NOVA SCOTIA COURT OF APPEAL

Citation: *Capital District Health Authority v. Murray*, 2017 NSCA 28

Date: 20170413
Docket: CA 439251
Registry: Halifax

Between:

Capital District Health Authority

Appellant

v.

Mark Jason Murray and The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

Judges:	MacDonald, C.J.N.S., Fichaud and Bryson, JJ.A.
Appeal Heard:	February 17, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed in part with costs to the Respondent Murray, per reasons for judgment of Fichaud, J.A., MacDonald, C.J.N.S. and Bryson, J.A. concurring
Counsel:	Karen Bennet-Clayton for the Appellant Capital District Health Authority Michael Dull for the Respondent Mark Jason Murray Agnes MacNeil and Catherine Lunn for the Respondent the Attorney General of Nova Scotia

Reasons for judgment:

[1] The Capital District Health Authority operates the East Coast Forensic Hospital. The Hospital cares for patients who have been found either unfit to stand trial or not criminally responsible. Over several months before mid-October of 2012, the Hospital's staff accumulated information that some patients had accessed illicit drugs. On October 16, 2012, with the Hospital's assent, Correctional Services workers of the Provincial Department of Justice conducted strip searches on 33 patients at the Hospital.

[2] One patient searched was the Respondent Mark Murray. Mr. Murray, on behalf of the 33 searched patients, applied for certification of a class proceeding against the Capital District Health Authority. The proceeding claims a civil remedy for breach of s. 8 of the *Charter of Rights and Freedoms* and for the tort of intrusion upon seclusion. The motions judge in the Supreme Court, Justice Denise Boudreau, certified the proceeding under Nova Scotia's *Class Proceedings Act*.

[3] The Authority appeals. It says the judge erred in determining, under ss. 7(1)(c) and (d) of the *Class Proceedings Act*, that (1) there were common issues and (2) a class proceeding would be the preferable procedure.

1. Background

[4] This factual summary is from the motions judge's decision (2015 NSSC 61), the affidavits, and the tendered discovery transcripts of Mr. Murray and of Ms. Brenda Mate, the Hospital's Health Services Manager.

[5] The mandate of the East Coast Forensic Hospital ("Hospital") includes the rehabilitation of individuals who are subject to the jurisdiction of the Review Board, established under s. 672.38(1) of the *Criminal Code*. The mandate also encompasses public safety.

[6] The Hospital's rehabilitation side has two units of 30 beds each. These are for persons who have been found to be either unfit to stand trial for a criminal charge or not criminally responsible. They are considered "patients" and receive treatment with the aim of eventual placement in the community. The Hospital's correctional or offender side, on the other hand, houses persons who are considered "inmates". The proposed class plaintiffs were on the rehabilitation side.

[7] The Appellant Capital District Health Authority ("Capital Health") operates the Hospital. Capital Health's Interdisciplinary Clinical Manual, Policy and Procedure no. CC-65, titled "Control of Contraband at the East Coast Forensic Hospital", discusses contraband:

> ECFH is committed to providing a safe environment to promote the rehabilitation and recovery of its patients. ECFH works collaboratively with the Department of Justice and Corrections staff to provide security services, including the seizure of contraband found on ECFH patients and/or hospital property.
>
> **DEFINITIONS**
>
> Contraband: Any substance or item patients are not authorized to have in their possession or any other item that may be perceived as a risk to the safety and security of the patients and/or staff, including but not limited to:
>
> …
>
> - Any items or substances, including those specifically prohibited or controlled by federal statute that, alone or in combination, may be used as a drug or mood altering substance;

The Policy then outlines the procedure after contraband is discovered. It does not discuss strip searches.

[8] Capital Health's Mental Health Program Clinical Policy and Procedure no. 1933, titled "Person Searches", governs the occasion and manner of strip searches. It says:

> Correctional Workers (CW) will conduct searches as outlined by this policy in the interest of health, safety and security.
>
> …
>
> **B. DEFINITIONS**
>
> …
>
> 4. **Strip Search** is when a person is required to undress completely and personally expose the external areas of the body orifices for visual inspection and the person's clothing will be closely examined and searched. At no time during a strip search is it necessary to touch a person to complete the search.
>
> …
>
> **D. CONDUCT OF PERSONAL SEARCHES**
>
> 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 in court; and

e) After personal contact visits (MIOU patients only)

…

3. 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. Staff of ECFH should advise CWs of any information that they have relevant to that determination, however, whether to conduct a search remains in the discretion of the CW.

4. A CW must obtain the authorization of the Officer In Charge or the ECFH Captain prior to conducting a strip search.

…

7. Where a patient refuses to be searched or resists a search, the CWs will advise a member of the patient's 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. …

8. Where there are staff concerns in relation to the appropriateness or the conduct of a search, ECFH staff should direct concerns to the ECFH Program Manager and CWs should direct concerns to the ECFH Captain for resolution in accordance with the Shared Services Agreement between the CDHA and the Department of Justice.

…

E SEARCH DOCUMENTATION

...

2. A report will be completed with respect to every strip search conducted pursuant to Section D(1)(c) on the basis of reasonable and probable grounds. The report shall detail the grounds of the search, the manner of the search, the results of the search and any other relevant details and shall be in the form attached to this policy as Schedule "A". A copy of every report shall be forwarded to the ECFH Captain and the Program Manager for ECFH.

…

[9] Ms. Mate's affidavit described a series of events which indicated that illegal substances were on the Hospital's premises.

- On June 22, 2012, eight 25 mg. tablets of Diphenhydramine Hydrochloride were found in a patient's locker. A psychiatrist, Dr. Neilson, emailed Ms. Mate that "[o]ther clients must be using the psychotic patients as 'dupes' to hide their drugs" and "[m]aybe a general search is in order". A search of all lockers found no other pills.

- On July 25, 2012, a patient expressed concern that another patient was selling him cigarettes "laced with drugs".

- On July 31, 2012, a search of a patient's room located non-pharmaceutical contraband and a bottle with one tablet of Advil Sinus.

- Between September 12 and 19, 2012, seven patients tested positive for illegal substances after random urine screening and, on September 26, 2012, a nurse overheard a patient saying "I'm lucky it didnt [*sic*] show up on my urine drug screen".

- On September 19, 2012, Ms. Mate received an email from a Hospital employee that "[w]e are having a significant surge in substance use this week" and said "[c]ertainly the present mix of clients have some that are known as providers and perhaps there is something more we can do from that perspective that we are missing".

- On October 1, 2012, a nurse found 450 mg of lithium in a patient's room.

- On October 2, 2012, "patient N" tested "positive for meth".

- In the weeks before October 16, four patients had asked that their rooms be locked from the outside at night, as they were afraid other patients under the influence of drugs might enter.

- On October 14, 2012, Dr. Neilson sent an email that included:

> … Certain clients have a black market trade going on in all kinds of goods – contraband and otherwise – such as cigarettes, THC, toiletries, electronics, clothing, etc. … Black market trading is increasingly a security issue here, and although it is not usually direct clinical risk related issue, it could become one if tension/stress rise due to mounting debt. …

- On October 15, 2012, Dr. Pottle wrote an email respecting "patient U", that "[U]'s team strongly suspects that he is running a 'black market'

operation given many patient reports, including reports that he has brought in street drugs".

- Between October 1 and 15, 2012, nineteen patients had unsupervised community access outside the Hospital.

- Then, on October 15, 2012, Dr. Neilson sent an email reporting that some patients were acting oddly, two patients "were caught smoking a 'hash – smelling' product", and that "Spirit 420", a herbal incense, has been brought in by certain patients. Three patients were searched, but nothing was found.

[10] Most of these events involved identified patients. But the Hospital and the provincial Department of Justice's Correctional Services Division decided to broaden the investigation. Ms. Mate spoke to the facility's Forensic Captain, Capt. Todd Henwood of the Correctional Services Division. Ms. Mate's affidavit describes the conversation:

> 50 On October 16, 2012 at approximately 8:00 am, I spoke with Captain 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 behaviours detailed in Dr. Neilson's email created significant concern regarding the safety of the patients and staff on the ECFH Rehabilitation Units A and 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.

[11] The motions judge's reasons discuss how the decision was made to conduct the strip 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.

[12] Ms. Mate's discovery evidence supports the judge's comments:

Q. Capt. Henwood responded to say that, "Based on the information I have provided to him, he felt there was reasonable and probable grounds for the searches."
A. Yes.

Q. Yeah. So you discussed with him, before any search was conducted, that he would be doing the strip searches.

A. Yes. He said that he would be.

Q. Yeah. And you discussed that with him.

A. Yes.

Q. Yeah. And did you, as someone who, you know, is … has a responsibility as part of your job concerning policy and procedure, did you try to dissuade him in any way?

A. I left it to him for his reasonable and probable grounds. He's the expert in that field, and …

Q. Yeah.

A. … it's … his expertise is the security and safety of the building. So I left that to him.

…

Q. Yeah. And on paragraph 50, you evidenced that Capt. Henwood told you that based on the information you provided him, he felt there was reasonable and probable grounds.

A. Yes, he did.

…

Q. … Do you believe there was reasonable and probable grounds to strip search everybody that morning?

A. Yes, I do.

Q. What was it?

A. The fact that a number of people were appearing under the influence. The unit was a very unsafe place to be. There was people saying that … patients saying that they owed their whole comfort allowance cheques to certain individuals. If people were afraid to go to bed and go to sleep … we have family members saying that they're [*sic*] loved ones were reporting that, you know, they've been

off. Their mental status has been off. We had no way of knowing what individuals are in … are using. And when you add impaired mental status, you increase somebody's risk for violence. You put vulnerable people at risk. You put the staff safety at risk. You put everybody that enters our facility at risk.

Q. So those factors that you cited about, I guess, a number of specific individuals being found to be intoxicated, albeit with negative drug screenings and … and we know of one parent concerned about her daughter. In your mind, that was reasonable and probable grounds, for example, to strip search Ralph Atkinson on October 16th.

A. Yes.

Q. And Patient "A".

A. Yes.

Q. And Patient "B" and all the patients.

A. Yes.

Q. And so in that way, do you agree with me that the decision or the reasonable and probable grounds upon which all the patients were strip searched are the same?

A. Yes.

[13] On October 16, 2012, Correctional Services Workers searched lockers and strip searched the 33 patients.

[14] Mr. Murray's affidavit describes his search on October 16, 2012:

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 cleaned 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 lock-down.

5. Once we were all locked in our wedge, the Captain and another guard entered the wedge and told us 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 of my clothes and my underwear. The door was kept open, meaning the 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 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 in 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.
>
> 10. After the strip search showed that I had nothing on my possession, I was permitted to get dressed. After I did so, I was escorted to a wedge where they were holding other patients after they were strip searched. I witnessed patients escorted into that room one-by-one over a period of 1-2 hours.
>
> …

[15] The locker searches located some items. The strip searches found nothing. Ms. Mate's discovery testimony summarizes the outcome:

> **Q.** … Any narcotics found in either any … on the premises or on individuals?
>
> **A.** There was nothing. Salvia was found in a locker. And if I can go through, there was other things indicated here, that was found.
>
> **Q.** Yeah. What is "salvia"?
>
> **A.** Salvia is … it's a product. It's like a natural herb. But, if it's mixed with other things and smoked, you can get an intense high off of it. It's no longer legal to bring it in now. It's on the FDA regulations. But patients at that time were mixing it and smoking it to get high.
>
> **Q.** Yeah. It says here, "[T]ested negative for narcotics."
>
> **A.** Yes.
>
> **Q.** Does that mean it was …
>
> **A.** It's not a narcotic. It's … whatever test they have, their ion scanner is able to perform …
>
> **Q.** Yeah.
>
> **A.** … it didn't show up as a narcotic, but it certainly showed up as salvia.
>
> **Q.** Okay. So salvia showed up in a locker. Any other narcotics found either on the units or on the persons that were strip searched that day?
>
> **A.** No.

[16] As provided by Policy 1933, a "Strip Search Report" was completed for each patient. Capt. Henwood and Ms. Mate signed each report. Each report states:

> Reasons for search: 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 at 1530 hrs.
>
> What was the source of information relied upon to conclude a strip search was necessary in the circumstances. Direction and information came from Brenda Mate.
>
> Provide details of the search and results: 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 searched the bedroom and common area of the day room. Patient was escorted to A1 when the strip search was completed and returned to their room at the conclusion of the search of Unit [A or B, depending on the patient]
>
> No contraband was found.
>
> [underlining in the original reports]

[17] On December 20, 2013, a Notice of Action under the *Class Proceedings Act*, S.N.S. 2007, c. 28, was filed with the Supreme Court of Nova Scotia. The plaintiff was "R.A.", later identified as Mr. Ralph Atkinson. On July 18, 2014, Mr. Atkinson moved to certify the proceeding under ss. 4(3) and 7 of the *Class Proceedings Act*.

[18] On January 22, 2015, the plaintiff filed a Second Amended Notice of Action and Second Amended Statement of Claim. The amendment deleted Mr. Atkinson and named Mr. Mark Jason Murray as the representative plaintiff. This is the operative pleading. The Amended Statement of Claim proposes a class proceeding on behalf of "patients of the East Coast Forensic Hospital who were strip searched on October 16, 2012".

[19] On January 22, 2015, Mr. Murray filed an amended Notice of Motion in the Supreme Court to certify the proceeding under ss. 4(3) and 7 of the *Class Proceedings Act*.

[20] On January 30, 2015, Justice Denise Boudreau heard the motion. The evidence comprised affidavits, without cross-examination, and the discovery transcripts of Mr. Murray and Ms. Mate.

[21] On February 25, 2015, the judge issued a decision (2015 NSSC 61), followed by an Order of May 5, 2015, that certified the proceeding under s. 7 of the *Class Proceedings Act*, and stated 7 common issues (set out below, para. 50). Later I will discuss the legislation and the judge's reasons.

[22] On May 14, 2015, Capital Health filed with the Court of Appeal an application for leave to appeal and notice of appeal. Section 39(3)(a) of the *Class Proceedings Act* requires leave of a judge of this Court. On November 4, 2016, by consent, leave was granted. On February 17, 2017, this Court heard the appeal.

[23] Meanwhile, on May 27, 2016, Justice Boudreau issued a decision that added the Attorney General of Nova Scotia as a co-defendant to the class proceeding (2016 NSSC 141). The Attorney General appealed that ruling. The Attorney General's appeal was heard on the same day, and by the same panel as heard Capital Health's appeal. The Court's decision on the Attorney General's appeal is released concurrently with this decision (2017 NSCA 29).

[24] The Attorney General of Nova Scotia was added as a co-respondent to Capital Health's appeal. The Attorney General filed a factum and made oral argument at the hearing of Capital Health's appeal.

2. Issues

[25] Capital Health's factum raises two issues:

(a) Did the motions judge err by concluding that the proposed claims raise common issues, under s. 7(1)(c) of the *Class Proceedings Act*?

(b) Did the judge err by concluding that a class proceeding would be a preferable procedure for the fair and efficient resolution of the dispute, under s. 7(1)(d) of the *Act*?

3. Standard of Review

[26] I adopt Justice Saunders' description of the standard of review in *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68:

Standard of Review

[30] The governing standard of appellate review for the determination of the questions of common issues, and preferable procedure under the *Act*, was described by this Court in *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 (N.S.C.A.) at para. 111, leave to appeal refused [2014] S.C.C.A. No. 51 (S.C.C.):

> [111] Whether a common issue exists and whether a class action is the preferable procedure for the fair and efficient resolution of the dispute are questions of mixed fact and law. These questions are subject to a standard of review of palpable and overriding error unless the certification judge made some extricable error in principle with respect to the characterization of the standard of review or its application in which case it is an error of law reviewable on the standard of correctness (*Ring v. Canada (Attorney General)*, paras. 6-7).

[31] The unique nature of certification proceedings attracts special considerations on appeal. Courts across the country have recognized that a decision to grant a certification order is entitled to substantial deference. While of course no deference arises in cases where the motions judge has erred in principle, considerable deference is given to conclusions based on the weighing and balancing of factors that arise in certification proceedings. Justice Cromwell makes this point in *AIC Limited v. Fischer*, 2013 SCC 69 at para. 65:

> [65] I recognize that a decision by a certification judge is entitled to substantial deference: see *e.g. Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to preferable procedure is … entitled to special deference because it involves weighing and balancing a number of factors": *Pearson*, at para. 43. However, I conclude that does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see *e.g. Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv, *Markson*, at para. 33; *Cloud*, at para. 39.

[27] Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada* (Toronto: Thomson Rogers Canada Limited, 2014), pp. 362-63, comments on the standard of review for points that arise on this appeal:

> … Errors in principle in the approach to the certification criteria will also provide the basis for a appellate intervention; deference does not shield errors in principle.
>
> …

> … As for the common issues criterion, if the motion judge misconceives the action as being a collection of individual claims and thereby disregards evidence showing some basis in fact to support the existence of common issues, this error in principle will displace the substantial deference otherwise owed to certification judges when considering the common issues criterion and justifies appellate intervention.
>
> A number of appellate courts have held that the decision of a class action judge on the criterion of "preferable procedure" is entitled to special deference, because the judge must weigh and balance a number of factors in assessing this criterion.

4. The Requirements for Certification

[28] Section 7(1) of the *Class Proceedings Act* says that, if five conditions exist, the court "shall certify" the class proceeding:

> 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 a 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.

[29] The authorities have explained the certification court's standards for these conditions.

[30] The plaintiff "must show some basis in fact for each of the certification requirements set out in … the Act, other than the requirement that the pleadings disclose a cause of action". The latter point is "governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, para. 25, per McLachlin, C.J.C. for the Court; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, paras. 63, 71 and 97; *Elder Advocates of Alberta Society v. Alberta*, [2011] S.C.R. 261, para. 20.

[31] Winkler, *The Law of Class Actions in Canada*, pp. 29-30 explains what "some basis in fact" means:

> The Supreme Court of Canada has definitively rejected the argument that the standard of proof for meeting the certification requirements is a balance of probabilities. The "some basis in fact" standard is consistent with the fact that at the certification stage, the court is dealing with procedural issues, not substantive ones.
>
> The "some basis in fact" standard does not require the certification judge to resolve conflicting facts and evidence. At 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". A certification motion is not the time to resolve conflicts in the evidence or to resolve the conflicting opinions of experts.
>
> The evidentiary threshold of some basis in fact is an elastic concept, but it is not a requirement that (a) the action will probably or possibly succeed; (b) a *prima facie* case has been made out; or (c) there is a genuine issue for trial. The evidentiary threshold for certification is not onerous, and courts must not impose undue technical requirements on plaintiffs.
>
> Although the evidentiary threshold for meeting the statutory criteria is low, the court has a modest gatekeeper function and must consider the evidence adduced by both the moving party and the respondent in light of the statutory criteria. … The standard of "some basis in fact" does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."

[32] As for disclosing a "cause of action", section 8(2) of the *Class Proceedings Act* says that a certification order "is not a determination of the merits of the proceeding". Hence the "plain and obvious" standard borrowed from jurisprudence

regarding summary judgment on the pleadings. Winkler, *The Law of Class Actions in Canada*, page 24, elaborates:

> The question on a certification motion is not whether the plaintiff's claims are likely to succeed on the merits, but rather whether the claims in the action can appropriately be prosecuted as a class proceeding. Class action statutes are procedural and class action legislation expressly states that an order certifying a class proceeding is not a determination of the merits of the proceeding. The purpose of a certification motion is to determine how the litigation is to proceed and *not* to address the merits of the claim. In other words, the question for a judge on a certification motion is not "will it succeed as a class action?" but rather "can it *work* as a class action?" [Winkler's italics]

[33] In *Hollick*, the Chief Justice commented on the court's approach to a certification motion:

> 15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> 16 It is particularly important to keep this principle in mind at the certification stage. … Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead, it adopted a test that merely requires that a statement of claim "disclos[e] a cause of action". … Thus the certification stage is decidedly not meant to be a test of the merits of the action …. Rather the certification stage focuses on the <u>form</u> [McLachlin, C.J.C.'s underlining] of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action….

[34] In *Pro-Sys*, Justice Rothstein for the Court reiterated those points:

> [102] … The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. … 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 at 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" [citations omitted]. 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" [citation omitted].

To the same effect: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] 3 S.C.R. 545, para. 48. See also *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, supplementary decision 2014 NSCA 73, leave to appeal refused [2014] S.C.C.A. no. 51 and *Wright v. Taylor, supra*.

[35] Class action legislation aims to promote access to justice, judicial economy and behaviour modification. Later I quote the Supreme Court's elaboration of these concepts (paras. 107-09). Those objectives should guide the judge's exercise of discretion on certification and the other procedural aspects of case management: Winkler, *The Law of Class Actions in Canada*, pages 2, 14-15, 23, and authorities there cited.

5. The Motions Judge's Consideration of the Requirements

[36] On Mr. Murray's motion, after citing the principles (paras. 25-29), Justice Boudreau noted that the pleadings alleged: (1) a warrantless strip search, including an invasive cavity check, of individuals who had an expectation of privacy, (2) that the search was without reasonable and probable grounds, and (3) that the invasion of bodily integrity was intentional, highly offensive and caused distress, humiliation and anguish. The judge (paras. 31-43) said it was not plain and obvious that the pleaded causes of action – for breach of s. 8 of the *Charter* and the tort of intrusion on seclusion – would fail. Consequently, the pleadings satisfied s. 7(1)(a).

[37] On s. 7(1)(b), the motions judge (paras. 44-55) held that the class of searched individuals constituted an identifiable class who would be represented by Mr. Murray.

[38] On s. 7(1)(e), the judge (para.108) was satisfied that Mr. Murray could properly represent the class, had no conflict, and that his plan would workably advance the proceeding.

[39] Capital Health has not appealed those findings.

[40] This leaves the criteria of common issues and preferable procedure, under ss. 7(1)(c) and (d), that pertain to Capital Health's grounds of appeal.

6. First Ground of Appeal - Common Issues

[41] The *Class Proceedings Act* defines "common issues":

> 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;

[42] Section 10 gives further direction:

> 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 raise common issues not shared by all class members.

[43] Sections 14, 30 and 31 then provide that the common issues be determined together, with individual or other issues to be determined later by separate trials if necessary.

[44] The Supreme Court of Canada has instructed on the appraisal of commonality for a certification application.

[45] In *Pro-Sys*, Justice Rothstein said:

> [108] In *Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of her decision:
>
> (1) The commonality question should be approached purposively.

> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class 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.
>
> …
>
> [110] The multitude of variables involved in indirect purchaser actions may well provide a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.
>
> [111] Myers J. concluded that the claims raised common issues. I agree that their resolution is indeed necessary to the resolution of the claims of each class member. Their resolution would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis. Those findings are entitled to deference from an appellate court.
>
> [112] The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54).

[46] In *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 3, Justices LeBel and Wagner for the Court recapitulated the principles:

> [41] In *Dutton*, this Court laid down certain principles to be applied in deciding whether a class action raises one or more issues that are common to the claims of all the members of a class. McLachlin C.J., writing for the Court, stated the following:
>
> > Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of

> each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [underlining by Justices LeBel and Wagner]
>
> …

[43] In *Dutton*, this Court also stated that, for there to be a "common issue", success for one member of the class must bring with it a benefit for all the others:

> All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[44] In *Rumley v. British Columbia*, [2001] SCC 69, [2001] 3 S.C.R. 184 (S.C.C.), this Court confirmed the principles from *Dutton*. In the case of the commonality requirement, the purpose of the analysis is to determine "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": para. 29, quoting *Dutton*, at para. 39. The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.

[45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

[46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[47] Winkler, *The Law of Class Actions in Canada*, pages 109-11, summarizes:

> The underlying critical ingredient of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis. It is not necessary that all or even a majority of the questions of law or fact of the class members be identical, similar or related. What is required is that the claims of the members raise some questions of law or fact that are sufficiently similar or sufficiently related that their resolution will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary. It is generally appropriate to include possible defences among the common issues only when they rise to the level of making a subclass necessary.
>
> …
>
> A common issue need not dispose of the litigation, nor does it need to be one that is determinative of liability. 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. Further, 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. The number of individual issues compared to common issues is not a consideration in the commonality inquiry, although it is a factor in preferability assessment. …
>
> …
>
> For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. The focus of the analysis is not on how many individual issues there might be, but on whether there are issues the resolution of which would be necessary to resolve each class member's claim.

[48] The existence of significant individual issues does not disqualify the proceeding from class certification for the common issues. The authorities contemplate that pragmatic trial management will reconcile the two. However, the nature and prolixity of individual issues may defeat the guiding objective to avoid duplication. Then pragmatism will not avail and a class proceeding is inexpedient. In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, Chief Justice McLachlin for the Court explained:

> 29 There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres Inc.*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". 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 proceedings less fair and less efficient.

[49] With those principles in mind, I will turn to this case.

[50] The judge certified the following as common issues:

(a) Were class members all subjected to strip searches from one order?

(b) If the answer to (a) is yes, who ordered the strip searches?

(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 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?

[51] Issues (a) through (e) relate principally to the *Charter* claim. Issues (f) and (g) involve the tort claim.

(a) Common Issues for the *Charter* Claim

[52] Capital Health asks that the appeal be allowed and the motion for certification dismissed. Capital Health, endorsed by the Attorney General, submits that the judge failed to acknowledge the significance of the individual searches, and takes issue with the wording of particular issues. The submissions take several forms. I discuss some under the "preferable procedure" heading (paras. 114-22).

[53] **Are Common Issues "Irrelevant"?** Capital Health's factum says "[i]t was a palpable and overriding error of fact for the Motion Judge to base common issue (c) on the assertion that there was 'one strip search' " [Capital Health's underlining], when the evidence discloses 33 searches. Accordingly, says Capital Health, the judge wrongly assumed that the Correctional Services Workers who performed the individual searches did not individually assess the grounds for a

search. Further, says Capital Health, the judge's decision "glosses over the individual nature of the searches that occurred".

[54] Capital Health's factum acknowledges there was one decision to search:

> 19. It is not disputed that there was one decision made to order the strip searches of the 33 patients that occurred on October 16, 2012. …

But Capital Health says that doesn't matter. It asserts that any cause of action under the *Charter* focuses entirely on the individual search itself. At the appeal hearing, Capital Health's counsel said categorically that any initial blanket decision to search was "irrelevant" and "does nothing" to advance the plaintiffs' claim, because "everything" depends on the 33 separate interactions between the Correctional Services Workers and individuals at the time of each search.

[55] I respectfully disagree, as I will explain.

[56] The motions judge found (para. 69) that "a single decision was made to search a group, at one time, on the basis of one set of facts". Clearly the judge was aware that 33 individuals each were searched. The wording of issue (c) was meant to cite one blanket decision that there be 33 searches.

[57] For the *Charter* claim, the plaintiffs' theory is: (1) there was one decision to search 33 individuals, prompted by the apparent conduct of some, without regard to the individual circumstances of each person to be searched; and (2) such a blanket decision offends what the plaintiffs say is the principle that an individual assessment is required to ground a strip search. Mr. Murray's factum summarizes it this way:

> 35 … It is the *decision* to conduct and carry out the strip search of every patient without consideration of their individual circumstances, and without the grounds to do so *en masse*, which unjustifiably infringed on every patient's *Charter* rights. [underlining in factum]

At the appeal hearing, Mr. Murray's counsel reiterated that the proposed claim relies on those premises.

[58] Provided the claim satisfies the conditions in s. 7 of the *Class Proceedings Act* as interpreted by the authorities, the class plaintiffs may tailor their theory to suit a class proceeding. In *Rumley*, Chief Justice McLachlin put it this way:

> 30 … It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her *own* complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had *as a general matter* failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9). [Chief Justice McLachlin's italics]

[59] The evidence for the plaintiffs' factual premise is discussed above (paras. 10-14). That evidence provides "some basis in fact" for the class plaintiffs' premise that there was one blanket decision leading to the 33 searches. This conclusion satisfies the class plaintiffs' onus for commonality on the certification motion. Whether or not there was one blanket decision, leading to 33 searches, is for the trial judge at the common issues trial.

[60] The plaintiffs' legal premise draws from *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 and *R. v. Golden*, [2001] 3 S.C.R. 679.

[61] In *Vancouver v. Ward*, the Court held that civil damages were available under s. 24(1) of the *Charter* for a strip search that offended s. 8.

[62] In *Golden*, Justices Iacobucci and Arbour for the majority discussed when a warrantless strip search incidental to arrest will offend s. 8 of the *Charter*:

> 44 This Court has held that a search will be reasonable within the meaning of s. 8 of the *Charter* where (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search is conducted in a reasonable manner. [citations omitted] Applying this analytical framework to the present case, the Court must address the following questions:
>
> (1) Was the search authorized by law?
>
> (2) Is the law itself reasonable?
>
> (3) Was the search conducted in a reasonable manner?
>
> …
>
> *(d) The Preconditions of a Lawful Strip Search Incident to Arrest at Common Law*
>
> …

> 89 Given that the purpose of s. 8 of the *Charter* is to protect individuals from unjustified state intrusions upon their privacy, it is necessary to have a means of preventing unjustified searches **before they occur**, rather than simply determining after the fact whether the search should have occurred (*Hunter* [*Hunter v. Southam*, [1984] 2 S.C.R. 145], at p. 160). 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. …
>
> 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. …
>
> …
>
> 95 … A strip search will always be unreasonable if it is carried out abusively or for the purpose of humiliating or punishing the arrestee. Yet a "routine" strip search carried out in good faith and without violence **will also violate s. 8 where there is no compelling reason** for performing a strip search in the circumstances of the arrest.
>
> …
>
> 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** at 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 reasons 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. **When these preconditions** to conducting a strip search incident to an 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*.** [emphasis added]

Justices Iacobucci and Arbour discussed the "preconditions" in the passages of their reasons that addressed the first question from their para. 44: "Was the search authorized by law?"

[63] *Golden*'s passages contemplate that a strip search may infringe s. 8 if the "preconditions" – such as the "compelling reasons for performing a strip search in the circumstances" – did not exist before the search. It would follow that there may be an infringement even if, according to *Golden*, the later strip search is conducted "in a manner that does not infringe s. 8 of the *Charter*".

[64] *Golden* involved police strip searches after arrests. Here we have forensic patients in the Hospital's custody. The comments of Justices Iacobucci and

Arbour, respecting a search incident to a lawful arrest, may have to be adapted to the circumstances of this claim. The features of any such adaptation are not for the certification judge. They are a merits issue of mixed fact and law for the judge on the common issues trial.

[65] It is not plain and obvious that the cause of action, as Mr. Murray has chosen to frame it, will fail. Therefore, as stated in *Rumley*, the class plaintiffs may frame their cause of action to suit a class proceeding.

[66] Accordingly, a common issue that relates to a blanket decision to search is relevant.

[67] **Are There Common Issues for the *Charter* Claim?** It helps to recall the interplay of common and individual issues on a certification motion. From the *Class Proceedings Act* and the authorities (above, paras. 28-35, 41-48), I distill the following:

- The common issues may be factual or legal: s. 2(e).
- Commonality "should be approached purposively", and "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis": *Pro-Sys*, para. 108. *Vivendi*, para. 41; *Dutton*, paras. 39-40.
- It is unnecessary that the common issue "predominates over issues affecting only individual members": s. 7(1)(c). But the common ingredient should be "substantial": *Pro-Sys*, para. 108; *Vivendi*, para. 41; *Dutton*, paras. 39-40. If the issues are common "only when stated in the most general terms" and would "ultimately break down into individual proceedings", then duplication is not avoided, the underlying objective is frustrated, and class certification is inappropriate: *Rumley*, para. 29.
- *Dutton*, paras. 39-40, said that all class members must benefit from the successful resolution of the common issue, though not necessarily to the same extent. *Vivendi*, para. 45, added a qualification that this view "need not be applied inflexibly", meaning "success for one member of the class does not necessarily have to lead to success for all the members", though "success for one member must not result in failure for another".
- Common issues are not necessarily identical for every member: s. 2(e). A class may include a sub-class with separated common issues: s.

10(e). A "significant level of difference among the class members does not preclude a finding of commonality" *Pro-Sys*, paras. 108 and 112; *Dutton*, para. 54. The prospect that these "variables … may well provide a significant challenge at the merits stage" does not preclude certification: *Pro-Sys*, para. 110. It is expected that pragmatic trial management will meet the challenge: *i.e.* "[i]f material differences emerge, the court can deal with them when the time comes" (*Pro-Sys*, para. 112; *Dutton*, para. 54). The outcome may involve "nuanced and varied answers based on the situations of individual members" (*Vivendi*, para. 46).

- Separate assessment of damages does not preclude class certification: s. 10(a).

- Individual issues are not lost in the shuffle. After the common issues trial determines the common matters, the residual individual issues will be determined separately: ss. 14, 30 and 31.

[68] As discussed earlier (para. 57), the class plaintiffs' proposed theory operates on two premises, one factual and the other mainly legal: (1) there was one decision, without individual assessments, that all the individuals would be searched; and (2) s. 8 of the *Charter* requires that an individual assessment of grounds be made for each person to be strip searched.

[69] In my view, each premise generates a common issue.

[70] The common determination of the two premises will avoid duplication of fact-finding or legal analysis. The same witnesses will not have to testify 33 times on the factual issue. The judge will not have to make multiple rulings on the legal issue. These are substantial common ingredients whose resolution will serve the objectives of the *Class Proceedings Act* by promoting judicial economy.

[71] Success for some on the common issues will not mean failure for others.

[72] I disagree with Capital Health's submission that the motions judge erred by certifying common issues.

[73] **Do the Rulings in *Thorburn* or *Good* Apply?** Capital Health cites *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480. *Thorburn* involved strip searches at a city jail based on a provincial policy that mandated routine strip searches of new arrivals. The motions judge refused to certify a class proceeding. The Court of Appeal affirmed the motions judge's

ruling. The Court of Appeal held the view that the individual issues would overwhelm any common issue involving the policy.

> [41] … 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 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 class member. … An 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] … 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. …

[74] In my view, *Thorburn* does not determine Mr. Murray's certification application. The evidence in Mr. Murray's record indicates one blanket decision leading to the search of all 33 individuals. We do not have the facts that the courts in *Thorburn* considered to be pertinent: multiple arrests, each with its own grounds to arrest having implications for the decision to search each individual. In *Thorburn*, the Court of Appeal said "individual assessments would be necessary to determine if reasonable grounds existed". That is not this case, where the alleged *absence* of individual assessments is the *sine qua non* of Mr. Murray's proposed class cause of action under s. 8 of the *Charter*.

[75] More applicable is *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.), affirmed on this point 2016 ONCA 250, leave to appeal refused 2016 S.C.C.A. 255 (S.C.C.). Unlike *Thorburn*, the decisions of the Ontario Divisional Court and Court of Appeal had benefit of the judgments of the Supreme Court of Canada in *Pro-Sys* and *Vivendi*. At the G20 Summit in 2010, police detained *en masse* about 1,000 people. The detainees sought to certify a class proceeding against the police. The Divisional Court certified a class proceeding that claimed, among other things, damages for arbitrary detention contrary to s. 9 of the *Charter*. The Ontario Court of Appeal (para. 70) agreed summarily with the reasoning of the Divisional Court. The Divisional Court held that the "one sweeping order" to detain generated a common 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. Those divisions do not change the fact that there is nonetheless a central commonality linking each of the subclasses.
>
> …
>
> [44] The first proposed common issue is a common issue. It applies to all members of the class who were detained in that it asks the core question: 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 answer to that question will significantly advance the claim of each member of the class. …

[76] Capital Health and the Attorney General note that *Good* involved a claim of unlawful detention under s. 9, whose test differs from that for s. 8 cited in Mr. Murray's claim. With respect, this misses the point. Though their substantive grounds for search and detention may differ, both ss. 8 and 9 arguably involve some individual assessment of grounds before either the search (s. 8) or the detention (s. 9) occurs. Mr. Murray's allegation is that there was no individual assessment, by Capital Health or Correctional Services, before the decision to search. This generates a common issue, for reasons similar to those expressed in *Good*.

[77] **Does the Phrasing Suit the Common Issues?** I agree with counsel for the Attorney General that it is essential to "get the common questions right". An inadvertently misstated common question might distort the proceeding to everyone's detriment, and defeat the underlying objective of litigation economy.

[78] The motions judge's common issues (a) and (b) aim to address the class plaintiffs' first premise that I have discussed earlier (paras. 57 and 68) - whether or not individual assessments were made before the decision to search. However, that point may not be captured by the wording of the motions judge's question (a) – Were all class members searched "from one order"? It is possible that one order may have followed from individual assessments. Questions (a) and (b) should be re-worded and combined:

> *(a) Were class members subjected to strip searches further to one decision that did not individually assess the grounds to search each*

> *person and, if so, who made the decision that there would be strip searches?*

[79] The motions judge's common issue (c) asks "were there reasonable and probable grounds to order the one strip search of all class members?" and common issue (d) asks "can the defendant now justify the search of individual class members on the basis of individual considerations?"

[80] All the parties, for different reasons, take issue with questions (c) and (d). Mr. Murray says that the common issue should have asked simply whether the strip searches constituted an unreasonable search and seizure contrary to s. 8 of the *Charter*. Capital Health and the Attorney General submit that common issue (c) prejudges the merits, misstates the legal test under s. 8, and subsumes individual issues, while common issue (d) is facially inappropriate by explicitly incorporating individual considerations.

[81] The motions judge's phrasing of questions (c) and (d) is problematic for several reasons that I would characterize as errors of principle:

- The certification order should not intrude on the merits. The wording of the common question should not pre-judge the disputed criteria for the cause of action.
- The object at the certification stage is to define the common issues, not to predict and parse out the residual individual issues.
- It is counterintuitive to aggregate the residual "individual considerations" as a contrived "common" issue. In *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, Chief Justice Winkler for the Court said:

> 132 … A core of commonality either exists on the record or it does not. In other words, commonality is not manufactured through the statement of common issues. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around.

The common issues judge would have difficulty giving any useful answer to question (d).

- The individual issues are whatever remains after the defined common issues are determined. The certification judge should assume that a pragmatic trial judge, alert to the nuanced equilibrium between common and

individual issues, will ensure that, by the end of the day, everything is finally determined, but not duplicated.

[82] The common issue that emanates from the class plaintiffs' second premise is whether s. 8 of the *Charter* does or does not require an individual assessment of grounds for a strip search before the search occurs (above, paras. 57 and 68). That involves an analysis of *Golden*, and any other pertinent authorities, and consideration of how *Golden*'s propositions, in the context of a search following arrest, may apply to the circumstances of forensic patients in the Hospital on October 16, 2012. The interpretation of the authorities is an issue of law. The adaptation or application of those principles to this case would be an issue of mixed fact and law. In my view, common question (c) should be rephrased to read:

> *(b) Does s. 8 of the Charter require that, before a strip search, there be an individual assessment of grounds to search each person who is to be searched?*

[83] In my view, question (d) should be deleted as unnecessary. Affirmative answers to the reworded questions (a) and (b) will not necessarily equate to judgment for the class plaintiffs. Capital Health and the Attorney General will have the opportunity to raise any relevant residual individual issues whose answers would not conflict with the answers to the common questions. Consent is an example. There may be others. The identification of any residual individual issues is for the parties and the trial judge to work out after the common issues ruling sets the stage.

[84] The motions judge's common question (e) asks whether *Charter* damages are a "just and appropriate remedy". The judge's brief reasons do not explain what the question aimed to capture. In *Vancouver v. Ward*, *supra*, the Supreme Court established the framework for *Charter* damages. Common question (e) appears to address *Ward*'s "Step Two – Functional Justification of Damages" and "Step Three – Countervailing Factors", from paras. 21-45 of Chief Justice McLachlin's reasons. The Chief Justice summarized Step Two:

> [31] In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.

Of Step Three, the Chief Justice said:

> [33] However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

[85] In Step Two, the criteria of vindication and deterrence may have significant commonality. The compensation for the claimant's loss and suffering, on the other hand, veers to the individual. Step Three's open list of countervailing considerations is difficult to classify in the abstract. Overall, whether *Charter* damages are "just and appropriate" is not a linear analysis. The outcome would follow a balancing of criteria, some of which would be individualized. It is difficult to conceive – and the motions judge's conclusory reasons do not explain – how the answer could be aggregated, without consideration of material individual circumstances.

[86] The judge (para. 96) said that damages for the tort claim was not a common issue, because the matter would require "evidence from individual class members as to their particular circumstances". In my view, the same may be said of *Charter* damages. As Winkler, *The Law of Class Actions in Canada*, page 122, states:

> For an issue to be common, it must be capable of being answered once for all class members. Put differently, if an issue can be reached only by asking it of each class member, it is not a common issue.

[87] I would delete question (e) from the common issues, and leave damages for the trial of individual issues. Section 10(a) of the *Class Proceedings Act* says this does not preclude certification.

(b) Common Issues for the Tort Claim

[88] Common issue (f) asks "What are the elements of intrusion upon seclusion?". Common issue (g) asks "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?"

[89] In *Jones v. Tsige*, 2012 ONCA 32, the Ontario Court of Appeal approved the tort of intrusion upon seclusion. Justice Sharpe for the Court said:

> **c) Elements**
>
> 70 I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> 71 The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. 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.
>
> **d) Limitations**
>
> 72 These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.
>
> 73 Finally, claims for the protection of privacy may give rise to competing claims. Foremost are claims for the protection of freedom of expression and freedom of the press. As we are not confronted with such a competing claim here, I need not consider the issue in detail. Suffice it to say, no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims. A useful analogy may be found in the Supreme Court of Canada's elaboration of the common law of defamation in *Grant v. Torstar* ([2009] 3 S.C.R. 640) where the Court held, at para. 65, that "[w]hen proper weight is given to the constitutional value of free expression on

> matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public interest to know."

[90] Capital Health states that the courts in Nova Scotia have not conclusively determined that the tort even exists in this province or, if it does, whether its elements are those described by the Ontario Court of Appeal. Capital Health's factum submits:

> 86 … Certifying common issue (f) is more akin to determining whether the pleadings disclose a cause of action than to whether there is some basis in fact for the common issue. It is, in essence, a question about the viability of intrusion upon seclusion as a cause of action,
>
> 87 Whether pleadings disclose a cause of action is a question of law that this Court reviews for correctness. Because common issue (f) asks what the elements are for a cause of action, it gives rise to an extricable error of law and should be reviewed without deference. [Capital Health's underlining]

[91] The Attorney General adds that, if the tort exists, it should not apply where the plaintiff has asserted an alternative remedy which, in this case, is a claim for *Charter* damages under *Vancouver v. Ward, supra*. The Attorney General submits that the certification judge should resolve these questions under s. 7(1)(a) of the *Class Proceedings Act***.**

[92] I respectfully disagree.

[93] In *Trout Point Lodge Ltd. v. Handshoe*, 2012 NSSC 245, Justice Hood said:

> [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". …
>
> …
>
> [80] Because this is also a defamation action, I conclude this is a further reason to leave the issue of a cause of action for intrusion on seclusion for another day in another proceeding.

[94] In *Doucette v. Nova Scotia*, 2016 NSSC 25, Justice Boudreau said:

> [172] It has been recognized that, in an appropriate case, a Nova Scotia court could award damages for the tort of invasion of privacy or "intrusion upon seclusion" (*Trout Point v. Handshoe*, *supra*).

[95] On an application for certification, the requirement that the pleadings disclose a cause of action is "governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists" (authorities cited above, paras. 30-32). We have a unanimous decision of the Ontario Court of Appeal, not appealed, adopting the American *Restatement of Torts*, upholding this tort that has been twice acknowledged in an "appropriate case" by the Supreme Court of Nova Scotia, whose rulings have not been disturbed on appeal. With those authorities in place, in my view, it is not plain and obvious that the cause of action will fail. That suffices for a certification application.

[96] In *Pro-Sys*, para. 63, Justice Rothstein cited *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, p. 980 as authority for the "plain and obvious" test on a certification motion. Germane to this case is Justice Rothstein's cited passage from *Hunt v. Carey*:

> … Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. … [p. 980, per Wilson, J.]

Later in *Hunt v. Carey*, Justice Wilson added (pp. 990-91):

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

To similar effect: Winkler, *The Law of Class Actions in Canada*, pages 74-75 and authorities there cited.

[97] In *Pro-Sys*, Justice Rothstein disposed of a submission equivalent to that of the Attorney General on this appeal:

> 97 Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, it cannot be said that an action based on waiver of tort is sure to fail" and that the questions "about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involve[e] matters of policy that should not be determined at the pleadings stage" [citation omitted]. I agree. In

> my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.
>
> …
>
> 105 Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it is important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. …

[98] The policy issues involving the tort of intrusion upon seclusion, its elements or exceptions, should not be determined at the sterile certification stage. All the certification court can say is – it is not plain and obvious that the claim will fail. Section 8(2) of the *Class Proceedings Act* states the certification order does not determine the merits (discussed above, para. 32). Capital Health and the Attorney General have no reason for concern that the certification ruling will generate issue estoppel for the trial judge's ultimate determination of those matters.

[99] In *Brown v. Canada (Attorney General)*, 2013 ONCA 18, Justice Rosenberg for the Court explained the rationale for identifying a cause of action at the certification stage:

> 44 … As this case demonstrates, identification of a cause of action is fundamental. It is impossible for the defendant to meaningfully respond to an application for certification without knowing the cause of action. The definition of the class and the identification of the common issues depend upon the nature of the cause of action. … It is not possible to know whether an action can be appropriately prosecuted as a class action without identifying the fundamental issue of whether or not there is a cause of action. …

[100] In this case, the rationale is satisfied. Capital Health and the Attorney General know they face a claim for a tort whose elements were defined in *Jones v. Tsige*. The uncertainty is whether those elements will be accepted by Nova Scotia courts. But the same uncertainty would face these parties whether this was a class proceeding or 33 individual lawsuits. The uncertainty flows from the evolving common law, not the choice of procedure.

[101] In most class proceedings, the existence of the tort and the definition of its elements are not prescribed as explicit common issues. Rather, they are taken for granted. This case is different. We have the exceptional situation where the existence of the tort and, if it exists, the legal elements and exceptions of the novel tort are actively disputed. The same dispute applies to the claim of each class plaintiff. Section 2(a)(ii) of the *Class Proceedings Act* says that common issues include issues of law. The motions judge's common question (f) asks what are the elements of the tort. The answer will avoid unnecessary multiple rulings for 33 plaintiffs on this substantial legal issue. Success for some will not mean failure for others. It is a proper common issue. The class plaintiffs, Capital Health and the Attorney General will all benefit from the scale economies of a single ruling.

[102] However, as discussed earlier, the question should not pre-judge the merits of a disputed issue. Whether the tort even exists in Nova Scotia is in dispute. Accordingly, question (f) should be rephrased:

> *(c) Does the tort of intrusion upon seclusion exist in Nova Scotia and, if so, what are its legal elements and what are its legal exceptions that pertain to this claim?*

[103] Common question (g) essentially asks whether the tort has been proven. The motions judge (para. 92) gave no reasons to support her conclusion that this was a common issue. Then (para. 93) she acknowledged "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".

[104] The tort, as defined by *Jones v. Tsige*, involves the defendant's "conduct" that "intrudes" upon or "invades" the plaintiff's privacy. These terms materially involve the circumstances of each search. I reiterate the passage from Winkler, *The Law of Class Actions in Canada*, page 122, quoted earlier (para. 86). In my view, question (g) should be deleted from the common issues and left to the individual stage of the proceeding.

(c) Summary – Common Issues

[105] I would delete common issues (d), (e) and (g), rephrase and renumber common issues (a), (b), (c) and (f) as set out earlier, and otherwise dismiss Capital Health's first ground of appeal that challenged the common issues.

7. Second Ground of Appeal – Preferable Procedure

[106] Section 7(1)(d) prescribes a condition for certification that the class proceeding "would be the preferable procedure for the fair and efficient resolution of the dispute". Section 7(2) then directs:

> 7(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 common 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 defences 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.

(a) The Principles

[107] In *Fischer v. IG Investment Management Ltd.*, [2013] 3 S.C.R. 949, Justice Cromwell for the Court identified the three goals to be addressed by the preferability analysis – judicial economy, behaviour modification and access to justice:

> 22 In *Hollick*, McLachlin C.J. indicated that the preferability inquiry had to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice (para. 27). This should not be construed as creating a requirement to prove that the proposed class action will *actually* [Justice Cromwell's italics] achieve those goals in a specific case. Thus, when undertaking the comparative analysis, courts must focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized.

> 23 This is a comparative exercise, the court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. …

[108] Justice Cromwell then explained how access to justice affects the preferability analysis:

> 26 A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered: *Hollick*, at para. 33. To determine whether both of these elements are present, it may be helpful to address a series of questions. These questions must not be considered in isolation or in a specific order, but should inform the overall comparative analysis. …
>
> *(1) What Are the Barriers to Access to Justice?*
>
> 27 The sorts of barriers to access to justice may vary according to the nature of the claim and the make-up 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. …
>
> *(2) What Is the Potential of the Class proceedings to Address Those Barriers?*
>
> …
>
> 29 A class action may allow class members to overcome economic barriers "by distributing fixed litigation costs amongst a large number of class members … [and thus] making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own": *Hollick*, at para. 15. It may also allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf.
>
> …
>
> 34 Thus, class actions overcome barriers to litigation by providing a procedural means to a substantive end. As one author put it in a memorable phrase, a class procedure has the potential to "breath[e] new life into substantive rights" [citation omitted]. Even though a class action is a procedural tool, achieving substantive results is one of its underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice.
>
> *(3) What Are the Alternatives to Class Proceedings?*
>
> …

> 36 The motions court must look at all the alternatives globally in order to determine to what extent they address the barriers to access to justice posed by the particular claim: *Hollick*, at para. 30. …
>
> *(4) To What Extent Do the Alternatives Address the Relevant Barriers?*
>
> 37 Once the alternative or alternatives to class proceedings have been identified, the court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The court should consider both the substantive and procedural aspects of access to justice recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. The comparison, of course, must take place within the proper evidentiary framework that applies at the certification stage. …
>
> *(5) How Do the Two Proceedings Compare?*
>
> 38 The focus at this stage of the analysis is on whether, if the alternative or alternatives were to be pursued, some or all of the access to justice barriers that would be addressed by means of a class action would be left in place: *Hollick*, at para. 33. At the end of the day, the motions court must determine whether, on the record before it, the class action has been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in a case. As set out in *Hollick*, the court must also, to the extent possible within the proper scope of the certification hearing, consider the costs as well as the benefits of the proposed class proceeding in relation to those of the proposed alternative procedure.

[109] In *Hollick*, the Chief Justice's reasons give context for the analysis of the other two focal points of preferability analysis – the goals of judicial economy and behaviour modification:

> 32 … Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. … Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.
>
> …
>
> 34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to

> determining whether a class action should proceed. As noted in *Western Canadian Shopping Centres, supra*, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". … If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

(b) The Motions Judge's Findings

[110] The motions judge considered these criteria and concluded that the class proceeding was preferable:

- Some plaintiffs had initiated a human rights complaint. The motions judge found that this endeavour was speculative and would involve different factors than a judicial damages claim (para. 100).
- The judge found that there would be a significant judicial economy in trying the common issues together (para. 101).
- She found that the class plaintiffs belonged to a marginalized and disadvantaged group – mentally ill at odds with the criminal process – who were unlikely to pursue individual claims for minor amounts of damages. So the class action would promote access to justice (paras. 102-105).
- She found that the class proceeding would consider the balance between the Hospital's need to control its facilities and the privacy rights of patients. The outcome would serve the goal of behaviour modification in the future (paras. 106-07).

[111] The rephrasing of the common issues that I have adopted earlier serves to clarify, not undermine the motions judge's basic approach to commonality. Those changes do not jettison the deference due to the judge on the preferability analysis. This case is unlike *McQueen*, para. 164, where the judge's elementally flawed reasoning on common issues required the Court of Appeal to initiate a fresh analysis of preferability.

[112] As noted earlier (paras. 26-27), the motions judge's assessment of the criteria for preferability involves questions of mixed fact and law that are reviewable for palpable and overriding error, unless there is an extricable error of legal principle reviewed for correctness.

[113] The motions judge's findings on judicial economy, access to justice and behaviour modification were well-supported inferences. Her conclusion on the preferable procedure included no palpable and overriding error and no extractable error of principle.

(c) Do the Individual Issues Overwhelm the Common?

[114] On the appeal, Capital Health and the Attorney General list various issues that they say must be determined individually.

[115] Capital Health submits "an individual analysis is still required of each strip search conducted" to assess the manner of search, the privacy afforded, consent, capacity to consent, section 1 of the *Charter* and damages. Capital Health's factum says "the Motion Judge 'plucked out' the parts of the test for breach of section 8 that could be considered in common, without fully or properly considering how many individual determinations would be left over". The factum contends that "[i]ndividual considerations permeate the legal test for a breach of s. 8 of the *Charter*, and cannot be extracted easily to leave coherently common issues behind".

[116] The Attorney General enumerates nine individual items relating to the searches, the expectation of privacy, whether there was consent, and circumstances that supported suspicion of any individual when the decision to search was made.

[117] Capital Health and the Attorney General predict that the individual issues will overwhelm any economies of commonality, and cite *Rumley*'s para. 29 (above, para. 48).

[118] Winkler, *The Law of Class Actions in Canada*, pages 130-31, summarizes the governing proposition:

> The notion of individual issues "overwhelming" the common issues is often repeated in the case law. A class proceeding will not satisfy the requirement that it be the preferable procedure to resolve the common issues if the common issues are overwhelmed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final

> disposition of the claims of the class members. If the resolution of the common issues would not put the class members in a better position than if they simply pursued individual claims, there is little, if any benefit to proceeding by way of a class action. This would be the case where the resolution of the common issue would not materially advance each class member's claim for damages and where the questions affecting individual claims would inevitably break down into a long series of individual trials dealing with many complex issues. In such circumstances, any potential judicial efficiency would be lost, and there would be no advantage to a class proceeding that would justify its imposition on the absent class members, the defendant, or the court.
>
> As Winkler notes, this submission arises under the "preferable procedure" aspect of the analysis.

[119] As Winkler notes, whether the individual overwhelms the common is properly for the "preferability" analysis. The question is whether individual actions in the Supreme Court of Nova Scotia are preferable to one class action.

[120] In my view, the class proceeding better vindicates the objectives discussed in *Fischer* and *Hollick*. The trial of common issues would not defeat the purpose of the class proceedings legislation as posited in *Rumley*, para. 29.

[121] For the *Charter* claim, if the class plaintiffs fail to establish the two premises that are embodied by the common issues, their claim may fail in the starting gate. If they establish both as asserted then, depending how *Golden*'s principles are applied, significant elements of the *Charter* cause of action may be established. This outcome would obtain despite that, as Capital Health and the Attorney General urge, individual issues such as consent or s. 1 justification may remain. For the tort claim, the class aggregation of the legal arguments on the tort's existence, elements and exceptions would avoid repetitive submissions and rulings.

[122] Neither do I accept that, after the common issues ruling, the trial of individual issues would be burdensome. The examinations of the Correctional Services Workers who performed the searches, with the Strip Search Reports that are already in evidence, may provide sufficient evidence for the searches of many class members.

[123] My comments on the possible outcomes should not be taken as pre-judging the merits, which are entirely for the trial judge.

[124] I would dismiss this ground of appeal.

8. Conclusion

[125] I would allow the appeal in part by deleting common issues (d), (e) and (g), and by rephrasing the remaining issues as follows:

(a) Were class members subjected to strip searches further to one decision that did not individually assess the grounds to search each person and, if so, who made the decision that there would be strip searches?

(b) Does s. 8 of the Charter require that, before a strip search, there be an individual assessment of grounds to search each person to be searched?

(c) Does the tort of intrusion upon seclusion exist in Nova Scotia and, if so, what are its legal elements and what are its legal exceptions that pertain to this claim?

[126] In all other respects, I would dismiss Capital Health's appeal.

[127] Mr. Murray has achieved substantial success on the appeal, facing challenges to the class proceeding from both Capital Health and the Attorney General. The common issues have been reworded, as a result of the submissions of Capital Health and the Attorney General, but with some useful contribution from comments by Mr. Murray's counsel. Taking all this into account, I would order Capital Health to pay Mr. Murray costs of $3,000 all inclusive for the appeal, and the Attorney General to pay Mr. Murray $2,000 all inclusive for the appeal. The amounts are cumulative, should be payable forthwith, and in any event of the cause.

Fichaud, J.A.

Concurred: MacDonald, C.J.N.S.

Bryson, J.A.