**The Law Society of Saskatchewan Library's online newsletter highlighting recent case digests from all levels of Saskatchewan Court.
Published on the 1st and 15th of every month.**

Volume 26, No. 20 **October 15, 2024**

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***Kane v FCA US LLC*, [2024 SKCA 86]**

Jackson Schwann Tholl, 2024-09-12 (CA24086)

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The appellant had purchased one of the vehicles subject to recall notices by the respondent. The appellant had been dissatisfied with the repairs on the vehicles and claimed to have suffered losses as a result. She initiated an action and sought to have it certified as a class action covering the owners and lessees of approximately 900,000 vehicles affected by 24 different recall notices. Certification was not granted by the Court of King's Bench and the appellant appealed the decision.
HELD: The appeal was dismissed. (1) The chambers judge did not err in finding that was no reasonable cause of action that covered the appellant's heads of damage. The fact that a claim arises from a particular kind of pure economic loss does not necessarily signify that

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such loss is recoverable. A claim in negligence for pure economic loss is barred where the plaintiff advances no claim for personal injury or property damage nor pleads the imminent risk of a real and substantial danger. In this case, the appellant did not claim repair or disposal costs for the vehicle. There was also no claim of an imminent risk, and no material facts pleaded to support a real and substantial danger. The claim only spoke of potential problems that might arise in the future. (2) There was no reasonable cause of action regarding diminution of the value of the vehicles. The claim for an increased risk or increased likelihood of future harm arising out of the defects and an alleged loss in value of the subject vehicles did not disclose a reasonable cause of action. (3) The chambers judge did not err in his findings regarding an alleged breach of an express or implied warranty. A breach of warranty claim requires either the existence of a contractual relationship or some statutory basis. If it does not arise from a statute, a claim for a non-contractual implied warranty cannot succeed. In this case, there were no allegations about the existence of contractual warranties between the class members and the respondent. Neither were the pleadings related to a claim of collateral contract. The statement of claim did not plead any other legislation that implied a warranty item. (4) The chambers judge correctly determined that the requirements of unjust enrichment were not pleaded, and the remedy of disgorgement was not available. It is trite law that there is no remedy without a valid cause of action. The chambers judge determined that two of the elements of unjust enrichment – deprivation and absence of a juristic reason – were not sufficiently pleaded and that it did not represent a valid cause of action. This determination was not challenged on appeal. Without a cause of action linked to the remedy, disgorgement was not available. (5) The chambers judge did not err in his assessment of the evidentiary value of the recall notices. Generally speaking, recall notices have been found to provide evidence to help establish some basis in fact of commonality to varying degrees. Whether the information contained in a recall notice or similar document constitutes some basis in fact for the evidence-based certification considerations in s. 6(1) of *The Class Actions Act* will depend on the circumstances. In this case, the recall notices did not set out any evidence that the defects were irreparable or that the defects persisted despite the repairs. There was no evidence of any interrelatedness of the defects from one recall notice to another. They did not contain evidence about the dangers presented by the defects, did not provide any information that any motor vehicle accident had happened as a result of the defects, and did not address whether any personal injury had occurred. Overall, they did not provide any evidence that a compensable loss had been suffered. (6) The chambers judge did not err by finding that the common issues lacked commonality and by determining that certification could only be granted if the claim related to a single defect. In all certification applications, the putative plaintiff bears the evidentiary burden to establish the commonality of the proposed common issues. In this case, the appellant was required to provide some basis in fact of the following: (a) the proposed common issues actually existed; and (b) that they could be answered across the entire class. The appellant did not provide evidence of any commonality or connection among the vehicles or among the defects, other than the fact that they all involved the respondent's vehicles. On the other hand, the respondent provided evidence that the recalls and repairs were completed years before in a successful and effective manner and that Transport Canada took no issue with the respondent's actions in resolving the problem. This evidence was not responded to by the appellant. There was also no single proposed common issue that did not devolve into a series of unrelated subissues. (7) The chambers judge did not err by denying certification without attempting to craft his own set of common issues or without seeking further submissions on the modification of the common issues. A certification judge has the authority to modify proposed common issues in some circumstances. However, wholesale changes to the wording of proposed common issues by a certification judge raises issues of fairness to both parties. A certification judge must avoid being inappropriately conscripted into the role of ongoing assistant to one side or the other of the litigation. In this case, the appellant's argument was akin to placing the raw material for her proposed class action before the chambers judge with the expectation that he would construct a viable proceeding. It was not his role to re-engineer the common issues.

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***Evans v General Motors of Canada Company*, 2024 SKCA 87**

Schwann Kalmakoff Drennan, 2024-09-12 (CA24087)

Civil Procedure - Class Action
Class Action - Certification - Appeal
Class Actions - Procedure

The plaintiff/respondent had launched a class action against General Motors (GM) based on alleged defects in the Chevrolet Cruze car model, leading to alleged economic loss for the vehicle owners due to the decreased value of the cars and performance problems. The Court of King's Bench had certified the case as a class action, allowing the plaintiff to represent all individuals in Canada who purchased or leased a Chevrolet Cruze from 2011 onward. GM appealed that decision, raising issues with the claim of pure economic loss, class certification, and class action as the proper method for dispute resolution. Also, GM was committed to repairing the mechanical defects in the coolant system of the affected cars. The Court of Appeal (court) needed to review and decide if the judge who certified the class action erred in determining whether the plaintiff's claim of negligence was valid; a class action was the best way to address the legal issues; an identifiable group of people constituted the class; and the plaintiff was suitable to represent the class action.

Family Law - Homestead Rights - Non-owner Spouse

Mortgages - Foreclosure - Order *Nisi* - Foreclosure - Summary Judgment - Availability

Real Property - Partition

Statutes - Interpretation - *Class Actions Act*, Section 6(1)

Statutes - Interpretation - *Farming Communities Land Act*

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HELD: The court allowed GM's appeal and set aside the class certification order, concluding that the plaintiff's negligence claim for pure economic loss did not meet the legal standard, and a class action was not the preferred procedure for resolving this dispute because of GM's commitment to repair the defective vehicles. *The Class Actions Act* in Saskatchewan governs the certification of a class action and sets the following requirements: the pleadings disclose a cause of action, there is an identifiable class, common issues between the class members exist, the class action is the preferable procedure, and the class representative meets specific criteria. At the certification stage, the court does not test the claim's merits and instead focuses on the form and procedures. The court found the plaintiff's claim of negligence and pure economic loss did not meet the legal threshold because the pleadings did not allege real and substantial imminent risks of physical injury to persons or property from the issues with the coolant system. The pleadings claimed loss due to the defective cars' diminished value and performance issues, which do not meet the threshold of imminent risk to persons or property. The law on negligence and economic loss establishes that an action in negligence for pure economic loss must advance a claim for personal injury or property damage and plead imminent risk of a real and substantial danger to a person or property. Also, the decrease in the value of vehicles resulting from mechanical defects was not recoverable in negligence actions. Furthermore, the court stated that a class action was not the preferable way to resolve this dispute. GM had already committed to repair the vehicles at no cost, which addressed the core issue of the dispute and removed the need for litigation through the courts. The court did not find issues with the identifiability of the class members or the suitability of the plaintiff as the class representative. The Court of Appeal allowed the appeal on the first two grounds and set aside the certification order.

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***R v Stettner*, [2024 SKCA 88]**

Leurer Kalmakoff Drennan, 2024-09-11 (CA24088)

Criminal Law - Appeal - Conviction
Criminal Law - Appeal - Sentence
Criminal Law - Evidence - Admissibility

The accused appealed his conviction and sentence from Provincial Court. He had a total of 15 charges from two series of incidents. He had pled guilty to some of the charges. The charges included a variety of offences, such as multiple assaults, including against a domestic partner; mischief; and breach of probation. The appellant raised issues on both his convictions and sentence, alleging errors concerning the trial judge's improper admission and use of evidence

R v Stettner

S.C. v N.C.

Soldan v Plus Industries Inc.

Zimmer v Wynnychuk

of extrinsic misconduct, the inclusion of specific offences, and the performance of his trial lawyer. The Court of Appeal (court) had to consider whether there were errors in admitting certain evidence and issues with included offence matters under the *Criminal Code*. The court did not review the argument of performance of the defence trial lawyer.
HELD: The court allowed the conviction appeal and ordered a new trial. However, the court dismissed the appeal for the charges to which the appellant pleaded guilty and found no error that would have affected the sentences imposed for those offences. There had been errors in the admission and improper use of extrinsic misconduct evidence, but the court dismissed the argument regarding the included offence issues. The error of law concerning the admission and use of evidence was sufficient to set aside the conviction and order a new trial. During the trial, the former domestic partner of the appellant gave evidence of the appellant's historical violence against her, especially historical reference to assault by choking. The trial judge found the victim's evidence credible and reliable and admitted this extrinsic evidence about the past misconducts of the appellant. The court reviewed the principles regarding the admissibility of extrinsic misconduct evidence, noting that such evidence is presumptively inadmissible unless it is necessary for understanding the context of the relationship, proves motive or intent, or rebuts claims of fabrication. Evidence of bad character is inadmissible if used solely to prove that the accused is the type of person likely to commit the offence (see: *R v Handy*, 2002 SCC 56; *R v Bone*, 2024 SKCA 21). It is an error of law for a trial judge to admit evidence of misconduct and use it as the sole basis for determining the guilt of the accused without first assessing the admissibility of the evidence. The trial judge should also weigh the value of the evidence against its potential to unfairly prejudice the accused and ensure that the accused has an opportunity to respond to the evidence. The court concluded that the trial judge used the extrinsic evidence of misconduct as establishing that the accused had the propensity to commit the offences he was charged with, which is an error of law and warrants a new trial. The court did not find an error concerning the included offence issue. The court agreed with the trial judge's finding that the charge of assault by choking under section 267(c) of the *Criminal Code* was an included offence in the charge under section 246(a) due to the wording of the information, which specified that the accused had attempted to choke the victim while committing an assault. An offence is considered an included offence if all its elements are proven and if any legally available avenue of conviction for the main offence is established. In simpler terms, an offence is included if it is a part of or fully covered by the main offence (see: paragraph 70; *R v G.R.*, 2005 SCC 45). The court allowed the conviction appeal and ordered a new trial to the extent of error of law in the admission of extrinsic evidence. The court dismissed the appeal of the sentence and charges to which the accused had already pleaded guilty.

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***R v Arendt*, [2024 SKCA 89]**

Barrington-Foote Kalmakoff Drennan, 2024-09-13 (CA24089)

Charter of Rights - Exclusion of Evidence
Constitutional Law - *Charter of Rights*, Section 8 - Unreasonable Search and Seizure
Criminal Law - Controlled Drugs - Possession/Trafficking/Proceeds
Criminal Law - Search and Seizure - Search Warrants

The respondents in this case were charged with trafficking in methamphetamine, possession of methamphetamine for the purpose of trafficking and possession of proceeds of crime. At their joint trial, one of the respondents applied to have evidence excluded on the basis that it was obtained in violation of his rights under s. 8 of the Charter. The trial judge, having found that parts of the Information to Obtain (ITO) that was before the issuing judge must be excised, concluded that the warrant could not have been issued by the issuing judge. The Crown appealed the judgment.
HELD: The appeal was allowed. (1) The reviewing judge erred in law in removing certain portions of the ITO. A reviewing judge should not expunge the evidence of charges that have been stayed merely because charges have been stayed. Rather, as a rule, it should remain in the ITO and form part of the record when the reviewing judge considers whether the issuing judge could have issued the warrant. Here, the reviewing judge did not consider whether the Canadian Police Information Centre information, including the evidence of charges that were stayed, was relevant due to the link between drug trafficking, weapons and violence – a link that he had acknowledged. He determined relevance solely on the basis that the warrant did not relate to weapons or potential weapons charges. He also improperly took account of the fact that the information would be prejudicial. The reviewing judge applied the wrong legal test. (2) The reviewing judge erred by excising all of subparagraph VII(8)(f) of the ITO and the associated commentary. The reviewing court is not entitled to excise an entire paragraph or commentary simply because it has been found to contain some erroneous information. It may redact information and revise the ITO only to the extent necessary to ensure that it reflects what could properly have been included in it. In this case, there was evidence of the daily surveillance report of the “short duration” meeting between the person who had exited the first respondent’s house and the driver of the vehicle described in subparagraphs VII(8)(e) and (f) of the ITO. The reviewing judge was entitled to revise this paragraph to remove the statement that the driver was hunched over. He was also permitted to remove the statement in the commentary that the driver was “hunched forward” and manipulating the drugs. However, it was not open to him to delete the remainder of the commentary, in which the affiant opined that the drug deal was directed by the first respondent, as there was a foundation for the affiant’s opinion. (3) The reviewing judge erred by deciding that an issuing judge could not have issued the warrant because the affiant was unreliable. The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this case, while the reviewing judge stated that it would not be reasonable for the issuing judge to accept anything for which they had to take the affiant’s word, the reviewing judge arrived at that destination only after having decided that the affiant was not reliable. By doing so, he substituted his view for that of the issuing judge.

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***Soldan v Plus Industries Inc.*, [2024 SKCA 90]**

Caldwell Tholl Kalmakoff, 2024-09-19 (CA24090)

Civil Procedure - Appeal - Re-hearing - *Court of Appeal Rules*, Section 47(1)
Civil Procedure - Court of Appeal Rule 47

The respondent had terminated the applicant's employment, asserting that that she had abandoned her position. The applicant filed a complaint with the Saskatchewan Human Rights Commission alleging discrimination on the basis of disability. The matter was resolved after mediation, but the applicant launched another action against the respondent at the Court of King's Bench based on the subject matter. The respondent successfully applied to have the bulk of the claim struck. The applicant's appeal to the Court of Appeal against this decision was dismissed. The applicant sought to have the appeal re-heard.
HELD: The application was dismissed. (1) No special or unusual circumstances warranting a re-hearing were established by the appellant. Where a formal judgment has not been issued, the court can only re-hear the matter in special or unusual circumstances. What constitutes special or unusual circumstances is determined on a case-by-case basis and the requirement to demonstrate the existence of such circumstances means that a party applying for a re-hearing generally "has a significant hurdle to overcome." An application for a re-hearing will be denied where the applicant only seeks to offer submissions on points that were already before the court but are asserted to have been wrongly decided. In this case, all the arguments presented by the applicant addressed issues that were before the court and determined in the appeal decision. There was no evidence or submission aimed at establishing that special or unusual circumstances existed. The applicant's assertions only boiled down to an argument that the appeal decision was wrong and it should be redone and decided in her favour. This did not constitute special or unusual circumstances.

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***R v Patron*, [2024 SKCA 91]**

Leurer Jackson Caldwell, 2024-09-19 (CA24091)

Constitutional Law - *Charter of Rights*, Section 7 - Disclosure - Full Answer and Defence
Criminal Law - Appeal - Conviction and Sentence
Criminal Law - Harassment

The appellant was convicted of criminal harassment and failure to comply with a probation order. The appellant alleged that his trial was unfair because the Crown failed to disclose a video of the encounter which he said the complainant took on his cell phone. The appellant considered the failure to disclose as having affected trial fairness but principally having impeded his ability to make full answer and defence. The appellant appealed both his conviction and sentence.
HELD: The appeals against the conviction and sentence were dismissed. (1) The appellant did not discharge his burden of

establishing a violation of his right to disclosure. It is well established that the Crown is obligated to disclose information that it has in its possession where there is a reasonable possibility that it will be useful to an accused in making full answer and defence. It is equally well known that a person alleging a breach of this obligation bears the burden of establishing, on a balance of probabilities, that the Crown was or is in the possession of undisclosed, relevant evidence and that the accused's right to a fair trial has been violated by the failure to disclose that evidence. In this case, the Crown categorically denied that it or the police had a video recorded by the complainant. There was nothing in the evidence to call into question the Crown's denial in that regard. (2) The sentence was not excessive. On the face of the record, there was no error of principle in the trial judge's oral reasons for imposing the sentence he saw as a proportionate response to the appellant's crimes and the sentence was not demonstrably unfit.

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***R v Daniels*, [2024 SKCA 92]**

Kalmakoff McCreary Bardai, 2024-09-19 (CA24092)

Criminal Law - Appeal - Reasons for Judgment
Criminal Law - Defences - Intoxication
Criminal Law - Murder - First Degree

The appellant was appealing against his first-degree murder conviction. He contended that the trial judge failed to consider a defence of intoxication supported by the evidence and also failed to provide reasons for a finding that he intended to kill the victim. HELD: The appeal was dismissed. (1) The trial judge did not err in failing to address the defence of intoxication. Advanced intoxication is a defence that may negate fault in the context of crimes that require the Crown to prove specific intent. The question in cases where the defence of intoxication is raised is not whether an accused has consumed alcohol or drugs but rather whether they were too intoxicated to form the specific intent required to support a murder conviction. While an accused person is entitled to rely on any evidence of intoxication to argue that they lacked the requisite intent for murder, where the evidence speaks of nothing beyond mild intoxication on the part of the accused, that will generally not be sufficient to give the defence an air of reality. In this case, there was no basis upon which the trial judge could have properly found there to be an air of reality to the contention that the appellant was in an advanced state of intoxication such that the appellant could not form the specific intent necessary to be guilty of murder. The actions of the appellant observed on video did not suggest anything beyond mild intoxication, if they suggested intoxication at all. The same could be said of the appellant's interactions with the attendant at the gas station, the attendants at Circle K and with the taxi driver. In addition, the appellant's evidence that he formulated a plan to rob the victim and that they took a long walk together did not support an argument that he was in a state of advanced intoxication, nor did the intricate manner in which the victim was tied up. In short, even assuming the appellant's evidence of consumption was true and viewing the remainder of his evidence in the most positive light could not give rise to an air of reality that he was in a state of advanced intoxication such that the defence might apply. (2) The trial judge did not err by relying on the appellant's "concession" to support a finding of intent. When assessing the sufficiency of a trial judge's reasons, the reviewing court reads the reasons as a whole, in the context of the evidence, arguments and trial. In this case, the trial judge's decision and her findings of fact even in the absence of the "concession" supported the conclusion that the intent required to be established in the context of a murder charge was proven beyond a reasonable doubt. The reasons allowed for appellate review, permitted public accountability and told the appellant not just what the decision was, but the basis for the decision.

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***R v Hartnell*, 2024 SKCA 93**

Schwann Kalmakoff Drennan, 2024-09-20 (CA24093)

Criminal Law - Appeal - Fresh Evidence
Criminal Law - Appeal - Conviction and Sentence
Criminal Law - Controlled Drugs - Possession/Trafficking
Criminal Law - Sufficiency of Reasons

The appellant was convicted by a Provincial Court judge of two counts of drug possession for the purposes of trafficking and was sentenced to approximately 8 months' imprisonment. The appellant appealed both his conviction and sentence. He also brought two separate applications to adduce fresh evidence on appeal.
HELD: Both the appeal against conviction and leave to appeal sentence were dismissed. The application to adduce fresh evidence was also denied. (1) The evidence sought to be adduced was not evidence. The witness the appellant sought to be introduce was also known or should have been known to him at trial, which meant he could have called her as a witness. The opinion of an expert witness about the appellant witness's mental state could not have changed the result of the trial. The evidence filed regarding ineffective trial counsel was also not evidence capable of supporting his application. (2) The trial judge's reasons were not insufficient. Judicial intervention is only warranted where the reasons amount to an error of law because they foreclose meaningful appellate review. Where insufficient reasons are raised as a ground of appeal, an appellate court must examine and assess "whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review." In this case, it was readily apparent what the trial judge decided from a factual perspective and why she decided it. The trial judge was also alert to the governing law and provided a reasoned explanation for why she found the appellant guilty of the possession for purpose of trafficking charges and why she acquitted him of the oxycodone charge. The reasons satisfactorily informed the parties of the basis for her verdict and permitted meaningful appellate review. (2) The trial judge did not misapprehend the Crown's evidence. First, the introduction of select pages of the notebooks through the expert's report proceeded by consent of both the Crown and the defence. Second, the appellant was aware of the content of the evidence. Third, the trial counsel's approach to the notebook evidence was largely consistent with his trial strategy, which ultimately proved to be unsuccessful. This was not a basis for appellate intervention. (3) The trial judge did not err by rejecting the appellant's witness's testimony. A trial judge's assessment of credibility and reliability is a finding of fact that is entitled to deference on appeal. An appellate court cannot interfere with a trial judge's assessment of credibility unless it is established that such assessment cannot be supported on any reasonable view of the evidence. In this case, the trial judge's finding that the appellant's witness was not believable was solidly grounded in the numerous and obvious inconsistencies in her testimony. The appellant's suggestion that the witness was intoxicated at the time of the incident also found no support in the record. (4) The

trial judge did not err by conducting the trial in the appellant's absence. Under s. 650 of the *Criminal Code*, the general rule is that an accused must be present in court during the whole of their trial. That rule is, however, subject to exceptions, including situations where the court allows the accused to appear by counsel for any part of the trial other than when evidence is being given. In this case, while the appellant was not in the courtroom when trial counsel asked the judge to have the matter adjourned to give him time to review additional Crown disclosure and obtain instructions from his client in relation to it, he was present when the presentation of the evidence began. The record showed that no evidence was called nor was any argument made in the absence of the appellant. (5) The trial judge's verdict was not unreasonable. Where it is argued that a trial decision should be set aside on the basis that it is unreasonable, the question an appellate court must determine is whether the verdict is one that a properly instructed jury or judge could reasonably have rendered. Appellate intervention will be warranted where there is no evidence to support the conclusion reached by the trial judge, where the verdict is plainly contradicted by the evidence relied on by the trial judge in support of an inference, or where the verdict is shown to be incompatible with evidence that is uncontradicted and not rejected by the judge. In this case, the appellant provided no reasoned argument as to how the evidence, considered as a whole, would have precluded a reasonable jury, properly instructed and acting judicially, from reaching a verdict of guilt beyond a reasonable doubt. The appellant also failed to show how any factual findings were palpably wrong or that the judge drew an inference or made a finding of fact essential to the verdict that was plainly contradicted by the evidence or incompatible with evidence that was not otherwise contradicted or rejected. There was no basis for appellate intervention. (6) There was no finding of ineffective assistance of counsel. To establish ineffective assistance of counsel, an appellant must demonstrate the following: (a) that the counsel's acts or omissions constituted incompetence; and (b) a miscarriage of justice resulted. In this case, there was no evidence to successfully support a miscarriage of justice argument. The appellant failed to explain how trial counsel's decision not to challenge every single matter at trial constituted incompetence, let alone that his litany of (alleged) failures amounted to a miscarriage of justice. There was also no evidence that trial counsel allowed the prosecutor to tamper with evidence and that he purposely provided ineffective assistance as a form of retaliation against the appellant. (7) The appellant had served out his full sentence at the time of his appeal hearing and the sentence appeal was moot.

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***R v McKenzie*, [2024 SKKB 150](#)**

Zerr, 2024-08-19 (KB24154)

Criminal Law - Aiding and Abetting
Criminal Law - First Degree Murder

On October 3, 2019, the body of the victim was found on the shoulder of Highway 102 near La Ronge, Saskatchewan. The victim had suffered multiple stab wounds, blunt force trauma and was bound with packing tape. The accused persons were charged with kidnapping and first-degree murder. The Crown's primary theory was that the accused and her co-accused participated in a plan and continuing enterprise to confine and kill the victim.
HELD: The accused were convicted of manslaughter and kidnapping. (1) The accused committed an unlawful act that caused the

victim's death. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence. Based upon the physical findings, including the proximity of the "Y" turn tire impressions to the bloody snow, the victim was forced out of a vehicle at the Lamp Lake turnaround and there sustained the sharp force injuries that caused her death. To suggest that the accused persons had a change of heart and simply delivered the victim home, after which she encountered someone else who drove her to the Lamp Lake turnaround and inflicted 47 sharp force injuries, was not a reasonable inference. Also, the level of unspent animus at departure from 936A Quandt Crescent, the group's clear motive to inflict further harm, and the heightened mood, timing, and tenor of things said upon return to the address also made it unreasonable to infer that the group dropped the victim at an unknown location with an unknown person or persons who then who drove her to the Lamp Lake turnaround, evicted her from the vehicle, and inflicted the sharp force injuries. In this case, the only reasonable inference to draw was that one or more of the accused persons inflicted the sharp force injuries that caused the victim's death. (2) The principal offenders intended to cause death or bodily harm that they knew was likely to cause death and were reckless whether death ensued. (3) The court was not satisfied beyond a reasonable doubt that the accused persons knew the principal offender intended to cause death or intended to cause bodily harm that was likely to cause death and was reckless as to whether death ensued. (3) The accused persons possessed the *mens rea* for manslaughter. If an accused aids or abets the principal in the commission of a dangerous unlawful act where a reasonable person in the circumstances would have appreciated that bodily harm was the foreseeable consequence of the unlawful act, the accused may be found guilty of manslaughter. In this case, a reasonable person in all the circumstances would have appreciated that further bodily harm was the foreseeable consequence of kidnapping, a dangerous and unlawful act. Specifically, a reasonable person would have foreseen that the victim, beaten past the point of recognition, was not about to be driven home. Rather, she was about to be driven away from 936A Quandt Crescent, forced from the vehicle, and abandoned in some isolated place during the early morning hours of December 23, 2019, wearing only a hoody and sweatpants. Under the circumstances, bodily harm was an objectively foreseeable consequence of the dangerous unlawful act of kidnapping. (4) The accused persons aided or abetted the principal offender(s) to commit the dangerous, unlawful act of kidnapping. The elements of the offence of kidnapping are: (a) that the accused unlawfully took the complainant and removed her, by force or fraud, against her wishes to another place; and (b) that the accused did so intending that the complainant be confined against her will. In this case, the accused provided the car and the muscle as the victim was removed by force against her will from 936A Quandt Crescent.

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***Forster v Forster*, 2024 SKKB 168**

Elson, 2024-09-16 (KB24161)

Real Property - Partition
Statutes - Interpretation - *Farming Communities Land Act*

The applicant and the respondent carried on a farming partnership for many years and entered into a written partnership

agreement in January 2010. In January 2016, the parties entered into an "agreement in principle" for the sale of the applicant's interest in the partnership, and the agreement of sale was executed in December 2016. The applicant was dissatisfied with the division of the farmlands under the partnership and brought an application for an order to "partition by way of subdivision" the undivided interests in the farmland previously used by the partnership.
HELD: The application was dismissed. (1) The parties were no longer jointly engaged in farming operations. Under s. 2(1) of *The Farming Communities Land Act* (FCLA), two circumstances must be in place before the court is obliged to issue directions. The first circumstance is that the land must be registered in the names of two or more persons such that they each have an "undivided interest in the land." The second is that these persons, or some of them, either alone or along with other persons, must be "jointly engaged in farming operations" on the land. In this case, the parties, as tenants in common, held undivided interests in the subject farmland. However, on a purposive construction of s. 2(1) of the FCLA and given the undisputed evidence that the applicant and his corporate entity had ended their active participation in the partnership as of December 31, 2015, the parties were not jointly engaged in farming operations on the subject land when the application was filed.

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***R v Mohamed*, [2024 SKKB 169]**

Klatt, 2024-09-18 (KB24162)

Criminal Law - Manslaughter - Sentencing
Criminal Law - Sentencing - Sentencing Principles

The defendant had been found guilty of manslaughter on the basis that he aided in an unlawful act where, in the circumstances, a reasonable person would have appreciated that bodily harm was the foreseeable consequence of the unlawful act. The Crown advocated for a prison sentence of 13 years while the accused advocated for a prison sentence of between six to eight years.
HELD: The accused was sentenced to 10 years' imprisonment. The accused was also prohibited from possessing any firearm for a period of 10 years from the date of his release from prison. (1) A ten-year sentence was fit and appropriate in the circumstances. Section 718 of the *Criminal Code* states that the purpose of sentencing in all cases is to protect society and, along with other crime prevention initiatives, to contribute to respect for the law and the maintenance of a just, peaceful, and safe society by the imposition of just sanctions. Section 718 also sets out various objectives factoring into the determination of a "just sanction", including denunciation, deterrence, rehabilitation, promotion of responsibility and acknowledgement of harm caused. The fundamental principle of sentencing, that the sentence must be proportionate to the gravity of the offence and the offender's degree of moral responsibility in committing it, commands absolute adherence. The sentence must account for any aggravating and mitigating factors and must be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In this case, the victim was ambushed in an isolated area outside the apartment building. The point of luring him to an isolated area, away from the main entrance to the building, was to ensure an assault could be carried out without the perpetrators being caught. The victim's killing was execution-style, and it was a planned assault, not an impulsive one that erupted in the heat of the moment. The love and support of the accused's family and his obvious remorse were mitigating factors. Among the aggravating factors were

that the accused was clearly in violation of his curfew at the time the victim was killed. The accused knew of the plan to attack the victim and at no time did he resile from the plan. The accused also returned to be with his co-accused after moving his vehicle to where the attack was going to take place. In addition, the accused did nothing to render assistance to the victim after the shooting. It was also aggravating that while the plan of attack counted on luring the victim away from the main entrance and to the more isolated south exit, the shooting occurred at an apartment or condo building occupied by numerous residents. The fact that a firearm was used in the commission of the offence was also an aggravating factor. In all, the evidence was satisfactory as to the fact that the accused was a willing participant ready to play his part. In considering all the circumstances, including the aggravating and mitigating circumstances, the principles of sentencing, the case law, sentences in other like cases, the accused's role in the offence, and his circumstances, 10 years was deemed a fit and proportionate sentence.

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***S.C. v N.C.*, 2024 SKKB 170**

Richmond, 2024-09-19 (KB24163)

Family Law - Child Support - Section 7 Expenses
Family Law - Custody and Access- Best Interests of Child
Family Law - Custody and Access - Child Support - Spousal Support - Determination of Income
Family Law - Division of Matrimonial Property

The parties met in the spring of 2006 and got married the same year. After three children, considerable financial strain, and emotional angst, they separated in August 2019. After several interim court applications, an interim shared parenting arrangement was put in place. The parties were unable to resolve the issues arising from the breakdown of their relationship and sought a divorce.
HELD: The divorce was granted. The court ordered that the parties share parenting of their children. The court ordered that the respondent pay the petitioner $1,509 in spousal support per month and $2,875 per month as child support. There would be no s. 7 expenses paid to either party for reimbursement. The court also ordered that the respondent pay the petitioner $254,189 should the petitioner obtain release from her mother regarding the respondent's debt, and $50,357 in the event that the petitioner failed to obtain the release. (1) The *Divorce Act* enumerates several factors to be considered in determining the best interests of the children. Considering the enumerated best interests factors in the *Divorce Act*, including having given careful consideration to the allegations of family violence, and having regard to the primary consideration of the children's physical, emotional and psychological safety, security and well-being, the children were best served by an order that maintained their current shared parenting plan on a weekly rotation as existed currently. The children were well bonded and enjoyed close relationships with both parents and were thriving under the current arrangement. There was nothing in the evidence that justified disrupting what had proven to be a workable parenting arrangement other than to limit further communications between the parties. A parenting arrangement that minimized contact between the parents was in the children's best interests. (2) Child support must be considered having regard to the parties' shared parenting arrangement. The starting point was to determine the parties' incomes and to calculate a set-off amount using the

Federal Child Support Guidelines. From there, however, an inquiry had to be made into the parties' households, their costs and what might be fair having regard to the means and needs of the parties. Given the steady increase in the respondent's salary and dividends and the lack of any information to suggest that the subject of his investment would not continue to do well, there was no justification for not including the divided income in a calculation of support. There was also nothing in the evidence to make the court believe that the full amount of pre-tax income should not be included in a determination of the respondent's income other than the historical pattern of earnings and the fact that it was sustained primarily from another related company over which the respondent had only minimal control as a minority shareholder. (3) An order for spousal support was warranted. In making an interim or final order for spousal support, the court shall take into consideration the condition, means, needs and other circumstances of each spouse including the length of time the spouses cohabited; the functions performed by each spouse during cohabitation; and any order, agreement or arrangement relating to support of either spouse. The court does not take into consideration any spousal misconduct in relation to the marriage. In addition, the court is not to consider any conduct in a variation application that could not have been considered in the making of the initial order. However, the consequences of misconduct are not rendered irrelevant because of their genesis in the other spouse's misconduct. In this case, the petitioner appeared decimated by the marriage and its breakdown. The petitioner was unable to work and her inability to function at her former level was one of the consequences arising from the relationship. There was also no indication that she would get well anytime soon. In the circumstances, spousal support was warranted. (4) There was no retroactive adjustment for support. In this case, it was hardly fair to adjust the property division to account for debts paid by the respondent or the petitioner's debt reduction due to a consumer proposal when the respondent was not paying a proper amount for support. (5) Section 2(1) of *The Matrimonial Property Act* requires that the matrimonial property or its value be distributed and distributed equally, subject only to the exceptions, exemptions and equitable considerations mentioned elsewhere in the statute. In this case, given the debt against the family home, it had essentially no value. The respondent's hunting land was valued at $110,000. The court was also satisfied that the value of the petitioner's pension was $133,861.55. (6) The respondent had made partial payment to the petitioner's mother and had acknowledged the debt by doing so. It was a valid debt and to put it on the petitioner's side made little sense given the petitioner's insolvency.

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***First National Financial GP Corporation v Churko*, [2024 SKKB 171]**

Robertson, 2024-09-19 (KB24164)

Civil Procedure - Summary Judgment
Mortgages - Foreclosure - Order *Nisi* - Foreclosure - Summary Judgment - Availability

In August 2024, the plaintiff filed a notice of application seeking an order *nisi* for foreclosure with a seven-day redemption period. The application scheduled for September 3, 2024, was adjourned to September 5, 2024, when it was argued in chambers with decision reserved. The key issue was whether the application should be granted, and if so, on what terms.
HELD: The application was granted. Costs were fixed at $5,000 payable to the plaintiff. (1) The appraisal report submitted by the applicant was reliable and sufficient. The respondent did not persuade the court that the amounts claimed by the applicant were inaccurate, nor that the report was inadmissible, and the respondent provided evidence supporting its claim. (2) The redemption

period was fixed at 90 days, the standard period.

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***Zimmer v Wynnychuk*, 2024 SKKB 172**

Bergbusch, 2024-09-18 (KB24165)

Family Law - Homestead Rights - Non-owner Spouse

The respondent sought an order discharging an interest based in alleged homestead rights in certain land. The petitioner and the respondent cohabited in a house on the property from January 2008 until July 2014. The petitioner issued a petition in September 2014 seeking an equal division of the family home and family property, custody and access, and child and spousal maintenance. In July 2014, the petitioner registered interest against title to the family home to protect her homestead rights in the property. Following a pre-trial conference in August 2020, the petitioner and the respondent entered into minutes of settlement ostensibly resolving all outstanding issues in their family law proceeding. The parties' agreement was incorporated into a consent order granted by the court on September 18, 2020. A term of the order was that the petitioner relinquished her claim to the family home and agreed to sign any documents the respondent reasonably required to give effect to the relinquishment of her claim. The petitioner opposed the application and refused to sign a discharge of her interest, alleging that the respondent had not complied with his obligation to turn over to her certain items of personal property, and the agreement was unenforceable.
HELD: The respondent's application was granted. (1) The petitioner did not have homestead rights to the property. Homestead rights provided in *The Homesteads Act, 1989* are limited in scope. In the case of cohabiting unmarried spouses, these rights are extinguished after the non-owning spouse has ceased living on the homestead for 24 months. This 24-month time-period coincides with the length of time that a common law spouse has to bring an application under *The Family Property Act* after the cohabitation ceases. In this case, the petitioner had not lived in the family home since 2014. The petitioner's homestead rights were extinguished 24 months after she vacated the property, in July 2016. Consequently, the interest she registered against title to the property to protect her homestead rights was exhausted. (2) It was fair and reasonable for the petitioner's interests to be discharged. First, the petitioner agreed in the minutes of settlement to relinquish her claim to a division of the family home and to sign any documents necessary to give effect to that agreement. The settlement was reached by the parties with the assistance of their counsel during a pre-trial conference and subsequently reduced to a written agreement that each of the parties and their counsel signed. Secondly, the parties consented to the order, which incorporated the terms of their settlement agreement. Third, the petitioner's reasons for refusing to sign a discharge involved unrelated complaints about the respondent's performance of his obligations under the minutes of settlement and the order. The petitioner had not done anything to advance a claim against the respondent for breach of his obligations, despite the passage of time. Finally, the relevant facts were uncontroverted and there was no genuine issue requiring a trial relating to the extinguishment of the petitioner's homestead rights.

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