SUPREME COURT OF NOVA SCOTIA

Citation: *Bonn v Nova Scotia (Attorney General)*, 2026 NSSC 84

Date: 20260317
Docket: *Hfx* No. 510210
Registry: Halifax

Between:

Matthew Alexander Bonn

Plaintiff

v.

The Attorney General of Nova Scotia, representing His Majesty the King in right of the Province of Nova Scotia

Defendant

Motion for Certification

Judge: The Honourable Justice Diane Rowe

Heard: June 3 and 5, 2025, in Halifax, Nova Scotia

Counsel: Nasha Nijhawan for the Plaintiff
Agnes MacNeil, KC and Daniel Boyle for the Defendant

By the Court:

[1] The plaintiff Matthew Bonn seeks an Order certifying his action as a class proceeding pursuant to s.11(1) of the *Class Proceedings Act,* S.N.S. 2007, c.28 (CPA). The action seeks compensation for breaches of certain rights under the *Canadian Charter of Rights and Freedoms* (*Charter*) and claims damages in tort for trespass, all of which he pleads occurred while he was imprisoned by the Defendant Attorney General of Nova Scotia (AGNS). The litigation was originally commenced with Mr. Peter Monteith as the named plaintiff, then later naming Mr. Bonn as plaintiff by amendment on January 15, 2025.

[2] Mr. Bonn was a prisoner who was strip searched directly after receiving Opiod Agonist Therapy (OAT) medication while he was incarcerated in the AGNS' adult provincial prisons. The strip search was performed as a policy measure undertaken by the AGNS. He pleads that he was one of many persons subject to such a strip search pursuant to this policy.

[3] Mr. Bonn's claims include that the AGNS breached his *Charter* rights as follows: s. 8 (unreasonable search and seizure); s. 7 (liberty and security of the person); s. 12 (cruel and unusual treatment and/or punishment); and discrimination contrary to s. 15. Further, Mr. Bonn pleads that his claim against the AGNS also includes the tort of trespass to the person (specifically for false imprisonment, assault, and battery).

[4] The AGNS has not filed a defence to the action, reserving the right to do so pending the outcome of the certification motion. While there is some agreement by AGNS with the Plaintiff's submissions during the hearing, there are ongoing differences. The AGNS submits that the issues outstanding on this motion are the determination of the Class Definition, Class Period(s), and the content of the proposed common issues.

[5] In principle, AGNS agrees with the Plaintiff that a class proceeding is the preferable procedure for this litigation. Further, the parties agree that Mr. Bonn is an appropriate representative plaintiff. I will address both of these elements for certification more fully below.

[6] In regard to the causes of action being pled by Mr. Bonn, the AGNS submits that each of the *Charter* breach allegations will require a determination by a court whether any of them are saved by s. 1 of the *Charter* at this stage. The AGNS

submits that the s.15 *Charter* breach claim will require a comparator group to be defined, which the Plaintiff disagrees with.

[7] There are continuing divergences in relation to the common issues, specifically in regard to the issue of the tort of trespass to the person, and whether *Charter* or tort damages can be determined on an aggregate basis and quantum, and also the issue of non-monetary remedies.

[8] Further, while the parties have largely agreed on the contents of a class definition there is an issue regarding its temporal scope.

[9] The order for class action certification is granted. My reasons for granting the order follow, with direction on the content of the order.

Law

[10] A certification motion is solely procedural and not a determination of the merits of the proceeding (as per s. 8(2) of the CPA). If the court is of the opinion that the action satisfies the requirements set out in the legislation, it is mandated to proceed with the certification.

[11] Subsections 7(1) and (2) of the CPA mandates that upon an application for certification of an action as a 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.

(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.

Evidence

[12] The Plaintiff provided his affidavit (Matthew Bonn Affidavit dated November 17, 2022) in which he attested to being strip searched while at the Central Nova Correctional Facility (Central Nova). Attached to Mr. Bonn's affidavit is a news report concerning the death of Mr. Clayton Cromwell while he was in a Corrections facility as the impetus for the creation of a stricter policy for regulating OAT and imposing strip searches. He also submits that the AGNS could have employed other methods to administer OAT, including injection, which would have obviated strip searches.

[13] Mr. Bonn was strip searched after being administered OAT medication for a medically diagnosed substance use disorder. In the course of the searches, prisoners removed their clothing and, while nude, were visible to nurses, guards and other prisoners. He was ordered to expose his intimate areas, and touch them to show areas obscured.

[14] He noted that either all of the OAT recipients were strip searched on administration of medication at certain times, or none of the OAT recipients were strip searched. The searches were not particularized to any recipient. Mr. Bonn did not feel he could refuse, as he felt his compliance would be forced.

[15] The Plaintiff also relies on another affidavit (Peter Monteith Affidavit dated November 17, 2025) attesting to Mr. Monteith's experiences of strip search after receiving medication for opioid addiction while at the Central Nova.

[16] Mr. Monteith states that he was among a group of inmates who were strip searched pursuant to the policy while he in a corrections facility from February 2020 until about July 2021. He states that due to his personal experiences, which included childhood sexual abuse trauma and mental illness, that these strip searches caused him considerable distress. He is indigenous, and his difficult personal circumstances from childhood to adulthood are canvassed within his affidavit. Mr. Monteith had to retain counsel to formally request that the searches stop.

[17] Both of these men stated that the post OAT strip search experience was traumatic or humiliating.

[18] Mr. Bonn also submitted the affidavit of Dr. Claire Bodkin, a family physician and co-chair of a group focused on Prison Health at the College of Family Physicians of Canada (Dr. Bodkin Affidavit dated December 6, 2022). Her affidavit evidence is offered as an expert in evaluating the presence and history of childhood abuse in the population of persons incarcerated in Canada. Further, she enclosed and endorses the position statement by the College of Family Physicians of Canada concerning access to OAT in detention, as a medical treatment modality for opioid addictions.

[19] Mr. Bonn indicates there is evidence that the OAT policy ended on or about August 5, 2021. Further, the evidence is OAT policy was applicable to all persons, without individuation.

[20] AGNS submitted as evidence the Affidavit of Mr. Scott Keefe, the Acting Director-Correctional Services at the Nova Scotia Department of Justice, Correctional Services (Correctional Services) dated February 17, 2023. In the Keefe Affidavit, it is confirmed that the general description of the strip search process outlined by Mr. Bonn is reasonably accurate. Further, Mr. Keefe states that Mr. Monteith's description of the process for delivery of the OAT substances was also reasonably accurate. Mr. Keefe confirms that strip searches are no longer routinely conducted on inmates engaged in receiving OAT medications.

[21] Portions of a transcript of Mr. Keefe's cross-examination on his affidavit, (also referenced in the parties' submissions as "discovery") by Plaintiff's counsel

was included for the Court's review. Further, the AGNS directed the Court to responses to undertakings arising from Mr. Keefe's discovery, with responses, and particular information regarding dates within. The remainder of the AGNS' evidence included various policy documents concerning OAT medication distribution, with the investigation report of a death in custody (with redactions for privacy), and an associated internal Corrections directive.

Subsection 7(1)- subsections (a) through to (e)
Causes of Action

(a) *Charter* breaches:

[22] Both the Plaintiff and the Defendant agree that the statement of claim establishes viable causes of action in regard to the alleged breaches of ss. 7, 8, and 12 of the *Charter*. The AGNS does not concede the merits, of course.

[23] The AGNS does not agree that s. 15 of the *Charter* is established as a valid cause of action in the pleadings without an amendment of the statement of claim to plead a comparator group.

[24] AGNS submits that on a class certification that each cause of action to be pleaded is to be valid, rather than determining one viable cause of action in the pleadings. It seeks that the Court consider that the cause of action concerning the claim of a s. 15 *Charter* breach requires pleading of a comparator group for validity.

[25] The Notice of Action under the heading *Charter* s. 15 (discrimination) at para 47 pleads:

> 47. The class members were all receiving OAT medication because of an opioid addiction. Addiction is a disease and a disability that impacts individuals of all ages and across all parts of Canadian society. Addiction prompts chemical changes in the brain that affect behaviour, perceptions, pleasure, and pain. Opioid addiction is extremely powerful and difficult to overcome.

[26] It states class members, and potentially Mr. Bonn, were harmed by the strip searches and that this search was not necessary to protect health and safety. It is further pled that the prisoners were subjected to the searches due to their addiction and as a prerequisite for obtaining the medically prescribed medication. This then was adverse differential treatment contrary to s. 15 and a failure to accommodate disability.

[27] The plaintiff further states that the AGNS' acts and omissions were based on discriminatory stereotypes and views of those with opioid addictions.

[28] The AGNS submits that the decision in *Law v Canada (Minister of Employment and Immigration),* 1999 CanLII 675 (SCC) at para 30, indicates that there are three key elements to a s.15(1) discrimination claim: differential treatment; an enumerated or analogous ground; and discrimination in a substantive sense involving factors such as prejudice, stereotyping and disadvantage.

[29] AGNS refers the Court to Common Issue #9 that addresses post OAT strip searches (as per the Revised Schedule A provided to the Court) which is set out as:

> 9. Did the post-OAT strip searches of the class members infringe s. 15 of the *Charter*?
>
> a. Did the post-OAT strip searches create a distinction based on the class members' disability (opioid addiction)?
>
> b. Is the distinction created by the post-OAT strip searches discriminatory?

[30] The AGNS submits that the pleadings should set out facts illustrating how members of a comparator group received the protection or benefit of the law and facts that, if proven, show that the Plaintiff did not receive the same protection or benefit. They submit a comparator group that should be added to the claim is that of inmates receiving other forms of medication who were not strip searched. In the absence of some particularity about a comparator group, the AGNS pleads that it will be challenging to meet the Plaintiffs' case, for example if there is a need to retain an expert who would consider a particular comparator group for analysis. It is unclear to the AGNS whether this pleading intends to refer to the class members being treated in a discriminatory manner as a distinct group in comparison to all inmates in the general population, or to all inmates who are receiving any medications. Generally, the AGNS does concede this is a viable cause of action, but only if the pleadings are amended to include a comparator group.

[31] Mr. Bonn submits that it is unnecessary to plead a comparator group for the s. 15 *Charter* breach. He submits that more current law guides the Court, specifically *Withler v Canada (AG),* 2011 SCC 12 at para 2 in which McLachlin CJC and Abella J, held that:

> "… Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the

> end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"

[32] In oral reply to the stated AGNS position, Mr. Bonn submits that no amendment to the pleadings is required for the s. 15 claim and relies on CPR 13.03(1)(d).

[33] Mr. Bonn requests that the Court consider *Withler, supra*, at paras 55 to para 67, with emphasis on para 63. I will reproduce paras 61 to 63, with emphasis:

> *(4) The Proper Approach to Comparison*
>
> [61] The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.
>
> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

[34] I agree with the Plaintiff. It is not necessary for a comparator group to be narrowly defined in the pleadings at this stage.

[35] The current form of the pleadings, with the details of the Revised Common Issues set out under the heading of s. 15 (discrimination) should guide the enquiry sufficiently as it currently reads to be focused on an allegation of discriminatory treatment alleged by inmates receiving OAT and subject to strip search versus all inmates in the correctional facility who did not receive OAT. If required, further particulars may be addressed in time by narrowing the scope to those inmates who received medication that was not OAT for an analysis.

[36] Reference is made to the justification analysis pursuant to s. 1 of the *Charter* within the pleadings, as per paras 52 through to 57 of the action, which will be concluded by a Court in the course of proceedings.

(b) Tort form of Trespass to the Person

[37] The cause of action concerning the tort of trespass to the person was intermingled in argument by counsel with the common issue of the tort claim. I will address the common issue arguments concerning the tort claim later in the decision.

[38] For the purposes of this portion of the certification test, Mr. Bonn highlights to the Court that it is tortious to compel a person to strip naked on the threat of physical force or other punishment without lawful authority (as per *R v Golden*, 2001 SCC 83 at para 67 in the corrections context), arguing that the compulsion by the AGNS staff to require OAT inmate recipients to strip naked constitutes trespass to the person. Trespass to the person, he submits, includes the torts of false imprisonment, assault and battery.

[39] Fichaud, JA's commented at paras 91-95 of *Nova Scotia Health Authority v. Murray*, 2017 NSCA 28 by ("*Murray*") on the tort of invasion of privacy or "intrusion on seclusion" rather than the tort of trespass to the person. In *Murray,* the Court was determining whether the novel tort being pled should properly have been struck from certification, as an alternative remedy for *Charter* damages had also been advanced by the plaintiff. As Fichaud, JA wrote:

> [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.** [emphasis added]

[40] The Plaintiff relies on caselaw in which standard prison strip searches have been found to be tortious, and include assault, battery and false imprisonment in the corrections setting (*Golden, supra*; *Nurse v Canada* [1977] FCJ. No. 713). There is also the recent certification decision in *Farrell v Attorney General of Canada*, 2023 ONSC 1474, in which certification was granted for claims of trespass to the person in the context of a strip search, and for the tort of "intrusion upon seclusion."

[41] The AGNS, in reply, acknowledges that the statement of claim, from paras 58 to 61, set out the allegations in the pleadings that would be necessary to sustain a viable cause of action respecting trespass to the person (but without conceding the merits).

[42] Upon my review of the pleadings, I agree that the tort of trespass to the person is a viable cause of action as set out within.

[43] In conclusion, I am satisfied that the causes of action for the *Charter* breaches and the tort claim, as put forward by the plaintiff, are established for the purposes of s. 7(1)(a) of the CPA.

Identifiable Class and the Temporal Scope

[44] The evidence by both the plaintiff and AGNS established that the OAT policy applied across a proposed defined class of "male prisoners who were strip searched directly after receiving Opioid Agonist Therapy medication while incarcerated…".

[45] Both the AGNS and the plaintiff agreed, by the time of hearing, that the locations were the policy was operative should be defined with particularity, as the Central Nova Correctional Facility, the Northeast Nova Scotia Correctional Facility and the Cape Breton Correctional Facility.

[46] However, the temporal scope for the class members was the subject of dispute.

[47] The plaintiff submitted that the class definition should be:

> Male prisoners who were strip searched directly after receiving Opioid Agonist Therapy medication while incarcerated between January 1, 2014 and December 31, 2021:
>
> (a) In Central Nova Correctional Facility;
>
> (b) In Northeast Nova Scotia Correctional;
>
> (c) In Cape Breton Correctional Facility.

[48] The AGNS submitted that the temporal scope should be narrowed by facility and date, in accordance with the evidence available at the time of hearing the certification. Its submission is that the class be defined as:

> Male prisoners who were strip searched directly after receiving Opioid Agonist Therapy medication while incarcerated
>
> (d) In Central Nova Correctional Facility between January 1, 2014 and December 31, 2021;
>
> (e) In Northeast Nova Scotia Correctional Facility between February 2015 and April 20, 2020;
>
> (f) In Cape Breton Correctional Facility between November 8, 2016 and July 28, 2021.

[49] The AGNS submits that the class period should not be a question for the merits hearing but rather is a question to be addressed at the certification stage as part of the class definition as the scope of class must be clear and identifiable at this stage with a basis in fact. The dates that the AGNS has submitted as the accurate temporal scope by specific facility are supported in the affidavit evidence

of Mr. Keefe, and responses to undertakings provided by the AGNS after the discovery examination of Mr. Keefe, held in advance of the certification hearing.

[50] The AGNS acknowledged that it does not have complete records regarding the time period and administration of the OAT policy for each facility, however the AGNS submits that the plaintiff has not provided any evidence that post OAT searches happened outside of the specified dates in the available evidence it has tendered per facility. The AGNS submits that the plaintiff could have sought more particularity prior to the certification hearing but did not do so.

[51] Mr. Bonn submits that there is not yet a complete disclosure or a meaningful opportunity to test the evidence relied upon by the AGNS in setting these narrower dates per facility for the class definition. Both the plaintiff and the AGNS recognize that some class members may have moved in and out of facilities at differing points.

[52] Mr. Bonn submits that there are "no downsides" if the broadest temporal scope is applied across the named facilities. He highlights the risks inherent in an underinclusive class period in the event that subsequent disclosure and discovery establish that OAT recipients were strip searched outside of the periods put forward by the AGNS, specifically:

> (i) Later broadening of the class definition may require fresh certification notices to be sent out and a fresh opportunity to opt out, adding to expense and lengthening time;
>
> (ii) The defendant may face multiple individual claims for those falling outside of the class definition, if narrowly defined at the outset;
>
> (iii) Limitations period considerations may impact prospective claimants if the period is narrowly defined at the outset, rather than be determined at the merits stage.

[53] The risk of excluding potential members of the defined class at this stage due to incomplete early information is a serious consideration as this may foreclose access to justice. As there has not been complete disclosure to date, it would be premature to narrow the dates by facility at this stage. The most appropriate approach is to use the dates for which there is some basis in fact for the fullest temporal scope of the OAT policy, from the time of its formation to the time of its apparent discontinuance by AGNS to the facilities, rather than narrowing the temporal scope by each facility.

[54] Again, in *Murray*, Fichaud, JA, at paras 31 and 32 set out the "some basis in fact" standard which a Court will employ:

> [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." [emphasis added]

[55] I find that there is some basis in fact establishing that the operative dates of the OAT post strip search policy are January 1, 2014 to December 31, 2021 and these dates will be captured in the class definition proposed by Mr. Bonn as the temporal scope.

[56] I am not required at this stage, on the basis of the evidence that is currently available, to reconcile or make determinations of fact on the differences between the plaintiff and the AGNS on the temporal scope of the OAT policy per facility. If there are specific limitations period defences put forward or claims made in which discoverability is a factor, then determination at a merits hearing will be the appropriate stage with more fulsome evidence to settle the issues.

Common Issues

[57] On the second day of the certification hearing, a document headed "REVISED Schedule A- Proposed Common Issues- June 5, 2025" was submitted by Mr. Bonn (I will refer to this as the Common Issues). This document did not reflect an agreement between the parties in whole but reflected the Common Issues that Mr. Bonn was seeking to certify and have the Court consider on that day. There are 19 Common Issues identified in that document.

[58] Counsel for the parties have engaged in substantive communication to narrow their differences in regard to the Common Issues.

[59] It was highlighted by Mr. Bonn at the hearing that the Common Issue #15 difference was resolved between the parties with an anticipated change to the form of language used, rather than removal of the common issue, to reflect that no assessment of individual damages on this Common Issue is being requested. The plaintiff had earlier proposed in the written brief to remove Common Issues #14 and #15 so long as Common Issues #16 and #17 remained.

[60] The AGNS seeks a revision to Common Issues #17, which will be addressed below. It also addresses the issue of whether *Charter* and/or tort damages can be determined on an aggregate basis in whole or in part, and the determination of quantum.

[61] The Common Issues #11, #14, #17 and #18 were the focus of oral submissions at the certification hearing.

[62] The test for common issues is set out in *Murray*, paras 44-48 (and these paragraphs recently reaffirmed by the Court of Appeal in *Northwood Care Group Inc. v. Surette*, 2025 NSCA 52) as follows:

> [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.

…

[46] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 (CanLII), [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]

[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.

[63] With this guidance in mind, I will review each of the disputed Common Issues.

Common Issue #11 reads as follows:

> 11. Did the post-OAT strip searches of the class members constitute trespass to the person?
>
> > a. Did each post-OAT strip search of the class members constitute a deprivation of liberty against the individual's will caused by the defendant without lawful authority (false imprisonment)?

> b. Did each post-OAT strip search of the class members constitute the intentional infliction of unlawful force by the defendants on the class members without consent (assault)?
>
> c. Did each post-OAT strip search of the class members cause them to at least apprehend the threat of harmful or offensive unwanted physical force to subdue any individual who did not cooperate with the search (battery)?

[64] The AGNS objects to the inclusion of Common Issue #11, as it submits that each component of Common Issue #11 would require an individualized analysis that is not conducive to determination in a class proceeding.

[65] In sequence, the AGNS is of the view that Common Issue #11 poses the following challenges:

- #11(a) would require a determination of whether there had been a deprivation of liberty "against the individual's will";
- #11(b) would require a subjective analysis of the intentional infliction of unlawful force to address the claim of assault; and that
- #11(c) requires a subjective analysis of whether a class member had apprehended a threat of harmful or offensive unwanted physical force.

[66] AGNS maintains that there is no evidence of unwanted touching during strip searches and therefore no basis in fact. Further the requirement of "intention" cannot be determined on a common basis as it requires a subjective analysis of the individual factors. In addition, AGNS submits that the unwanted nature of the strip search has to be determined on an individual basis.

[67] The AGNS relies upon *Murray*, para 86, as authority that evidence from individual class members would be required to address a tort claim, which in *Murray* was pled as the then novel tort of intrusion on seclusion. In *Murray* at paras 86 and 87, Fichaud JA wrote:

> [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

[68] AGNS argues that the plaintiff's characterization of the tort of trespass to the person is overly broad. It disputes whether the tort of trespass against the person, and the subsumed torts in the subsections lend themselves to effective determination in a class proceeding.

[69] Mr. Bonn maintains that Common Issue #11 should be certified as trespass to the person includes false imprisonment and assault, and that neither of these require physical touching. Mr. Bonn highlights that intentional torts do not require subjective intent to cause the harm.

[70] In this matter, each of the strip searches could be seen as intentional as none were inadvertent acts. Further, the plaintiff argues that tort liability will be based on the fact that the searches lacked lawful authority and the common features of the imbalance of power and positional dynamic between guards and prisoners is the focus for consideration and not the basis of any individual issues.

[71] Therefore, the plaintiff proposes adding the words "common elements of" to Common Issue #11 at the outset to:

> **"Did the <u>common elements</u> of post-OAT strip searches of the class members constitute trespass to the person?" (emphasis added).**

[72] If the policy meets the elements of tort, the Plaintiff submits, then the occurrences were unjustified. The Plaintiffs' affidavit evidence from Mr. Bonn, Mr. Monteith and the expert evidence of Dr. Bodkin indicates that harm occurred or could reasonably have occurred.

[73] In *Murray*, the Court was focused on a singular decision to search all 33 inmates at the East Coast Forensic Hospital. In this matter however, the application of the post-OAT policy was done at multiple locations over a lengthy period of time broadly to members of the proposed defined class, albeit with early indication that there was some exercise of discretion on the timing of the application of the policy by corrections officers.

[74] Again, in *Murray*, Fichaud, JA remarked with approval at para 32:

> [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]

[75] If the elements of the tort of trespass against the person are established by the Plaintiff, then the determination of each subsection will be determinative of the tort across a broader temporal and location scope with a larger defined class than what was before the Court in *Murray*.

[76] As was recently reaffirmed in *Northwood Care Group Inc. v. Surette*, 2025 NSCA 52, citing *Pro-Sys* (at para 13):

> "…evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all class members." (emphasis added in *Surette*, and reproduced here).

[77] The AGNS submits that tort damages should be determined at an individual issues trial. However that is not what is being asked at this point in the certification. The question before this Court is whether the Common Issue #11 as framed will require the Court to make a determination of a common issue capable of being answered once for all class members. If the Plaintiff can prove elements of the tort of trespass to the person (with the subsumed torts) on an evaluation of the policy and its application to the defined class then it will be responsive for all class members subject to the policy.

[78] I do not agree that Common Issue #11(a) requires evidence of an "individual's will". All of the class members were in prison. I accept Dr. Bodkin's affidavit, as well as recognize that there are issues of power and control inherent in a corrections setting as was argued by the Plaintiff. *Farrell, supra*, at para 180

indicates that it is a factual dispute as to whether the prisoner actually could exert will in the circumstances in the event of a refusal to strip by choosing to go into general population if corrections policy did not permit this.

[79] Further, in regard to Common Issue #11(b) the AGNS submits that it is possible that some inmates may not have had the same reaction to strip search due to, essentially, institutionalization with rote submission and then perhaps consent given. The Plaintiff strenuously disagrees with this submission. I would agree. Further, on the issue of consent, that issue and whether consent is vitiated in the circumstances can be addressed in a trial on the common issues as a question of mixed fact and law.

[80] Common Issue #11(c), the AGNS submits, would require a determination of force for the tort of battery and it pleads that the element of apprehension is individual in nature. The AGNS notes that Mr. Bonn and Mr. Monteith's affidavits state they had apprehension of force but not all inmates might not have felt this. This is somewhat akin to the submission on Common Issue #11(b) regarding the element of consent. Again, I can see that this element may be considered in a trial on the common issues, as above.

[81] AGNS submits on the issue of battery that there is no evidence of "touching". However, on reading *Farrell*, I note the question of whether unwanted touching was forced in that the inmates who were subject to strip search were forced to touch themselves as they were compelled to remove their own clothes and touch their own persons, in intimate areas.

[82] The issue for this Court on the certification is not to determine the merits, but to determine whether this is an issue with sufficient common elements for which a determination will guide the determination of the defined issue for the class members.

[83] The burden to prove causation in trespass to the person is on the Plaintiff who must show a direct causal connection between the act of the defendant and the harm alleged.

[84] *Murray* at para 101:

> [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.

[85] I would certify Common Issue #11, with the amendment to the preamble of the subsections to read:

> **"Did the <u>common elements</u> of post-OAT strip searches of the class members constitute trespass to the person?"**

Common Issue #14- If a *Charter* breach has been established, are damages under s. 24(1) warranted?

[86] The AGNS refers the Court to *Vancouver (City) v Ward*, 2010 SCC 27, (para 4) which established that there are three steps a court must undertake when considering the issue of awarding damages under s. 24(1) of the *Charter*:

- The Court must first determine there has been a breach of a Charter right; then
- The Court will consider whether damages are a just and appropriate remedy to effect compensation, vindication of the right and/or deterrence of future breaches; and
- There are no countervailing factors that defeat the functional considerations that support a damage award and render damages inappropriate or unjust.

[87] The final step is the determination of damages quantum, based on evidence of loss, and consideration of functional aspects of s. 24(1) including vindication or deterrence.

[88] AGNS pleads the Court must go though all the analysis in *Ward* before any finding that s. 24(1) damages are available. The AGNS relies on paras 84-87 of *Murray*, in which a *Ward* analysis was made by Fichaud, JA indicating that Nova Scotia *Charter* jurisprudence holds that s. 24(1) damages are not available in this matter as a common issue and it objects to certification of Common Issue #14.

[89] In *Murray*, at para 84 to 85 concerning the common issue for whether *Charter* damages are "just and appropriate" Fichaud, JA held that:

> [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. [Emphasis added]**

[90] The AGNS submits that *Murray* shows that the balancing of the "countervailing factors" (including a potential award of tort damages) at the third step of the *Ward* test in this matter would require an individualized approach. The burden would fall on the AGNS. The similarity in circumstances is highlighted here as *Murray* also involved a strip search of inmates, in that case in a hospital setting.

[91] The Plaintiff points to para 85 of *Murray*, decided in 2017, in which Fichaud JA writes that it is "…. difficult to conceive.." at that time and in the circumstances of the case before the appellate court how damages could be determined (and aggregated), but this is a new situation. He argues that the Nova Scotia Court of Appeal did not go further on the issues of s. 24(1) *Charter* damages as the record in *Murray* was limited. Further, he submits that there are more recent decisions, upheld on appeal, in other Canadian jurisdictions in which s. 24(1) *Charter* damages were certified as a common issue, and then the subject of damages awards, upheld on appeal.

[92] The Plaintiff refers to a trilogy of recent cases: *Brazeau v Attorney General (Canada),* 2019 ONSC 1888, at paras 400-434, aff'd 2020 ONA 184; *Francis v Ontario*, 2020 ONSC 1644, at paras 534-596, aff'd 2021 ONCA 197; and *Reddock v Canada (Attorney General)*, 2019 ONSC 5053, aff'd 2020 ONCA 184. All three cases addressed s. 24 remedies in common, with each case arising in the context of segregation in corrections facilities.

[93] All three are summary judgment decisions, and dispositive of the merits of the common issue of *Charter* damages. In *Brazeau*, at para 427, Perell J remarks that this is an "evolution of *Charter* damages", and in keeping with what "reasoned and compelling notions of appropriate and just remedies demand."

[94] Perrell J, in the course of these summary judgments in *Brazeau*, *Reddock* and *Francis* undertakes the analysis and outlines an approach that would be satisfactory and in keeping with *Ward*. The availability of s. 24(1) *Charter* remedies were all determined in common.

[95] *Reddock*, at para 312, notes that *Charter* remedies are associated with both s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act*, 1982. It's noted that s. 52(1) of the C.A. 1982 authorizes a declaratory remedy when a law violates the Constitution of Canada, rather than a personal remedy (also as per *Francis*, para 536).

[96] Perell, J goes on to consider the flexibility of s. 24(1) and recalls jurisprudence that it is intended to be given a generous and purposive interpretation and application (*Reddock*, para 317)

[97] In *Reddock*, Perrell J focused his analysis on vindication and deterrence as relevant countervailing factors (paras 324 -334) and determined that compensation at a base level for the breach of *Charter* rights (in recognition of a base level of

harm for class members mental suffering) could be assessed and set, without any prejudice to a class members idiosyncratic claim at individual issues trials for (a) additional compensatory damages for the contraventions of the *Charter* or for systemic negligence; and (b) punitive damages (as per *Reddock*, paras 378 -383). This creates a "way forward" in process.

[98] It does appear, on the record, that the AGNS has not raised specific grounds to challenge the availability of s. 24 remedies as a distinct common issue. The Plaintiff submits that if the AGNS does raise specific grounds under the *Ward* test, then that can be addressed in considering Common Issue #17. I would agree.

[99] I would certify Common Issue #14.

[100] The 2023 *Farrell* certification decision concerning strip searches in the context of a prison is particularly persuasive for me, not because it most resembles in fact the current action seeking certification, although that is a consideration. Glustein, J's decision on certification is based on the reasoning of each of Perell, J's summary judgment decisions in *Brazeau/Reddock/Francis*, (upheld on appellate review) which undertook the *Ward* analysis.

Common Issue #17: "Can *Charter* and/or tort damages be determined on an aggregate basis in whole or in part? If yes, what quantum of aggregate damages is warranted?"

[101] The AGNS submitted that the reference to *Charter* damages should be removed from Common Issue #17 as it cannot be decided as a common issue due to its individual elements, with reliance on *Murray*, at paras 86 and 87. The remainder of Common Issue #17 may be appropriate for a Common Issue finding, however.

[102] In *Murray*, the class action was to certify a proceeding in which 33 inmates at the East Coast Forensic Hospital were strip searched on a single incident. There were functional questions concerning the s. 8 breach on those facts. In addition, the plaintiff in that matter sought to obtain a decision with all aspects of the *Charter* damages in aggregate.

[103] In *Murray*, the policy stipulated that a strip search may, on the exercise of discretion, take place where there are "reasonable and probable grounds" for a search of this nature, which would require a subjective analysis, and would be made pursuant to *Ward*.

[104] That is not the case here. In this matter, there are substantial factual differences. The OAT inmates are a pre-identified group within the OAT policy due to their medically prescribed OAT. This was no subjective application of the OAT policy.

[105] The AGNS submits that this Court is bound by *Murray*, and that removal of Common Issue (e) regarding s. 8 *Charter* damages from certification in *Murray* was warranted by the application of *Ward*, as tort damages were available for the Plaintiff.

[106] However, the Plaintiff submits that if a Court finds that the OAT policy itself breached the *Charter*, and can not be addressed after undertaking a s. 1 *Charter* analysis, then a positive finding of a breach of an enumerated *Charter* right may result in application across the class for baseline damages pursuant to s. 24(1) (with Plaintiff's reliance on *Golden* and also *Farrell*).

[107] Mr. Bonn draws the Court's attention to the certification in *Farrell*, in which the equivalent certified issue was framed as: "If a *Charter* breach or tort has been established, can damages be determined on an aggregate basis in whole or in part? If yes, what quantum of aggregate damages is warranted?" (*Farrell*, at Schedule A, para 4).

[108] Mr. Bonn's submission is that the framing of Common Issue #17 is to first address whether aggregate damages can be determined by the common issues judge, and then any assessment of quantum undertaken if the Court is affirmative on the first question.

[109] In *Ramdath v George Brown College of Applied Arts and Technology*, 2015 ONCA 921, at para 76, the Court determined that an award of aggregate damages is available to provide access to justice.

[110] Further, Mr. Bonn pleads that this is a matter in which the Plaintiff is seeking a base damage amount through a common issues trial while also giving class members the option to seek increased damages on an individualized process (as outlined in the Litigation Plan). This approach had been applied in *Brazeau/Reddock/Francis*. It differs from the situation in *Murray*, which was considered and distinguished in *Reddock* (*Reddock* at para 387).

[111] As Glustein, J. sets out at paras 330-332:

> [330] Courts have ordered aggregate damages by providing a base level of damages for alleged *Charter* breaches and tortious conduct while providing class members the option of seeking increased damages based on their individualized situations. In *Good v. Toronto (Police Services Board),* 2016 ONCA 250, 130 O.R. (3d) 241; leave to appeal refused, [2016] S.C.C.A. No. 37050, affirming 2014 ONSC 4583, 121 O.R. (3d) 413 (Div. Ct.), Hoy A.C.J.O. held, at para. 75:
>
> > Further, this appears to be a case where the common issues judge may well determine that at least part of TPS' liability can reasonably be determined without proof by individual class members. As the Divisional Court highlighted, s. 24(1) asks whether the aggregate or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73, that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the Charter, a minimum award of damages in a certain amount is justified". [Emphasis added.]
>
> [331] A similar approach was followed in *Daniells v. McLellan*, 2017 ONSC 6887, in which the court certified a proposed common issue of whether damages for intrusion upon seclusion could be awarded on an aggregate basis. In *Daniells*, Ellies J. held, at para. 23, that "the present case is one in which a common issues trial judge could determine a base amount of damages without proof of loss for each class member on the basis that every class member's privacy was breached, and was breached in the same way."
>
> [332] In *Reddock,* a global amount of $20 million was approved to fulfill the goals of compensation, vindication, and deterrence, with $9 million of that amount awarded as the compensatory component calculated based on $500 for each inmate placed in administrative segregation for more than 15 days: at paras. 476-86, aff'd Brazeau (2020), at paras. 102-4.

[112] I will also note the most recent decision on settlement of a class action in Nova Scotia, *Estey v. Attorney General (Nova Scotia),* 2025 NSSC 368, in which there was an aggregate settlement reflective of damages for class members for alleged breaches of s. 7 and s. 15 of the *Charter*, pursuant to a government policy applied against a defined class.

[113] I would certify Common Issue #17.

Common Issue #18 is "Are any other non-monetary remedies warranted?"

[114] In oral argument, the AGNS submits that "other non-monetary remedies" is extremely vague, and therefore would make it difficult to prepare for trial. It submits that para 80 of the Notice of Action sets out a list of relief being sought. In the AGNS' view, the pleading which references counselling may be considered a non-monetary benefit potentially, although AGNS does state it pays for such counselling as may be required or ordered.

[115] Further, the AGNS submits that the broad "catch all" clause of "such other relief.." is too broad to be of assistance in determining the content and scope of Common Issue #18. A Common Issue should be of some assistance in preparing for the trial and AGNS pleads that this does not assist and that there is no basis in fact established. The AGNS proposes that if a specific non-monetary remedy is sought then it should find expression in the pleadings with amendment by the Plaintiff at a later date, and not be the subject of a Common Issue at this stage.

[116] The AGNS disputes that the Plaintiff's submission that quashing disciplinary records may be one appropriate remedy in the matter as the statement of claim does not seek expungement of records. It notes that disciplinary adjudications are highly individualized and cannot be assessed in common. Further, the AGNS argues that the Court lacks jurisdiction to expunge government records.

[117] In response, Mr. Bonn maintains that Common Issue #18 should be a certified common issue.

[118] The plaintiff submits that expungement of disciplinary records is an available "appropriate and just" remedy under s. 24(1) of the *Charter*, as pleaded in the statement of claim. He argues that if there is a disposition that all of the strip searches were unlawful, then it should follow that the records would be capable of being expunged for that common reason. Finally, the Plaintiff submits that the availability of expungement is an issue to be determined at the hearing on the merits.

[119] Mr. Bonn submitted in oral argument that Common Issue #18 is intended to refer to the *Charter* remedies in s. 24(1).

[120] However it is clear that there is no evidence to suggest what it may be. If there is evidence uncovered on the way to a trial on the Common Issues then the Plaintiff could amend the pleadings with particularity.

[121] The Plaintiff does not want to be limited while engaging in discovery, as discovery and production of documents may become too narrowly defined by a narrower Common Issue, with the Plaintiff unable to obtain information on whether class members were subject to disciplinary measures as a result of a refusal to participate in a strip search. This may result in duplication of process in the event it does become apparent that disciplinary records will be required for a court to consider an appropriate non-monetary remedy.

[122] I agree with the Plaintiff's submission on this point, and would include the Common Issue #11. The *Farrell* decision specifically considers the same common issue (at para 339), as in *Sherry Good v Toronto Police Services Board*, 2014 ONSC 4583 (at para 84).

Representative Plaintiff and Litigation Plan

[123] Mr. Bonn's affidavit satisfied the Court that he comes within the proposed class defined, as a male receiving OAT subject to strip search pursuant to the policy during the requisite time period in the custody of the defendant's facility. Mr. Monteith's affidavit recounts his experiences as an inmate who was strip searched after receiving post-OAT medication. In keeping with the CPA s. 7(1)(b), the evidence before me establishes there are two or more class members. There is no indication that Mr. Bonn's interests are in conflict with other class members. He also had been an inmate at two of the defendant's facilities in the time period.

[124] The AGNS does not dispute that Mr. Bonn is an appropriate representative plaintiff.

[125] I am satisfied that Mr. Bonn may be appointed the representative plaintiff for this proceeding.

[126] Schedule B of Mr. Bonn's factum appended an earlier form of litigation plan. After discussion between counsel, with consideration of the AGNS' responding brief, Mr. Bonn submitted an Amended Litigation Plan to the Court on June 5, 2025.

[127] The parties are in agreement that the Nova Scotia Health Authority is a proper party to identify the individuals who received the medication, and most precise record holder.

[128] The Plaintiff intends to bring a motion in the event that certification is granted seeking the production of health records. Counsel will then work together to address the form of notice to class participants. I take particular note of the AGNS' submission that access to the internet may be difficult for potential class members, and is dependent on their personal circumstances which may preclude their ability to be informed. I will note that class members in class action proceedings for whom poverty, literacy, or health status may have been limiting factors were adequately included by a combination of notice and outreach methods. If more particularity is required to outline notice and contact methods for intended class members, the Court anticipates there will be a return for case management by the parties.

[129] It is possible that the names and addresses of persons in custody may not be reliable, given the passage of time, so the Court intends to make an order permitting current address information to be provided for notice purposes to class counsel. Counsel are to provide proposed language for the order to that effect.

[130] At this stage, the only requirement for the Court is to find that the litigation plan is workable. The Amended Litigation Plan outlines a series of steps to provide for general communication with Class members via a website with regular posting. The identification of the class will take place in conjunction with review of additional health records which provide dates for the administration of the OAT substances. Further, notice provisions are outlined, which may require some additional work for refinement, but are sufficient as a starting point.

[131] The posting of notices in the facilities may be helpful, as unfortunately some individuals who may be within the class could have reoffended and may be most likely to be reached in this manner. It is not a cost prohibitive measure.

[132] Trial of the common issues is contemplated within, with remedies. I note that the consideration of "other remedies" such as declarations is provided within the plan.

[133] The Court is satisfied that the "Amended Litigation Plan" document is workable and takes a specific notice that privacy issues may be required to be addressed in future.

[134] The purpose of a litigation plan on certification is to assist the Court to determine whether the goals of certification will be met by the tentative plan, which will be finalized in due course as the litigation proceeds.

Subsection 7(2)-Preferable procedure Consideration

[135] In *Murray*, at paras 107- 109, Fichaud, JA wrote:

> [107] In Fischer v. IG Investment Management Ltd., 2013 SCC 69 (CanLII), [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.

[136] In this matter, the class can be narrowly defined however the period of time that the post-OAT policy was in place and the multiple locations in which it was carried out, make it likely that a class action rather than a multiplicity of individual actions is the most judicially efficient procedure.

[137] The policy was applied across the defined group. Further, they were carried out without subjective application of the OAT policy, as all persons medically prescribed OAT were captured within the policy and strip search.

[138] Access to justice is a factor in this matter, as the members of the class would face significant financial and other barriers would be even higher for these intended litigants. A class proceeding, with a centralized approach, and the possibility of individual assessment of damages as may be elected, would ensure that the greatest number of potential litigants can access the justice system if seeking redress.

[139] The litigation plan, in its initial formation, is fair, efficient and manageable.

[140] The OAT policy is no longer being applied, in its former version, but the class proceeding may serve to inform institutional behavioural change if there are breaches of *Charter* rights or tort consequences found.

Conclusion

[141] The Order for certification of the class proceeding is granted. Mr. Bonn is the representative plaintiff.

[142] The Class shall be defined as follows:

> Male prisoners who were strip searched directly after receiving Opioid Agonist Therapy medication while incarcerated between January 1, 2014 and December 31, 2021:
>
> (g) In Central Nova Correctional Facility;
>
> (h) In Northeast Nova Scotia Correctional;
>
> (i) In Cape Breton Correctional Facility.

[143] Plaintiff's counsel is to provide a finalized clean form of Common Issues based on the form of the document referenced as Common Issues Final that was provided to the Court on June 5, 2025, with the removal of Common Issue #14 and rewording of Common Issue #15 as agreed between the parties.

[144] The preamble to Common Issue #11 is to be reworded as:

> Did the common elements of post-OAT strip searches of the class members constitute trespass to the person?

[145] The Common Issues document is to be provided to the Court in draft prior to finalizing the form of Certification Order as it will be a Schedule "A" to the Certification Order.

[146] Parties are to schedule a Case Management appearance with the assigned judge as soon as is practicable to set.

[147] The document headed "Amended Litigation Plan" before the Court on June 5, 2025 ("Litigation Plan") shall also be an attachment to the Certification Order, as Schedule "B". The Court is mindful that this is a flexible plan and may require the parties to come back to the Court for further refinement as the matter proceeds.

[148] A motion to obtain the required records from the Nova Scotia Health Authority is to be set down.

[149] The details regarding the provision of notice of certification and opting out is to be the subject of a further Order. Parties may provide written submissions or schedule an appearance before me as case management judge to finalize the contents of that order.

[150] Mr. Bonn requests that the Certification order include a statement of the relief sought for the breaches to be inclusive of damages, declarations and other orders.

[151] Plaintiff's counsel are to prepare the draft form of order, with attachments for the Common Issues and the Litigation Plan as above, with the AGNS to review as to form.

[152] Mr. Bonn's counsel stated that costs were sought however I do not have a submission from AGNS on this point. The parties are to submit written positions on costs within 30 days of this order, in the event that they are unable to come to an agreement.

Rowe J.