Court of Appeal for Saskatchewan **Citation:** ***Fayant v Forester*****, 2026 SKCA 56**
Docket: CACV4248 **Date: 2026-04-22**

Between:

Rosanna Fayant

Appellant
(Respondent)

And

Shelley Forester

Respondent
(Applicant)

Before:	Leurer C.J.S., Caldwell and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Chief Justice Robert W. Leurer
In concurrence:	The Honourable Justice Neal W. Caldwell The Honourable Justice Keith D. Kilback
On appeal from:	2023 SKKB 161, Saskatoon
Appeal heard:	March 17, 2026
Counsel:	William Warren for the Appellant Tom Baldry for the Respondent

Leurer C.J.S.

I. INTRODUCTION

[1] This appeal concerns s. 96(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. Under that section, a trustee may apply to a court for a declaration that property of the bankrupt person has been transferred at undervalue and the court may order that the transferee pay the difference between the value of the consideration they paid and the value of the property. This is an appeal from such an order: *Forester v Fayant*, 2023 SKKB 161 [*Chambers Decision*].

[2] Shelley Forester is a creditor of her former spouse, Ritchie Poitras, who is now bankrupt. Mr. Poitras's debt arises from a judgment after trial, which resolved issues between himself and Ms. Forester under *The Family Property Act*, SS 1997, c F-6.3: *Forester v Poitras* (24 October 2022), Battleford FLD-BF-00193-2016 (SKKB) [*Family Property Judgment*]. Rosanna Fayant is Mr. Poitras's mother, who it was alleged received the undervalued property that is the subject of the *Chambers Decision*.

[3] One of the contested issues in the family property litigation was the value of an acreage that Mr. Poitras had acquired when he and Ms. Forester were in a spousal relationship. In his property statement sworn in January of 2017, Mr. Poitras valued the acreage at $300,000. He had also listed it for sale in that year for $360,000 and for $327,000 in the year following. However, by the time his dispute with Ms. Forester went to trial, he contended it was worth much less than that for property division purposes.

[4] On June 24, 2019, which was after the family law proceedings were commenced, but well before the *Family Property Judgment* issued, Mr. Poitras transferred title to the acreage to Ms. Fayant. In the transfer of the title, Mr. Poitras swore the value of the acreage to be $162,000.

[5] The *Family Property Judgment* was granted by Hildebrandt J. on October 24, 2022. In it, she determined the value of the acreage to be $300,000. Justice Hildebrandt ordered Mr. Poitras to pay to Ms. Forester a total of $171,500, $150,000 of which was for one half of the value of the acreage and the remaining $21,500 was for costs.

[6] Three weeks after the *Family Property Judgment* was rendered, on November 14, 2022, Mr. Poitras made an assignment into bankruptcy. Ms. Forester is, by far, Mr. Poitras's largest unsecured creditor.

[7] Ms. Forester asserts that Mr. Poitras transferred the acreage to his mother to defeat her ability to collect the money she is owed under the *Family Property Judgment*. Because of the lack of money in the bankruptcy estate, Mr. Poitras's bankruptcy trustee declined to take proceedings against Ms. Fayant to challenge the transfer. However, Ms. Forester obtained an order pursuant to s. 38 of the *BIA*, permitting her to do so, at her own expense. The order authorizing Ms. Forester to bring proceedings against Ms. Fayant stipulates that any surplus of funds from the recovery of the acreage transferred for undervalue are to be paid to the trustee to augment the bankruptcy estate (see *Chambers Decision* at para 4).

[8] Ms. Forester acted under the authority given to her by the bankruptcy court, and applied under s. 96(1)(b) of the *BIA* for a declaration that the transfer of the acreage to Ms. Fayant was at undervalue and for a judgment of $230,000, which she asserted to be the difference between the value of the acreage, which she said was $300,000, and the consideration Mr. Poitras received for it.

[9] Ms. Fayant opposed Ms. Forester's application. First, she maintained that the amount owed to Ms. Forester under the *Family Property Judgment* was not ascertainable, such that Ms. Forester's claim was not provable in bankruptcy. The judge rejected those arguments (see *Chambers Decision* at paras 13-18). This finding is not at issue in this appeal.

[10] Second, Ms. Fayant argued that other conditions precedent for the making of an order under s. 96(1)(b) were not present. The judge disagreed, holding on the contentious points that (a) the transfer of the acreage was at undervalue because the acreage was worth $300,000 when Mr. Poitras transferred it to Ms. Fayant and the consideration she gave was valued at only $70,891.40, and (b) in transferring the acreage to his mother, Mr. Poitras had intended to defraud, defeat or delay Ms. Forester's claim as a creditor.

[11] Based on these findings, the judge granted judgment in favour of Ms. Forester against Ms. Fayant in the amount of $229,108.60.

[12] Ms. Fayant appeals from the *Chambers Decision*. I would dismiss her appeal. These are my reasons.

II. ISSUES

[13] So far as is material to this appeal, s. 96(1) of the *BIA* states as follows:

> 96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee – or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor – if
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> …
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> (b) the party was not dealing at arm's length with the debtor and
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> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
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> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
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> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
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> (B) the debtor intended to defraud, defeat or delay a creditor.

[14] Ms. Fayant puts into issue several of the preconditions for the making of an order under this section. The following questions provide an appropriate framework to decide her appeal:

(a) Did the judge err in law by accepting the *Family Property Judgment* as evidence of the value of the acreage as of the date of its transfer to Ms. Fayant and evidence of Mr. Poitras's intentions when transferring the acreage to his mother?

(b) Did the judge err in law by placing an onus on Ms. Fayant to disprove any of the elements of s. 96 of the *BIA*?

(c) Did the judge err in law by misapplying the legal test for determining if the consideration received by Mr. Poitras was "conspicuously less" than market value?

(d) Are any of the judge's findings of fact or mixed fact and law palpably wrong?

(e) Did the judge err in some other material way that requires appellate intervention?

III. ANALYSIS

A. The *Family Property Judgment* as evidence of value and Mr. Poitras's intentions

1. The evidence and the judge's reasons

[15] To establish the value of the acreage at the date it was transferred to Ms. Fayant, and Mr. Poitras's intentions when doing so, Ms. Forester filed the *Family Property Judgment* and provided her own affidavit which recited some of the findings made by Hildebrandt J.

[16] As has been noted, in the *Family Property Judgment*, Hildebrandt J. determined the value of the acreage to be $300,000. In doing so, she took note of Mr. Poitras's efforts to frustrate the gathering of evidence concerning the value of the acreage:

> [53] In light of the petitioner's legitimate concern that Mr. Poitras, in transferring the acreage to his mother, was dissipating property, attempts were made to contact her, in keeping with the requirements of s. 28 of *The Family Property Act*. However, as Mr. Poitras confirmed in cross-examination, he instructed his mother to "obstruct the process" and not even answer any calls from the petitioner's counsel. Mr. Poitras also testified that it was "correct" that his mother had taken the property "with the *lis pendens* on it" and therefore she "knew it was disputed".
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> [54] Mr. Poitras also confirmed under cross-examination that he had refused to accommodate an appraisal. Despite repeated requests, he declined to allow an appraisal and threatened to contact the media, the Law Society, and other "proper authorities" if counsel for the petitioner continued to pursue an appraisal. Mr. Poitras testified that he had refused the appraisal "because a whole bunch of work was done on the property and there was no way [Ms. Forester] was going to benefit". This obstructive conduct on the part of Mr. Poitras leaves this court with the challenge of valuing the acreage property.

[17] Justice Hildebrandt then considered what evidence she had of the value of the acreage, which she summarized as follows:

> [58] Here, Mr. Poitras provided no evidence regarding the value of the acreage. However, Ms. Forester's counsel again points to the property statement of the respondent sworn January 9, 2017, approximately six weeks after the petition was issued, found on the court file and marked as Exhibit P-8 for identification in this trial. Therein Mr. Poitras states that the "current" value of the acreage, located at the SE-1-44-16-W3, is $300,000. Mr. Poitras, in cross-examination, as previously noted, acknowledged having completed the property statement and agreed that he had a lawyer at the time.
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> [59] In Exhibit P-5, Kijiji advertisements are included, which demonstrate that Mr. Poitras attempted to sell the acreage in February of 2017 for $360,000 and made a further attempt in early 2018 with a price of $327,000. In the TD Canada Trust application for personal credit, included in Exhibit P-4, and signed by Mr. Poitras on May 23, 2015, Mr. Poitras stated that the "current value" of the acreage (referenced as the principal residence on Brada

> Road) was $660,000. In the circumstances, however, this latter document may represent a gross over-valuation as part of an attempt to secure greater credit.

[18] At the end of the day, Hildebrandt J. accepted the value of the acreage to be the $300,000 Mr. Poitras swore to “mere weeks” after Ms. Forester had issued her family property petition in January of 2017 (*Family Property Judgment* at para 60).

[19] Apart from relying on the *Family Property Judgment* to establish the value of the acreage, Ms. Forester did not provide any other independent evidence of its value when it was transferred to Ms. Fayant. Her justification for this, as set out in her supplemental brief filed with the judge, was that she had been denied the opportunity to secure a third-party appraisal of the acreage.

[20] Ms. Fayant filed two affidavits of her own.

[21] In the first, she deposed that she had lent money to her son and attached a spreadsheet detailing the transfer of $32,827.36 to him between May 9, 2016, and November 10, 2020. She also stated that there were “a lot of records” pertaining to “loans and payments made on behalf of [Mr. Poitras]”. However, she stated that she had “been unable to locate” these documents but she had notes and they total $158,911.21. She attached a single page spreadsheet dated January 13, 2023, titled “Monies Owed to me by Richard Poitras from 2009 – 2022”, with entries totaling this amount. She then stated that the transfer of the acreage was “for the agreed value of $162,000.00 for the repayment of the Loans up to that point”, and she attached the affidavit of value that had been submitted with the transfer of the land. Later in her affidavit, Ms. Fayant attested that the transfer was “in satisfaction of the Loans outstanding in 2019, and for the future loans [she] would need to provide him”. Ms. Fayant also attested that she did not agree that the acreage was worth $300,000.00 when she took title to it “because the acreage was in the middle of being developed and so did not have significant value”.

[22] In relation to the statements made by Hildebrandt J. in paragraph 45 of the *Family Property Judgment*, Ms. Fayant stated that “I cannot recall with clarity whether [Mr. Poitras] advised me to avoid or obstruct the divorce proceeding, however I have never made an attempt to obstruct any court action”.

[23] Ms. Fayant concluded her first affidavit by identifying that Mr. Poitras was “in the process of arranging for an appraisal of the [acreage] to be done, and this appraisal will attempt to value the [acreage] as of June of 2019”.

[24] Ms. Fayant’s second affidavit attaches the report of a professional appraiser as contemplated in the first affidavit. The report opines that the acreage had a value of $165,000 as of June 24, 2019. The author of the appraisal report qualified this opinion as to value with what she described as an “extraordinary assumption”:

> It should be noted that this appraisal is based on the effective date of June 24, 2019, based on the request of the client. The inspection of the subject property was conducted on July 17, 2023. <u>An extraordinary assumption is required as the condition of the subject property as of the effective date is unknown; therefore, it is based on the site contact’s description. The client states that the dwelling, as of June 24, 2019, was only shell space with no insulation or interior finishing, but it did have the electrical panel and two baseboard heaters. The client stated that the shop has remained unchanged since June 24, 2019. One well was functional as of the effective date but one didn’t have power. Note that there was no mobile home on the site as of the effective date, per the client. An extraordinary limiting condition is required, in that any change to this assumption may cause the opinion of value stated in this report to change</u>.
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> Per the client, the dwelling was only shell space (no interior finish) as of the effective date. It had two electric baseboard heaters, a 100 amp electrical panel but no insulation. Overall, the interior of the subject is considered to be in poor condition.
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> (Emphasis added)

2. The Chambers Decision

[25] To succeed, Ms. Forester was obligated to prove that the acreage had been transferred at undervalue. Section 2 of the *BIA* defines “transfer at undervalue” as follows:

> ***transfer at undervalue*** means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor[.]

[26] Since the consideration received by Ms. Fayant was the acreage, to determine if the consideration received by Mr. Poitras was conspicuously less than the consideration he gave, the

judge was called to determine the value of the acreage when it was transferred to Ms. Fayant on June 24, 2019, and the consideration Mr. Poitras received. Likewise, the judge was required to determine if Mr. Poitras "intended to defraud, defeat or delay a creditor" when he transferred the acreage to his mother.

[27] After summarizing the evidence before her on the question of the value of the acreage as of June 24, 2019, the judge concluded that the value of the acreage was $300,000 as of that date:

> [27] Thus, the evidence before the bankruptcy court is the self-serving affidavit of value that Poitras used to transfer title, along with an appraisal that is based on what Poitras told the appraiser as to the condition of the acreage. Oppositely, the trial judge's findings in the [*Family Property Judgment*] set the value at $300,000. Poitras swore a property statement in January 2017, deposing that the value of the acreage was $300,000. That property statement was some two years prior to the transfer of the acreage to Fayant.
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> [28] On the preponderance of evidence, I must conclude that the value of the acreage at the time of the transfer to Fayant was $300,000. Furthermore, the doctrine of estoppel by *res judicata* applies in this situation. The trial judge has already determined the value of the acreage.

[28] As for the consideration received by Mr. Poitras, the judge reviewed, in detail, Ms. Fayant's evidence as to the debts she alleged her son owed to her prior to the transfer of the title. As part of this she observed that, based on the documentation attached to Ms. Fayant's affidavit, "the sum of $28,691.40 was the actual amount advanced before June 24, 2019, being the date of transfer" (at para 29). The judge also noted that, at the family property trial, Mr. Poitras had sworn that he owed his mother $70,000 for a debt he incurred in 2008-2009. The judge remarked that Hildebrandt J. "was circumspect about the veracity of this" and observed that, "[n]one of what [Mr. Poitras] stated at trial corresponds to the list that [Ms.] Fayant attached to her affidavit" (at para 31). In these circumstances, the judge reached her own determination as to the consideration received by Mr. Poitras and concluded that it was conspicuously less than the value of the acreage he had transferred to Ms. Fayant:

> [32] Based on this conflicting evidence offered by both Fayant and Poitras, I must conclude that the only debt which Fayant has proven is the sum of $28,691.40.
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> [33] When Poitras transferred the acreage to Fayant on June 24, 2019, a mortgage in favour of the Bank of Nova Scotia for $42,200 was registered on the title, having been registered on June 25, 2013. No evidence was led as to the amount of this mortgage that remained outstanding at the time of transfer. The mortgage must be considered in determining whether the consideration received by Poitras was conspicuously less than the fair market value of the consideration given by him.

> [34] In this case, with no evidence before me, I will calculate the outstanding amount of the mortgage as being $42,200 at June 24, 2019. That is the most fair calculation that can be made. Thus, with Fayant's loans totaling $28,691.40 and the mortgage of $42,200, Poitras has received consideration of $70,891.40. The acreage has a fair market value of $300,000. That is "conspicuously less" than the value of the acreage transferred to Fayant on June 24, 2019; it is almost $230,000 less.

[29] On the issue of Mr. Poitras's intentions, the judge wrote as follows:

> [35] For Forester to be successful in this application, she must prove that Poitras intended to defraud, defeat or delay her as his creditor. There is no better or more conclusive evidence of Poitras's intent than the findings of the trial judge, as stated in paragraphs 53 and 54 of her decision. The trial judge concluded that Poitras transferred the acreage to Fayant so that Forester could not benefit from the increased value in the acreage. Poitras told his mother to not cooperate in the [*Family Property Judgment*].
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> [36] I need look no further for the "badges of fraud". Poitras has declared his intent, under oath, before the trial judge. With that element of s. 96 of the *BIA* being proven, Forester is entitled to judgment against Fayant for the difference between the value of the consideration received by Poitras and the value given by Poitras, that is, the sum of $229,108.60.

3. Parties' positions

[30] Ms. Fayant argues that the judge erred in law by accepting the *Family Property Judgment* as evidence of the value of the acreage as of its transfer to her and as evidence of Mr. Poitras's intentions when transferring it. Ms. Fayant also advances several subsidiary arguments, including that (a) there is no place for the operation of *res judicata* or issue estoppel, because she was not a party to the family property litigation between her son and Ms. Forester, (b) it is procedurally unfair to import into the bankruptcy proceedings findings from a trial in which she was not a party, (c) Hildebrandt J.'s assessment of the value of the acreage is irrelevant in the context of the bankruptcy proceedings, because it was determined at a different date than when the acreage was transferred to her, and (d) Hildebrandt J.'s findings as to Mr. Poitras's intentions were not focused on the same inquiry as what is required to decide the *BIA* application.

[31] For her part, Ms. Forester invites this Court to refuse to even consider Ms. Fayant's argument that the judge erred in law by assigning evidentiary value to Hildebrandt J.'s findings made in the *Family Property Judgment*. In this regard, Ms. Forester relies on *British Columbia (Attorney General) v Malik*, 2011 SCC 18 [*Malik*], to maintain that the law distinguishes between the admissibility of findings of prior civil and criminal judgments in subsequent civil proceedings, and the weight such findings are to be given. Ms. Forester asserts that the suggestion the *Family*

Property Judgment is inadmissible or should otherwise be given no weight is a new argument made for the first time in this appeal. Ms. Forester also advances several other alternative arguments.

4. The judge did not err in relying on the Family Property Judgment findings

[32] Only exceptionally will an appeal court allow a party to raise an issue for the first time on an appeal (*Quan v Cusson*, 2009 SCC 62 at para 36 [*Quan*], *Mosiuk v BASF Canada Inc.*, 2025 SKCA 90 at paras 43-48 [*Mosiuk*]; *Silzer v Saskatchewan Government Insurance*, 2021 SKCA 59 at paras 34-39 [*Silzer*]; and *A.M. v Ministry of Social Services*, 2020 SKCA 114 at paras 183-189 [*A.M.*]). This may occur "where the interests of justice require [entertaining a new issue] and where the court has a sufficient evidentiary record and findings of fact to do so" (*Quon* at para 37). In *Guindon v Canada*, 2015 SCC 41, the Supreme Court characterized the discretion to hear an issue being raised for the first time on appeal as "one that is narrow and should be exercised sparingly" (at para 5). Elaborating on the grounds for exercising that narrow discretion, the Court held that relevant factors include "the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice" (at para 20). Moreover, "[t]he burden is on the appellant to persuade the Court that, in light of all of the circumstances, it should exercise its discretion to hear and decide the issue" (at para 23).

[33] Applying these principles to this case, I am satisfied that Ms. Fayant did not argue before the judge that the *Family Property Judgment* did not provide evidence of the value of the acreage as of the date of its transfer to Ms. Fayant. She also did not assert that the *Family Property Judgment* was inadmissible or could not provide evidence of Mr. Poitras's intentions when transferring the acreage to his mother. Rather, these arguments are advanced by Ms. Fayant for the first time in this appeal.

[34] In the brief of law Ms. Fayant filed before the judge, she argued that the court "should not be *bound* by the earlier ruling in the [*Family Property Judgment*], and as such must consider the evidence provided to it to determine what was the fair market value of the Property at the time of the Transfer" (emphasis added). However, I do not interpret the brief as setting out the position

that the findings made in the *Family Property Judgment* had *no* evidentiary value, which is the position taken by Ms. Fayant in this appeal.

[35] In *Quan*, a question arose as to whether the appellant really was raising a new argument on appeal. The Supreme Court defined *new* as "legally and factually distinct from the issues litigated at trial" (at para 39). In the circumstances of that case, the Court found that there was "considerable overlap" between the evidence and arguments bearing on the new issue and the issues raised at trial (at para 39). The arguments were all "directed toward the same fundamental question" (at para 40). By contrast, in the present appeal, the argument that the *Family Property Judgment* is not determinative of the issues of value and intent and the argument that it is inadmissible or otherwise had no probative value are directed towards fundamentally different questions and demand different responses. Ms. Forester did not need the *Family Property Judgment* to be dispositive for it to support her claim. However, if it was inadmissible or otherwise had no probative value, the possibility of proving her claim depended on adducing additional evidence. The obvious response to a line of argument calling the *Family Property Judgment* into question in this way, had it been made before the judge, would have been for Ms. Forester to summon the same record that was assembled for Hildebrandt J., thereby circumventing its putative evidentiary deficiencies. I will return to this point momentarily.

[36] Turning to this Court's discretion to consider this new issue in this appeal, it is important to be clear about the representations made by Ms. Fayant to the judge. At the outset of the bankruptcy proceedings, she was represented by legal counsel, through whom she filed her evidence and submitted a brief of law and a civil Chambers appearance memo. The same legal counsel also appeared for Ms. Fayant at the commencement of the hearing before the judge and during the making of argument on behalf of Ms. Forester. However, after Ms. Forester's counsel concluded his argument, the parties sought an adjournment of the proceedings to pursue settlement discussions. These proved to be unsuccessful, and the matter was returned to Chambers on a different day. The judge recorded what happened on that occasion:

> [6] On the resumption of the application on July 24, 2023, Fayant's counsel sought leave to withdraw, as Fayant had dismissed him as her lawyer. Fayant was not in the courtroom and never did appear on the application. Her former counsel did not know whether she sought a further adjournment to seek new counsel. He simply confirmed that Fayant was not present in the courtroom and there were no plans for her to be in attendance.

> [7] Because Fayant's former counsel had already filed all the affidavit evidence and a comprehensive brief of law on the issues, I allowed Forester's counsel to address the court on what remedy he sought on Forester's behalf. Counsel submitted that the value of the acreage should be set at $300,000 and the loans that Fayant had proven she had made to Poitras up to June 24, 2019, was the sum of $28,691.40. Forester's counsel also conceded that some consideration should be made for the mortgage of $42,200 that Fayant assumed when Poitras transferred the title to the acreage to her.

[37] I provide this detail as to the course of these proceedings to make three points. First, Ms. Fayant had the benefit of legal advice when she developed and advanced her position before the judge. Second, Ms. Fayant's legal position before the judge was as set out in the comprehensive brief of law her legal counsel had filed. Third, Ms. Fayant had the opportunity to present additional argument, beyond what was communicated in her brief of law, but chose not to do so. These three considerations militate against inferring that Ms. Fayant made an argument that was not set out in express terms in the brief of law filed before the judge.

[38] In her factum, Ms. Forester describes Ms. Fayant's decision not to argue this point as a "tactical decision" made by her counsel. I cannot find, on the record, that the decision taken by Ms. Fayant's counsel not to object to the admissibility of the *Family Property Judgment* was done to secure an advantage in the litigation. Nevertheless, I am satisfied from a review of the record that Ms. Fayant's failure to raise the issue before the judge has deprived Ms. Forester "of an opportunity to adduce different admissible evidence to establish the same point" (*Saskatchewan v Racette*, 2020 SKCA 2 at para 36 [*Racette*], quoting *Foley v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2002 ABCA 297 at para 65 [*Foley*]). Specifically, Ms. Forester would have had the opportunity to lead additional evidence to support the value she was seeking to assign to the acreage and to establish Mr. Poitras's intentions. At the very least, as already mentioned, it is to be expected that if the issue had been raised before the judge, Ms. Forester could have summoned the same record that was assembled for Hildebrandt J. on these subjects, rather than simply relying on the findings that Hildebrandt J. made in the *Family Property Judgment*.

[39] Appeal courts are especially reluctant to entertain arguments on an appeal that were not raised in a court from which an appeal is taken where it cannot be confidently said that the record on which it is asked to decide the matter would have been materially the same (see *Silzer* at para 36; *Racette* at para 65; *Rieger v Burgess*, 1988 CanLII 209 at pp 41-43, [1988] 4 WWR 577 (SKCA) [*Rieger*]). *Quan*, quoting *Lamb v Kincaid*, 1907 CanLII 38, 38 SCR 516 at p 539 (SCC), expressed

this as a requirement that, "had the question been raised at the proper time, no further light could have been thrown upon it" (at para 36). In *Racette*, this Court, quoting *Foley* at paragraph 65, further explained that, "[b]ecause appellate review cannot account for missing evidence, the only remedy is a new trial, a drastic result that causes further delays and onerous costs" (at para 36). There must be some "substantial wrong" or "miscarriage of justice" suffered by the appellant to outweigh the prejudice of ordering a new trial or, barring a new trial, depriving the respondent of the opportunity to establish an alternative evidentiary basis for the assertion in question (see *Mosiuk* at para 45; *Racette* at para 37; and *Quan* at para 43). To reiterate, "[t]he burden is on the appellant to persuade the appellate court that all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial" (*A.M.* at para 184). Ms. Fayant has not discharged this burden (*Mosiuk* at para 46).

[40] The concerns associated with a litigant advancing a new argument on an appeal are accentuated in this case because Ms. Fayant withdrew from participation in the proceedings in the Court of King's Bench. Even accepting that this decision was not taken for tactical reasons, entertaining this new issue would be anathema to principles of finality in judicial proceedings.

[41] In oral argument on appeal, Ms. Fayant – who was represented by different counsel than who had acted for her in the Court of King's Bench – referred to several case authorities as standing for the proposition that counsel error does not excuse a trial judge from committing a legal error in the admission of evidence or in some other way at a trial. She also relied on several authorities to say that a failure to object to evidence does not make inadmissible evidence admissible.

[42] Many of these cases are distinguishable as having arisen in the context of criminal proceedings, where an accused person's liberty is at stake: *R v Swietlinski*, 1994 CanLII 71, 119 DLR (4th) 309 (SCC); *R v Revet*, 2010 SKCA 71; *R v Pintar*, 1996 CanLII 712, 110 CCC (3d) 402 (ONCA); *R v Smith*, 1990 CanLII 13300, 42 OAC 395 (ONCA). *Mosiuk*, citing various appellate decisions, held that "[i]n most cases, 'if no objection is made to the admissibility of evidence in a *civil* trial, an objection on appeal will usually be unsuccessful'" (at para 45, emphasis added). The difference between a civil proceeding and a criminal proceeding is that "[t]he concept of miscarriage of justice has less resonance in a civil dispute over money, where an individual's liberty is not at stake" (*Racette* at para 36, quoting *Foley* at para 60). In other words, the potential

for prejudice to an appellant arising from a court's refusal to hear a new issue in a criminal appeal is much greater, shifting the balance in the appellant's favour.

[43] Ms. Fayant raised several other cases that are similarly of limited assistance. *Guarantee RV Centre Inc. v Schmidt*, 2007 ABCA 89, is not relevant because the Court found that the appellant did, in fact, object at first instance to the admission of the evidence in question (see para 20). In each of *Quan*; *Adam v Campbell*, 1950 CanLII 326, [1950] 3 DLR 449 (SCC), *Rieger*; and *Doherty v Home Insurance Co.*, 1986 CanLII 7823, 19 CCLI 314 (ONSC), courts determined that deficiencies in the record resulting from a failure to object at first instance were not concerning in the circumstances. Finally, the discussion of the issue in *Gellie v Naylor*, 1986 CanLII 2673, 28 DLR (4th) 762 (ONCA), was limited to the uncontroversial statement that a party's "failure to object to [the trial judge's misdirection] does not preclude the appellant from relying on the misdirection, although the appellant's contention would have been reinforced by a timely and appropriate objection". Neither this decision nor any of the others offered by Ms. Fayant deviate from the view that the circumstances permitting an appellant to raise a novel issue on appeal are exceptional.

[44] Ms. Fayant's argument also proceeds on the incorrect assumption that findings made in a judicial proceeding can never be given weight unless the prerequisites for *res judicata* apply. That is not the law. On this, Binnie J. wrote in *Malik*:

> [37] The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties. The doctrines of *res judicata*, issue estoppel and abuse of process are all part of this larger judicial policy but they do not exhaust its potential.

[45] Justice Binnie went on to describe the factors that affect the weight and significance that can be attached to findings made in a prior judgment (see paras 42-48). Again, however, it cannot be said that the record that would be relevant to the application of these factors is unaffected by the fact that this issue was not raised before the judge and Ms. Fayant withdrew from participating in the proceedings in the Court of King's Bench.

[46] In short, I agree with Ms. Forester's primary argument; it is not open to Ms. Fayant to assert in this appeal that the judge erred in law by admitting the *Family Property Judgment* as evidence of its findings or by attaching evidentiary weight to the findings made by Hildebrandt J. in it. This appeal must be decided on the basis that the judge did not err in accepting that the *Family Property Judgment* was admissible to prove the findings made in it and that those findings were entitled to evidentiary weight.

B. The judge did not misapply the applicable onus

[47] Ms. Fayant also argues that the judge erred in law by failing to "appreciate" the persuasive (or legal) onus resting on Ms. Forester to prove the prerequisites for the making of an order under s. 96(1) of the *BIA*. I cannot agree.

[48] There can be no doubt the judge recognized that Ms. Forester carried the legal burden of proving on the balance of probabilities all prerequisites for the making of such an order. As part of her introduction, the judge identified, as one of two issues she was called to decide, "whether Forester *has proven* all the requirements of s. 96 of the *BIA*" (at para 8, emphasis added). Later, the judge began her analysis beginning at paragraph 19 of the *Chambers Decision* with a statement of the same issue.

[49] Having correctly identified the onus resting on Ms. Forester, the judge proceeded to identify that two of those requirements were not in dispute, being that Ms. Fayant was a related person to Mr. Poitras and that the transfer took place within the time period relevant to s. 96(1)(a) (see *Chambers Decision* at para 20). The judge then squarely placed the onus of proof on Ms. Forester in connection with those requirements that were contentious, stating as follows:

> [21] However, for Forester to be successful in the application, she must prove that Poitras intended to defraud, defeat or delay her claim as a creditor. To calculate the amount that Fayant must pay Forester, on behalf of the bankruptcy estate, a determination must be made as to "the difference between the value of the consideration received by the debtor and the value of consideration given by the debtor". That is, a determination must be made of the value of the acreage at the time of the transfer to Fayant on June 24, 2019. Also, a determination must be made as to the consideration Poitras received from Fayant to allow the court to decide if the transfer constitutes a "transfer at undervalue". These facts are in dispute between the parties.

[50] I accept that, in paragraph 21, the judge expressly stated only that Ms. Forester "must prove" Mr. Poitras's intention to defraud, defeat or delay Ms. Forester's claim, and made no similar

statement in connection with the other disputed elements of s. 96(1). However, in the overall context of the stated issue, and the discussion that follows, I see no basis to conclude she either misunderstood, or misapplied, the onus. The judge's determinations on these elements of the section express her conclusion that the preconditions for the making of an order under the section had been established on the balance of probabilities.

[51] Thus, for example, as previously quoted, she stated that, "*[o]n the preponderance of evidence*, I must conclude that the value of the acreage at the time of the transfer to Fayant was $300,000" (at para 28, emphasis added). The emphasized words display a correct understanding of the law that the existence of a persuasive (legal) burden of proof is seldom determinative in civil proceedings, where a court or tribunal is required to make determinations based on a balance of probabilities. In this regard, the burden simply means that "a party has an obligation to prove or disprove a fact or issue to the criminal or civil standard" (*Cop v Saskatchewan Government Insurance*, 2019 SKCA 75 at para 53 [*Cop*], quoting S. Lederman, A. Bryant, M. Fuerst, & J. Sopinka, *The Law of Evidence in Canada*, 5th ed (LexisNexis, 2018) at p 94). Thus, in civil proceedings, it "is only if the judge cannot reach a conclusion because the evidence is so evenly balanced that the persuasive burden becomes relevant" (*Yorkton (City) v Mi-Sask Industries Ltd*., 2021 SKCA 43 at para 34, referring to *Cop*. See also *Ace Burger Ltd. v G and I Construction Group Inc.*, 2025 SKCA 82 at para 55).

[52] In summary, the judge did not place an onus on Ms. Fayant. At its highest, the judge was faced with a situation where findings had been made by Hildebrandt J., based on evidence, that was left without a response, or was met with evidence that the judge found to be of insufficient evidentiary value to displace the weight she was prepared to attach to the findings made in the *Family Property Judgment*.

[53] On the first of these subjects, Ms. Fayant offered *no* evidence of Mr. Poitras's intentions. She left this evidentiary gap notwithstanding that it was clear from the record before the judge that Mr. Poitras was cooperating with Ms. Fayant in her opposition to Ms. Forester's application. In this context, it is hardly surprising that the judge was prepared to accept the findings on this issue made by Hildebrandt J., who had heard viva voce evidence on the subject, and made specific findings about why Mr. Poitras had transferred the acreage.

[54] On the question of value, it is correct that Ms. Fayant provided a report of a qualified appraiser completed on July 18, 2023. As has been noted, the report valued the acreage at $165,000 as of June 24, 2019. However, the appraiser's opinion as to value depended entirely on the "extraordinary assumption" that – in contrast to the property's condition in 2023 – the dwelling on the acreage "was only shell space with no insulation or interior finishing, but it did have the electrical panel and two baseboard heaters". *There was no evidence before the judge that this assumption was correct*. This was the case, notwithstanding the ease with which Ms. Fayant or Mr. Poitras, one or both of whom have been in continual possession of the acreage, could have provided it, if it were true.

[55] Likewise, neither Ms. Fayant nor Mr. Poitras denied that Mr. Poitras had sworn a statement that the acreage was worth $300,000 in 2017, or that he had listed the property for sale in that year for $360,000 and for $327,000 in 2018. Neither provided an explanation for why the value would have dropped in 2019, when it was transferred to Ms. Fayant.

[56] The strongest basis for asserting that the judge placed the legal (or persuasive) burden on Ms. Fayant is found in the judge's previously quoted statement that she "must conclude that the only debt which Fayant has proven is the sum of $28,691.40" (at para 32). However, this comment must be understood in the context of the evidence.

[57] The state of the accounts between Ms. Fayant and her son was a matter that could only be known between them, and the documentation provided by Ms. Fayant showed only that $28,691.40 had been transferred by Ms. Fayant to her son before the title passed. The statement that the only debt that had been proven by Ms. Fayant was a debt in this amount is easily understood as a finding by the judge that Ms. Fayant had not met the tactical burden that fell on her in a context where it was clear that no direct cash consideration had passed between Ms. Fayant and Mr. Poitras. I do not interpret this as improperly placing the legal or persuasive burden on Ms. Fayant to establish that the transfer was not for undervalue. Instead, read fairly, the *Chambers Decision* leaves this squarely on Ms. Forester.

[58] I would make one last point. It would have been easy for Mr. Poitras and Ms. Fayant to have proven the amount of the debt secured by the mortgage assumed by Ms. Fayant, but they did

not do so. The judge was extremely generous to Ms. Fayant when she *assumed* that the secured debt was equivalent to the face amount of the security.

[59] In conclusion, I see no basis to find that the judge erred in law by improperly placing a persuasive (or legal) onus on Ms. Fayant to disprove the prerequisites for the making of an order under s. 96(1) of the *BIA*.

C. The judge did not misapply the test for what is "conspicuously less" consideration

[60] As I have observed, to succeed, Ms. Forester was obliged to prove that the acreage had been transferred at *undervalue*, which is defined in s. 2 of the *BIA* to mean that "the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor". Ms. Fayant argues that the judge "failed to grapple with" the legal test for determining that the consideration she paid was "conspicuously less" than market value. She asserts that the judge "simply declared the transaction 'conspicuously less' without a single datum, calculation, or analytical step to justify that label". She refers to case law that assists in determining when a transfer might be said to have occurred for consideration that is "conspicuously less" than the fair market value of the property that is transferred.

[61] The first decision Ms. Fayant relies on is *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68 [*Peoples Department Stores*]. She cites it to support the proposition that "the test for determining whether the difference in consideration is 'conspicuously greater or less' was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors" (at para 85). In *Peoples Department Stores*, the Supreme Court referred, with approval, to *Skalbania (Trustee of) v Wedgewood Village Estates Ltd.*, 1989 CanLII 2747, 60 DLR (4th) 43 (BCCA). In that case, a difference of $1.18 million between fair market value and the consideration received by the bankrupt was seen as conspicuous, where the fair market value was $6.6 million, leaving a discrepancy of more than 17%. The Court observed that "[w]hile there is no particular percentage that definitively sets the threshold for a conspicuous difference, the percentage difference is a factor" (at para 85). The Court also discussed some of the factors that would bear on this question, as follows:

> [86] As for the factors that would be relevant to this determination, the court might consider, *inter alia*: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L.W. Houlden and G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.

[62] Ms. Fayant argues that the judge did not consider the types of factors identified in the quoted passage from *Peoples Department Stores*. She asserts in her factum that the judge "identified no margin-of-error for rural-acreage appraisals, [and] ignored the fact that the only two contemporaneous valuation instruments – the statutory Affidavit of Value ($162,000) and Dynamic Appraisal's retrospective appraisal ($165,000) – differed by a trivial 1.8%".

[63] The second case that Ms. Fayant relies on is *Bailie v Bailie*, 2010 BCSC 946 [*Bailie*]. In that case, Pearlman J. commented that the type of evidence that will be required to establish an undervalue transfer may vary depending on the consideration that is paid, stating as follows:

> [145] Where the consideration is inadequate or nominal, a creditor need only show that the transferor intended to delay, hinder or defraud the creditor (or other) of his or her remedies. Where on the other hand, valuable consideration has passed, the creditor must also show that the transferee actively participated in the fraud. Where valuable consideration has passed, then the focus is not on the sufficiency of that consideration, but on the intentions of both parties to the transaction: *Chan v. Stanwood*, 2002 BCCA 474 at paras. 20, 21.

[64] Referring to *Bailie*, Ms. Fayant asserts that the transfer in this case was not for a token amount, but instead "involved at least $70,000 in documented cash advances, assumption of a $42,000 mortgage, and a property whose value independent professionals fixed at roughly $165,000", which she says "are miles away from the 'inadequate or nominal' consideration that would permit an easy inference of a scheme to frustrate creditors".

[65] Ms. Fayant correctly observes that the judge did not undertake any sort of detailed analysis as to whether this amount of consideration was "conspicuously less" than the fair market value of the property. However, in a context where (on the facts as found by the judge) the total consideration represented less than one quarter (25%) of the value of the property, no detailed reasons were required to support the conclusion that the consideration was conspicuously less than its fair market value. The stark difference between the value of the property and the consideration received by Mr. Poitras rendered superfluous any analysis by the judge whether "the consideration

received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor”.

[66] The act of “[w]eighing the adequacy of consideration is not an exercise in precision but one of judgment” (*Montor Business Corporation v Goldfinger*, 2016 ONCA 406 at para 53). As has been stated in another case, “the calculation of fair market value after the fact, and whether consideration is ‘conspicuously less’ than fair market value, necessarily requires judgment rather than the application of a mathematical formula” (*Hofer (Re)*, 2019 ABQB 405 at para 31 [*Hofer*]). As noted, in *Peoples Department Stores*, a difference of 17% between the consideration paid and the property’s fair market value was found to meet the test of being conspicuously less. Other cases have suggested that a difference of 6% might not be (see *Indarsingh (Re)*, 2015 ABQB 158 at para 15; *Royal Bank of Canada v Racher*, 2017 ABQB 181 at para 116; and *Hofer* at para 31).

[67] In the context provided by these cases, Ms. Fayant’s argument that the judge erred in law in connection with the legal test for consideration and whether it can be said to be conspicuously less than the fair market value of an item of property is unpersuasive.

D. The judge’s findings were not palpably wrong

[68] The substance of Ms. Fayant’s appeal reduces to the suggestion that the judge’s findings of fact or mixed fact and law were palpably wrong.

[69] I have, in my reasons for dismissing Ms. Fayant’s allegations of legal error, explained the evidentiary foundation for the judge’s findings as to the value of the acreage, the consideration received by Mr. Poitras and his intentions when transferring the property to Ms. Fayant. I would make a few additional comments.

[70] The judge’s reasons disclose that she was open to considering evidence that might counter Hildebrandt J.’s conclusions regarding the acreage’s value and Mr. Poitras’s intentions when transferring it to Ms. Fayant, but Ms. Fayant offered none that the judge found persuasive.

[71] Ms. Fayant correctly observes that Hildebrandt J.’s finding as to the value of the acreage was as of the date of the family property trial, held in 2022, while the transfer of the acreage occurred in 2019. However, the judge demonstrated her awareness that her task was to determine the acreage’s value on the date of the transfer to Ms. Fayant, when she stated that she “must

conclude that the value of the acreage *at the time of the transfer to Fayant* was $300,000" (at para 28, emphasis added). The fact that Hildebrandt J. valued the acreage at a different date did not mean that the valuation was of no evidentiary significance, particularly given the basis for it and the judge's conclusion that what was offered to suggest a different value was of minimal evidentiary value.

[72] Likewise, Ms. Fayant's assertion that Hildebrandt J. was not tasked, in the context of the family property dispute, to determine if Mr. Poitras had intended to defraud, defeat or delay Ms. Forester's claim as a creditor is correct. However, this does not displace the fact that Hildebrandt J. made findings of fact as to Mr. Poitras's efforts to frustrate the gathering of evidence concerning the value of the acreage and his intentions when transferring the acreage to his mother. I can find no palpable error in the judge's analysis, as revealed in paragraphs 35 and 36 of the *Chambers Decision*, quoted earlier in these reasons.

[73] In the latter regard, it is Mr. Poitras's intentions, and not Ms. Fayant's, that are relevant (*Urbancorp Toronto Management Inc. (Re)*, 2018 ONSC 2965 at para 21). As I have already observed, Ms. Fayant offered *no* evidence of Mr. Poitras's intentions, notwithstanding that her affidavit indicated that he was cooperating with her in putting together the evidence to respond to Ms. Forester's application.

[74] Ms. Fayant takes the position that the judge should not have made a finding regarding Mr. Poitras's intentions because the judge did not have evidence of contemporaneous emails, creditor demands, hidden conveyance terms or expert forensic tracing. If relevant emails and the like existed, they would be in the possession of Mr. Poitras and Ms. Fayant. I see no basis for complaint that Ms. Forester did not bring any such information forward in the absence of evidence that such documentation existed and was in her possession.

[75] In summary, I reject Ms. Fayant's argument that the judge's findings of fact or mixed fact and law were palpably in error.

E. No need to decide if *res judicata* or issue estoppel applies

[76] Ms. Fayant argues the judge erred in law when she invoked the doctrine of *res judicata* in connection with the valuation issue and the doctrine of estoppel. She maintains that neither *res*

judicata or issue estoppel applied because she was not privy to the family property litigation and the issues decided in it were different.

[77] For her part, Ms. Forester says that Ms. Fayant was privy to the family property litigation because of the efforts taken to secure Ms. Fayant's participation in that proceeding under s. 28 of *The Family Property Act*. Section 28 applies when there is an allegation that family property has been transferred to a third party for less than adequate consideration and allows the court to order that a donee or transferee of family property "pay or transfer all or part of the family property to a spouse" (s. 28(2)(b)). When a spouse applies for such an order "the applicant shall serve the transferee or donee with a notice of the application" (s. 28(5)).

[78] Both parties also referred to many case authorities in support of their position regarding the applicability of *res judicata* and issue estoppel. Given my conclusion that the judge did not err in her primary analysis, I see no reason to consider if Ms. Fayant could be said to have been privy to the family property litigation and therefore directly bound by the *Family Property Judgment*.

IV. CONCLUSION

[79] I would dismiss Ms. Fayant's appeal. This result will leave in place the judgment in favour of Ms. Forester against Ms. Fayant for $229,108.60. This amount exceeds the value of Ms. Forester's extant judgment against Mr. Poitras. As has been noted, the order authorizing Ms. Forester to bring proceedings against Ms. Forester stipulated that any surplus of funds from the recovery of the acreage transferred for undervalue are to be paid to the trustee to augment the bankruptcy estate, which will include the payment of any surplus to Mr. Poitras should there be any after the claims of all creditors are satisfied.

[80] Ms. Forester is entitled to have the costs of this appeal paid by Ms. Fayant, which I would fix at $6,000 for the appeal and the show-cause hearing.

"Leurer C.J.S."
Leurer C.J.S.

I concur.

"Caldwell J.A."
Caldwell J.A.

I concur.

"Kilback J.A."
Kilback J.A.