CITATION: Sherry Good v. Toronto Police Services Board 2014 ONSC 4583
DIVISIONAL COURT FILE NO.: 288/13
DATE: 20140806

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

ASTON, NORDHEMER & LINHARES de SOUSA JJ.

BETWEEN:	
SHERRY GOOD Appellant (Plaintiff)	*M. Klippenstein, K. Elson, K. Ardal and E. Gillespie*, for the 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 Respondent (Defendants)	*K. McGivney, C. Woodin & D. Hornich*, for the respondent *S. Chaudhury & A. Bolieiro*, for the Law Foundation of Ontario
	HEARD at Toronto: June 23 & 24, 2014

NORDHEIMER J.:

[1] This is an appeal from the decision of Horkins J. refusing to certify this proceeding as a class action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. There is also an application for leave to appeal the motion judge's award of costs in favour of the respondent.

Background

[2] The action arises out of the G20 summit that was held in Toronto on June 26 and 27, 2010. This meeting of world leaders drew large numbers of people to the city who wished to

protest or voice out their concerns regarding a wide variety of issues. It was well known, based on prior G20 summits, that a large number of protests would occur. It was also known that some of the protests might get out of control or become violent. Indeed, it was known that there would be some individuals present who would use the summit, and the occasion of the protests, to cause trouble, including to engage in acts of vandalism. One of the main concerns in this regard was with respect to an established group known as the "Black Bloc" who had a history of using such events to infiltrate peaceful protests and then take steps to transform an otherwise peaceful protest into a violent one.

[3] There is no issue that conduct of that type occurred during the course of the G20 summit in Toronto. There were a number of instances of apparently peaceful protests suddenly becoming violent. In some instances, smaller groups would split off from larger groups and move in different directions in an apparent effort to confuse the police and splinter their response. Some individuals engaged in acts of vandalism including breaking store windows and, in a couple of instances, trashing police vehicles.

[4] In recognition of these known concerns, there were a large number of police officers from different police services deployed to provide security, including the R.C.M.P. and the O.P.P. among others. Different police services had different responsibilities. The largest task, however, fell to the Toronto Police Service. It was the Toronto Police Service that was principally responsible for policing the city, both in terms of the G20 summit as well as all of the other normal daily policing requirements to ensure the safety and security of the citizens of Toronto, including all of the visitors to the city.

[5] The command structure for the policing of the G20 summit began with the Major Incident Command Centre ("MICC"). The MICC was located in the headquarters building of the Toronto Police Service located at 40 College Street. The MICC was headed by two Toronto Police Service Superintendents who alternated in that role during the course of the G20 weekend.

[6] As I have already mentioned, during the course of the G20 weekend, there were many demonstrations that occurred at different times and in different areas of the city (albeit all in the general downtown core). These demonstrations involved varying numbers of people. Some

demonstrations were smaller, some were larger. In response to these demonstrations, and the unlawful conduct that sometimes sprung out of them, the police took certain actions that form the basis for claims sought to be advanced for five of the six groups of individuals in this proposed class action. In these five instances, the police encircled or "boxed in" a group of persons and thus detained them. It is asserted by the appellant that this occurred without any regard for the personal circumstances or conduct of the individuals who wound up being detained. Those five instances can be summarized as follows.

[7] The Esplanade: On the evening of Saturday, June 26, 2010, police encircled a large group of individuals who were assembled outside the Hotel Novotel on the Esplanade. It is alleged that the police did not give any warning or explanation prior to this action. The individuals encircled were not allowed to leave. Over a number of hours, the police arrested all present without regard to individual circumstances. The arrestees were then taken to a central Detention Centre that was located on Eastern Avenue. This Detention Centre had been specially constructed for the G20 event. The Detention Centre forms the basis for the sixth group claim that I will describe in greater detail below.

[8] Eastern Avenue: In the early hours of Sunday June 27, 2010, a group of demonstrators was gathered outside the Detention Centre on Eastern Avenue to protest the arbitrary arrests conducted by the police earlier that day. The police ordered the crowd to disperse. It is alleged that the police gave this crowd only a short opportunity to leave before they proceeded to surround approximately thirty individuals. All of these individuals were arrested. They were then taken to the Detention Centre.

[9] University of Toronto Gymnasium: During the G20 weekend, demonstrators who were visiting from out-of-town (largely from Québec) had been allowed to sleep in a University of Toronto gymnasium. At approximately 9:00 a.m. on Sunday, June 27, 2010, the police attended at the gymnasium. It is alleged that the police entered the gymnasium with weapons in hand and blocked all of the exits. The police then proceeded to arrest all 113 individuals who were present. These persons were once again taken to the Detention Centre.

[10] Parkdale: Later, on the afternoon of Sunday, June 27, 2010, a large number of police encircled an entire crowd of individuals assembled at the corner of Queen Street West and Noble Street in the Parkdale neighbourhood. It is again alleged that the police did not provide any warning of their intended actions nor did they provide any opportunity for the individuals to disperse. The police maintained this cordon for approximately two hours. The individuals involved were eventually permitted to leave but only after being subjected to a mandatory search of their persons.

[11] Queen and Spadina: Later in the day on the same Sunday, the police again encircled an entire crowd of individuals. This time these individuals were assembled at the corner of Queen Street West and Spadina Avenue. Once again, it is alleged that the police did not provide any warning of their actions. The police did not provide any opportunity for the individuals to disperse nor did they provide any explanation for this mass detention. Unfortunately, the weather turned from what had been a typical warm summer day into a cold downpour. Despite the changed weather conditions, the individuals who were being detained were held for approximately four hours on the street. It was only after this time had passed, and apparently after the direct intervention of the Chief of Police, that this mass detention was lifted and the individuals involved were allowed to leave.

[12] Those are the basic facts regarding what are referred to as the "five location based subclasses" on whose behalf it is sought to obtain certification of this action as a class action. There is a sixth proposed class, however. That sixth class consists of those person who were held at the Eastern Avenue Detention Centre. It is alleged that persons held at the Detention Centre were not provided with the opportunity to consult counsel. It is also alleged that these persons were denied adequate food and water, denied proper space to sleep and denied warm and dry clothing and/or blankets. It is further alleged that the persons held were subjected to verbal abuse and threats. The situation at the Detention Centre was described both by officers and by detainees as "chaotic", among other terms.

The requirements for certification

[13] Before turning to the five requirements for certification of a class action under the *Class Proceedings Act, 1992*, I want to address a preliminary matter. The proposed class action, as presented on this appeal, was markedly different from the proposed class action that was considered by the motion judge. This is a common feature of a great many class proceedings. Unlike almost any other type of action, it has become almost routine for plaintiffs in class actions to reformulate their proceeding if they are unsuccessful in obtaining certification in the first instance. Plaintiffs will add or remove defendants. They will add, delete or otherwise amend common issues. They will alter class definitions. They will amend and re-amend the statement of claim. This "moving target" approach does not just occur once. It can occur many times and at all of the different levels of the appellate process, including at the Court of Appeal, if the goal of certification continues to elude the representative plaintiff. In fact, the common issues and the class definition are often amended more than once at each level.

[14] It is entirely unclear why this peculiar approach is permitted in class actions. Normally, if a party has failed to plead a material element of their claim, the action is dismissed and the party is required to start over. That is not the approach taken in class proceedings, however, as I have already set out. One can point to many certification decisions in this Province where this phenomenon is demonstrated. That said, it is nonetheless an approach that has been the subject of criticism. For example, in *Keatley Surveying Ltd. v. Teranet Inc.* (2014), 119 O.R. (3d) 497 (Div. Ct.) Sachs J. observed, at para. 39:

> Nothing in these reasons should be taken as endorsing the practice of recasting certification motions on appeal. This practice clearly undermines the way class action certification motions should proceed through the courts. Using appellate courts to hear matters *de novo* both deprives the courts of the expertise of the judges who have been assigned to hear these cases at first instance and requires three judges to determine issues that could and should have been heard by one judge.

[15] Nevertheless, this practice is well established and has been implicitly (if not expressly) countenanced by the Court of Appeal.[1] Given that reality, it is not open to this court to refuse to

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[1] see, for example, *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.)

consider the case as it is presented before us as opposed to considering solely the case that was presented to the motion judge especially where, as here, the respondent does not suggest that it has suffered incurable prejudice from the revisions. I mention all of this only to make clear that we are dealing with a different case than the case that was before the motion judge. The fact that my conclusions may differ from hers must be considered with that reality firmly in mind.

[16] I will mention one other effect of this unusual process by which appeals are taken in class proceedings. The fact that the representative plaintiff can significantly alter almost every facet of the proposed class proceeding on appeal makes it somewhat difficult to adhere to a normal standard of review by an appellate court. I recognize, and accept, that the decisions of motion judges on the issue of certification are entitled to deference. Appellate courts should not interfere with such decisions absent an error in principle or a palpable and overriding error of fact or of mixed fact and law.[2] However, it does seem somewhat unfair, if not artificial, to decide, for example, that the motion judge made an error in principle in reaching her conclusion when the nature of the claim, and the foundation for it, has been entirely rewritten subsequent to that decision. Indeed, if we were to have confined our review to the record on the original certification motion, we might well have deferred to the decision of the motion judge and dismissed the appeal.

Section 5(1)(a) – cause of action

[17] Unlike the situation before the motion judge, there is now no dispute that the amended statement of claim discloses proper causes of action. Those causes of action that the motion judge found were not made out in the original claim have been dropped as have the three defendants that went along with them. Only the respondent remains as a defendant in this action. This requirement for certification is therefore made out.

Section 5(1)(b) – identifiable class

[18] The proposed class definitions are set out in Appendix A to these reasons. With the exception of the Gymnasium subclass, the class definitions for the location based subclasses are

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[2] *Fulawka v. Bank of Nova Scotia* (2012), 111 O.R. (3d) 346 (C.A.) at para. 76.

virtually identical. For example, the Queen and Spadina subclass is defined as those persons who were:

> 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.

[19] The exception in the Gymnasium subclass is that the words "and eventually released without charge" do not appear. That is because, in the case of the Gymnasium subclass, all of the persons were arrested and charged. In the other subclasses, some of the persons affected were charged and others were not. I will return to the effect of these words in the other four subclasses later.

[20] The respondent criticizes the class definition first on the basis that, if the subclasses are defined as submitted by the appellant, it will be unclear whether a person is or is not in the class. The respondent says that the use of the words "mass detention" and "in the vicinity" are vague and do not allow for a person to know with certainty whether he or she is part of the class or not.

[21] This criticism found favour, at least in part, with the motion judge who said in her reasons, at para. 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?

[22] I do not share the view that the definition of these subclasses is vague or unclear. With respect, the expression "mass detention" is an entirely understandable one in normal English parlance. It is also qualified by the term "police cordon". I have trouble with the concept that any individual would have difficulty knowing whether they were the subject of a detention of a large group of people by being surrounded or otherwise impeded in their movement by the presence of the police.[3] I do not accept that the use of the words "in the vicinity" adds any element of confusion. Those words simply differentiate one subclass from another in terms of

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[3] I note that one definition of the word "mass" included in the Oxford English Dictionary is "a large number of people or objects crowded together" – see *The Oxford English Dictionary, s.v.* "mass"

the geographic area where the mass detention took place. Again, a person, if they were part of a mass detention by the police, should not have any difficulty in determining whether they were at Queen and Spadina or on Eastern Avenue when they were detained.

[23] Another criticism advanced by the respondent in terms of the class definition is that the exclusion of persons who were charged is an arbitrary one and thus invalidates the class definition. The respondent points to cases such as *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 where McLachlin C.J.C., in discussing the requirements for an identifiable class, said, at para. 21:

> The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue.

[24] The respondent says that the core premise of the appellant's claim is that the detention of the class members was the result of one command order unrelated to the personal circumstances of each class member. The appellant says that such a command order was unlawful and thus the detentions were unlawful. If that premise is accepted, then the respondent says that people who were charged are as entitled to be in the class as are persons who were not charged since whether the person was ultimately charged does not determine if they were unlawfully detained.

[25] I agree that, on the appellant's view of what happened respecting these arrests, whether a person was or was not charged does not change the unlawfulness of the detention order and therefore a person who was charged could advance the same claim as a person who was not. That reality does not mean, however, that the exclusion of persons who were charged is arbitrary. Rather, the exclusion of those persons is in response to the respondent's position that the fact that a person was charged may provide some *ex post facto* justification for the detention and arrest. It thus avoids a complication in the prosecution of the claims and increases the manageability of the proceeding.

[26] I do not see any reason why a representative plaintiff should not be permitted to model the class definition to streamline the proceeding and eliminate issues that might otherwise be raised by the defence. For example, in a proposed class action arising from an alleged faulty medical device or drug, if there was some evidence that a subset of persons who received the device or took the drug might have suffered the same consequences regardless of the effect of the device or drug, I do not see any reason why the representative plaintiff could not choose to exclude those persons from the class in order to avoid those complications in attempting to establish their case. Pragmatism does not equate to arbitrariness.

[27] The flaw that the motion judge found with the class definition was not that it was arbitrary but, rather, that it was overbroad. She found that the exclusion of those persons who were charged did not solve that problem with the class definition. In particular, she said, at para. 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.

She added at para. 175:

> Finally, excluding persons who were charged with offences does not exclude those who engaged in unlawful conduct within the proposed class.

[28] With respect, those observations fail to take into account the fundamental foundation for the claim that is being advanced by the appellant. Central to the appellant's claim is that the persons in the subclasses were detained based upon a command order that did not take into account whether any of those persons had or had not committed an offence or even whether there were reasonable grounds to suspect that any of those persons had committed an offence. Rather, the persons in the subclasses were detained simply because they were part of a large group who had congregated in a particular area of the city.

[29] As I shall discuss further when it comes to the common issues requirement, if the appellant's core contention is correct, it is of no consequence whether any member of the class did, in fact, commit a criminal offence or a breach of the peace. The police cannot justify the

detention of a person based on information that they either did not have, or which they did not rely upon, in ordering a person to be detained.

[30] Finally, on the identifiable class requirement, there is the issue of the subclasses themselves. The respondent asserts that the subclasses are prohibited by s. 5(2) of the *Class Proceedings Act, 1992*. On this point, the motion judge said, at para. 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.

[31] Both the motion judge and the respondent refer to s. 5(2) as providing for the "creation of subclasses". In fact, s. 5(2) does not do that. Section 5(2) reads:

> (2) 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,
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> (a) would fairly and adequately represent the interests of the subclass;
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> (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
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> (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

[32] Rather than creating subclasses, all that s. 5(2) does is stipulate that where there is a subclass of members who have claims that are not shared by all class members and the court is of the view that the subclass needs to be separately represented, then the court shall not certify the proceeding unless that separate representation is provided. There is nothing in s. 5(2) that either creates subclasses or that prohibits multiple subclasses within a class.

[33] On this point, the respondent refers to *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) where Winkler J. said, at para. 45:

> 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.

[34] I make two observations with respect to that reference from *Caputo*. First, the issue in *Caputo* was very much different than is the one here. In *Caputo*, there were three defendants who manufactured a similar product. The nature of the claims that the plaintiffs set up against these three defendants inevitably raised distinct issues regarding the conduct of each of those defendants. It is not surprising that, in those circumstances, the motion judge characterized the claims against the different defendants as lacking "the essential element of commonality". Second, there is nothing in this quoted passage from *Caputo* that suggests that a representative plaintiff cannot combine a number of potential classes into a single proceeding. In other words, *Caputo* does not stand for the proposition that the combination of classes in a single proceeding is prohibited. Rather, the failing in *Caputo* was the finding that the attempt to do so in that case resulted in an action that "vastly overreaches" and "is void of the essential element of commonality".

[35] In this case, there is a single defendant and a single course of conduct alleged. Each of the proposed subclasses (save for the Detention Centre subclass) have the commonality of an alleged command order being made ordering the detention of the class members without regard for the individual characteristics or conduct of each class member. Indeed, it is alleged that one command officer, Superintendent Fenton, issued the command order in at least three of the five location based subclasses.[4]

[36] Further, allowing multiple subclasses to be joined in the same class proceeding, where they share a central common issue, facilitates two of the recognized goals of class proceedings:

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[4] It is not clear, on the material to which the appellant has had access to date, who issued the command order for the other two location based classes.

judicial economy and improving access to justice. It is also consistent with employing a generous interpretation of class action legislation. As McLachlin C.J.C. said in *Hollick*, at para. 15:

> In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

and continuing at para. 16:

> It is particularly important to keep this principle in mind at the certification stage.

[37] In essence, in this case, we have a broad class of persons who were allegedly arbitrarily detained in each instance by the police through the use of a single sweeping order. That broad class is then divided into subclasses distinguished only in each specific instance by the geographic location where the particular mass detention occurred.[5] Those divisions do not change the fact that there is nonetheless a central commonality linking each of the subclasses.

[38] Lastly, on this point, even if the respondent was correct in its interpretation of the effect of *Caputo*, all that would result would be the creation of five separate class actions – one for each subclass – each with the same single defendant. If that were to be the result, there would be strong reasons for those five separate class actions to be tried together including for reasons of judicial economy, similarity of issues, common evidence and others. The end result, in practical terms, would be the same.

[39] I am satisfied therefore that the appellant has established that there is an identifiable class of two or more persons and therefore the requirement of s. 5(1)(b) is met for the location based subclasses.

[40] I reach a slightly different conclusion with respect to the Detention Centre subclass. While I am satisfied that the Detention Centre subclass is a proper class by itself, it does not share the same commonality of issues that the location-based subclasses do. In fact, the issues involving the Detention Centre subclass raise very distinct and different issues than the location

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[5] For these purposes, the issue of whether the class member was charged or not charged is not relevant.

based subclasses. While I will deal with that point in more detail when I come to consider the common issues, there is no overarching commonality that legitimately links the Detention Centre subclass with the location based subclasses. The evidence in support of the claim of the former is entirely different from the evidence in support of the claim of the latter. The mere fact that some members of the location based subclasses were taken to the Detention Centre is insufficient to establish a common link since the nature of the claim arising from the Detention Centre subclass is entirely independent of whether the person was lawfully or unlawfully detained in the first instance.

[41] The Detention Centre subclass is clearly a stand-alone class. There may, or may not, be good and valid reasons why the claim of the Detention Centre class should be tried together with the claims of the location based subclasses. However, since that issue was not directly addressed before this court, I do not consider it appropriate to determine whether an order to that effect should be made. That is an issue that can be addressed before the class action judge assigned to these actions.

Section 5(1)(c) – common issues

[42] The proposed common issues are set out in Appendix B to these reasons. In my view, not all of the common issues are, in fact, common. In addition, the record does not provide the necessary evidence to support some of the common issues. That said, I am nonetheless satisfied that there are common issues in this case that are suitable for determination in a class context.

[43] The principles applicable to the common issue requirement were helpfully summarized by Strathy J. in *Singer v. Schering-Plough Canada Inc.* [2010] O.J. No. 113 (S.C.J.).[6] They are:

1. Whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis;

2. The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution;

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[6] This summary was quoted with approval by Winkler C.J.O. in *Fulawka v. Bank of Nova Scotia* (2012), 111 O.R. (3d) 346 (C.A.) at para. 81

3. There must be a basis in the evidence before the court to establish the existence of a common issue;

4. In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues;

5. The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;

6. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;

7. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class, that is, "success for one member must mean success for all";

8. A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

9. Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;

10. Common issues should not be framed in overly broad terms.

[44] The first proposed common issue is a common issue. It applies to all members of the class who were detained in that it asks the core question: were the members of the class arbitrarily detained and/or arrested in violation of their rights at common law or under s. 9 of the *Canadian Charter of Rights and Freedoms*? The answer to that question will significantly advance the claim of each member of the class. Indeed, on the record before this court, it is arguable that the answer to that question will be both the beginning and the end of the liability analysis for the entire class.

[45] It should also be remembered, on this point, that in order for an issue to be common, it does not have to resolve all issues that may exist in terms of establishing liability and damages. It need only advance the claim of each class member to a sufficient extent that it warrants being done on a collective, as opposed to individual, basis. The claim here is, in essence, the equivalent of a claim of a systemic wrong. As noted recently in *Dennis v. Ontario Lottery and*

Gaming Corp. (2013), 116 O.R. (3d) 321 (C.A.) the case law offers many examples where class actions have been certified to determine claims where all class members are exposed to the same conduct of the defendant. The observation of Sharpe J.A., at para. 53, is equally applicable to the case here:

> When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.

[46] With respect to this common issue, it is important to keep in mind the test for whether the police have the right to detain someone. That test is set out in the Supreme Court of Canada's decision in *R. v. Mann*, [2004] 3 S.C.R. 59 where Iacobucci J. said, at para. 27:

> The Court of Appeal for Ontario helpfully added a further gloss to this second stage of the *Waterfield* test in *R. v. Simpson* (1993), 12 O.R. (3d) 182, at p. 200, by holding that investigative detentions are only justified at common law "if the detaining officer has some 'articulable cause' for the detention", a concept borrowed from U.S. jurisprudence. Articulable cause was defined by Doherty J.A., at p. 202, as:
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> ... a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.
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> Articulable cause, while clearly a threshold somewhat lower than the reasonable and probable grounds required for lawful arrest (*Simpson, supra*, at p. 203), is likewise both an objective and subjective standard (*R. v. Storrey*, [1990] 1 S.C.R. 241, at p. 250; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 29).

[47] A central feature of the above test is the requirement that the officer, who gives the order to detain a person, must have reasonable cause to suspect that the person "is criminally implicated in the activity under investigation". In this case, the allegation is that the command order was given without regard to whether any particular individual swept up in the mass detention was or was not implicated in the unlawful activity with which the police were concerned. In other words, the allegation is that the police engaged in an approach of detaining

people first and then later deciding whether any of those persons were actually engaged in criminal activity.

[48] This is a very important aspect of the first common issue. It is apparent that much time and emphasis was placed by the respondent before the motion judge on the activities of the Black Bloc. Indeed, the motion judge made some extensive reference to the Black Bloc and the activities in which it was believed that they had engaged during the course of the G20 summit. However, none of that activity is relevant to the first common issue because it is alleged that the command order was not given with the reasonable belief that all of the persons to be detained were members of the Black Bloc. To the contrary, as I have said, it is alleged that the command order was given without regard to the specific conduct of the persons being detained.

[49] On this point, it is important to remember that the police cannot sweep up scores of people just in the hope that one of the persons captured is a person who they believe is engaged in criminal activity. The police are only lawfully able to detain those persons who meet the *Mann* test, at para. 34:

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence.

The same is true in terms of persons who are arrested except that the test for an arrest is even higher than it is for a detention. As already pointed out, the two tests share both an objective and a subjective element.

[50] The respondent submits that there is insufficient evidence to support the first common issue and consequently the appellant has failed the requirement to show "some evidence" in support of the common issues. The respondent again points to the earlier activities of the Black Bloc and other information that the police had that is said to demonstrate that the police had reasonable grounds to believe that persons within the group that was detained were engaged, or had been engaged, in criminal activity.

[51] In my view, in advancing this attack on the common issues, the respondent misconceives the "some evidence" requirement. The requirement comes from *Hollick* where McLachlin C.J.C. said, at para. 25:

> In my view, 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.

[52] It is important to put this evidentiary burden in its proper perspective. First, it is not a heavy burden and, second, it is not intended to turn the certification hearing into a test of the merits of the proposed class claims. On that latter point, since defendants in class actions seem to routinely file evidentiary records responding to the plaintiff's assertions of fact, it becomes very easy for the certification motion to evolve into a battle over the merits with the result that, rather than focussing on whether the class proceeding should be certified, the focus shifts to whether the action will succeed. Indeed, I fear that is what happened in this certification motion.

[53] It is clear that the certification motion is not intended to address the merits of the representative plaintiff's claim or be a predictor of its likely success. This has been the subject of repeated pronouncements from various courts. In *Hollick*, McLachlin C.J.C., at para. 25, said simply that the representative plaintiff must show "some basis in fact" for the certification requirements. The Chief Justice had earlier, at para. 16, made it clear that the certification motion is "decidedly not meant to be a test of the merits of the action".

[54] This important distinction was recently reinforced in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R 477. In that decision, Rothstein J. referred to the above comments from *Hollick* and then said, at para. 100:

> The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements.

[55] The low threshold for the "some basis in fact" requirement resting on the representative plaintiff was reiterated by the rejection in *Pro-Sys* that a balance of probabilities standard applied to the level of the evidentiary requirement. Rothstein J. was emphatic that the certification stage

was not the time to resolve conflicts of fact nor was it intended to assess the merits of the claim. He summarized these points at para. 102, where he said:

> The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

[56] In addressing the common issues requirement, the motion judge made a number of comments that, in my view, demonstrate that, rather than deciding there was some basis in fact for the common issues, the motion judge instead weighed the appellant's evidence against the respondent's evidence as to the merits of the claims and concluded that the respondent's evidence was to be preferred. For example, the motion judge said in her reasons:

> 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. (para. 206)
>
> 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. (para. 209)
>
> 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. (para. 213)
>
> 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. (para. 223)
>
> 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. (para. 235)

[57] The motion judge concluded her analysis of the factual assertions made by the parties at para. 238 where she said:

> 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."

[58] The motion judge's recitation of the evidence demonstrates to me that, while she may not have engaged in a process of finding facts, she did engage in an assessment of whose evidence was more likely to "carry the day" in the end result. For example, in para. 235 the motion judge said that it was "not possible to determine whether the arrests of all present were unlawful". With respect, that is not the point. It is not the function of the motion judge to decide whether the appellant's claim will ultimately succeed. I reiterate, on this point, what Rothstein J. said in *Pro-Sys* at para. 105:

> I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial.

[59] It was not therefore relevant whether the evidence at the certification stage could prove that all of the arrests were unlawful. Rather, what was relevant was whether there was some evidence that could suggest the possibility of that result. In that regard, the appellant filed affidavits from persons involved who attested to the arbitrary nature of the detentions and arrests supplemented by comments from various police officers that they had no discretion not to detain

and arrest. The appellant also pointed to various police notes recording the issuance of mass arrest orders, instructions that persons detained were not to be allowed to leave before being arrested and that the intent was to detain and arrest not to disperse the crowd.

[60] As I have already pointed out, the fact that defendants in class actions engage in delivering large evidentiary records in response to certification motions inevitably raises the spectre that an assessment of the merits of the claim will occur, whether intentionally or unintentionally. In doing so, defendants either misunderstand, or fail to appreciate, the heavy burden they are undertaking when they choose to travel down that road. It is not enough for a defendant to show that there is "another side to the story". Rather, if a defendant chooses to embark on this exercise, they must show that there is no evidence to support the plaintiff's claim. This point was aptly put in *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) where Cullity J. said, at para. 68:

> It must, I believe, follow logically that, although a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter.

[61] The evidence proffered by the appellant clearly establishes some basis in fact for the proposition that the members of the location based subclasses were arbitrarily detained and/or arrested and that consequently that they were falsely imprisoned at common law and/or their rights under s. 9 of the *Charter* were violated. Proposed common issue #1 is therefore a suitable common issue for certification purposes.

[62] I reach a different conclusion with respect to proposed common issue #2. That proposed common issue fails to find any foundation in the evidence. The most that the appellant can point to in support of her assertion that the gymnasium subclass members were discriminated against contrary to Ontario's *Human Rights Code*, by targeting them for arrest or negative treatment based on the fact that they were Québécois, are some inappropriate comments made by one or more arresting officers along with the perception that people who spoke French were being targeted.

[63] I do not consider that evidence to rise to even the very low threshold required for finding some basis of fact in support of a common issue. It amounts to little more than conjecture and speculation. It is also somewhat inconsistent with the central allegation that there was a single order made to arrest all who were present in the gymnasium.

[64] Proposed common issues #3 through #6 deal only with the Detention Centre subclass. While I will deal with a separate problem with the Detention Centre subclass later, the evidence establishes that there were some serious issues that arose from the manner in which individuals were treated while they were housed at the Detention Centre. Indeed, the motion judge found that to be the case. At para. 242 of her reasons, she said:

> 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.

[65] The motion judge went on to find, in essence, that the proposed common issues respecting the Detention Centre would be satisfactory common issues if the Detention Centre was a "stand-alone" class. However, since the Detention Centre subclass was put before her as one of a number of other subclasses, all of which were to be certified or not, the motion judge concluded that she would not certify the action solely for the Detention Centre subclass.

[66] The motion judge's conclusion in this regard was entirely reasonable given the manner in which the issue was put before her. The appellant now takes the position, through her entirely revised approach to the proceeding as a whole, that the Detention Centre subclass could be separately certified. Indeed, the appellant takes the position, if necessary, that all of the subclasses could be certified as individual separate class actions. I will deal with that submission later.

[67] Proposed common issue #5 poses a separate issue in terms of whether the evidence provides some basis in fact that persons at the Detention Centre were denied their rights to counsel under s. 10(b) of the *Charter*. On balance, I conclude that there is some evidence that

would support this proposed common issue. In particular, I refer to the report of the Honourable John Morden entitled "Independent Civilian Review into matters relating to the G20 Summit". In that report, that was commissioned by the respondent, Mr. Morden found that, because of problems with the way in which the Detention Centre was run, persons held there "were not given access to lawyers or a telephone". That report, coupled with the evidence provided by the proposed additional representative plaintiff, Thomas Taylor, regarding his experience at the Detention Centre in terms of being denied counsel, is sufficient to provide some basis in fact for this proposed common issue.[7]

[68] I am satisfied therefore that proposed common issues #3 through #6 are proper common issues.

[69] Proposed common issue #7 poses a more difficult issue. I question whether s. 1 of the *Charter* could have application in this case to excuse what would otherwise be violations of individual rights under the *Charter*. It is not clear what "reasonable limits prescribed by law" could be relied upon by the respondent to justify any *Charter* breaches that might be found to have occurred in this case and the respondent did not point to any during the course of the argument of this appeal. That said, I recognize the possibility, as this proceeding moves forward and other information comes to light, that some argument could arise in this regard. That possibility, however, is insufficient to ground the s. 1 issue as a separate common issue. Rather, it seems to me that the proper way to address that possibility is to include any s. 1 considerations within the ambit of common issue #1. I would propose, therefore, that common issue #1 be amended to include the s. 1 issue.

[70] Proposed common issues #8 through #11 are all related to any remedy that might be granted if the classes are successful in any of their claims. All of the oral argument on these proposed common issues was directed at the issues of aggregate damages and punitive damages, both of which the respondent submits are not proper common issues.

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[7] Thomas Taylor is being added as a representative plaintiff because the appellant was not held at the Detention Centre. The respondent therefore contended that she could not properly represent the Detention Centre subclass. The addition of Mr. Taylor is intended to address that asserted deficiency.

[71] Section 24(1) of the *Class Proceedings Act, 1992*, sets out the requirements for awarding aggregate damages. The section reads:

> 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.

[72] In terms of aggregate damages, the respondent's core objection is that the issue of damages necessarily requires individual examination and therefore is not amenable to a global assessment. I agree that some limited individual examination may be necessary before a final award of damages could be made but that reality does not preclude an aggregate assessment of some level of damages for the class members. In that regard, I note that s. 24(1) refers to "part" of a defendant's liability to a class and also refers to there being no questions of law or fact "other than those relating to the assessment of monetary relief" remaining to be determined in order to establish the "amount" of the defendant's monetary liability.

[73] It seems to me that if a trial judge were to conclude, with respect to any of the location based subclasses, that the answer to common issue #1 was "Yes", it would be open to the common issues judge to determine that there was a base amount of damages that any member of the class was entitled to as compensation for the breach of their constitutional or common law rights. It does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the *Charter*, a minimum award of damages in a certain amount is justified.

[74] I would add that such a conclusion does not preclude a system whereby any individual class member could decide to seek an increased amount of damages on an individualized basis because of his or her particular circumstances nor would it preclude the respondent from being able to establish, in any particular instance, that a class member should be denied even the base

amount of damages because of their conduct before, during or after their detention in the context of the overall timeframe of the G20 summit. I note, on this point, that s. 24(4) provides that the court must consider "whether individual claims need to be made to give effect to the order". Pursuant to s. 24(6), the court could require a class member to file an affidavit, for example, before receiving their portion of the award and that affidavit could be designed to address, among other things, any issues that might arise about any class member receiving an award of damages who was actually subsequently convicted of any offence arising out of the G20 summit. Proceeding by way of such aggregate damages would, however, likely preclude the need for a large number of class members to prove their damages on an individual basis.

[75] I am satisfied that it should be open to a common issues trial judge to consider whether aggregate damages in this, or any other, form would be an appropriate remedy. This is again consistent with the conclusion reached in *Pro-Sys* where Rothstein J. said, at para. 134:

> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge.

[76] I am satisfied that proposed common issue #8 is a common issue.

[77] In terms of punitive damages, I am aware that a great many class proceedings have included punitive damages as a common issue including cases in the Supreme Court of Canada[8] and in the Court of Appeal[9]. Indeed, punitive damages is a common issue that is often not in dispute. However, the respondent does dispute it here and it does so based on the decision in *Robinson v. Medtronic, Inc.*, [2009] O.J. No. 4366 (S.C.J.).

[78] In *Robinson*, Perrell J. considered the issue of punitive damages as it related to a defective medical product. After citing the Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, that sets out the principles for awarding punitive damages, Perell J. said, at paras. 170-171:

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[8] see, for example, *Rumley v. British Columbia*, [2001] 3 S.C.R. 184

[9] see, for example, *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)

> It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their purposes.
>
> In order to rationally determine whether punitive damages should be awarded and to determine the quantum of them, the court needs to know the quantum of compensation that will be awarded. Earlier in his judgment, at para. 74, Justice Binnie stated: "[T]he governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation)." Later in his judgment, at para. 100, he stated: "The rationality test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of quantum."

[79] I do not accept, as the respondent contends, that *Robinson* stands for the proposition that punitive damages can never be included as a common issue in a class proceeding unless it will be known to a certainty, at the conclusion of the common issues trial, what level of compensatory damages will be awarded. If it does stand for that proposition, then I disagree with that conclusion and would not follow it. There are many situations where a positive finding of liability on one or more common issues in a class proceeding would be sufficient to establish an appropriate foundation for an award of punitive damages. The common issues trial judge will likely, by that point, have an in-depth understanding of the conduct of the defendant and will also have some appreciation of the level of compensatory damages that would be appropriate for any harm done. In the context of a class proceeding, that is sufficient to allow the common issues trial judge to assess the appropriateness of an award of punitive damages employing the criteria set out in *Whiten*.

[80] A common issues trial judge in a class proceeding should not be precluded from making an award of punitive damages just because, at the time that the common issues are determined, it is not possible to also decide the appropriate level of compensatory damages. One of the fundamental rationales for class proceedings is that they are capable of determining issues on a class-wide basis with the result that each individual class member's claim is advanced to a

significant degree without the time and expense of determining those same issues individually. It is not uncommon that the issue of damages will have to be determined at a later stage and, likely, on an individual basis. That is not a reason to deny certification of a proceeding as a class action, as s. 6 of the *Class Proceedings Act, 1992* expressly states. It would do a disservice to the principles underlying class proceedings to decide that punitive damages generally had to await the determination of all of the individual damages. The judge who conducts the common issues trial is in the best position to determine whether an award of punitive damages is appropriate. It would be counterproductive to remove from the common issues trial judge the right to decide that issue on behalf of the class and in advance of the determination of any individual damages – the determination of which could take a lengthy period of time. It would also be contrary to the goal of the efficient resolution of common issues to hold that the common issues trial judge could not determine the issue of punitive damages until after the individual compensatory damages were determined.[10]

[81] All of this analysis may be somewhat academic since I believe that the respondent misreads the thrust of the decision in *Robinson*. Of importance to the decision in that case as it relates to the issue of punitive damages was the fact that the common issues trial would not determine the ultimate liability of the defendant. Causation and injury to the individual class members were ultimately going to have to be determined after the common issues trial and after individual assessments. I can understand why, in that situation, Perell J. decided that punitive damages could not be determined on a class basis at the common issues trial. He did not, however, decide that punitive damages could never be decided as a common issue. In fact, Perell J. left open the possibility of including punitive damages as a common issue when he said, in his reasons, at paras 190-191:

> Just as it cannot be said that class members are being denied compensatory damages because they must prove causation and damages individually, it cannot be said that they are being denied punitive damages in a case in which punitive damages are not amenable to being proven as a common issue.

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[10] I recognize the possibility that the common issues trial judge might conclude that s/he could not properly establish the appropriate quantum of punitive damages until after the individual compensatory damages are determined. In that rare situation, the common issues trial judge could postpone that determination until after the individual damage assessments have been made but still determine it as a common issue: *Chalmers (Litigation guardian of) v. AMO Canada Co.*, [2010] B.C.J. No. 2451 (C.A.).

> There may be cases where at the common issues trial, the court is in a position to rationally and proportionately decide the questions of whether a defendant should pay punitive damages to the class and the amount of those punitive damages. In my opinion, however, this is not one of those cases.

[82] In this case, the common issues trial judge will be armed with all of the necessary information, including a general understanding of the likely level of compensatory damages, to make an informed decision on the appropriateness of an award of punitive damages. If, for example, the common issues judge determines that the police flagrantly breached the rights of the individual class members through their conduct of engaging in mass detentions, then it would be entirely appropriate for the common issues trial judge to decide whether punitive damages ought to be awarded to satisfy the purposes of those damages as set out in *Whiten*.

[83] Consequently, I am satisfied that punitive damages is a proper common issue in this case.

[84] The final two common issues under the remedies section are the request for declarations and the request for the expungement of certain records arising from the police actions. The respondent complains that the declaratory relief is unacceptably vague because it does not specify what declarations would be sought. I do not accept that criticism. The relief sought in this regard is directly related to the lawfulness of the police action. Incorporating it as a common issue simply provides the common issues trial judge with the right to make declarations regarding the conduct of the police if s/he considers such declarations to be a fitting remedy. It may be that such declarations would be seen as a necessary remedy in addition to, or instead of, an award of punitive damages, for example. I do not see any reason why the common issues trial judge should be denied the right to decide whether that form of relief is warranted.

[85] The same vagueness argument is made regarding the request for records to be expunged. The respondent says the appellant does not identify which records this relief would be applicable to. I first note on this point that, at this early stage of the proceeding, the appellant has not had the opportunity to obtain discovery from the respondent and thus is not fairly in a position to identify what records should be subject to this claim for relief. In any event, the same points I made regarding the declaratory relief apply generally to this issue. The common issues trial judge will likely hear what records were made by the police and whether it is proper for the court

to order that they be expunged depending on the conclusions reached on the other common issues. Again, the common issues trial judge should have the right to order that records be expunged as part of the collection of remedies that can be considered for any unlawful conduct that may be found.

[86] I am satisfied therefore that proposed common issues #10 and #11 are proper common issues.

Section 5(1)(d) – preferable procedure

[87] The principles to be applied in determining whether a class action is the preferable procedure for determining the common issues were originally set out in *Hollick*. Those principles were then summarized by Rosenberg J.A. in *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), at para. 69:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[88] The motion judge concluded that a class proceeding was not an appropriate mechanism for the resolution of the issues raised in this case. In reaching that conclusion, the motion judge said, at para. 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.

[89] I repeat what I said earlier and that is that the case before the motion judge was much different from the case that is before this court. Undoubtedly, the motion judge's conclusions regarding other issues impacted on her conclusion regarding preferable procedure. The landscape has now been altered, however. In its new and narrower state, it is much easier to see that this proceeding is the preferable procedure for determining the common issues.

[90] I reiterate that the core allegation in the location based subclasses is that the police ordered the mass detention and/or arrest of individuals without any consideration or determination of whether their individual conduct warranted such action. In that regard, it is alleged that a single command was made in each instance to effect those mass detentions and arrests. It is further alleged that the same command officer made those orders in at least three of the five location based subclasses and either that officer, or one other command officer, made the orders in the other two instances.

[91] On the material before us, the number of persons affected in each location based subclass is as follows:

Queen and Spadina	500
Esplanade	200
Eastern Avenue	30
Parkdale	75
Gymnasium	113

[92] It is obvious that there will be significant judicial economy achieved in determining once, and for all members of each of these classes, on what basis the order to detain and/or arrest was made and how that order was communicated to the front line police officers. It would be the antithesis of judicial economy to undertake that analysis tens, if not hundreds, of times for each individual class member, given the nature of the allegations as to how these detentions and/or arrests took place.

[93] Further, there is a very serious issue of access to justice raised by this case. Those individuals who were held in the rain and the cold for a number of hours at Queen and Spadina

are not likely, on an individual basis, to consider it worthwhile to advance their own individual claims arising from the loss of their liberty. Most of those individuals, as angry and unhappy and offended as they undoubtedly are at what was done to them by police officers sworn to "serve and protect", would not likely be willing to devote the time and expense required to seek individual relief through the legal system. That is especially so when one recognizes that in almost all of these cases we are not dealing with physical injuries or significant psychological damage. Rather, the damage was made to the liberty interests of these individuals where the harm is, perhaps, easier to ignore and easier to minimize. Lacking any physical effect, a person who might otherwise be willing to invest in advancing a claim may well, in this instance, consider the energy and expense as the equivalent of "throwing good money after bad". It is a harm, however, that is nonetheless real and it is harm, if proven, that should not go unremedied.

[94] The respondent submits, on this point, that some individual actions have been commenced and, indeed, some of those actions have been resolved. I do not consider that a strong argument against the conclusion that access to justice is an issue here. I do not know what the circumstances of those cases were and whether, for example, there were physical injuries that were a part of the claim in those cases. I also note that the small number of individual cases actually commenced compared to the large number of persons affected seems to me to provide additional support for the conclusion that access to justice is an important consideration in this case.

[95] Finally, contrary to the respondent's submission, I believe that behaviour modification is also an objective deserving of consideration in this case. The fact that there have been a number of investigations undertaken about the policing of the G20 summit does not persuade me that the goal of behaviour modification has been achieved. If the appellant's central allegation is proven, the conduct of the police violated a basic tenet of how police in a free and democratic society are expected to conduct themselves. Their actions, if proven, constitute an egregious breach of the individual liberty interests of ordinary citizens. On this view of the respondent's conduct, it is not hyperbole to see it as being akin to one of the hallmarks of a police state, where the suppression of speech, that is uncomfortable for those in positions of power, is made a prime objective of those whose job it is to police the public. If that view of the conduct in this instance

is made out, an award of damages to the individual citizens affected may be the most telling and lasting expression that such conduct should never be tolerated.

[96] I reach a similar conclusion regarding the Detention Centre subclass. The manner in which the Detention Centre was operated during the G20 summit has been the subject of much adverse commentary. It has given rise to criticism by judges in other cases where the conditions of the Detention Centre were advanced as grounds for *Charter* relief regarding subsequent prosecutions of individuals who were detained. For example, in *R. v. Botten*, [2012] O.J. No. 5053 (S.C.J.) the conditions at the Detention Centre were used as the basis for an attempt to stay a prosecution of a charge of mischief. While the court dismissed the stay application, it did comment on the conditions at the Detention Centre. At para. 58, Sachs J. said:

> After Ms. Botten was arrested she was detained for over eight hours in conditions that should not be tolerated in a free and democratic society. She was put in an overcrowded and cold pen, with no opportunity to get dry or comfortable in any way. If people wanted to sit or sleep most of them had to sit or lie on a cold, wet, concrete floor. If they wanted to go to the toilet they could not do so in privacy. Ms. Botten developed a medical condition that she had to be treated for as a result of her detention. While I appreciate that detention facilities have to weigh privacy interests against security concerns, we cannot allow them to become a vehicle for unnecessarily stripping citizens of their dignity and threatening their health, especially when they have not even been charged with a criminal offence. This is what happened to Ms. Botten and many others on the night that she was arrested and detained at the Esplanade. As a community we must be concerned that this kind of wholesale abuse of fundamental rights does not go unnoticed. If it does, we run the risk of it repeating [and] the more it happens the more the fabric of what makes us a democracy will be torn away.

[97] As I have already concluded, the conditions at the Detention Centre, and the manner in which it was run, can be determined on a class-wide basis. While individual impacts may give rise to the need for some individual damage assessments, a base award of damages for any violations of constitutional rights may again be possible for the members of this class. Regardless of that issue, the determination of the conditions at the Detention Centre, including their impact on the persons housed there, and whether those conditions constituted violations of *Charter* protected rights can, and should, be determined once and once only. A class action is the preferable way of making that determination. It is once again not realistic to expect that persons who were held in the Detention Centre, and subjected to the conditions of that facility,

will launch their own proceedings, especially if no long-term physical harm was occasioned to them. Individual claims are equally unlikely if such persons were never charged with a criminal offence and it is known that many of the persons detained at the Detention Centre were never charged.

[98] A class proceeding to determine the issues raised by the Detention Centre promotes all of the objectives of a class proceeding: judicial economy, access to justice and behaviour modification. It is also a fair, efficient and manageable method of advancing the claim.

[99] All of that said, the Detention Centre subclass shares little in common with the location based subclasses except for the fact that some of the members of the latter wound up being housed at the Detention Centre and therefore are also members of that class. There is no issue in common between the two groups, however. The issues raised by the Detention Centre subclass are not similar to the issues raised by the location based subclasses nor do they involve similar evidence nor do they apparently involve even the same decision makers. Indeed, the only common theme between the two is the fact that the claims emanate out of the G20 summit and the conduct of the police for whom the respondent is responsible.

[100] Consequently, while I would certify a class action to determine the common issues for the Detention Centre class, that I have set out above, that class action should properly be separate and apart from the class action involving the location based subclasses. Notwithstanding that conclusion, it may be that there will be advantages from having the two class actions managed by the same judge and it may be that there will be advantages to having the two class actions tried by the same judge, one after the other or as the court may direct. However, those are decisions that are best left to the persons in charge of administering class proceedings in Toronto.

Section 5(1)(e) – representative plaintiff

[101] The motion judge dealt with this issue very briefly. She said, at paras. 265-266:

> 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.
>
> The s. 5(1)(e) criterion is not met.

There were no submissions made at the hearing of the appeal directed to this fifth and final requirement. It is, though, addressed briefly in the parties' facta.

[102] As already noted, during the course of the proceedings before the motion judge, a second representative plaintiff, Thomas Taylor, was proposed to be added to address the criticism that the appellant could not adequately represent the Detention Centre class because she was not taken to the Detention Centre.

[103] Many of the respondent's complaints about the representative plaintiffs involve a repetition of their position on the common issues. I have already addressed those matters in my consideration of the common issues and will not repeat them here.

[104] The respondent also complains that the appellant is not a member of each of the location based subclasses and cannot therefore adequately represent the location based subclasses of which she is not a member. It is not, in my view, necessary to have a separate representative plaintiff for each of the five location based subclasses. Given the commonality of the issues that I would certify for determination within the class action relating to the location based subclasses, any person who was detained can adequately address the issues raised for each of those subclasses.

[105] I cannot find any legitimate complaint regarding the ability of the appellant to be the representative plaintiff on behalf of the location based subclasses nor can I find any legitimate complaint regarding the ability of Mr. Taylor to be the representative plaintiff on behalf of the Detention Centre subclass.

[106] In terms of the litigation plan, while it may have to be somewhat reworked given my conclusion that there should be two separate class actions certified, it is otherwise adequate. Again, the only criticisms from the respondent regarding the litigation plan mirrored its criticisms of the common issues and those have been addressed.

Summary

[107] The appeal is allowed and an order is granted certifying the proceeding as a class action for the determination of the following common issues for the five location based subclasses (i.e. Queen and Spadina, Esplanade, Eastern Avenue, Parkdale and Gymnasium):

1. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members at common law and/or (b) arbitrary detention or imprisonment contrary to s. 9 of the *Charter* including a determination whether the mass detentions and/or arrests are justified under s. 1?

2. 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?

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

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

5. Are orders requiring the Defendant to expunge stipulated records warranted?

[108] An order will also go certifying a separate class action for the Detention Centre class with Thomas Taylor as the representative plaintiff for the purpose of determining the following common issues:

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

2. Did the Defendant owe a duty of care to the Detention Centre class 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?

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

4. Did the Defendant detain the class members for an excessive and/or unnecessarily long time, such that their ongoing detention constituted false imprisonment or arbitrary detention contrary to s. 9 of the *Charter*?

5. 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?

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

[109] The appellant is entitled to her costs of the appeal fixed at $55,000 inclusive of disbursements and HST, the amount having been agreed between the parties.

[110] That leaves the matter of the costs of the original certification motion. At the conclusion of the appeal, the court advised the parties that it seemed, in our collective view, that the issues raised regarding the costs awarded on the certification motion, including the application for leave to appeal that order, might best await the outcome of the appeal. The parties agreed that this appeared to be the best route to take since the outcome of the appeal might itself impact on the original costs award, depending on the outcome.

[111] Consequently, the parties may file written submissions on the costs of the original certification motion. The appellant (including the Law Foundation of Ontario) shall file their submissions within thirty days of the date of the release of these reasons and the respondent shall file its submissions within fifteen days thereafter. The submissions of each party shall not exceed ten pages in length. No reply submissions shall be filed without leave of the court.

NORDHEIMER J.

ASTON J.

LINHARES de SOUSA J.

Date of Release: AUG 0 6 2014

APPENDIX A

The Proposed Class

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").

APPENDIX B

Common Issues

The five location-based mass-detention and mass-arrest subclasses:
(i.e. Queen and Spadina, Esplanade, Eastern Avenue, Parkdale 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?