IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Westcott v. Dumont 2009 NSSC 22

Date: 20090127
Docket: 41933
Registry: Sydney, Nova Scotia

Between:

Marilyn Westcott

Plaintiff

v.

Jean-Yves Dumont

Defendant

DECISION

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	November 10, 12, 13, 2008 and January 20, 2009
Oral Decision:	January 24, 2009
Written Decision:	January 27, 2009
Counsel:	Mr. Hugh R. McLeod, counsel for Ms. Westcott Ms. Candee McCarthy, counsel for Mr. Dumont

I. INTRODUCTION

[1] Despite a language barrier, Marilyn Westcott and Jean-Yves Dumont commenced a relationship in May 1990 in Ontario, where Ms. Westcott and her infant daughter, Cassandra were living. The parties and Cassandra moved to Cape Breton in approximately 1991. Another addition to the family occurred with the birth of Alexandra in 1995.

[2] The family initially lived in an apartment. A home, with an attached store, was acquired in 1992. This became the family residence. Ms. Westcott was the sole owner of the property. There was no joint tenancy. A fire destroyed the home in 2005. The insurance company in prepared to pay out an additional $180,042 for the building and contents. Ms. Westcott seeks 100% of the insurance proceeds; Mr. Dumont seeks an equal division of the proceeds.

II ISSUES

[3] The following issues will be determined in this decision:

a) What is the applicable burden of proof?

b) What was the nature of the relationship between Ms. Westcott and Mr. Dumont?

c) Has either party proven a claim for unjust enrichment?

d) If so, what is the appropriate remedy?

e) In the alternative, has Mr. Dumont established a resulting trust?

[4] In addition to these issues, Ms. Westcott asked this court to make a finding that Mr. Dumont does not have an insurable interest in the real and personal property situate at 1457 Donkin Morien. I decline to determine this issue for the following reasons:

a) There are parallel actions involving Ms. Westcott, Mr. Dumont and Co-operators General Insurance Company in the Supreme Court General Division;

b) Although there are similarities between the proceedings, the issues which must be determined in the separate actions are not the same;

c) The defendant insurance company was not represented in the matter which proceeded in the Family Division. It would be inappropriate to determine an issue which affects a defendant who did not have the opportunity to participate as a party at trial; and

d) The issue of insurability will be resolved, either by consent, or through a judicial pronouncement, in the actions commenced in the Supreme Court General Division.

III BACKGROUND INFORMATION

[5] Mr. Dumont was employed in the construction industry as a painter and dry wall taper when he first met Ms. Westcott. He spoke only french. He owned a car and was contributing to a pension plan. Mr. Dumont had no other assets.

[6] Ms. Westcott spoke only English. She had been employed as a book-keeper for several years before Cassandra's birth. She was forced to quit her employment because of a lack of child care. Ms. Westcott was divorced and unemployed when she formed a relationship with Mr. Dumont. Ms. Westcott, however, did have savings. She owned an investment certificate in excess of $40,000 which she acquired through a divorce settlement reached in approximately 1987. She also owned furniture and other household items.

[7] After moving to Cape Breton, Ms. Westcott used her significant savings of $41,974 to assist in the acquisition of 1457 Donkin Morien on February 25, 1992. The balance of the financing was obtained by assuming the vendor's existing mortgage in the amount of $26,662, and by borrowing $10,000 from Ms. Westcott's father. This loan was repaid within 9 months.

[8] A portion 1457 Donkin Morien served as a corner store from February 1992 until approximately February 1994. The store was profitable because poker machines were available to patrons. Once the poker machines were removed in 1994, the store ran a deficit and was closed. After the store closed, extensive renovations were effected on the property.

[9] A second property, the Birch Street property, was acquired on March 21, 2001. Approximately $12,000 was required as a down payment for its purchase. The balance of the financing was obtained through a mortgage. The mortgage and original deed were held in the name of Mr. Dumont alone. On February 22, 2002, Mr. Dumont executed a Quit Claim Deed which resulted in Mr. Dumont and Ms. Westcott owning the Birch Street property as joint tenants. On February 27, 2004, Ms. Westcott executed a Quit Claim Deed in which she released her interest in the Birch Street property to Mr. Dumont. Mr. Dumont then refinanced the property. This second mortgage was likewise held in Mr. Dumont's name alone. On July 21, 2004, the Birch Street property was sold and $3,591.29 was realized from the sale.

[10] Ms. Westcott and the children maintained their primary residence in Cape Breton. Mr. Dumont, however, left Cape Breton at various times, usually to find

employment in Ontario and Quebec, returning to Cape Breton to collect EI. Mr. Dumont also went to Japan in 2003.

[11] The amount of income which Mr. Dumont earned varied during the relationship with a high of approximately $39,000 in 1999 and a low of $3,718 in 2003. Typically, Mr. Dumont worked sufficient hours to collect EI for the balance of the year. He also engaged in "cash jobs" while collecting EI. The income which he earned from cash jobs was not reported to the government.

[12] Ms. Westcott's income likewise varied from year-to- year. Her reported income, which included RRSP income, social assistance, EI, and CPP, went from a low of approximately $6,200 in 1991 to a high of approximately $25,000 in the year 2000. Further, Ms. Westcott did not report the substantial income which was generated from the poker machines from 1992 until 1994. As well, in the year 2000, Ms. Westcott received a substantial, retroactive lump sum in CPP benefits. In addition, Ms. Westcott collected CPP, the family allowance, and the child tax credit on behalf of the children during their qualifying years. Finally, Ms. Westcott netted approximately $95,000 in an accident settlement in 2002.

[13] During the course of the relationship, various items were acquired. Money was earned and money was spent. Bills were paid. The children grew and developed. The children loved both Ms. Westcott and Mr. Dumont. Although Cassandra was not his biological child, Mr. Dumont had an excellent relationship with her, as well as Alexandra. In all respects, Mr. Dumont was the father to both girls.

[14] A fire destroyed 1457 Donkin Morien on February 12, 2005. The property was insured through Cooperators. There were some administrative errors in the endorsement and other policies from Coop. These were eventually resolved. Cooperators is willing to pay out an additional $180,042.36 on the policy: $80,000 for the building and a further $100,042.36 on the contents. This payment is in addition to payments previously made, including $6,000 transferred to Ms. Westcott.

[15] At the time of the fire, Mr. Dumont was working in Quebec, having left Cape Breton in August 2004. Mr. Dumont did not return to Cape Breton until September 2005.

[16] This file was the subject of much litigation. Issues with respect to custody, access, child support as well as child protection matters arose and were eventually resolved. Further, actions involving the insurance company were taken out. Proceedings were commenced in the Family and General Divisions of the Supreme Court. Several consolidation orders were made. This court will determine only the issues relating to unjust enrichment, constructive trust, and resulting trust.

[17] A trial was held on November 10, 12, and 13, 2008. Ms. Westcott, Mr. MacPhee, and Mr. Dumont testified and oral submissions were rendered. Further, counsel made a brief appearance on January 20, 2009 to clarify the amount of insurance proceeds in dispute.

IV Analysis

[18] **What is the applicable burden of proof?**

[19] In **F.H. v. McDougall**, 2008 SCC 53, Rothstein J. confirmed that there is only one standard of proof in civil cases - proof on a balance of probabilities. He further held that there are no degrees of probability within the civil standard. In

every civil case, a judge should take into account the seriousness of the allegations or consequences or inherent improbabilities; however, these considerations do not alter the standard of proof. In all cases, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must always be clear, convincing and cogent to satisfy the balance of probabilities test. Evidence must not be considered in isolation, but rather examined based upon the totality of the evidence. The court must assess the impact of inconsistencies on questions of credibility and reliability which relate to the core issue. It is not necessary for the judge to deal with every inconsistency, but rather the judge must address in a general way the arguments advanced by the parties: **F.H. v. McDougall** paras 40, 45- 49 .

[20] In considering the arguments advanced by the parties, I have applied the civil burden of proof. I have reviewed the totality of the evidence with reference to the internal consistencies and inconsistencies, and in reference to the position of each of the parties. In determining whether either party has met the civil burden of proof, I have looked for clear, convincing and cogent evidence. I have made specific credibility findings based upon the evidence and in light of the civil burden of proof.

[21] **What was the nature of the relationship between Ms. Westcott and Mr. Dumont?**

[22] **Position of Ms. Westcott**

[23] Ms. Westcott stated that she wanted to have a traditional family for the benefit of the children. She was unsuccessful in her attempts to make this dream a reality, although she acknowledged that Mr. Dumont had a loving relationship with both children. She said that the children were always excited and happy when Mr. Dumont came home, especially at Christmas.

[24] Ms. Westcott described a relationship based on an unequal distribution of responsibility, both financially and emotionally. Ms. Westcott stated that Mr. Dumont was absent from the home between three to six months of every year. She felt that Mr. Dumont gave little to the relationship.

[25] Ms. Westcott indicated that she met most of the financial and emotional needs of the children and of the family. She advised that Mr. Dumont spent money on alcohol and drugs, and in particular marijuana. Mr. Dumont also paid for his own shelter expenses when he was living away from Cape Breton. Ms. Westcott described Mr. Dumont as a person who spent significant amounts of money and who incurred a great deal of debt. Ms. Westcott portrayed herself as fiscally prudent.

[26] Ms. Westcott described a relationship of economic independence for the most part. She acknowledged that Mr. Dumont contributed money to the operation of the household because he had an obligation to support the children and because he was living with Ms. Westcott from time-to-time. Ms. Westcott described Mr. Dumont's financial contribution as being varied. His contribution was minimal at times; at other times, amounting to an average of $300 to $500 per month; and in the year in which Mr. Dumont earned $39,000 per annum, approximately $700 per month.

[27] Ms. Westcott stated that the relationship ended in July 2004. She said she did not agree with Mr. Dumont's decision to refinance and sell the Birch Street property. She said that Mr. Dumont removed 99% of his belongings from the home before he left for Quebec in July 2004, and thus little of his personal property remained in the home at the time of the fire in 2005.

[28] **Position of Mr. Dumont**

[29] Mr. Dumont disagreed with Ms. Westcott. He indicated that he assumed the traditional role of breadwinner in the relationship. He said that he had an "old fashioned" perspective, and that he took care of his family to the best of his ability. Mr. Dumont advised that he handed his income over to Ms. Westcott to control and disburse because Ms. Westcott was organized, a good money manager, and because his English language skills were poor.

[30] Mr. Dumont stated that he worked in the store at 1457 Donkin Morien and was not paid. After the store closed, he had to work in Quebec and Ontario because there was no employment in the local area. He worked away

approximately 3 months of the year and collected EI for the balance of time. He also engaged in the underground economy for cash.

[31] Mr. Dumont said that he participated in the many renovations which transformed the home at 1457 Donkin Morien. He described his many efforts with the renovations.

[32] Further, because he was going to Japan in 2003 and was attempting to sell the Birch Street property, Mr. Dumont signed a power of attorney in favour of Ms. Westcott. Mr. Dumont had no difficulty with the POA because Ms. Westcott was in charge of the finances in any event.

[33] From Mr. Dumont's perspective, his life with Ms. Westcott was a joint venture. They lived together, raised children together, paid bills together, and combined their resources. Their relationship was like that of a married couple. She was listed as a common law spouse on his health and pension plans.

[34] Mr. Dumont stated that he and Ms. Westcott each contributed to their relationship and to the acquisition of the assets. Mr. Dumont acknowledged that he did not discuss property issues with Ms. Westcott, but rather assumed that everything was equal.

[35] Mr. Dumont further states that the relationship did not terminate until September 2005. The parties were still a couple when the fire occurred in February 2005.

[36] **Decision**

[37] In **Walsh v. Bona**(2002), 210 N.S.R. (2d) 273 (S.C.C.), the Supreme Court of Canada held that the establishment of a common law union is a lifestyle choice from which different legal obligations flow than exist in marital unions, absent legislative or contractual provisions to the contrary. Personal autonomy must be respected. Bastarache J. noted that many people involved in non-marital relationships have chosen to avoid the institution of marriage and its legal consequences. The state should not impose a marriage-like-regime on couples who

have chosen not to marry. To do so would effectively nullify the individual's freedom to choose alternative family forms.

[38] This respect for personal autonomy is further justified because persons who choose not to marry can nonetheless bind themselves to the same regime of economic partnership as married couples either by entering a domestic contract or by registering as domestic partners pursuant to the *Vital Statistics Act* R.S.N.S. 1989, c 494: **Walsh v. Bona,** supra, paras. 49 and 50.

[39] In **Walsh v. Bona**, supra, Bastarache J. confirmed that mutual intention is what differentiates married and unmarried unions at paras 54 and 55, which state in part:

> ¶ 54 In the present case, however, the MPA is primarily directed at regulating the relationship between the parties to the marriage itself; parties who, by marrying, must be presumed to have a mutual intention to enter into an economic partnership. Unmarried [page361] cohabitants, however, have not undertaken a similar unequivocal act. I cannot accept that the decision to live together, without more, is sufficient to indicate a positive intention to contribute to and share in each other's assets and liabilities. It may very well be true that some, if not many, unmarried cohabitants have agreed as between themselves to live as economic partners for the duration of their relationship. Indeed, the factual circumstances of the parties' relationship bear this out. It does not necessarily follow, however, that these same persons

> would agree to restrict their ability to deal with their own property during the relationship or to share in all of the other's assets and liabilities following the end of the relationship. ...
>
> ¶ 55 In my view, people who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties. It is true that the benefits that one can be deprived of under a s. 15(1) analysis must not be read restrictively and can encompass the benefit of a process or procedure, as recognized in M. v. H., supra. It has not been established, however, that there is a discriminatory denial of a benefit in this case because those who do not marry are free to take steps to deal with their personal property in such a way as to create an equal partnership between them. If there is need for a uniform and universal protective regime independent of choice of matrimonial status, this is not a s. 15(1) issue. The MPA only protects persons who have [page362] demonstrated their intention to be bound by it and have exercised their right to choose.

[40] It is not the function of this court to legislate. It is not incumbent upon this court to impose a matrimonial property regime upon the parties in the absence of a contract or declaration of domestic partnership filed pursuant to the *Vital Statistics Act*.

[41] In the case at bar, Ms. Westcott and Mr. Dumont made a lifestyle choice. They did not marry. There is no evidence as to why this decision was made. This decision must nonetheless be respected. The joint venture theory espoused by Mr.

Dumont is rejected. I find that there was no mutual intention to share in a marriage-like economic property regime. This conclusion is drawn from the following findings which I make:

a) The parties did not register as domestic partners and did not enter into a contract adopting the principles of the *Matrimonial Property Act*;

b) No joint debt was created with third parties. All mortgages and credit cards were held individually. Although Ms. Westcott accessed Mr. Dumont's credit cards from time-to-time, the obligation to the third party creditors was not joint. In fact, the Birch Street property changed ownership three times to ensure that Ms. Westcott was not liable on the mortgages encumbering the property;

c) There were no joint bank accounts, savings or investments. Each party opened bank accounts in his/her own name;

d) The only property held in the joint names of the parties was Birch Street, and this was placed in joint names for a limited period of two years. I infer that the property was placed in joint names to provide some security to Ms. Westcott because she contributed in excess of $12,000 towards its purchase;

e) The parties referenced a single status on all income tax and governmental forms. This provided each with certain monetary and income tax credits which would not otherwise be available; and

f) The parties classified themselves as single to allow Ms. Westcott to collect social assistance benefits and to permit access to government grants to fund renovations during the course of their relationship.

[42] I acknowledge that Ms. Westcott was listed as a common law spouse on Mr. Dumont's health and pension plans. This is reflective of their status for the purpose of accessing specific employment benefits. This designation does not create a mutual intention to equally share in the property owned by the other, nor to create joint liability.

[43] In addition, I do not accept that Ms. Westcott knowingly signed an endorsement in October 2004 with Cooperators in which she allegedly said that the policy was to be placed in the joint names of the parties because she and Mr. Dumont owned everything together. I make this finding for the following reasons:

> a) The statement on the endorsement is incorrect. There was no joint property. The only property which had been held in joint names had been sold in July 2004;
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> b) Throughout the relationship, Ms. Westcott went through great pains to ensure the financial independence of the parties. I accept that Ms. Westcott was deeply troubled by the spending patterns of Mr. Dumont and his inability to contribute financially to the family in an appropriate manner. Ms. Westcott wanted to protect her property from Mr. Dumont. She would not have given contrary instructions to an insurance agent;

c) The endorsement contained errors. The agent who signed the endorsement did not testify. I find that the agent must have misunderstood what Ms. Westcott said;

d) The parties had separated in July 2004; and

e) If the hand written additions were on the document when Ms. Westcott signed the endorsement in October 2004, the contents of the additional writing were not brought to Ms. Westcott's attention. I find that Ms. Westcott would not have signed the endorsement had she been aware of the statement that the parties owned everything jointly.

[44] I further find that the parties' relationship ended in July 2004. I reject the evidence of Mr. Dumont when he stated that the relationship terminated in September 2005. This conclusion is supported by several key findings stemming from the fact that Mr. Dumont left Cape Breton at the end of July 2004 and did not return until September 2005. The key findings are as follows:

a) Mr. Dumont had never missed a Christmas with the family before 2004. Christmas was an important family celebration and Mr. Dumont always ensured he was present for it. No specific reason was given for his unexplained absence in 2004. I find that he was absent because the relationship had ended and Mr. Dumont was permanently living in Quebec;

b) Mr. Dumont did not return to Cape Breton after he learned of the fire. The fire was likely the most tragic event in the lives of Cassandra, Alexandra, and Ms. Westcott. What parent and spouse would not return home after such an upheaval to provide comfort and direction? No specific reason was given for Mr. Dumont's absence. I find that he was absent

> because the relationship had ended and Mr. Dumont was permanently living in Quebec; and
>
> c) Before 2004, Mr. Dumont was not absent from Cape Breton for more than six months, and usually no more than four months of each year. He usually returned after he had worked sufficient hours to collect EI. He was never absent for thirteen months in a row. I find that Mr. Dumont was absent for thirteen months because the relationship had ended and Mr. Dumont was permanently living in Quebec.

[45] The suggestion that because Ms. Westcott was listed as the "co-habitant wife" on Mr. Dumont's pension plan for the year ending December 31, 2005 does not detract from my finding for two reasons. First, Mr. Dumont stated that the parties separated in September 2005. The December pension plan statement lists Ms. Westcott as a common law spouse at a time when even Mr. Dumont stated that the parties were no longer living together.

[46] Second, Mr. Dumont is not an organized, efficient book keeper. Neither is he mean spirited. I infer that Mr. Dumont simply did not remember to notify the pension administrator that there had been a change in his common law status until after December 2005.

[47] Similarly, Ms. Westcott and the girls continued on Mr. Dumont's health plan after the separation in July 2004. The coverage for the girls was part of Mr. Dumont's responsibility as their father. Retaining Ms. Westcott on the plan did not cost Mr. Dumont any additional money. Further, I infer that Mr. Dumont did not think to cancel Ms. Westcott's coverage until after 2005.

[48] Finally, I acknowledge that Ms. Westcott was driving the vehicle held in Mr. Dumont's name although with licence plates owned by Ms. Westcott. This fact does not support a September 2005 separation date. Mr. Dumont loved his children and wanted to provide for them. Ms. Westcott needed the car to transport the children.

[49] In summary, although the parties had a relationship between 1990 and 2004, this relationship did not trigger marriage-like benefits upon its dissolution. Mr. Dumont did not meet the burden of proof which was upon him. His argument is rejected.

[50] **Has either party proven a claim for unjust enrichment?**

[51] **Position of Mr. Dumont**

[52] Mr. Dumont asserts that he has proven his claim for unjust enrichment for several reasons, including the following:

> a) He worked long hours in the store and was not paid for his work. He usually worked fourteen hours a days, except on Sunday when the store did not open until noon. He did all the cooking for the take out counter, was responsible for store sales, and also looked after the poker machines by counting coins and ensuring their efficient operation. He indicated that Ms. Westcott was rarely at the store, although she did work there from time-to-time. He indicated that Ms. Westcott looked after the children, their home, and did all the paperwork associated with the store including ordering stock and paying bills;
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> b) He completed substantial renovations to 1457 Donkin Morien. It was in rough shape when it was purchased. Through his efforts, the home was like new when it burned in 2005. The renovations which he perfected included dry wall taping, painting, building two bedrooms and a bathroom in the former store portion of the house, constructing one large master bedroom from the two small bedrooms in the former sleeping area, building a staircase, and assisting with the grant work involving the chimney, roof, septic bed, windows, plumbing, and siding. Further he noted that although grants were obtained to do some of the renovations, it was because of his friendship with the contractors that he was able to get deals and more work accomplished with the grant money;
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> c) He was the primary wage earner in the family and gave his earnings to Ms. Westcott to disburse as she saw fit. He trusted Ms. Westcott. If Ms. Westcott was using her money to pay the mortgage or to purchase RESPs, it was only because Ms. Westcott had control of Mr. Dumont's earnings and credit cards to pay for groceries and other family related expenses;

d) Mr. Dumont said that Ms. Westcott had access to all of his credit cards and that she used these to buy household goods and pay for household expenses. He did not mind. This was part of Ms. Westcott's efforts to make ends meet; and

e) Mr. Dumont lost his possessions and household contents in the fire and was not compensated for these.

[53] Mr. Dumont states that he is entitled to fifty percent of the insurance proceeds, including the $6,000 already disbursed to Ms. Westcott.

[54] **Position of Ms. Westcott**

[55] Ms. Westcott vehemently denies that Mr. Dumont was successful in proving his claim for unjust enrichment. If this court determines that Mr. Dumont has proven his case, Ms. Westcott seeks a set-off based upon an unjust enrichment claim that she asserts in the alternative.

[56] In response to the claims of Mr. Dumont, Ms. Westcott states the following:

a) Although Mr. Dumont worked in the store for about two years, he had access to money from the till and also got money from Ms. Westcott. Ms. Westcott acknowledged that Mr. Dumont did not receive a paycheque. Ms.

Westcott said that Mr. Dumont did not work hard at the store because the store's only profit was from the poker machines. She disagreed that Mr. Dumont worked long hours cooking over a hot stove;

b) Mr. Dumont's unpaid contributions to the renovations were minimal. He was paid for all grant work that he completed because he was hired by the contractors who were in charge of the grants. Most of the renovations were completed through grant funding which Ms. Westcott secured on her own, without any assistance from Mr. Dumont. Any other renovations were done as a family, and Mr. Dumont's contribution was minimal in terms of time and actual expense incurred;

c) Mr. Dumont did earn more taxable income than she. However, Mr. Dumont also spent a great deal of money on his own personal pursuits, including alcohol and marijuana. Mr. Dumont incurred more debt than Ms. Westcott. Further, Mr. Dumont also paid for his own expenses when he was away from home;

d) Although Mr. Dumont did contribute to the household, he had two children to support and was also living in the home for a portion of each year;

e) Ms. Westcott paid for 1457 Donkin Morien with her own money;

f) The credit card debt which was incurred by Mr. Dumont was for the most part his charges. Ms. Westcott said that she used her own credit cards for her purchases;

g) Ms. Westcott also had nontaxable income sources which she used for her own expenses, those related to the operation of the house, and for the care and education of the children. These income sources included the family allowance, child tax credit, the child's portion of the CPP benefits, and a substantial motor vehicle accident settlement; and

h) Mr. Dumont had taken his possessions when he left in July 2004, with the exception of some old tools and personal mementoes. These were later stolen.

[57] Ms. Westcott also reviewed the contributions which she made in support of her unjust enrichment claim. These contributions included the following:

a) When the Birch Street property was acquired, Ms. Westcott provided the down payment in excess of $12,000. Mr. Dumont did not repay her;

b) Mr. Dumont reaped $51,460 from the Birch Street property which was never shared with Ms. Westcott. This figure was derived from adding the $12,482 down payment, with the $3,592 net proceeds of sale, and the mortgage money which was used to pay off Mr. Dumont's credit cards;

c) Ms. Westcott provided Mr. Dumont with free shelter and shelter related expenses; and

d) Ms. Westcott supplied Mr. Dumont with homemaking and child care services over the course of their relationship.

[58] In summary, Ms. Westcott states that Mr. Dumont has not proven his claim for unjust enrichment on a balance of probabilities. In the alternative, his claim is set-off against the successful unjust enrichment claim which Ms. Westcott has proven against Mr. Dumont.

[59] **Law**

[60] In **Peter v. Beblow**, [1993] 1 S.C.R. 980, the Supreme Court of Canada discussed the law of unjust enrichment and the restitutionary relief of constructive trust. McLachlin J. as she then was, cautioned against the use of unjust enrichment as a means of dispensing fairness between the parties where the doctrinal elements were not present at para 4:

> 4. Notwithstanding these rather straightforward doctrinal underpinnings, their application has sometimes given rise to difficulty. There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a "benefit" to the defendant or a "detriment" to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit and other terms associated with quasi-contract have never quite succeeded in duplicating" (G.E. Palmer, The Law of Restitution, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

[61] Three elements must be proven if a claim of unjust enrichment is to succeed. They are:

> a) An enrichment;

b) A corresponding deprivation; and

c) The absence of a juristic reason for the enrichment.

[62] McLachlin J. indicated that the elements of enrichment and deprivation must be examined from an economic approach, while the third element, juristic reason, must be subject to a flexible test that varies based upon the factual circumstances of the case. In discussing this flexible test, McLachlin J. states at paras 9 to 13:

> 9 What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like Peel, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.
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> 10 In every case, the fundamental concern is the legitimate expectation of the parties: Pettkus v. Becker, supra. In family cases, this concern may raise the following subsidiary questions:
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> 11 (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?
>
> 12 (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?

[63] Further courts must recognize the value of domestic services. Such services should not be distinguished from any other form of contribution: **Peter v. Beblow**, supra, at paras. 19 and 20. Thus a benefit can include the conferring of money, property, work, or services, whether domestic or otherwise.

[64] Some examples where a claim for unjust enrichment have been successfully made out include the following:

a) Where the applicant has proven a direct monetary contribution: **Nicholson v. Whyte** (2005), 236 N.S.R. (2d) 76 (S.C.); **L.P. v. R.M.** [2000] N.S.J. No. 77 (S.C.); and **Barry v. MacDonald** (2003), 216 N.S.R. (2d) 142 (S.C.);

b) Where the parties have joint finances and pooled their resources; **Marsh v. Snow** (2004), 229 N.S.R. (2d) 203 (C.A.); and **Cropper v. Butler**, [2000] N.S.J. No. 326 (S.C.);

c) Where one party worked in a business and did not receive remuneration for his/her services: **Becker v. Pettkus**, [1980] 2 S.C.R. 834; and

d) Where there were substantial domestic services rendered and substantial household renovations completed without payment: **Turbide v. Moore**, [2006] N.S.J. No.120 (S.C.).

[65] Some examples where a claim for unjust enrichment have been refused or significantly reduced include the following:

> a) Where parties have maintained separate financial and property regimes: **Oakley v. Sing** (2000), 182 N.S.R. (2d) 375 (S.C.);
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> b) Where the value of services provided by one party is set-off against free or reduced shelter expenses by the other party: **Goddard v. Hambleton,** [2005] N.S.J. No. 381(C.A.); and **Dempsey v. Edwards**, 2005 NSSC 181(S.C.);
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> c) Where an oral contract confirmed that the parties agreed to evenly split living expenses. The cause of an action for unjust enrichment is not an instrument of opportunism: **Goddard v. Hambleton**, *supra*;
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> d) When the claim involves a division of a pension where there is no evidence of a direct contribution to the plan: **Marsh v. Snow**, *supra*; **Brownie v. Hoganson**, [2005] N.S.J. No. 470 (S.C.), and **Barry v. MacDonald**, *supra*; and
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> e) Where the benefit conferred was a result of a gift: **Berdette v. Berdette**, 1991 CarswellOnt280(C.A.), leave to appeal to S.C.C. refused (1991) 137 N.R. 388.

[66] **Decision on Mr. Dumont's Unjust Enrichment Claim**

[67] I have reviewed the law, the evidence, and the submissions of the parties. I have applied the correct burden of proof. I find that Mr. Dumont has proven, on a

balance of probabilities, with clear, convincing and cogent evidence, a claim for unjust enrichment based upon the following factors which confirm that Mr. Dumont conferred a benefit on Ms. Westcott, while suffering a corresponding deprivation, and in the absence of a juristic reason. These factors are as follows:

> a) Mr. Dumont worked long hours in the store for Ms. Westcott for approximately two years without remuneration. Because Ms. Westcott was not paying an employee, she was able to retain more income from the poker machines and the store than she otherwise would have;
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> b) Mr. Dumont assisted with some renovations for which he was not paid by a third party contractor, including renovations associated with dry-wall taping, painting, hardwood floor refinishing, and the construction of new bedrooms; and
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> c) Mr. Dumont contributed $2,600, as found in exhibit 14, towards the purchase of an additional piece of vacant land which is owned by Ms. Westcott, although few details were provided to the court about the vacant land.

[68] I find, however, that Mr. Dumont has failed to supply clear, cogent, and convincing evidence in relation to the other arguments that he advanced. I recognize that Mr. Dumont's credit cards were occasionally used to pay the personal expenses of Ms. Westcott, including her speeding ticket and property insurance in 2004 for1457 Donkin Morien. However I find that such intermingling

was not frequent, and that the occasional use of Mr. Dumont's credit cards to pay for expenses related to Ms. Westcott and the children was minimal at best.

[69] I find that there was little intermingling of funds. I accept that the parties did not pool their resources, although Ms. Westcott did manage Mr. Dumont's bills. This was a job which was basically foisted upon Ms. Westcott due to Mr. Dumont's lack of skills. Such does not establish an unjust enrichment claim.

[70] I infer that Ms. Westcott was unfortunately very familiar with Mr. Dumont's weaknesses and lack of financial prudence. She loved Mr. Dumont, as did the children, but Ms. Westcott was not unwise with money. She did not want to be responsible for Mr. Dumont's many debts. She did not want to share the property which she accumulated as result of her own efforts with Mr. Dumont. Ms. Westcott thus ensured that she maintained finances separate from Mr. Dumont.

[71] I reject the argument that 1457 Donkin Morien was acquired through the joint efforts of the parties. This property was acquired through the efforts of Ms. Westcott by:

a) Using approximately $40,000 of her divorce settlement towards the purchase price;

b) Negotiating a $10,000 loan from her father; and

c) Paying out the assumed mortgage.

These efforts all occurred without the help of Mr. Dumont.

[72] I recognize that Mr. Dumont provided varying amounts of money to Ms. Westcott during their relationship. This money cannot be used by Mr. Dumont to establish an unjust enrichment claim. The money which was given was provided pursuant to valid legal obligations which Mr. Dumont owed to Ms. Westcott. In particular, Ms. Westcott was providing free shelter to Mr. Dumont during the times when he was living with the family. Mr. Dumont did not pay rent, or board. The amount supplied, usually in the vicinity of $300 to $500 per month, although there were a few years when more income was given, was insufficient to meet Mr. Dumont's shelter expenses, let alone his legal obligation to support his two children.

[73] I also find that Mr. Dumont failed to establish that household chattels were purchased jointly. I accept that the vast majority of the household chattels were purchased by Ms. Westcott, primarily with her Sears card. I find that Mr. Dumont

failed to establish on a balance of probabilities that he owned or contributed to the acquisition of the household items.

[74] In addition, I find that when Mr. Dumont left Cape Breton in July 2004, he took most of his personal belongings, tools and household items which he owned. The items which were left consisted of older tools and miscellaneous personal items of little monetary value. I accept some of the items had great sentimental value.

[75] I decline to find an unjust enrichment claim in respect of the personal property which Mr. Dumont left in Ms. Westcott's basement. These were cleaned and returned following the fire. They were later stolen. The person alleged to be responsible for the theft is being tried in provincial court in the spring of this year.

[76] I also reject the unjust enrichment claim which Mr. Dumont advanced against the RESP's which Ms. Westcott saved for the children. I find that all funds used to acquire these savings either belonged to Ms. Westcott or were monetary presents gifted to the children. Mr. Dumont has no claim to these funds.

[77] **Decision on Ms. Westcott's Claim for Unjust Enrichment**

[78] I have reviewed the law, evidence and the submissions of the parties. I have applied the correct burden of proof. I find that Ms. Westcott has been successful in advancing her unjust enrichment claim against Mr. Dumont. I find that she has supplied clear, cogent and convincing evidence that she conferred a benefit upon Mr. Dumont while suffering a corresponding deprivation in the absence of a juristic reason. I draw this conclusion based upon the following findings which I make:

> a) Ms. Westcott contributed $12,487.15 towards Mr. Dumont's purchase of the Birch Street property in 2001. I find that Ms. Dumont used a portion of the retroactive CPP payment which she received for this purpose. Mr. Dumont's cashed in RRSPs were used to pay out his car loan, and not directed towards the down payment. I infer that Ms. Westcott became joint owner of the property after the mortgage was registered to provide her with security for her investment;
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> b) Mr. Dumont received the net proceeds of sale in the amount $3,591 when the Birch Street property sold in July 2004. I reject Mr. Dumont's evidence to the contrary. I draw a negative inference from his failure to supply the cashed cheque from Crosby Burke despite being asked to do so at the time of the discovery. I also prefer the evidence of Ms. Westcott on this point; and

c) Ms. Westcott supplied domestic services on Mr. Dumont's behalf during the course of their relationship, although the evidence lacked specific details as to what these services entailed.

[79] In summary, for the reasons stated I find that each of the parties has established his/her claim of unjust enrichment against the other.

[80] **If the unjust enrichment claim has been established, what is the appropriate remedy?**

[81] Mr. Dumont claims 50% of the fire insurance proceeds. Ms. Westcott claims a monetary award against Mr. Dumont which is to be set-off against any monetary award which she may owe him.

[82] In **Peter v. Beblow**, *supra*, McLachlin J. reviewed the applicable test to be considered in determining the proper remedy after a finding of unjust enrichment has been made out. She stated that the first step requires a determination as to whether a monetary award is insufficient and whether there is an nexus between the contribution and the property. If both questions are answered in the

affirmative, then the plaintive is entitled to the proprietary remedy of constructive trust. In determining whether a monetary award is sufficient, the court may take into account the probability of the award being paid, as well as any special interest in the property acquired by the contributions.

[83] In **Nicholson v. Whyte**, *supra*, Williams J. reviewed other authorities and indicated five questions to be addressed in determining the appropriate remedy for a finding of unjust enrichment:

> a) Is the plaintiff's entitlement relatively small compared to the value of the property?
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> b) Is the defendant able to satisfy the plaintiff's claim without a sale of the property?
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> c) Does the plaintiff have any special attachment to the property?
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> d) What hardship would be caused to the defendant if the plaintiff received a title interest?
>
> e) Is there any reason why monetary damages might be inappropriate?

[84] In the case at bar, I find that a monetary award is the appropriate remedy. I find that the nexus between the contributions and the property is insufficient to award the proprietary remedy. Mr. Dumont's overall contribution to 1457 Donkin Morien was relatively small in comparison to the property itself. The property was acquired for $70,000 in 1992. Ms. Westcott paid for the property. Although the

home was completely renovated by the time of the fire, I find that it was Ms. Westcott who paid for the majority of the renovations or was instrumental in negotiating grants to do so.

[85] I find that Ms. Westcott will be able to satisfy Mr. Dumont's claim without the sale of 1457 Donkin Morien. The insurance proceeds will provide Ms. Westcott with the necessary resources. Mr. Dumont does not have any special attachment to the property. There are no reasons why monetary damages would be inappropriate.

[86] I must now resolve the quantum of the monetary award. Because I have rejected a constructive trust claim, I am not to use the value survived approach, rather I must use the value received approach: **Dempsey v. Edwards**, *supra*, at para. 25. The comments of Campbell J. in discussing the inherent difficulties of such a task are relevant at paras. 54 and 55 which state in part:

> 54 As mentioned above, the Supreme Court of Canada has concluded that damages should be assessed using the value added approach; that is to measure the value of the services rendered. There is very little, if any, evidence before me as to the value of the direct work related to the property or of the domestic and child rearing services. On the other hand, damages here are analogous to general damages in other

> civil cases, the basis for which is often discretionary and involves, necessarily, a somewhat arbitrary approach.
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> 55 In my opinion, the approach of placing a market value on the services and the contribution has to result in an amount of damages that is consistent with the extent of the enrichment of the asset. It seems illogical to me that damages designed to address an unjust enrichment of an asset could exceed the value of that enrichment. ...

[87] In fixing the quantum of the award, I have balanced all of the factors which supported the findings of the unjust enrichment claims. Mr. Dumont's strongest claim relates to unpaid labour while working for Ms. Westcott in her store for two years. I estimate this to equate to approximately $40,000 worth of services taking into account the tax free nature of the payment. Further, Mr. Dumont contributed $2,600 towards the purchase of the vacant land. Finally, I assign $6,000 as the value of the unpaid labour which Mr. Dumont rendered during the renovation of the home.

[88] Ms. Westcott is entitled to $12,487 for the down payment on the Birch Street property and approximately $10,000 for domestic services rendered based upon the limited evidence which I was supplied.

[89] On the totality of the evidence, I find that Mr. Dumont's unjust enrichment claim exceeds Ms. Westcott's claim. After the claims are netted out, I order Ms. Westcott to pay Mr. Dumont the sum of $26,113. This will be paid out when Ms. Westcott receives the fire insurance proceeds.

[90] **Has Mr. Dumont established a claim of resulting trust?**

[91] Resulting trusts are grounded upon a common intention which can be inferred or presumed from the circumstances of the case: **Barrett v. Henneberry** (1984), 61 N.S.R. (2d) 428 C.A.

[92] In **Nicholson v. Whyte**, *supra*, Williams J. reviewed the law concerning resulting trust at para. 7:

> ¶ 7 The law relating to resulting trusts was summarized in **Hamilton v. Hamilton** , [1996] O.J. No. 2634, (1996) CarswellOnt. 2421 (Ont. C.A.) where the court stated at paragraph 39:
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> 39 A presumption of a resulting trust arises in favour of persons who contribute financially to the purchase of property but do not take title in their own name, and do not intend to give a gift of the entire beneficial interest in the property to the registered

> or recorded title holder. Equity presumes that the non-titled party does not intend a gift when he contributes to the purchase price of a property. The non-titled party is treated as the equitable holder of the beneficial interest; the extent of his or her beneficial interest is proportionate to the financial contribution made to acquire the property. The presumption of a resulting trust is rebuttable on a showing by the title-holder that the non-titled party intended the title-holder to have the property for his or her own benefit. The presumption of a resulting trust is also rebuttable on a showing that the transfer to the titled party was not gratuitous. See Oosterhoff and Gillese, Text, Commentary and Cases on Trusts, 4th ed. (1992) and Hovius, Family Law: Cases Notes and Materials, 3rd ed. (1992).

[93] Mr. Dumont failed to prove a claim of resulting trust. Ms. Westcott paid for 1457 Donkin Morien without any assistance from Mr. Dumont. Mr. Dumont failed to prove a common intention. To the contrary, Ms. Westcott never intended to share the beneficial ownership of her real and personal property with Mr. Dumont, inclusive of the insurance proceeds. There was no common intention that Mr. Dumont would gain a proprietary interest in the property owned by Ms. Westcott. I reject Mr. Dumont's claim.

V. Conclusion

[94] Each party has proven a claim for unjust enrichment against the other. The equitable remedy of a constructive trust is denied, as is the claim for a resulting trust. After applying a set-off, Ms. Westcott will pay Mr. Dumont the sum of $26,113 and this payment will form a first charge against the fire insurance proceeds which Ms. Westcott receives.

[95] If either party wishes to be heard on the issue of costs, written submissions will be provided within 30 days. Counsel for Mr. Dumont is directed to draft the order and forward it to counsel for Ms. Westcott for his consent as to form.

T.M. Forgeron J.