified common issue (d). If a court considered common issue (d), and reached the conclusion that the defendant could now argue justification with respect to each individual search, then the *Charter* analysis would immediately and necessarily become individual.

[60] The proposed defendant submits that if the s. 8 breach is a common issue, it should be explicitly framed as such, to wit:

> 1. Was there a violation of a section 8 Charter right to be secure against unreasonable search and seizure?
>
> 2. If the answer to (1) is yes, is the breach saved pursuant to section 1 of the *Charter* is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society?

[61] I am in agreement with the proposed defendant that both these questions are necessary to any *Charter* analysis. However, at this time I am not persuaded that they are common issues within this class-action proceeding.

Common issue (e)

[62] Common issue (e) presently reads:

> (e) If Section 8 of the *Charter* was breached, are *Charter* damages a just and appropriate remedy?

[63] The proposed defendant submits that this common issue should be reworded as:

> (e) If Section 8 of the *Charter* was breached, are *Charter* damages an appropriate and just remedy pursuant to section 24 (1) of the *Charter*?

[64] Remedies are contained in Section 24 of the *Charter*. The certified common issue focused on whether damages would be an appropriate remedy; although it did not mention Section 24, in my view, that went without saying. It would only be through Section 24 that remedies could be discussed.

[65] I see no need to modify the existing common issue. Having said that, if counsel are in agreement that these words should be added to common issue (e), for additional clarity, I will make this change on consent.

[66] Lastly, in relation to the common issue (f) about "intrusion upon seclusion", I have already dealt with those earlier in this decision.

[67] In conclusion, I find that the existing certified common issues are as applicable to the proposed defendant, as they were to the existing defendant. I certify them all again in relation to the proposed defendant. Given my conclusion

that the common issues are appropriate, it follows that I reject the proposed defendant's argument that these issues as framed constitute prejudice to them.

[68] It is acknowledged that class actions can evolve as matters proceed. This is appropriate and, in my view, a fairly necessary part of the process. Courts have held that within a class action proceeding, a case management judge can decide to re-state the common issues with greater particularity (*Cloud v. Canada* [2004] O.J. No. 4924). Therefore, I am open to further discussion about the common issues as they have been presently framed, and open to continued debate about modifications.

[69] Lastly, the proposed defendant has stated that assuming they are added as the defendant, there are additional common issues, being the following :

> [1] whether the AGNS or CDHA are vicariously liable for the actions of their employees;
>
> [2] if the AGNS and CDHA are found liable, how any damages awarded ought to be apportioned between them.

[70] I agree that these are live issues. Neither plaintiff nor defendant had great objection to them. I see no reason why they would not be common to all class members. I would be prepared to include both of those in the order.

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

[71] I found in my original decision that this criteria had been met in relation to the original defendant. I see no distinction with the proposed defendant. As I said in my original decision, 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. In my view a class action is an appropriate vehicle to effect the plaintiff group's access to justice, so as to most efficiently litigate these questions.

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**

[72] Mark Murray continues to be the representative party here. I found Mr. Murray to be appropriate in my original decision and I see nothing that would change the conclusion here.

[73] 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 *CPA* in relation to the proposed defendant, AGNS. I grant the application to add that defendant to this certified class proceeding. I certify the same common issues and class members as in my original certification decision, with some amendments (if the parties consent) as noted in this decision.

Boudreau, J.