Divisional Court File No. 288/13
(Superior Court File No. CV – 10 – 408131 00CP)

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N :

SHERRY GOOD

Plaintiff
(Appellant)

and

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

Defendants
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED NOTICE OF APPEAL
(Appeal of Decision to Dismiss Motion for Certification)

THE PLAINTIFF, SHERRY GOOD, APPEALS to the Divisional Court of the Superior Court of Justice from the Order of Honourable Madam Justice Horkins dated May 24, 2013 at Toronto, Ontario dismissing the Plaintiff's motion for certification as a class proceeding pursuant to section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), and from the costs order of Honourable Madam Justice Horkins, dated September 16, 2013.

THE APPELLANT ASKS that the Order dated May 24, 2013 denying certification be set aside and that an order be granted as follows:

a. Certifying this proceeding as a class proceeding;

b. Remitting the remainder of the certification order required by s. 8 of the *Class Proceedings Act, 1992* to a judge appointed by the Regional Senior Justice of the Superior Court;

c. Granting the Plaintiff leave to amend her pleadings by a Third Fresh as Amended Statement of Claim in accordance with this Honourable Court's reasons;

d. Granting the Plaintiff her costs of the certification motion and this appeal; and

e. Such further and other relief as counsel may advise and this Honourable Court may deem just.

THE APPELLANT ASKS that leave be granted to appeal from the costs order dated September 16, 2013, that the order be set aside, and that an order be granted as follows:

a. Granting the Law Foundation of Ontario ("Law Foundation") party status for the purpose of an appeal in relation to costs;

b. Declaring that no costs are payable to the Defendant Toronto Police Services Board ("Toronto Police") for the Plaintiff's motion to certify the action as a class proceeding;

c. In the alternative, varying the costs order to provide that the Toronto Police's costs of the certification motion be reduced to an amount fixed by the Divisional Court;

d. Granting the Plaintiff and Law Foundation their costs of the appeal in relation to costs; and

e. Such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS OF APPEAL ARE:

A. Overview of the Proposed Class Action

The Five "Location-Based" Subclasses

1. This class action concerns five mass detentions at five locations in the City of Toronto on June 26 and 27, 2010 during the G20 summit. For each mass detention, a commanding officer made an (allegedly unlawful) order to arrest or detain the *entire group* of individuals present. The Plaintiff asserts that liability for false imprisonment can be determined in common for each group by assessing whether the *commanding officer* in question had the requisite legal grounds to make the order to detain or arrest the *entire group*. These five group arrests/detentions each comprise a proposed subclass in the action. They are referred to as the "Location-Based Subclasses".

The Detention Centre Subclass

2. The class action also concerns the deplorable conditions in the temporary G20 detention centre. The detention centre held most G20-related detainees (including individuals arrested at the five locations discussed above and elsewhere in Toronto). The Plaintiff asserts that the common circumstances faced by the detention centre detainees give rise to a number of common issues. The Respondent and the Motions Judge agreed that these issues can be managed in common. The detainees in the detention centre comprise the sixth proposed subclass, the "Detention Centre Subclass".

3. The overall class is composed of the members of the Location-Based and Detention Centre Subclasses.

4. The proposed class definition is attached as **Schedule "A."**

5. The proposed common issues list is attached as **Schedule "B."**

Narrowed Scope of Appeal

6. To narrow the issues on appeal, the Plaintiff is only appealing with respect to certain aspects of the proposed action. In particular, the Plaintiff:

   a. Is only appealing against the Respondent Toronto Police (the Plaintiff has released the other Defendants from the action);[1]

   b. Has removed the "systemic" common issues from the proposed common issues list, as well as the former common issues 4-7 (re: ancillary causes of action relating to the Location-Based Subclasses); and

   c. Has removed the "Residual"[2] and "Queen's Park"[3] subclasses from the proposed class definition.

7. Schedule "C" explains in detail the aspects of the claim that the Plaintiff is *not* appealing. The Plaintiff is *not* seeking to raise new or additional issues or claims, but simply to narrow the issues on appeal.

B. The Two Fundamental Errors Made by the Honourable Motions Judge

8. It is respectfully submitted that many of the erroneous conclusions made by the Honourable Motions Judge, Madam Justice Horkins, flowed from the following two fundamental errors of law and principle:

   a. **False Imprisonment Common Issue:** Her Honour erred by not certifying false imprisonment as a common issue for the Location-Based Subclasses even though, for

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[1] The Respondent has acknowledged that it is responsible for the Detention Centre, the police actions in Toronto, and for the decisions made by all police officers in the performance of their duties in the area under its jurisdiction in Toronto. This area includes the locations of the mass arrests and/or detentions of the Location-Based Subclasses (see Her Honour's reasons, paras. 60, 101 & 203).

[2] Unlike the five Location-Based Subclasses, the former Residual Subclass consisted of persons that were arrested in circumstances other than a mass arrest (e.g. individually).

[3] Unlike the five Location-Based Subclasses, the Queen's Park Subclass members were not surrounded by a police cordon (i.e. they were never subject to the manoeuvre often referred to as "kettling" or "containment"). Many persons who were members of the Residual and Queen's Park Subclasses are still included in the overall class because they were taken to the Detention Centre and are therefore part of the Detention Centre Subclass.

each of the five subclasses, a commanding officer made an order to detain the *entire group*. The lawfulness of each arrest/detention depends on whether the *commanding officer* in question had the requisite legal grounds to make the order to arrest or detain the *entire group*. This question can be determined in common for each Location-Based Subclass.

b. **Subclass Structure:** Her Honour erred in deciding that the Plaintiff's proposed subclass structure is impermissible. Most importantly, the six subclasses proposed by the Plaintiff are inextricably linked, and are therefore properly grouped together in one class action (rather than divided into six separate class actions). Further, the proposed structure is permitted by the *CPA* and furthers the purposes of the *CPA* (e.g. judicial economy).

9. These two fundamental errors are detailed below, followed by a list of other errors we respectfully submit the Honourable Motions Judge made, organized according to the five-part test under s. 5(1) of the *CPA*.

First Fundamental Error: Not Certifying the False Imprisonment Common Issue

10. The Motions Judge erred by not certifying the following proposed common issue:

> 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*?

11. This core proposed common issue relates to the five Location-Based Subclasses. These five groups were arrested and/or detained by police *en masse* pursuant to an order from a commanding officer. These mass arrest/detention orders were typically made by the officer in charge of the Toronto Police G20 command centre (the "Command Centre").

12. The Motions Judge accepted that "orders were made by the command center that affected groups of people" and that the Respondent was responsible for these orders. The

Respondent acknowledges responsibility for all decisions made by all police officers in the performance of their duties at the five locations.

13. However, Her Honour erred in law in concluding that these groups cannot have the lawfulness of their arrests or detentions determined together. Stated differently, Her Honour erred by concluding that the lawfulness of the mass arrests *cannot* be decided in common even though an order was made to arrest or detain *each group as a whole*. This fundamental erroneous conclusion flowed primarily from the following two errors:

    a. Failing to apply the relevant legal criteria for establishing the lawfulness of an arrest or detention; and

    b. Misapplying the evidentiary principles applicable to certification motions.

Failure to Apply the Relevant Legal Criteria for Establishing the Lawfulness of a Detention

14. Her Honour erred in law and principle by failing to apply or analyze the legal criteria for establishing the lawfulness of an arrest or detention. Her Honour's reasons are irreconcilably inconsistent with the accepted legal principles set out in key Supreme Court of Canada jurisprudence on this issue.

15. Most importantly, Her Honour failed to apply the central two-part test for establishing the lawfulness of an arrest as set out by the Supreme Court of Canada in the leading decision, *R. v. Storrey*, [1990] 1 S.C.R. 241. According to that test, an arrest is only lawful if the relevant police service establishes that *both* of the following criteria are met: (i) the relevant officer must *subjectively* have reasonable and probable grounds for the arrest, and (ii) *objectively*, a reasonable *person placed in the position of the officer* must be able to conclude that there were indeed the requisite grounds. The importance of this test is detailed below.

16. Her Honour also failed to apply, or refer to, the Supreme Court of Canada decision in *R. v. Debot*, [1989] 2 S.C.R. 1140. According to *R. v. Debot* and subsequent case law, the "reasonable and probable grounds" analysis focuses on the officer who ordered the arrest, *not* the officer or officers who carried out the arrest.

17. The principles set out in *R. v. Storrey* and *R. v. Debot* are settled and binding law. According to those key principles, the arrests/detentions at issue will only be lawful if the Respondent can establish that *both* of the following criteria are met: (i) the *commanding officer* (who issued the arrest order) subjectively had reasonable and probable grounds, and (ii) objectively, a reasonable *person placed in the position of the commanding officer* would conclude that there were indeed the requisite grounds.

18. These two cases, which Her Honour failed to apply, are central to the Plaintiff's theory of commonality. The first part of the legal test focuses on what, subjectively, is in the mind of the commanding officer. The commanding officer's testimony would be the key evidence. Therefore, the relevant analysis and evidence is the same for everyone subject to the mass arrest/detention order. If the officer subjectively did not have the requisite grounds, then the arrest was unlawful, and no analysis of objective reasonableness is needed.

19. The analysis for the second part of the test (objective reasonableness) is also common to all persons subject to the order of the commanding officer. This analysis is completed from the perspective of a theoretical person in the place of the commanding officer. It therefore remains focused on the commanding officer and the information he or she received.

20. Based on the tests set out in *R. v. Storrey* and *R. v. Debot*, the lawfulness of the class members' arrests can be determined in common for each Location-Based Subclass. This can be accomplished for each group by assessing whether the commanding officer in

question (typically the head of the Command Centre) had the requisite legal grounds to make the relevant mass arrest/detention order.

21. The Motions Judge erred in law by failing to apply the tests set out in *R. v. Storrey* and *R. v. Debot*. These tests are central to the question of whether the lawfulness of the arrests can be tried in common. Her Honour did not even refer to *R. v. Debot* or the two-part test set out in *R. v. Storrey*. Her Honour's reasons are incorrect in law because they contradict the accepted legal principles set out in that Supreme Court of Canada case law.

Error Regarding the Evidentiary Principles Applicable to Certification Motions

22. The Motions Judge also erred in apparently accepting that "street-level" officers were given the discretion to choose whether or not to follow the orders from the Command Centre to arrest or detain the Location-Based Subclasses. The Plaintiff referred Her Honour to extensive first-hand affidavit evidence indicating that no such "street level" discretion existed at the locations in question. Her Honour disregarded this extensive evidence and did not address it in the reasons. Her Honour's apparent factual conclusion has no basis in the evidence. It is a palpable and overriding factual error.

23. Her Honour's incorrect assumption regarding the alleged discretion of "street level" officers is also an erroneous application of the standard of proof on a motion for certification. Although the Motions Judge correctly noted that it is not the role of the court on a certification motion to "find facts," she appears to have done so nonetheless.

24. The improper finding of facts and the failure to apply *R. v. Storrey* and *R. v. Debot* are both fatal errors in Her Honour's analysis of the false imprisonment common issue. If those cases are properly applied, it becomes apparent that liability for false imprisonment can be determined in common for the Location-Based Subclasses.

Second Fundamental Error: Finding That the Plaintiff's Approach to Subclasses is Impermissible

25. The second fundamental error made by Honourable Motions Judge was in deciding that the Plaintiff's approach to subclasses is "impermissible." In reaching this conclusion, Her Honour:

a. Failed to recognise the important, inextricable links between the subclasses;

b. Incorrectly found that the *CPA* forbids the proposed structure; and

c. Failed to recognise that the proposed structure would further the purposes of the *CPA*.

The Subclasses are Inextricably Linked

26. The Motions Judge incorrectly held that there is "no link" between the subclasses. On the contrary, the subclasses are linked by important common factual and legal questions, including (but not limited to) the following:

a. The Respondent, in its Statement of Defence, attempts to justify the mass arrests/detentions based on the alleged overall level of "widespread criminality and public disorder." Two central common questions for all subclasses are (i) whether these allegations of widespread disorder are true (which is disputed) and (ii) whether those allegations constitute a valid justification for the mass detentions and/or arrests or for the overcrowding of the Detention Centre.

b. Each of the five Location-Based subclasses were detained *en masse* through a relatively new police manoeuvre referred to as "kettling" or "containment." These subclasses are linked by common legal questions relating to this manoeuvre, including (but not limited to) the following: What is the lawful scope, if any, of police powers to surround (and arrest) entire groups of individuals in the context of peaceful protests? What grounds must police have to make such an order? What are the limits

on this power? Are police required to leave an opportunity for egress? Are warnings required? How many? How long can the detention continue?

27. These are questions that will be common to the analysis of whether the mass detention/arrest orders were lawful for each of the Location-Based subclasses. It is not necessary, under the *CPA* or otherwise, that those common questions be formally presented as common issues on the proposed common issues list. The goals of the *CPA* will be furthered by hearing these issues together, whether or not they are itemized on the formal common issues list.

28. Furthermore, the five Location-Based Subclasses are inextricably linked to the Detention Centre subclass. First, the Detention Centre Subclass contains many of the same individuals as the Location-Based Subclasses (i.e. people arrested *en masse* at the five locations and later held in the Detention Centre). Second, the assessment of damages is overlapping because the negative consequences of the wrongful arrests include the subsequent deplorable treatment and overly prolonged detention in the Detention Centre.

29. The subclasses are linked by important common issues, by overlapping proposed class members, and by inextricable damage assessments.

The Proposed Subclass Structure is Permitted by the CPA

30. Her Honour incorrectly held that it is impermissible for "all members of the main class to also belong to a subclass". There is nothing in the *CPA* or the case law that prohibits the subclass structure proposed by the Plaintiff (as long as there are links between the subclasses). It is not uncommon for all members of a class to belong to a subclass.

The Proposed Subclass Structure Furthers the Goals of the CPA

31. The Motions Judge also failed to analyze the Plaintiff's proposed subclass structure in light of the goals of the *CPA*. The use of subclasses in this action allows for the above

common legal and factual questions to be determined in one action, rather than six separate class actions for each subclass, or in over 1000 individual actions. Addressing these issues in a single class action avoids duplication of fact finding and legal analysis and also avoids conflicting court decisions, which promotes judicial economy.

Alternative Class Structure: Convert to Six Class Actions

32. In the alternative, if this Honourable Court decides that the Plaintiff's approach to subclasses is impermissible, the Plaintiff will seek leave to convert this single proposed class action into six separate class actions (one per subclass) to be heard together. The Plaintiff submits that one class action with six subclasses is the preferable procedure. However, she is willing to proceed with six separate class actions that are heard together, in cooperation with other appropriate representative plaintiffs, if necessary.

C. Conclusions Relating to Five-Part Certification Test and Other Errors

33. Many of the erroneous conclusions reached by the Honourable Motions Judge flowed from the above two fundamental errors. However, it is respectfully submitted that the Motions Judge made numerous additional errors, including those listed below.

34. The below is a (non-exhaustive) list of the Motions Judge's key conclusions regarding each part of the five-part test certification under s. 5(1) of the *CPA*.

Cause of Action Criterion – s. 5(1)(a) of the CPA

a. **Negligence re Detention Centre:** Her Honour erred in not approving the negligence cause of action with respect to the Detention Centre. This cause of action is properly pleaded and there is no dispute that police owe a duty of care to those in their custody.

b. **Other Causes of Action:** Her Honour *correctly* held that the remainder of the causes of action that fall within the scope of this appeal were properly pleaded. This includes

false imprisonment, discrimination under the *Human Rights Code*, and claims under the *Canadian Charter of Rights and Freedoms* ("*Charter*").

Identifiable Class Criterion – s. 5(1)(b) of the CPA

c. **Subclass Structure:** As discussed above, Her Honour erred in concluding that the Plaintiff's proposed subclass structure is impermissible.

d. **Breadth of Definition:** Her Honour erred in deciding that the class is overly broad. This error was based on a grave misapprehension of the Plaintiff's theory of commonality. Her Honour incorrectly understood the exclusion of certain charged persons from the proposed class as being central to the Plaintiff's theory of commonality. Instead, the Plaintiff's theory is that commonality flows from the orders of commanding officers to arrest or detain entire groups (see e.g. paragraphs 14 to 21 above) – *not* from the exclusion of certain persons charged with criminal offences from certain subclasses.

e. **Clarity of Definition:** Her Honour erred in deciding that the term "mass detention," used in the subclass definitions, is unclear. On the contrary, that term is expressly defined in the Statement of Claim. It provides a clear and objective basis on which to determine membership in the class (i.e. whether a person was surrounded by a police cordon at the relevant time and location).

f. **Residual and Queen's Park Subclass:** Her Honour raised concerns regarding the Residual and Queen's Park subclasses. Those subclasses have been removed to narrow the issues on appeal. Unlike the five Location-Based Subclass, the former Residual Subclass consisted of persons that were arrested in circumstances other than a mass arrest (e.g. individually). Unlike the five remaining Location-Based Subclass, the Queen's Park Subclass members were not surrounded by a police cordon (i.e. they were never subject to the manoeuvre often referred to as "kettling" or "containment").

Common Issues Criterion – s. 5(1)(c) of the CPA

g. **False Imprisonment of Location-Based Subclasses:** As discussed above, Her Honour erred in not certifying false imprisonment as a common issue for the Location-Based Subclasses.

h. **Disregarding Relevant Case Law:** The Motions Judge erred by disregarding eight cases before Her Honour in which judges certified class actions to assess the lawfulness of police orders to encircle and detain groups. Although those cases are from other jurisdictions, they are directly analogous and the same reasoning would apply in Ontario. In each of the eight cases, classes were certified based on the core common question, also at issue here, of whether or not an arrest or detention of an entire group was lawful.

i. **Detention Centre Issues:** Her Honour *correctly* found that the proposed issues relating to the Detention Centre Subclass could be addressed in common (with the one exception below). These common issues were also conceded by the Respondent.

j. **Negligence re Detention Centre:** Her Honour erred in not considering whether alleged negligent management of the Detention Centre is a valid common issue. This flowed from Her Honour's error in not approving the negligence cause of action with respect to the Detention Centre. The negligent management of the Detention Centre is a valid common issue for the same reasons that Her Honour relied on in approving the other common issues relating to the Detention Centre (see above paragraph).

k. **Aggregate Damages:** Her Honour erred by not certifying the assessment of aggregate damages as a common issue. This error was based on an incorrect legal assumption that each person must have suffered the same damages. The Plaintiff proposed a category and/or formula-based approach to assess damages globally and in a way that appropriately addresses differences in the treatment of class members.

This approach is similar to global damages assessments approved in other mass arrest class action precedents that were before Her Honour.

l. **Merits-Based Analysis:** Her Honour erred in law by conducting a preliminary merits-based analysis of the action, including an extensive review of the Respondent's evidence of protestor misconduct. This review could only have been pertinent to whether or not the group arrests were justified (which is clearly an issue for the common issues trial) rather than whether or not the lawfulness of the mass arrests can be addressed in common.

m. **Irrelevant Evidence:** Her Honour erred in relying heavily on a number of irrelevant and highly prejudicial videos depicting a brief but intense episode of vandalism of police cars and public property that occurred on the afternoon of June 26, 2010. The videos are impressionistically shocking (as are other publicly available videos of *police* misconduct) but they are not relevant. *None* of the videos relate to the specific circumstances present at the actual mass arrest/detention locations at issue in this claim. None are relevant to the certification test.

n. **Other Common Issues:** As a result of Her Honour's conclusions with respect the class definition and the proposed false imprisonment common issue, the Motions Judge did not find it necessary to directly address the remainder of the proposed common issues that are the subject of this appeal.

Preferable Procedure Criterion – s. 5(1)(d) of the CPA

o. **Overall Preferable Procedure Conclusion:** Her Honour erred in concluding that the proposed class action was not the preferable procedure. This error flowed from Her Honour's erroneous analysis regarding the common issues and the class definition, as detailed above.

p. **G20 Reports & Reviews:** Justice Horkins erred in finding that the various previous reviews and reports created by various public authorities regarding the G20 summit are sufficient to achieve behaviour modification. None of these are binding, none provide compensation to those harmed, and none comprehensively assess what occurred. Most are narrowly focused self-assessments completed by a police service regarding its own actions.

q. **Individual Actions:** Justice Horkins erred in relying on the existence of approximately 40 individual legal actions as support for the conclusion that a class action is not needed. Over one thousand individual legal actions would be required to address the claims of the proposed class members. This would waste judicial resources and would likely lead to conflicting judicial decisions. It would also limit access to justice – many proposed class members do not have the resources to commence individual actions or to see their cases through to a successful conclusion.

Representative Plaintiff and Litigation Plan Criterion – s. 5(1)(e) of the CPA

r. **Litigation Plan:** Her Honour erred in concluding that the Plaintiff's litigation plan "suffers from the same flaws as the class proceeding as a whole." This conclusion directly flowed from and was dependent on her erroneous analysis and conclusions with respect to the common issues and class definition, as detailed above.

35. The Plaintiff also relies on such further and other grounds as counsel may advise and this Court may deem just.

D. Grounds Regarding Order as to Costs

36. The grounds for appeal with respect to the costs order are as follows:

a. The Law Foundation is a party for the purpose of an appeal in relation to costs under Rule 12.04(3) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194;

b. The Plaintiff seeks to join the costs appeal with the appeal as of right under Rule 61.03(7);

c. The Motions Judge erred in principle in concluding that the certification motion did not raise a novel point of law;

d. The Motions Judge erred in principle in concluding that the Toronto Police's conduct during the G20 Summit is not a relevant consideration in the context of awarding costs of the Plaintiff's certification motion;

e. Such further and other grounds as counsel may advise and this Court may deem just.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

37. With respect to the appeal of the judgement dismissing the motion for certification, section 30(1) of the *CPA*, which provides a right to appeal an order dismissing a motion to certify a proceeding as a class proceeding without first obtaining leave to appeal;

38. With respect to the appeal of the judgement regarding costs:

a. Section 30(1) of the *CPA;*

b. Rule 61.03(7)(8), *Rules of Civil Procedure*, RRO 1990, Reg 194;

c. Section 133(b), *Courts of Justice Act*, RSO 1990, c. C.43; and

d. leave is required to appeal this judgement regarding costs.

39. The appellant requests that this appeal be heard at Toronto.

November 15, 2013

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SCHEDULE A – PROPOSED CLASS DEFINITION

Date: November 15, 2013

A. The Proposed Class

1. The proposed class members for this action include those individuals who were:

   (a) Arrested or subjected to mass detention 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");

   (b) Arrested or subjected to mass detention 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");

   (c) Arrested or subjected to mass detention 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");

   (d) Arrested or subjected to mass detention 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");

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

   (f) Arrested and imprisoned in the Eastern Avenue Detention Centre beginning on June 26 or 27, 2010 (the "Detention Centre Subclass").

B. The Proposed Subclasses

2. This action seeks particular relief on behalf of the following proposed subclasses (as defined above): the (1) Queen and Spadina Subclass, (2) Esplanade Subclass, (3) Eastern Avenue Subclass, (4) Parkdale Subclass, (5) Gymnasium Subclass, and (6) Detention Centre Subclass.

C. Additional Information Relating to the Class and Subclass Definition

3. The first five subclasses relate to the location of a mass arrest or detention, and therefore will be referred to as the "Location-Based Subclasses." These five subclasses are mutually exclusive.

4. The sixth subclass, the Detention Centre Subclass, includes members of the Location-Based Subclasses who were imprisoned in the Detention Centre after their arrest at a certain location. The Detention Centre Subclass also includes individuals who are not contained in the Location-Based Subclasses because, for example, they were arrested at other locations before being imprisoned at the Detention Centre.

5. The Plaintiff asserts that those "subjected to mass detention" includes those subjected to the police tactic known as "kettling," whereby police detain a large group of people *en masse* by forming a cordon around them and preventing persons from leaving the group, often for an extended period of time.

SCHEDULE B – PROPOSED COMMON ISSUES LIST

Date: November 15, 2013

The six location-based mass-detention and mass-arrest subclasses:

(i.e. Queen and Spadina, Esplanade, Eastern Avenue, Parkdale, Queen's Park, and Gymnasium subclasses)

1. 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*?

2. Did the Defendant 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?

Detention Centre Subclass:

3. 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*?

4. Did the Defendant owe a duty of care to the Detention Centre Subclass members, and if yes, did the conditions and/or treatment of detainees in the Eastern Avenue Detention Centre amount to a breach of that duty of care?

5. Did the Defendant 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)?

6. Did the Defendant 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:

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

Remedies and damages:

8. If the Defendant 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?

9. Was the Defendant guilty of conduct that justifies an award of punitive damages?

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

11. Are orders requiring the Defendant to expunge certain records warranted?

SCHEDULE C – DETAILS RE ASPECTS OF CLAIM NOT SUBJECT TO APPEAL

Date: November 15, 2013

Aspects of Claim Not Subject to Appeal

1. To narrow the issues on appeal, the Plaintiff is only appealing with respect to certain aspects of the proposed action. In particular, the plaintiff is *not* appealing with respect to the following:

2. **Canada, Ontario, and Peel:** The Plaintiff is in the process of obtaining a consent order formally dismissing the action as against the Attorney General of Canada ("Canada"), Her Majesty The Queen in right of Ontario ("Ontario"), and the Regional Municipality of Peel Police Services Board ("Peel").

3. **Residual and Queen's Park Subclasses:** The Plaintiff is no longer proposing the Residual and Queen's Park Subclasses as separate subclasses.[1] The class action therefore no longer challenges the initial arrests of these individuals. Unlike the five Location-Based Subclasses, the former Residual Subclass consisted of persons that were arrested in circumstances other than a mass arrest (e.g. individually). Unlike the five Location-Based Subclasses, the Queen's Park Subclass members were not surrounded by a police cordon (i.e. they were never subject to the manoeuvre often referred to as "kettling" or "containment").

4. **"Systemic" common issues:** The Plaintiff is no longer proposing "systemic" common issues (see former common issues 1 and 2). The negligence common issue has been narrowed to now only apply to Detention Centre.

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[1] Many persons who were members of the Residual and Queen's Park Subclasses are still included in the overall class because they were taken to the Detention Centre and are therefore part of the Detention Centre Subclass.

5. **Former common issues 4 to 7 (ancillary torts and *Charter* breaches):** The Plaintiff is no longer proposing former common issues 4 to 7. These issues related to additional, ancillary torts and *Charter* breaches alleged with respect to the Location-Based Subclasses. Although the Plaintiff is not seeking damages for the *Charter* breaches cited in common issues 4 to 7, the Plaintiff continues to seek declarations regarding the lawfulness of certain police actions and/or tactics during the G20 Summit. These could include, for example, a declaration that certain police actions or tactics were inconsistent with the guarantee of freedom of expression under s. 2 of the *Charter*.

Class Definition – Revisions to Reflect Removal of Subclasses

6. The proposed class definition has been revised to reflect the Plaintiff's decision not to appeal with respect to the Residual and the Queen's Park Subclasses.

7. The revisions do not effect the substance of the definition (except for the removal of those two subclasses). In particular:

   a. The Plaintiff continues to propose a number of location-based subclasses along with a Detention Centre Subclass.

   b. The criteria for membership in the subclasses remains exactly the same.

   c. It remains the case that all members of the overall class are also a member of a subclass.

8. The revisions to the proposed class definition are as follows:

   a. The Residual and Queen's Park Subclasses have been removed from the proposed list of subclasses.

   b. The definition of the overall class has been revised to account for the fact that some individuals in the former Residual and Queen's Park Subclasses are no longer in the

overall class. The revised overall class definition simply defines the class as the individuals arrested at the five mass arrest/detention locations and those held in the Detention Centre (i.e. the subclasses).

c. The above two revisions require a reordering of the paragraphs and a revision to the paragraphs explaining the overlap between the subclasses (see paragraphs 3 and 4 in Schedule "A").

Common Issues List – Revisions to Reflect Removal of Common Issues

9. The proposed common issues list has been revised to reflect the narrowed common issues for appeal. Common issues 2 and 4-7 have been removed. Common issue 1 (re: negligence) has been narrowed to apply only to the Detention Centre.

10. The wording of the remaining proposed common issues is unchanged (except for replacing the plural "Defendants" with the singular "Defendant").

11. The former common issues that have been removed are as follows (as worded in the common issues list attached to the original Notice of Motion):

Re: Systemic legal breaches

1. In their planning, management, and/or direction of G20 Summit security operations, did the Defendants systemically breach:
   a. A duty of care owed to the class members; and/or
   b. Their constitutional duties under the Charter?
2. Did the Defendant's' officers abuse their office by making decisions or giving orders that they knew were unlawful (or were reckless as to their unlawfulness), and knew would result in harm to the class members?

Re mass-detention and mass-arrest subclasses:

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)?

Statement of Claim

12. The Plaintiff's Appeal Book and Compendium will contain a draft proposed 3rd Fresh as Amended Statement of Claim to address the following changes:

a. Adding Thomas Howard Taylor as an additional proposed representative plaintiff;

b. Releasing Canada, Ontario, and Peel Police as Defendants;

c. Removing the "systemic" common issues and former common issues 4-7 from the common issues list; and

d. Removing the "Residual" and "Queen's Park" subclasses from the proposed class definition.

SHERRY GOOD
Plaintiff

v.

TORONTO POLICE SERVICES BOARD et al.
Defendants

Divisional Court File No. 288/13

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Proceeding commenced at Toronto

FRESH AS AMENDED NOTICE OF APPEAL
(Appeal of Decision to Dismiss Motion for Certification)

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