CITATION: Good v. Toronto Police Services Board, 2013 ONSC 3026
COURT FILE NO.: CV-10-408131-00CP
DATE: 20130524

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
	)	
SHERRY GOOD	)	*Eric Gillespie, Murray Klippenstein, Kent Elson, Basil Alexander, Erin Wallace,* and *Kiel Ardal* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
TORONTO POLICE SERVICES BOARD and ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, and REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD	)	*Kevin McGivney, Cheryl Woodin* and *Damian Hornich,* for the defendant Toronto Police Services Board and Regional Municipality of Peel Police Services Board
	)	
	)	*Charleen Brenzall, Nanette Rosen, Julie De Marco* and *Shain Widdifield,* for the defendant Attorney General of Canada
	)	
Defendants	)	
	)	*Kim Twohig* and *Tom Schreiter,* for the defendant Her Majesty the Queen in Right of Ontario
	)	
	)	**HEARD:** December 3, 4, 5, 2012 and January 28, 29, 30, and 31, 2013

C. HORKINS J.

INTRODUCTION

[1] This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("*Class Proceedings Act*").

[2] On June 26 and 27 2010, the Group of Twenty Countries World Summit was held in Toronto ("the G20 Summit"). During the G20 Summit, the police arrested, detained, and/or imprisoned many people.

[3] On June 27, 2010, the representative plaintiff was participating in a demonstration at the intersection of Queen Street West and Spadina Road when the police surrounded and detained her and the other demonstrators.

[4] The plaintiff seeks to certify this proposed class action on behalf of a class defined as those individuals in the City of Toronto who were arrested and/or subjected to mass detention by police, on June 26 and 27, 2010, in relation to the G20 Summit, and were:

(a) released without charge; and/or

(b) imprisoned in the Eastern Avenue Detention Centre.

[5] The plaintiff proposes that all class members be divided among several subclasses. She proposes six location based subclasses, a residual subclass and a detention center subclass.

[6] A considerable amount of evidence was produced on this motion describing the problems encountered with policing during the G20 Summit. Some of this evidence is very critical of the police and their actions during the G20 Summit. The Toronto Police Services Board acknowledges the scrutiny of their policing services and concedes that there were shortcomings in how the policing was carried out during the G20 Summit. However, it must be remembered that a motion to certify a proceeding as a class action is a procedural motion. The purpose of this motion is not to find facts and assign responsibility. The sole issue is whether the plaintiff has satisfied the s. 5 criteria.

[7] As an overview, this proposed class action tries to advance numerous causes of action against multiple defendants. The broad sweeping nature of this proposed class action is problematic. Many of the pleaded causes of action are flawed. The plaintiff seeks to divide the proposed class into a series of impermissible subclasses. The commonality that the plaintiff says exists is artificial. The motion does not pass the s. 5 inquiry and the certification motion fails for the following reasons.

THE LEGAL FRAMEWORK

[8] Subsection 5(1) of the *Class Proceedings Act* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

(a) the pleadings 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 the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

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

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[9] These requirements are linked: 'There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.) ("*Sauer*"))

[10] Winkler J. pointed out in *Frohlinger v. Nortel Networks Corp*, [2007] O.J. No. 148 (S.C.J.) at para. 25, that the core of a class proceeding is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

[11] The decision to certify is not merits-based. The test must be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 ("*Western Canadian Shopping Centres")* at paras. 26-29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 ("*Hollick*") at para. 15.

[12] In *Hollick* at para. 25, the "some basis in fact" test was introduced when the court stated that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

[13] Since it is not the role of the court on a certification motion to "find facts", I conclude that *Hollick* directs the court to confirm that there is *some evidence* to support the s. 5(b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the "some basis in fact" test (see *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) ("*Fresco*") at paras. 61, 63; *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, 2011 ONSC 4914, [2011] O.J. No. 3746, leave to appeal to Div. Ct. refused, 2012 ONSC 225, [2012] O.J. No. 143; *Kafka v. Allstate Insurance Co. of*

Canada, 2011 ONSC 2305, [2011] O.J. No. 1683 ("*Kafka*"), aff'd 2012 ONSC 1035, [2012] O.J. No. 1520; leave to appeal to C.A. ref'd).

5(1)(A) - CAUSE OF ACTION

Legal Framework

[14] The first criterion for certification is the disclosure of a cause of action. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) (*"Cloud"*), the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ("*Hunt*") that is used for Rule 21 motions is also used to determine whether the proposed class proceeding discloses a cause of action.

[15] Unless the claim has a radical defect or it is plain and obvious that it could not succeed, the requirement in s. 5(1)(a) will be satisfied. This determination is to be made without evidence and claims that are unsettled in the jurisprudence should be allowed to proceed.

[16] The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: see *Hunt* at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at 679 (C.A.).

[17] I will review the structure of the pleading and then consider each cause of action and whether the plaintiff has satisfied s. 5(1) (a). As an overview, it is my conclusion that the following causes of action satisfy the test under s. 5(1)(a):

- False imprisonment/arrest against Toronto Police Services Board (Toronto) only;
- Battery against Toronto only for the six location based subclasses and the Residual subclass;
- Assault against Toronto only (limited to the Queen and Spadina and Queen's Park subclasses);
- Conversion and trespass against Toronto only for all class members except members of the Queen and Spadina Subclass who were not arrested; and
- Infringement of *Charter Rights* (including the Human Rights claim) against Toronto only and against class members as described below.

[18] Except as noted above, all other causes of action fail to meet the s. 5(1) (a) criterion. Since there are no surviving causes of action against the defendants Her Majesty the Queen in Right of Ontario, the Regional Municipality of Peel and Attorney General of Canada, the action against them is struck.

OVERVIEW OF THE STATEMENT OF CLAIM

[19] There have been several amendments to the statement of claim. The current version of this pleading is the 2nd as Amended Statement of Claim, as amended on October 12, 2011 (the "pleading").

[20] During the hearing of the certification motion, plaintiff's counsel proposed a further amendment to allow a second representative plaintiff to be added. The defendants consented to this amendment although the pleading has not yet been amended. They say that the addition of this second representative plaintiff does not cure the numerous problems with certification. I agree.

Class Definition and Subclasses

[21] The pleading proposes a class definition with eight subclasses (paras. 9-13). Every putative class member is a member of a subclass. The class definition and subclasses are described in the pleading as follows:

> Proposed Class
>
> Those individuals in the City of Toronto who were arrested and/or subjected to mass detention by police, on June 26 and 27, 2010, in relation to the G20 Summit, and were:
>
> (a) released without charge; and/or
>
> (b) imprisoned in the Eastern Avenue Detention Centre.
>
> Location Subclasses
>
> Putative class members who were arrested or subjected to mass detention by police as follows:
>
> (1) in a police cordon in the vicinity of the intersection of Queen Street West and Spadina Avenue on the afternoon of June 27, 2010, and eventually released without charge (the "Queen and Spadina Subclass");
>
> (2) in a police cordon in the vicinity of the Hotel Novotel Toronto Centre on the Esplanade on the evening of June 26, 2010, and eventually released without charge (the "Esplanade Subclass");
>
> (3) in a police cordon in the vicinity of the Eastern Avenue Detention Centre on the morning of June 27, 2010, and eventually released without charge (the "Eastern Avenue Subclass");

(4) in a police cordon in the vicinity of the intersection of Queen Street West and Noble Street on June 27, 2010, and eventually released without charge (the "Parkdale Subclass");

(5) during mass arrests in the vicinity of Queen's Park on the afternoon of June 26, 2010, and released without charge or charged with unlawful assembly and/or any other offence related to a failure to disperse from the vicinity of Queen's Park; (the "Queen's Park Subclass");

(6) at the University of Toronto Graduate Students' Union Gymnasium on the morning of June 27, 2010 (the "Gymnasium Subclass"); and

Residual Subclass

Individuals who were arrested in relation to the G20 Summit at locations in Toronto (other than those listed above) for whom the defendants have records relating to the arrest and who were eventually released without charge.

Detention Centre Subclass

An "overlapping subclass" consisting of all putative class members who were arrested and imprisoned in the Eastern Avenue Detention Centre beginning on June 26 or 27, 2010 (the "Detention Centre Subclass").

The Defendants and their Roles

[22] There are four defendants named in the pleading: Toronto Police Services Board ("Toronto"), Attorney General of Canada ("AG Canada"), Her Majesty the Queen in Right of Ontario ("Ontario") and Regional Municipality of Peel Police Services Board ("Peel").

[23] Pursuant to the applicable legislation, each defendant is responsible for the "wrongful or negligent acts or omissions" of their respective police forces and its members: the Toronto Police Service ("TPS"), the Royal Canadian Mounted Police ("RCMP"), the Canadian Forces, the Ontario Provincial Police ("OPP") and the Peel Regional Police ("Peel Police") (paras. 4-7). Reference in this judgment to the RCMP includes the Canadian Forces.

[24] To prepare for the G20 Summit, the RCMP set up the Integrated Security Unit (the "ISU") that consisted of representatives from the RCMP, OPP, TPS, Peel Police and the Canadian Forces ("ISU Partners"). The ISU Partners shared responsibility (paras. 17-19).

[25] The ISU was under the direction of a Chief Superintendent of the RCMP. The RCMP was also responsible for the "general co-ordination of security" (para. 16). The TPS, OPP, Peel Police and Canadian Forces shared responsibility with the ISU.

[26] The TPS was responsible for "co-ordination of public order within the City of Toronto", "crowd management", and "prisoner processing". As part of these responsibilities, a temporary

detention centre for prisoner processing for G20-related arrests was created at 629 Eastern Avenue, Toronto, Ontario (the "Detention Centre") (para. 17).

[27] The OPP participated in the strategic and operational decision making of the ISU, and provided direct assistance to the TPS by taking part in public order policing activities in the City of Toronto during the G20 Summit, at the request of the TPS (para.18).

[28] The Peel Police and Canadian Forces participated in the strategic and operational decision making of the ISU in relation to the G20 Summit (para. 19).

[29] The RCMP, TPS, OPP, Peel Police, and Canadian Forces operated under a "unified command" for G20 Summit purposes (para.20).

The Causes of Action

[30] Part VI of the pleading is titled "Overview of the Causes of Action". The plaintiff pleads several causes of action against the defendants: false imprisonment, assault and battery, conversion and trespass to chattels, abuse of public office, negligence, breach of *Charter* rights (ss. 2 (b), (c), (d); 7, 8, 9 and 10(a) and (b) and 12) and discrimination under the *Human Rights Code*.

[31] The plaintiff pleads that "police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners" committed "unlawful and unjustifiable" breaches of *Charter* rights and "unlawful acts or torts" (paras. 26- 27).

[32] Not every cause of action applies to every proposed subclass. Para. 172 of the pleading sets this out as follows:

Tort / Charter Violation	Applicable To
(a) False imprisonment	All class members (for the Other Charged Individuals, false imprisonment is pleaded in relation to the excessive length of their detention, and not in relation to the individual circumstances of their arrests)
(b) Assault & Battery	Queen and Spadina Subclass, Esplanade Subclass, Eastern Avenue Subclass, Parkdale Subclass, Queen's Park Subclass, Gymnasium Subclass, and Residual Subclass
(c) Conversion & Trespass to Chattels	All class members except members of the Queen and Spadina subclass who were not

		arrested
(d)	Abuse of Public Office	All class members
(e)	Negligence	All class members
(f)	*Charter*, s. 2(b), (c) and (d)	All class members
(g)	*Charter*, s. 7	All class members
(h)	*Charter*, s. 8	All class members except members of the Queen and Spadina subclass who were not arrested
(i)	*Charter*, s. 9	All class members (for the Other Charged Individuals, arbitrary detention is pleaded in relation to the excessive length of their detention, and not in relation to the individual circumstances of their arrests)
(j)	*Charter*, s. 10(a)	Queen and Spadina Subclass, Esplanade Subclass, Eastern Avenue Subclass, and Parkdale Subclass (i.e. all class members who were "kettled")
(k)	*Charter*, s. 10(b)	All class members
(l)	*Charter*, s. 12	Overlapping Detention Centre Subclass
(m)	Discrimination under *Human Rights Code* (TPS, OPP, and Peel Police)	Gymnasium Subclass

The Defendants' Conduct

[33] The pleading focuses on the conduct of the defendants in their "planning, preparing, directing, and overseeing the G20 Summit security operations". It is alleged that the defendants

"deliberately intended to violate the fundamental rights of class members; or, alternatively, that the Defendants intentionally or negligently failed to put adequate measures in place to ensure that these rights would be protected" (para.29).

[34] Further, it is alleged in para. 31 that the defendants adopted a model of policing that relied on the following:

(a) widespread pre-emptive detention and arrest to round up demonstrators without reasonable grounds or judicial oversight;

(b) the use of mass-detention facilities to warehouse demonstrators without due process;

(c) harassment of suspected demonstrators and journalists;

(d) the assertion of increased unlawful police search and detention powers and the abuse of such powers;

(e) the creation of large militarized no-go zones in formerly public space;

(f) the "kettling" and mass arrest of demonstrators on the street; and

(g) the use of excessive force to intimidate and disperse lawful and peaceful demonstrations.

[35] This model of policing was "deliberately designed, structured, and implemented to violate the rights of the class members in order to achieve security objectives" or "was negligently designed, structured, and implemented to achieve these security objectives with disregard for the rights of the class members and the harms that would result from the foreseeable violation of their rights" (para. 35).

[36] Given the experience of other summits, political demonstrations were expected. In fact thousands of people peacefully protested. More than 1,000 people were unlawfully arrested and/or detained by "police officers under the command, supervision, and jurisdiction of the Toronto Police Service and the other ISU Partners" (para. 22).

[37] Over 100 protestors were released at the scene of the detention without being charged. Over 700 protestors were arrested and taken into custody, purportedly under the breach of peace power and released without being charged. Approximately 200 protestors were charged and many of the charges were withdrawn stayed or dismissed (paras. 22 -23).

[38] The pleading describes the defendants' unlawful conduct for each subclass (paras. 66-171). It is pleaded that this unlawful conduct was the "direct and foreseeable consequence of the implementation of the Defendants' overall plan and model for summit security" (para. 66). Particulars of the harm caused to the putative class members are set out for each subclass.

[39] I will now consider the causes of action and whether the plaintiff has satisfied s. 5(1)(a).

SYSTEMIC NEGLIGENCE

[40] The plaintiff lists the torts that "were committed against the Plaintiff and the proposed class members by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners." The plaintiff alleges that the defendants are liable for these torts (para. 26). Negligence is one of listed torts. Throughout the pleading it is described as "systemic negligence".

[41] Part B of the pleading deals with Systemic Negligence. The duty of care is set out in paras. 38-42 and the breach of the duty is set out in para. 36.

[42] The plaintiff "asserts that the Defendants are responsible for their conduct in planning, preparing, directing, and overseeing the G20 Summit security operations in a manner that was deliberately intended to violate the fundamental rights of class members; or, alternatively, that the Defendants intentionally or negligently failed to put adequate measures in place to ensure that these rights would be protected." (para. 29)

[43] It is important to note that the plaintiffs allege that a duty of care was owed at the ISU level in the planning of the G20 and overseeing police operations. The pleading states that "commanding and supervising members" of the ISU, including "officers responsible for planning and overseeing police operations during the G20 Summit" owed the class members a duty to do the following (paras. 38-40):

- to consider and allow for the lawful exercise of class members' fundamental legal and constitutional rights and to ensure that these rights were not systemically disregarded;

- to take reasonable care that those under their command and supervision did not engage in widespread or systemic violations of the class members' civil rights and fundamental freedoms; and

- to take reasonable care that those under their command and supervision acted in accordance with their common law and statutory duties, including the fundamental duty to obey the law.

[44] The plaintiff alleges that the commanding and supervising members of the ISU and ISU Partners acknowledged and affirmed their duty to respect the civil rights and fundamental freedoms of demonstrators prior to the G20 Summit.

[45] It is also alleged that the breach of duty occurred at the ISU level. The plaintiff pleads as follows (para. 36):

> The Defendants, and, in particular, commanding and supervising members of the ISU and ISU-member forces responsible for planning and overseeing police operations during the G20 Summit, breached their duties owed to the class members and knowingly or negligently contributed to and participated in systemic violations of the class members' legal and constitutional rights ….

[46] Particulars of the defendants' breach of duty consist of "actions and omissions" that are set out in para. 36 (a) – (u). These particulars cover the model of policing that was adopted and implemented, directing and authorizing specific practices, tactics and actions such as the policy of pre-emptive mass detention and arrests of suspected demonstrators, without reasonable grounds, promoting a climate of fear and intimidation and insufficient training of "front line officers".

Analysis

(i) ***Cloud and Rumley do not assist***

[47] The plaintiff relies on the fact that systemic negligence claims were certified in *Cloud* and *Rumley v. British Columbia*, 2001 SCC 69 ("*Rumley*"). She argues that her systemic negligence claim follows the precedent in *Cloud* and *Rumley*. These cases are clearly distinguishable since they did not involve police officers and the issue of when police owe a private law duty of care. *Cloud* and *Rumley* involved claims of alleged systemic negligence made by students in residential schools. Both actions focused on flawed policies and practices in the schools and how the schools were managed. In *Cloud*, former students of an aboriginal residential school commenced the class action. *Rumley* involved a residential school for hearing and site impaired children. Each case focused on the systemic breach of the school's duty of care.

[48] It is obvious why the plaintiff in this G20 Summit claim chose to frame the cause of action as systemic negligence. Cases like *Cloud* and *Rumley* have held that the commonality required by s. 5(1)(c) is met when a significant part of every class member's claim focuses on the same policies and practices employed by the defendant. However, the plaintiff cannot assume that the defendants owed her and the putative class a private law duty of care. *Cloud* and *Rumley* do not assist the plaintiff in showing that the facts pleaded fall within a category in which a duty of care, owed by police officers, has previously been recognized. The defendant schools in *Cloud* and *Rumley* obviously owed a duty of care to the students and the existence of a duty of care was not challenged. Just because *Cloud* and *Rumley* involved claims of systemic negligence does not mean that the plaintiff's cause of action, which she describes as systemic negligence, meets the test under s. 5(1) (a).

(ii) ***The Duty of Care***

[49] Liability in negligence is predicated on a plaintiff demonstrating that a defendant owes a private law duty of care. Police officers owe a private duty of care to individuals in certain circumstances. They owe a duty to take reasonable care for the safety of a person in their custody: *Ellis v. Home Office*, [1953] 2 All E.R. 149 (C.A.); *Abbott v. Canada* (1993), 64 F.T.R. 81 (T.D.); *Funk v. Clapp* (1986), 68 D.L.R. (4th) 229 (B.C.C.A.); *Rhora v. Ontario*, [2004] O.J. No. 3087 (S.C.J.); aff'd [2006] O.J. No. 3484 (C.A.). Police also owe a duty to a particular suspect under investigation (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41) and to specific individuals or groups that are at particular risk of becoming victims of crime (*Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), 39 O.R. (3d) 487). The duty of care in these circumstances is based on a relationship of proximity between the police

and the plaintiff, that gives rise to a duty on the part of the police to consider the particular interests of the plaintiff.

[50] The plaintiff argues that her systemic negligence claim falls within two of these recognized categories: the duty of care police owe to suspects and the duty of care that police owe to persons in their custody. However, as noted in my review of the pleading, this is not what the plaintiff pleads. The alleged duty in the plaintiff's pleading focuses on the ISU's planning of the G20 Summit and the overseeing of police operations. The pleading does not allege a duty owed by a specific police officer to a putative class member.

[51] Nowhere in the pleading does the plaintiff allege a duty of care based on the relationship between a police officer and a suspect under investigation. As a result, this recognized category does not assist the plaintiff.

[52] This leaves the duty owed to those in custody. There is one reference to this duty in the pleading and it is found in para. 152. This paragraph only deals with the Detention Center subclass. Para. 152 is located in Part D of the pleading, where the plaintiff describes the defendants' "unlawful conduct" for each subclass.

[53] Para. 152 states that "[p]olice officers owed a duty of care to those who were in their custody or detained and imprisoned under their control, command, or supervision…in the Detention Centre. Police officers breached this duty by maintaining inhumane conditions within the detention centre, causing Detention Centre subclass members to suffer physical and psychological harms."

[54] While para. 152 obviously describes one of the recognized areas where police officers owe a private duty of care, this is not the focus of the plaintiff's systemic negligence cause of action. The mere reference in para. 152 to a duty owed to those in custody, does not mean that the plaintiff's systemic negligence cause of action is grounded in a properly pleaded and recognized private law duty of care.

[55] The pleading as a whole demonstrates that the plaintiff's systemic negligence cause of action is grounded in the planning and supervising activities of the defendants at the ISU level. Various paragraphs in the pleading demonstrate this point. The alleged duty of care focuses on the ISU and not a specific police officer or a defendant. The plaintiff alleges that "commanding and supervising members of the Integrated Security Unit and the ISU Partners, including those officers responsible for planning and overseeing police operations during the G20 Summit" owed a duty of care (paras. 38-40). As well, they owed a duty of care to see that those "under their command and supervision acted in accordance with their common law and statutory duties" (para 40). The decision to frame the duty at the high level of planning and overseeing is also apparent in para. 36 where the plaintiff sets out particulars of the breach of duty. These particulars describe actions and omissions of the defendants in the planning and overseeing of the G20 Summit. There is no specific reference to the duty owed to those in custody at the Detention Center and the specifics of how that duty was breached as described in para. 152.

[56] A negligence pleading also requires that the plaintiff allege harm as a result of the defendant's breach of duty. The harm alleged in this pleading also flows from the breach of duty at the ISU level (paras. 36-37).

[57] As already noted para. 152 falls under Part D of the pleading titled "The Unlawful Conduct of the Defendants with Regard to Particular Subclasses". Before launching into the particulars of conduct for each subclass, the plaintiff pleads in para. 66 that this conduct is tied back to the "Defendants' overall plan and model for summit security". The plaintiff pleads that what happened in each subclass was a "specific manifestation of the general systemic violations by the Defendants and their overall disregard for the class members' *Charter* rights."

[58] The decision to frame the negligence cause of action by focusing on the high level of the defendants' planning and overseeing is also apparent from the common issues. Only common issue 1.1 deals with the systemic negligence cause of action and it states as follows:

> In their planning, operation or management of G20 Summit security, did the defendants owe a duty of care to the class members?

[59] In summary, when the pleading is read as a whole, it is clear that the plaintiff is alleging that the defendants owed a duty of care in their planning and overseeing of the G20 Summit. This is the foundation for the systemic negligence cause of action. This does not fall within one of the recognized categories where police officers owe a private law duty of care. Class counsel offered no case law to suggest otherwise.

[60] Should another court decide that there is a properly pleaded cause of action arising out of para. 152, I add that this paragraph is nevertheless flawed. It does not specify which defendants are targeted. Instead, para. 152 is a general allegation that "police officers" owed the duty of care. This conflicts with para. 17 of the pleading, where the plaintiff states that Toronto was responsible for "co-ordination of public order within the City of Toronto", "crowd management", and "prisoner processing" and this included the temporary Detention Centre at 629 Eastern Avenue, in Toronto. Further, there is no statutory basis for alleging that any of the other defendants owe a duty of care to putative class members arrested and held in a Toronto detention facility. This is supported by the review of the applicable statues set out below. Therefore to the extent the pleading alleges that a duty was owed to those in custody at the Detention Center, it was a duty owed by Toronto and not the other defendants.

[61] Since the plaintiff has not pleaded a previously recognized private law duty of care, it is necessary to consider if a duty of care should be recognized.

A Duty of Care is not Recognized

[62] If the law does not recognize a duty of care as pleaded in the statement of claim, then it is necessary to determine if a new duty of care should be recognized. This requires the application of the test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 ("*Cooper*") (the "Anns test") to the facts alleged in the statement of claim.

[63] The first branch of the Anns test, requires a consideration of the following questions:

(1) Was it reasonably foreseeable that the defendants' negligence might result in the legal and constitutional rights of the putative class members?

(2) Were the defendants in a close and direct relationship with the plaintiff and putative class making it just to impose a duty of care on each defendant to them? (see Cooper at para. 42) This is known as the proximity requirement.

[64] The debate in this case is not about whether harm was foreseeable. The issue is proximity.

[65] Where a claim is advanced, as in this case, against a public authority exercising statutory powers, the proximity analysis focuses initially on the applicable statutory scheme and, secondly, on the interactions, if any, between the public authority and the plaintiff. Where the statutory scheme, expressly or by implication, forecloses or imposes a private law duty of care, the analysis is concluded. It is not for the court to contradict the terms of the legislation. Where the statutory scheme is not determinative, it continues to shape the relationship between the public authority and the plaintiff and is relevant in deciding whether the specific interactions between them are sufficient to create the degree of proximity required to establish a *prima facie* duty of care (see *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 at paras. 75-77). The following statutory framework is relevant and determinative of this issue.

Applicable Statutes

[66] The following review of applicable statutes confirms the public law nature of the duty of care owed by police.

1. Ontario and Toronto

[67] The conduct of police officers in Ontario is monitored and regulated by the *Police Services Act*, R.S.O. 1990, c. P. 38, Part V (the "*PSA*").

[68] The OPP and TPS police derive their duties and powers from the provisions of the *PSA*. The *PSA* does not expressly or implicitly create a private law duty of care. Rather, the public nature of the duties under the *PSA* is evident from the "Declaration of Principles" in s. 1, and the duties of police officers in s. 42 of the *PSA*.

[69] Section 1 of the PSA provides:

> Police services shall be provided throughout Ontario in accordance with the following principles:
>
> 1. The need to ensure the safety and security of all persons and property in Ontario.

2. The importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights* and *Freedoms and the Human Rights Code*.

3. The need for co-operation between the providers of police services and the communities they serve.

4. The importance of respect for victims of crime and understanding of their needs.

5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.

6. The need to ensure that police forces are representative of the communities they serve.

[70] Subsection 42(1) of the *PSA* provides that the duties of a police officer include, *inter alia*, preserving the peace, preventing crimes, assisting victims of crime, apprehending criminals and other offenders, laying charges and participating in prosecutions. Subsection 42(3) provides that "[a] police officer has the powers and duties ascribed to a constable at common law." At common law, the general duty of a constable is to preserve the peace as it relates to the protection of life and property: *R v. Sanderson* (2003), 174 C.C.C. (3d) 289, at para. 25 (Ont. C.A.).

[71] Unless the facts pleaded fall within one of the few situations where a private duty of care has been recognized, courts have held that the duties imposed on police are a matter of public law. Police owe their duties to the public at large and not to individual members of the public. My interpretation of the *PSA* is consistent with long standing case law. (See, for example, *Schacht v. The Queen* (1973), 30 D.L.R. (3d) 641, [1973] 1 O.R. 221, at para. 13; *Romagnuolo v. York*, [2001] O.J. No. 3537 (S.C.J.) at para. 36; *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1989), 58 D.L.R. (4th) 396 (H.C.), aff'd (1990), 72 D.L.R. (4th) 580 (Div. Ct.) at pg. 14 (QL)).

[72] More recently in *Project 360 Investments Ltd. (c.o.b. Sound Emporium Nightclub) v. Toronto Police Services Board,* [2009] O.J. No. 2473 (S.C.J.) at paras. 18-19, the court considered this case law and confirmed the public nature of the duty that police owe under the *PSA*. I adopt the following from this decision:

> 19 … it is manifest from the statement of the principles governing the delivery of police services set forth in s. 1 of the *PSA*, the duties of police officers set forth in s. 42(1), and the common law powers and duties incorporated by s. 42(3), that the duty of the police is to the public as a whole and not to specific individuals. To paraphrase language used by the Supreme Court of Canada in *Edwards v. Law Society of Upper Canada, supra*, and borrowed by the Court of Appeal in *Williams, supra*, in fulfilling their duties the police are required to act in the general public interest and to balance "a myriad of competing interests the nature of which are inconsistent with the imposition of a private law duty of care". [Emphasis added.]

[73] Lastly, the public nature of the duty that police owe was also confirmed in *Wellington v Ontario*, 2011 ONCA 274 at para. 44. The court considered whether provisions of the *PSA* could support a private law duty of care owed by police investigators towards victims of crime as follows:

> There is now a well-established line of cases standing for the general proposition that public authorities, charged with making decisions in the general public interest, ought to be free to make those decisions without being subjected to a private law duty of care to specific members of the general public. Discretionary public duties of this nature are "not aimed at or geared to the protection of the private interests of specific individuals" and do "not give rise to a private law duty sufficient to ground an action in negligence": *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), at para. 17; *Williams*, at paras. 29-30; *Attis*, at paras. 59-60; *River Valley Poultry Farm v. Canada (A.G.)* (2009), 95 O.R. (3d) 1 (C.A.), at paras. 41-42.

[74] In addition to the above reasons, the *PSA* also makes it clear that there is no basis in law for alleging that a duty was owed by the OPP. The *PSA* provides that the municipal police service, in this case the TPS, is responsible for policing within the City of Toronto. The responsibilities of the OPP are set out in s. 19 of the *PSA*. The relevant part of this section confirms that the OPP only has the responsibility to provide "police services in respect of the parts of Ontario that do not have municipal police forces other than municipal law enforcement officers." The City of Toronto has a police force and therefore the *PSA* does not impose responsibility on the OPP for this area.

[75] Each police service is restricted to acting within its own jurisdiction. While the ISU consisted of representatives from all of the defendants, the ISU is not a legal entity with any statutory authority. It is simply a name given to a group of independent police services. The *PSA* does not permit police services to expand their policing jurisdiction in the case of a large-scale event.

2. AG Canada

[76] The same result follows for the RCMP. The plaintiff alleges that AG Canada is liable for the wrongful or negligent acts and omissions of members of the RCMP and Canadian Forces. The plaintiff also pleads that AG Canada is liable for the actionable wrongs of "…. members of other police forces operating under the jurisdiction, supervision, or command of the RCMP or its members." (para. 5) There is no statutory basis for holding AG Canada liable for members of other police forces.

[77] Historically, the Crown was immune from liability in tort. Subsections 3(a) and (10) of the *Crown Liability and Proceeding Act*, R.S.C., 1985, c. C-50 provides that the Crown can be vicariously liable for torts committed by Crown servants in situations where the Crown servant would be personally liable.

[78] The effect of these provisions is that the Crown can be vicariously liable when a servant owed a private law duty of care to the plaintiff, breached the applicable standard of care and the plaintiff's damages resulted from that breach.

[79] Members of the Canadian Forces and the RCMP are deemed to be Crown servants for the purpose of determining liability in proceedings against the Crown. Members of other police forces are not deemed to be Crown servants under the *Crown Liability and Proceedings Act* as is the case for the RCMP.

[80] The RCMP have an overarching public duty pursuant to s. 18 of the *Royal Canadian Mounted Police Act* , R.S.C., 1985, c. R-10 (“*RCMP Act*”) that states:

> It is the duty of members who are peace officers, subject to the orders of the Commissioner;
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

[81] There is also legislation specific to the G20 Summit that imposes a public duty on the RCMP. The G20 Summit was designated an intergovernmental conference within the meaning of the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, s 10(1); ("*FMIOA*"). The *FMIOA* provides that the RCMP has primary responsibility to ensure the security for the proper functioning of such intergovernmental conferences.

[82] The *FMIOA* also provides in s. 10.1(2) that the RCMP may take appropriate measures, including restricting access to an area for the purpose of ensuring the security for the proper functioning of an intergovernmental conference.

[83] Pursuant to the regulations of the *Royal Canadian Mounted Police Act* (*Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361), members of the RCMP also have a specific and ongoing duty to protect Internationally Protected Persons ("Protected Persons") who attend intergovernmental conferences from real or potential harm. Protected Persons include foreign heads of states and government, delegates, their families and others.

[84] In addition, the *Security Offences Act*, R.S.C., 1985, c. S-7, s 6(1), provides that members of the RCMP have primary responsibility to deal with offences which constitute a threat to the security of Canada or where a Protected Persons is the victim or where there exists an apprehension of such offences taking place.

[85] In summary, the legislative scheme that governs the RCMP does not give rise to a private law duty. Aside from the RCMP’s general role as peace officers, the legislated mandate of the RCMP in the context of the G20 Summit was directed to Protected Persons and the G20 Summit

itself. With the possible exception of the RCMP's duties towards Protected Persons, any duty of care was owed to the public at large and not to specific individuals.

Specific Interactions do not show Proximity

[86] It is important to repeat that the plaintiff alleges negligence that focuses on the defendants' participation in the ISU and their planning management and/or direction of the security at the G20 Summit.

[87] The systemic negligence pleading does not allege any interaction between the plaintiff (and putative class members) and any of the defendants in the planning management and/or direction of the G20 Summit security. Rather, the plaintiff alleges in para. 41 that "Commanding and supervising members of the ISU and ISU Partners acknowledged and affirmed their duty and responsibility to respect the civil rights and fundamental freedoms of demonstrators in public representations by public officials in the days and weeks leading up to the G20 Summit."

[88] General statements made to the public at large acknowledging public duties and obligations and a commitment to the performance of those duties, combined with the reliance on those public statements by members of the public affected by the performance of those duties, cannot, standing alone, create a relationship of proximity. (See *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 49-50; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 at paras. 95 and 105).

[89] In summary, it is plain and obvious that the systemic negligence cause of action against all defendants will fail and must be struck.

FALSE IMPRISONMENT/ARREST

[90] The tort of false imprisonment/arrest ("false imprisonment") requires a plaintiff to prove that the alleged deprivation of liberty was: (1) total and complete; (2) against the plaintiff's will; and (3) caused by the defendant. If these three elements are established, the onus then shifts to the defendant to prove that the arrest or detention was justified at common law or by statute (see *Moak v. Ontario (Provincial Police)*, [2008] O.J. No. 8 (S.C.J.) at para. 51.)

[91] The plaintiff alleges that all putative class members were unlawfully detained and/or arrested by the defendants. In general, the plaintiff has pleaded the elements of the tort of false imprisonment. However, as explained below, the plaintiff broadly asserts this cause of action against all defendants and for this reason the pleading is flawed.

[92] The plaintiff pleads that the defendants totally deprived the class members in each of the location-based subclasses of their liberty, against the will of those class members (paras. 70-71, 77-78, 88, 93-95, 109, 124, 131). These elements are also pleaded for the Residual Subclass (see para. 115) and the Detention Centre Subclass (paras. 75, 82, 91, 105, 112, 138, 148, and 165).

[93] Concerning justification for the arrests and detentions, the plaintiff pleads that there were no reasonable and probable grounds, that the breach of the peace powers could not be lawfully invoked, and that there was no unlawful assembly.

[94] All of the detentions and arrests described in the pleading occurred in the City of Toronto. The pleading is filled with allegations about what the police officers did at the various locations.

[95] For all of the location based subclasses the plaintiff pleads that "supervising and commanding officers were responsible for ordering, authorizing and overseeing the mass detention and mass arrest of the respective subclass members. In each of these situations, these supervising and commanding officers were aware or were recklessly indifferent to the fact that the mass detention or mass arrest of peaceful demonstrators and others was not legally justified, and that their orders or actions exceeded the lawful scope of police powers." (para. 67). This is followed by numerous allegations about what "police officers" did at the specific subclass location (paras. 69-171).

[96] There is a reliance on the words "supervising and commanding officers" and "police officers" without identifying if they are Toronto, Peel, OPP or RCMP officers. However, in para. 26 where the plaintiff lists her causes of action, she pleads that each tort was "committed against the Plaintiff and the proposed class members by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners. The Defendants are liable for these torts."

[97] As explained above, the *PSA* confirms that Toronto is responsible for policing within the City of Toronto. The OPP, RCMP and Peel police have no jurisdiction to police in the city. On the facts pleaded there is simply no basis in law to claim that Ontario, AG Canada and/or Peel are responsible for policing in the City of Toronto. For this reason it is plain and obvious that the false imprisonment cause of action against Ontario, AG Canada and Peel will fail and must be struck. Toronto does not dispute the false imprisonment cause of action against it under s. 5(1)(a).

[98] Before leaving my analysis of this cause of action, I want to address a reference in the pleading to two detention facilities that are outside the City of Toronto: Maplehurst Correctional Complex and Vanier Center for Women. While the pleading does not allege that Ontario was responsible for these facilities, Ontario agrees that they are located outside of Toronto and fall within Ontario's jurisdiction. However, as explained below the reference to these Ontario detention facilities does not mean that the false imprisonment cause of action is properly pleaded against Ontario.

[99] The reference to Maplehurst and Vanier is in the section of the pleading dealing with the Gymnasium subclass (paras. 124-147). This subclass is described as "those proposed class members who were arrested or subjected to mass detention by police … at the University of Toronto Graduate Students' Union Gymnasium on the morning of June 27, 2010". The pleading describes how police entered the gymnasium and arrested 70 individuals who were staying at gymnasium overnight. These people were transported to the Eastern Detention Center and then taken to the Ontario Court of Justice where they appeared before a Justice of the Peace. The pleading describes their alleged treatment at the Gymnasium and at the Detention center. The actions of police officers that are described in the pleading must relate to Toronto, since all of this police activity took place within Toronto's jurisdiction.

[100] When the Gymnasium class members appeared before the Justice of the Peace, 10 class members were released on conditions and the rest transported to provincial prisons for the night. The men were taken to Maplehurst and the women to Vanier.

[101] The mere reference in the pleading to these provincial detention facilities does not mean that the plaintiff has properly pled the false arrest cause of action against Ontario. The subclass is defined as those arrested at the Gymnasium that is located in the City of Toronto. There is no dispute that Toronto was responsible for the police actions in the City of Toronto.

[102] It is unclear if the plaintiff intended her reference to Maplehurst and Vanier as a foundation for asserting the false imprisonment claim against Ontario. If that is what the pleading intends, it is unclear and cannot be sustained in law. Any putative class members who were detained at Maplehurst or Vanier were detained at these facilities pursuant to a judicial order having been taken before a Justice of the Peace. Four separate statutory provisions prohibit a cause of action from arising in these circumstances:

(i) The *Criminal Code* R.S.C. 1985, c. C-46, s. 2(1) provides that a person "required or authorized by law to do anything in the administration or enforcement of the law"… "is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose."

(ii) The *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 142 provides that a person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario;

(iii) The *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 8 provides that no action or other proceeding shall be commenced or prosecuted against any person for or by reason of anything done in obedience to a mandamus or mandatory order;

(iv) *The Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 2 provides that the Crown in not liable in respect of anything done in the due enforcement of the criminal law or of the penal provisions of any Act of the Legislature.

[103] Furthermore, detention pursuant to a judicial order is not "arbitrary detention" and therefore does not infringe section 9 of the *Charter*. (See *Pispidikis v. Scroggie*, [2003] O.J. No. 4830 (C.A.) at para. 44 and *Ontario v. Phaneuf*, [2009] O.J. No. 5618 (Div. Ct.) at paras. 42-45 and 51-52, aff'd [2010] O.J. No. 5631 (C.A.)).

[104] In summary, it is plain and obvious that the false imprisonment cause of action as against all defendants, except Toronto, will fail and must be struck.

ASSAULT AND BATTERY

[105] An assault is the "intentional creation of the apprehension of imminent harmful or offensive contact" (Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham: LexisNexis Canada, 2011) at p. 46). The standard is whether a reasonably

courageous person would be entitled to experience fear, although the person himself must have been aware of the imminent contact (See G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2010) at pp. 64-65). Battery occurs where a person "intentionally causes a harmful or offensive contact with another person" (Linden & Feldthusen at p. 42).

[106] Unless the police had legal authority, the physical handling, handcuffing, searching and other contact with the class members without consent constituted battery. The plaintiffs submit that if the arrests were unlawful, the subsequent physical contact was also unlawful. The defendants do not dispute this and note that these tort claims, as well as conversion and trespass to goods, "flow out of the false imprisonment claim."

[107] There is no section in the pleading that specifically deals with assault and battery. Assault and battery are included in the list of torts allegedly "committed against the Plaintiff and the proposed class members by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners" (para. 26).

[108] The chart in para. 172 of the pleading states that assault and battery apply to the six location-based subclasses and the Residual Subclass (but not the Detention subclass). One must look to the section of the pleading that deals with each subclass to determine if these torts have been properly pleaded.

[109] The plaintiff has properly pleaded the tort of battery for the location-based subclasses. The plaintiff pleads that the police made physical contact with the members of each of the location-based subclasses without consent, by handcuffing and searching them (paras. 74-75, 81, 91, 102-04, 109-12, 133-36). Similarly, the tort of battery has been properly pleaded with respect to the Residual Subclass (para. 115-16).

[110] The plaintiff has properly pleaded false imprisonment with respect to the subclasses, including a lack of legal authority for the arrests and detentions. Therefore, it follows that the plaintiffs have pleaded that the police did not have legal authority when they made physical contact with the location-based subclass members.

[111] The plaintiff has not pleaded the essential elements of assault for all of the six location-based subclasses and the Residual subclass. Assault has only been properly pleaded for the Queen and Spadina and Queen's Park subclasses. Here the plaintiff pleads that police intentionally created an apprehension of imminent harmful or offensive contact with the members of the Queen and Spadina and Queen's Park. This apprehension arose for the subclass members when they witnessed the police "charging at individuals, seizing them, violently pushing them to the ground, dragging them out of the surrounded area, and forcefully restraining them" (paras. 74, 109-11).

[112] These torts allege police activity in the City of Toronto by "police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners." (para. 22.) For the reasons I have already stated, there is no basis in law for alleging that any defendant other than Toronto is responsible for the police in this city. As a result, there is no

basis in law for alleging battery and assault against Ontario, AG Canada and Peel. It is plain and obvious that the battery and assault cause of action against them will fail and it is struck.

[113] The battery and assault cause of action meets the s. 5(1)(a) test, but only against Toronto as follows. Battery is properly pleaded against Toronto for the six location based subclasses and the Residual subclass. Assault is properly pleaded against Toronto but only for the Queen and Spadina and Queen's Park subclasses. It is plain and obvious that the rest of this pleading against Toronto will fail and must be struck.

CONVERSION AND TRESPASS TO CHATTELS

[114] There is no section in the pleading that specifically deals with conversion and trespass to chattels. It is included in the list of torts allegedly "committed against the Plaintiff and the proposed class members by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners." (para. 26)

[115] The chart in para. 172 states that this tort applies to all class members except members of the Queen and Spadina Subclass who were not arrested.

[116] The tort of trespass to goods is "[a]ny improper handling of, or causing damage to another's goods or seizure or movement of them" (Fridman at p. 107). Conversion is "a wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner" (Fridman at p. 117).

[117] The plaintiff pleads that the location-based subclass members (except members of the Queen and Spadina Subclass who were not arrested) were searched and had their personal property seized (paras. 75, 81, 91, 97, 112, 133-36). This is also pleaded for the Detention Centre Subclass members (paras. 154, 171) and the Residual Subclass (para. 119).

[118] Since the plaintiff has properly pleaded that the police lacked legal authority for the arrests and detentions, she has properly pleaded that the police did not have legal authority to search putative class members and seize their property. If the arrests were unlawful, the subsequent seizing of property was also unlawful.

[119] This cause of action meets the s. 5(1)(a) test, but only against Toronto.

[120] For the reasons already stated, there is no basis in law for making this claim against Ontario, AG Canada and Peel. It is plain and obvious that it will fail and it is struck.

ABUSE OF PUBLIC OFFICE

[121] The tort of abuse of public office (also known as misfeasance in a public office) is an intentional tort with two elements: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. These elements reflects "the well-established principle that misfeasance in a public office requires an element of 'bad faith or 'dishonesty' " (*Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3

S.C.R. 263 ("*Odhavji Estate*") at para. 32). As with all torts, the plaintiff must also prove causation and compensable damages.

[122] The making of a decision that could be adverse to the interests of the public is not sufficient to prove abuse of public office. This was stated in *Odhavji Estate* at para. 28:

> In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[123] The strict requirements of this cause of action were repeated in the recent decisions of the Ontario Court of Appeal in *Ontario v. Gratton-Masuy Environmental Technologies Inc.*, 2010 ONCA 501("*Gratton-Masuy*") at para. 84-85 and *Pikangikum First Nation v. Nault* 2012 ONCA 705 where at para. 77 the court stated as follows:

> The tort of misfeasance in public office is difficult to establish. The plaintiff must prove more than mere negligence, mismanagement or poor judgment. To succeed, the plaintiff must demonstrate that the defendant knowingly acted illegally and in bad faith chose a course of action specifically to injure the plaintiff.
>
> [Emphasis added]

[124] Since bad faith or dishonesty is an essential ingredient of the tort of misfeasance in public office, rule 25.06(8) requires that "full particulars" be pleaded (see *Gratton-Masuy* at para. 85). The pleading "must meet a stringent standard of particularity. A bald plea of malice is insufficient" (*Gratton-Masuy* at para. 89).

[125] While I recognize that the court must consider the pleading as a whole, there is no section in the pleading that deals with this cause of action. The only reference in the pleading to this cause of action is in paras. 26 and 172.

[126] Para. 26 lists torts that were "committed against the Plaintiff and the proposed class members by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners". The list includes "abuse of public office (also known as misfeasance in public office)". Para. 172 provides a chart showing what tort applies to each subclass. According to the chart, abuse of public office applies to all putative class members.

[127] When the entire pleading is reviewed, it is clear that the essential elements of this cause of action are not pleaded. I rely on the following review of the pleading.

[128] There is no allegation in the pleading that any of the defendants acted in bad faith or dishonestly. These words are not used in the pleading. The plaintiff does use the word unlawful

but simply using this word does not mean that the essential elements of this cause of action are properly pleaded as demonstrated below.

[129] It is not enough to simply allege that "unlawful acts" were committed (para. 26) or that "unlawful and unjustifiable violations of the Plaintiff's and the proposed class members' constitutional rights and freedoms were committed by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners." (para.27).

[130] Part VII is titled "*Unlawful Conduct for which the Defendants are Liable*". It is divided into three parts as follows:

A. Disregard for the Class Members' Rights in Summit Security Planning

B. Systemic Breach of Charter Rights and Systemic Negligence

C. The Unlawful Mass Detentions and Arrests of the Class Members

[131] In Part A the word unlawful is used once. It is alleged that the model of policing relied on "increased unlawful police search and detention powers and the abuse of such powers" (para. 31(d)).

[132] The title of Part B says that this section deals with systemic breach of *Charter* right and systemic negligence. However, the body of this section addresses negligence: the defendants' alleged breach of duty (para. 36), a bald reference to the resulting damage (para. 37) and the duty owed to the putative class members (paras. 38-42). Within Part B the word "unlawful" is used in in paras. 36 (s), (t), and (u) to describe police conduct and the alleged breach of duty. Once again, it is not enough to simply label conduct as unlawful. Furthermore, the alleged facts necessary to sustain the tort of abuse of public office "cannot be extricated from the pleas of negligence" (*Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261 at 79).

[133] The title of Part C refers to the "*Unlawful Mass Detentions and Arrests of the Class Members*". There are two sections in Part C: "*1. No Breach of the Peace*" and "*2. General Round-up of Demonstrators Not Made Lawful by Earlier Acts of Vandalism*". There is nothing in Part C that assists the plaintiff in showing that the essential elements of the abuse of office tort are pleaded.

[134] Section VIII of the pleading is titled "*The Plaintiff's Activities and Wrongful Detention on June 26 and 27*". Paras. 52-65 describe what allegedly happened to the plaintiff on June 26 and 27. These paragraphs do not address the elements of the abuse of public office tort.

[135] Section VIII then includes part "D" titled "*The Unlawful Conduct of the Defendants With Regard to Particular Subclasses*". The plaintiff alleges that in para. 66 that "The Defendants' unlawful conduct with respect to the particular subclasses, detailed below, was the direct and foreseeable consequence of the implementation of the Defendants' overall plan and model for summit security (discussed above in paragraphs 25 to 38)". Going back to paras. 25-38, there is nothing to show that the essential elements of this cause of action have been pleaded.

[136] Furthermore, it is unclear in the pleading where the "unlawful" conduct allegedly occurred: at the planning level or on the ground during the actual policing.

[137] The abuse of public office cause of action is asserted against the defendants as a group and no distinction is drawn among them. This is fatal given the serious nature of this cause of action. A "stringent standard of particularity" applies (*Gratton-Masuy* at para. 89).

[138] For the reasons stated, the plaintiff has not pleaded the essential elements of this cause of action. It is therefore plain and obvious that the abuse of public office cause of action will fail. It is therefore struck against all defendants.

INFRINGMENT OF *CHARTER* RIGHTS

[139] The plaintiff seeks a declaration that the defendants violated her *Charter* rights and those of the putative class members. The *Charte*r violations include sections 2(b), (c), (d),7, 8, 9, 10(a) and (b) and 12 of the *Charter*. As well, the plaintiff seeks damages pursuant to s. 24(1) of the *Charter*.

[140] The *Charter* allegations are not well organized in the pleading. The starting point is the chart in para. 172. It states which *Charter* right is allegedly infringed for each subclass. Sections 2(b), (c), (d), 7, 9 and 10(b) apply to all class members. Section 8 applies to all class members except members of the Queen and Spadina subclass who were not arrested. Subsection 10(a) applies to the Queen and Spadina, Esplanade, Eastern Avenue, and Parkdale subclasses (i.e. all class members who were "kettled"). Members of the Gymnasium subclass allege that they were discriminated against under the *Human Rights Code*.

[141] It is alleged that the *Charter* violations "were committed by police officers under the command, supervision, and jurisdiction of the Toronto Police Service and other ISU Partners." (para. 27). The "other ISU Partners" are not specified. Which defendant, aside from Toronto, is involved? All of the alleged police activity occurred in the City of Toronto. As previously noted, it is clear from the *PSA* that the municipal police service is responsible for policing within the City of Toronto (in this case the Toronto Police Service). Therefore, there is no statutory basis for asserting that police officers under the command, supervision, and jurisdiction of other ISU Partners committed the *Charter* violations.

[142] Referring to the *Charter* violations, the plaintiff pleads that the defendants are "directly and vicariously liable for these violations" (para. 27). Vicarious liability is a concept that belongs to negligence. In effect, the plaintiff seeks to import the private law concept of "joint and several liability" into the *Charter* violation claims. This is wrong in law and must be struck. A claim for *Charter* damages is a public law remedy distinct from private law tort concepts (see *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 at para.22).

[143] The pleading attempts to hold all of the defendants responsible for the Charter violations by alleging that they failed in their "planning, preparing, directing, and overseeing the G20 Summit security operations" and "failed to put adequate measures in place to ensure that these rights would be protected" (para. 29). This pleading appears to allege that the defendants had a positive obligation to prevent the Charter breaches and failed to do so. If this is what the plaintiff

intended to plead, it is wrong in law and must be struck. The Charter does not impose a positive obligation on the defendants to prevent Charter breaches. Speaking about s. 7 of the Charter, Perell J. confirmed this in *John Doe v. Ontario*, [2007] O.J. No. 3889 at para.113, affirm'd 2009 ONCA 132 as follows:

> Mr. Doe may feel deprived of liberty or security of the person but what he is actually seeking and what he submits that he is entitled to under s. 7 of the *Charter* is that Ontario takes steps to ensure that he enjoy life, liberty, or security of the person. Section 7, however, is a preclusive provision and not one that imposes positive obligations on governments: *Wynberg v. Ontario*, [2006] O.J. No. 2732 (C.A.); *Gosselin v. Quebec*, [2002] 4 S.C.R. 429.

[144] As a result of the above, the plaintiff is left with a claim against Toronto for *Charter* violations committed by the police officers in the City of Toronto. It is plain and obvious that the attempt to hold the other defendants liable for these violations will fail. Toronto's position is that the *Charter* claims are "derivative of the false imprisonment claim". Toronto does not dispute that the false imprisonment cause of action is properly pleaded and, as a result, the same position applies to the *Charter* claims.

[145] Subject to the above, the plaintiff has satisfied s. 5(1)(a) for the *Charter* and Human Rights claims as it relates to Toronto only. As against all other defendants, these claims are struck because it is plain and obvious that these claims will fail.

5(1)(B)- IDENTIFIABLE CLASS

Legal Framework

[146] Subsection 5(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant". The purpose of a class definition is: (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: see *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.). To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad.

[147] Class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. There simply must be a rational connection between the class member and the common issues: see *Sauer* at para. 32.

[148] In *Hollick*, the Supreme Court of Canada confirmed the test for determining if there is an "identifiable class." The plaintiff must define the class by reference to objective criteria, so that a given person can be determined to be a member of the class without reference to the merits of the action.

[149] The criterion of the class definition is important because the scope of the class definition influences the commonality of the proposed common issues, the manageability of procedures and whether a class action is preferable. This, in turn, affects the ability of the representative plaintiffs to represent the class members without conflict and the appropriateness of the litigation

plan: *Fischer v. IG Investment Management Ltd*., [2010] O.J. No. 112 (S.C.J.) at para. 133, rev'd on other grounds 2011 ONSC 292 (Div. Ct.), aff'd. 2012 ONCA 47, leave to appeal to S.C.C. granted [2012] S.C.C.A No 135.

Proposed Class Definition

[150] The plaintiff proposes a general class definition, with six location based subclasses, a residual subclass and a detention subclass that is also called an "overlapping subclass". Plaintiff's counsel states that everyone in the main class also belongs to a subclass and that any person not within a subclass is not intended to be included in the class. Some of the putative class members who belong to either a location based subclass or the residual subclass also belong to the overlapping subclass.

[151] The exact wording of the proposed class and subclasses is set out earlier in this decision. For ease of reference, it is repeated below:

> Main Class
>
> The plaintiff seeks to certify this class action on behalf of those individuals in the City of Toronto who were arrested and/or subjected to mass detention by police, on June 26 and 27, 2010, in relation to the G20 Summit, and were:
>
> (a) released without charge; and/or
>
> (b) imprisoned in the Eastern Avenue Detention Centre.
>
> Location Subclasses
>
> The proposed class is divided among seven proposed subclasses. Each subclass consists of putative class members who were arrested or subjected to mass detention by police as follows:
>
> (1) in a police cordon in the vicinity of the intersection of Queen Street West and Spadina Avenue on the afternoon of June 27, 2010, and eventually released without charge (the "Queen and Spadina Subclass");
>
> (2) in a police cordon in the vicinity of the Hotel Novotel Toronto Centre on the Esplanade on the evening of June 26, 2010, and eventually released without charge (the "Esplanade Subclass");
>
> (3) in a police cordon in the vicinity of the Eastern Avenue Detention Centre on the morning of June 27, 2010, and eventually released without charge (the "Eastern Avenue Subclass");
>
> (4) in a police cordon in the vicinity of the intersection of Queen Street West and Noble Street on June 27, 2010, and eventually released without charge (the "Parkdale Subclass");

(5) during mass arrests in the vicinity of Queen's Park on the afternoon of June 26, 2010, and released without charge or charged with unlawful assembly and/or any other offence related to a failure to disperse from the vicinity of Queen's Park; (the "Queen's Park Subclass");

(6) at the University of Toronto Graduate Students' Union Gymnasium on the morning of June 27, 2010 (the "Gymnasium Subclass")

Residual Subclass

Individuals who were arrested in relation to the G20 Summit at locations in Toronto (other than those listed above) for whom the defendants have records relating to the arrest and who were eventually released without charge

Detention Center Subclass

All individuals who were arrested and imprisoned in the Eastern Avenue Detention Centre beginning on June 26 or 27, 2010. (The plaintiff calls this an "overlapping subclass" because most of the members of the above 7 subclasses were imprisoned in the Eastern Avenue Detention Center.

[152] There are several problems with the proposed class definition. For the reasons that follow, the plaintiff has not satisfied the s. 5(1)(b) criterion.

Impermissible Use of Subclasses

[153] The plaintiff's approach to subclasses is highly unusual. I was not provided with any authority that allows all members of the main class to also belong to a subclass. Rather than seeking certification of one class with subclasses for those whose claims raise common issues not shared by all other class members, as contemplated by the *Class Proceedings Act*, the plaintiff seeks to certify as one class, eight distinct groups of claims with no common link. The plaintiff's proposal is contrary to the *Class Proceedings Act* and applicable case law.

[154] Section 5(2) of the *Class Proceedings Act* provides for the creation of subclasses as follows:

> Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,
>
> (a) would fairly and adequately represent the interests of the subclass;

> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
>
> (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. [Emphasis added.]

[155] In *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43; leave to appeal to S.C.C. refused, [2008] S.C.C No. 512, ("*Wuttunee*") the Saskatchewan Court of Appeal rejected this type of an approach to subclasses. Section 6(1)(b) of the Saskatchewan *Class Actions Act* that deals with subclasses is virtually identical to s. 5(1) (b). In *Wuttunee*, the court explained at para. 125 that the Act is not intended to be used to certify a series of claims without some common issues binding them:

> What the statutory provisions would appear to envision, however, is not that the identifiable class should be entirely composed of an array of subclasses, each with its own distinct set of claims and common issues, but, rather, that there should be a single, over-riding class, with its set of issues common to all members of a class, some of whom might form a subclass with a distinct set of issues common to its members but not other members of the class as a whole. … Clearly, the more the subclasses are seen to have in common only issues distinct from one another, the less likely it is that a single class, or, indeed, a single class action, has been identified.

[156] The class/subclass approach in this case presents significant hurdles to the manageability of this proceeding. Rather than articulating one proceeding with some issues capable of resolution in common for the entire class, the plaintiff's approach has at best "melded a number of potential classes into a single proceeding" (*Caputo v. Imperial Tobacco Ltd.*, [2004] OJ No 299 (S.C.J.) at para. 45). The result of this strategy was described by Winkler J. in *Caputo* as follows:

> In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to Hollick. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding.

[157] The plaintiff's proposed common issues highlight the above concern. There is only one proposed common issue that applies to all of the class and that is common issue 1.1 dealing with systemic negligence and the duty of care. In my consideration of s. 5(1)(a), I struck the systemic negligence cause of action. Since a common issue must be connected to a cause of action, common issue 1.1 fails. As a result, the very problem that Winkler J. identified in *Caputo* at para. 45 exists in this case. There is no "class sharing substantial 'common issues', the resolution of which will significantly advance the claim of each class member".

[158] The defendants say that the plaintiff is seeking to certify as one class, eight distinct groups of claims linked superficially by the allegations of "systemic wrongdoing". In fact there is no link at all because the negligence cause of action has not survived the s. 5(1)(a) test.

[159] In summary, the above problem with the proposed class definition is fatal and supports my conclusion that criterion 5(1)(b) has not been satisfied.

[160] Aside from this fatal flaw there are other deficiencies in the proposed class definition that I wish to address.

Other Deficiencies

1. Unclear language

[161] Various unclear words and phrases are used to try and define the subclasses. As explained below the ability to identify persons with a potential claim, define who will be bound by the result and describe who is entitled to notice is impaired.

[162] The Queen's Park subclass describes putative "class members who were arrested or subjected to mass detention by police … during mass arrests in the vicinity of Queen's Park on the afternoon of June 26, 2010, and released without charge or charged with unlawful assembly and/or any other offence related to a failure to disperse from the vicinity of Queen's Park" [Emphasis added].

[163] The phrase "vicinity of Queen's Park" is unclear and to a lesser extent so is the time. At the end of the motion, plaintiff's counsel suggested an amendment to try and clarify the language by defining the temporal and geographic boundaries as follows:

> Class members who were standing within 50 meters of Queen's Park Circle, arrested or subjected to mass detention by police during mass arrests after 5 p.m. on the afternoon of June 26, 2010, and released without charge or charged with unlawful assembly and/or any other offence related to a failure to disperse from this area.

[164] I assume that plaintiff's counsel means Queen's Park Crescent (not Circle). There must be some evidence that such a class exists as described above. There is ample evidence that crowds gathered in and around the general area that is known as Queen's Park and approached the area from different directions. Counsel's proposal that the subclass be limited to those standing within 50 meters of Queen's Park Circle is based on the evidence of Jessica Cole whose

affidavit was filed to support certification. She took photographs of the crowds that gathered and the police in the area. One photograph depicts part of a police line that is blocking people who are standing on Queens Park Crescent and the adjacent grass. This photograph only depicts the south east area of Queens Park Crescent. I have no evidence that the 50 meter limitation is appropriate for the entire Queen's Park Crescent. I am concerned that this last minute attempt to clarify the subclass is arbitrarily excluding people. A plaintiff cannot arbitrarily restrict a class definition to make it more amenable to certification (see *Caputo* at para. 39).

[165] The proposed Residual Subclass suffers from the same problem and is also over inclusive. This subclass includes the entire city of Toronto. How does a putative class member decide if his/her arrest was "in relation to the G20 Summit" and what does this mean? While "records of arrest" must exist, such records may offer no assistance to the person who is trying to determine if he/she was arrested in relation to the G20 Summit.

[166] All of the location based subclasses are defined by the term mass detention. How large does the group have to be to qualify as a "mass detention"? The plaintiff uses the term police cordon. If a police cordon was used does this mean that it was a "mass detention"? How is the putative class member to figure out if they were subjected to a mass detention?

2. Excluding those Charged

[167] The main proposed class definition and most of the subclasses exclude those who were charged during the G20 Summit. In doing so it is argued that uniformity is created and this will allow the adjudication of common issues to be done in common. This of course is the focus of the s. 5(1)(c) criterion. However, the scope of the class definition must be closely considered because it influences the commonality of proposed common issues, the manageability of procedures and whether a class action is preferable.

[168] The argument that the class definition creates uniformity is wrong. When this proposition is considered it is obvious that it does not work. The fact of a charge is not always a measure of a person's misconduct. Excluding those who were charged does not weed out of the class those who committed unlawful behavior to create the commonality that is needed in a class action.

[169] The absence of a charge does not establish that the arrest was unlawful, nor remove the need to assess each class member's behaviour in determining whether the arrest was justified in attempting to prove this civil claim. Consider, for example, s. 31 of the *Criminal Code* that provides the police with the power to arrest for breach of the peace as follows:

> (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

[170] An arrest to prevent a breach of the peace is justified when it is reasonable to infer from the conduct of the arrested person that he or she is about to join in or renew an ongoing breach of

the peace. This of necessity requires an assessment of any breach of the peace that has recently occurred (see *R. v. Drury*, 2004 BCPC 188 at paras. 38-39).

[171] Subsection 31(1) does not create an offence, but authorizes a peace officer to arrest any person whom he finds committing a breach of the peace, i.e., an act or actions which result in actual or threatened harm to persons or property, or the peace officer believes is about to commit a breach of the peace. There is a breach of the peace whenever harm is actually done or is likely to be done to a person or, in his presence, to his property, or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance.

[172] Since there is no offence, a person arrested for breach of peace will inevitably be released without charge. By excluding people who were charged from the class definition, the plaintiff has not excluded people who may in fact have breached the peace. This individual issue remains.

[173] The fact that an individual was arrested or detained under the *Criminal Code* but released without charge does not prove that the arrest was unlawful. In order to establish that an arrest or detention was justified, the officer need not demonstrate anything more than reasonable and probable grounds. As held by the Supreme Court of Canada, an officer is "not required to establish a prima facie case for conviction before making the arrest." (*R v. Storrey*, [1990] S.C.J. No 12, at para. 17; see also *R. v. Mann*, [2004] 3 S.C.R. 59 at para. 33-34.)

[174] The class definition captures those individuals who were "released without charge" during the G20 Summit weekend, but subsequently arrested and charged based on post-Summit investigations. For example, the class as presently defined would include the accused in *R. v. Botten*, [2012] O.J. No. 5053 (S.C.J.) who was arrested for mischief based on her activities during the Summit some months after the July 26-27 weekend.

[175] Finally, excluding persons who were charged with offences does not exclude those who engaged in unlawful conduct within the proposed class. On cross-examination the representative plaintiff Sherry Good conceded through counsel that the subclasses "possibly do include" persons who had committed acts of violence. Further, the plaintiff acknowledges that the class may include black bloc participants. The black bloc participants are described as follows at para. 26 of the affidavit of Staff Inspector Franks (the senior Toronto officer in charge of criminal investigations related to the G20 Summit):

> The now much publicized black bloc tactics are an example of this type of behaviour. The black bloc tactic is essentially the use of peaceful demonstration by individuals and groups as a cover for violent activity. Those engaged in black bloc tactics characteristically wear black clothing and gear such as balaclavas, ski masks, goggles and handkerchiefs to cover their face and conceal their identity as they engage in unlawful activity. Often crowds are used to provide cover to change out of black bloc clothing without detection. The tactic seeks to co-opt demonstrators to facilitate black bloc tactics.

[176] Ms. Good admitted on cross-examination that there were people who committed acts of violence during the G20 Summit who were not charged with offences. Additionally, Staff

Inspector Franks' evidence indicates that many people who engaged in misconduct during the G20 Summit were not charged with offences because they could not be identified. This is consistent with the evidence that crowd behavior was variable throughout the weekend and involved people who behaved lawfully at times and unlawfully at others.

[177] The class definition is therefore overly broad and simply assumes that each class member was unlawfully detained or arrested.

[178] The plaintiff has not satisfied the s. 5(1)(b) criterion.

THE REMAINING S. 5 CRITERIA

[179] The result of the plaintiff's failure to satisfy s. 5(1)(b) means that the certification motion fails. Consideration of the remaining s. 5 criteria becomes an artificial exercise since there is no acceptable defined class and set of subclasses against which the remaining criteria can be considered.

[180] To the extent that it is practical to do so, I will continue and consider the remaining s. 5 criteria.

5(1)(C) - COMMON ISSUES

Legal Framework

[181] Subsection 5(1) of the *Class Proceedings Act* requires that "the claims or defences of the class members raise common issues." Section 1 of the *Class Proceedings Act* defines "common issues" as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts ….

[182] For an issue to be common 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: see *Hollick* at para. 18.

[183] An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: see *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.), aff'd, [2003] O.J. No. 3918 (Div. Ct.).

[184] The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: see *Western Canadian Shopping Centres* at para. 39.

[185] The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: see *Frohlinger* at para. 25; *Fresco* at para. 21.

[186] An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: see *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[187] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that issues are common: see *Hollick* at para. 25. As Lax J. stated in *Fresco* at para. 61 "[w]hile only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one." [Emphasis added.]

[188] With regard to the common issues, "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. A class action should not be allowed if class members have conflicting interests." (*Western Canadian Shopping Centres* at para. 40.)

[189] Finally, a plaintiff is not required to produce evidence on each element of a cause of action pleaded. As Lax J. stated in *Glover v. Toronto (City)*, [2009] O.J. No. 1523 ("*Glover*") at para. 56: "One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged."

Proposed Common Issues

[190] Plaintiff's counsel revised the common issues three times to try and satisfy s. 5(1)(c). On the third day of the certification hearing, plaintiff's counsel requested time to submit a third draft of the proposed common issues. This prompted the defendants to request a dismissal of the certification motion. Understandably, they complained about the continually changing common issues and the resulting unfairness to them. The changes to the common issues were not minor.

[191] It is not unusual for class counsel to propose a minor change to a common issue either at the outset or during the motion. Such changes are usually requested to try and neutralize the criticism of the defence and address questions from the judge. However, in this case the revisions were significant and the constantly moving target was unfair to the defence. While I refused the defendants' request to dismiss the certification motion, I adjourned the motion to allow the defendants sufficient time to consider the revisions and ruled that no further revisions during the hearing of the motion would be allowed. The certification motion resumed in January 2013.

[192] While the plaintiff frames the proposed common issues against the defendants as a group, I will limit them to Toronto. This reflects my decision that there are no surviving causes of action against any defendant except Toronto.

[193] The revised proposed common issues are as follows:

Systemic Wrongdoing

1.1 In their planning, operation, or management of G20 Summit security, did the Defendants owe a duty of care to the class members?

Re Residual Subclass

1.2 Did commanding, supervising, or senior officers under the authority of the Toronto Police Service order or authorize officers to arrest individuals on grounds such as the failure to submit to a search or the possession of a bandana or other protest-related items?

1.3 Did commanding, supervising, or senior officers under the authority of the Toronto Police Service in the early evening of Saturday, June 26, 2010, order or authorize officers to arrest any demonstrators remaining on the streets?

1.4 Did the Defendants fail to ensure that officers received balanced and adequate training regarding the protection of *Charter* rights?

Re Location-Based Subclasses and Residual Subclass

1.5 Did commanding, supervising, or senior officers under the authority of the Defendants adopt or permit a strategy to "take back the streets" after the vandalism on Saturday through a general round up of peaceful demonstrators (including by the use of mass detentions/arrests as a method of crowd control or an improper reliance on the breach of peace power)?

1.6 Did the Defendants fail to have sufficient policies and practices in place for the protection of demonstrators' *Charter* rights, or otherwise fail to take reasonable steps to ensure the protection of the class members' *Charter* rights?

Abuse of Public Office

2.1 Did commanding, supervising, or senior officers under the authority of the Defendants know that the decisions or orders referred to in (a) and (b) below were unlawful, or were reckless as to their unlawfulness (if said orders or decisions were in fact made)?

(a) The decisions and orders referred to in paragraphs 1.2, 1.3 and 1.5 above; and

(b) The mass arrest/detention orders made in relation to the location-based subclasses?

2.2 Did commanding, supervising, or senior officers under the authority of the Defendants know that the decisions or orders referred to in paragraphs 2.1 (a) and (b) above would result in harm to the class members, or were reckless or willfully blind as to the possibility that harm would occur (if said orders or decisions were in fact made)?

The Mass-Detention and Mass-Arrest Subclasses
(i.e. Queen and Spadina, Esplanade, Eastern Avenue, Parkdale, Queen's Park, and Gymnasium subclasses)

3. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members and/or (b) arbitrary detention or imprisonment contrary to section 9 of the *Charter*?

4. If the mass detention or arrest of a subclass was unlawful, did the Defendants' conduct therefore also amount to (a) assault and/or battery; (b) trespass; and/or (c) a breach of section 8 of the *Charter* (i.e. unreasonable search and seizure)?

5. Did the Defendants infringe the respective subclass members' rights under section 2 of the *Charter* (e.g. freedoms of expression, peaceful assembly, and/or association)?

6. Did the Defendants infringe the respective subclass members' rights under section 7 of the *Charter* (i.e. right to life, liberty, and security of the person)?

7. Did the Defendants infringe the respective subclass members' rights under section 10 of the *Charter* (i.e. the right upon arrest or detention to be informed promptly of the reasons therefor, to retain and instruct counsel without delay, and to be informed of that right)?

8. Did the Defendants discriminate against the Gymnasium Subclass members under Ontario's *Human Rights Code* by targeting them for arrest or negative treatment based on prohibited grounds, including the perception that most or all of the subclass members were Québécois?

The Overlapping Detention Centre Subclass

9. Did the conditions or treatment of subclass members within the Eastern Avenue Detention Centre amount to cruel and unusual treatment or punishment under section 12 of the *Charter*?

10. Did the Defendants infringe the respective subclass members' rights under section 10(b) of the *Charter* (i.e. the right to retain and instruct counsel without delay and to be informed of that right)?

11. Did the Defendants detain the subclass members for an excessive and/or unnecessarily long time, such that their ongoing detention constituted false imprisonment or arbitrary detention contrary to section 9 of the *Charter*?

Charter Section 1

12. Were any infringements of the *Charter* justified and allowable under section 1?

Remedies and Damages

13. If the Defendants breached the class members' common law or *Charter* rights, can the Court make an aggregate assessment of damages as part of the common issues trial?

14. Were the Defendants guilty of conduct that justifies an award of punitive damages?

15. Are declarations regarding the lawfulness of certain police actions and/or tactics during the G20 Summit warranted?

16. Are orders requiring the Defendants to expunge certain records warranted?

Analysis of Common Issues

Common issues 1.1, 2.1 and 2.2

[194] A common issue must be connected to an existing cause of action. (See *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; aff'd 2013 ONSC 1169). Since I have struck the systemic negligence and abuse of process causes of action, it follows that common issues 1.1, 2.1 and 2.2 are not required. Assuming the action was certified, these common issues would not be approved.

Common issues 1.2, 1.3 and 1.4 – Residual Subclass

1.2 Did commanding, supervising, or senior officers under the authority of the Toronto Police Service order or authorize officers to arrest individuals on grounds such as the failure to submit to a search or the possession of a bandana or other protest-related items?

1.3 Did commanding, supervising, or senior officers under the authority of the Toronto Police Service in the early evening of Saturday, June 26, 2010, order or authorize officers to arrest any demonstrators remaining on the streets?

1.4 Did the Defendants fail to ensure that officers received balanced and adequate training regarding the protection of Charter rights?

[195] These common issues deal with the residual subclass. I have concluded that the problems with the definition of this subclass are fatal. As a result, there is no acceptable subclass to which these common issues apply (this also applies to common issues 1.5 and 1.6 that deal with the residual subclass).

[196] Apart from this problem, the common issues fail to satisfy s. 5 (1)(c) because they are not rationally connected to the claims of those who would fall into the residual group. Whether officers received balanced and adequate training or whether an order was made generally to arrest individuals on certain grounds or to arrest any demonstrators remaining on the streets, has no bearing on whether any residual subclass member was unlawfully arrested.

[197] Proving that a general order was made will not advance the litigation for the group. It would not establish liability in respect of any one class member, nor would it create any efficiency in determining each class member's claim. The individual exercise of examining if each person was arrested in relation to the G20 Summit and inquiring into the circumstances of each arrest both remain.

Common issues 1.5 and 1.6 - Location-Based Subclasses and Residual Subclass

1.5 Did commanding, supervising, or senior officers under the authority of the Defendants adopt or permit a strategy to "take back the streets" after the vandalism on Saturday through a general round up of peaceful demonstrators (including by the use of mass detentions/arrests as a method of crowd control or an improper reliance on the breach of peace power)?

1.6 Did the Defendants fail to have sufficient policies and practices in place for the protection of demonstrators' Charter rights, or otherwise fail to take reasonable steps to ensure the protection of the class members' Charter rights?

[198] These common issues suffer from the same problems described for common issues 1.2, 1.3 and 1.4. They ask questions that do not meaningfully advance the subclass member's claim. Regardless of the answer to the common issue, the core question remains: was the individual unlawfully detained or arrested?

3. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members and/or (b) arbitrary detention or imprisonment contrary to section 9 of the Charter?

[199] Common issue 3 deals with false arrest and arbitrary detention. It applies to the six location based subclasses. The plaintiff argues that the issue can be decided in common because common orders were made and common circumstances existed for each location based subclass.

[200] Toronto does not dispute that orders were made by the command center that affected groups of people. Toronto says that the fact of such orders does not mean that the issue can be decided in common for all members of the subclass.

[201] Toronto filed an affidavit from Staff Inspector Randy Franks, the senior Toronto police officer in charge of criminal investigations related to the Summit. His affidavit provides some evidence about the structure of G20 policing which is summarized below.

[202] The RCMP was the lead security agency for the Summit. It was responsible for overseeing security planning and operations as well as the coordination of operational security planning with provincial and municipal law enforcement agencies. The RCMP had the lead in delivering protective security services in connection with internationally protected persons and for maintaining the security of identified Summit meeting sites and the area in which most of the international delegations were situated.

[203] Since the G20 Summit took place within the City of Toronto, the TPS was tasked with the responsibility for providing security services in all areas of Toronto outside of the RCMP protected zones. The TPS was responsible for the decisions made by all police officers in the performance of their duties in the area under the jurisdiction of TPS. There is no dispute that each subclass is located within the jurisdiction of the TPS.

[204] The Major Incident Command Centre ("MICC") was the central point of command, control, communication and information for the area under the jurisdiction of the TPS. The MICC provided coordination and operational direction to street level field commanders. Field commanders were in turn responsible for decision-making about police response both for fixed sites within the jurisdiction of the TPS and for mobile sections of officers who were deployed to various events as they were occurring.

[205] Toronto states that police decisions were a combination of direction from the MICC and the exercise of discretion at the street level. There is evidence showing that MICC was able to provide police officers in the field with direction based on the accumulation and synthesis of information from multiple sources; a function which could not be accomplished by "street level" police officers. Individual officers were responsible for deciding whether detention, arrest and/or a charge were appropriate. In so doing they may have relied upon grounds developed by other officers. Officers exercising discretion in the immediate circumstances played a fundamental role in determining what police response was possible and appropriate. The layered decision making was necessary given the environment in which police were operating through the Summit weekend.

[206] The plaintiff's approach is premised on the single assertion that because a command was made to arrest a group, the lawfulness of that arrest can be decided in common. I disagree. There is extensive evidence that the individual conduct among protestors during the G20 Summit varied.

[207] The plaintiff's approach is grounded in a series of assumptions that are contrary to the evidence that is available. The plaintiff assumes that: (i) all the arrests and detentions of class

members were uniformly unlawful; (ii) the demonstrations in each subclass location were uniformly peaceful and did not pose any risk, imminent or otherwise, of any actual or threatened harm; and (iii) all arrests were for the same reasons, applied without the discretion of street level officers and uniformly across each subclass.

[208] As noted in *Western Canadian Shopping Centres at para.40*, "with regard to the common issues, 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. A class action should not be allowed if class members have conflicting interests."

[209] For each of the locations, an affidavit has been filed from a person in the proposed location subclass. In essence, this evidence is offered to show that the arrest/detention of the group as a whole was uniform and unlawful. However, this is at odds with a wealth of evidence that I will briefly review. The plaintiff's position ignores the scale and complexity of misconduct and threatened harm which was occurring before, during, after and around peaceful protests.

[210] Throughout the G20 Summit weekend many individuals were intent on using the cover of legitimate protest for illegitimate purposes, inciting police response or compromising the security of the Summit. These people posed a threat to other protesters, the public and the G20 Summit. Crowd behaviour was inconsistent and unpredictable throughout the G20 Summit.

[211] The black bloc tactics are an example of this type of behaviour. The black bloc tactic uses peaceful demonstration by individuals and groups as a cover for violent activity. Those engaged in black bloc tactics characteristically wear black clothing and gear such as balaclavas, ski masks, goggles and handkerchiefs to cover their faces and conceal their identities as they engage in unlawful activity. Often crowds are used to provide cover to change out of black bloc clothing without detection. The tactic seeks to co-opt demonstrators to facilitate black bloc tactics.

[212] The black bloc tactics were acknowledged and explained by McMahon J. in *R v. Pflug-Back* (July 19, 2012), Toronto, at p. 4 in the sentencing of a black bloc participant as follows:

> The individuals initially participated in a mass peaceful protest with their faces visible. During the protest march at some point with others shielding them from discovery, they emerge from the protest all wearing black with their faces covered with masks, scarves or bandanas.

[213] In contrast to the plaintiff's assertions of entirely peaceful protests marked by sporadic and discrete violence, a document titled "Fire and Flames! A Militant Report on Toronto Anti G20 Resistance" written in July, 2010 by an author using the pen name "ZigZag" paints a different picture. The document specifically celebrates the scale of violence perpetrated in Toronto during the Summit. Staff Inspector Franks states that "Fire and Flames" accurately describes behaviours and tactics that were on display throughout the Summit. The plaintiff has not challenged this evidence.

[214] Fire and Flames states that the "singular purpose of the action was clearly vandalism", in apparent reference to the vandalism perpetrated by those engaged in black bloc tactics and those who facilitated their actions. Fire and Flames provides an insider's account of the scale of the

black bloc activities within the Summit, indicating that "the black bloc itself was approximately 100-150 strong, with another 300 or so masked militants not in black".

[215] Staff Inspector Franks highlights the degree of variability of conduct in his affidavit at para. 126:

> ... the behaviour of the many thousands of people who attended the City of Toronto during the Summit was as varied as I have ever seen in the context of a public event. Many people behaved peacefully and lawfully. Others did not. The variety of individual behaviour throughout the Summit included behaviour which was clearly intended to use the fact of the Summit to engage in criminal conduct. One of the greatest challenges faced by police officers during the Summit was to respond to and anticipate the great variety of conduct occurring in the City on June 26 and 27, 2010.

[216] Arrests were made throughout the City of Toronto and at various times over the course of the Summit. Staff Inspector Franks states that many of the arrests cannot be categorized into discrete time frames, locations or circumstances. Arrests and detentions during the Summit reflected the variety of conduct which was occurring. Offences included breach of the peace, unlawful assembly, carrying a weapon while attending a public meeting, carry concealed weapon, obstruct police officer, conspiracy to commit indictable offence, being intoxicated in a public place, mischief over; carry concealed weapon, prohibited device or ammunition, disguise with intent; causing disturbance, mischief under, threatening damage, possession of property obtained by crime, assault; mischief endangering life, common nuisance, unlawfully in dwelling, theft under, and assault peace officer.

[217] Materials confiscated from some of those arrested included body armour, bottles filled with motor oil, cans of gasoline, black clothing, bandanas, duct tape, knives, pliers, goggles, hammers, mallets, Allen keys, wire cutters, box cutters, screwdrivers, rocks, gas mask, Molotov cocktails and golf balls.

[218] In some cases, individuals who had engaged in unlawful activity were identified during the subsequent investigations after the G20 Summit. Some of these individuals engaged in peaceful protest during one part of the G20 Summit while engaging in unlawful activity at another time during the weekend. As an example, one individual was photographed vandalizing a police vehicle on Queen Street on the afternoon of June 26. This man later gave a video interview describing a subsequent encounter with police at Queen's Park on the afternoon of June 26. In this man's description of his behaviour that day, he portrays himself as a peaceful protester and innocent victim of the police response to the events that he himself had participated in through his vandalism earlier during the G20 Summit.

[219] TPS records of policing the G20 Summit have identified approximately 1,118 individuals who were arrested between Saturday, June 19, and Sunday, June 27. The dynamics and volume of activity occurring during the G0 Summit were such that the information of the TPS concerning the number of people who were arrested is not complete.

[220] After the G20 Summit, police investigations led to an additional 257 criminal charges against 47 individuals arising out of conduct which occurred during the G20 Summit. The Ministry of the Attorney General has reported as of June 20, 2012 that 330 people were charged and appeared before the Court. However, there were over 100 individuals whom Staff Inspector Franks believed had committed criminal offences during the G20 Summit but for whom only partial identification was established at the time investigation concluded. As a result, the TPS was not able to lay charges against these individuals. Further, an unquantifiable number of people committed criminal offences who could not be identified at all.

[221] It is acknowledged, as the plaintiffs point out, that many charges were subsequently withdrawn. However, the reasons the Crown may withdraw a charge are varied. Just as a criminal charge does not establish as a matter of fact whether misconduct occurred, the absence or withdrawal of a charge does not speak to whether or not there was misconduct which could justify an arrest or detention.

[222] Due to the nature of the events surrounding the G20 Summit and limitations on policing resources which existed both at the time and following, there was significant criminal conduct which was not followed by charges. The plaintiff did not challenge this evidence.

[223] During the G20 Summit numerous photographs and videos were taken by the public, media sources, and police forces. The TPS collected some of this evidence and filed it on the certification motion. It is yet another source of evidence that shows the existence of unlawful conduct alongside peaceful protestors.

[224] For example, one video depicts a crowd of protesters marching along College Street towards Queen's Park and shows a disparate crowd. Some are clearly engaged in black bloc tactics while others are not. Upon reaching the southern edge of Queen's Park, a man dressed in black with a blue balaclava covering his face vandalizes a bus shelter. A short time later a van parked on the side of the road is attacked with objects that appear to be rocks or paving stones. Some members of the crowd can be seen standing by and watching while others take pictures of the scene. Soon after arriving at Queen's Park, a number of individuals dressed in black, some of whom were engaging in black bloc tactics, are seen removing their black clothes so they could more easily blend into the surrounding crowd. This process is known as "deblocking". In the videos people can be seen engaging in black bloc tactics and those supporting them can be heard making threatening remarks towards anyone who appears to be filming.

[225] During the G20 Summit, certain individuals were intent on inciting police response. For example, one video shows a man in the middle of Queen Street next to burning police cars yelling at officers and members of the public. This person tells police that "there's going to be more", making apparent reference to the violence that resulted in the damaged vehicles in the roadway. He carries on with a verbal attack on the police in an attempt to goad them into a response.

[226] There were also instances where individuals directed physical attacks against the police themselves. There is a video illustrating a number of people running eastbound on Queen Street from Spadina Avenue - eventually surrounding and attacking an occupied Toronto police cruiser.

[227] The plaintiff, Ms. Good, describes being part of a group of people who were detained at Queen Street and Spadina Avenue on Sunday June 27, 2010. She states that the group was uniformly peaceful and that she did not see any "black bloc" presence in the crowd or the use of disguises. She did not believe they intended to damage property. It is on this basis that she concludes in her affidavit that there was no basis for the police decision to detain the group which had gathered at Queen and Spadina and that the decision was "absurd".

[228] However, on cross-examination, Ms. Good acknowledged that she did not know the people who had joined the crowd of hundreds, did not know why any one of them had joined the group, what their intentions were with respect to the demonstration or with respect to threatening the security of the Summit. She also acknowledged that it was possible that individual demonstrators within the crowd had engaged in violence or black bloc tactics before they joined this group.

[229] Ms. Good also acknowledged on the basis of her experience with protests that there can be episodes of violence within peaceful protests, as was occurring in the G20 Summit, that her impressions of the crowd were limited to what she could see and hear and violence within the large group in which she was situated was possible.

[230] The plaintiff filed an affidavit from Rosalind Lewis that attached multiple intelligence reports indicating the presence of black bloc participants within the assembled group at Queen and Spadina.

[231] The evidence of the Tommy Taylor, the second proposed representative plaintiff assumes that all people in the Esplanade group were acting peacefully. However when cross-examined Mr. Taylor acknowledged that he did not know any of the people who were protesting on the Esplanade and did not know their intentions or what they had done before congregating in front of the Novotel Hotel.

[232] The plaintiff relies on affidavits from people who she says fit within one of the subclasses. Their cross-examinations reveal the variable conduct within the group and that they assumed others around them were engaging in entirely lawful behaviour with no intention to cause property damage or threaten the security of the G20 Summit. Like the plaintiff, they had no information about the intentions of those in the group or their prior conduct. Some examples follow.

[233] Jessica Cole was arrested at Queen’s Park. Her own experience varied from her boyfriend’s. He was at Queen’s Park with Jessica and not arrested. She did not see anyone else arrested and therefore cannot provide evidence about the circumstances of other arrests. Ms. Cole alleges that the police used excessive force during her arrest and subsequent transportation to the Detention Center. The issue of whether such force occurred and whether it was appropriate in the circumstances will depend upon whether and to what extent Ms. Cole's conduct precipitated the use of force if at all, how the force was effected by the individual officers, and why.

[234] There is evidence available concerning the Gymnasium location that demonstrates variable conduct. Police had available evidence that there were people at the gymnasium who had participated in black bloc tactics when the arrests at that location occurred. As well, police found items that had been used as weapons on the prior day in bushes and areas surrounding the gymnasium.

[235] Jacinthe Poisson was in gymnasium on the morning of June 27. She admits that she knew very few people present in the gymnasium, let alone whether all or most of them were from Quebec. There were small groups of friends and she did not know them. She conceded that she had seen people using bandanas to mask their identity the day before and she had no idea whether any such people were present with her in the gymnasium or what they had been doing the day before. It is not possible to determine whether the arrests of all present were unlawful based upon her evidence alone.

[236] Riali Johannesson is a lawyer who arrived at the Parkdale location. She describes a peaceful group of approximately 75 persons who were boxed in by police for an extended period without warning, explanation, or adequate legal grounds. Ms. Johannesson states that she was forcibly placed inside the police cordon despite having identified herself as a lawyer who was present for the purpose of providing legal advice. After being held for about an hour and half, Ms. Johannesson and the other individuals were allowed to leave, but only after being subjected to a mandatory police search. When she arrived at the Parkdale location, there were people already in custody. She is unable to say what may have transpired in these arrests.

[237] Police notes indicate that black bloc participants were present and that weapons were seized at the Parkdale location. In Ms. Johannesson's evidence, she acknowledges being told by police that there was a belief the assembled group contained black bloc participants. She further gives evidence that people were being selectively taken from the crowd and that clearly not all arrests were approached on the same basis. The lawfulness of the arrests or detention across the subclass cannot be determined on Ms. Johannesson's evidence alone.

[238] The review of the above evidence is not for the purpose of finding facts but rather to show the variation of conduct among people at the G20 Summit and therefore the lack of commonality. As the court stead in *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at para. 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."

Common issues 4-8 and 12

[239] Counsel agree that these common issues 4-8 are derivative of the false arrest/detention claims. The same lack of commonality exists. For example, assault and battery are intentional torts that can only be assessed with reference to each individual experience. With respect to assault, whether each individual apprehended imminent harmful or offensive contact can only be determined by inquiries of each individual. Likewise, the tort of battery requires an individual inquiry to determine whether each person was subject to offensive contact. Determining liability for conversion or trespass to chattels or unreasonable search and seizure also requires an inquiry

to be made of each subclass member with respect to the chattels alleged to be converted or trespassed upon and the nature of the interference with the chattels.

Common issues 9, 10, and 11 – Detention Center subclass

9. ***Did the conditions or treatment of subclass members within the Eastern Avenue Detention Centre amount to cruel and unusual treatment or punishment under section 12 of the Charter?***

10. ***Did the Defendants infringe the respective subclass members' rights under section 10(b) of the Charter (i.e. the right to retain and instruct counsel without delay and to be informed of that right)?***

11. ***Did the Defendants detain the subclass members for an excessive and/or unnecessarily long time, such that their ongoing detention constituted false imprisonment or arbitrary detention contrary to section 9 of the Charter?***

[240] These common issues deal with what happened in the detention center and not what lead to the person's detention. The common issues focus on the condition of the detention center, the treatment of those detained, the duration of the detention and whether the defendants infringed s. 10(b) rights.

[241] There is no dispute that Toronto set up this detention center. It was responsible for the conditions in the facility and what happened to the people who were detained inside.

[242] There is considerable evidence about the poor conditions inside the detention facility. This evidence is common among those who swore affidavits. They were held in wire cages where the temperature was cold. Bathroom facilities were not readily available and were not private. The availability of food and water was limited to the extent it was even available. People were handcuffed during their detention and many were strip searched.

[243] The processing of those detained was slow. The June 2012 report titled "Independent Civilian Review Into Matters relating to the G20 Summit" authored by the Honourable John W. Morden (the "Morden Report") provides considerable evidence about the problems. For example, one pre-booking officer was responsible for screening every person that arrived at the detention center. The Morden Report states that this resulted in a "crippling bottleneck at the beginning of the prisoner booking process". While waiting to be screened by the pre-booking officer, prisoners were held in pre-booking cells in "procedural 'limbo' and were not afforded the same care as prisoners who had been through the booking process". They were "held in restraints, they were not given any access to lawyers or a telephone, there was no record of when they were fed, and young people were not able to contact a parent or guardian." Some were "kept in pre-booking cells for over 24 hours." The duration of the detention varied. The affidavits filed for this motion, record periods of detention varying from 18 – 57 hours.

[244] The Morden Report states that the "crippling bottleneck" in the detention centre pre-booking procedures meant that detainees were never given access to "duty counsel or the telephone booths for calls to private lawyers". Even after the booking process was completed,

difficulties gaining access to lawyers continued. This is documented in a series of emails between duty counsel and police officer at the detention center.

[245] All of the above represents a common set of circumstances that the detainees faced. As a result, there is evidence that these common issues can be managed in common. Toronto does not dispute this point. If this subclass was presented as a proposed stand-alone class action, there would be a compelling argument that common issues 9, 10 and 11 satisfy the s. 5 (1)(c) criterion (assuming the rest of the s. 5 criteria were satisfied).

Remaining Common Issues

[246] In the circumstances of this failed certification motion, I will not review the damage common issues (13-16) except to say that aggregate damages are obviously inappropriate in this case.

[247] Common issue 13 asks whether the court can make an aggregate assessment of damages as part of the common issues trial. Rather than proposing an issue to be determined at trial, it asks whether the proposed issue can be determined at the common issues trial. This is not an appropriate case for an aggregate assessment of damages either for the class as a whole or a series of subclasses.

[248] Section 24 of the *Class Proceedings Act* contemplates that damages will be the only remaining issue to be determined at the common issues trial. It states as follows:

> (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> [Emphasis added.]

[249] Recently, in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 125, the court reinforced that the above requirements in s. 24. With respect to s. 24(1)(c) the court stated as follows:

> Finally, s. 24(1)(c) states that the aggregate of the defendant's liability "can reasonably be determined without proof by individual class members." This

> provision is directed at those situations where the monetary liability to some or all of the class is ascertainable on a global basis, and is not contingent on proof from individual class members as to the quantum of monetary relief owed to them. In other words, it is a figure arrived at through an aggregate assessment of global damages, as opposed to through an aggregation of individual claims requiring proof from individual class members. I would describe the latter calculation as a "bottom-up" approach whereas the statute envisages that the assessment under s. 24(1) be "top down".
>
> [Emphasis added]

[250] It is clear from the evidence and even from the pleading that the experience of the proposed class members varied. This is not a case where monetary liability could be ascertained on a global basis. One obvious example is the contrast between those detained in the detention center and those who were not. Another example is the experience of Jessica Cole at Queens Park. Her arm was broken. This is obviously not an experience shared by all in this subclass.

5(1)(D) - PREFERABLE PROCEDURE

[251] Subsection 5(1)(d) of the *Class Proceedings Act* requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[252] The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues: see *Cloud* at para. 73; *Hollick* at paras. 27-28; and *Markson* at para. 69.

[253] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: see *Hollick* at para. 29.

[254] The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

[255] It is clear given the lack of commonality that a class action would not be a fair, efficient and manageable method of advancing the claim. The impermissible use of eight subclasses creates an unwieldy group of claims. There is no single class that shares “substantial common issues” (*Caputo* at para 45). The common issues are subsumed by a plethora of individual issues. The result would be unmanageable litigation punctuated by numerous individual inquiries, and

full trials for each class member. Instead of furthering the goal of judicial economy, a class proceeding would impede this important goal.

[256] In the circumstances of this case, the proposed class action would not promote the objectives of judicial economy, access to justice or behaviour modification. Nor would it be a fair, efficient or manageable method of advancing the claims raised by the plaintiff.

[257] Behaviour modification in this case does not depend on a class action. The conduct of police officers during the G20 Summit has been and continues to be reviewed as follows:

(a) Complaints were made to the Office of the Independent Police Review Director ("OIPRD") which, as of May 1, 2011, had received 286 complaints, 196 of which were retained by the OIPRD and 90 of which were assigned to the TPS Professional Standards Unit for investigation.

(b) The TPS created the G20 Professional Standards Unit Investigative Team to conduct an investigative review of materials from the G20 Summit to internally identify conduct issues. The G20 PRS Investigative Team conducted 246 investigations.

(c) As a result of work of the PRS and the G20 PRS Investigative Team, 108 officers were subject to disciplinary action, one officer was charged under the *Criminal Code*, and a number of ongoing investigations or disciplinary proceedings under the PSA continue.

(d) Seven investigations were undertaken by the SIU under its independent authority pursuant to s. 113 (5) of the *PSA* to cause investigations to be conducted into the circumstances of serious injuries that may have resulted from criminal offences committed by police officers. As a result, 2 officers were subject to criminal charges.

[258] In the weeks and months which followed the G20 Summit, various levels of government and regulatory bodies announced their respective intentions to examine the policing of the G20 Summit from a systemic perspective. These G20 Summit reviews included the following:

(a) Toronto Police Service, "After-Action Review G20-Summit", June 2011: This is a comprehensive review of events before, during and after the Summit which was conducted at the direction of Chief William Blair of the Toronto Police Service. It resulted in 10 recommendations flowing from key issues that arose during the planning, operational and post-event phases of the Summit and which were designed to allow the TPS to learn from the Summit experience and to improve performance in future operations

(b) The OIPRD, "Policing the Right to Protest" G20 Systemic Review Report prepared by Mr. Gerry McNeely, Independent Police Review Director, May 2012. This is a 12 chapter comprehensive review pursuant to s. 57 of the *PSA* of the background, organizational structure, operational events, prisoner processing and

training associated with policing the Summit. It resulted in 42 recommendations relating to planning, command and control, arrest and containment, tactics, equipment and prisoner handling, communication and the media in connection with policing large scale events.

(c) The Toronto Police Services Board, "Independent Civilian Review into Matters Relating to the G 20 Summit", June 2012. (the Morden Report). This report was commissioned by Toronto and conducted by the Hon. John W. Morden in accordance with Terms of Reference prepared for and approved by the Board on September 23, 2010. It is an 11 chapter report resulting in 38 recommendations generally focused upon the Board's statutory responsibility under the *PSA* for the provision of adequate and effective police services in the City of Toronto.

(d) The Commission for Public Complaints against the RCMP, "Public Interest Investigation into RCMP Member Conduct related to the 2010 G8 and G20 Summits", May 2012.

(e) The House of Commons Standing Committee on Public Safety and Security, "Issues Surrounding security of the G8 and G20 Summits", March 2011. This report followed 5 days of hearings including various witnesses before the Standing Committee.

(f) Report of Ombudsman of Ontario "Caught in the Act", prepared by Andre Marin, December 7, 2010. This report focused upon circumstances concerning the passing of Regulation 233/10 under the *Public Works Protection Act* which designated an area in the vicinity of the security fence at the outermost security perimeter surrounding the Metro Toronto Convention Center as a "public work".

(g) The Report of the Review of the Public Works Protection Act, April 28, 2011, prepared by the Hon. R. Roy McMurtry, for the Ministry of Community Safety and Correction Services. This report also focused upon recommendations concerning the *Public Works Protection Act*.

[259] In addition, the Canadian Civil Liberties Association has delivered a report titled "Breach of the Peace", dated November, 2010. This report resulted from public hearings held in Toronto and Montreal on November 10 through 12, 2010 that were sponsored by the Canadian Civil Liberties Association and the National Union of General and Public Employees. The report provided 8 recommendations flowing from the conclusions reached.

[260] Finally, I note that the absence of a class action has not prevented individual actions from proceeding. Following the G20 Summit, 37 lawsuits, 4 human rights complaints and one application have been issued in respect of events arising out of the G20 Summit.

[261] The individual civil claims have been commenced in the Small Claims Court and in the Superior Court under both the Simplified Procedure and as regular proceedings. Counsel have been retained to act for plaintiffs in the majority of these claims but not all. The damages sought vary widely. The types of claims being pursued are substantively the same as to those pleaded in

the plaintiff's claim and include claims for false arrest, assault, negligence and breach of *Charter* rights. At the time of the hearing, 16 of the individual claims had been resolved.

[262] In summary, the plaintiff has not satisfied the s. 5(1)(d) criterion.

5(1)(E) – REPRESENTATIVE PLAINTIFF WITH A WORKABLE LITIGATION PLAN

[263] The final requirement for certification is that there be a representative plaintiff who will fairly and adequately represent the interests of the class, has produced a suitable litigation plan and does not have a conflict of interest on the common issues, with other class members. The capability of the proposed representative to provide fair and adequate representation is an important consideration. The standard is not perfection, but the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interest of the class ...." (*Western Canadian Shopping Centres* at para. 41).

[264] Given the fatal deficiencies noted above, there is no acceptable class action against which to consider the proposed representative plaintiffs and the plan. However, I note the following. During the hearing, class counsel proposed that Thomas Taylor be added as a second representative plaintiff to address concerns regarding the ability of Ms. Good to represent all subclasses. Ms. Good does not personally advance many of the claims she purports to bring on behalf of class members. Ms. Good was never arrested and therefore was not taken to the Detention Center. Mr. Taylor is a proposed member of the Esplanade subclass and he was taken to the Detention Center. In this sense he is more "representative" of those arrested and detained.

[265] Section 5(1)(e)(ii) of the *Class Proceedings Act* requires the representative plaintiff to produce a plan for the proceeding that sets out a workable method for advancing the proceeding on behalf of the class. The litigation plan suffers from the same flaws as the class proceeding as a whole. It assumes that it is possible to determine liability for all class members at the common issues trial.

[266] The s.5 (1)(e) criterion is not met.

CONCLUSION

[267] The plaintiff has failed to satisfy the s. 5 criteria. The certification motion is dismissed.

[268] If the parties cannot agree on costs they will provide written costs submissions to the court no later than July 5, 2013. The parties will agree on a timetable for exchanging submissions that will include time for a brief reply.

C. Horkins J.

Released: May 24, 2013

CITATION: Good v. Toronto Police Services Board, 2013 ONSC 3026
COURT FILE NO.: CV-10-408131-00CP
DATE: 20130524

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SHERRY GOOD

Plaintiff

– **and** –

TORONTO POLICE SERVICES BOARD and ATTORNEY GENERAL OF CANADA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, and REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: May 24, 2013