

IN THE SUPREME COURT OF BRITISH COLUMBIA

*Khadikin v. The Corp. of the City
Of Nelson, et al
2003 BCSC 1987*

Date: 20031031
Docket: 8197
Registry: Nelson

2003 BCSC 1987 (CanLII)

Between:

Ronald Walter Khadikin

Plaintiff

And

**The Corporation Of The City Of Nelson,
Sgt. Dan Maluta, Sgt. Douglas Haddow,
And Cst. John Vandeborn**

Defendants

Before: The Honourable Mr. Justice Crawford

Oral Reasons for Judgment

October 31, 2003

R.W. Khadikin Appearing On
His Own Behalf

Counsel for the Defendants

D.G. Butcher

Place of Hearing:

Nelson, B.C.

[1] **THE COURT:** In the early afternoon on June 7, 1999, Mr. Khadikin was in the bar of the Queens Hotel on Baker Street, in the City of Nelson, British Columbia. Officer Vandeborn, believing Mr. Khadikin was in breach of an undertaking not to be on a licensed premise, entered the Hotel, arrested Mr. Khadikin, and took him to the police station for booking. Shortly after the booking was concluded, Mr. Khadikin was released. On June 10, 1999, Mr. Khadikin issued a Writ of Summons and a Statement of Claim, claiming damages of \$2,500,000 not only for that incident, but also for an earlier arrest on or about the May 8, 1999. As to the earlier charge, that has subsequently been prosecuted and played no part in the proceedings before me.

[2] Mr. Khadikin has continued with his claims arising from the incident of June 7, 1999. In *Fridman, Second Edition, On the Law of Torts in Canada*, at p.77, the author says:

The action for false imprisonment lies when the liberty of a person has been restrained against his or her will, without authority of the law. In the words of Justice Medhurst in ***Otto v. J Grant Wallace Ltd.***, an action lies for false imprisonment where anyone is improperly detained, however little the force, if any, that is used in connection with the detention. The defendant acting in error in arresting or imprisoning the plaintiff may not excuse him from liability. Only if he acted with some lawful justification will his conduct not be actionable.

[3] The onus of establishing such justification lies on the defendants, once the plaintiff has made out the case of false imprisonment, or as it is called in some cases, false arrest, which it has been suggested judicially is somewhat broader than false imprisonment. So, if the police can justify the arrest, there is no action.

[4] A case like this puts into focus our rights to individual freedom of movement, and on the other hand lies the police powers set out in the **Criminal Code**. I heard this matter at Nelson on October 27, 28 and 29, and I will set out a number of sub-headings. I will doubtless edit the final edition of these Reasons. Firstly, I deal with the pre-trial proceedings.

PRE-TRIAL PROCEEDINGS

[5] As I noted, the Writ was issued on June 10, 1999. The defence was summary and filed on June 21, denying any liability. A **Rule 18A** application by the defendants on December 18, 2001, resulted in the claims against Sergeant Haddow and Sergeant Maluta being dismissed, the claim for false arrest and false imprisonment of May 8, 1999, being dismissed, the claim of intimidation made in para. 14 of the Statement of Claim being dismissed, the claim in paragraph 23 of abuse and malicious prosecution also being dismissed. The

defendants filed an Amended Statement of Claim on January 16, 2003. The action proceeded solely against Officer Vandeborn and the City of Nelson, regarding the incident of June 7, 1999.

PLEADINGS

[6] Mr. Khadikin made specific reference to the pleadings in his argument. He said he issued the claim promptly, to prevent what he regarded as harassment by the Nelson police. His claims related, at the time, to two matters, the charge of trafficking in cocaine on May 8, 1999 - that is the date of the charge - and secondly, the arrest of his person on June 7, 1999. The charge of cocaine trafficking has resulted in his conviction and sentence. I looked at the Statement of Claim. It is dated at Nelson on June 9, 1999. It is signed by the plaintiff. It may be useful, given its immediacy to June 7, 1999, to quote some paragraphs. Paragraph 15:

The Plaintiff, acting pursuant to the conditions of his undertaking

and that is a reference to the undertaking from his original arrest on May 8, 1999;

appeared at the Nelson Provincial Court as directed on June 7th, 1999, at which time his initial release conditions were removed by a Provincial Court judge,

who commented adversely on the Crown's case against the Plaintiff.

16. On the afternoon of June 7th, 1999, the Plaintiff, along with his retired uncle, were having a soft drink at the Queens Hotel in the City of Nelson.
17. The Defendant Vandeborn attended at the Queens Hotel and arrested the Plaintiff, searched the Plaintiff on Baker Street in the City of Nelson and physically placed the Plaintiff in a marked patrol car.
18. The Plaintiff advised the Defendant Vandeborn that he was [I think it is meant to be "not"] not breaking any laws and the arrest he was making was a false arrest.
19. There were numerous people present throughout the search and arrest.
20. The Plaintiff was taken to Nelson City Police headquarters, at which time the Plaintiff advised the Defendant Maluta that the arrest was unlawful and that he had committed no offence and advised the Defendant Maluta and Vandeborn to verify his statement with the Court Registry in the City of Nelson. Both Defendants refused to do so, although a telephone was present on the counter.
21. The Defendants, Vandeborn and Maluta, processed the Plaintiff, pursuant to the provisions of the ***Criminal Records Act***.
22. The Defendants questioned the Plaintiff as to whether he was in possession of hypodermic needles, removed all of his personal effects, and locked the Plaintiff in a room in an effort to allow the Plaintiff to contact counsel. The police did not obtain counsel as requested by the Plaintiff.

[7] And he then, in para. 23, alleges the acts of false arrest and false imprisonment, causing him special damage, loss of income, and expenses to defend the charges and allegations.

[8] In the Amended Statement of Defence, filed on behalf of Officer Vandeborn and the City of Nelson on January 16, 2003, the defendants say, in para. 5(a):

- (a) On May 8th, 1999, the plaintiff was arrested on a warrant issued with respect to a charge of trafficking in a controlled substance, to wit, cocaine, which offence occurred on May 3rd, 1999, in the City of Nelson, British Columbia.
- (b) Later on May 8th, 1999, the plaintiff was released on an undertaking given to a police officer or an officer in charge, and a promise to appear in the Provincial Court of British Columbia at Nelson on June 7th, 1999. The undertaking contained an undertaking that the plaintiff abstain from going to "or being found in any licensed premises, as defined by L.C.L.A., except restaurants, within the City of Nelson." (The prohibition)
- (c) The fact that the plaintiff was charged and was subject to the prohibition on entering a licensed premises in Nelson, was entered on a computer data base, the Canadian Police Information Centre (CPIC), by the Nelson City Police. On June 7th, 1999, the plaintiff appeared before the Honourable Judge Takahashi in the Provincial Court of British Columbia and entered into a new undertaking given to a judge, which new undertaking did not contain any restrictions on the plaintiff's attendance in licensed premises. The new undertaking was prepared by the court registry at 11:55 a.m. and signed by the plaintiff shortly thereafter.

- (e) At approximately 1:30 p.m. on June 7th, 1999, the Nelson City Police received a telephone call from a person, who did not identify themselves, who said that the plaintiff was in the bar at the Queens Hotel, 621 Baker Street, Nelson, British Columbia.
- (f) The defendant, Vandeborn, attended at the Queens Hotel and there found the plaintiff in licensed premises, to wit the bar at Queens Hotel. The defendant, Vandeborn, checked the information on the CPIC database. He confirmed the prohibition on entering licensed premises in Nelson was still in effect. The defendant, Vandeborn, was advised the prohibition was still in effect.
- (g) The defendant, Vandeborn, arrested the plaintiff. The plaintiff complained the arrest was false, but did not explain why. He did not tell Vandeborn that he had executed the new undertaking, and he did not have a copy of the new undertaking in his possession.
- (h) The plaintiff was taken to the Nelson City Police station. There, he disclosed he had signed the new undertaking. This was confirmed with the registry of the Provincial Court of British Columbia, and the plaintiff was released.

[9] Paragraph (i) deals with the plaintiff's conviction, by a jury, of drug trafficking. The defendants say that the police officer at all material times had reasonable and probable grounds to arrest and detain Mr. Khadikin, as he appeared to be in breach of his undertaking, contrary to s.145 of the **Criminal Code**. When read together, the two pleadings are very similar.

THE EVIDENCE:

For The Plaintiff:

Mr. Khadikin

[10] Mr. Khadikin is fifty years of age. He grew up in Nelson. He took a B.A. in psychology, worked for a while in various justice related positions, including border immigration, deputy sheriff, and prison intake. He attained an LL.B. in the early 1980s, practiced for a year, and resigned from the Law Society of British Columbia when convicted of the offence of obstructing justice. He has had some occasional position as a volunteer with the U.N. Refugee Commission. He waived an opening statement, and as evidence he acknowledged he was convicted of the narcotics charge, trafficking in a controlled substance. The charge goes back to May 3, 1999. His arrest on May 8, and the terms of the undertaking, which I have already put in short form, are in Exhibit 5 in the record.

[11] He said on June 7, 1999, he made an application to the Provincial Court judge for a Declaration that the condition be deleted, and his application was granted. After the new release papers were completed, he went for lunch at a local hotel, he says at about 12:30 p.m. He met with his retired

uncle. He had a soft drink. A few people were in the hotel. He said he only knew one, a Bruce Leeming, who he knew from high school days. He said Officer Vandeborn entered, and then confronted him. He said he knew the officer. He had never had a problem with him. He said the officer appeared to have an attitude, that he rushed up to the table and took his soft drink and Mr. Khadikin said to him, "That's Coca Cola, what's the problem?" And he said Officer Vandeborn replied, "You're in licensed premises. You're under arrest." Mr. Khadikin said in reply, "I'm allowed to be." Mr. Khadikin says he did not mention at that time that he had been in Provincial Court that morning.

[12] Mr. Khadikin said Officer Vandeborn then forcefully took his right arm, and pushed him towards the door some ten or fifteen feet away. He said he offered Officer Vandeborn a quarter to call the courthouse. He says Officer Vandeborn checked his CPIC and said, "The licensed premises condition is still in effect." Mr. Khadikin said Officer Vandeborn took him to the doorways, searched him, manhandled him, and roughly placed him in the police cruiser, which was located outside the front door of the Queens Hotel.

[13] Mr. Khadikin said that once in the police car, he asked the officer to go to the courthouse, which was only a block or

so away, but instead, he was driven to the police station, which is apparently not very far away, either. He was taken through the back entrance of the police station, walked to the front area. At the front area, Mr. Khadikin said he repeated the request that the officer telephone the courthouse, but the officer declined. Mr. Khadikin said he saw the Chief Inspector in one of the offices, and again requested a telephone call be made to the courthouse. This time he said that was to verify the changed release condition. He said he was taken to the booking area. Sergeant Maluta was at the booking area. He recalls his shoes and coat being taken, and being questioned as to having hypodermic needles. He said for him it was a fairly degrading experience. He said he saw a telephone at the booking desk, and he again requested a call be made to the courthouse.

[14] Mr. Khadikin said he was read his rights, and when asked if he wanted counsel, he declined, again repeating that they check with the courthouse. He was given a room and a telephone and the opportunity to call counsel. He did not use it at that time. He says he was again removed to the booking area, that he again asked the officer to contact the courthouse. He said he had told them then, he had been in court that morning and the release conditions had changed.

Then he says he was put back in the room where he could telephone counsel. He said he did not see the need. He said the officers said, "Exercise your right to counsel," and he was put in telephone contact with a lawyer, a Don Skogstad. He said he believed the lawyer then telephoned the police station, and the officers then telephoned the courthouse.

[15] Mr. Khadikin then entered as an exhibit a letter of March 7, 2000. It was a letter from a solicitor, regarding the undercover police operation that evidently caught him on May 3, 1999. The letter stated Mr. Khadikin was not a target of the undercover operation, nor was Mr. Khadikin previously identified as a drug trafficker. Mr. Khadikin said he drew the Writ and Statement of Claim and filed it on June 10, to stop the police actions against him. He said he asked his uncle and his old school friend to take note of the events. He said on his first arrest he was treated politely and courteously. He said he put the time of his arrest at 1:45 p.m. He said he thought he was released between 3 p.m. and 4 p.m.

[16] In cross-examination, he agreed he had been convicted of threatening a potential witness, giving rise to the obstruction of justice charge and conviction in January 1985. He agreed he had a strong animus against former Nelson police

officers. He said it was a lot better, now. He agreed that he had on occasion called the Nelson City Police corrupt, a morally bankrupt organization, a group of thugs, clowns, and admitted authorship of a photograph of clowns, which he had entitled "Nelson Police."

[17] From a transcript of his discovery, taken on August 9, 2001, p.53, questions were read in as follows:

267 Question: You were angry with the city police by this point, weren't you.

Answer: I was, and I still am. Frankly, if I was run over crossing the street, I wouldn't phone the city police department, here.

268 Question: You'd be interested in getting any revenge you could against the city police, is that fair?

Answer: Not at any cost, or at any price, at this particular time.

269 Question: Generally speaking, if -

Answer: I'm not happy with these clowns. Let's put it that way.

270 [the continuation of the question]: -- if an opportunity arose to get revenge against the city police for arresting you, you would take it?

Answer: I certainly would.

[18] Mr. Khadikin agreed he had no previous difficulties, and I take it they are previous to June 7, 1999, with Officer

Vandenborn. He agreed he had campaigned to get the City Police replaced by the R.C.M.P. He agreed he had a better than average knowledge of the workings of the legal system and the criminal process, and how the Court's orders are processed. Examples of practical jokes he has played were put to him. It was suggested he had set up the police on June 7, 1999 as a practical joke. Mr. Khadikin denied such a suggestion.

[19] There is a Notice to Admit filed as Exhibit 5, and while I do not have it right at hand, it shows the processing of the new release undertaking on June 7, 1999. Mr. Khadikin agreed he had signed it. The typist's notes at the bottom of the document show the document prepared at 11:55 a.m. on June 7, 1999. The other documents reflect Mr. Khadikin's trial by jury on the drug trafficking charge, his conviction and sentence and the loss of his appeal. Mr. Khadikin agreed he did not take a copy of the June 7 undertaking form with him on June 7, nor did he offer a copy of the document to Officer Vandenborn at the Queens Hotel, nor did he proffer it to the officers at the police station.

[20] As to the events at the Hotel, Mr. Khadikin said he did speak to an old high school friend, Bruce Leeming. He knew if the police came to the hotel, they would not know the changed

release terms unless they had been tracking his case that day. He knew the police would rely on their CPIC. He knew that from his days in practice, because he had used it himself. He knew the Nelson police would be responsible for the input into CPIC. He knew CPIC would not show the changed release condition at the time he went to the Queens Hotel. Mr. Khadikin denied he told Mr. Leeming he was going to telephone the police or someone to set up an arrest and to claim damages. Mr. Khadikin agreed Mr. Leeming raised the issue of Mr. Khadikin being in the bar in breach of his release condition, that he was not meant to be there, that Mr. Khadikin explained to Mr. Leeming the condition had changed, but the police would not know. Mr. Leeming asked him, "Well, what if the police come in," to which Mr. Khadikin replied, "They can telephone the courthouse and verify." He said he knew later someone did telephone the police, but it was not he or anyone else he knew in the bar. He categorically denied telling Mr. Leeming and Ms. Frampton that he was going to set up his own arrest.

[21] Mr. Khadikin agreed that when Officer Vandeborn came into the hotel, Mr. Khadikin was seated with his uncle, that Officer Vandeborn placed Mr. Khadikin under arrest and took him out of the hotel, and that Mr. Khadikin said to him, "This

is a false arrest, and it'll cost the city \$10,000." He denied never telling Officer Vandeborn that his bail condition had changed. He said he told Officer Vandeborn that CPIC was wrong, i.e. that the information was wrong on the CPIC, and he said that several times he told Officer Vandeborn to telephone the courthouse. He recalled Officer Vandeborn telephoning his dispatcher two times to check the release conditions on the CPIC. He said he was not handcuffed during the arrest. He said he could not remember if he sat in the front seat of the police cruiser, though he felt he was forcibly placed in the police cruiser. He agreed he was not placed in a cell at the police station, although he said that he was placed in a locked room after he had told the officers his bail conditions had changed and they should check them. He disagreed that he was at the station for an hour or less. He agreed he was not strip searched. He disagreed that he only told the police officers of the changed bail term after the call was made to Mr. Skogstad. He disagreed the officers promptly called the courthouse after he advised them of the changed bail term, nor would he agree he was promptly released once the police found out of the change of bail term.

[22] But on discovery transcript being put to him, he agreed he was let out promptly once the officers telephoned the

courthouse. He said the officers did not telephone the courthouse immediately when he told them. Mr. Khadikin said he had not lost any work because of this incident, nor has he lost any friends, nor has he lost any position in a community organization. He agreed he had suffered a loss of liberty. He asserted he had been traumatized, and that had led him to issuing the Writ.

Mr. Leeming

[23] Mr. Leeming has known Mr. Khadikin since schooldays in Nelson. He was using drugs heavily in 1999. His evidence as to the events at Queens Hotel on June 7, 1999 was to the effect he was in the bar at the Queens Hotel, having lunch with a Leslie Frampton, a friend of his and a former girlfriend. He said he saw Mr. Khadikin in the hotel, that Mr. Khadikin came over to him, and he asked Mr. Khadikin why he was in the bar, as he knew Mr. Khadikin was not meant to be there. Mr. Khadikin told him that the condition had changed. Mr. Leeming asked him, "What will happen if the police come?" Mr. Khadikin replied, "I'll take them to court, I guess." Fifteen or twenty minutes later, a police officer, who he thought was the usual beat cop, came in and arrested Mr. Khadikin. Mr. Leeming said he saw the officer handcuff Mr. Khadikin, that he saw Mr. Khadikin offer the police officer a

coin and say, "I got the conditions removed." Mr. Leeming said he sat some ten or fifteen feet from the bar telephone. He did not see anyone use it at any time while he was there.

[24] In the courtroom, Mr. Leeming recognized Officer Vandeborn as the beat cop who arrested Mr. Khadikin. He described the arrest as a little bit rough, as when any handcuffs are put on. Mr. Leeming agreed he had, during this time, been on drugs and during his relationship with Frampton, spent over \$200,000 maintaining his drug habit. He said Ms. Frampton was on prescription Demerol at the time of the incident at the Queens Hotel.

[25] In cross-examination, he said on June 7, 1999, he was living at the Queens Hotel and that his relationship with Ms. Frampton had ended in March or April of 1999. He agreed he gave evidence at Mr. Khadikin's trafficking trial and he said that someone else sold the drugs to the undercover police officer. As to the events of June 7, 1999, he said he spoke to Mr. Khadikin, that he asked, and he seems very much duplicating his earlier testimony, "What are you doing here?" Mr. Khadikin said the conditions had been removed that day. He asked, "What if the police come in?" Khadikin answered, "They will probably arrest me, and I'll take them to court." He thought Mr. Khadikin said he would tell them to call the

court registry before he was arrested. He denied Mr. Khadikin told him it would be a setup to sue the city. He thought Officer Vandeborn was just the usual beat cop, checking the Nelson bars, as they regularly do in the middle of the day. He was shown his affidavit of December 11, 2001. He agreed it contained no mention of Mr. Khadikin producing a quarter for the police officer, nor did the affidavit make any reference to Mr. Khadikin being put in handcuffs, but he asserted he did recall seeing Mr. Khadikin offer the officer a quarter. In re-examination, he said he was not sure of the sequence of Mr. Khadikin saying the conditions had been changed and that he would sue if arrested. On that note, Mr. Khadikin closed his case.

For The Defendant:

[26] The defence made an opening, in essence saying the police had acted on reasonable and probable grounds; accordingly, their actions were justified and fell in the protective provisions of s.25 of the *Canadian Criminal Code*.

Ms. Frampton

[27] Ms. Frampton, an onlooker to the incident, was called. She acknowledged she had conflicts and medical issues resulting in her use of prescription Demerol, and that she had

had a serious cocaine habit, and as to that, she said she had stopped taking cocaine a year ago. As to the incident of June 7, 1999, she recalled going to the Queens Hotel and having lunch with Mr. Leeming. She recalled Mr. Khadikin having a conversation with Mr. Leeming, that Mr. Khadikin said that his restrictions had been lifted, that he was going to get someone to make a telephone call because the police did not know, that the police were being called so that they would then arrest him, and if he was arrested, he could charge them. In cross-examination, it was evident that she had given two statements to the police, in September and October of 2000, but she was not prepared to swear to the truth of any other matters or events that had occurred. The statements were not tendered before me in evidence. Much of the cross-examination of her focused on her drug habit and the circumstances of the taking of the statements, but little attack was made on her description of the conversation between Mr. Khadikin and Mr. Leeming.

Officer Vandeborn

[28] Officer Vandeborn retired from the Nelson City Police force in February of 2000. He now teaches English in Brazil. His police experience included five years in Vancouver, six years with the Delta City Police force, and the Nelson City

Police, 1986 to February of 2000, when he retired. He said he had known Mr. Khadikin socially, and had seen him in the course of his duties as the beat officer in Nelson. He agreed he had on one occasion lent Mr. Khadikin a small amount of money. As to the events of June 7, 1999, he said he had returned from a vacation a few days beforehand. The day before, Sergeant Haddow told him of the drug investigation that had taken place in May, and those who had been charged, including Mr. Khadikin.

[29] About 1:30 p.m. on June 7, he said the police dispatcher advised him there had been an anonymous telephone call received, advising Mr. Khadikin was in the Queens Hotel bar. Officer Vandeborn asked the dispatcher to check the release terms on CPIC, and then got in his car and drove the few blocks to the Queens Hotel. In that time, the information regarding the condition that Mr. Khadikin not go into a licensed premises was confirmed to him. He entered the Hotel. He saw Mr. Khadikin sitting with another man. There were few others in the bar. He approached Mr. Khadikin and said he was going to arrest him for breach of his undertaking, and touched him on the shoulder and asked him to get up. He said Mr. Khadikin said to him, "This is a false arrest." He said Mr. Khadikin gave him no other information, nor did he offer him a

quarter, nor did he ask Mr. Khadikin why he was saying it was a false arrest. Knowing Mr. Khadikin, he asked him to come to the hotel lobby, where he chartered him, i.e., he read from his card as to Mr. Khadikin's **Charter** rights. He says Mr. Khadikin told him he did not want counsel, and repeated to him that it was a false arrest, and added, "This will cost the city \$10,000 or \$15,000."

[30] Officer Vandeborn, as he then was, said he searched Mr. Khadikin, and given Mr. Khadikin's words, i.e., about this being a false arrest, got on his radio to the dispatcher and he asked the dispatcher to confirm the release condition was still in effect, and he placed the radio in a position where Mr. Khadikin could hear the dispatcher's response. The dispatcher said the condition regarding not going on licensed premises was still in effect. Officer Vandeborn then escorted Mr. Khadikin to his car, put him in the front seat, and drove to the police station. On entering the police station, he said Mr. Khadikin was offered a telephone to speak to counsel, and the offer was declined, so Officer Vandeborn then took Mr. Khadikin to the booking area. He was not familiar with the computer processing, and asked Sgt. Maluta to computer process the booking.

[31] Officer Vandeborn said he again searched Mr. Khadikin, and when the booking procedure was almost complete, Mr. Khadikin said, "I was in court this morning, and I had the no go term rescinded." He was asked if he had any paper to prove his assertion, and he said, "No," so the booking process was completed. Then Mr. Khadikin said he wanted to speak to counsel, and he was put in the interview room and put in telephone contact with Mr. Skogstad. At the same time, Officer Vandeborn telephoned the court registry. They advised him Mr. Khadikin's release condition had been rescinded that morning. Officer Vandeborn told Sergeant Maluta, and Mr. Khadikin was taken back to the booking area, given his possessions and released at about 2:30 p.m. Officer Vandeborn estimated the passage of time from the advice of the bail change to Mr. Khadikin's release at some five minutes. When asked if Mr. Khadikin had told him at the hotel that his bail condition had changed, he said that he would have telephoned the dispatcher and got them to telephone the court registry, but that had not happened.

[32] Officer Vandeborn was then cross-examined. Officer Vandeborn denied Mr. Khadikin told him to call the court registry at the hotel, or in the police car, or at the police station front office, or in front of Inspector Anderson.

Officer Vandeborn agreed Mr. Khadikin told him of the changed condition at the booking procedure, and that the booking procedure continued, because the process was almost finished. Officer Vandeborn agreed an offence notice could have been issued in the circumstances, but it was just as fast to do it as he did. Officer Vandeborn denied a point of discussion, namely the questions relating to hypodermic needles. He disagreed the process was an attempt to degrade Mr. Khadikin. Officer Vandeborn denied Mr. Khadikin told him his CPIC would not have the information, or that the CPIC information was wrong. When asked why Officer Vandeborn called the CPIC two times, Officer Vandeborn said he did it for Mr. Khadikin's benefit.

Sergeant Maluta

[33] Sergeant Maluta was the next witness. Sergeant, as he then was. Now, he is Chief Constable. He is an officer of twenty-two years' experience, beginning with the Nelson police force in 1990 and appointed as Chief Constable October 1, 2001. His evidence of the incident of June 7, 1999, began with hearing Officer Vandeborn's calls to the dispatcher to determine Mr. Khadikin's bail status, and the dispatcher confirming the bail condition, namely that Mr. Khadikin was not to be on licensed premises. He said he heard Officer

Vandenborn's call from the hotel to the dispatcher, confirming the bail condition, and shortly after that, Officer Vandenborn and Mr. Khadikin arrived at the police station, where initially he saw Mr. Khadikin go to the interview room. Then Officer Vandenborn came to Sergeant Maluta and asked him to help with the computer booking procedure.

[34] He said Mr. Khadikin was loud and protesting it was a false arrest, and he would sue, and that the officers did not know what they were doing. Sergeant Maluta said in view of the CPIC information, he did not understand Mr. Khadikin's position. Then he said Mr. Khadikin spoke these words, "I went to court this morning, and I got the condition dropped." Sergeant Maluta said he looked over to Officer Vandenborn. He said Officer Vandenborn looked surprised to him, and said, "That's news to me." Sergeant Maluta then said, "I'll finish the booking," and that he told Officer Vandenborn to check with the court registry, and he said he finished the booking in a few minutes, and then put Mr. Khadikin in the interview room, to allow him to contact counsel. Shortly after, Officer Vandenborn came back to him and told him the result of his inquiry to the court registry, that the release condition had been deleted, that there was no requirement that Mr. Khadikin

not be allowed into licensed premises. Sergeant Maluta told Officer Vandeborn to release Mr. Khadikin.

[35] Sergeant Maluta estimated Mr. Khadikin's time at the police station in Nelson on June 7, 1999, at some twenty minutes.

[36] He described the CPIC record maintenance procedures, and its use with respect to a court order, that once the registry processes an order, it is placed in a mailbox in the Nelson Court registry for police pickup. That usually occurs about 3:30 p.m. each day, that the police then enter the document into their file and enter the information into the CPIC. That is still their current procedure.

[37] In cross-examination, Chief Constable Maluta said that Mr. Khadikin never asked him to telephone the courthouse. He said that Mr. Khadikin was treated fairly, throughout. He said Mr. Khadikin appeared quite agitated. He said he considered the breach of the bail condition a potentially serious matter, as it could result in a remand in custody. He agreed he continued the booking procedure after Mr. Khadikin said he had been in court that morning. That was the end of his evidence. An exhibit was entered without objection, which confirms the procedures regarding processing orders in the Nelson Courthouse.

FINDINGS

[38] The findings, then, are largely consistent with the pleadings. On May 8, Mr. Khadikin had been charged with trafficking, and he was released on one condition, namely that he not frequent licensed premises. On June 7, he went to court and that condition was removed. In the middle of the day, or shortly thereafter, he went to the Queens Hotel, where he met his uncle, and spoke with Mr. Leeming. Mr. Khadikin and Mr. Leeming's description of the conversation is fairly similar, but different on one point. Mr. Khadikin said he explained the condition had changed, that the police would not know, and when Mr. Leeming asked him, "Well, what if the police come in," Mr. Khadikin says, "They can telephone the courthouse and verify it." Mr. Leeming's evidence is slightly different. He said he asked Mr. Khadikin why he was in the bar, as he knew Mr. Khadikin was not meant to be there. Mr. Khadikin told him the condition had changed. Mr. Leeming asked him, "Well, what will happen if the police come?" And Mr. Khadikin replied, "I'll take them to court, I guess." And it was only slightly different on cross-examination, that Mr. Khadikin said, "They will probably arrest me, and I'll take them to court."

[39] Someone did telephone the police about 1:30 p.m. The police did check their CPIC. They found there was still a condition of release, on their record. The police attended. They arrested Mr. Khadikin, I would say about 1:35 p.m. I find Mr. Khadikin did assert, "This is a false arrest." I find the police then checked the CPIC again. They still had the same information. I find the police did put Mr. Khadikin in the front seat of the police car and drove him to the police station, where he was offered the opportunity to telephone counsel, which he declined. I find he was then taken to the booking area, where he was searched, and in the course of that booking, he continued to assert he had been falsely arrested, and that he advised he had been in court that morning, and the condition had been changed. The police continued to complete the booking. At the same time, they checked with the court registry, and they found indeed the condition of the release had been changed. There was no condition. I find Mr. Khadikin was released at 2:30 p.m.

[40] I have some conflicting testimony, then, from Mr. Khadikin, Mr. Leeming and Ms. Frampton, and Officer Vandeborn as to the events at the hotel, and at the police station as between Mr. Khadikin, Officer Vandeborn, and Sgt. Maluta. Plainly, the circumstances amount to a false arrest. The

issue then is justification. Did the police officers act on reasonable grounds, or in good faith? I am satisfied, as I said, that Mr. Khadikin asserted it was a false arrest, early in the course of the arrest by Officer Vandeborn, but the crucial issue is when did Mr. Khadikin tell Officer Vandeborn that he had been in court on that morning of June 7, 1999? Was it at that first opportunity, when Mr. Khadikin was arrested at the Queens Hotel, or was it at the booking desk at the Nelson police station? If it was at the first opportunity at the Queens Hotel, can there be any question that the continuation of the arrest process amounted to a false arrest or imprisonment? The law is clear in such circumstance. The arrest would be false. But in my view, the evidence leans the other way, to the later announcement at the police station. In particular, first we look at the circumstances.

(1) Someone called the police.

This is strange. Mr. Khadikin could not point to anyone at the barroom who would call. It raises the question, who would call? Who cared? Who would be interested?

(2) The conversation with Mr. Leeming.

He was consistent on both occasions. "What will happen if the police come?" Mr. Khadikin replied, "I will take them to

court, I guess." And on the second time, in cross-examination, Mr. Khadikin answered, "They will probably arrest me, and I'll take them to court." That raises the question why Mr. Khadikin would anticipate he would be arrested, and why would he anticipate then taking the police to Court?

(3) I look back at Mr. Khadikin's pleadings. They are dated June 9, 1999. I read them earlier. In light of the evidence, I read them again. The great advantage they have is that they are written in close proximity to the date of the events.

15. The Plaintiff acting pursuant to the conditions of his undertaking, appeared at Nelson Provincial Court as directed, on June 7th, 1999, at which time his initial release conditions were removed by a Provincial Court judge.

All of that is established before me. I continue:

...who commented adversely on the crown's case against the Plaintiff.

[41] There is no evidence before me of such comment.

16. On the afternoon of June 7th, 1999, the Plaintiff, along with his retired uncle, were having a soft drink in the Queens Hotel in the City of Nelson.

That is true.

17. The Defendant Vandeborn attended at the Queens Hotel, arrested the Plaintiff, searched the Plaintiff on Baker Street in the city of Nelson, and physically placed the plaintiff in a marked patrol car.

Other than questioning what "physically" means, there is no disagreement about that.

18. The Plaintiff advised the Defendant Vandeborn that he was not breaking any laws, and the arrest he was making was a false arrest.

I find that to be the case, too. He did claim false arrest.

19. There were numerous people present throughout the search and arrest.

Well, some were there, some gave their evidence, but I know of no others that make up the numerous people.

20. The Plaintiff was taken to Nelson City Police headquarters, at which time the Plaintiff advised the Defendant Maluta that the arrest was unlawful and that he had committed no offence -

[42] Again, I find that supported in the evidence of Sgt. Maluta. And it goes on to say:

- and advised the Defendant Maluta and Vandeborn to verify his statement at the Court Registry in the city of Nelson. Both Defendants refused to do so, although a telephone was present on the counter.

And then 21 deals with the processing and so on.

[43] On his own recitation of the events, written two days after, not until he was with Sgt. Maluta does Mr. Khadikin plead and aver that he disclosed he had been in court that morning, and the release conditions had been removed. That I find in the words "and advised the defendant, Maluta and Vandeborn, to verify his statement with the court registry." When I look at the evidence of the plaintiff, through the prism of his own words of claim, not all of his evidence rings true. That contrasts with the evidence of the Officer Vandeborn and Sgt. Maluta. Their evidence was clear, and rings with that clarity. The evidence of Mr. Leeming and Ms. Frampton can only direct me to the conclusion that Mr. Khadikin knew the Nelson police might arrest him that day, and he knew that before the event took place, and that he was already considering a claim against them for wrongful arrest and imprisonment. How could he consider such a claim without already knowing he had information that an arresting police officer did not have? To ask the question directs me to a conclusion that Mr. Khadikin knew his true situation at midday on June 7, 1999, and he did not reveal it until he was at the booking desk with Sgt. Maluta.

LAW

[44] Counsel referred me to two cases where CPIC information was wrong or not available, and citizens of Canada were improperly arrested. In *Wall v British Columbia*, a decision of Madam Justice Koenigsberg, [1995] B.C.J. No. 1697, (S.C.) there had been a series of errors. A man faced a minor fisheries offence, in Port Alberni. He transferred the charge to Richmond, and pleaded guilty and paid his fine, but the warrant was left outstanding in Port Alberni, and he was subsequently wrongly arrested. He was arrested four years later, after the offence. Not unnaturally, he protested at the time, but he could not prove anything, so the police took him to the police station. He was taken from his home. He was taken before a justice of the peace and he was released. There, the Court found while the warrant was valid, albeit defective, the officer had reasonable and probable grounds for executing the warrant and arresting the plaintiff.

[45] The statutory defence for the police officer in this situation lies in s.25(1) of the *Criminal Code*, which requires anyone who is authorized by law to do anything in the administration or enforcement of the law, and as a police officer, if he acts on reasonable grounds, is justified in doing what is required or authorized, and using as much force

as necessary. And subparagraph (2) deals with a slightly different situation, where a person is required or authorized by law to execute a process, that person if acting in good faith is justified in executing the process, notwithstanding the process is defective, or that it was without jurisdiction. Good faith, in the circumstances, requires the police officer be satisfied on reasonable grounds that the process is not defective.

[46] While Mr. Khadikin told Officer Vandeborn it was a false arrest, he did not say why, he simply triggered the officer's rather predictable response, to go back to the CPIC information to see if he was acting on proper grounds, and he did so. I find Officer Vandeborn acted on reasonable grounds. I find Officer Vandeborn acted in good faith.

[47] I should also refer to *Lord v the Attorney General of Canada*, a decision of Madam Justice Allan, 2001 BCSC 212. Mr. Lord was subject to a prohibition not to enter any federal prison or penitentiary for a period of a year. He appealed that term, and he won a reduction, but on November 11, 1998, he entered Matsqui Prison to see his son, and was subsequently arrested by a police officer. The police officer relied on a CPIC information. He only found the original one-year prohibition. The CPIC did not show the reduction in the term

of the prohibition. The police were told the appeal court had varied the prohibition. The police asked for paper to verify. Mr. Lord was held from 1:26 p.m. until 8 p.m. on November 11, when finally a copy of the appeal order was given to the police. The court referred to s.25(2) of the **Criminal Code** that a police officer must have reasonable and probable grounds for making the arrest. See **R. v. Storrey**, [1990] 1 S.C.R. 241. The fact of the arrest is based on an invalid court order or warrant does not render the arrest a false arrest. See **Davidson v. the City of Vancouver** (1986), 4 B.C.L.R. (2d) 68 (S.C.). The Court found the police officers acted in good faith, on what they considered to be a valid information on the CPIC radio. The action of Mr. Lord for false arrest and false imprisonment was dismissed.

[48] I refer to those cases in part to point out that there the plaintiffs made prompt complaint that there was no basis for the arrest, not merely asserting a false arrest, but giving reason for it. Here, Mr. Khadikin gave evidence that he did warn of false arrest, but I cannot accept that he told Officer Vandeborn the necessary second sentence, that his release condition had changed that morning, not until he was at the booking desk at the police station.

DECISION

[49] So, I am satisfied, firstly as a question of fact, that there is no basis for the claim of false imprisonment or false arrest. Secondly, as a matter of law, that it is not established it is a false arrest or a false imprisonment.

OBITER

[50] One aspect was not truly canvassed before me, and I should, for want of completeness, touch on this. It was not raised in the pleadings, which is important, but I noted in the *Lord* case, Madam Justice Allan gave consideration to the provisions of s.495 of the **Criminal Code**, which provides that police officers can arrest persons without a warrant, when they are found committing an offence. But under s.495(2), it says:

- (2) A peace officer shall not arrest a person without warrant for
 - (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction.

[51] That would have been the situation here. Mr. Khadikin had given a promise not to go into a licensed premises. He would have faced a charge under s.145(5.1), the breach of the undertaking, where he could be guilty of an indictable

offence, or guilty of a summary conviction offence. The officer is required to consider the circumstances, and the public interest, as to the person's identity, the necessity to preserve evidence, or to prevent the continuation of the offence, and then the officer is given the opportunity then not to arrest, but to simply provide the person with a Notice to Appear. Section 495(3) reads:

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceeding under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2), R.S., c. C-34, s.450; R.S., c.2 (2nd Supp.), s.5; R.S.C. 1985, c.27 (1st supp.), s.75.

[52] Well, non-compliance has not been alleged here. It was touched on tangentially, but it was not raised. Nor was it raised in the evidence of Officer Vandeborn, because it was not raised in the pleadings. In cross-examination from Mr. Khadikin, Officer Vandeborn acknowledged he had known the nature of the offence, that it was a breach of an undertaking, and that he could have chosen an alternative, and issued the appearance notice under s.496. But had it been necessary, I

would find in these circumstances that it would have been a reasonable thought in the officer's mind and in the public interest, that the offence would continue, and the public interest would have required Mr. Khadikin's arrest. In any event, in the finish, there is justification found in the provisions of s.25 of the **Criminal Code**. In sum, then, the action of the plaintiff is dismissed.

COSTS

[53] **MR. BUTCHER:** My Lord, it is David Butcher, here.

[54] **THE COURT:** Yes, sir.

[55] **MR. BUTCHER:** I am asking for an order of costs, in this case, and I can advise the Court that a settlement offer of \$1 plus tax for costs and disbursements was issued on July 25, and asking for double costs, since that date.

[56] **THE COURT:** What do you say as to costs, Mr. Khadikin?

[57] **MR. KHADIKIN:** I am sorry, what do I say to costs? It is my position that both parties should bear their costs. And I say it in light of my submissions I made to this Court with respect to why I initiated these proceedings. It is that simple. A matter of self-defence, to me. That is all it was. There is three initial offers, three main offers made. One to

pay my costs. One to pay my costs and a dollar, and one for \$3,000. The settlement conference resulted in a situation where Mr. Butcher had a discussion with me regarding potential legal fees. I returned an offer in that respect of \$7,500, which was refused. That is the discussions we had on costs. I am not (indiscernible) fees or settlement. I would also point out, as the court is abundantly aware, that the **18A** application that the defendants pursued was unsuccessful. I would ask Your Lordship to follow the reasoning that was applied in **Lord**, with respect to costs.

[58] **THE COURT:** There are a number of factors that come into my mind on this issue. One is the flag, as Mr. Justice Wilson put it, on the **18A** application. Mr. Khadikin said, "This is a false arrest." Secondly, there are the factors that might have been considered at the time, given the officer's knowledge of Mr. Khadikin, and the other factors that might go into consideration of the issues raised by s.495. Thirdly, there is the continuation of the process, that once the other part of the case regarding the trafficking was dealt with, a good deal of the sting had gone from the claim of Mr. Khadikin. Fourthly, there has been the opportunity of settlement taken. Mr. Khadikin, at least from his viewpoint, has conducted this case on a matter of principle. He says the

issue of pleadings prevent any further actions against him by the police. I rather doubt it would prevent the police from acting properly in any circumstance, but at least that was his thinking.

[59] The Court said in **Wall**:

This action was necessitated because the system made a mistake. While the R.C.M.P. officers acted in good faith and are not liable, it is understandable why a citizen of this country would be outraged and feel that the R.C.M.P. officers could have done more to avoid exposing an innocent person to such a humiliating process.

And each party bore their own costs.

[60] Madam Justice Allan followed that reasoning in **Lord**, that the officers acted in good faith, and she ordered each party bear their own costs. This is not a situation like **Wall** or **Lord**, that is, a mistake in the process. Here, it appears to me, there is a delay in the information going through the process. And it would not be unfair to surmise that Mr. Khadikin knew that was going to be a factor in the events that turned out on June 7, 1999. On the other hand, I still have in mind there was a lesser process that could have been used, and I take that into account. Mr. Butcher, I am not going to allow double costs. You are entitled to an ordinary set of Scale 3 costs.

[61] **MR. BUTCHER:** Thank you very much, My Lord. There is one other issue. I wonder if I might have an order dispensing with Mr. Khadikin's signature on the final order?

[62] **THE COURT:** Well, Mr. Khadikin is here. Mr. Khadikin, do you have any objection? Do you want to sign the court order? Do you want to approve it as to form?

[63] **MR. KHADIKIN:** I see no reason why I should not.

[64] **THE COURT:** All right. No, I will not dispense with the signature on the document, but should Mr. Khadikin not put his signature to the form of order within fifteen days of presentment to him, then I will dispense with the signature.

[65] **MR. BUTCHER:** I think that concludes all matters, My Lord.

[66] **THE COURT:** Thank you.

[67] **MR. BUTCHER:** Thank you.

"R. Crawford, J."
The Honourable Mr. Justice R. Crawford