

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

KEITH ALEXANDER,	)	<u>R. Ian Histed</u>
	)	for the plaintiff
plaintiff,	)	
	)	<u>Stuart J. Blake, K.C.</u>
- and -	)	<u>Aaron W.K. Challis</u>
	)	<u>Amelia M. Peterson</u>
	)	<u>Eric Moon</u>
	)	for the defendant
THE CITY OF WINNIPEG,	)	
	)	<u>William G. Haight</u>
defendant.	)	<u>Franco Aiello</u>
	)	for Adam Cheadle
	)	and Andrew Zurawsky
	)	
	)	<u>Judgment Delivered:</u>
	)	August 6, 2026

PERLMUTTER A.C.J.

INTRODUCTION

[1] In this action, stemming from the arrest of the plaintiff police officer for uttering threats, are the following motions:

1. The plaintiff's motion to amend the statement of claim;
2. The plaintiff's motion to introduce in this action evidence obtained on the examinations for discovery in another action filed by the plaintiff for

malicious prosecution against the two other police officers who are alleged to have witnessed the uttering of the threats (the “malicious prosecution action”);

3. The defendant’s summary judgment motion dismissing the plaintiff’s claim; and
4. The plaintiff’s motion that this action be consolidated or heard at the same time as the malicious prosecution action.

[2] As well, the defendant objects to the admissibility of evidence in the plaintiff’s affidavit filed in reply to the defendant’s evidence supporting its summary judgment motion as irrelevant and/or as inadmissible hearsay. The plaintiff objects to the admissibility of some of the defendant’s affidavit evidence as inappropriate reply evidence. In addition, it is the plaintiff’s position that, although he has not filed a motion for summary judgment, summary judgment on liability should be granted in his favour.

BACKGROUND

[3] On October 29, 2019, the plaintiff was arrested, without a warrant, by Edward Chalmers with the assistance of his partner Marc Leveque, who were both police officers with the Professional Standards Unit (the “PSU”) of the Winnipeg Police Service (“WPS”). The plaintiff was charged with two counts of utter threats. The background leading to his arrest is as follows.

- On April 25, 2019, the PSU was asked to commence an investigation regarding alleged threats by the plaintiff against police officer Tyler

Schmidt. It was alleged that these threats were witnessed by police officers Adam Cheadle and Andrew Zurawsky on March 18 and 19, 2019. At the time, the plaintiff supervised Cheadle and Zurawsky at Division 13.

- Officer Cameron Mackid of the PSU was assigned as the supervisor of the investigation and Chalmers was assigned as the lead investigator with Leveque assisting.
- On May 1, 2019, the plaintiff was given notice of the investigation when he was placed on administrative leave.
- The investigation took place between April 25 and August 6, 2019.
- Chalmers deposed that after concluding the investigation, he formed the belief that there were reasonable and probable grounds to arrest the plaintiff for the charge of utter threats. However, he deposed that it was standard practice for the PSU in matters involving allegations against police officers to first refer the file to Manitoba Prosecutions for a Crown opinion.
- On October 23, 2019, the WPS received correspondence from Manitoba Prosecutions recommending that charges be laid against the plaintiff.
- On October 24, 2019, Chalmers notified the plaintiff of the contents of the Crown opinion, and an appointment was made for the plaintiff to attend PSU headquarters for his arrest on October 29, 2019.
- On October 29, 2019, the plaintiff and his lawyer attended the PSU headquarters, where he was arrested for two counts of utter threats. The

plaintiff was not handcuffed, searched, interrogated, or placed in a cell. He was released on a promise to appear with an undertaking to abstain from contacting Zurawsky, Cheadle, and Schmidt. In his affidavit evidence, Chalmers estimated that the plaintiff was at PSU headquarters for approximately 30 minutes.

- On October 19, 2021, the plaintiff filed the statement of claim in this action.
- On February 2, 2022, the charges were stayed.
- In a separate action, on January 19, 2024, the plaintiff filed the malicious prosecution action which remains outstanding as against Cheadle and Zurawsky.

ISSUES

[4] The motions, challenges to the admissibility of the parties' affidavit evidence, and the parties' related positions give rise to the following issues:

1. Should leave be granted to amend the statement of claim?
2. Is the plaintiff's evidence at paragraphs 24 to 41 of his affidavit affirmed January 22, 2026, dating back to 2007, relating to his exam marks and various dealings with previous supervisors inadmissible as irrelevant?
3. Is the plaintiff's evidence at paragraphs 49, 64, 65, and 70 of his affidavit affirmed January 22, 2026, inadmissible as hearsay?

4. If the actions are not consolidated, should excerpts from the examinations for discovery of Zurawsky and Cheadle in the malicious prosecution action be admitted as evidence in the summary judgment motion?
5. Is Chalmers's reply affidavit inadmissible?
6. Should summary judgment be granted dismissing the plaintiff's claim?
7. If summary judgment is not granted in the defendant's favour, should summary judgment be granted in the plaintiff's favour regarding liability in this action?
8. If summary judgment is not granted in the defendant's favour, should this action be consolidated or heard together with the malicious prosecution action?

ANALYSIS

1. Should leave be granted to amend the statement of claim?

[5] The statement of claim seeks damages for arbitrary detention contrary to s. 9 of the ***Canadian Charter of Rights and Freedoms***. It is the plaintiff's position that the statement of claim as currently drafted also includes an action for false imprisonment. He seeks to amend the claim to add particulars of both these causes of action. However, it is the defendant's position that the only cause of action set out in the statement of claim is for damages for arbitrary detention contrary to s. 9 of the ***Charter***. The defendant says the proposed amendments raise a new cause of action that is statute-barred. If false imprisonment is a new cause of action, it is undisputed that it is statute-barred.

[6] The body of the statement of claim is brief, consisting of only one page, which includes the following:

3. On October 29, 2019 at 1300 hours, police officers of the Winnipeg Police Service acting in the course of their duties arrested, detained and imprisoned the plaintiff at an address in downtown Winnipeg, Manitoba.

4. The arrest, detention and imprisonment of the plaintiff was arbitrary and unconstitutional and as such, contrary to the right assured to the plaintiff by section 9 of *The Canadian Charter of Rights and Freedoms*.

[7] The plaintiff seeks two amendments to the statement of claim.

[8] The plaintiff seeks to amend paragraph 3 to add the following after "Manitoba":

The Officers who arrested the plaintiff did not believe and did not have reasonable grounds to believe that the arrest of the plaintiff was necessary:

- a) to establish the plaintiff's identity;
- b) to secure or preserve evidence of or relating to the alleged offence; or
- c) to prevent the continuation or repetition of the offence or the commission of another offence.

The Officers who arrested the plaintiff did not believe and did not have reasonable grounds to believe that if they did not arrest the plaintiff he would fail to attend court in order to be dealt with according to law.

[9] The plaintiff also seeks to amend paragraph 4 to insert the word "false" between the words "was" and "arbitrary".

[10] Court of King's Bench Rule 26.01 provides:

On motion at any stage of an action the court may grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[11] In considering a motion to amend under Rule 26.01, in ***Lagimodiere et al. v. The Wawanesa Mutual Insurance Company et al.***, 2020 MBQB 154, Edmond J.

(as he then was) held as follows:

30 In *Winnipeg (City) v. Integra Credit Union Ltd.*, 2013 MBCA 2, 288 Man.R. (2d) 133 (QL), the Court of Appeal confirmed the factors to be considered on a motion under Rule 26.01 as follows (at para. 16):

- (a) the seriousness of the prejudice to the other party;
- (b) whether that prejudice that would result can be compensated for by costs or an adjournment;
- (c) whether there was a delay on the part of the party moving for the amendment and, if so, whether the delay has been satisfactorily explained; and
- (d) the nature of the proposed amendment and whether it raises a valid, arguable point that has merit.

31 In considering the seriousness of the prejudice to the other party, the court considers whether any of the proposed amendments create a new cause of action and if so, whether the new cause of action is statute barred.

32 In *Onishenko Estate v. Quinlan*, [1972] S.C.R. 380 (S.C.C.) (QL), the Supreme Court of Canada held that amendments to pleadings that create new causes of action which are statute barred may only be allowed if "special circumstances" exist. It is clear that special circumstances have been interpreted to be "rare" and "exceptional". (See *Miller v. Jaguar Canada*, [1998] 123 Man.R. (2d) 161, [1997] M.J. No. 555 (Man. C.A.) (QL))

33 The analysis to be undertaken to consider whether to grant an amendment respecting a new cause of action arising outside a limitation period was considered in *Arctic Foundations of Canada Inc. v. Mueller Canada Ltd. (c.o.b. Mueller Flow Control)*, 2009 MBQB 309, 248 Man.R. (2d) 123 (QL) and the questions to be answered can be summarized as follows:

- a) Do the proposed amendments create new causes of action? If so,
- b) When did the new causes of action arise and what are the limitation dates?
- c) Are the new causes of action statute barred?
- d) If the limitation period has expired, should the proposed amendments nonetheless be permitted if "special circumstances" exist?

(See also, *Arnason Industries Ltd. v. Red Sucker Lake First Nation et al*, 2024 MBKB 69, para. 8)

[12] It is the defendant's position that weighing against the proposed amendments (in addition to the lapsed limitation date) are the plaintiff's delay in pursuing them and prejudice to the defendant because, if leave is granted to amend, the defendant would be facing a claim for additional damages for false imprisonment and a jury trial. As well, the defendant asserts that the proposed amendments contradict the plaintiff's position that false imprisonment is already pled and, in any event, does not meet the requirements regarding proper pleading of false imprisonment.

[13] The plaintiff's proposed amendment to paragraph 3 of the statement of claim is grounded in ss. 495(1) to 495(3) of the *Criminal Code*, R.S.C., 1985, c. C-46. As will be further discussed, these sections are also relevant to the issue of summary judgment. They establish and delineate some of the powers of arrest without warrant held by peace officers. The pertinent sections are the following:

Arrest without warrant by peace officer

495 (1) A peace officer **may arrest without warrant**

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

Limitation

(2) A peace officer **shall not arrest** a person **without warrant** for

- (a) an indictable offence mentioned in section 553,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
- (c) an offence punishable on summary conviction,

in any case where

- (d) he believes on reasonable grounds that **the public interest**, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

- (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

Consequences of arrest without warrant

(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 proceedings 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).

[emphasis added]

[14] In *R. v Carignan*, 2025 SCC 43, Côté J., writing for the court, stated the following regarding the foregoing sections of the *Criminal Code*:

82 I therefore find that an analysis of the text, context and purpose of s. 495(2) *Cr. C.* leads to the conclusion that the limitations imposed on the power of arrest without warrant are mandatory in nature. This provision requires peace officers, in order to properly exercise their discretion to arrest a person without warrant, to assess whether the arrest is justified in the public interest and whether there is a risk that the accused will not appear. When the conditions set out in para. (d), para. (e) and any of paras. (a) to (c) of s. 495(2) *Cr. C.* are met, an arrest without warrant is prohibited. Thus, peace officers contravene s. 495(2) *Cr. C.* where they fail to assess these criteria before acting or where they -- wrongly -- make an arrest without warrant when the conditions (if they are met) do not permit them to do so.

83 It follows from the above that an arrest contrary to s. 495(2) *Cr. C.* is unlawful because it is contrary to this law, which suffices to characterize said arrest as arbitrary within the meaning of s. 9 of the *Charter*. Indeed, since the enactment of the *Charter* in 1982, this Court has had occasion to state that an unlawful arrest or detention, including one not authorized by law, is necessarily an arbitrary arrest or detention and infringes s. 9 of the *Charter* [citations omitted].

84 Since I am of the view that an arrest contrary to the law established by s. 495(2) *Cr. C.* results in this arrest made in violation of binding norms being unlawful, this is sufficient to characterize such an arrest as arbitrary within the meaning of s. 9 of the *Charter*. ...

85 The main source of disagreement between the parties with respect to s. 495(3) *Cr. C.* lies in para. (a) of this provision. This paragraph sets out the presumption that, notwithstanding s. 495(2) *Cr. C.*, a peace officer who complies with s. 495(1) is "acting lawfully and in the execution of his duty" for the purposes of various proceedings, subject to certain conditions.

86 It is not in dispute that this paragraph serves, among other things, to provide a peace officer who has made an arrest without warrant with protection in a criminal proceeding where that officer is personally facing a criminal charge for failure to comply with s. 495(2) *Cr. C.*, despite the fact that the officer complied with s. 495(1) *Cr. C.* As Minister Turner explained, the bill was drafted in such a way that a peace officer could not be prevented from acting "for fear of a criminal suit in the exercise of his discretion" (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, March 4, 1971, at p. 11). It is also not in dispute that s. 495(3)(b) *Cr. C.* nevertheless allows a person who has been arrested and believes the arrest to be contrary to s. 495(2) *Cr. C.* to bring a civil suit against the peace officer, or the officer's employer, in order to establish that the officer did not comply with the

requirements of s. 495(2) *Cr. C.* and thus to obtain damages as a remedy [citations omitted].

...

137 From this perspective, s. 495(3)(a) *Cr. C.* provides peace officers or any person responsible for them with greater protection when proceedings are brought against them under the *Criminal Code* or any other Act of Parliament by creating a presumption that peace officers are deemed to have acted lawfully and in the execution of their duty. As for s. 495(3)(b) *Cr. C.*, it sets out the parameters for a civil suit that may be brought by a person who believes that his or her arrest was contrary to s. 495(2) *Cr. C.* For the purposes of such a lawsuit, the peace officer is presumed to have acted lawfully and in the execution of his or her duty unless the person arrested without warrant successfully demonstrates that the arrest was contrary to the requirements established by s. 495(2) *Cr. C.* Section 495(3)(b) therefore ensures that, in a civil suit against the peace officer or any person responsible for that officer for a contravention of s. 495(2), the plaintiff bears the burden of proof.

[15] The offence of utter threats is a hybrid offence and thus the plaintiff's arrest is subject to s. 495(2). It is the plaintiff's position that the proposed amendments to paragraph 3 of the statement of claim do not add a new cause of action but only provide detail of liability to reflect his onus under s. 495(3)(b) of the ***Code***.

[16] Turning to the application of the relevant factors, as noted, the parties disagree as to whether the proposed amendments create a new cause of action. In ***Klassen v. Beausoleil***, 2019 ONCA 407, which considered the Ontario equivalent to Manitoba's Rule 26.01, the Ontario Court of Appeal provided the following:

[26] The expiry of a limitation period is one form of non-compensable prejudice. A party cannot circumvent the operation of a limitation period by amending their pleadings to add additional claims after the expiry of the relevant limitation period: *Frohlick v. Pinkerton Canada Ltd*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 24; *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 21-23; *United Food and Commercial Workers Canada, Local 175 Region 6 v. Quality Meat Packers Holdings Limited*, 2018 ONCA 671, at paras. 64; *Davis v. East Side Mario's Barrie*, 2018 ONCA 410, at paras. 31-32. In this regard, the "addition of new statute-barred claims by way of an amendment is conceptually no different than issuing a new and separate Statement of Claim that advances a statute-barred claim" (emphasis [in original]): *Quality Meat Packers*, at para. 64; citing *Frohlick*, at para. 24.

[27] **An amendment will be statute-barred if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period:** *North Elgin*, at paras. 19-23, 33; *Quality Meat Packers*, at para. 65. In this regard, **the case law discloses a "factually oriented" approach to the concept of a "cause of action" – namely, "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person":** *North Elgin*, at para. 19; *Quality Meat Packers*, at para. 65.

[28] **An amendment does not assert a new cause of action – and therefore is not impermissibly statute-barred – if the "original pleading ... contains all the facts necessary to support the amendments ... [such that] the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded":** *Dee Ferraro*, at paras. 4, 13-14; *North Elgin Centre Inc.*, at paras. 20-21; *East Side Mario's Barrie*, at paras. 31-32; *Quality Meat Packers*, at para. 65. Put somewhat differently, **an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded:** *North Elgin*, at para. 23.

[29] The relevant principle is summarized in Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed. (Toronto: LexisNexis, 2017), at p. 186:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon [which] the original right of action is based.

[30] In the course of this exercise, **it is important to bear in mind the general principle that, on this type of pleadings motion, it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies:** *Farmers Oil and Gas Inc. v. Ontario (Ministry of Natural Resources)*, 2016 ONSC 6359, 134 O.R. (3d) 390 (Div. Ct.), at para. 23.

[31] Finally, the court may refuse an amendment where it would cause non-compensable prejudice. The prejudice must flow from the amendment and not some other source: *Iroquois Falls*, at para. 20. At some point the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party is presumed. In this event, the onus to rebut the presumed prejudice lies with the moving party: *State Farm*, at para. 25.

[32] Alternatively, the responding party may resist the amendment by proving actual prejudice – i.e. by leading evidence that the responding party has lost an opportunity in the litigation that cannot be compensated by an adjournment or an award of costs as a consequence of the amendment. It is incumbent on the responding party to provide specific details of the alleged prejudice: *State Farm*, at para. 25.

[33] Irrespective of the form of prejudice alleged, there must be a causal connection between the non-compensable prejudice and the amendment. The prejudice must flow from the amendment and not from some other source: *State Farm*, at para. 25.

[emphasis added]

(See also, ***Winnipeg (City) v. Entegra Credit Union Ltd.***, 2013 MBCA 2, paras. 30-32)

[17] False imprisonment is the intentional and total confinement of a person against his or her will without justification. If a police officer acts with legal authority, his or her imprisonment of a person is justified. An imprisonment is not justified when it follows an unlawful detention or arrest. (***Ward v. City of Vancouver***, 2007 BCSC 3, at para. 49, aff'd 2009 BCCA 23, rev'd on other grounds, 2010 SCC 27; ***Jensen v. Stemmer et al.***, 2007 MBCA 42, paras. 64-65; and Lewis N. Klar, Q.C. and Cameron S.G. Jeffries, ***Tort Law***, 6th ed. (Toronto: Thompson Reuters, 2017) at p. 67).

[18] The test to determine whether a plaintiff's section 9 ***Charter*** rights have been infringed is the same in both criminal and civil proceedings. However, the evidentiary rules surrounding the admissibility of evidence will be different (***McCormack v. Evans***, 2025 ONCA 767). The claimant must show they were (1) detained or imprisoned [by a defendant who must be a state actor]; and (2) that the detention or imprisonment was arbitrary (***R. v. Hufsky***, 1988 CanLII 72 (SCC), [1988] 1 S.C.R. 621, paras. 12-13). A detention or imprisonment will always be arbitrary, and the claimant's s. 9 ***Charter***

rights will always be infringed, where the detention is not authorized by statute or common-law (*R. v. Grant*, 2009 SCC 32, paras. 54-55; *R. v. Tim*, 2022 SCC 12, para. 22).

[19] In the case at hand, it is undisputed that the claim for arbitrary detention is properly pled. Given the elements to establish a cause of action for wrongful imprisonment, in the circumstances, in my view, the claim for a breach of s. 9 of the *Charter* as pled subsumes an action for false imprisonment. As well, in applying the “factually oriented” approach to the concept of a cause of action, in the case at hand, it is the alleged existence of the same factual situation which is claimed to entitle the plaintiff to recover for both arbitrary detention and false imprisonment.

[20] Moreover, for the tort of false imprisonment, “A claimant has the burden of proving imprisonment, and having done this, the onus then lies on the defendants to prove a justification in defence” (*Tort Law*, p. 67; see also, *Bullen & Leake & Jacob’s Precedents of Pleadings*, 13th ed (London: Sweet & Maxwell Ltd., 1990), at p. 386). Given this more limited initial burden on a plaintiff to prove false imprisonment, the proposed amendments to paragraph 3 (to reflect s. 495(3) of the *Code*) are unnecessary to establish false imprisonment (and thus do not raise a new cause of action). Rather, they add particulars to the claim for arbitrary detention.

[21] The defendant asserts that the proposed amendments should not be permitted as they do not meet the requirements for proper pleading of false imprisonment based on the following from *Rebillard v. Manitoba (A.G.) et al.*, 2014 MBQB 181:

26 If the plaintiff is pursuing a claim based on false arrest or false imprisonment, she must plead the following material facts:

- (a) The arresting officer(s) did not have a warrant for the arrest of the plaintiff.
- (b) The arresting officer(s) did not subjectively have reasonable and probable grounds to believe an offence had been committed.
- (c) A reasonable person placed in the position(s) of the arresting officer(s) would not conclude there were reasonable and probable grounds for the arrest.
- (d) The arresting officer(s) did not believe the arrest was necessary on reasonable and probable grounds to prevent the continuation of the offence. See section 495(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and *R. v. Storrey*, [1990] 1 S.C.R. 241.

[22] While judicial comity would typically dictate that I follow the foregoing, it does not appear that in providing the foregoing all binding authority in case law was considered. This may be due to the plaintiff being a self-represented litigant who may not have had the legal research experience necessary to bring such case law to the attention of the presiding judge. Given the burden on a plaintiff to prove false imprisonment (as described above), I would adopt the following from ***C.H.S. v. Alberta (Director of Child Welfare)***, 2008 ABQB 513, regarding the essential elements for false imprisonment:

[53] The elements of the tort are that the plaintiff has been imprisoned, or confined, and that the imprisonment was directly caused by the defendant. Once these two elements have been demonstrated, the onus shifts to the defendant to show that the detention was justified: Klar, at 55; Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Toronto: LexisNexis Canada, 2006) at 50 [“Linden”]; *Frey v. Fedoruk*, 1950 CanLII 24 (SCC), [1950] S.C.R. 517; *Forster v. MacDonald* (1993), 1993 CanLII 7302 (AB QB), 146 A.R. 270, 108 D.L.R. (4th) 690 (Q.B.), aff’d (1995), 1995 ABCA 334 (CanLII), 174 A.R. 174, 127 D.L.R. (4th) 184, (C.A.); *Kendall and Kendall v. Gambles Canada Ltd.*, 1981 CanLII 2149 (SK QB), [1981] 4 W.W.R. 718, 11 Sask. R. 361 (Q.B.). In *Dix v. Canada (A.G.)*, 2002 ABQB 580, Ritter, J. (as he then was) summarized the elements of the tort of false imprisonment at para. 564:

- (a) That the Plaintiff was totally deprived of his liberty;

- (b) The deprivation was against his will;
- (c) The deprivation was directly caused by the Defendant.

[23] In my view, even without the proposed amendments, the pleading requirements for false imprisonment are met by the current statement of claim.

[24] Accordingly, I find that the proposed amendments do not raise a new cause of action and in any event, in these unique circumstances, are nonetheless permitted as "special circumstances" as the defendant had adequate notice of the claim on the basis of the existing pleading. As such, I am granting leave to amend the statement of claim.

2. Is the plaintiff's evidence at paragraphs 24 to 41 of his affidavit affirmed January 22, 2026, dating back to 2007, relating to his exam marks and various dealings with previous supervisors inadmissible as irrelevant?

3. Is the plaintiff's evidence at paragraphs 49, 64, 65, and 70 of his affidavit affirmed January 22, 2026, inadmissible as hearsay?

[25] The essence of the defendant's motion for summary judgment is that the arresting officers (Chalmers and Leveque) had reasonable and probable grounds for the arrest. As such, it is the defendant's position that the evidence in the plaintiff's affidavit regarding his employment history back to 2007 is irrelevant.

[26] Evidence is relevant if it helps to prove a fact in issue or helps the court assess the probative value of evidence. The threshold for admissibility is low. (*Harper v. Manitoba*, 2026 MBKB 88, para. 13)

[27] In the case at hand, a significant aspect of the plaintiff's position is that the investigation upon which Chalmers and Leveque relied to support their grounds for

arrest was tainted and part of a larger endeavour by the WPS executive to terminate the plaintiff's employment. While it is apparent from the case law (further discussed below) that the relevant timeframe to consider whether there were grounds for the plaintiff's arrest is in the timeframe of the arrest, it remains open to the plaintiff to argue that circumstances that pre-date the arrest provide context for assessing the circumstances at the time of the arrest. As a result, I am unable to conclude, having regard to the relatively low threshold for relevance, that this evidence is not logically probative. As such, it will remain as part of the record.

[28] In considering the admissibility of those paragraphs objected to on the grounds of hearsay, I note that Court of King's Bench Rule 39.01(4) allows the admission of hearsay in summary judgment motions in some circumstances. However, the court must consider whether allowing the hearsay would ensure a fair and just determination of the motion. As explained by Mainella J.A. in *Winnipeg (City) v. Sheegl*, 2023 MBCA 63:

110 Rules 4.07(2) and 39.01(4) of the *KB Rules* are relevant to affidavit evidence on a motion for summary judgment and read as follows:

Contents

4.07(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

Contents – motions

39.01(4) An affidavit for use on a motion, including a motion for summary judgment, may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

111 In *Dakota Ojibway Child and Family Services*, this Court explained that, consistent with the "culture shift" (at para 147) signalled in *Hryniak* away from traditional trial procedures in an appropriate case and the wording of the relevant rules of court on a summary judgment motion, there can be some relaxation of the rules of evidence as to the contents of an affidavit provided that the judge is satisfied that a fair and just determination of the issues can otherwise be made.

112 The approach signalled in *Dakota Ojibway Child and Family Services* does not mean that exclusionary rules, such as the rule against hearsay, have been abolished or should be ignored on a motion for summary judgment. Far from it. Rather, the judge should exercise their gatekeeper role, mindful that they enjoy some leeway as to the use of hearsay evidence in an affidavit filed on a motion for summary judgment (for example, where the underlying source of the information is reliable and would be admissible at a trial (see *Saito v Lester Estate*, 2021 ABCA 179 at paras 11-12)).

(See also, *Harper*, para. 19)

[29] The impugned evidence is as follows:

49. ...I was warned by Constable Dech to watch my back around Andrew Zurawsky who he thought had it in for me.

...

64. ...I learned from [Ashley Kushnir] that the second assessment was not authorized or requested by Occupational Health. She told me that someone who was not authorized to be in possession of my medical records had obtained them. She said that any follow up could only be requested by Occupational Health and they did not see any need for it.

65. I have since learned that Chief Danny Smyth demanded a report from Patrol Sergeant Andrew Zurawsky... Patrol Sergeant Zurawsky says that he was given only 10 minutes to write that report. ...

...

70. He and Patrol Sergeant Zurawsky agreed, one with the other, to make these false allegations against me no later than that date... Although they would later claim that they requested this meeting because they did not believe that Inspector Dennison was making adequate plans to deal with my potential for violence, they apparently did not say this to him. Instead, they asked for permission, they say, to go over his head to a[t]tempt to prevent my return to work as their direct supervisor. They say they were given that permission...

(Affidavit of Keith Alexander, affirmed January 22, 2026)

[30] The foregoing consists of out of court statements tendered to establish the truth of its contents and but for Rule 39.01(4) would be inadmissible hearsay. There is no opportunity for cross-examination of the sources. There is no indication of the source of the information in parts of paragraphs 64, 65, and 70 or whether they are second, third, or fourth hand accounts. Allowing this evidence to be admitted would not be a fair determination of the issues.

4. If the actions are not consolidated, should excerpts from the examinations for discovery of Zurawsky and Cheadle in the malicious prosecution action be admitted as evidence in the summary judgment motion?

[31] The essence of the evidence which the plaintiff seeks to adduce in the case at hand from the examinations for discovery in the malicious prosecution action is similar to the evidence that I have now excluded as hearsay. Under Rule 30.1(3), all parties and their lawyers are deemed to undertake not to use evidence or information obtained on examination for discovery for any purposes other than those of the proceeding in which the evidence was obtained, subject to the enumerated exceptions. None of these exceptions apply. Rule 30.1(8) provides the basis for otherwise admitting such evidence:

If satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[32] The deemed undertaking rule addresses the invasion of privacy and confidentiality of a litigant's affairs consequent on discovery and precludes the use of material disclosed on discovery for a collateral or ulterior purpose (*Penner v. P.*

Quintaine & Son Ltd., 2007 MBCA 159, para. 18). I am not satisfied that the interests of justice in permitting the use of the discovery evidence from the malicious prosecution action in the summary judgment motion outweighs any prejudice that would result to the defendants in the malicious prosecution action. I say this for two reasons.

[33] First, as argued by the defendant's counsel, none of the purposes for which discovery evidence may be used (under Rule 31.11(1) read in against an adverse party or under 31.11(2) for impeachment) apply. Second, this evidence could have been obtained by the plaintiff by examining the sources of this information under Rule 39.03 (which provides for the examination of a witness for the purpose of having a transcript of their evidence available for use at the hearing of a motion or application).

[34] Accordingly, I am not admitting this evidence. However, as will be discussed below, even if this evidence was admitted, it would not have had any impact on my summary judgment decision.

5. Is Chalmers's reply affidavit inadmissible?

[35] In his affidavit in response to the defendant's summary judgment motion, the plaintiff deposed that none of the defendant's witnesses stated that his arrest was necessary for any of the reasons set out in s. 495(2) of the **Code**. In reply, the defendant filed an affidavit attested to by Chalmers in which he explains why it was necessary to arrest the plaintiff. The plaintiff objects to this affidavit, arguing it is improper reply because the defendant was required to include in its initial affidavits all the facts relied upon in support of their motion. However, given that the plaintiff only

first raised the issue of s. 495 of the **Code** in his own responding affidavit, which was filed prior to cross-examination, I am satisfied that this is permissible reply evidence.

6. Should summary judgment be granted dismissing the plaintiff's claim?

[36] It is the defendant's position that summary judgment should be granted because Chalmers and Leveque, as the arresting officers, had reasonable and probable grounds to arrest the plaintiff and the arrest, which was executed without a warrant, met the requirements of s. 495(2) of the **Code**.

[37] It is the plaintiff's position that the WPS executive were trying to end his police career by any means. They first tried to claim he was mentally ill and suicidal. Only when that failed, had they resort to a concocted criminal charge, that would be difficult to refute as it was two sergeant witnesses (Cheadle and Zurawsky) against him. As well, the plaintiff alleges many shortcomings in the PSU investigation. Moreover, the plaintiff argues that to succeed on its summary judgment motion, the defendant must prove that the plaintiff committed the offence of utter threats. The plaintiff points out that his evidence, that he is innocent, remains unchallenged.

[38] In addition, it is the plaintiff's position that by causing his arrest, it was as though Cheadle and Zurawsky carried it out themselves and given their lack of reasonable and probable grounds, the defendant as their employer is liable. In support of this position, the plaintiff relies upon the description of the law regarding false imprisonment in **Sinclair v. Ruddell**, 1906 CanLII 218 (MB CA), 16 Man. R. 53 pp. 62-64; **Mann v. Rasmussen**, 1928 CanLII 694 (AB SCAD), [1928] 3 D.L.R. 319; and **Kalo v. Gray Academy of Jewish Education**, 2006 MBQB 260.

[39] In **Mann**, at p. 517, Walsh J. stated:

While it is quite true that the arrest was actually made by the constable, I can see no escape from the conclusion that it was made at the instigation of the defendant without justification and for his own improper purpose of effecting by means of it the return of this wheat. This is sufficient to make him liable for it, though the arrest was in fact made by the constable.

[40] In **Kalo**, Master Sharp (as she then was) stated:

15 G.H.L. Fridman, *The Law of Torts (supra)* comments on the differences between the tort of malicious prosecution and false imprisonment as follows, at p. 846:

The tort of malicious prosecution must be distinguished from false imprisonment or false arrest. The former is concerned with the bringing of a false charge against the plaintiff, thereby setting the criminal process in motion and involving the plaintiff in an actual trial or the risk of a trial. The latter is a tort committed when the defendant personally seizes the plaintiff and puts him under restraint, with a view to subsequent criminal proceedings, or achieves the same result by employing the services of a police officer.

[41] However, the plaintiff's description of the law omits the importance of the directness requirement discussed in **Tort Law**, at pp. 70 -71:

As with the other trespasses, false imprisonment must occur directly as a result of the defendant's conduct. ...

The most important legal consequence of the directness requirement is that, unless the defendant personally has detained the plaintiff or has been responsible for the detention, the tort cannot be made out. ...

...Even where a police officer arrests a person, without warrant, on the information of an alleged witness or victim, it cannot be said that the arrest and imprisonment were brought about by the direct act of the complainant, since the decision to arrest was the police officer's. Where on the other hand, the informant "directs" the police to make an arrest, or otherwise utilizes the police for their own private purposes, an action may lie.

[emphasis added]

[42] Similarly, in ***Webster v. Wasylyshen***, 2005 ABQB 142, reversed on other grounds at 2007 ABCA 23, Marshall J. stated:

[59] With respect to the tort of wrongful imprisonment, the law requires the plaintiff to show that the defendant was the direct cause of the false imprisonment. Merely making a complaint to the police does not expose a defendant to liability for false imprisonment if the police act on their own initiative in making an arrest or detention. To attract liability, the defendant must actually direct the officer to make the arrest or detention. [citations omitted]

[43] In the case at hand, Cheadle and Zurawsky did not direct Chalmers and Leveque to arrest the plaintiff. Rather, Chalmers and Leveque decided to arrest the plaintiff following their investigation.

[44] I also disagree with the plaintiff's submission that the defendant is required to demonstrate that the plaintiff actually made the threats.

[45] In ***Abboud v. Ottawa Police Services Board***, 2016 ONSC 1052, in the context of a motion for summary judgment dismissing the plaintiff's claims for damages for breaches of various ***Charter*** rights including s. 9, false detention, false arrest, and negligent investigation, R. Smith J. explained:

32 **To establish that the detention was justified by law, the defendant police must show that they had reasonable and probable grounds for the arrest and detention.** (See *Moak* at para. 51). In *Ferri v. Ontario (Attorney General)*, 2007 ONCA 79 at para. 102, 219 O.A.C. 340, the Ontario Court of Appeal held that "there will be no genuine issue for trial where the evidence shows reasonable and probable ground at the time of the arrest."

...

36 In *R. v. Storey*, [1990] 1 S.C.R. 241 at pages 250-251, the Supreme Court of Canada set out the test for reasonable and probable grounds for arrest as follows:

An arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that

there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

37 **The police are not required to exhaust all avenues of investigation or establish the absence of a valid defence before proceeding** (*Wong* at para. 59). Any defences that an accused may raise are to be determined at trial, not in the course of the investigation (*Lamka v. Waterloo Regional Police Services Board*, 2012 CanLII 98291 at para. 48 (Ont. Sup. Ct. (Sm. Cl. Div.))).

[emphasis added]

[46] In applying the test for summary judgment as outlined in ***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91, the defendant has satisfied me that the summary judgment process permits me to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute and that proceeding to trial would generally not be proportionate, timely, or cost-effective. I am so satisfied because the issue for summary judgment is whether there is a genuine issue requiring a trial as to whether the arrest and detention of the plaintiff was lawful. In light of the legal principles outlined above, I agree with the defendant's submission that this case is not about the credibility of the witnesses, whether the threats were in fact made, or whether Zurawsky, Cheadle, or the WPS executive were truthful. Rather, it turns on the information received by the PSU and whether this information was sufficient to meet the reasonable and probable grounds test outlined in ***R. v. Storrey***, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, as well as whether the arrest was in compliance with s. 495 of the **Code**. I also agree with the defendant's counsel that the existing record upon which Chalmers and Leveque came to their conclusion will not change for a trial.

[47] For the following reasons, I am persuaded that the defendant has met its evidential burden of establishing that there is no issue requiring a trial.

[48] Both the arresting officers Chalmers and Leveque gave evidence that they believed there were reasonable and probable grounds to arrest the plaintiff for utter threats. In his affidavit, Chalmers deposed that he found Cheadle and Zurawsky's allegations of the threats to be credible and he was not aware of any motive that either would have to lie. Chalmers also deposed that it appeared to him that Cheadle and Zurawsky's reporting of the allegations was motivated by a desire to see the plaintiff get help for his mental health. Importantly, he deposed that Cheadle and Zurawsky's allegations were supported by the statements given by other witnesses. In his cross-examination on his affidavit evidence, Chalmers testified that he believed the threats happened and there was a serious realistic threat. In my view, based on the governing legal principles, it was proper for Chalmers and Leveque as the arresting officers to rely on the evidence in the PSU record. I find that their subjective beliefs were objectively reasonable for the following reasons.

[49] During the course of the investigation, Chalmers conducted eight interviews which included the following:

- Cheadle indicated that on March 19, 2019, he met with the plaintiff who was going back and forth between crying and anger. The plaintiff told Cheadle that Schmidt was to be transferred to Division 13, in April 2019, and the plaintiff was angry about this as a result of an incident that had taken place at a party at Schmidt's residence involving the plaintiff's ex-

wife. During Cheadle's meeting with the plaintiff, the plaintiff began clenching his fists and gritting his teeth and told Cheadle that he was going to "pound [Schmidt] into the ground" and that Cheadle would have to "choke [the plaintiff] out" to prevent him from assaulting Schmidt. Cheadle believed the plaintiff intended to harm Schmidt. On the drive back to the station, the plaintiff reiterated the threats and repeated that Cheadle would have to "choke [the plaintiff] out" to prevent the assault. Once back at district headquarters, in the presence of Cheadle and Zurawsky, the plaintiff repeated the threats, that Cheadle would have to "choke [the plaintiff] out" to prevent the assault and told Zurawsky that Zurawsky would have to "rip [the plaintiff's] arms off" to prevent the assault. On April 24, 2019, Cheadle sent an email detailing his concerns.

- Zurawsky indicated that on March 18, 2019, in a meeting with the plaintiff, the plaintiff explained that he was upset about his relationship with his ex-wife. The plaintiff's hands were shaking, he was crying, and he was talking through gritted teeth. The plaintiff explained the incident at Schmidt's residence involving the plaintiff's ex-wife and expressed that he wanted to "pound" Schmidt and that Zurawsky would have to "tear [the plaintiff's] arms off" to stop the attack. The plaintiff said he would assault Schmidt if he saw him in the workplace. Zurawsky spoke with Inspector Dennison who said that the plaintiff had already had a

conversation with Dennison and “told [Dennison] more than [Dennison] wanted to know”.

- Zurawsky indicated that on March 19, 2019, in front of Cheadle and Zurawsky, the plaintiff reiterated the threats and was pacing, angry, and had his teeth clenched.
- Zurawsky indicated that on March 20, 2019, the plaintiff was in a rage about Schmidt and did not want Schmidt to come into the workplace. Dennison sent the plaintiff home. Zurawsky stated that if the plaintiff had been a person on the street, he would have placed the plaintiff in handcuffs as a result of the plaintiff’s anger. Zurawsky realized that the plaintiff’s threats against Schmidt were serious and he was concerned about Schmidt’s safety.
- As a result of Zurawsky’s concerns throughout the week that the plaintiff was going through withdrawal or was having a breakdown, Zurawsky contacted WPS Behavioural Health.
- Zurawsky indicated that on April 26 or 27, 2019, Schmidt told Zurawsky and Cheadle that Schmidt’s fiancée had told Schmidt that the plaintiff’s ex-wife was terrified of the plaintiff and afraid for her life. Zurawsky also stated that he had been contacted by Glenn Rand, a former police officer, who told Zurawsky about an angry outburst that the plaintiff recently had while working for Rand’s business, causing Rand to let the plaintiff go.

- Schmidt indicated that he had never met the plaintiff but that the plaintiff's ex-wife had attended a party at Schmidt's house.
- Officer Marc Philippot was the Staff Sergeant in Division 13 at the time of the alleged threats. Philippot indicated that during his meeting with Dennison and the plaintiff, the plaintiff expressed that he could not work on the same shift with Schmidt as a result of an event that happened at a party at Schmidt's residence involving the plaintiff's ex-wife. When describing this event, the plaintiff was tense, angry, and upset. The plaintiff wanted Schmidt moved from the division but Dennison and Philippot disagreed, although they agreed to move Schmidt from the plaintiff's shift. Philippot indicated that Zurawsky came to him some time during that first week with concerns about the plaintiff's reactions and Zurawsky was concerned about Schmidt. Zurawsky was also concerned about the plaintiff's well-being. Philippot too was concerned for the plaintiff's well-being and the well-being of others in the workplace due to the plaintiff's access to weapons. Philippot indicated that he believed that Cheadle and Zurawsky had "definite concerns" that the threats were real.
- Dennison indicated that the plaintiff explained to him that Schmidt's fiancée was friends with the plaintiff's ex-wife and that he was upset because Schmidt had not done anything to stop the plaintiff's ex-wife from engaging in inappropriate behaviour at a party at Schmidt's house. Dennison believed that the plaintiff's hatred towards Schmidt was real.

After Dennison attended the plaintiff's ex-wife's home with the plaintiff, the plaintiff was crying hysterically, and Dennison gave him the rest of the day off. At the end of March 2019, the plaintiff was placed on behavioural health leave. Dennison indicated that Rand had reached out to Philippot to report that the plaintiff had made threats of self-harm.

- Rand, who was the plaintiff's friend, indicated that the plaintiff had started having breakdowns leading to him firing him from his company. Rand had heard about the incident at Schmidt's house involving the plaintiff's ex-wife and knew that the plaintiff blamed Schmidt. Rand had spoken to the plaintiff's mother who stated that the plaintiff had threatened to shoot himself. Rand reported these comments to the WPS. Rand also met with the plaintiff's sister and mother who were both concerned with the plaintiff's mental state and did not think he should have a gun. Rand reported this to Philippot.
- Officer Peter Breuer indicated that he was working on March 19, 2019, when the plaintiff was in Division 13 and that the plaintiff "went into a rage" when he could not reach Zurawsky by radio and phone and when he was able to get in touch with him, Breuer indicated that he heard the plaintiff scold Zurawsky and that the plaintiff was grinding his teeth and was angry.

- On July 2, 2019, the plaintiff was interviewed under charge and caution with his counsel present. The plaintiff indicated that he did not intend to threaten Schmidt nor would he do harm to him or any other person.

[50] From the interview information compiled by Chalmers, it is apparent that both Zurawsky and Cheadle consistently relayed concerns about a threat to cause physical harm to Schmidt, and, several of those interviewed had concerns about the plaintiff's instability in the workplace which was causing safety concerns. There is nothing in the interview record that substantiates the plaintiff's position that essentially his arrest was part of a plan by the WPS executive to rid him from the WPS workforce. There is also no evidence in this record that Cheadle or Zurawsky had an unfavourable history with the plaintiff. Also supporting the reasonableness of the beliefs of Chalmers and Leveque to arrest the plaintiff is the plaintiff's own evidence that any police officer would expect the allegations of threat against Schmidt to result in an arrest.

[51] The plaintiff raised several flaws in Chalmers's investigation. For example, the narrative prepared by Officer McCartney reported that when McCartney advised the plaintiff's ex-wife of Zurawsky's indication regarding her fear for potential violence by the plaintiff, she stated that she was not fearful at the time. The plaintiff's counsel submits that this was exculpatory evidence that was not provided to Crown counsel for their opinion. The plaintiff's counsel also suggests flaws in the timeline of reporting to Dennison of the alleged threats as well as other seemingly inconsistent dates of events. For example, the plaintiff's counsel points out that it was inconsistent with the plaintiff making threats for Dennison to have sent the plaintiff an email on March 28, 2019

(after the March 19-20, 2019 timeframe described above), advising him that upon completion of any referral program, he expected the plaintiff to be in charge of A3 platoon. As well, the plaintiff's counsel argues that the several psychological reports that supported the plaintiff's fitness to return to work substantiate the plaintiff's position that the charges were concocted as another way to end the plaintiff's police career.

[52] In Chalmers's cross-examination on his affidavit, he conceded that his investigation was not perfect. However, I agree with the defendant counsel's submission that perfection is not the legal standard. Some of the applicable principles regarding the standard of reasonable and probable grounds are:

- Proof of reasonable and probable grounds for arrest does not require a *prima facie* case for conviction (**Storey**, pp. 249-251);
- Police are not required to exhaust all avenues of investigation or establish the absence of a valid defence before proceeding (**Abboud**, para. 37);
- Police are not required to engage in the weighing of credibility or reliability of witnesses before laying a charge (**Bennett v. Treit**, 2023 ABKB 348, para. 80); and
- Reasonable and probable grounds based on evidence from an imperfect witness can still be objectively reasonable, unless there is overwhelming evidence to render that witness incredible (**Can v. Calgary Police Service**, 2013 ABQB 226; aff'd 2014 ABCA 322, para. 45).

[53] As mentioned, even if I were to consider the evidence I ruled inadmissible, it would not change my finding for three reasons.

[54] First, as discussed, based on the law regarding false imprisonment, the evidence does not support the plaintiff's argument that Cheadle and Zurawsky were directing the arrest.

[55] Second, it is all the circumstances known by the arresting officers (Chalmers and Leveque), and, as experienced officers, inferences that may be drawn from those circumstances at the time of arrest, that are relevant. In his submissions, the plaintiff's counsel sought, in particular, to rely upon evidence in the malicious prosecution action that Chief Danny Smyth demanded a report from Zurawsky who says that he was given only 10 minutes to write this report. However, the evidence about this demand arose after the time of arrest and thus would not have been part of the circumstances known to Chalmers and Leveque at the time of arrest.

[56] Third, in light of the governing legal principles discussed above, all the evidence that I have excluded, in my view, would be insufficient to detract from the other evidence which I have found demonstrates that the subjective beliefs of Chalmers and Leveque as the arresting officers were objectively reasonable. The same applies to the evidence (that I have not excluded) regarding the plaintiff's employment background and experiences.

[57] Another issue that the plaintiff raises as precluding summary judgment is his description of the "suspicious circumstance" created by the loss of the notes that were used by Dennison at his PSU interview. The plaintiff suggests that these notes included exculpatory evidence. However, I agree with the defendant's counsel that this argument is based on speculation. There is no evidence to support this suggestion, and

the plaintiff made no attempt to confirm his suspicion by examining Dennison as a witness under Rule 39.03. As it exists, in my view, these missing notes do not detract from the record on which the decision was made to arrest the plaintiff.

[58] Last, in considering whether there is a genuine issue requiring a trial, I turn to the question of whether the plaintiff's arrest complied with s. 495 of the ***Criminal Code***. That is to say was his arrest necessary? A prosecution could have been initiated by serving the plaintiff with a notice to appear.

[59] It is undisputed that with his arrest, an undertaking was required by the arresting officers for the plaintiff not to contact Zurawsky, Cheadle, and Schmidt. Chalmers deposed that at the time of the arrest, the plaintiff had not been back to work and given the history of the plaintiff's behaviour, Chalmers was concerned about potential further offences if the plaintiff was to come into contact with any of Cheadle, Zurawsky, and/or Schmidt. Chalmers deposed that the undertaking could not have been compelled without arresting the plaintiff. In his affidavit evidence, the plaintiff deposed that there were no grounds to believe his arrest over half a year after the alleged threats was necessary to prevent the repetition of the offence or the commission of another offence.

[60] Recognizing the onus on the plaintiff under s. 495(3)(b) to rebut the presumption in s. 495(3) that the arresting officers were acting lawfully and with no compelling evidence undermining Chalmers's evidence as to why an undertaking was necessary, I find that the plaintiff has not raised a genuine issue requiring a trial.

[61] I also find that the plaintiff's arrest without a warrant does not raise a genuine issue requiring a trial because the plaintiff consented to be arrested without a warrant and waived his related rights under s. 9 of the **Charter**.

[62] The tort of false imprisonment is an intentional tort (**C.H.S.**, para. 51). In the context of intentional torts, the defence of consent is available, most commonly raised in defence to claims of assault and battery, particularly in the sports or medical context. However, consent is also a defence to false imprisonment (**Khan v. El Al Israel Airlines**, 1991 CarswellOnt 696 (WL), 4 O.R. (3d) 502, para. 49; **V.A.H. v. Lynch**, 2009 ABCA 221). As noted in **Tort Law**, "[i]n order to constitute a valid defence, a consent must be free, full and informed" (p. 150).

[63] In **R. v. Willis**, 1992 CanLII 2780 (ON CA), 7 O.R. (3d) 337, the Ontario Court of Appeal outlined the test for waiving a constitutional right in the context of consent to an otherwise unauthorized seizure, infringing s. 8 of the **Charter** (p. 25):

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- (vi) the giver of the consent was aware of the potential consequences of giving the consent.

[64] In ***Korponay v. Attorney General of Canada***, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41, the Supreme Court of Canada explained that when waiving a procedural right under the ***Code*** that exists for the accused's benefit, the validity of any waiver (p. 49):

...is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.

[emphasis in original]

[65] The Supreme Court of Canada subsequently confirmed in ***R. v. Bartle***, 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173, (pp. 203-204), that the test it outlined in ***Korponay*** applies equally to determining whether an accused has validly consented to waive their ***Charter*** rights.

[66] The plaintiff's arrest took place at PSU headquarters at a pre-arranged time agreed to in advance between Chalmers and the plaintiff's lawyer. In his cross-examination on his affidavit evidence, Chalmers testified that when he made the appointment, plaintiff's counsel did not object to the plaintiff being arrested and he did not object to the arrest when at the appointment.

[67] In these circumstances, by voluntarily attending the PSU, with the advice of counsel, I find that the plaintiff consented to be arrested without a warrant. The purpose of a warrant is to empower police to arrest an accused. However, in the case at hand, there was no need to obtain a warrant as the plaintiff agreed to attend PSU for the stated purpose of being arrested. There was a lawful basis to arrest the plaintiff without a warrant. The plaintiff's consent provided justification for the plaintiff's arrest

and detention such that false imprisonment has not been established. As well, the brief detention/imprisonment of the plaintiff was lawful and did not breach his rights under s. 9 of the *Charter*.

[68] Accordingly, I am granting the defendant's motion for summary judgment dismissing the claim. As such, I need not consider the issues of consolidation of this action with the malicious prosecution action or whether summary judgment is to be granted in the plaintiff's favour.

CONCLUSION

[69] In conclusion, while leave was granted to amend the claim (such that it was the amended claim that I considered in determining the defendant's summary judgment motion), I am granting summary judgment dismissing the plaintiff's claim. If costs cannot be agreed upon, counsel may file written submissions.

A.C.J.