NOVA SCOTIA COURT OF APPEAL
Citation: ***Hepworth v. Hepworth***, 2012 NSCA 117

Date: 20121123
Docket: CA 354165
Registry: Halifax

Between:

James Hepworth

Appellant

v.

Tammi Hepworth

Respondent

Judge(s):	Oland, Hamilton, Fichaud, JJ.A.
Appeal Heard:	May 31, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed and cross-appeal dismissed, per reasons for judgment of Oland, J.A.; Hamilton and Fichaud, JJ.A. concurring
Counsel:	Karen J. Killawee, for the appellant Peter Lederman, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] The division of assets on the dissolution of a marriage is often difficult. In this case, it is also complicated by the fact that the matrimonial home is situate on land not owned by the parties, but by the Millbrook First Nation (the "Band"). The appellant, James Hepworth, is a member of that Band. Furthermore, in the case law on compensation for homes on reserve land, both parties were members of an Indian band. Here, however, the respondent, Tammi Hepworth, is Caucasian. She cannot remain on Band property.

[2] While in a relationship and then during their marriage, the parties lived in a house on the Millbrook Band Reservation. The trial judge found that, on their divorce, the respondent is entitled to compensation for their home. In this appeal, the main question is whether he erred in doing so and, if not, whether he erred in awarding the amount he did.

[3] For the reasons which follow, I am of the view that the judge did not err in determining the respondent's entitlement to compensation. However, he erred in the amount of the compensation award. This affects the equalization amount.

Background

[4] In 1997, the Band provided Mr. Hepworth with the lot for a house; the infrastructure including sewer, water and utilities; labourers to construct the house; and a $27,500.00 subsidy. The parties contributed $19,500.00 of their own money. Over the years, they did some renovations and repairs to the home. The Band reimbursed them for some of those.

[5] The parties married in 2000. They have three children. In August 2008, they separated. The following year, Ms. Hepworth commenced divorce proceedings. Among other things, she sought a division of assets.

[6] Justice Kevin Coady of the Nova Scotia Supreme Court presided at the trial. His judgment is contained in a decision and an addendum, neither of which is reported.

[7] Reserve land is governed by the federal *Indian Act*, R.S.C., 1985, c. I-5. The provisions relevant to this appeal read:

> Reserves to be held for use and benefit of Indians
>
> **18.** (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.
>
> ...
>
> Possession of lands in a reserve
>
> **20.** (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.
>
> Certificate of Possession
>
> (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.
>
> ...
>
> Transfer of possession
>
> **24.** An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.
>
> Indian ceasing to reside on reserve
>
> **25.** (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

When right of possession reverts

(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

...

Restriction on mortgage, seizure, etc., of property on reserve

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

[8] At trial, each of the parties filed affidavit evidence and testified. The judge also heard the evidence of Lloyd Johnson, who has been a Band Councillor since 1975 and Chairman of Millbrook Housing since 1978. Mr. Johnson testified that Mr. Hepworth does not have a Certificate of Possession for the land on which the house is situated. He explained that one has to request this from Band Council and pay for the survey which costs about $3,000.00. He gave this evidence:

Q. Okay. If Mr. Hepworth applied to the Band Council to get a certificate of possession, is there any reason why he wouldn't get it? Assuming he paid for the fees.

A. There's no reason, if he paid for the cost of the survey.

[9] Since Indian Affairs does not ask for the sale price when a Band member with a Certificate of Possession sells to another Band member, little information is available as to sale prices. Mr. Johnson testified:

Q. Do you - - in the course of things, do you - - do you get information about some properties that have sold and what - - what can you tell us about the selling prices that you're aware of?

A. The highest one I know of is forty thousand.

> **Q.** And what kind of a house was that?
>
> **A.** That is a - - was a bungalow, fireplace. A well built house, I would say. I'm not an expert on appraisals, but it - - it would - - it would be worth a hundred thousand.
>
> **Q.** Off reserve? Is that what you mean?
>
> **A.** If it was off the reserve - - that's without counting the land.

[10] The judge received into evidence an appraisal as of July 2008 prepared by A. Paul Weatherby. That appraisal of the home assessed its market value as $127,000.00. It also gave a total replacement cost of $123,648.00 which, less accrued depreciation, was $98,918.00. While the appraisal correctly noted that the property is owned by the Band, and a Certificate of Possession can only be sold or traded to another Band member, it incorrectly indicated that the current owner had a Certificate of Possession.

[11] According to the evidence of the parties and their pre-trial submissions, Mr. Hepworth gave Ms. Hepworth $10,000.00 in August 2008, the month they separated. This payment was intended to compensate her for contributions made to the home, and maybe to help her buy another home.

[12] The issues before the judge at the hearing on May 26 and 27, 2011 concerned not only the home, but also custody, child support, matrimonial property and debts. At the end of the hearing, the judge gave an oral decision. He began by dealing with the claim for retroactive child support and by calculating the equalization payment required for all matters other than the home. He considered the $10,000.00 Mr. Hepworth gave to Ms. Hepworth as a matrimonial asset, and included it in his division of personal property in calculating the equalization payment.

[13] The judge then determined that Ms. Hepworth was entitled to compensation for the home. He decided to rely upon Lloyd Johnson's evidence as to its value. The judge reasoned:

> [19] The evidence is very clear, the matrimonial home is on Band land. All these people have is a right of possession without a Certificate of

Possession. The law is clear, the **Indian Act** which is Federal Legislation trumps the **Matrimonial Property Act** which is Provincial Legislation. I refer to **Paul v. Paul**, 2008 NSSC 124, **Derrickson v. Derrickson** [1986] 1 S.C.R. 285 and **George v. George**, 1996 Can LII 2766 (B.C.C.A.). In other words the presumptive division does not apply. These cases also establish that it is open to a Court to address this by way of a compensation order. These compensation orders require some market value being attributed to the property. Mr. Lederman suggests the replacement cost approach as was done in **Darbyshire-Joseph v. Darbyshire-Joseph**, 1998 Can LII 3522. There may be times or cases where this approach would be appropriate. In this case I have an appraisal for $127,000.00 and a total replacement cost of $123,648.00, both figures found in the 2008 appraisal by Mr. Weatherby. The value of the land and any tax factors obviously have not been factored in. I am satisfied there is relatively no market value for this home. Millbrook is a small Reserve. It is a modest community economically speaking. Few, if any, houses move on any kind of a sale basis. Most transactions are without formality or costs. Only Band members can live there. It is not mortgageable which has a downward pressure on the value. All these things produce, as I say, a downward effect on the value regardless of what was spent on building the home.

[20] It is clear that Ms. Hepworth cannot live there. On the flip side both parties have invested whatever they have earned into the construction, improvement and maintenance of their family home. In normal circumstances they would share equally from their investment in the home and the family. I am not able to put value on this asset that is not there just for the purpose of the end result. It is what it is. I am satisfied that Ms. Hepworth knew of these limitations when they built the home. It is also noteworthy that Ms. Hepworth benefited from living on the Reserve for as long as she lived there as did Mr. Hepworth.

[21] What evidence of value do I have before me? Really, just Mr. Johnson's evidence. He testified the highest price he ever heard of was $40,000.00. His evidence was very limited in that no details were provided as to who they were, their status, where this happened, the kind of a house or any other factors. He had heard of one house going for $40,000.00. That is the evidence before me. Nothing has been advanced to refute that figure. On the evidence and the authorities before me I attribute a $40,000.00 value to this home.

[22] I will make a compensation order in lieu of division in the amount of $40,000.00. I will set-off the retroactive support award of $10,000.00 and

> the equalization award of $12,829.36 which leaves Mr. Hepworth indebted to Ms. Hepworth in the amount of $17,170.64. I recognize that Mr. Hepworth cannot mortgage his property and I see no other avenue to buy out Ms. Hepworth's claim as I have found it to exist. I order that on or before January 1, 2012 he will pay Ms. Hepworth $5,000.00, on or before January 1, 2013 a further $5,000.00 and on or before January 1, 2014 the final sum of $7,170.64. [Emphasis added]

[14] Immediately after the judge gave his oral decision, counsel drew his attention to the fact that if the value of the house is $40,000.00, Ms. Hepworth's share is only $20,000.00, not $40,000.00. In his discussions with counsel which are contained in his decision, the judge stated:

> [27] **THE COURT:** Okay. Well, put it this way I'm not changing the bottom line. I can change it the way through and I can do that. I have to go with what I've got. I've got $40,000.00. If I were to do that then Mrs. Hepworth would get no benefit other than the $10,000.00 that was given to her.
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> ...
>
> [31] **THE COURT:** I...I hear you loud and clear but as I said, I can address this a number of ways but I'm trying to do justice between these parties as a final thing and it's no surprise that what I had to do was think about what was the right thing to do for these people. I tried in the time I had allotted to me to do that. That hasn't changed. This to me is a good balance and if I have to adjust my reasons I will do that. [Emphasis added]

[15] On June 9, 2011 the judge issued a written addendum to his May 27, 2011 oral decision. In its entirety, his addendum reads:

> [1] On May 27, 2011 I delivered an oral decision which is attached to this addendum. I now wish to address my remarks on the issue of the matrimonial home. I found that the home was worth $40,000 which I concluded allowed for a compensation order in favour of Ms. Hepworth. Counsel for Mr. Hepworth correctly pointed out that this value did not allow for the compensation order that I made. This was an arithmetic lapse on my part.
>
> [2] I revise the value of the matrimonial home to $80,000. While I recognize that this amounts to working backward, I have concluded that the end

> result supports this change. The appraisal of Mr. Weatherby allows me to deduct the value of the land, as well as any tax factors, and come up with a value in the area of $80,000. I find that the home is worth $80,000. All other aspects of my oral decision remain as given. [Emphasis added]

[16] Mr. Hepworth appeals the Order dated October 6, 2011 and Ms. Hepworth cross-appeals.

Issues

[17] The grounds raised on both the appeal and cross-appeal argue that the judge erred in regard to the compensation for the home, but differ in their approach. Each of the parties also put forward other grounds, some of which were settled by agreement. At the hearing of the appeal, the grounds of appeal that remained for determination by the court were:

> 1. The judge erred in law when he considered the home subject to an order for compensation. In the alternative, he erred in law and in fact when he valued it at $40,000.00. In the further alternative, he erred in law and in fact when he revised its value to $80,000.00.
>
> 2. He erred in law and in fact when he included the entirety of Ms. Hepworth's line of credit as a matrimonial debt, and accepted that there was no asset value to a line of credit account which stood at $14,000.00.
>
> 3. He erred in fact when he calculated the equalization payment and included the $10,000.00 payment as a matrimonial asset.

[18] The respondent cross-appeals. She submits that:

> 1. The judge erred in law and in fact when he concluded that Mr. Hepworth had overpaid child support in the amount of $10,000.00, when there was no evidence that allowed such a conclusion.
>
> 2. He erred in law in not accepting the appraised construction cost of the home, less the HST component, as the only reasonable valuation of the home for purposes of division under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, as amended ("*MPA*").

Standard of Review

[19] In *MacCulloch v. MacCulloch*, 2012 NSCA 10, Farrar, J.A. observed that:

> [15] The standard of review on matrimonial appeals was summarized by Cromwell, J.A. (as he then was) in **MacLennan v. MacLennan**, 2003 NSCA 9 at ¶ 9:
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> > 9 In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996**)**, 150 N.S.R. (2d) 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.). The determination of support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (S.C.A.D.) at 162; **LeBlanc v. LeBlanc**, [1988] 1 S.C.R. 217 at 223 - 24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at 1374 - 77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518 at paras. 10 - 13.

[20] This court stated in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43:

> [21] The law on the standard of review was exhaustively considered by Saunders, J.A. in **McPhee v. Gwynne-Timothy**, 2005 NSCA 80. Those standards are:
>
> 1. For findings of fact and inferences drawn from facts, there must be a palpable and overriding error to warrant overturning a trial judge. An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. A high degree of deference is paid to a trial judge's findings (**McPhee, supra**, ¶ 32) ...
>
> 2. On questions of law the standard of review is one of correctness, the trial judge must be right (**McPhee, supra**, ¶ 33) ...
>
> 3. Findings of mixed law and fact are said to fall along a "spectrum of particularity". They involve applying a legal standard to a given set of

> facts and are to be reviewed according to the palpable and overriding error standard unless the alleged error of law can be isolated from the mixed question of law and fact. Where that occurs the isolated legal principle will attract a correctness standard (**McPhee, supra**, ¶ 33) ..."

[21] The first ground of appeal asks whether the home could even be subject to a compensation order. That is a question of law for which the appropriate standard of review is correctness. The remaining grounds are subject to the palpable and overriding error standard.

Analysis

The Home

[22] Mr. Hepworth neatly summarized his opening position in his factum thus:

> 37. A Certificate of Possession, issued pursuant to the *Indian Act*, provides evidence of lawful possession of Reserve Land. This is the closest to a property interest an Indian can have on Reserve Land, as title to said lands always remains vested in the Crown (Section 18 of the *Indian Act*) ... . Mr. Hepworth did not possess a Certificate of Possession; his ability to reside in the Home, which was situated on the Band land, was by virtue of his membership in the Band and subject to policies of the Band Council. Thus, Mr. Hepworth did not have a property interest in the Home and Ms. Hepworth could not have such an interest due to her not being First Nations. Therefore, there was no 'matrimonial home', as defined by the *Matrimonial Property Act*, ... to be considered a family asset by the Court upon the division of property.

[23] Mr. Hepworth relies on *Paul v. Paul*, 2008 NSSC 124, the only case from this Province which dealt with this issue. There, the husband and wife were both members of the Eskasoni Band. The home they constructed in approximately 1975 was on Band land. So was the convenience store adjacent to the home, which they started in 2003 and which the wife continued to operate after their separation until it closed in 2006. The parties did not have a Certificate of Possession. After separation, the wife occupied the home with two adult children and other family.

[24] In his decision, Wilson, J. of the Nova Scotia Supreme Court (Family Division) described one of the issues to be determined as the occupation of the home and business premises. He disposed of this issue in a single paragraph:

> [10] Neither party was able to establish an ownership interest in the lands on which the matrimonial home and variety store are located. In fact, these lands have been identified as common Band lands. Neither party had a certificate of possession, which entitled them to occupy the lands for any specific period of time. The husband seeks an Order that he have exclusive use of the land on which the convenience store is located and his wife have possession of the land on which the former matrimonial home is located. The question of possession of common Band lands is governed by the provisions of the **Indian Act**. The Eskasoni Band Council is the authority which determines possession/use of these lands. This Court finds that it has no jurisdiction pursuant to the **Matrimonial Property Act** to order exclusive use of the subject lands as requested by the husband.

There was no compensation order in favour of the wife.

[25] The appellant points out that while the judge referred to *Paul* in his decision, there was no analysis. He says that the judge should have interpreted the decision as establishing that, without a Certificate of Possession, there was no property interest to be divided. With respect, I cannot agree that *Paul* reaches that far. The decision does not identify compensation as an issue, nor does it contain any reasoning around that question. It appears that the issue there was not compensation for the home, but only its possession and use. On this appeal, the question is squarely entitlement to compensation.

[26] Two cases which predate *Paul* dealt with compensation for homes on Band property: *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, and *George v. George* (1996), 81 B.C.A.C. 63. Both were divorce proceedings which considered the federal *Indian Act* and the *Family Relations Act*, R.S.B.C. 1996, c. 128, of British Columbia.

[27] In *Derrickson,* the parties were First Nations Band members. Pursuant to the provincial legislation, the appellant wife sought a declaration of entitlement to a one-half interest in the properties in which her husband held Certificates of Possession, or for compensation in lieu of division. The issue was whether, in view of the *Indian Act,* certain provisions of the *Family Relations Act* dealing with

the division of family assets are constitutionally applicable to lands in a reserve held by an Indian.

[28] The Supreme Court of Canada held at ¶ 79 that provincial legislation dealing with the division of family assets was constitutionally inapplicable to the lands in question, and the provincial Supreme Court lacked the jurisdiction to make an order pursuant to that statute relating to those lands. This is the basis for the statement in *Paul* that the Supreme Court of Nova Scotia had no jurisdiction to order possession of lands owned by an Indian Band.

[29] However, the wife in *Derrickson* was not without a remedy. Chouinard, J. writing for the court observed that the *Family Relations Act* allowed the court to order one spouse to pay the other "compensation ... where property has been disposed of, or for the purpose of adjusting the division". He stated:

> 86. ... If the court may make an order for compensation because division is not possible where property has been disposed of, surely it must be empowered to make such an order "for the purpose of adjusting the division", where property exists but cannot be divided because no division can be made of reserve lands.
>
> ...
>
> 88. Compensation in lieu of a division of property is not a matter for which provision is made under the *Indian Act* and in my view there is no inconsistency or "actual conflict" between such a provision for compensation between spouses and the *Indian Act*.

He agreed with the Court of Appeal that the matter should be remitted to the trial judge to complete the disposition of assets.

[30] A decade later, *George* was decided by the British Columbia Court of Appeal. There the parties, both members of an Indian Band, resided on a property allocated to the appellant not by the Band Council, but by relatives. Unlike *Derrickson*, but like the situation here on appeal, a Certificate of Possession had never been issued to him. The trial judge found nevertheless that the appellant had lawful possession under s. 20(1) of the *Indian Act*, and granted the wife a compensation order.

[31] The fundamental question raised on the appeal was whether a Band member's use and occupancy of real property on reserve lands must be evidenced by a Certificate of Possession before he can be said to have an interest in property for which a compensation order may be granted pursuant to the *Family Relations Act* of British Columbia. According to Rowles, J.A. writing for the Court of Appeal, there was ample documentary evidence to support the conclusion that the Band Council had approved the allocation of the property to the appellant and the inference that the Minister of Indian Affairs had as well. In dismissing the appeal, she stated:

> **39** In light of the evidence in this case, I think it was open to the trial judge to conclude that the appellant was lawfully in possession of the Dollarton property under s. 20(1) of the Indian Act, regardless of the fact that he had not obtained a Certificate of Possession under s. 20(2) of the act.
>
> **40** I note as well that while "lawful possession" of the Dollarton property has not been evidenced by issuance of a Certificate of Possession, it would be difficult for a band council, in view of the evidence presented in this case, to assert successfully that Mr. George is not entitled to continued use and occupancy of the property.
>
> **41** Based on the judgment in Derrickson, supra, it was open to the trial judge to grant a compensation order under s. 52(2)(c) of the *F.R.A.* in relation to the appellant's right to use and occupy the Dollarton property.

[32] Following the analysis in *George*, I will consider whether the appellant had a property interest in the home even though he does not have a Certificate of Possession. Here, it was the Band which provided Mr. Hepworth with the land, workers to build the home, necessary infrastructure, a subsidy and, over the years, some reimbursement for renovations and repairs carried out by the parties. The parties lived on the property, undisturbed, for over a decade. There was no suggestion that the Band ever had, or now has, any concerns regarding the use and possession of the home. There was no evidence of any unusual impediment to Mr. Hepworth obtaining a Certificate of Possession. Rather, the evidence showed that it was essentially his for the asking. Mr. Johnson, who for over thirty years has been a Band Councillor and Chairman of Housing, testified that the appellant had only to apply and pay the survey cost in order to obtain a Certificate of Possession.

[33] In my view, in the particular circumstances of this case, the appellant was lawfully in possession of the property pursuant to s. 20(1) of the *Indian Act*. While he does not have a Certificate of Possession, according to s. 20(2) that document is only evidence of his right to possession. Its absence does not necessarily mean that the person does not have a right to possession and occupation.

[34] According to Mr. Hepworth, his lawful occupation of the property without a Certificate of Possession does not constitute a "property interest" which would be captured under the definition of "matrimonial property" in the *Matrimonial Property Act.* That definition reads:

> **3 (1)** In this Act, "matrimonial home" means the dwelling and real property occupied by a person and that persons spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest.

[35] It is clear that whatever Mr. Hepworth's interest in the property may be, it is not a leasehold interest. There is no evidence of any of the usual characteristics of a landlord/tenant relationship. For example, there is no lease, written or otherwise, between the Crown and Mr. Hepworth. Nor is there any evidence of a fixed term of occupation and use, or of rent paid by Mr. Hepworth to anyone.

[36] The phrase "property interest other than a leasehold interest" in s. 3 of the *MPA* has been interpreted in cases which only dealt with non-reserve properties. See, for example, *Gale v. Gale*, 2008 NSSC 177 (Family Division) where the parties occupied a property for an extended time under a rent to own arrangement; both *Fleet v. Fleet*, 2005 NSSC 69 (Family Division), and *Begin v. Begin,* [1996] N.S.J. No. 561 (SC)*,* where the mother of one of the parties owned the property; and both *Grandy v. Grandy,* [1993] N.S.J. No. 538 (SC), and *Beaman v. Beaman*, [1984] N.S.J. No. 11, (SC), where the parties leased their homes with the option to purchase through government programs. In all these cases, after a review of the particular facts in each instance, the courts were persuaded that a party's bundle of rights in a property amounted to more than a purely leasehold interest and so fell within the definition of "matrimonial property" in the *MPA*.

[37] Here, Mr. Hepworth's bundle of rights to the property on which the house sits is very much affected by his status as an Indian and the unique provisions of

the *Indian Act*. As explained earlier, the title to land to which Mr. Hepworth has a right of occupy remains in the Crown. He does not enjoy an unfettered right to alienate his interest by deed or will. His ability to obtain financing using his interest in the property is severely constrained. These complications and others arising from the *Indian Act* provisions and jurisprudence such as *Derrickson* continue to challenge the courts. See, for example, *Syrette v. Syrette*, 2012 ONCA 693, varying 2011 ONSC 6108.

[38] In order to dispose of this question, it is not necessary that I determine whether Mr. Hepworth's lawful possession of the property falls within the definition of "matrimonial home" in the *MPA*. Assuming, without deciding, that it did not, it is my view that it would be caught under the definition of "matrimonial assets" in that legislation. Section 4(1) reads:

> **4 (1)** In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
>
> (b) an award or settlement of damages in court in favour of one spouse;
>
> (c) money paid or payable to one spouse under an insurance policy;
>
> (d) reasonable personal effects of one spouse;
>
> (e) business assets;
>
> (f) property exempted under a marriage contract or separation agreement;
>
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.

None of the listed exceptions apply in this case. Accordingly, his rights to the property constitute real or personal property acquired before or during the marriage. They are "matrimonial assets" which are subject to division between the parties.

[39] How, then, should the value of that property be calculated?

[40] The appellant submits that the judge erred in valuing it at $40,000.00 and, alternatively, in revising his valuation to $80,000.00. The respondent argues that the most fair and equitable way to value the home is to rely on the replacement cost.

[41] I begin by observing that neither party supported a valuation based on market value in the usual sense. As the judge explained in his reasons, there is relatively no market since only Band members can live there and Millbrook is a small reserve.

[42] I then turn to the respondent's argument for valuation based on replacement cost. In her factum, she urged that:

> Replacement cost is a figure that can be arrived at objectively and scientifically, with a precision that no other method can offer. It makes the valuation of a matrimonial home on a reserve predictable and certain, which are results that the common law should strive to achieve.

The respondent submits that that method was adopted in *Darbyshire-Joseph v. Darbyshire-Joseph*, [1998] B.C.J. No 2765; 1998 Can LII 3522 (BC SC). However, a review of that decision discloses that there was no competing methodology before the court in that case.

[43] As in *Paul*, *Derrickson* and *George*, both parties in *Darbyshire-Joseph* were First Nations Band members. They held Certificates of Possession over two lots on the Capilano Reserve of the Squamish Nation. Since those Certificates had been issued to the parties jointly, *prima facie* both were entitled to the use and occupation of the home on one lot. The husband, who had custody of the children, wanted to live in the home with them. He asked that the wife, who had been residing there since their separation, be compensated for the permanent improvements made to the home.

[44] Kirkpatrick, J. "reluctantly" concluded that she was unable to make a compensation order as it was not, as in *Derrickson*, a question of compensation being made in lieu of a division of property. The property had already been

"divided" and the *Indian Act* did not provide for the forced transfer of the parties' interests. However, she provided her views on compensation in case it might assist in an out of court resolution. At ¶ 29, she stated that the parties appeared to agree that the appropriate method of calculation was based on the replacement cost of the improvements to the matrimonial property. She then analysed the evidence before her and determined the amount.

[45] As is seen from this summary of *Darbyshire-Joseph*, that case did not establish that calculation of the compensation amount must, or even should, be based on the replacement cost of improvements. The judge simply adopted the approach agreed to by the parties.

[46] Here, the judge had two different valuations - the testimony of Mr. Johnson of the highest sale price of which he was aware, and the Weatherby appraisal which included replacement cost. In the end, the judge relied on the evidence of value provided by Mr. Johnson, who had testified that the highest price he had ever heard of was $40,000.00. It is apparent from ¶ 19 of his decision that he considered the replacement cost approach. He cited *Darbyshire-Joseph* and the submissions of counsel, and continued:

> ... Mr. Lederman suggests the replacement cost approach as was done in **Darbyshire-Joseph v. Darbyshire-Joseph**, 1998 Can LII 3522. There may be times or cases where this approach would be appropriate. In this case I have an appraisal for $127,000.00 and a total replacement cost of $123,648.00, both figures found in the 2008 appraisal by Mr. Weatherby. The value of the land and any tax factors obviously have not been factored in. I am satisfied there is relatively no market value for this home. Millbrook is a small Reserve. It is a modest community economically speaking. Few, if any, houses move on any kind of a sale basis. Most transactions are without formality or costs. Only Band members can live there. It is not mortgageable which has a downward pressure on the value. All these things produce, as I say, a downward effect on the value regardless of what was spent on building the home.

The judge gave reasons for rejecting replacement cost. The property cannot be mortgaged which severely limits the ability of a party to raise funds to pay compensation to the other party. Moreover, I observe that a valuation based on replacement cost could be considered a windfall, as the parties did not have to pay for the cost of materials, infrastructure and labour.

[47] That the judge considered Mr. Johnson's evidence to be clearly the best, and indeed the only satisfactory, evidence of value is reflected in his question and answer to himself in [21] of his decision: "What evidence of value do I have before me? Really, just Mr. Johnson's evidence." The judge was aware of frailties with that evidence, including the spareness of detail and the fact that it was limited to one house. He specifically referred to them before attributing a $40,000.00 value to the home.

[48] The division of property is a matter which requires the exercise of judicial discretion. What valuation methodology should be followed is for the trial judge to determine based on the evidence presented by the parties. This court applies a deferential standard of review and, unless the result is so wrong as to amount to an injustice, it will not interfere with a discretionary decision on the division of property. The judge considered various approaches, and articulated reasons for proceeding as he did on valuation. In the particular circumstances of this case, I see no palpable and overriding error in the judge's original valuation of the home at $40,000.00. I would emphasize that this does not mean that the method he used is the only appropriate approach in all such compensation cases. Another fact situation may support a replacement cost or other approach.

[49] However, when the judge realized that half of that amount would not provide the respondent with compensation he thought appropriate, he reacted by doubling that valuation in his supplemental decision. The judge's revision of the value of the home from $40,000.00 to $80,000.00 was not, as he described it in his addendum, merely "an arithmetic lapse." It is clear from his discussions with counsel following his oral decision that he deliberately adjusted the compensation amount in order to reach or attain "the bottom line" result that he intended. This he did after having considered both the Weatherby appraisal and the evidence of Lloyd Johnson, and after having determined to rely on that of Mr. Johnson. The judge's complete about-face in his addendum, in order to reach a result not based on his own assessment of the evidence, amounts to an error in principle. This approach is insupportable and attracts appellate intervention.

[50] I would reverse the judge's revised valuation of the home at $80,000.00 contained in his addendum to his decision. For the purposes of the division of the matrimonial assets, the value of the home remains $40,000.00. Accordingly, the

respondent is entitled to compensation in the amount of $20,000.00 for her interest in the home.

Equalization Payment

[51] The remaining grounds of appeal and cross-appeal all allege error in the judge's calculation of the equalization payment.

[52] I begin by summarizing both the appellant's arguments. First, he criticizes the judge's acceptance that there was no asset value to a certain bank account. At trial, Ms. Hepworth produced a statement dated May 18, 2011 from the Royal Bank of Canada which listed several accounts in her name. That included a line of credit described as AC RCL which showed a balance of $14,060.70. Several times under cross-examination, Ms. Hepworth was asked whether she had an account with $14,000 and where and when those funds accumulated. She never did give a definitive answer. Rather, she maintained that she did not know whether or not she did.

[53] Second, the appellant also submits that the judge erred in finding that the respondent's line of credit was a matrimonial asset and including all of it in the equalization payment calculation. He points out that Ms. Hepworth withdrew sizable round amounts almost monthly for which, he says, she did not provide an explanation. The appellant asked that at least some of this line of credit should remain the respondent's sole responsibility.

[54] In the opening paragraphs of his decision, the judge reminded the parties that the court must decide the issues on the evidence presented to it. He stated that this was one of those cases where the evidence was deficient and the court had to do its best with what was provided. In referring to areas where the evidence was vague, he specifically mentioned the $14,000.00 shown on the bank statement and the removal of funds from Ms. Hepworth's line of credit pre-separation.

[55] Here is how the judge dealt with those two items which Mr. Hepworth raises on appeal:

> [17] The $14,000.00 account and, as well, the pre-separation removal of cash advances made in favour of Ms. Hepworth is an unreolved [sic] issue. Ms. Hepworth has handled disclosure and given her evidence in a way that

> fosters distrust and causes the Court to be concerned. I do not accept her evidence that she was flustered. I am not satisfied, however, that she has these funds hidden away. To go there I would have to find that she lied under oath and I would need a lot more than suspicion to make such a finding. I have no idea what Ms. Hepworth did with the pre-separation cash advances and I have no alternative but to accept that she paid them towards appropriate family expenses. There is no evidence before me that she did not use these amounts to satisfy family obligations. There is no evidence before me that says she squandered or, as we used the words a few times, squirreled away this money for future reference. After all they did have separate accounts. So I will not be making any adjustments relative to the $14,000.00 and the cash withdrawals. In effect I am finding they were drawn from matrimonial funds and expended on matrimonial expenses.

[56] The judge's reference to acceptance that Ms. Hepworth used the line of credit to pay appropriate family expenses is based on her testimony that before the couple separated, the money withdrawn was for groceries, bill payments, the needs of the children or house expenses, and that all the funds she had withdrawn in the year before separation was used for family purposes. Hampered by evidence which he described as insufficient, the judge had to make the call as to the respondent's credibility in regard to the bank account and the line of credit. He was not prepared to find that she was not telling the truth. This court accords high deference to a trial judge's determination of credibility. I am not persuaded that the appellant has raised any grounds which would allow interference with the finding of credibility in regard to these two items.

[57] I turn then to the respondent's argument on cross-appeal regarding the equalization payment. At trial, Mr. Hepworth sought approximately $14,000.00 in a retroactive adjustment of his table support. According to the judge, where the three children have resided since separation had been a fluid situation, with the children moving between the two parties. He stated that while the evidence did not allow him to be precise as to the amount, he accepted that Mr. Hepworth had overpaid. He estimated that Ms. Hepworth owed the appellant $10,000.00 in retroactive table support.

[58] Ms. Hepworth cross-appeals, arguing that the basis on which the judge made this imputation is not apparent. She says that from separation until May 2011, the parties carried on pursuant to an earlier consent order which awarded her

$648.00 in child support for one of the children, although the children spent varying amounts of time with each parent, and one of them went from being a child of the marriage to not being such a child and then back again. The respondent argues that there was no clear evidence, such as calendars recording when one or more children were with each parent, to support the judge's figure of $10,000.00. She suggests that the judge's figure was plucked out of the air. She also submits that the appellant did not ask for an adjustment prior to the matter being set down for hearing.

[59] While the appellant did not request such an adjustment in his divorce documents, the matter was raised in his July 9, 2010 affidavit, and his counsel's pre-trial brief dated May 18, 2011. Moreover, it was identified at the outset of trial as an issue without objection from the respondent. The judge heard the evidence of the parties as to which of them had one or more children in his or her care, a child was sharing her time between their homes, and other aspects relevant to child support. Given the quality of the evidence that the parties placed before him, I am not prepared to say that he made any palpable and overriding error.

[60] My determination that the respondent is entitled to compensation of $20,000.00 for the house necessitates a recalculation of the equalization payment ordered by the trial judge. In that regard, one factor remains to be addressed, namely the $10,000.00 paid by the appellant to the respondent the month they separated, for contributions made to the home and maybe towards another home. The judge included it as a matrimonial asset in calculating the equalization payment. According to the appellant, this amount should not have been included until following that calculation, and then as an advance on equalization. His counsel says that he incorrectly factored it into a document presented to the judge who did not pick up counsel's error.

[61] In my view, the $10,000.00 paid by the appellant to the respondent in regard to the home should be set off separately. Thus, the equalization calculation begins with debt and other figures as of the date of separation:

	Mr. Hepworth	Ms. Hepworth
Debt	-$26,417.59	-$13,854.00
Assets		
Tax return		$3,445.33
RRSP		$1,400.00
TOTAL	-$26,417.59	-$9,008.67

The difference in their positions is $17,408.92, which divided in half to reflect the 50/50 division, comes to $8,704.46 owed by Ms. Hepworth to Mr. Hepworth.

[62] To calculate the final result, the compensation order for the home is set off against the $10,000.00 credit for the payment on separation, the equalization payment for personal property, and the amount for retroactive child support:

Item at issue	Amount Mr. Hepworth owes to Ms. Hepworth	Amount Ms. Hepworth owes to Mr. Hepworth
Compensation order for the home	$20,000.00	
Credit for payment on separation		$10,000.00
Equalization payment		$8,704.46
Retroactive child support		$10,000.00
TOTAL	$20,000.00	$28,704.46

The respondent, Ms. Hepworth, owes the appellant, Mr. Hepworth, the difference of $8,704.46.

Disposition

[63] I would allow the appeal and dismiss the cross-appeal. I would order the respondent to pay the appellant an equalization payment of $8,704.46. This amount will be paid as follows: on or before January 1, 2013, the respondent will pay the appellant $5,000.00; and on or before January 1, 2014, the final sum of $3,704.46. In all other respects, the Corollary Relief Order dated October 6, 2011 remains unchanged. There will be no order as to costs.

Oland, J.A.

Concurred in:

Hamilton, JA

Fichaud, JA