

CANADA / JUDGMENT

Nikal v. British Columbia

2024 BCSC 2420

COURT

Supreme Court of British Columbia

DECIDED

27 November 2024

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2024 BCSC 2420 Nikal v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nikal v. British Columbia,

2024 BCSC 2420

Date: 20241127

Docket: S19009

Registry: Smithers

Between:

Briar Gerrydean Nikal

Plaintiff

And

His Majesty the King in Right of the

Province of British Columbia

Defendant

Before: The Honourable Justice Tindale

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by videoconference:

I.B. Lawson

Counsel for the Defendant Province of British Columbia appearing by videoconference:

J.G. Penner

S.T. Dillman

Counsel for the Attorney General of Canada appearing by videoconference:

C.N. Landsiedel

S. Flader

Place and Date of Hearing:

Prince George, B.C.

November 7, 2024

Place and Date of Judgment:

Prince George, B.C.

November 27, 2024

- [1] THE COURT: His Majesty the King in Right of the British Columbia (the "Province"), pursuant to a notice of application filed July 31, 2024, seeks the following orders:
- 1) an order pursuant to Rule 9-5 of the Supreme Court Civil Rules striking the notice of civil claim and dismissing the within action; and
 - 2) in the alternative, an order pursuant to Rule 6-7(2)(b), adding the Attorney General of Canada ("Canada") as a defendant and amending the style of proceeding accordingly.
- [2] The plaintiff, Briar Gerrydean Nikal, is opposed to the relief claimed.
- [3] Canada consents to dismissing the action and, in the alternative, being added as a defendant.

Background

- [4] The plaintiff was arrested on October 18, 2022, at approximately 12:40 am for the offences of touching for a sexual purpose and sexual assault of a 14-year-old complainant.
- [5] The plaintiff was released by police the same day at approximately 4:00 pm on an undertaking with conditions that the plaintiff have no contact with anyone under 16 years of age.
- [6] At the time of his arrest, the plaintiff was a single parent with a young daughter.

- [7] On January 27, 2023, the plaintiff filed a notice of civil claim seeking damages pursuant to s. 24(1) of the Canadian Charter of Rights and Freedoms, and costs. The notice of civil claim, Part 1, reads, in part, starting at para. 3:
3. The Plaintiff was arrested on October 18, 2022 at approximately 12:40 AM for the offences of touching for a sexual purpose and sexual assault. . . .
 4. In the course of receiving legal advice from the 24-hour duty counsel service, the Plaintiff was informed that police intended to release him on conditions, which included that he have no contact with any person under 16 years of age. When the Plaintiff explained he could not agree to that condition because he is a single parent with a six-year-old daughter, it was put to police by duty counsel that such condition should be modified to allow him to continue parenting his daughter.
 5. The Plaintiff was told by police they would not make such a modification, and if he did not agree to the proposed condition, he could remain in custody and speak with a supervisor in the morning about a modified condition.
 6. The Plaintiff agree to wait to speak with a supervisor and was lodged in a cell which had urine and feces on the bed frame and toilet, and which had blood stains on the bottom of the cell door extending in a splatter pattern across the wall and up to the ceiling. He then became upset and anxious, and experienced symptoms of a panic attack.
 - . . .
 8. Eventually, a corporal spoke with the Plaintiff and after hearing the Plaintiff say he could not agree to a no-contact condition with "anyone" under 16 years of age, the corporal said he would "talk to the Crown about it" and the Plaintiff was lodged back in the same cell. His complaint to the corporal about the urine, feces and blood was ignored and he heard the guard tell the corporal that the cell had been cleaned.
 - . . .
 10. Sometime after 3:00 PM, the corporal returned to the cell and said the Plaintiff must sign a condition which "the Crown has agreed to" which was no different from the first, and which prohibited him from having contact with "anyone" under 16 years of age. The Plaintiff was told that if he did not agree to the conditions, he would have to remain in custody until the next day. The corporal told the Plaintiff he could apply to the court to have the conditions changed, and so the Plaintiff signed an undertaking to have no contact with anyone under 16 years of age. He was released at approximately 4:00 PM.
 - . . .
 12. The Plaintiff has no criminal record. He has been the primary parent to his six-year-old daughter since February 1, 2021, and he was awarded sole custody of her after a trial in the Supreme Court in June, 2022.

...

15. The police conduct set out above was an infringement of the Plaintiff's right not to be denied reasonable bail without just cause pursuant to s. 11(e) of the Canadian Charter of Rights and Freedoms ("Charter"). Police conduct was also an infringement of the Plaintiff's right not to be arbitrarily detained or imprisoned pursuant to s. 9 of the Charter. Police conduct was also an infringement of the Plaintiff's right to liberty and to security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice pursuant to section 7 of the Charter.

[8] On April 27, 2023, the Province filed a response to civil claim.

[9] There is currently a 15-day trial set to commence February 24, 2025.

Position of the Parties

Province

- [10] The Province argues that the plaintiff has named the wrong defendant. The Province is not liable for an award of Charter damages arising from actions of the RCMP. The Province notes that the notice of civil claim alleges no tort claims and solely seeks damages pursuant to s. 24(1) of the Charter.
- [11] The Province says that when the Province served the response to civil claim on the plaintiff, they requested that the plaintiff name the proper defendant, that being Canada, and discontinue the action as against the Province. This did not occur.
- [12] The Province argues that all of the actions that form the basis of the plaintiff's claim were taken by members of the RCMP, specifically the plaintiff says that he was arrested by the RCMP and detained in a facility operated by the RCMP. It was the members of the RCMP that set certain conditions for his release which he considered unreasonable, and it was members of the RCMP who would not agree to change those conditions.
- [13] The Province notes that it has entered into a long-term agreement with Canada known as the Provincial Police Service Agreement (the "Agreement"). In the preamble to the Agreement, it reads:

D. The Parties recognize that:

- (i) the Province has the constitutional jurisdiction over the administration of justice which includes the responsibility for policing;
- (ii) the RCMP is a federal entity and matters relating to the control, management, and administration of the RCMP are within exclusive federal jurisdiction; and
- (iii) the Commissioner of the Royal Canadian Mounted Police, under the direction of the Federal Minister, has the control and management of the RCMP and all matters connected therewith;

- [14] The Province says that it is plain and obvious that if the plaintiff is able to establish an award for damages based on breaches of his Charter rights by the RCMP, any award for damages can only properly be made against Canada and not the Province.
- [15] The Province also argues it is plain and obvious that the plaintiff's claim against the Province should be dismissed as disclosing no reasonable claim.
- [16] The Province says that the plaintiff was not denied bail and he consented to the conditions of release proposed by the RCMP after he received legal advice and after being advised that he can apply to the court to have his conditions varied.
- [17] The Province argues that the plaintiff's detention was not arbitrary as it was clearly rationally connected to the charges of touching for a sexual purpose and sexual assault relating to a 14-year-old complainant.
- [18] The Province acknowledges that the plaintiff was deprived of his liberty for approximately 16 hours. However, that deprivation was in accordance with the principles of fundamental justice.
- [19] The Province notes that the plaintiff has pled that his right to the security of person was infringed as he was separated from his daughter by the conditions of his release. The Province says this argument must fail because the plaintiff had the opportunity to apply to have the conditions of his release amended immediately after being released from custody.
- [20] The Province argues that not all state action that has the effect of separating a parent from their child constitutes a restriction of the parent's right to security of the person.
- [21] The Province argues that for all of these reasons, the plaintiff's claim is bound to fail.

Canada

- [22] Canada argues that it is not plain and obvious that the plaintiff cannot proceed against the Province. Canada, however, does consent to being added as a party to the action and the style of cause being amended accordingly.
- [23] Canada notes that pursuant to The Constitution Act, 1867, 30 & 31 Vict, c 3 at s. 92 (14) (UK), reprinted in RSC 1985, Ap II, No. 5 and the Police Act 1996, c 367, ss 2, 2.1 ("Police ACT"), the Province has constitutional jurisdiction over the administration of justice in the province. The Minister of Public Safety and the Solicitor General must ensure that an adequate and effective level of policing and law enforcement is maintained throughout British Columbia. In addition, the Minister must also designate a Director of Police Services who is responsible for superintending police and law enforcement functions in British Columbia.

- [24] The Province contracted with Canada to utilize the Royal Canadian Mounted Police in its provincial policing. Canada says that how Canada and the Province divide responsibilities at the operational level of policing may be the subject of evidence at trial: *Surakka v. Canada* (Attorney General), 2018 BCSC 236 at para. 30.
- [25] Canada argues that the plaintiff's claim for a Charter breach is, however, meritless.
- [26] Canada agrees with the Province that the plaintiff's claim should be struck under Rule 9-5(1) (a) of the Supreme Court Civil Rules (the "Rules"). Canada argues that it is plain and obvious that the plaintiff has no reasonable prospect of success.
- [27] Canada argues that the plaintiff has not pled false arrest in the notice of civil claim.
- [28] Canada notes that pursuant to s. 503 of the Criminal Code, an accused can be held up to 24 hours before being taken before a justice.
- [29] In the case at bar, the plaintiff was released after 16 hours in relationship to the offence of sexual interference and sexual assault. The plaintiff was accorded access to legal counsel. However, he complains of being released on a condition that he have no contact with children under the age of 16.
- [30] Canada says the RCMP consulted with Crown counsel about removing the condition that the plaintiff have no contact with any person under the age of 16 years, however it was not removed, and Canada notes the plaintiff eventually consented to the condition and was released.
- [31] Canada says that the plaintiff was advised that he could apply to a judge to vary the condition.
- [32] Canada says that even if the facts as pled are true, there is no Charter breach.

Plaintiff

- [33] The plaintiff argues that the environment he was in, in custody, was unpleasant and he was given a choice of either agreeing to the conditions as posed by the RCMP officer or staying in cells.
- [34] The plaintiff argues that it is for the trial judge to decide whether there was a breach of his Charter rights.
- [35] The plaintiff argues that he was entitled to reasonable bail and it is not reasonable to place him on a condition that he could not have contact with anyone under the age of 16, because he was a single father of a young child.
- [36] The plaintiff says that his claim is primarily in regard to the denial of reasonable bail.
- [37] The plaintiff also argues that the interference by the state with regard to the parent-child relationship can be a breach of his s. 7 Charter rights.

- [38] The plaintiff argues that because he was denied reasonable bail and there was no lawful authority for his detention, his detention was arbitrary.
- [39] The plaintiff says that no action lies against Canada and the proper defendant is the Province, and the plaintiff cites the decision of *Bergen v. Guliker*, 2014 BCSC 5 at paras. 15 - 18 for that proposition.

Decision

- [40] The Province seeks to have the within claim dismissed pursuant to Rule 9-5 of the Rules which reads:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,
- and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
- [41] The test to strike a claim for not disclosing a reasonable cause of action is whether it is plain and obvious that the claim cannot succeed: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.
- [42] The Court of Appeal for British Columbia in *Johnson v. British Columbia (Attorney General)* 2022 BCCA 82, in discussing striking a claim for Charter damages, stated the following at para. 29:
- [29] The Respondents' notices of application sought to strike certain passages in the [amended notice of civil claim] and the [amended notice of constitutional question] on the basis that the claim for Charter damages has no reasonable prospect of success. Neither notice of application specified which sub-rule of Rule 9-5(1) of the Supreme Court Civil Rules, B.C. reg. 168/2009 [SCCR] was relied upon. However, the parties approached the applications and this appeal as if it was brought under Rule 9-5(1)(a); that is, that the pleading of the claim for Charter damages could not succeed because it did not disclose a reasonable claim. I agree that the application to strike the claim for Charter damages must be considered under Rule 9-5(1)(a), and that the test to be applied is whether "it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" or "has no reasonable prospect of success": *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.
- [43] Section 11 of the Charter reads:

Any person charged with an offence has the right

. . .

(e) not to be denied reasonable bail without just cause;

[44] Section 9 of the Charter reads:

Everyone has the right not to be arbitrarily detained or imprisoned.

[45] Section 7 of the Charter reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[46] As I understand the plaintiff's argument, the Charter violations alleged in the notice of civil claim flow from the fact that the plaintiff was not given reasonable bail. The plaintiff says that he was not given reasonable bail because one of the conditions of his release separated him from his young daughter, who he has custody of.

[47] The Criminal Code of Canada provides for the release of persons charged with criminal offences on bail.

[48] Section 503 of the Criminal Code allows for individuals arrested on criminal offences to be detained up to 24 hours before being taken before a justice.

[49] In the circumstances of this case, the accused was released after 16 hours, on conditions that he agreed to after receiving legal advice and discussing his release conditions with the RCMP.

[50] The plaintiff, based on the facts as pled in the notice of civil claim, was aware he could apply to court to vary the condition with regard to no contact with children under the age of 16.

[51] The plaintiff was charged with sexual offences relating to a child complainant. He was released on bail with the condition that he have no contact with children under the age of 16. That condition is rationally and directly related to the nature of the offence that the plaintiff was charged with.

[52] The plaintiff was released within the 24-hour period authorized by s. 503 of the Criminal Code.

[53] There is no basis to conclude that the plaintiff was not given reasonable bail in the circumstances, as pled in the notice of civil claim.

[54] It is plain and obvious that the plaintiff's claim that his s. 11(e) Charter rights were violated, assuming that the facts pled are true, has no reasonable prospect of success.

- [55] It is also plain and obvious that the plaintiff's claim that his s. 9 Charter rights were violated, assuming that the facts pled are true, has no reasonable prospect of success because he was arrested on charges of sexual assault and sexual interference and released on reasonable bail after 16 hours. There is no basis to find that there was an arbitrary detention.
- [56] Finally, the plaintiff's claim is that his s. 7 Charter rights were also violated because the state separated him from his child for a period of time. The plaintiff consented to his bail release conditions, including a condition that he not be in the company of children under the age of 16. The plaintiff had the ability to apply to the court to vary the conditions, which he ultimately did.
- [57] However, the Criminal Code provisions relating to the release of persons charged with criminal offences is not a regime that is designed to remove children from their parents, such as provincial child protection legislation.
- [58] The purpose of the no-contact condition with persons under the age of 16 was rationally and directly connected to the offences that the plaintiff was charged with.
- [59] While the plaintiff may have been separated from his daughter for a period of time because of the bail condition, he had the ability to apply to court to vary that condition, or he could have had a bail hearing at the time of his detention.
- [60] The plaintiff, as I said, was released after 16 hours, which is within the period prescribed by the Criminal Code.
- [61] The impugned bail condition again was rationally and directly connected to the offences that the plaintiff is charged with and, as such, it is clear that any infringement of the plaintiff's right to life, liberty, and security of the person was in accordance with the fundamental principles of justice.
- [62] It is plain and obvious that the plaintiff's claim that his s. 7 Charter rights were violated, assuming that the facts pled are true, has no reasonable prospect of success.
- [63] For all the above-noted reasons, the plaintiff's notice of civil claim is struck out and dismissed. In my view, there are no amendments to the notice of civil claim that could be made that would change this decision.
- [64] Given my ruling in dismissing the plaintiff's claim, it is not necessary to determine whether the Province is the proper party to be named as a defendant in the action.
- [65] Is there anything further we need to deal with?
- [66] CNSL I. LAWSON: Not from the plaintiff, thank you, Justice.
- [67] THE COURT: Thank you
- [68] CNSL S. DILLMAN: Justice, I would ask that the court award the costs of the application to the Province.

[69] THE COURT: All right. Any submissions on that?

[70] CNSL I. LAWSON: No, Justice. Costs follow the event.

[71] THE COURT: All right. The Province is awarded the costs of the application as against the plaintiff.

"The Honourable Mr. Justice Tindale"

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Prepared on 24 October 2026 · Esheria